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Budgeting for Exoneree Compensation:Indemnifying Exonerees Not Officials to Deter Future Wrongful Convictions

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BUDGETING FOR EXONEREE COMPENSATION: INDEMNIFYING EXONEREES NOT OFFICIALS TO DETER FUTURE WRONGFUL CONVICTIONS

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As survivors of state harm, exonerees are often woefully undercompensated compared to present jury awards for wrongful incarceration. Furthermore, by precluding exonerees who have falsely confessed or pled guilty from receiving state compensation, lawmakers squander an opportunity to increase police accountability going forward, further stacking the deck against those who have already been failed by the system.

This Note proceeds as follows: Part I provides a background of false confessions, why they occur in the context of police interrogation, and their consequences for an exoneree seeking compensation from the state for their wrongful incarceration. Part II investigates avenues of legal redress for the wrongly incarcerated and explores whether meaningful compensation may reform the underlying procedures which often lead to false confessions. Part III argues for legislative amendments to meaningfully increase the availability and amount of exoneree compensation. This Part proposes the adoption of budgetary arrangements in which law enforcement agencies bear the burden of settlements and judgments against them, thus facing financial constraints when litigation is costly. In addition, it proposes state statutory establishment of Wrongful Conviction Trust Funds with annual contributions determined by the state's rate of incarceration, and

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contributions either diverted from or directly tied to law enforcement agency budgets. Such budgetary constraints provide long-term incentives for law enforcement to adopt procedures which increase accuracy in investigation and minimize the risk of wrongful conviction. Moreover, prosecutors may further the objectives of such reforms by lobbying for the establishment of Wrongful Conviction Trust Funds and the legislative abolishment of mandatory minimum sentencing, limiting over-charging practices, and better staffing Conviction Integrity Units, where prosecutors have largely failed to promote police accountability.

INTRODUCTION: THE CHICAGO POLICE TORTURE SCANDAL

In 1993, Wayne Washington was brought into the police station in connection with the shooting and murder of Marshall Morgan Jr. — a standout basketball player for the Illinois Institute of Technology — after Tyrone Hood told the police he was with Washington at the time of the crime.[1] Washington was left alone and handcuffed to a chair for hours before Detectives John Halloran and Kenneth Boudreau beat him, repeatedly kicked his chair over, and demanded he confess to committing the homicide of Morgan Jr. with Hood.[2] Over two days of violent interrogation, Washington maintained his innocence.[3] Ultimately, detectives prepared a statement implicating Washington and Hood in the homicide and promised Washington could go home upon signing the confession.[4] Desperately wanting to escape the detectives who had beaten him and unable to endure further physical and psychological abuse, Washington signed the false statement drafted by the police.[5]

Washington was indicted, pled not guilty, and then tried prior to Hood.[6] With little evidence at trial, the government presented the two sets of statements that were violently coerced by Chicago police officers.[7] The first was Washington's false statement, indicating that he planned a robbery with Hood and received a gun from a man named

1. *See* People v. Washington, 186 N.E.3d 1055, 1057 (Ill. App. Ct. 2020); Megan Hickey, *Wrongfully convicted of murder, Wayne Washington's odyssey to clear his name still not over,* CBS CHICAGO (May 30, 2022) https://www.cbsnews.com/chicago/news/wayne-washington-wrongfully-convicted-innocence-certificate/ [https://perma.cc/RMK3-QYBZ].

2. *See* Brief for The Innocence Project and the Innocence Network as Amici Curiae Supporting Petitioner-Appellant, People v. Washington, 187 N.E.3d 707 (Ill. 2022) (No. 93-CR-14676) [hereinafter Brief for The Innocence Project].

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

Jody Rogers.[8] Second were statements made by brothers Michael and Jody Rogers, who testified that they witnessed Hood say he was going to commit a robbery, that they supplied Hood a gun the day of the murder, and that Hood subsequently told them he murdered Mr. Morgan.[9] The Rogers brothers later recanted their testimony, stating it was the product of physical abuse and threats by police.[10] The jury at Washington's trial was not able to reach a verdict and the court declared a mistrial.[11]

Before Washington's retrial, the prosecution offered him a plea deal to a 25-year sentence.[12] After seeing Hood, a man who maintained his innocence, receive a 75-year sentence, Washington decided to plead guilty.[13] However, during his incarceration, Washington resolutely maintained his innocence and filed numerous petitions for post-conviction relief, each denied by the courts.[14] Hood similarly filed petitions for post-conviction relief, one of which resulted in the governor granting his petition for clemency and commuting his sentence.[15] Subsequently, new evidence revealed the true perpetrator of the murder — the victim's own father — and the State moved to vacate Washington and Hood's convictions and grant them new trials.[16] The court granted the motion, and the State then dismissed the charges against them.[17]

Soon after, Washington and Hood filed petitions for certificates of innocence without any opposition from the State.[18] In support of his petition, Hood submitted evidence that two key witnesses had recanted their coerced testimony and the victim's father had killed his son to collect on a life insurance policy.[19] However, the statute governing certificates of innocence in Illinois has a limitation, commonly seen in other states as well, that resulted in the circuit court granting Hood's petition but denying Washington's.[20] In Illinois, a certificate of

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8. *See* Brief for The Innocence Project, *supra* note 2.
9. *See id.*
10. *See id.*
11. *See id.* at 10.
12. *See* People v. Washington, 186 N.E.3d 1055, 1057 (Ill. App. Ct. 2020).
13. *See id*. Hood was convicted and sentenced to 75 years in prison after Washington's mistrial and before his plea deal. *Id.*
14. *See* Brief for The Innocence Project, *supra* note 2.
15. *See Washington*, 186 N.E.3d at 1057.
16. *See id.*; *see also* People v. Hood, 196 N.E.3d 47, 50 (Ill. App. Ct. 2021).
17. *See id.*
18. *See* Brief for The Innocence Project, *supra* note 2.
19. *Hood*, 196 N.E.3d at 50.
20. *Washington*, 186 N.E.3d at 1059, 1061.

innocence can be denied if the defendant contributed to his conviction.[21] Because Washington had given a false confession and pleaded guilty, the court concluded that Washington voluntarily contributed to his conviction, and thus was not entitled to a certificate of innocence pursuant to chapter 735 section 5/2-702 of Illinois state law.[22] This decision was affirmed by the appellate court.[23]

Mr. Washington is just one of the many survivors of Chicago police's systematic use of torture from the 1970s through the 1990s, which included tactics such as electric shocks, beatings, cigarette burnings, suffocation, sexual assault, kicking, screaming, and threats with assault weapons.[24] The torture was mostly led by Jon Burge and included at least 118 Black and Latinx victims.[25] As of 2019, at least 65 known

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21. *See id.* at 1060.

22. *See id.* at 1059.

23. *See id.* at 1061. Washington's case is now pending appeal in the Supreme Court of Illinois. Without a certificate of innocence, he is not only precluded from obtaining compensation from the state for 14 years of wrongful incarceration, but his murder conviction also remains on his record. *See* Hickey, *supra* note 1; *see also* Todd Feurer, Shardaa Gray & Megan Hickey, *Judge Pushes Back Ruling on Certificates of Innocence for Brothers Exonerated in 1994 Murder,* CBS CHI. (Mar. 16, 2023), https://www.cbsnews.com/chicago/news/brothers-exonerated-for-1994-murder-return-to-court-after-bid-for-certificates-of-innocence-delayed/ [https://perma.cc/4TWY-QE4V]. Functionally, this makes it more difficult for him to find a job and means he is unable to chaperone his daughter on school trips. *See id.* By taking up his case, the Illinois judiciary can right this wrong both for Washington and many others that are similarly situated because of a gross misuse of police and state power.

24. *See, e.g.*, NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 144 (2016) (describing serial racial torture by former Chicago police commander Jon Burge, which included placing bags over victims' heads, shocking their genitals with cattle prods, and shouting the n-word while electrocuting them); G. Flint Taylor, *The Chicago Police Torture Scandal: A Legal and Political History*, 17 CUNY L. REV. 329, 331 (2014) ("Burge's electric shock device, which he referred to as the 'n***** box,' was sometimes on display on a table in the Robbery office, and continued to be a signature of their interrogations in high profile cases.") (citations omitted).

25. *See* Aislinn Pulley, *Chicago Paves the Way for Reparations for Police Sadism*, ACLU (Jan. 2019), https://www.aclu.org/issues/chicago-paves-way-reparations-police-sadism [https://perma.cc/CL8J-9V4D]; Natalie Y. Moore, *Payback*, MARSHALL PROJECT (Oct. 30, 2018), https://www.themarshallproject.org/2018/10/30/payback [https://perma.cc/Z3J9-VUQ3]. In 1969, Burge returned from his military duty at a prisoner of war camp in South Vietnam and soon after became a Chicago police officer. *See* Taylor, *supra* note 24, at 330. After decades of allegations against him, Burge was fired in February 1993, but his regime of violent, coercive interrogation practices persisted in the Chicago Police Department for decades. *See* Hinton v. Uchtman, 395 F.3d 810, 822 (7th Cir. 2005) (Wood, J., concurring) (stating that a "mountain of evidence indicates that torture was an ordinary occurrence" in the Chicago Police Department under Burge's command and comparing interrogation tactics to the Abu Ghraib facility in Iraq). Burge was convicted of perjury in 2010 and spent four years in prison, but he never faced criminal charges related to his time as an officer and

torture survivors remained incarcerated due to the confessions elicited from the racialized torture Burge's crew inflicted.[26] Some spent years or decades in prison like Washington, some were put on death row, and others died behind bars.[27]

False confessions are a contributing factor in almost 30% of convictions later overturned by DNA evidence, and they are one of the leading causes of wrongful conviction.[28] In Chicago, false confessions are particularly prevalent. Cook County police account for an estimated 25% of all known false confessions nationwide.[29] Notably, the available data only represent "the tip of an iceberg," as there are circumstances in which false confessions are neither trackable nor discoverable, including confessions disproved before trial, confessions in juvenile proceedings protected by confidentiality provisions, or confessions given for minor crimes not subject to post-conviction scrutiny.[30]

Concerned in particular about the false confessions arising from the Cook County interrogations, on May 6, 2015, Chicago passed the nation's first reparations ordinance for survivors of Burge's torture ring.[31] The ordinance provides five radically transformative elements: (1) the creation of a $5.5 million reparations fund to provide up to $100,000 to torture survivors; (2) "free access to the city's colleges for

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collected a pension from the Chicago until he died. *See* Heather Cherone, *Cost of Burge-Era Torture Grows as Chicago City Council Agrees to Pay 2 Wrongfully Convicted Men $14M,* WTTW (Jan. 26, 2022, 8:28 PM), https://news.wttw.com/2022/01/26/cost-burge-era-torture-grows-chicago-city-council-agrees-pay-2-wrongfully-convicted-men#main-content [https://perma.cc/NC87-BL8X].

26. *See* Pulley, *supra* note 25.

27. *See id.*

28. *See* Kyle C. Scherr et al., *Cumulative Disadvantage: A Psychological Framework for Understanding How Innocence Can Lead to Confession, Wrongful Conviction, and Beyond*, 15 PERSPS. ON PSYCH. SCI. 353, 353 (2020).

29. *See* Brief for The Innocence Project, *supra* note 2; *see also* Klara Stephens, *Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations*, 11 NE. UNIV. L. REV. 593, 598 (2019) ("Peter Neufeld famously said, '[q]uite simply, what Cooperstown is to [b]aseball, Chicago is to false confessions. It is the Hall of Fame.'") (citations omitted); Janet Moore, *Reviving Escobedo*, 50 LOY. UNIV. CHI. L.J. 1015, 1029–30 (2019) ("By early 2019, Illinois had the second highest number of exonerations (296) among the fifty states, following only Texas. Nearly 80 percent (235) of the Illinois exoneration cases were from Cook County. Thus, more wrongful convictions have been detected and corrected in this single county as in the entire state of California. In 2017 alone, Cook County was responsible for almost half of the nation's 29 exonerations attribute to false confessions.").

30. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications,* 37 J. AM. ACAD. PSYCHIATRY L. 332, 332 (2009).

31. Pulley, *supra* note 25.

survivors and family members"; (3) "the creation of a public memorial"; (4) "mandatory teaching of the police department's torture ring to eighth graders and high school sophomores in Chicago public schools"; and (5) "the creation of a center on the Southside dedicated to addressing the psychological effects of torture."[32]

The legacy of false confessions has cost Chicago taxpayers millions because the city, not police departments or police officers, bears the cost of police misconduct.[33] As of January 2022, Chicago taxpayers have paid $130 million in lawsuit settlements and judgments related to Burge's misconduct.[34] While this is a large expense for taxpayers, the cost constitutes a sliver of municipal and state police and corrections budgets. In fact, the Chicago Police Department budget was almost $1.8 billion in 2020 alone.[35] Since there is no financial incentive to investigate officers who violate the law and those officers are never personally financially liable for such behavior, structures of government funding only serve to perpetuate official misconduct.[36] Nearly all cities have comparable mechanisms of officer indemnification and these persistent police practices are not unique to Chicago.[37] Instead, Chicago is "ordinary in its dysfunction."[38]

As demonstrated by Washington's case, false confessions and pleas have serious consequences for an exoneree's ability to obtain damages from the state. Namely, Iowa,[39] New Jersey,[40] Oklahoma,[41] and Ohio[42]

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32. *See id.*; *see also Chicago City Council Approves Reparations for Victims of Torture During Interrogation*, INNOCENCE PROJECT (May 7, 2015), https://innocenceproject.org/chicago-city-council-approves-reparations-for-victims-of-torture-during-interrogation/ [https://perma.cc/SUW2-WGFD].

