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Adele Bernhard
Pace Law School, abernhard@law.pace.edu

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A SHORT OVERVIEW OF THE STATUTORY REMEDIES FOR THE WRONGLY CONVICTED: WHAT WORKS, WHAT DOESN'T AND WHY

ADELE BERNHARD[1]

INTRODUCTION

Since the first wrongful conviction was overturned by DNA evidence, more than 230 wrongly convicted individuals have been exonerated. For most, the long awaited and hard won exoneration is the beginning of a new struggle. Exonerees face insuperable hurdles upon release. Lacking recent employment history or experience, work is difficult to secure. Without education or funds, most can't access necessary counseling or relevant training. Often without family, they live alone and lonely.[2] Money alone can never repair damage done by an undeserved prison sentence or fully compensate for pain and suffering. A monetary award, however, does provide a springboard from which to begin life again.

Compensation statutes are necessary because individuals convicted and incarcerated for crimes they did not commit are generally precluded from recovering damages by the inflexibility of tort law and civil rights doctrine, despite later exoneration.[3] It's surprisingly difficult for exonerees to win civil lawsuits. Doctrines of immunity protect police and prosecutors. Malpractice claims against inadequate defense counsel are virtually impossible to mount. Sometimes there is simply no one to blame: witnesses make mistakes, defense counsel act reasonably, and the prosecution has probable cause.[4] And even if a lawsuit is feasible, civil litigation is expensive, time consuming, and uncertain. Ultimately, although a few exonerees have won large awards, most have not.[5]

In response to the failure of the tort and civil rights laws to provide a consistent remedy for exonerees, and in light of the obvious fact that the criminal justice system can never be completely error-proof, some states have enacted

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[1] Associate Professor of Law, Pace Law School. B.A. and J.D. New York University.

[2] VOLLENS, LOLA & EGGERS, DAVID, SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED 432-33 (2005).

[3] *See generally*, Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86-92 (1999) (hereinafter *When Justice Fails.)*

[4] *See also* Bernhard, *supra* note 3 at 86-92 (1999) (discussing legal barriers to recovery).

[5] For a complete listing of DNA exonerations, see The Innocence Project—Know the Cases, http://www.innocenceproject.org/know/ (last visited March 21, 2009). The website includes an interactive map of the United States, which provides details of exonerees by state and whether the exonerees received compensation.

statutes to compensate exonerees.[6] Ideally, compensation statutes should provide generous, rapid, and certain damage awards, accompanied by education and social services, for all those who have been wrongly convicted and later exonerated. This Article will address the need for such statutes and examine some of the differences among them.

I. David Shephard: A Prime Example

David Shephard's story is a prime example of why we need compensation statutes.[7] David was wrongly convicted of rape based on one mistaken eyewitness identification. After his release from prison, he found it almost impossible to win an award of damages to help him begin life again.

In 1982, David Shephard was nineteen. He worked at Newark Airport in New Jersey.[8] David was a member of the airport ground crew who directed jets to the gates.[9] David was making a good salary for a young man who had yet to graduate high school.[10] He was involved in a serious relationship with a young woman, and the two were expecting their first child.[11] His life changed on New Year's Eve 1983, however, when he was arrested for a crime that he did not commit.[12]

A. *The Crime*

A week earlier, on Christmas Eve, a white woman was shopping at the Woodridge Mall in New Jersey when she was abducted by two men.[13] The men forced her to accompany them to a neighboring town where they took turns having sex with her in her own car.[14] Afterwards, the victim reported the crime to the police. Unable to provide a detailed description of the perpetrators,[15] she

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[6] For a complete list of the state statutes, see the attached chart.

[7] David Shephard's story is one of twenty-six collected in Edward Conners et al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, 70-71 (U.S. Department of Justice, National Institute of Justice) (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf. After I read about his story, I called his attorney Paul Casteleiro to learn about the details of his fight for compensation. David Shephard's story has since been recounted in Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted 223-33 (2000). *See also* Bernhard, *supra* note 3 at 110-11.

[8] Scheck, *supra* note 7 at 225.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id,*

[15] David Shephard is African American, and the victim is white. Cross-racial misidentifications are common. *See generally*, Sheri Lynn Johnson, *CROSS-RACIAL IDENTIFICATION ERRORS IN CRIMINAL CASES*, 69 Cornell L. Rev. 934 (1984).

remembered that one of the attackers referred to the other as "Dave."[16] A week later, police recovered the victim's car near a terminal building at Newark Airport. They found her purse in a trash bin close to where the car was abandoned.[17] The police investigation subsequently focused on people connected to the airport. The police called the administrator in charge of the ground crew who arranged to exhibit the crew to the victim, identifying those staff members whose names were Dave.[18]

B. *The Identification*

When David Shephard picked up his paycheck on New Year's Eve, the victim was watching as he and his fellow employees were paraded single file through a specially assembled tent in the hangar.[19] There were two employees named Dave. Supervisors pointed them out. Not surprisingly, the victim subsequently identified David Shephard as one of the two men who had raped her. Today it might be possible to argue that the parade was so suggestive as to violate due process.[20] Social scientists are now studying the malleability of memory and the process by which identifications are made, and they have made inexpensive practical suggestions to decrease the likelihood of mistaken identification.[21] Police forces are slowly adopting some of those suggestions and incorporating them into practice.[22] As a result of the social science revelations, courts are beginning to look more critically at cases where the only proof

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[16] Scheck, *supra* note 7 at 225-27.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] The substantive test for determining whether a due process violation occurred at the lineup is whether, considering the totality of circumstances, the pretrial identification was so unnecessarily suggestive that it created a substantial likelihood of mistaken identification. Neil v. Biggers 409 U.S. 188 (1972).

[21] *See* Gary L. Wells et al., *Recommendations for Properly Conducted Lineup Identification Tasks, in* ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 223, 229 (David Frank Ross et al. eds., 1994); Avaraham M. Levi, *Are Defendants Guilty If They Were Chosen in a Lineup?* 22 LAW & HUM. BEHAV. 389 (1998); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,* 22 LAW & HUM. BEHAV. 603, 603-13 (1998); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 779 (1995).

[22] For example, the Wisconsin Department of Justice, Office of the Attorney General has adopted a "Best Practices for Eyewitness Identification"; the New Jersey Office of the Attorney General has created mandatory guidelines for the police in preparing and conducting photo and live lineup identification procedures: and the Northampton Massachusetts Police Department's Administration and Operations Manual contains guidelines for Eyewitness Identification. All these examples can be found by checking the Eyewitness Identification section of the Innocence Project Website at www.innocenceproject.org.

is the testimony of a single eyewitness,[23] and, as a result, the concept of due process as applied to identification procedures is becoming more expansive. However, when David Shephard was arrested, that line-up parade at Newark was unquestionably legal,[24] and eyewitness testimony was generally viewed as reliable and trustworthy. Based on the victim's identification, David was arrested, indicted, and brought to trial.

C. *The Trial*

At trial, the victim testified that she was certain David Shephard had raped her. David Shephard asserted his innocence,[25] and testified that he had been at work on the evening of the rape. Family members told the jury that he had left the house and returned as usual.[26] David even found and convinced the bus driver who normally took him to work to testify. Unfortunately for David, his witnesses were not as convincing in their testimony as the victim was in hers. Perhaps because the crime occurred on Christmas Eve, no one could remember specific details regarding David's whereabouts on that day.[27] Their testimony sounded generic. The driver, for example, could only say that David was a regular passenger.[28] He couldn't say for sure that David was on the bus on Christmas Eve.[29] Presented with two opposing narratives, the jury discredited the alibi witnesses and convicted David Shephard.[30]

D. *The Exoneration*

David Shephard served eleven years and four months in the state penitentiary before analysis of the semen preserved in the rape kit (but not subjected to DNA analysis at the time of the crime and investigation) proved beyond a reasonable doubt that he was not the rapist, leading to his release.[31]

When David Shephard finally walked out of prison, he reconnected with the

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[23] People v. LeGrand, 8 N.Y.3d 449 (2007) (holding that it was error for trial court to deny defense request to call an expert to testify about the causes of mistaken identification.)

[24] One reason for fashioning an exclusionary rule that would disallow testimony resulting from an improper identification procedure is to deter law enforcement authorities from exhibiting an accused to witnesses in a suggestive manner. 2 IMWINKELRIED, EDWARD J. ET AL, COURT ROOM CRIMINAL EVIDENCE, § 2805 (3d ed.); *citing* United State v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S.263 (1967). It could be argued here that there was no police involvement in the procedure. It could also be argued that the identification parade was even less suggestive than a line-up as so many fillers were used.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id*.

[29] *Id.*

[30] *Id.*

[31] Conners, *supra* note 7 at 71; Scheck, *supra* note 7 at 227.

woman he had been dating.[32] By then, his son had grown into a teenager. Shephard found a job in janitorial services, but making less than he had as a young man at Newark Airport.[33] In addition to the humiliation caused by settling for low wage work, David was shocked to discover, when he picked up his first paycheck, that his wages were being garnished by the state for failure to pay child support.[34] Although he had been serving a prison term that deprived him of the right to raise his child, he was nevertheless obligated to reimburse the state for welfare benefits extended to the mother of his child.[35] David needed money and vindication.

E. *Search for Damages*

Upon leaving prison, David needed an income. He contemplated filing a lawsuit, surmising that a person who had served almost twelve years in prison for a crime he did not commit would be entitled to some kind of compensation. David took his transcript, police reports and DNA test results, and looked for a civil rights lawyer.[36] He met Paul Casteleiro, a New Jersey lawyer specializing in civil rights and criminal defense work. Mr. Casteleiro read through all the material, but informed David that he could not fashion a cause of action. Paul explained that, "There was no one to sue."[37] Once the victim had made the identification, the police had probable cause to arrest.[38] As a matter of fact, it was their responsibility to arrest David. And, because the prosecutors had no reason to doubt the victim's identification or her credibility, they believed it was their responsibility to prosecute the case.[39] Although the victim thought was certain about her identification, she was wrong. Defense Counsel may not have tried a perfect case, but her assistance was not ineffective, nor did it amount to legal malpractice. In the end, it was clear that neither the police, nor the prosecutors, defense counsel, nor the victim could be sued. Simply put, not every mistake can be remedied through a lawsuit.

II. Private Bills

Upon realizing that David did not have a legal cause of action, Paul Casteleiro explored other possible avenues of compensation. He discovered that many states permit legislators to enact legislation with the sole and exclusive function

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[32] Scheck, *supra* note 7 at 228.

[33] Lola Vollens & David Eggers, Surviving Justice: America's Wrongfully Convicted and Exonerated 432-33 (2005).

[34] Scheck, *supra* note 7 at 228.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Bernhard, *supra* note 3 at 86-89.