33. *See, e.g.*, Kevin Davis, *Under Questioning: The Chicago Police Legacy of Extracting False Confessions is Costing the City Millions*, 104 A.B.A. J. 36, 38–39 (2018); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1147 (2016); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 590 (2000).

34. *See* Cherone, *supra* note 25.

35. *See What Policing Costs: A Look at Spending in America's Biggest Cities: Chicago IL*, VERA INST. OF JUST., https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities/chicago-il [https://perma.cc/X8FQ-QL9L] (last visited Jan. 28, 2023).

36. *See* Schwartz, *supra* note 33; *see also* Emery & Maazel, *supra* note 33.

37. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 904 n.85 (2014).

38. VAN CLEVE, *supra* note 24, at 22.

39. *See* IOWA CODE ANN. § 663A.1.

40. *See* N.J. STAT. ANN. § 52:4C-3.

41. *See* 51 OKLA. STAT. tit. 51 § 154.

42. *See* OHIO REV. CODE ANN. § 2743.48.

preclude those who pled guilty from receiving compensation, even if that plea was coerced, while courts may interpret contributory provisions as barring those who falsely confessed.[43] By denying exoneree compensation to those who gave a false admission but are factually innocent, both the legislature and judiciary preclude any meaningful justice and fail exonerees, who often have access to fewer resources and support programs than if they had committed a crime.[44] Furthermore, lawmakers squander an opportunity to realign police incentives and reform police behavior by increasing accountability, thus reducing the chances of future official abuses, false confessions, and by extension, wrongful convictions.

Part I of this Note provides a background of false confessions, why they occur in the context of police interrogation, and their consequences for an exoneree seeking compensation from the state for their wrongful incarceration.[45] Part II investigates avenues of legal redress for the wrongly incarcerated and explores whether meaningful compensation may reform the underlying procedures which led to the false confession.[46] Part III argues for legislative amendments to meaningfully increase the availability and amount of exoneree compensation.[47] This part also proposes the adoption of budgetary arrangements in which law enforcement agencies bear the burden of settlements and judgments against them — thus facing financial constraints when litigation is costly — coupled with prosecutorial reform to root out causes of wrongful convictions.[48] In addition, it proposes state statutory establishment of Wrongful Conviction Trust Funds with annual contributions determined by the state's rate of incarceration, and contributions either diverted from or directly tied to law enforcement agency budgets.[49] Part IV concludes that forcing police departments to assume financial responsibility for wrongful convictions may provide the long-term financial incentives necessary to reform underlying coercive techniques and procedures and deter official misconduct.[50]

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43. *See* People v. Washington, 186 N.E.3d 1055, 1057 (Ill. App. Div. 2020).

44. Evan J. Mandery et al., *Compensation Statutes and PostExoneration Offending,* 103 J. CRIM. L. & CRIMINOLOGY 553, 578 (2013) (noting that the exonerated may not qualify to receive the support available to re-entering citizens on probation or parole because they no longer fit into those categories).

45. *See infra* Part I.

46. *See infra* Part II.

47. *See infra* Section III.A.

48. *See infra* Section III.B.

49. *See infra* Section III.C.

50. *See infra* Part IV.

I. BARRIERS TO COMPENSATION: RE-PUNISHING SURVIVORS OF STATE HARM

Part I begins with a discussion of the phenomenon of false confessions, emphasizing interrogation techniques which lead to wrongful convictions but remain lawful. Because false confessions often lead to guilty pleas, Part I then discusses the coercive environment in which innocents are compelled to plead guilty. Finally, this Part highlights the impacts of false admissions on a claimant's ability to attain exoneree compensation.

A. A Carceral State: False Confessions and Wrongful Convictions

Today in the United States, the "land of the free," one in 30 people is under some form of penal control and 2.2 million people are behind bars — a 943% increase over the last 50 years.[51] Moreover, while the United States houses only 5% of the world's population, it holds 25% of its prisoners.[52] Annually, the prison system costs taxpayers $80 billion, and in states like California and Michigan, more money is earmarked for imprisoning young people than educating them.[53] The proliferation of mass incarceration in the last half century has disrupted millions of American families and communities while data show that prosecution and particularly incarceration are ineffective tools to deter bad behavior in the larger population.[54]

Professor Elizabeth Hinton suggests the carceral state expanded in response to demographic shifts at mid-century, "the gains of the African American civil rights movement, and the persistent threat of

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51. *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 5–6 (2017).

52. *See id*. at 5.

53. *See id.*

54. *See, e.g.*, David Roodman, *Reasonable Doubt: A New Look at Whether Prison Growth Cuts Crime,* OPEN PHILANTHROPY (Sept. 24, 2017), https://www.openphilanthropy.org/research/reasonable-doubt-a-new-look-at-whether-prison-growth-cuts-crime [https://perma.cc/F2PD-4HN4] ("The crux of the matter is that tougher sentences hardly deter crime, and that while imprisoning people temporarily stops them from committing crime outside prison walls, it also tends to increase their criminality *after* release."). In fact, incarceration may make people more prone to future crime because it separates them from support structures, subjects them to violence and trauma inside, and fails to address underlying issues, like mental health disabilities, addiction, and poverty. *See generally* DON STEMEN, THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [https://perma.cc/FRU5-ZAH8]; AMANDA Y. AGAN, JENNIFER L. DOLEAC & ANNA HARVEY, NAT'L BUREAU OF ECON. RSCH., MISDEMEANOR PROSECUTION (2022), https://www.nber.org/papers/w28600 [https://perma.cc/84S8-57WT].

urban rebellion."[55] As Black citizens relocated to the urban north, primarily White, middle-class residents fled from cities to suburbs.[56] Amidst a series of "riots" in the 1960s and warped public perception around crime fueled by law and order rhetoric and faulty statistics, a growing consensus of law enforcement officials, policymakers, federal administrators, and journalists concluded that crime was specific to Black urban youth.[57] Urban police officers were conceived of as "frontline soldiers" of the War on Crime and given military grade weapons and surveillance technologies to match.[58] Simultaneously, law enforcement received new powers to direct and administer urban social programs in spaces previously occupied by War on Poverty programs.[59]

Young Black men emerged as the foremost target of federal policymakers. Their deliberate arrest and incarceration was seen as a preventative strategy.[60] Soon, federal policymakers would require employment initiatives, public schools, and grassroots organizations to partner with juvenile courts, police departments, and correctional facilities to receive funding.[61] Hinton argues this was potentially more consequential than the modernization and militarization of the police because it resulted in a "vast and ever-expanding network of institutions responsible for maintaining social control post-Jim Crow," which "metastasized into the modern carceral state."[62]

The virtual replacement of trials with pleas has paralleled the proliferation of mass incarceration. Spending by localities on law enforcement agencies increased from $44 billion in 1977 to $123 billion in 2019. From the War on Poverty to the War on Drugs, incarceration has increased drastically amidst the "criminalization of urban space."[63]

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55. *See* HINTON, *supra* note 51, at 11.

56. *See id.* at 11–12.

57. *See id.* at 12.

58. *See id.* at 13.

59. *See id.*

60. *See id.* at 22.

61. *See id.* at 14.

62. *See id.* "By expanding the federal government's power in the pursuit of twinned social welfare and social control goals, Johnson paradoxically paved the way for the anticrime policies of the Nixon and Ford administrations to be turned against his own antipoverty programs." *Id.*

63. Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. OF AM. HIST. 703, 706 (2010) (coining and defining the "criminalization of urban space" as "a process by which increasing numbers of urban dwellers — overwhelmingly men and women of color — became subject to a growing number of laws that not only regulated bodies and communities in thoroughly new ways but also subjected violators to unprecedented time behind bars"); HINTON, *supra* note 51, at 25–26 (arguing such

America's tendency to criminalize behavior that citizens freely engage in combined with the aggressive policing of violations has had perverse consequences. The country's courts have become overwhelmed and as a result; approximately 95% of convictions in U.S. state, federal, and juvenile courts are resolved by plea.[64] Therefore, any procedural improvements for defendants at trial are largely symbolic.[65] In fact, Professor William J. Stuntz has argued that without such a high percentage of guilty pleas, the whole system would collapse under the sheer number of people we prosecute.[66] Thus, prosecutors face strong pressure to bargain for guilty pleas, while checks on their power are few and far between. Additionally, for those who cannot make bail there is a strong incentive to accept guilty pleas to avoid pre-trial detention at institutions like Rikers Island, thus effectively subverting the presumption of innocence.[67]

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strategies have "produced a new and historically distinct phenomenon in the post-civil rights era: the criminalization of urban social programs").

64. *See* Allison Redlich et al., *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCH. 339, 339 (2017); *see also* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (acknowledging that ours is a "system of pleas, not a system of trials").

65. *See* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. UNIV. L. REV. 63, 92–96 (2011) (proposing solutions to plea bargain issues, such as subjecting DA offices to audits and granting State Attorney General oversight over prosecutors); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992) ("Constitutional and doctrinal objections aside, plea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent."); Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ [https://perma.cc/6MVQ-ZCGJ] ("[P]lea bargains make it easy for prosecutors to convict defendants who may not be guilty, who don't present a danger to society, or whose 'crime' may primarily be a matter of suffering from poverty, mental illness, or addiction. And plea bargains are intrinsically tied up with race, of course, especially in our era of mass incarceration.").

66. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1–11, 58 (2011).

67. Amy Dezember & Allison D. Redlich, *Plea Bargaining in the Shadow of the Trial, in* HANDBOOK ON SENTENCING POLICIES AND PRACTICES IN THE 21ST CENTURY 276 (Cassia Spohn et al. eds., 2019). In 2022 alone, 19 people have died while in New York's abominable jails on Rikers Island awaiting trial. *See* Erica Bryant, *19 People Have Died from New York City Jails in 2022*, VERA INST. OF JUST. (Dec. 12, 2022), https://www.vera.org/news/nyc-jail-deaths-2022#:~:text=Image%20courtesy%20of%20the%20%23HALTsolitary,Kross%20Center%20on%20Rikers%20Island [https://perma.cc/E3LH-6KBY]. Leading scholars have argued that mass incarceration feeds on legal reforms that are not aimed at decarceration, and that criminal procedural rights have actually contributed to a larger, more punitive system because a "criminal caste" is more tolerable if the government instills rights before stripping them of humanity and core dimensions of citizenship. *See, e.g.*, Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights,* 122 YALE L.J. 2176, 2184–88 (2013).

The over policing of Black and Brown neighborhoods and the subsequent rise of the carceral state has led to an increase in wrongful convictions, where the person convicted is factually innocent of the charges against them.[68] When an innocent person is imprisoned in the place of the actual perpetrator, the perpetrator remains free. Since 1989, the National Registry of Exonerations has maintained a database of innocent persons who were convicted of crimes and later exonerated.[69] In 2019, the eight states with the most exonerations, in order, were Illinois, Pennsylvania, Texas, New York, Michigan, California, Florida, and Maryland.[70] Since wrongful convictions provide concrete cases in which the system convicted innocent persons, exonerations illuminate procedural deficiencies which may impede the truth-seeking function of the criminal justice system.[71] Leading causes of wrongful convictions include false confessions, mistaken eyewitness identification, bad forensic evidence, jailhouse informant testimony, and police misconduct.[72] Faulty eyewitness testimony has led to the highest number of wrongful convictions and disproportionately affects vulnerable racial minorities,[73] particularly because cross-racial eyewitness identifications — those in which the witness and defendant

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68. *See* Clare Gilbert, *Beneath the Statistics: The Structural and Systemic Causes of Our Wrongful Conviction Problem,* GA. INNOCENCE PROJECT (Feb. 1, 2021), https://www.georgiainnocenceproject.org/2022/02/01/beneath-the-statistics-the-structural-and-systemic-causes-of-our-wrongful-conviction-problem/ [https://perma.cc/PQ77-8SWY] (explaining that mass incarceration "dramatically increases the number of people in prison and thus, statistically, the number of wrongfully convicted people in prison").

69. *See Our Mission*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/mission.aspx [https://perma.cc/44UD-33YX] (last visited Jan. 28, 2023).

70. *See* Daniele Selby, *These 8 States Had the Most Exonerations in 2019,* INNOCENCE PROJECT (Apr. 2, 2020), https://innocenceproject.org/these-8-states-had-the-most-exonerations-in-2019/ [https://perma.cc/6Y3X-P4AY].

71. *See* Catherine L. Bonventre et al., *Studying Innocence: Advancing Methods and Data*, *in* EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 301, 305 (Allison D. Redlich et al. eds., 2014).