[39] Id. at 89-90

of making a monetary award (using the state's money) to an exoneree.[40] The "private bill" mechanism (as this special legislation is often described) may sound anachronistic, but it is still used across the country in those unusual situations when a state incurs a legitimate debt and has no other means of repaying that debt.[41]

Other exonerees have won damages awards through private bills; one such example is Edward Honaker, who received a half a million dollars from the state of Virginia in 1996.[42] The Alabama legislature granted Freddie Lee Gaines a million dollars to compensate him for the years he spent in prison wrongly convicted.[43] In 2005, the state legislature of Georgia awarded Clarence Harrison a million dollars.[44]

The private bill is not a perfect solution because it's an award granted through the political system, not a right recognized by the legal process.[45] Enacting a law is a cumbersome, multistep, slow process. Exonerees must find a legislator willing to introduce the bill. The legislator must then garner support in both houses so that the bill will pass when it comes up for a vote. This can be a long and arduous process depending upon what else is being debated and the fiscal health of the state. In Florida, for example, it took Freddie Lee Pitts and Wilbert Lee 20 years to muster sufficient support to convince the state legislature to enact a bill providing them with compensation.[46]

Moreover, because there is no fact-finding mechanism in the political process, there is no way to know, when the private bill is introduced, whether the person on whose behalf the bill has been introduced is really innocent. This concern is generally illusory when an exoneration is based on DNA evidence (because DNA proof of innocence is completely certain), but not every reversal of a conviction is predicated on DNA evidence or even on new evidence at all. Sometimes convictions are reversed for reasons not synonymous with innocence, and sometimes those cases are not re-tried or re-prosecuted. In those –

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[40] *Id.* at 93-97.

[41] Michelle Tsai, *18 Years in Prison? Priceless: How do they figure the payouts for people who were wrongly convicted?* www.slate.com/id2166483/ first published May 18, 2007, (noting twenty-nine states without compensation statutes in which exonerees must lobby for a private bill to recover losses). The Private Bill can be used in other situations besides to assist exonerees, but it has been instrumental in obtaining damages awards for exonerees.

[42] Act of Apr. 6, 1996, 1996 Va. Acts 754. *See* Bernhard, *supra* note 3 at 94-95 (discussing the Honaker case in further detail). Edward Honaker served ten years convicted of rape before being exonerated with DNA evidence. The evidence against him consisted only of the victim's identification. Since 1995, Virginia has compensated seven people through Private Bills.

[43] Act of May 20, 1996, 1996 Ala. Acts 579.

[44] Act of May 10, 2005, 2005 Ga. Laws 374.

[45] Bernhard, *supra* note 3 at 93-97.

[46] Maurice Rosen Act, 1998 Fl. Laws 431 *See* Bernhard, *supra* note 3 at 95 (discussing the *Pitts* and *Lee* cases in further detail).

probably few – situations, individuals may falsely claim to have been innocent. Arguments and speeches on the floor of the legislature can be misleading, and without a judicial fact-finding procedure legislatures may be deceived into making an undeserving award. On the other hand, and probably more frequently, truly innocent and deserving claimants may fail to engender the requisite support. Innocence and exoneration do not always guarantee political support. In David Shephard's case, the private bill route was not an option at all because the New Jersey constitution forbids the use of a private bill.[47]

III. Compensation Statutes

If neither a civil rights claim nor a tort claim will lie, and a private bill option is either too uncertain or unavailable, the only other possible recourse is a statute enacted specifically to compensate exonerees.[48] Twenty-five states, the District of Columbia, and the federal system have enacted special statutes to provide indemnification for the wrongly convicted.[49] These statutes do not require claimants to discover why the prosecution was erroneous, or who made mistakes which "caused" the investigation to go awry, or even what those mistakes might have been.[50] Compensation statutes provide money and services to exonerated individuals without regard to fault or blame. Generally, claimants need only establish innocence and prove that they served time in prison as a result of the wrongful conviction.

The drive to enact compensation statues began in 1932 when Edwin Borchard published *Convicting the Innocent*, a collection of sixty-five stories of people Borchard believed were completely innocent.[51] Appealing to our national pride, he pointed out that many South American and European countries had already enacted similar legislation.[52] In the United States, the first state statute was enacted in 1913, and several have been enacted within the last five years.[53] All the statutes are different, and while some work well, others do

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[47] "The Legislature shall not pass any private, special or local laws." N.J. Const. art. IV, § 7, para. 9; Bernhard, *supra* note 3 at 110.

[48] Bernhard, *supra* note 3 at 73-74.

[49] *See Compensating the Wrongly Convicted Fact Sheet*, http://innocenceproject.org/Content/309.php (last visited Feb. 28, 2008); The Innocence Project, http://www.innocenceproject.org/news/LawView1.php (last visited Feb. 28, 2008) (detailing state compensation laws as selected from an interactive map).

[50] Compensation statutes serve a purpose different from civil rights litigation. While a successful civil rights lawsuit will change behavior – in addition to winning an award for the injured party – by establishing who was at fault and what those individuals or organizations did that violated the law, compensation statutes serve a narrower purpose. They simply indemnify exonerees for their loss, pain and suffering.

[51] Edwin Borchard, Convicting the Innocent: Errors of Criminal Justice (1932).

[52] *Id*. at 375-406

[53] See attached chart

not.[54]

Compensation statutes operate similarly to workers' compensation systems. Workers' compensation systems were created during the Industrial Revolution as society recognized that workers would inevitably be hurt on the job. The workers' compensation system pays injured workers regardless of fault. It doesn't matter whether the machine malfunctioned or whether the worker fell asleep on the job. So long as the injury happened on the job, damages are awarded according to the severity of the injury and the time lost. Likewise, in a criminal justice system as large as ours, where multiple discretionary decisions are made every single day, a certain number of people will be wrongly convicted. Compensation statutes measure an exoneree's loss separate and apart from how that loss occurred. Ideally, the statutes should be easy to access, generous and provide awards quickly. Unfortunately they do not all work perfectly.

Many compensation statutes provide only limited awards.[55] For example, Louisiana recently enacted a statute that only provides $15,000 per year of incarceration with a maximum payout of $150,000.[56] Additionally, the statute requires claimants to waive their right to sue the state in order to collect the small recovery.[57] Apparently the statute was designed primarily to indemnify the state from its own wrongdoing and only secondarily to assist the wrongly convicted.

At the other end of the spectrum are state statutes with no limitation on awards, and which provide social services to assist in the transition from prison to civilian life. In New York, for example, claims are determined by a Court of Claims judge who assesses damages in the same way damages are assessed for any tort claim.[58] Judges render careful decisions, paying close attention to claimants' experiences in prison and lost opportunities. The average payout in New York has been around $150,000 per year of wrongful incarceration.[59] Modern statutes provide access to social services, such as counseling and education, recognizing the difficulty that claimants have adjusting to life outside prison walls after many years of institutionalization.[60]

IV. Requirements and Disqualifiers

Some statutes discourage claims because they require claimants to have been

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[54] *See Compensating the Wrongly Convicted Fact Sheet*, *supra* note 49.

[55] Bernhard, *supra* note 3 at 105-08.

[56] La. Rev. Stat. Ann. § 15:572.8 (2009); La. Code Civ. Proc. Ann. art. 87 (2008).

[57] *Id.*

[58] N.Y. Ct. Cl. Act § 8-b (McKinney Supp. 2008), *available at* http://www.nyscourtofclaims.state.ny.us/claimsact.shtml.

[59] See MacLaw: The New York Court of Claims Decisions Database, http://vertumnus.courts.state.ny.us/claims/maclaw.html (last visited March 22, 2009), for a listing of opinions and damage awards pursuant to N.Y. Ct. Cl. Act § 8-b.

[60] Mass. Gen. Laws Ann ch. 258D § 5 (West 2008).

pardoned in order to recover.[61] The pardon requirement throws the process back into the political maelstrom. Claimants' potential recovery depends on the political will of the executive and the wealth of the state coffers. Other statutes incorporate disqualifiers: some disqualify those with prior felony convictions,[62] while others prohibit a person who pled guilty from recovering—even though several of the first 200 DNA exonerees pled guilty.[63] For example, in California, Christopher Ochoa was charged with a car jacking robbery and threatened with a sentence of twenty-five years to life.[64] Out of fear, he accepted a plea to a two year sentence. When the stolen car was found, the perpetrator's sweater and cap – identified by the victim – were in the car. When the material was subjected to DNA testing, the real profile of the perpetrator emerged, and he was subsequently arrested.[65] Mr. Ochoa was released. It is unfair to disqualify those claimants who were truly innocent but may have pled guilty on counsel's advice, or because they were understandably afraid to go to trial.[66]

Another common disqualifier is the prohibition against recovery for those who have done something that "contributed to the conviction."[67] That language has been interpreted by courts to mean confessing to the crime or making an admission even when that confession or admission was elicited through extreme psychological pressure—so long as the pressure did not amount to physical abuse. In other words, if a claimant confessed to the police, even after many hours of interrogation, or even after having been subjected to trickery, in some states that claimant may be precluded from recovering damages because the confession will be construed to mean that the exoneree contributed to his own conviction.[68]

Many innocent people have falsely confessed. In Pennsylvania, Bruce Godschalk was charged with two rapes that he did not commit.[69] The circumstances of the crimes were similar, and the police surmised that the same person

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[61] See Attached Chart

[62] *See, e.g.,* Victims of Wrongful Incarceration Compensation Act, 2008 FLA. Laws 39, § 4 (precluding recovery for those who have ever been convicted of a felony).

[63] Access to Post-Conviction DNA Testing, http://www.innocenceproject.org/Content/304.php (last visited March 30, 2009).

[64] The Innocence Project: Christopher Ochoa Case, http://www.innocenceproject.org/Content/230.php (last April 21, 2009).

[65] *Id.*

[66] *Id.*

[67] Bernhard, *supra* note 3 at 108-09. *See, e.g.,* D.C. CODE § 2-241 to 2-245 (2009); N.Y. CT. CL. ACT § 8-b (McKinney Supp. 2008).

[68] *See* Attached Chart

[69] Godschalk v. Mountgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 367 (E.D. Pa. 2001) (detailing Mr. Godschalk's battle to obtain DNA testing); The Innocence Project: Bruce Godschalk Case, http://www.innocenceproject.org/Content/154.php (last visited March 22, 2009) (detailing Mr. Godschalk's exoneration).

committed both rapes. The rape kits in both cases tested positive for semen. Bruce was arrested, interrogated, and eventually confessed. The confession was believed to be reliable because it included details that the police said only the police and the perpetrator would have known. For example, the confession included the detail that one of the victims was menstruating. At trial one victim identified Bruce and the other could not. He was convicted of both.