72. *See The Causes of Wrongful Conviction*, INNOCENCE PROJECT, https://innocenceproject.org/causes-wrongful-conviction./ [https://perma.cc/AXA3-4A58] (last visited Dec. 27, 2022) ("Only a fraction of criminal cases involve biological evidence that can be subjected to DNA testing, and even when such evidence exists, it is often lost or destroyed after a conviction. Since they don't have access to a definitive test like DNA, many wrongfully convicted people have a slim chance of ever proving their innocence.").

73. *See id.* Black people are seven times more likely than white people to be wrongfully convicted of murder and three times more likely to be convicted of sexual assault than innocent white people. *Id.*

being identified are of different racial backgrounds — are significantly less reliable.[74]

False admissions encompass two related but distinct issues: confessions and guilty pleas. Although interrogations and plea bargaining occur at different points in the conviction process, the logic underlying both is strikingly similar. While the objective of interrogation is to elicit a confession from the suspect to use as evidence against them going forward, plea bargaining offers defendants a lesser charge/sentence in exchange for an admission of guilt, thereby avoiding a contested trial.[75] At their core, each is guilt-presumptive and designed to encourage a person to admit guilt to a crime.[76] Hence, both guilt-presumptive interrogations and plea negotiations might serve to increase the "so-called efficiency" of the criminal legal process but are "at odds with the search for truth that is vital to the functioning of the American adversarial system."[77] In fact, researchers have begun to articulate a Gestalt-like framework that demonstrates "a multistage set of processes wherein innocent individuals — once mistakenly targeted for suspicion — suffer cumulative disadvantages."[78] This phenomenon starts with the interview and interrogation process, wherein police are unable to distinguish the innocent from guilty and innocents are more willing to speak with police; continues in the ensuing investigation of witnesses, alibis, and forensic evidence, which may be biased or overlook exculpatory evidence; through guilty-plea negotiations with prosecutors and/or a trial before a judge or jury due to the power of

74. *See Cross-Racial Identification and Jury Instruction*, INNOCENCE PROJECT (May 20, 2008), https://innocenceproject.org/cross-racial-identification-and-jury-instruction/ [https://perma.cc/45HK-2YNW] ("In 66 of the 216 wrongful convictions overturned by DNA testing, cross-racial eyewitness identification was used as evidence to convict an innocent defendant . . . . Three decades of social science research has shown that cross-racial bias exists in identification.").

75. *See* Amy Dezember & Allison D. Redlich, *Plea Bargaining in the Shadow of the Trial*, *in* HANDBOOK ON SENTENCING POLICIES AND PRACTICES IN THE 21ST CENTURY 275–76 (Cassia Spohn et al. eds., 2019); *see also* Norman L. Reimer & Martín Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 215 (2019) (arguing the trial penalty falls most harshly on racial and ethnic minorities and the poor because of implicit bias, disparate policing practices, and the extreme underfunding of the public defense function).

76. *See* ROBERT J. NORRIS ET. AL., WHEN JUSTICE FAILS: CAUSES AND CONSEQUENCES OF WRONGFUL CONVICTIONS 58 (2018).

77. *See id.*

78. Scherr et al., *supra* note 28, at 354.

confession evidence; and persists through post-conviction appeal efforts at exoneration and reintegration into society.[79]

1. Miranda *Fails to Prevent False Confessions*

Confessions must be voluntary under the federal Constitution to have binding legal force. In relevant part, the Fifth Amendment provides: "No person shall . . . be compelled in any criminal case to be a witness against himself."[80] The Due Process Clause has been interpreted to bar the use of involuntary confessions, defined as statements obtained through official coercion instead of the product of an individual's "rational intellect and free will."[81] However, the involuntary test provided little concrete guidance to state and federal officials in the course of their jobs, or to the judiciary in enforcement. In practice, this standard required courts to reconstruct the events leading up to the confession in the face of diametrically opposing accounts from police and suspects.[82] In the mid-1960s, as police shifted from the use of physically coercive tactics to psychological ploys and strategies,[83] the Supreme Court announced that the Fifth Amendment right against self-incrimination was binding on the states via the Fourteenth Amendment.[84]

Two years later, the Court again relied on the Fifth Amendment in *Miranda v. Arizona*, which radically reconceptualized individuals' relationship with law enforcement and acknowledged the adversarial nature of police interrogation.[85] The Court recognized that in such an environment, there were pressures which may "compel [a suspect] to speak where he would not otherwise do so freely."[86] Accordingly, *Miranda* instituted protocols to safeguard the constitutional privilege

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79. *Id.* at 354–55. Importantly, it has been shown that Black and Latino defendants in the U.S. are treated more harshly than White defendants at each progressive stage of the criminal-justice system; minorities are more likely to be detained, receive a custodial plea offer, get incarcerated, and in some cases, receive harsher sentences. *See* Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014).

80. U.S. CONST. amend. V.

81. Reck v. Pate, 367 U.S. 433, 440 (1961).

82. *See* NORRIS ET AL., *supra* note 76, at 66.

83. *See* Kiera Janzen, *Coerced Fate: How Negotiation Models Lead to False Confessions*, 109 J. CRIM. L. & CRIMINOLOGY 71, 71 (2019).

84. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

85. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

86. *See id.* at 467.

against self-incrimination, thus setting a "constitutional minimum" or floor, so that no state may provide lesser protection than the baseline.[87]

On its surface, *Miranda* offered the straightforward framework necessary to proactively govern the admissibility of confessions in criminal cases. The decision requires police to advise suspects of their rights and the consequences of foregoing them.[88] Further, statements made to the police are only admissible in court if the suspect chooses to relinquish or waive those constitutional protections. Before *Miranda*, admissibility turned on the "voluntariness" of the confession under the "totality of coercive circumstances" of the interrogation, which depended on the specific interrogation tactics employed by the police and the characteristics of the suspect questioned.[89] However, *Miranda* rights only apply to suspects in custodial interrogation, which left uncertainty about the rule's practical scope.[90] Further, *Miranda* safeguards are not always required, and they could be waived even when they were.[91] Thus, *Miranda* falls short of adequately protecting against the risk of false confessions.

Moreover, scholars have suggested that the evolution to a totality of the circumstances test illustrates that after the judicial establishment of *Miranda* safeguards, the Court was willing to allow police leeway in employing interrogation tactics which had once been considered coercive.[92] Namely, although the police may not threaten individuals

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87. *See* Vega v. Tekoh, 142 S. Ct. 2095, 2109 (2022) (Kagan, J., dissenting). Despite the Court's previous interpretation of *Miranda* as a "constitutional rule," the Court held that citizens are unable to collect damages under §1983 for violations of their *Miranda* rights. *See id*. at 2108–09.

88. *See Miranda*, 384 U.S. at 467–73 (establishing that prior to custodial interrogation, the suspect must be told that he has a right to remain silent, that anything he says can and will be used against him as evidence, that he has a right to the presence of an attorney during questioning, and that, if he cannot afford an attorney, one will be appointed to represent him).

89. *See Reck*, 367 U.S. at 440.

90. *See* NORRIS ET AL., *supra* note 76, at 67.

91. *See* Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices,* 99 MICH. L. REV. 1211, 1213 (2001).

92. *See* Miriam S. Gohara, *A Lie for A Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 796–99 (2006) ("Prior to its 1966 decision in Miranda v. Arizona, the Supreme Court, applying a due process voluntariness test, recognized, in several cases, that the police use of deceptive interrogation tactics played a significant role in producing involuntary confessions."); *see also* White, *supra* note 91, at 1212–13 ("To some extent, of course, *Miranda*'s limitations may be attributed to post-Miranda decisions. As previous commentators have pointed out, decisions by the Burger and Rehnquist Courts have substantially weakened Miranda's protections.").

they are questioning,[93] nor make express promises such as immunity from prosecution or judicial leniency,[94] police may employ trickery and deceit in their attempts to elicit incriminating statements from suspects.[95] In separate instances, courts have found confessions to be admissible when police falsely told a suspect that his accomplice had already implicated him in a murder,[96] that suspect's fingerprints and handprints were found in a murder victim's home,[97] that the suspect failed a polygraph exam,[98] that gunpowder residue was detected on the suspect's hands,[99] that tire tracks left at the scene of the crime matched suspect's car,[100] and that eyewitnesses identified the suspect.[101] While these tactics might help persuade a guilty party to confess wrongdoing, it has been empirically established that such tactics also increase the risk of inducing an innocent individual to falsely admit guilt. Scholars contend that when an interrogator deceives a suspect as to the evidence against him, misleading him to believe that police have overwhelming evidence of guilt, the suspect is more likely to give a false confession.[102] Only a few state and federal courts have circumscribed such deceptive

93. *See* Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (concluding police threats to remove a suspect's children and the government aid she received to support them overcame suspect's will and coerced her confession since she was not familiar enough with the legal system to know if police had the authority to make good on such threats).

94. *See* United States v. Powe, 591 F.2d 833, 836 (D.C. Cir. 1978) ([I]t is firmly established that self-incriminating statements induced by promises or offers of leniency shall be regarded as involuntary and shall not be admitted into evidence for any purpose."). *Cf.* United States v. Harris, 914 F.2d 927, 933 (7th Cir. 1991) (holding a suspect's statements voluntary where he was led to believe that no charges would be brought against him if he cooperated).

95. *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969).

96. *See id.* (establishing that police deception on its own was inadequate to render confession involuntary).

97. *See* Commonwealth v. Selby, 651 N.E.2d 843, 845–47 (Mass. 1995).

98. *See* Sotelo v. Ind. State Prison, 850 F.2d 1244, 1251–52 (7th Cir. 1988) (finding suspect's confession voluntary where police lied to suspect that the results of polygraph indicated that he was lying about his innocence).

99. *See* Lincoln v. State, 882 A.2d 944, 953 (Md. App. 2005).

100. *See* People v. Thompson, 785 P.2d 857, 874 (Cal. 1990); *see also* State v. Kelekolio, 849 P.2d 58, 61 (Haw. 1993) (drawing a distinction between deliberate falsehoods that are "intrinsic" to the facts of the offense and falsehoods which are "extrinsic" to those facts and holding that the intrinsic deception will be considered among the totality of the circumstances whereas the extrinsic deception, which is more likely to reasonably lead to a false confession, will be considered *per se* coercive).

101. *See* State v. Griffin, 262 A.3d 44, 84 (Conn. 2021) (holding defendant's confession voluntary even though "interrogators told the defendant, falsely, that two eyewitnesses had identified him from a photographic array," among other deceptive techniques).

102. *See* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.–C.L. L. REV. 105, 146 (1997).

tactics.[103] If the tactics employed are not so extreme as to render the confession involuntary and the *Miranda* threshold requirements have been satisfied, courts generally hold that a suspect's incriminating statements are admissible in evidence.

2. Coerced Confessions Follow Coercive Interrogations

A police-induced false confession begins with a misclassification error, in which police err in identifying an innocent suspect as guilty and thus pursue an intensive interrogation.[104] While police officers may believe, based in part on their training, that they can accurately detect when a person is lying, a significant body of research has established that people, including law enforcement officials, are poor at determining when others are being honest.[105] Interrogation training often claims to identify telltale signs that a person is lying, even though no such reliable cues exist.[106]

In a 1985 book, experts concerned with the phenomenon of false confessions enumerated three distinct types of false confessions: voluntary, coerced-compliant, and coerced-internalized.[107] A "voluntary" false confession occurs when an innocent person confesses to a crime he did not commit without prompting, coercion, or other pressures from law enforcement.[108] Conversely, when coerced-compliant or coerced-internalized confessions are elicited through police interrogation, they are not voluntary acts.[109]

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103. *See, e.g.*, Gohara, *supra* note 92, at 803–08.

104. In fact, innocent people are more likely to submit to police questioning and waive their *Miranda* rights to remain silent and have legal representation than their guilty counterparts because the phenomenology of innocence leads them to believe they have nothing to hide from law enforcement. *See* Scherr et al., *supra* note 28, at 358.

105. *See, e.g.*, Charles F. Bond Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 216–17 (2006); Aldert Vrij, *Why Professionals Fail to Catch Liars and How They Can Improve*, 9 LEGAL & CRIMINOLOGICAL PSYCH. 159 (2004).

106. Jillian R. Yarborough, *The Science of Deception Detection: A Literature and Policy Review on Police Ability to Detect Lies*, 3 J. CRIM. JUSTICE & L. (2020).

107. *See* Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 76 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).

108. *See id*. at 76–77. There are many reasons why a person may voluntarily give a false confession, including to gain notoriety for a high-profile crime or a desire to protect the actual perpetrator. *See id.*

109. *See id.* at 77. Because it requires inference as to the suspect's subjective state of mind and balances the dual concerns for trustworthiness and due process, voluntariness remains a difficult concept to operationalize. *See id.* at 70–71.

Coerced-compliant confessions occur when an innocent suspect confesses to escape an intolerable situation created by the police, such as physical violence and/or psychological manipulation.[110] In these scenarios, a suspect acquiesces to the demand for a confession to escape a stressful situation, avoid punishment, or gain a promised or implied reward, giving into interrogative pressure because the suspect believes the short-term benefits of confessing outweigh the long-term cost of being subjected to the extreme interrogation methods[111]

Both situational factors (which vary with the interrogation) and dispositional factors (attributes of the suspects being questioned) affect the likelihood of police eliciting a false confession.[112] Although most modern coerced-compliant false confessions are obtained by psychological manipulation in the context of the "inherently compelling pressures"[113] of police interrogation, police violence or threats of violence continue to be responsible for many coerced-compliant false confessions. In fact, police threats of violence or actual violence during the relevant interrogation accounts for two thirds of all known false confessions caused by police misconduct nationwide.[114] In Chicago alone, violence or threats of violence were present in 68% of known false confessions.[115]

Coerced-compliant confessions resulting from solely psychological coercion often employed the "Reid Technique."[116] Developed in the 1940s by Fred Inbau and popularized by Chicago Police Detective John Reid,[117] the Reid Technique remains the most influential and widely used interrogation method in the nation.[118] The methodology first

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110. *See id.* at 77.

111. *See id.*

112. *See* NORRIS ET AL., *supra* note 76, at 61–62.

113. Miranda v. Arizona, 384 U.S. 436, 467 (1966); *see also* Corley v. United States, 556 U.S. 303, 321 (2009) ("Custodial police interrogation, by its very nature, isolates and pressures the individual, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.").

114. *See* Samuel Gross et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, *in* NAT'L REGISTRY OF EXONERATIONS 1, 31 (2020).

115. *See* Stephens, *supra* note 29, at 604.

116. *See* Gohara, *supra* note 92, at 827–31 (reviewing data showing coercive interrogation techniques induce false confessions in actual convictions and laboratory experiments). The Court itself noted that the tactics advocated by Reid Technique may elicit false confessions. *Miranda*, 384 U.S. at 449 nn.9, 25.

117. Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 SEATTLE J. SOC. JUST. 301, 301 (2017).

118. *See* Gohara, *supra* note 92, at 808.

instructs investigators to isolate the suspect in a small private room to increase the suspect's anxiety and eagerness to escape.[119] Lengthy periods of physical isolation controlled entirely by the police without social support can be highly stressful.[120] While most interrogations last less than two hours,[121] a study on known false confessions found that the average interrogation length for interrogations yielding a false confession was 16 hours.[122] Once isolated and confined, officers typically begin the nine-step process laid out in the Reid Technique, employing tactics which have repeatedly been present in known cases of false confessions and resultant wrongful convictions.[123] For example, the officer may regularly invade the suspect's personal space or present the suspect with false evidence.[124]

Police often use maximization and minimization tactics per the Reid technique.[125] "Maximization" involves making accusations, overriding objections, and citing evidence — either real or manufactured — to coerce the suspect to confess.[126] Maximization is meant to convey the interrogator's unquestionable belief that the suspect is guilty and that any denials of guilt will fail.[127] For example, the detectives who elicited Washington's confession "engaged in 'maximization' techniques when they repeatedly rejected Mr. Washington's honest assertions of innocence and continued to accuse him of murder, falsely telling him that they had people linking him to the crime and that he could not leave until he confessed."[128] Frequently used in combination with maximization, "minimization" serves to provide the suspect with moral justification for having committed the offense.[129] With this tactic, the interrogator offers sympathy and understanding, providing alternative explanations for the crime, like suggesting to the suspect that the murder was spontaneous, provoked, or accidental.[130] Research has

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119. Frances E. Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 L. & PSYCH. REV. 159, 165 (2013).

120. *See, e.g.*, *id.* at 186.

121. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 948 (2004).

122. *See id.*

123. *See generally* Timothy E. Moore & Lindsay Fitzsimmons, *Justice Imperiled: False Confessions and the Reid Technique*, 57 CRIM. L.Q. 509 (2011).

124. *See* Chapman, *supra* note 119.

125. *See id.*

126. *See* Kozinski, *supra* note 117, at 343.

127. *See* Chapman, *supra* note 119.

128. Brief for The Innocence Project, *supra* note 2.

129. *See id.*

130. *See id.*

demonstrated that this tactic implicitly communicates that leniency in punishment is forthcoming upon confession, which often leads innocent people who feel trapped to confess.[131]

Unlike coerced-compliant confessions, coerced-internalized confessions are those in which an innocent individual is so influenced by the suggestions of the interrogator that they accept the interrogator's version of events and believe they have committed the crime.[132] Through highly suggestive questioning and proffered explanations for the suspect's alleged lack of memory, the suspect may internalize the interrogation and "accept the interrogators' accounts of events."[133] These types of false confessions are more likely to occur when the suspect is particularly vulnerable — someone young,[134] living with cognitive deficits,[135] or a survivor of trauma[136] — and the interrogators lie or present the suspect with false evidence.[137]

Children and young adults disproportionately falsely confess to crimes they did not commit because they are easier to manipulate and may not understand the implications of waiving *Miranda* rights.[138] Notably, the prefrontal cortex, which is involved in impulse control, foresight, weighing risk-reward, etc., is not fully developed in adolescent brains.[139] Thus, children and young adults are more likely to confess in exchange for what they perceive as an immediate benefit

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131. *See id.*

132. *See id.* at 170.

133. *See id.*

134. *See generally* Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions*, 20 UNIV. PA. J. CONST. L. 1211 (2018).

135. *See, e.g.*, Samson J. Schatz, *Interrogated with Intellectual Disabilities: The Risks of False Confession*, 70 STAN. L. REV. 643, 643 (2018).

136. *See* Hayley M.D. Cleary et al*., How Trauma May Magnify Risk of Involuntary and False Confessions among Adolescents*, 2 WRONGFUL CONV. L. REV. 173, 173 (2021) (arguing that "trauma may operate as an additional risk factor for involuntary and false confessions among adolescents by generating both additive and interactive effects beyond youths' general, developmentally driven vulnerabilities in interrogation"); *see also* LENORE E. A. WALKER, *False Confessions of Battered Women*, *in* THE BATTERED WOMAN SYNDROME 451, 451–65 (4th ed. 2016).

137. *See* Saul M. Kassin, *Internalized False Confessions*, *in* 1 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR EVENTS 169, 175 (Michael P. Toglia et al. eds., 2007).

138. *See* Sahdev, *supra* note 134, at 1220.

139. *See id.* at 1217–18; *see also* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (recognizing that there are three general, fundamental differences between juveniles and adults: juveniles lack maturity and have "an underdeveloped sense of responsibility"; "juveniles are more vulnerable or susceptible to negative influences and outside pressures"; and juveniles are not as formed as adults).

— like ending an interrogation.[140] Similarly, differences in the prefrontal cortex mean children perceive intervals of time as lasting longer than adults do.[141] So, an interrogation lasting a few hours might feel never ending, and is therefore more likely to prompt a false confession.[142] Additionally, young people are more susceptible to leading questions and outside pressure and influence than adults, especially from authority figures.[143] Regardless, the Reid Method does not distinguish between juveniles and adults.[144] Interrogators may use leading questions, positive, and negative feedback to elicit false confessions from children trying to tell the police what they want to hear so the interrogation will conclude. Because minorities in urban communities are more likely to interact with law enforcement and be arrested as minors,[145] false confessions are more likely to impact children of color.[146]

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140. *See* Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 893 (2010) ("The cognitive, social, and emotional traits that make youth so different from adults may, in turn, make them especially vulnerable to the systemic factors already known to contribute to wrongful convictions."); Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 441 (2006) (arguing that "adolescents are much less able to engage in sound hypothetical, contingent reasoning than are adults and that the physiological immaturity of adolescent brains is a major factor in adolescents' inability to perform these tasks").

141. *See* Seth P. Waxman, *Innocent Juvenile Confessions*, 110 J. CRIM. L. & CRIMINOLOGY 1, 4 (2020).

142. *See id.*

143. *See id.*

144. *See* Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 414–15 (2013) (stating that the Reid Method provides identical instructions for interrogating juveniles and adults).

145. *See, e.g.*, Jeffrey Fagan, *No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing*, 68 UCLA L. REV. 1584 (2022) (finding consistent evidence of disparities in police responses to Black, Hispanic, and Black Hispanic civilians and attributing high error rates to stereotypes and archetypes wielded to articulate suspicion and justify street seizures); Nancy E. Dowd, *Children's Equality: The Centrality of Race, Gender, and Class*, 47 FORDHAM URB. L.J. 231, 239 (2020) (establishing that if boys of color do encounter police in school or on the streets, "they are more likely to be placed in the juvenile justice system rather than placed in a diversion program"); Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PROC. NAT'L ACAD. SCIS. U.S.A. 8261, 8261 (2019) (determining that "adolescent boys who are stopped by police report more frequent engagement in delinquent behavior 6, 12, and 18 months later, independent of prior delinquency, a finding that is consistent with labeling and life course theories").

146. *See* Erika N. Fountain et al., *Children Should Never Be Interrogated Without a Lawyer Present. Here's Why*, BALT. SUN (Mar. 1, 2021, 11:14 A.M.),

This issue is further compounded by the fact that minors do not have a constitutional right to attorney or presence of an interested adult before waiving their *Miranda* rights.[147] Despite the established social science, in *Fare v. Michael C.*, the Court found a 16-year-old's request to speak to his probation officer did not operate to invoke his Fifth Amendment rights under *Miranda* and the appropriate test for evaluating a minor's waiver of rights was the totality-of-circumstances test used for adults.[148] A few states require the presence of a parent or interested adult before a minor may waive their *Miranda* rights, which functionally replaces the totality-of-circumstances test so a minor's statements would be *per se* inadmissible unless the interested adult was present when *Miranda* rights were waived.[149] While this safeguard is better than nothing, parents can often reproduce the authoritative nature of law enforcement and may encourage their child to waive their *Miranda* protections.[150] For these reasons, scholars and advocates argue that a constitutional right to consult with an attorney before a minor's *Miranda* rights may be waived would better protect minors from the risk of false confession and wrongful conviction.[151] Evidently, *Miranda* safeguards alone have fallen short of preventing coercive confessions, especially from the young and vulnerable, which has severe implications for the proper functioning of the criminal justice system.

B. Cascade Effects of False Confessions: False Pleas

False confessions bias the perceptions of the investigators, forensic experts, eyewitnesses, prosecutors, and others tasked with investigating the truth and providing independent evidence to a judge and jury. Upon obtaining a confession, police typically conclude the

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https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0302-juvenile-interrogations-20210301-llha2qrmkjhybdpbt4lh7cz56a-story.html [https://perma.cc/7E6W-X4T3].

147. *See* Sahdev, *supra* note 134, at 1233 ("Seeing that the *Fare* totality test and state requirements do not adequately protect juveniles' *Miranda* rights, the Supreme Court, if given the opportunity, should adopt a new, *per se* rule requiring a juvenile to consult with an attorney before waiving his or her rights.").

148. 442 U.S. 707, 708 (1979).

149. New Jersey (under 14 years old), Massachusetts (including 17 year olds) and Kansas (under 14 years old) have judicially adopted the interested adult rule, while the Vermont Supreme Court interpreted the Vermont Constitution to require the presence of an interested adult for a minor to waive *Miranda* rights. State v. Presha, 748 A.2d 1108 (N.J. 2000); Com. v. Smith, 28 N.E.3d 385 (Mass. 2015); In re B.M.B., 955 P.2d 1302 (Kan. 1998); In re E.T.C., 449 A.2d 937, 940 (Vt. 1982).

150. *See* Jennifer Alberts, *Interrogation of Juveniles: Are Parents the Best Defenders of Juveniles' Right to Remain Silent?*, 19 NEW CRIM. L. REV. 109, 122–23 (2016).

151. *See id.* at 123.

investigation and deem the case closed. If the confession is internally inconsistent or contradicted by external evidence, police may overlook exculpatory information that can alter their interpretation of existing evidence.[152] Notably, studies have shown that information about confessions can even alter officials' interpretation of fingerprint evidence[153] and the testimony of eyewitnesses.[154] In 65% of false confession cases that contained multiple errors, the police obtained the confession before conducting the remainder of their investigation.[155] This suggests that any available evidence subject to confirmation bias may wrongfully corroborate a false confession. Illustratively, in one study of false confession cases, researchers found that 78% of false confession cases had one or more additional evidence errors, such as being accompanied by improper forensic science (63%), mistaken eyewitness identifications (29%), and informants or snitches (19%).[156] Importantly, instead of serving as gatekeepers to maintain the fidelity of evidence against innocent confessors, prosecutors and other legal officials habitually rely on the confessions.[157]

False confessions have a cascade effect. Since confessions often constitute some of the strongest evidence at trial,[158] innocent people who falsely confess are incentivized to plead guilty to avoid their prejudicial effect at trial. The presence of a confession significantly increases the likelihood of conviction, even if the factfinders are informed that the confession was coerced by police misconduct[159] or if

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152. *See* Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCH. 431, 433 (2012).

153. *See* Itiel E. Dror & David Charlton, *Why Experts Make Errors*, 56 J. FORENSIC IDENTIFICATION 600, 612 (2006).

154. *See* Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 PSYCH. SCI. 122, 122 (2009).

155. *See* Kassin, *supra* note 152, at 437.

156. Scherr et al., *supra* note 28, at 364. Consistent with the cumulative disadvantage framework, in two thirds of these investigations the confession was obtained first. *See id.*

157. *See id.* ("Of 2,363 cases posted by the end of January 2019, 1,258 (53%) involved some form of official misconduct, defined as an abuse of power by prosecutors, police, or other government officials. Within the subsample of 288 false-confession cases, however, a staggering 231 (80%) were afflicted by official misconduct versus 1,027 of 2,075 nonconfession cases.").