Six years later, Bruce obtained DNA testing which the government fought, arguing that because of his confession the test results wouldn't exculpate him.[70] The DNA from both rape kits matched, and the test showed that there was just one perpetrator and that person was not Bruce Godschalk. Bruce was released after fifteen years in prison. His exoneration shows that the police suggested facts to Bruce which were then included in the "confession." Either intentionally or negligently, the police assisted him to incorporate unique facts into his confession to add verisimilitude, and then misled the prosecuting district attorney by failing to inform him that they had transmitted those facts. His confession was false even though it was convincing.

Researchers have categorized three kinds of false confessions:[71] voluntary false confessions, of which the Jon-Benet Ramsey case is an example,[72] coerced-compliant false confessions, in which the target confesses in order to escape interrogation or gain a promised reward but doesn't believe what he says,[73] and finally, coerced internalized false confessions, where in the end, the target believes the confession. An example of an internalized confession might be the Martin Tankleff case in Long Island, New York.[74]

Police receive special training in interrogation techniques that are "designed to break suspects down, [and] convince them that they are doomed, so that they

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[70] *Godschalk*, 177 F. Supp. 2d at 367-68.

[71] Saul Kassin has written extensively on the subject of false confessions. *See* Saul M. Kassin, *On the Psychology of False Confessions: Does Innocence Put Innocents at Risk*, 60 AM. PSCYHOL. 215, 221 (2005). *See also* Miriam S. Gohara, *A Lie for a Lie: False Confession and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM, URB. L.J. 791, 808 (2006). In the paragraphs that follow, I present a quick and simplistic overview of their work.

[72] "On August 16, 2006, 41-year-old John Mark Karr, a former schoolteacher, confessed to killing Ms. Ramsey" after correspondence with "a journalism professor at the University of Colorado. Once apprehended, he confessed to being with JonBenét when she died, stating that her death was an accident." In the end, however, no charges were brought against Karr as his DNA did not match that found on JonBenét Ramsey's body" and his unprompted confession was disbelieved. http://en.wikipedia.org/wiki/JonBen%C3%A9t_Ramsey#cite_note-8

[73] *Godschalk*, 177 F. Supp. 2d at 367-68.

[74] Miriam S. Gohara, *A Lie for a Lie: False Confession and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM, URB. L.J. 791, 792-3 (2006) (Police convinced Martin Tankleff, who had been asleep at home during his parents' murder, that perhaps he had blacked out and killed his parents).

soon believe that making a confession . . . [is the only] rational or risk reducing choice."[75] Interrogators generally begin the interrogation process in the same way. At the start they are non-accusatory but rather friendly, and ask simple biographical questions to put the target at ease. During this time the police try to "sense" whether the target is lying, although most scientific experiments show that no one can figure out who is lying and who is telling the truth.[76] During this period, the target believes that the situation is going to be okay. He's going to go home. He'll convince the police that he's innocent. [77]

If the interrogator starts to believe the suspect is lying, the interrogator moves to an aggressive and confrontational style, deliberately increasing the tension.[78] The suspect then begins to feel desperate, and his or her emotions change from feeling in control to out-of-control. Police understand that increased emotionality interferes with rational thinking.[79] After increasing the tension and emotionality, interrogators may begin to dominate the interview, with the goal of convincing the target to incriminate him or herself. Sometimes the police use a technique called maximization, which is an elaborate process designed to break down the suspect and convince him that the situation is hopeless and that he will inevitably be convicted.[80] To do this, police often relate the evidence that they believe leads to the suspect.[81]

Sometimes the police exaggerate or even manufacture evidence to increase the sense of hopelessness.[82] They may, for example, pretend to have DNA results when they do not, or pretend that colleagues lifted the suspect's finger-

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[75] Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 WIS. L. REV. 291, 334 ("Most police in the United States are trained in what is known as the "Reid Technique" of interrogation. The most influential of the police training manuals that teach this method is Inbau, Reid, Buckley, and Janyne's *Criminal Interrogation and Confessions* . . . ."). *See* FRED INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 209-374 (2001).

[76] *Id.* at 336 ("In clinical studies, people consistently perform at only slightly better than chance levels [with typical accuracy rates of about 45 to 60 percent, when chance is 50 percent] at distinguishing lies from truth"); *citing* Samantha Mann, Aldert Vrij and Ray Bull, *Detecting True Lies, Police Officers' Ability to Detect Suspects' Lies*, 89 J. APPLIED PSYCHOL. 137, 137 (2004).

[77] *See generally*, Richard A. Leo*, False Confession: Causes , Consequences, and Solutions*, in WRONGLY CONVICTED : PERSPECTIVES ON FAILED JUSTICE, (Saundra D. Westervelt and John A Humphrey, Eds)(herein after *False Confession*)

[78] *Id.* at 334.

[79] If you want to learn more about interrogation techniques and how they impact the targets of police investigation, see Saul M. Kassin, O*n the Psychology of False Confessions: Does Innocence Put Innocents at Risk,* 60 AM. PSYCHOL. 215, 219-221 (2005).

[80] Richard A. Leo*, False Confession, supra* note 77 at 40 – 41.