158. *See* Kassin & Wrightsman, *supra* note 107, at 67.

159. *See* Kassin, *supra* note 152, at 436. Researchers have established that "people do not adequately discount confessions—even when they are retracted and judged to be the result of coercion." *Id.* at 433.

the defendant is a juvenile.[160] False confessions can even cause factfinders to overlook exculpatory evidence that should otherwise exonerate the defendant.[161]

Similarly, attorneys and judges are not immune from the biasing impact of false confession evidence. Astonishingly, social scientists researching the impact of confession evidence on trial and appellate judges have demonstrated that even when there was weak direct evidence of guilt against the suspect, judges were still significantly more likely to convict upon the presentation of a confession elicited by police coercion.[162] Defense and prosecuting attorneys are also affected by confession evidence. Defense attorneys may feel compelled to encourage their clients to plead guilty if a false confession elicited by police coercion will be admitted at trial — regardless of factual innocence — because of the impact the confession will have on the factfinder at trial. Meanwhile, prosecutors may double down on efforts to procure other incriminating evidence, regardless of its credibility, in response to a defendant's claim of a false confession elicited by police coercion.[163]

False confessions bias the whole adversarial process, from the police investigation to the trial, and pose a high risk of wrongful conviction if the innocent "confessor" decides to go to trial. A report by the National Registry of Exonerations determined that exonerees who

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160. *See generally* Allison D. Redlich, Simona Ghetti & Jodi A. Quas, *Perceptions of Children During a Police Interrogation: Guilt, Confessions, and Interview Fairness*, 14 PSYCH. CRIME & L. 201 (2008). Likewise, people do not adequately discount confession evidence even when told that the defendant suffers from mental illness or was under duress. *See* Lisa A. Henkel, *Jurors' Reactions to Recanted Confessions: Do the Defendant's Personal and Dispositional Characteristics Play a Role?*, 14 PSYCH. CRIME & L. 565 (2008). Researchers have also demonstrated that confession evidence is not adequately discounted even if the confession was reported secondhand by an informant motivated to lie. *See* Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 L. & HUM. BEHAV. 137 (2008).

161. *See* Kassin, *supra* note 152, at 433–34.

162. *See* D. Brian Wallace & Saul M. Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors?*, 36 L. & HUM. BEHAV. 151, 156 (2012) (finding a significant increase in convictions where other evidence was weak, which otherwise yielded a 17% conviction rate; guilty verdicts rose to 95% with in low-pressure confession conditions and still rose to 69% in high-pressure confession conditions).

163. *See* Kassin, *supra* note 152, at 439. The discretion allowing prosecutors to drive mass incarceration also allows them to conceal police wrongdoing. *See* Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 912 (2020).

falsely confessed were three times more likely to plead guilty.[164] While approximately 20% of exonerations were convicted by guilty pleas,[165] this figure is likely an underestimation given how difficult they are to detect.[166]

The regular occurrence of innocent people pleading guilty is directly related to the compelling incentive for a defendant to avoid the "trial penalty," a significantly more severe sentence upon losing a trial compared to what was offered in plea negotiations.[167] There are relatively few safeguards in place in the plea-bargaining process and defendants have strong incentives to plead, regardless of true guilt.[168] Many people await trial in jail, and a plea may allow them to avoid lengthy pretrial detention. Additionally, pleas generally reduce the charges, sentence, or other consequences of conviction at trial.[169] When the plea terms substantially reduce the possible sentence at trial, "it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and

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164. NAT'L REGISTRY OF EXONERATIONS, GUILTY PLEASE AND FALSE CONFESSIONS (2015), https://www.law.umich.edu/special/exoneration/Documents/NRE. Guilty.Plea.Article4.pdf [https://perma.cc/FJ46-Q6TP].

165. *See* Scherr et al., *supra* note 28, at 366 ("[S]elf-report rates of false guilty pleas, especially among at-risk populations, are up to 2 times higher (e.g., 27% of juveniles and 37% of offenders with mental health problems, respectively . . . ."); *see also* Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 L. & HUM. BEHAV. 79 (2010); Tina M. Zottoli et al., *Plea Discounts, Time Pressures and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH. PUB. POL'Y & L. 250, 256 (2016).

166. *See, e.g.*, Samuel R. Gross, *Investigative Procedure and Post-Conviction Review: Resetting Incentives to Separate the Innocent From the Guilty*, *in* WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 229, 232 (Marvin Zalman & Julia Carrano eds., 2014); Allison D. Redlich, *The Validity of Pleading Guilty*, *in* ADVANCES IN PSYCH. & L. 1, 19 (Monica K. Miller & Brian H. Bornstein eds., 2016).

167. *See* Norman L. Reimer & Martín Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 215 (2019). In one Virginia county, the average discount rate from the maximum possible sentence of the indicted charges to the actual sentence received as part of a plea deal was an astonishing 96%. *See* Amy Dezember & Allison D. Redlich, *Plea Bargaining in the Shadow of the Trial*, *in* HANDBOOK ON SENTENCING POLICIES AND PRACTICES IN THE 21ST CENTURY 275, 291 (Cassia Spohn et al. eds., 2019).

168. *See* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line*, 17 NEV. L.J. 401, 401 (2017).

169. *See id.* Hard bargaining can be a factor contributing to an overly coercive atmosphere where defendants are faced with serious consequences, such as the death penalty or life in prison, if they reject a plea offer or are faced with take-it-or-leave-it offers under time pressure. *See id.* at 413–14.

regardless of whether one is factually innocent."[170] Moreover, in capital matters, the trial penalty incentivizes innocent people to plead guilty to avoid the death penalty.[171]

Coercive pleas are particularly troubling because defendants who plead guilty forego a host of constitutional protections — the right against self-incrimination, the right to confront and cross-examine accusing witnesses, the right to trial by jury, the right to require the prosecution establish all elements of the charged crime beyond a reasonable doubt, and the right to appeal — that they would otherwise have if they proceeded to trial.[172] Additionally, "defendants who plead guilty may knowingly or unknowingly relinquish the right to full discovery of the evidence the state has against them."[173] Furthermore, since ending cases via plea virtually forecloses a defendant's ability to challenge police misconduct, one underreported consequence of plea bargaining is its tendency to conceal official misbehavior.[174] Even without an express written waiver in the plea deal, the Supreme Court has concluded that a guilty plea necessarily forecloses appeal of most constitutional challenges related to state misconduct which occurred prior to the plea.[175]

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170. People v. Shaw, 2019 Ill. App. (1st) 152994, ¶ 42 ; *see also* People v. Reed, 2020 Ill. 124940, ¶ 33 (recognizing that defendants may choose to plead guilty to avoid a more severe sentence at trial).

171. *See* NORRIS ET AL., *supra* note 76, at 63–64. For instance, Henry Alford pled guilty to a murder he maintained he did not commit to avoid a possible death sentence if he were convicted at trial. *See id.* Despite their coercive nature, almost all jurisdictions accept *Alford* pleas. *See id.*

172. *See* Scherr et al., *supra* note 28, at 365 (noting that for innocents, waiver of the right to appeal "virtually eliminates the possibility of future exoneration because they are considered to have voluntarily relinquished their opportunity to use postconviction appeals to rectify a wrongful conviction").

173. *Id.* In the context of trials, prosecution's failure to disclose all exculpatory and material evidence to the defense is considered prosecutorial misconduct under *Brady*. *See, e.g.*, U.S. Dep't of Just., Just. Manual § 9-5.001 (2000). However, in the context of pleas, the Supreme Court has held that "exculpatory impeachment evidence" (i.e., evidence that speaks to the credibility of witnesses) need not be disclosed prior to entering into plea bargains. *See* Scherr et al., *supra* note 28, at 365 (quoting United States v. Ruiz, 536 U.S. 622, 625 (2002)). A federal court recently extended this holding to traditional exculpatory material under *Brady*. *See* Alvarez v. City of Brownsville, 860 F.3d 799, 802 (5th Cir. 2017).

174. Thus, it is advantageous to prosecutors' codependent relationship with police to sweep police misconduct under the rug via a favorable plea offer than to expose that misconduct to judicial and public scrutiny. *See generally* Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730 (2017) (describing formal and informal systems of police influence and impacts of police involvement in plea bargaining).

175. *See* Class v. United States, 138 S. Ct. 798, 805 (2018) (reaffirming holding in Haring v. Prosise, 462 U.S. 306 (1983), that guilty plea extinguishes Fourth

Perhaps most importantly for this Note, false admissions have serious consequences for the wrongly convicted and their ability to recover money damages upon exoneration. For example, Iowa,[176] New Jersey,[177] Oklahoma,[178] and Ohio[179] preclude those who pled guilty from receiving compensation, even if that plea was coerced, while courts may interpret contributory provisions to bar those who falsely confessed.[180] Like Wayne Washington, those who have falsely confessed or plead guilty may be entirely precluded from obtaining compensation, even though they are survivors of state harm and the supervening cause of their wrongful incarceration was official misconduct.[181] As such, false confessions represent one of the most significant barriers to obtaining compensation for one's wrongful conviction.

C. Current Methods of Exoneree Compensation

Ultimately, exonerees are survivors of state harm to whom the community bears a responsibility. Compensation statutes not only provide a systematic form of redress, but also demonstrate some level of acknowledgment by the government of the wrong done. However, it is important to recognize that, beyond fairness, social benefits flow from compensating the wrongfully convicted.[182] Because scholars have demonstrated that exonerees who are compensated more than $500,000 commit offenses at a significantly lower rate than those who are either not compensated or compensated less than $500,000, the positive consequences of better compensating the wrongfully convicted may sufficiently justify improved compensation statutes.[183]

Amendment claims at habeas stage); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("We hold, therefore, that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus.").

176. *See* IOWA CODE ANN. § 663A.1 (West 2022).

177. *See* N.J. STAT. ANN. § 52:4C-3 (West 2013).

178. *See* 51 OKLA. STAT. ANN. tit. 51, § 154 (West, 2021).

179. *See* OHIO REV. CODE ANN. §§ 2305.02, 2743.48 (West 2022).

180. *See* People v. Washington, 186 N.E.3d 1055, 1056–57 (Ill. App. Div. 2020).

181. *See supra* Introduction.

182. *See* Mandery et al., *supra* note 44, at 563.

183. *See id*. at 553–64. Cash helps counter the resulting "post-conviction poverty" that afflicts disproportionate numbers of Black and Latino Americans who are incarcerated, including exonerees. *See* Patricia L. Brown, *For People Just Leaving Prison, a Novel Kind of Support: Cash*, N.Y. TIMES (July 7, 2022), https://www.nytimes.com/2022/07/07/business/cash-assistance-incarcerated.html [https://perma.cc/G9T3-LEKJ].

Generally, exonerees may obtain compensation in one of three ways: civil litigation, private legislation, and statutory compensation.[184] Civil litigation involves exonerees bringing tort law and civil rights claims in court.[185] Such litigation is often protracted and costly, and rarely successful because of the various defenses shielding government officials from prosecution.[186] A second method is private legislation, which requires exonerees to petition their state legislature to pass a bill to compensate them individually.[187] This method requires political savvy, as an exoneree must convince a legislator to introduce the bill and obtain the necessary votes and support of the governor to pass it. Because of the unpredictable nature of lawsuits and legislative decisions, both civil litigation and private legislation may lead to highly uneven reparations for exonerees. Thus, some academics and advocates support statutory compensation,[188] which involves the legislature passing laws to establish a system for providing compensation to qualifying exonerees. Despite their limitations, statutes are the best approach to compensate the unjustly convicted.[189]

Because an acquittal is not equivalent to a declaration of innocence from the state,[190] exonerees must undergo a two-step process to get damages for loss of liberty. First, the conviction must be vacated, which means only that the prosecution failed to meet its burden of proof.[191] Second, the claimant must commence a discrete proceeding for

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184. *See* Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 372 (2017).

185. *See id.*

186. *See id.* at 425–26; *see also* Roy Strom, *Out of Prison and Broke, Wrongful Convicted Sell Their Cases*, BLOOMBERG L. (Feb. 2, 2022, 10:56 AM), https://news.bloomberglaw.com/business-and-practice/out-of-prison-and-broke-wrongly-convicted-turn-lawsuits-to-cash [https://perma.cc/YYH8-XJ3U].

187. *See id.* Importantly, some state constitutions bar private bills. *See, e.g.*, Rector v. State, 495 P.2d 826, 827 (Okla. 1972); Adams v. Harris Cty., 530 S.W.2d 606, 608 (Tex. Civ. App. 1975).

188. *See, e.g.*, Gutman, *supra* note 184; Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated – How to Fund Wrongful-Conviction Compensation Statutes,* 44 IND. L. REV. 503, 510–17 (2011).

189. Gutman, *supra* note 184.

190. To receive compensation, the conviction must be overturned and an exoneree must prove that he or she is innocent of the charged crime. *See D.C. Circuit Update: Clarifying the Procedure for a Certificate of Innocence*, BURNHAM & GOROKHOV, PLLC, https://www.burnhamgorokhov.com/d-c-circuit-certificate-of-innocence/#:~:text=One%20must%20prove%20that%20one,sought%20in%20the%20federal%20system [https://perma.cc/MLB4-QQ4S] (last visited Jan. 25, 2023).

191. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1321–23 (1997) (arguing that the criminal justice system creates a significant risk that innocent people will be systematically convicted and that the guilty will be acquitted).

damages.[192] In construing the federal statute, courts have held that a compensation proceeding is not a criminal trial, and that the burden of proof can be placed on the petitioner.[193] Accordingly, most state compensation statutes place the formidable burden on the claimant to demonstrate by clear and convincing evidence that claimant is factually innocent and/or require the claimant to show that claimant engaged in no misconduct which brought about claimant's prosecution or conviction.[194] Importantly, states can choose whether to oppose an exoneree's claim for compensation.[195] While "opposed claims are litigated judicially or administratively," unopposed claims simply proceed "to a determination of compensation."[196] However, no state offers the exoneree a choice to either receive a set of services and statutorily prescribed money award or to pursue litigation for uncapped damages at the compensation determination stage.[197]

The enactment of state statutory compensation schemes has accelerated since the proliferation of DNA exonerations beginning in 1989.[198] The first applications of forensic DNA identification provided conclusive evidence of wrongful convictions in the American criminal legal system.[199] Since then, nearly 3,000 people have been exonerated, about half of them are Black, 35% white, and 12% Hispanic.[200] As the number of overturned convictions grew through the 1990s and into the 2000s, an increasing number of states confronted the need to compensate exonerees for wrongful incarceration.[201]

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192. Gutman, *supra* note 184, at 423.

193. *See* United States v. Brunner, 200 F.2d 276, 280 (6th Cir. 1952) ("Innocence of the petitioner must be affirmatively established and neither a dismissal nor a judgment of not guilty on technical grounds is enough.").

194. *See* Gutman, *supra* note 184, at 371; *see also* Nelson v. Colorado, 137 S.Ct. 1249, 1251 (2017); *id.* at 1260 (Alito, J., concurring) (describing the burden of proof imposed by Colorado's Exoneration Act as, "harsh, inflexible, and prevent[ing] most defendants whose convictions are reversed from demonstrating entitlement to a refund"). Colorado's Act also governed the process for obtaining compensation for wrongful conviction. *See* COLO. REV. STAT. §§ 13-65-101–03.

195. *See* Gutman, *supra* note 184, at 412.

196. *See id.*

197. *See id.*

198. *See id.* at 385.

199. *See* Innocence Project, *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18, 2018), https://innocenceproject.org/dna-revolutionary-role-freedom/ [https://perma.cc/JNQ9-CQEY].

200. *See* Roy Strom, *Out of Prison and Broke, Wrongful Convicted Sell Their Cases*, BLOOMBERG L. (Feb. 2, 2022, 10:56 AM), https://news.bloomberglaw.com/business-and-practice/out-of-prison-and-broke-wrongly-convicted-turn-lawsuits-to-cash [https://perma.cc/YYH8-XJ3U].

201. *See* Gutman, *supra* note 184, at 385.

In 2004, the federal government enacted 28 U.S.C. Section 2513, which awards $50,000 for each year a federal exoneree was wrongly incarcerated but prohibits civil recovery if someone falsely confessed.[202] The federal statute, which was endorsed by then President George W. Bush only applies to federal crimes.[203] As of 2021, only two of the 118 people listed as being exonerated in the National Registry of Exonerations have been awarded compensation.[204] This generally ineffective federal statute has been used by many states as a template after which to draft respective state statutes.[205] Today, 36 states and Washington D.C. have laws that offer compensation for exonerees, although there remains wide variation in both the remedy and a claimant's ability to access that remedy state-to-state.[206] While some states have made strides in providing improved statutory compensation for exonerees, police budgets remain untouched while taxpayer dollars fund such compensation.

II. THE PROBLEM OF "ADEQUATE" EXONEREE COMPENSATION

A. Statutory Compensation Schemes Inadequately Restore Exonerees

For the most part, current statutory schemes inadequately compensate exonerees and leave them vulnerable to leverage from the

202. Gates v. D.C., F. Supp. 3d 1, 14 (D.D.C. 2014) ("Congress intended [the federal statute] to preclude a certificate [of actual innocence] '[w]here there has been an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion, or an analogous attempt to suppress such testimony of opinion.'" (citing United States v. Graham, 608 F.3d 164, 173–74 (2010))); s*ee also* Christina Carrega, *More than 2,800 have been wrongly convicted in the US. Lawmakers and advocates want to make sure they're paid their dues*, CNN (July 7, 2021), https://www.cnn.com/2021/07/07/politics/wrongful-conviction-compensation-bill/index.html [https://perma.cc/UJE9-3WP6].

203. *See* Jeffrey S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 CLEVELAND ST. L. REV. 219, 235–38 (2021).

204. *Id.* at 219.

205. *See* Carrega, *supra* note 202.

206. *See id*. Press coverage and popular support are largely responsible for the enactment of relatively recent statutes. *See* Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 712 (2004). In states without legislative relief, exonerees must either retain counsel and incur the costly litigation expenses to bring a civil suit against the government or have a private bill passed. *See id.*

state[207] and other actors.[208] Exonerees are survivors of state harm. While incarcerated, the wrongly convicted must fight a legal battle to prove their innocence while enduring the hardships of prison. After release, exonerees face the same struggles of re-entry as other institutionalized people, but ironically, are not often entitled to re-entry services available to actual offenders who have been released on parole or probation — such as halfway houses and rehabilitation programs.[209]

1. Awarding "the Deserving" and Contributory Provisions

Exoneree statutes are drafted with the objective of compensating the deserving.[210] However, it is insufficient to consider state compensation statutes solely from the perspective of claimants when the interest and budget of the state are so clearly implicated.[211] Tort-based full compensation for wrongful incarceration can be enormous.[212] Cities may rightly fear instances of unplanned, large,

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207. Counsel in post-conviction relief proceedings and compensation cases may come across the despicable practice of offers by the State to concede post-conviction relief in exchange for an agreement to waive rights to civil damages. *See* Josh Saul, *The Fairbanks Four's Brutal Fight for Freedom*, NEWSWEEK (Jan. 12, 2016, 5:39 AM), https://www.newsweek.com/2016/01/22/alaska-fairbanks-four-and-how-murder-convictions-end-414201.html [https://perma.cc/QT98-JTE8].

208. Exonerees may also face the difficult decision of signing over a large portion of their awards to litigation funders in exchange for the funding necessary to bring their claims against the state. *See* Strom, *supra* note 200.

209. *See* Mandery et al., *supra* note 44, at 577–78. Technically not ex-offenders or parolees, often "exonerees cannot take advantage of prerelease counselling, job training, substance abuse treatment, and housing assistance," even though people leaving prison tend to be among those with the dire housing needs. *Id.* Exonerees are typically released with no more than a bus ticket and gate money generally ranging from $10 to $150. *See id.*

210. *See* Gutman, *supra* note 184, at 371.

211. The doctrine of sovereign immunity is largely about protecting the dignity of state treasuries. *See* Katherine M. Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1701–02 (2022) ("Like qualified immunity, sovereign immunity and related protections for government entities fall hardest on populations that suffer a disproportional share of constitutional harm, including communities of color in the context of police violence.").

212. *See* Gutman, *supra* note 184, at 398. In assessing "appropriate monetary damages in wrongful conviction cases brought under federal civil rights theories and in states with uncapped statutory compensation provisions . . . . Recent jury verdicts in civil rights cases routinely approach or exceed $1 million per year of incarceration." *Id.* (citing Spencer v. Peters, 857 F.3d 789, 793 (9th Cir. 2017)) (reinstating $9 million verdict for over 19 years of incarceration); Jason Meisner, *Jury Awards $13.4 Million to Man Wrongly Imprisoned for Decades for Murder*, CHI. TRIB. (Apr. 12, 2017, 8:02 PM), https://www.chicagotribune.com/news/breaking/ct-wrongful-conviction-multimillion-dollar-verdict-met-20170412-story.html [https://perma.cc/48L6-A76D]

episodic payouts.[213] Generally, two justifications for restrictive conditions on the availability of exoneree compensation are advanced: the cost and a fear of compensating the undeserving.[214]

The opposition to a legislative solution warns that exoneree statutes will be costly, and increasingly so as more and more exonerees petition for awards.[215] However, these concerns are overstated. Innocent individuals must have the means to establish their innocence, which can be exceedingly difficult. In fact, law professor Jeffrey Gutman estimates that only about one third of exonerees were able to meet said burden and obtain compensation for wrongful conviction.[216] Because claimants face such a high burden of proof, it is approximated that the amount paid nationally to a surprisingly small percentage of exonerees is roughly equivalent to a low-wage job ($27,000/year of incarceration), "effectively awarding little or nothing for loss of liberty."[217]

Moreover, even in states with the greatest number of exonerations, the cost of exoneree compensation constitutes a fraction of a percentage of state corrections budgets.[218] For example, Ohio, which has a somewhat generous statute and high percentage of claims awarded, has spent approximately $21.3 million on statutory compensation through 2016, or an average of $760,986 per year.[219] Comparatively, the budget for the Ohio Department of Rehabilitation and Corrections for the 2016 fiscal year was $1,666,729,709.[220] Thus,

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(awarding $13,390,000 for almost 19 years of wrongful incarceration); Jason Meisner & Elyssa Cherney, *Jury Awards $22 Million in Damages to Wrongly Convicted Ex-El Rukn*, CHI. TRIB. (Dec. 15, 2016, 8:27 PM), https://www.chicagotribune.com/news/breaking/ct-el-rukn-trial-verdict-met-20161215-story.html [https://perma.cc/GE29-RPLB] (reporting jury award of $22 million for 18 years of incarceration); Albert Samaha, *Jury Awards Upstate Man $41 Million for 16-Year Wrongful Imprisonment*, VILLAGE VOICE (Oct. 24, 2014, 11:48 AM), https://www.villagevoice.com/2014/10/24/jury-awards-upstate-man-41-million-for-16-year-wrongful-imprisonment/ [https://perma.cc/AA5M-KNC8] (covering a 2015 verdict of $41.65 million for 16.5 years of wrongful incarceration, plus $1.65 million lost wages).

213. *See* Gutman, *supra* note 184, at 373. Illustratively, "following several substantial judgments in favor of wrongly convicted individuals, Connecticut replaced its progressive uncapped statute with one that imposes damage caps." *Id.*

214. *See* Bernhard, *supra* note 206, at 713–17.

215. *See id*. at 713 (citing Interview with Ann Lambert, Legislative Counsel, ACLU of Mass. (Jan. 2004) and Interview with Sharon Bivens, Alabama Legislative Fiscal Office (Aug. & Sept. 2000)).

216. *See* Gutman, *supra* note 184, at 395.

217. *Id.* at 393, 395.

218. *See id.* at 387.

219. *See id.* at 394.

220. *Id.*

the annual cost of compensating Ohio's wrongly convicted is 0.0457% of its corrections budget.[221] Similarly, Illinois had the highest number of exonerations of any state in 2019, and has paid $130 million total in payouts for all time, while the Illinois Department of Corrections had a budget of approximately $1.5 billion in 2020 and the Chicago police budget for just 2020 was almost $1.8 billion.[222] Despite the state's history of wrongful convictions, these numbers demonstrate that exoneree awards pale in comparison to the budgets for law enforcement agencies and corrections facilities necessary to maintain the carceral state.

The adversarial nature of obtaining compensation and the high burden of proof placed on claimants reflect a hypervigilant concern of compensating those who are potentially undeserving. Many states require exonerees prove factual innocence by clear and convincing evidence,[223] while others have lowered this standard to the more reasonable preponderance of the evidence standard.[224] Along with a high burden of proof on the claimant, drafters frequently include carveouts intended to preclude the undeserving from collecting compensation, but in practice, deprive innocents from restoration for harm suffered. Together, these factors contribute to the disappointing results of statutory exoneree compensation.

Perhaps most significantly for this Note, lawmakers and lobbyists for prosecutors have sometimes demanded that compensation statutes exclude individuals who have "contributed to their own conviction."[225]

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221. *Id.*

222. *See These 8 States Had the Most Exonerations in 2019*, INNOCENCE PROJECT (April 2, 2020), https://innocenceproject.org/these-8-states-had-the-most-exonerations-in-2019/ [https://perma.cc/B653-8TH5]; *What Policing Costs: Chicago, IL*, VERA INST. OF JUSTICE, https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities/chicago-il [https://perma.cc/59WT-H3QV] (last visited Jan. 26, 2023); Heather Cherone, *Cost of Burge Era Torture Grows as Chicago City Council Agrees to Pay 2 Wrongfully Convicted Men $14M*, WTTW, https://news.wttw.com/2022/01/26/cost-burge-era-torture-grows-chicago-city-council-agrees-pay-2-wrongfully-convicted-men [https://perma.cc/9YY7-LJAL] (last visited Apr. 10, 2023); *Illinois Criminal Justice System Agency Budget Requests for Fiscal Year 2022*, CIVIC FEDERATION (Apr. 23, 2021), https://www.civicfed.org/iifs/blog/illinois-criminal-justice-system-agency-budget-requests-fiscal-year-2022 [https://perma.cc/4T2K-LHYW].