[81] *Id.*

[82] Findley at 335; *citing* Saul Kassin, Christing C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW& HUM . BEHAV. 187, 188 (2003).

prints from the crime scene or that the suspect failed a lie detector test, when none of that is true.[83] Once the appropriate state of hopelessness has been achieved, the police begin to suggest resolution through a technique called minimization.[84] Police interrogators may suggest that they know the suspect wasn't the mastermind, or that they know he didn't mean to kill, but only to rape, and that if he confesses to the rape they'll intercede with the prosecution for leniency.[85]

Although deception isn't per se prohibited under current case law, some forms of deception are certainly proscribed.[86] For example, when police fabricated an audio tape so that it sounded as though a fictitious eyewitness had already identified the target of the interrogation as the perpetrator (hoping to fool the target into thinking there was a witness against him), a New Jersey trial court held that the resulting confession was voluntary and admissible.[87] On appeal, the court traced the history of police interrogation practices from the use of physical force to the modern day use of psychologically coercive techniques and condemned the use of police-fabricated tangible evidence.[88] Hopefully, that ruling will be noticed, followed and expanded as a result of what we learn about confessions and the dangers of police deception and trickery. The new research seems to show that psychological coercion is just as real and powerful as physical coercion, and as a result, confessions resulting from such interrogations should not be considered voluntary,[89] and no false confession

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[83] In State v.Cayward 552 So. 2d 971 (Fla. Dist. Ct. App. 1989), *review denied,* 562 So. 2d 347 (Fla. 1990) police fabricated two scientific reports to indicate that semen stains on the victim's underwear came from Cayward. The police showed the false reports to Cayward. He confessed. The Florida court held that the manufacture of false documents by police officials offends the traditional notions of due process under both the state and federal constitutions. Many courts, however, disagree with the *Cayward* decision. For example, in Sheriff, Washoe County v. Kevin Bessey, 112 Nev. 322 (1997), a detective presented a suspect with a false crime lab report. The inmate then made a number of inculpatory statements. The Supreme Court reversed the district court's suppression of the confession holding that there was nothing in the treatment of the accused or the setting of the interrogation that was coercive; there was no reason to believe the accused's statements were not voluntary; and there was no evidence the fabricated document did produce or was likely to produce a false confession.

[84] Richard A. Leo*, False Confession, supra* at note 77: *State v. Patton*, 362 N.J. Super. Ct. App. Div. 16, 18 (2003).

[85] Richard A. Leo*, False Confession, supra* note 77

[86] People v. Leyra, 302 N.Y. 353 (1951) (holding that where the police deprived the target of food and sleep and brought in a psychiatrist and neurologist who induced the defendant to confess by falsely pretending that he had come to aid him, the deception to render the resulting confession was inadmissible as involuntarily made.)

[87] *State v. Patton*, 362 N.J. Super. Ct. App. Div. 16, 18 (2003).

[88] *Id.* at 27-28.

[89] A statement will be suppressed if a court deems it to have been involuntarily made. The traditional definition of involuntary is "not the product of a rational intellect or free

should preclude compensation. Compensation statutes must be drafted or amended to permit recovery by individuals who falsely confessed in response to police interrogation techniques.

V. Compensation Statutes Make a Difference

When Paul Casteleiro realized that he couldn't bring a lawsuit on David Shephard's behalf, he lobbied for a compensation statute in New Jersey.[90] First he involved the press.[91] He recruited journalists to write about David's story. He then sent the clippings, along with a draft statute, in press packets to every single state legislator in New Jersey.[92] New Jersey State Senators Rice and Cardinale sponsored the bill,[93] and it quickly gained support and passed in the first legislative session.[94] The statute, however, is limited – it awards only $20,000 a year.[95] Nevertheless, that statute gave David Shephard a $220,000 cushion with which to begin life again. David subsequently married the woman he was dating when he was arrested, and they have a second child. (David's also been promoted.)

VI. What You Can Do

Across the country, individuals who were wrongly convicted and have since been exonerated remain un-represented by counsel. Those exonerees could use help to explore whether they could bring a civil rights lawsuit, or whether they could access a compensation statute in their state.

If you would like to help, feel free to send me an email (abernhard@law.pace.edu) and I will introduce you to your local Innocence Project. If you're at a law school, this might be a project for a clinical program, or your clinic may take on the task of designing a compensation statute if you live in a state that lacks one. If Paul Casteleiro, a single, solo practitioner can get a statute passed, think of what a well-funded, highly resourced, law school

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will." Townsend v. Sain, 372 U.S. 293 (1963). Although a psychologically coercive situation can render a statement involuntary, generally courts are reluctant to find statements to have been involuntarily made unless the statement result from physical abuse. The Tankleff case is a good example of what kinds of techniques courts will allow. During the course of the police interrogation of Marty Tankleff whose conviction for murdering his parents has now been vacated and whose charges dismissed in the interest of justice (199 AD2d 550), police officers pretended to call the hospital and to speak with Mr. Tankleff's father who they said he had awoken from a coma to blame Marty for his murder. The resulting confession was introduced at the trial and the conviction was upheld. People v. Tankleff, 199 AD2d 550, (2nd Dept. 1993), aff'd 84 NY2d 992 (1994) . Mincey v. Arizona, 437 U.S. 385 (1987)

[90] Bernhard, supra note 3, at 110-111.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] N.J. Stat. Ann. §§ 52:4C-1 to 4C-6 (West 2001).

can do. This is an ideal way to get your students involved in doing justice, learning about the criminal justice system, and also learning that they, even while they're in law school, can do something to make that system better.

TABLE

When Justice Fails: Indemnification for Unjust Conviction

Adele Bernhard[†]

The following table summarizes the statutes on indemnification for unjust conviction and imprisonment that Adele Bernhard discusses in her article *When Justice Fails*, 6 U Chi L Sch Roundtable 73. (Last updated August 11, 2008.)