223. *See*, *e.g.*, COLO. REV. STAT. §§ 13-65-101–03; IOWA CODE ANN. § 663A.1 (West 1997); MASS. GEN. LAWS ch. 258D § 1-9 (2018); 14 ME. REV. STAT. ANN. tit. 14, §§ 8241–44 (1993); N.J. STAT. ANN. § 52:4C-1 to 4C-7 (West 2013); N.Y. CT. CLAIMS ACT § 8-b; 51 OKLA. STAT. § 154 (2003).

224. *See, e.g.*, 735 ILL. COMP. STAT. § 5/2-702 (2021); CON. GEN. STAT. § 54-102uu (2016).

225. Bernhard, *supra* note 206, at 717.

For example, New York, Illinois, Mississippi, and D.C. statutes — or the common law interpreting such statutes — require that the claimant did not contribute to or bring about their conviction.[226] Two types of "contributory" behavior frequently identified in the course of statutory interpretation are confessions and guilty pleas.[227]

New York and Illinois courts have interpreted these contributory provisions to bar certificates of innocence — and by extension, compensation — to those who falsely confessed or pled guilty.[228]

Moreover, exoneree statutes in Iowa,[229] Oklahoma,[230] Ohio,[231] New Jersey,[232] and D.C.[233] expressly bar those who pled guilty from obtaining compensation from the state. Interestingly, Massachusetts precludes claimants who pled guilty from collecting damages, "unless such plea was withdrawn, vacated or nullified by operation of law."[234] While New Jersey's exoneree statute precludes those who pled guilty from obtaining compensation, those who falsely confessed may collect from the state if the admission is later found to be false.[235] More in line with the scientific understanding of voluntary and involuntary false confessions, California bars compensation "if the board finds by a preponderance of the evidence that a claimant pled guilty . . . to protect

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226. *See* N.Y. CT. CL. ACT § 8-b (McKinney 2007); People v. Washington, 186 N.E.3d 1055, 1060 (Ill. App. Div. 2020); MISS. CODE ANN. § 11-44-7 (2013); Edmonds v. State, 243 So.3d 286 (Miss. 2017); D.C. CODE ANN. § 2-422 (2017).

227. *See* Bernhard, *supra* note 206, at 717.

228. *See Washington*, 186 N.E.3d at 1060. Doug Warney, an intellectually disabled man, was convicted based on a detailed confession to police during a 12 hour interrogation.

Warney v. State, 16 N.Y.3d 428, 431–33 (2011). After 9 years in prison, Warney was exonerated by DNA and released. *See id*. at 433. However, when he sought reparations via the state's compensation statute, a court ruled that he was ineligible to do so since his wrongful conviction resulted from his "own conduct" — namely, the police induced false confession. *See id*. at 434. The New York State Court of Appeals reversed the decision, holding that the Court of Claims had improperly dismissed Warney's claim based on credibility and factual findings without allowing him to prove his detailed allegations that he did not cause or bring about his conviction via his own conduct. *See id*. at 437.

229. *See* IOWA CODE ANN. § 663A.1 (West 2022).

230. *See* 51 OKLA. STAT. tit. 51, § 154 (2021).

231. *See* OHIO REV. CODE ANN. § 2743.48 (West 2019).

232. *See* N.J. STAT. ANN. § 52:4C-3 (West 2013).

233. D.C. CODE § 2-425 (1981) ("This subchapter shall not apply to any person whose conviction resulted from his entering a plea of guilty unless that plea was pursuant to North Carolina v. Alford, 400 U.S. 25 (1970).").

234. MASS. GEN. LAWS ANN. Ch. 258D, § 1(C)(iii) (West 2018).

235. *See* N.J. STAT. ANN. § 52:4C-3 (West 2013).

another from prosecution for the underlying conviction for which the claimant is seeking compensation."[236]

Contributory provisions of this nature fail to consider and offset the powerful forces which encourage innocents to plead guilty in the criminal legal system. Lawmakers might understand these provisions to incentivize defendants to go to trial instead of pleading guilty when they are innocent. Furthermore, such drafting likely reflects the erroneous assumption that those who are innocent would not confess or plead guilty. However, especially when a person is exonerated based on newly obtained exculpatory evidence that was unavailable at the time defendant would have gone to trial, it is unjust to bar compensation simply because the exoneree took a plea.

2. Current Compensation Schemes Structurally Reinforce Racism

Ineligibility provisions like these disproportionately impact those exonerees who are vulnerable racial minorities.[237] Considering the higher frequency with which Black and Brown people interact with the criminal justice system compared to other races, there is an increased probability that a Black or Brown exoneree will have a false confession elicited from them by police.[238] This is particularly true for minors in over-policed communities who are at an increased risk of interrogative manipulation eliciting a false confession.[239] Further, based on the number of Black, LatinX, and Native Americans wrongfully imprisoned after making a false confession and the "high volume" of innocent people of color "taking pleas every day in the criminal system," it is expected that "many present and future Black exonerees will be barred from statutory recovery."[240] For many exonerees without the means to hire a lawyer to recover damages, attorneys may be deterred from taking cases on retainer when they involve false admissions because of such carveouts. These provisions convey that a person who made a false admission is somehow responsible for their conviction — despite immense institutional pressure to make such admission — and thus unworthy of their constitutional rights and individual liberty.

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236. CAL. PENAL CODE § 4903 (West 2022).

237. *See generally* Erin Keith, *Wronged Without Recourse: Examining Shortcomings of Compensation Statutes for Black Exonerees*, 8 GEO. J. L. & MOD. CRITICAL RACE PERSPS. 335 (2016).

238. *See id*. at 343.

239. *See id.*

240. *See id*.

Moreover, most statutes prescribe shockingly modest awards or "impose caps on monetary compensation that are far below those awarded by most juries and judges in recent federal civil rights cases" and cases brought under statutes without caps.[241] For example, Wisconsin awards a maximum of $25,000, regardless of the length of incarceration.[242] Arbitrary caps on compensation fail to account for the nature, severity, and variation of injuries suffered while incarcerated and overlook the pressing needs for social, vocational, medical, and educational services following what is often years of wrongful incarceration. Additionally, this somewhat mechanical remedy does not consider the varying characteristics and needs of the exonerated.

Only about half of the states with compensation statutes offer support beyond monetary compensation.[243] This is particularly worrisome because exonerees often lack access to the same types of state re-entry services offered to people on parole, such as transitional housing, assistance with finding employment, etc.[244]

Furthermore, by over policing marginalized communities and requiring additional resources to expunge convictions, the state contributes to the perpetuation of a permanent underclass.[245] "In the past few decades, the number of adults in the United States who have criminal records has exploded," and altogether, federal and state records include one third of the U.S. adult population.[246] As more Americans become "criminals," American culture "increasingly relies on a person's record to sort individuals" to allocate housing, public

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241. *See* Gutman, *supra* note 184, at 371. In fact, recent jury awards in civil rights cases routinely approach or exceed $1 million per year of incarceration. *Id.* at 398.

242. *See* WIS. STAT. ANN. § 775.05 (West 2022). However, the law provides that if the claims board determines the amount they are able to award under the statute is inadequate, the claims board may submit a report specifying the amount considered fair to both houses of the legislature. *See id.*

243. For example, Texas enacted the Tim Cole Act, which entitled exonerees to $80,000 for every year of wrongful incarceration and offers various services for exonerees, after Tim Cole died in 1999 while serving a 25-year sentence for a rape he did not commit. *See Timothy Cole*, INNOCENCE PROJECT, https://innocenceproject.org/cases/timothy-cole/ [https://perma.cc/Y3CL-NH23] (last visited Feb. 3, 2023). Under the Act, exonerees are assigned a case manager who helps the exoneree select an individualized plan of medical, dental, and psychological services for re-entry.

244. *See* Mandery et al., *supra* note 44.

245. *See* Amy F. Kimpel, *Criminal Law: Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 464–65 (2022) (explaining expungement is not automatic "even when it intuitively seems as though it should be, such as in the context of formal exoneration").

246. *See* id. at 443.

assistance, education, and employment.[247] For example, at the hiring stage, 93% of employers screen applicants for criminal records.[248] Additionally, many licensing boards ban those with criminal convictions from obtaining licenses, or at least consider criminal records.[249] This impact falls disproportionately on Black and Brown people as well as low-income communities.

The most prominent methods of cleaning criminal records are fee-based diversion and expungement. While diversion is a front-end reform and expungement is a back-end reform, both seek to alleviate the effects of a system of mass criminalization. "Diversion allows a person who is charged with a crime to avoid a conviction," usually by satisfying certain conditions to earn the dismissal of a charge.[250] "Expungement, or record sealing, allows a person with a conviction or arrest record to erase or conceal that fact."[251] Once a person is charged with a crime, government officials set the price for a clean slate and the high costs keep some defendants from benefitting.[252] While expungement can reduce the harsh discrimination exonerees face in the employment and housing contexts, expungement schemes remain complicated for a layperson to navigate and the number of people eligible for relief far outpaces free legal services.[253] Further, expungement has costs, including a fee for obtaining a copy of one's criminal record and costs to file an expungement petition.[254] Some expungement statutes require a defendant to have paid all fees, fines, and restitution associated with defendant's original case, presenting a "catch-22" for those "most in need of record relief" to re-enter the workforce.[255]

Imposing a premium on diversion and expungement and allowing defendants to pay to maintain or restore a clean record perpetuates

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247. *See id.*at 444.

248. *See id.*

249. *See id.* at 444–45.

250. *See id.* at 447. "Embraced as a means for reform," diversion is now well established in forty-eight states and D.C., allowing "defendants to avoid formal convictions by submitting to a period of supervision." *See id.* at 450.

251. *See id.* at 447. Most states allow expungement, although usually only on first-time or low-level convictions. *See id.* at 464.

252. *See id*. at 458. For example, "when the New Orleans District Attorney lowered costs for diversion from $1,200 to $200, participation tripled." *Id*.

253. *See id*. at 465–66.

254. *See id.* at 466–67. The cost to file an expungement petition in Michigan is $50, while Louisiana charges $550 per petition. *See id.*

255. *See id.* at 467.

and calcifies race and class divides.[256] Given the historically entrenched socioeconomic disparities between White communities and communities of color, Black and Brown defendants are more likely to be relegated as "criminals." Law professor Amy Kimpel has described "how racial inequalities in the criminal legal system can fuel racial inequalities in American society at large and how the reforms of diversion and expungement can, rather than mitigating those inequalities, further enable and conceal race-based discrimination."[257] By over-policing lower-income, racially diverse communities and failing to provide legal services for expungements to exonerees, states perpetuate both the racial wealth gap and a permanent underclass.[258]

B. Exoneree Compensation Does Not Deter Future Official Misconduct

While advocates and scholars agree that legislative amendments to exoneree statutes can meaningfully increase the availability and amount of compensation for the wrongly convicted, they have generally neglected to consider how amended compensation statutes might also serve to deter official misconduct and wrongful convictions going forward. Institutional structures and government funding coalesce to prioritize police efficiency over accuracy in eliciting confessions, and more broadly, convictions. Police, prosecutors, and forensic scientists have an incentive to convict someone, but little to no incentive to convict the actual perpetrator.[259]

1. Institutional Actors

When police have strong incentives to clear cases,[260] they have weaker incentives to discriminate between the guilty and the innocent. "The number of confessions an officer obtains is linked to his or her

256. *See id.* at 439.

257. *Id.* at 448–49.

258. *See id*. at 439.

259. *See generally* Scherr et al., *supra* note 28; *see also* Roger Koppl & Meghan Sacks, *The Criminal Justice System Creates Incentives for False Convictions*, 32 CRIM. JUST. ETHICS 126 (2013).

260. Incentives are highest when the pressure to solve the case is intense, such as when crimes make headlines or when police officers are killed. Burge's team exemplified this by employing torture "most egregiously" in the face of institutional pressure to secure confessions at all costs. *See* Stuart Schrader, *Book Review*, 126 AM. HIST. REV. 1296, 1296–97 (2021) (reviewing ANDREW S. BAER, BEYOND THE USUAL BEATING: THE JON BURGE POLICE TORTURE SCANDAL AND SOCIAL MOVEMENTS FOR POLICE ACCOUNTABILITY IN CHICAGO (2020)).

interviewing competence."[261] Pressure to obtain confessions from suspects may lead officers to employ "coercive interrogation tactics which have the potential to lead to false confessions."[262] Although some scholars have questioned the legitimacy of "crime clearance rates as an indicator for effective policing," this remains the most common standard measure of police efficiency.[263] With the development and implementation of CompStat, a computerization and quantification program used by police departments and originally set up by New York Police Department (NYPD) in the 1990s, police managers faced tremendous pressures to meet weekly quantitative targets supposedly indicative of their precinct performance.[264] Furthermore, "police unions have accumulated so much power that they have expanded their role to include the usurpation of managerial oversight so that the police chiefs are left with little, if any, meaningful managerial authority" to institutionalize reforms.[265] Instead, collective bargaining agreements control hiring, firing, disciplining, and promotion of officers, so police chiefs often lack the necessary tools to keep "bad apples" off the street.[266]

Moreover, prosecutors often receive evidence from police demonstrating the suspect's guilt but may not be given all information about other suspects or evidence which does not support the police's construction of events.[267] As such, police play an oversized role in dictating what crimes are brought before the local prosecutor to pursue charges.[268] But police officers' influence over prosecution extends far

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261. *See* Chapman, *supra* note 119, at 164.