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
AL	AL Act # 2001 659	Conviction vacated or reversed and the charges dismissed on grounds consistent with innocence	Not specified	State Division of Risk Management and the Committee on Compensation for Wrongful Incarceration	2 years after exoneration or dismissal	Minimum of $50,000 for each year of incarceration, but legislature must appropriate the funds.	2004	Nothing specified, but a new felony conviction will end a claimant's right to compensation.
CA	Cal Penal Code §§ 4900 to 4906	Pardon for innocence or being "innocent"	Not specified	State Board of Control makes a recommendation to the legislature	6 months after acquittal, pardon, or release and 4 months before new legislative meeting	$100 per day of Incarceration.	Amended 8/28/00	Claimant must show he did not contribute to arrest or conviction.
CT	HB# 5933	Pardon, or conviction vacated, or reversed, and the charges dismissed on grounds consistent with innocence.	Preponderance of the evidence.	Claims Commissioner	2 years from date of pardon or dismissal	No limit. Commissioner may consider wide range of damages and expenses, including attorney's fees. This claim not a bar to other claims & Commissioner may order payment for job training as well as for counseling and tuition at state school.	2008	Nothing specified.

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
DC	DC Code § 1-1221 to 1-1225	Pardon for innocence or conviction reversed or set aside on the ground that claimant is not guilty.	Clear & Convincing	Civil Court	Available to any person released after 1979.	No maximum & No punitive damages	1981	Claimant must show that he did not commit any of the acts charged, or that his acts constituted no crime and that he did not, by his misconduct, bring about the prosecution, and he must not have plead guilty.
FL	2008 FL. ALS 39	Certification by prosecuting authority that petitioner is innocent, that no further criminal proceeding will be initiated, no questions of fact remain, and petitioner is eligible for compensation.	If prosecuting authority does not certify, admin. law judge must find innocence by clear and convincing.	Trial court – can consider claim even if prosecuting authority does not certify innocence. Claim would then be sent to admins. law judge for factual determination of innocence, and trial judge could adapt findings or not.	Initially, petitioner must file for a declaration of wrongful conviction. After July, 2008, petitioner must file w/in 90 days after order vacating conviction. Prior to July 08, by July 1, 2010. Then must file for compensation w/in 2 years from declaration.	$50,000 per year, adjusted for COL increases. & 120 hours of tuition at a career center, community college or state university; and any fines or costs imposed at sentence. Limit of $2 million.	2008	Must not have been convicted of a felony; and must not have been serving time for another felony when serving time for the felony for which petitioner was declared innocent.
IL	Ill Rev Stat ch. 705 § 505/8	Pardon for Innocence.	Preponderance of the evidence	Court of Claims		≤5 yrs., 15K max, ≤14 yrs., 30K max, >14 yrs., 35K max, with COLA increase for each year since 1945.	1945	

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
IA	Iowa Code Ann § 663A.1	Conviction vacated or reversed & charges dismissed.	Clear & Convincing	District Court for liability; State Appeal Board or Civil Ct. for Damages.	2 years	$50 per day & lost wages up to $25,000/yr & attorney's fees.	1997	Claimant must not have plead guilty.
LA	R.S.15:572.8 and .9 & Code Civ. Pro. Art. 87	Conviction reversed or vacated, and petitioner "has proven" factual innocence.	Clear and Convincing	19th Judicial District Court - trial by judge alone.	2 years from vacatur of conviction or for cases pending when statue was passed, by September 2007.	$15,000 per year; with a maximum award of $150,000. Court may award costs of job/skills training for one year, and medically necessary medical and counseling services for three year; as well as tuition expenses at a community college or unit of the state university system –at a cost of not more than $40,000.	2005	Nothing specified.
MA	Ann L. MA. Gen'l Laws, Chapter 258D § 1-9	Pardon or conviction reversed & charges dismissed on grounds consistent with innocence or case tried to acquittal.	Clear & Convincing	Superior Court in the county where the claimant was convicted or in Suffolk County.	2 years	A maximum of $500,000 may be awarded and the Court may order services – physical &/ or emotional, educational services at any state of community college, and expungement of the record of conviction.	2004	Claimant cannot have plead guilty, unless such plea was withdrawn, vacated or nullified by operation of law.

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
ME	14 Me Rev Stat Ann 8241-8244	Pardon for Innocence.	Clear & Convincing	Superior Court	2 years from pardon.	300K, no punitive damages.	1993	Nothing specified.
MD	Md State Fin & Proc § 10-501	Pardon on the ground that conviction was in error.	"Conclusive"	Board of Public Works	Not specified	Actual damages.	1963	Nothing specified.
MO	MO Statute 650.055 – 9	Person must be "determined to be 'actually innocent' only by DNA Evidence.'	DNA evidence must demonstrate innocence	Not specified	1 year form release from confinement – after August 28, 2003.	$50 per day of post-conviction confinement.	2005	Nothing specified.
MT	Mont. Code Ann. § 53-1-214			Funds to be appropriated by the legislature	Nothing specified.	Provides educational aid to wrongfully convicted persons exonerated by post-conviction DNA testing.	2003	Nothing specified.
NH	NH Stat § 541-B:14	"Found innocent"	Board must find by majority vote that claim is "justified."	Board of Claims	3 years	20K cap	1977	Nothing specified.
NJ	NJ Stat Ann §§ 52:4C-1 to 4C-6	None	Clear & Convincing	Superior Court	2 years from release or pardon	Twice the amount of claimant's income in the year prior to incarceration or 20K per year of incarceration, whichever is greater.	1997	Claimant did not, by his own conduct, cause or bring about conviction.

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
NY	NY Ct. of Claims Act § 8-b	Pardon or conviction reversed & charges dismissed on grounds consistent with innocence or case tried to acquittal.	Clear & Convincing	Court of Claims	2 years Cases where claimant asserts proof with DNA evidence shall receive docketing priority.	No limit.	1984	Claimant did not commit any of the acts charged in the accusatory instrument, or his acts did not constitute a crime; and claimant did not by his own conduct cause or bring about the conviction.
NC	NC Gen Stat §§ 148-82 to 148-84	Pardon for innocence	Not specified	Industrial Commission makes a recommendation to Governor.	5 years	50,000 each year Max. of 750,000 Award may also include job skills training and tuition reimbursement.	1947 Amended 2008	Nothing specified.
OH	Ohio Rev Code Ann § 2305.02 & § 2743.48	Conviction vacated or reversed & charges dismissed,	Preponderance of evidence; Walden v. State, 547 N.E.2d 962	Court of Common Pleas for liability; Court of Claims for damages.	2 years	40,330 per year, (or amt. determined by state auditor) in addition to lost wages, costs, and attorney's fees.	1986 Amended 2002	Claimant must not have pled guilty.
OK	51 Okl. St. § 154	Conviction vacated and charges dismissed, or pardoned, and, in either case, upon a finding that the claimant did not commit the crime for which he or she had been convicted.	Clear and convincing evidence	State Civil Court	No time limit	$175,000 (no punitive damages).	2004	Claimant must not have pled guilty, and must have been imprisoned solely as a result of the wrongful conviction.

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
TN	Tenn Code Ann §9-8-108	"Exoneration" or pardon for innocence	Not specified	Board of Claims	1 year	$1,000,000.	1984 Amended 2004	Nothing specified.
TX	Tex Code Ann §§ 103.001; 103.051; 052, 103.1041.	Pardon or has been granted relief on the basis of innocence.	Preponderance of evidence.	May file administrative claim with comptroller or civil suit but not both.	2 years release from custody or discovery of evidence substantiating claim.	50K per year to a max of $500,000. $100K per year if sentenced to death – and child support payments that accrued and were not paid while claimant was in prison.	Amended 2001 & 2007	Claimant must not have pled guilty. Payments terminate if claimant is subsequently convicted of a crime punishable as a felony.
UT	78-35a-405	Under Utah 78-35a-402, district court must determine factual innocence.	Finding of Innocence must be by clear and convincing - but no separate standard for determining award.	District court where conviction was rendered.	Petitioner must file for post-conviction relief (e.g. declaration of innocence) w/in 1 year of final judgment, or date on which petitioner should have known of new facts upon which petition is based - no separate limit for filing claim for compensation.	For 15 years, petitioner may receive the monetary value of average annual nonagricultural payroll. Office of Crime Victim' Reparation to make initial payment w/in 45 days of court finding of innocence. The award is not taxable under Utah law.	2008	Claimant must be a citizen or otherwise lawfully in the USA at the time of the incident. Petitioner can not recover for any period of time while serving a sentence for another felony, and payments may be suspended if petitioner is convicted of a subsequent felony.

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
VA	8.01-195.10	Conviction vacated pursuant to VA Code Cptr. 19.2-327.2 et seq.	Not Specified	General Assembly	Not Specified	90% of the VA per capita personal income–for up to 20 yrs. Tuition worth $10,00 in the VA Comm. College system.	2004	Claimant may not have pled guilty – unless he or she was charged with a capital offense. If the claimant should subsequently be convicted of a felony, he or she becomes ineligible to receive further payments owed. Finally, acceptance of the award precludes filing any further or additional claims against the state for conduct arising out of the factual situation in connection with the conviction.

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
VT	13 V.S.A Chptr. 182	As a result of DNA evidence, the conviction was reversed or vacated and the charges dismissed, or tried to an acquittal, or a pardon was granted.	Preponderance of evidence	Washington County Supreme Court	3 years from exoneration, unless claimant was not provided with notice of the right to bring an action, in which case claimant shall be granted an additional year in which to file	Minimum of 30K per year - maximum of 60K per year of incarceration, adjusted proportionally for partial years served; Awards may include in addition: lost wages, costs, and attorneys fees; Claimant entitled to up to 10 years of eligibility for Vermont State Health Plan; Award is not taxable by state and no offset for cost of incarceration is allowed.	2007	The claimant did not suborn perjury or fabricate evidence during any of the proceedings related to the crime with which he or she was charged.
US (Fed)	28 USC § 1495 & § 2513	Pardon for innocence, or conviction reversed or set aside on ground that claimant is not guilty and found not guilty at new trial or rehearing.	Not specified	U.S. Court of Federal Claims		5K	1948	Claimant did not commit acts charged and did not by misconduct or neglect cause prosecution.
WV	W Va Code § 14-2-13(a)	Pardon for innocence, or conviction reversed & either charges dismissed or acquittal on retrial.	Clear & Convincing	Court of Claims	2 years after pardon or dismissal	"fair and reasonable damages."	1987	Claimant did not contribute to or bring about conviction.

STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
WI	Wis Stat § 775.05	None specified besides proof of innocence.	Clear & Convincing	Claims Board	None specified	5K/yr, max 25K but Board may petition legislature for additional funds.	1913	Claimant did not contribute to or bring about conviction.