262. *See id.*

263. *See* Koppl & Sacks, *supra* note 259, at 138.

264. *See id.* at 139.

265. *See* Deborah Ramirez & Tamar Pinto, *Policing the Police: A Roadmap to Police Accountability Using Professional Liability Insurance*, 73 RUTGERS U.L. REV. 307, 310–13 (2021) (proposing a four-part solution to the current lack of police accountability "by restricting [police unions'] collective bargaining, narrowing qualified immunity, and using professional liability insurance as an instrument for identifying officers engaged in risky policing behaviors . . . [and] pricing them out of policing").

266. *See id*.

267. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1338 (2012).

268. *See id.* A large portion of such cases are nonviolent crimes and misdemeanors, arrests often made following prolonged police surveillance or as the consequence of some unrelated stop. *See, e.g.*, David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, U. CHI. LEGAL F. 237, 241, 254–56 (1994) (criticizing Supreme Court jurisprudence permitting such surveillance); Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 543–44 (2016) (describing the proactive strategies employed to police high-crime neighborhoods).

beyond selecting who will be policed. Police can exert substantial influence over the prosecutor's understanding of the merits of a case through the police reports they write[269] and the opinions they voice during pretrial proceedings such as plea bargaining.[270] Prosecutors rely on the police to make their case not only through evidence provided, but oftentimes through testimony at trial.[271] In fact, officers frequently testify as witnesses both to the confession and to the criminal behavior being charged, reiterating the facts that formed the basis of their initial report; this testimony may be flawed,[272] rehearsed,[273] or even fabricated.[274]

The structural codependency between police and prosecutors partly explains why prosecutors routinely fail to charge or otherwise hold police accountable for their misconduct.[275] For example, amidst the Burge scandal, line Chicago prosecutors continued taking Burge's cases forward without disclosing the torture which would have unraveled them.[276] In so doing, prosecutors validated the illegally extracted police confessions and allowed police to operate with

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269. *See* Juliet Brodie, *Reflections on the Unjust Influence of Police Reports in the Criminal Justice System*, SLS BLOGS (June 10, 2015) https://law.stanford.edu/2015/06/10/clinics-2015-06-10-reflections-on-the-unjust-influence-of-police-reports-in-the-criminal-justice-system/ [https://perma.cc/B8UA-SPWN].

270. *See* Abel, *supra* note 175, at 1769–77. When police testimony is the prosecution's evidence of guilt, it might be pitted against the defendant's testimony at trial, where police testimony enjoys a great deal more credibility than civilian testimony. *See* Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1341 (2018).

271. *See* Trivedi & Van Cleve, *supra* note 163, at 905 ("For prosecutors, breaking step with police or questioning their framing of events was tantamount to being dead in the office.").

272. *See* Brodie, *supra* note 269.

273. *See* MICHELLE M. HELDMYER, FED. L. ENF'T TRAINING CTRS., THE ART OF LAW ENFORCEMENT TESTIMONY: FINE TUNING YOUR SKILLS AS A WITNESS 3 (2018) (advising officers to become more effective witnesses by improving their skills as storytellers).

274. *See, e.g.*, I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J., 835, 836–37 (2008) (quoting then-Judge Alex Kozinski as stating it is "an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers"); Trivedi & Van Cleve, *supra* note 163, at 905–06 ("Twelve of twenty-seven prosecutors said that police perjury sometimes occurred, seven did not directly respond, and eight said that it did not . . . . all twenty-four public defenders responded that perjury occurred" while "[t]wenty of twenty-seven judges said that [police] perjury occurred.").

275. *See* Trivedi & Van Cleve, *supra* note 163, at 900–01.

276. *See* VAN CLEVE, *supra* note 24, at 150 (describing how police influence over prosecutors might explain why "most prosecutors remained silent and dutifully pursued the cases that came their way").

"unchecked oversight" in exchange for the "benefits of high conviction rates and long sentences."[277] Chicago provides just one illustrative example of a culture in which prosecutors, intimidated by a "culture of compliance" and reluctant "to jeopardize the flow of criminal cases and helpful testimony that police officers provide, proactively deploy their legal discretion and extralegal power to cover for police" through strategic plea bargaining and charge manipulation, legally or illegally withholding evidence of misconduct, and lobbying against police reform in state legislatures.[278]

Despite their constitutional duty to act as "neutral and detached magistrate," prosecutors have strong incentives to clear cases because performance is directly tied to conviction rates.[279] Although prosecutors are not generally paid per conviction,[280] research has shown the importance of convictions in establishing promotions for prosecutors.[281] This general incentive to convict may also create an incentive to overcharge because harsh consequences of conviction give the prosecutor greater bargaining leverage to obtain pleas.[282]

Like police, prosecutors also fall prey to psychological biases which may impact their impartiality. Much scholarly attention has been given to such bias or "tunnel vision" and cases in which prosecutors irrationally refuse to admit error.[283] Cognitive psychology illuminates

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277. High conviction rates on violent cases were politically valuable for the appearance that the office was tough on crime and earned prosecutors promotions. *See* Trivedi & Van Cleve, *supra* note 163, at 897.

278. *Id.* at 901.

279. Koppl & Sacks, *supra* note 259, at 148.

280. While atypical, a District Attorney in Colorado, Carol Chambers, implemented a system of financial bonuses for "prosecutors who take at least five cases per year to trial and secure a 70% felony conviction rate" in 2010. *See id.* at 149.

281. *See, e.g.*, Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135 (2004); Daniel Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009).

282. *See, e.g.*, Norman L. Reimer & Martin Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 218 (2019); Alkon, *supra* note 168 (arguing that the Supreme Court "should limit prosecutorial hard bargaining tactics in plea negotiations to better protect defendants' right to counsel" because such behavior "interferes with defense lawyers' ability to do their jobs," thus encroaching on defendants' constitutional right to counsel).

283. *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401 (2011); Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771 (2010); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial*

the challenges investigators face from confirmation bias,[284] motivated reasoning,[285] groupthink,[286] commitment effects,[287] the coherence effect,[288] and selection bias.[289] While the tendency to seek confirmatory information is in tension with prosecutors' role as "ministers of justice" to seek the truth, it is in line with prosecutors who are trying to persuade and marshal evidence in a one-sided manner that is persuasive to judges and juries.[290] This tendency is compounded on the front end of the criminal system, when the majority of suspects charged are guilty and, all too frequently, thinly staffed defense counsel with

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Discretion and Post-Conviction Evidence of Innocence, 6 OHIO ST. J. CRIM. L. 467 (2009).

284. "Confirmation bias" is defined as the "inclination to retain, or a disinclination to abandon a currently favored hypothesis." DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 23 (2012). "In the context of criminal investigations, confirmation biases have been labeled *tunnel vision*." *Id*. at 24.

285. "Motivated reasoning" research "shows that people's reasoning processes are readily biased when they are motivated by goals other than accuracy," which can include any "wish, desire, or preference that concerns the outcome of a given reasoning task." *Id*. at 25.

286. Cohesive groups can fall prey to "groupthink," a phenomenon described as encompassing "illusion[s] of invulnerability," collective rationalization, "belief in the group's inherent morality," stereotypes of out-groups, pressure on dissenters, "self-censorship," "illusion[s] of unanimity," and "self-appointed mindguards." IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 174–75 (2d ed. 1982).

287. Escalating commitment has been identified as a factor in flawed criminal investigations and commitment has been found to increase along with "increases in the actor's responsibility for the original error, the room for concealing the failure, the adversity of the outcome of the original decision, the perceived threat entailed by the exposure of the error, and the publicity of the original error." *See* SIMON, *supra* note 284, at 30.

288. "Coherence effect" is a psychological phenomenon that occurs when integrating evidence in a complex decision-making process. The effect is driven by "a bidirectional process of reasoning," and when combined with other biasing factors, may sway the outcome of entire cases. For example, witnesses who fit the investigator's theory may be judged more reliable and items of evidence are not evaluated independently, but by how they fit into the theory of the case. *Id.* at 34–35.

289. Selection biases include: "selective faming strategy," the tendency to frame an inquiry in a way that supports the hypothesis; "selective exposure," the tendency to expose oneself to information that confirms the "hypothesis while shielding [oneself] from discordant information"; "selective scrutiny," the tendency to selectively "scrutinize information that is incompatible with [one's] conclusion"; and "selective stopping," the tendency to "shut down inquiries after having found a sufficient amount of evidence to support [one's] leading hypothesis." *Id.* at 37–39.

290. *See* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1037 (2009).

inadequate access to the information available to the prosecution fail to make effective arguments to counteract the guilt hypothesis.[291]

Defense lawyers have a constitutional duty of "vigorous and effective advocacy" for their clients.[292] That said, overworked and underfunded public defenders are often unable to mount a vigorous defense for every client and, thus, are an inadequate counterweight to the incentives of police, prosecutors, and forensic scientists. While states use varying systems for insuring indigent defendant's constitutional right to counsel is preserved,[293] all of them incentivize plea bargains over the best defense at trial.[294] Moreover, "[m]ost public defender organizations are funded by their adversary — the state."[295] Institutional concerns, like conserving costs, "create an incentive to move cases through the system expeditiously," resulting in a strong emphasis on guilty pleas.[296] Unfortunately, indigent defendants, who are primarily low-income people and people of color,[297] are disproportionally impacted by ineffective assistance of counsel stemming from a lack of resources. But when an innocent defendant goes on trial, the difference between an acquittal and a wrongful conviction often depends on the skill, dedication, and resources of the defense attorney. In fact, in a study on the first 255 exonerations based on DNA evidence, the Innocence Project found that at least 20% of the accused raised ineffective assistance of counsel claims on appeal and 81% of those claims were rejected by appeals courts.[298] Notably, the Court has made the standard for ineffective assistance of counsel claims an exceedingly high bar, requiring defendant proves not only cause, but also prejudice.[299]

Consequently, people are routinely convicted without the procedural due process guaranteed by the Constitution. Scholars have argued that the confluence of these institutional forces creates

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291. *See* Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO STATE J. CRIM. L. 705, 718 (2017).

292. Jones v. Barnes, 463 U.S. 745, 754 (1983).

293. *See* Gideon v Wainright, 372 U.S. 335, 344 (1963).

294. *See* Koppl & Sacks, *supra* note 259, at 150.

295. *Id*.

296. *See id.* at 150–51.

297. Kimpel, *supra* note 245, at 439.

298. *See When the Defense Fails*, INNOCENCE PROJECT, https://innocenceproject.org/when-the-defense-fails/ [https://perma.cc/9GVS-CQA6] (last visited Feb. 3, 2023).

299. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

incentives for false convictions in the American criminal justice system.[300]

2. Official Immunity from Suit

Law enforcement's incentives are further compromised because of the judicial doctrine of qualified immunity which protects police from any personal financial liability.[301] By its text, 42 U.S.C. Section 1983 provides a right of action to citizens whose constitutional rights have been violated by a state actor. However, the broad doctrine of qualified immunity raises the burden of proof for victims by requiring them to show both the violation of a constitutional right *and* that the law violated was clearly established.[302] The Court developed qualified immunity to protect "all but the plainly incompetent or those who knowingly violate the law," thus ensuring officials can carry out their duties without fear of liability.[303]

Because of the two-prong burden put on plaintiffs bringing claims under Section 1983, qualified immunity has resulted in virtual impunity for officers nationwide. As it currently stands in most jurisdictions, plaintiffs must identify clearly established precedent where a court has held identical conduct in an identical "specific context" to be unconstitutional.[304] Paradoxically, courts are no longer required to create such precedent in each Section 1983 case that they adjudicate, which has frozen the case law and limited precedent plaintiffs may rely on.[305] Police officers, shielded by qualified immunity and enabled by union protection, "pay[] absolutely nothing," and "remain[] on the force with few repercussions" for police misconduct.[306]

Unless the police officer's conduct was part of a municipal police department's pattern of practices or policy, the Supreme Court will not hold municipalities vicariously liable for a police officer's conduct.[307] However, because police unions have bargained for indemnification agreements, unions have forced municipalities — and by extension taxpayers — "to agree to pay vicariously for conduct for which the

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300. *See, e.g.*, Scherr et al., *supra* note 28; Koppl & Sacks, *supra* note 259.

301. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 605 (2021).

302. *See id.*; Ramirez & Pinto, *supra* note 265, at 312–13.

303. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017)).

304. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001); Schwartz, *supra* note 301, at 605.

305. *See* Pearson v. Callahan, 555 U.S. 223 (2009).

306. *See* Ramirez & Pinto, *supra* note 265, at 313.

307. *See* Monnell v. Dep't Soc. Servs., 436 U.S. 658, 691, 694 (1978).

municipality is not liable."[308] Law professor Joanna Schwartz reviewed a sample of 9,225 civil rights damages actions decided in favor of plaintiffs between 2006 and 2011 and found officers financially contributed "to just 0.02% of the over $730 million spent by cities, counties, and states in these cases."[309] When civil suits against officers are successful, municipalities pay the award with taxpayer money that would otherwise be designated for important activities such as education, research and healthcare.[310] "By allowing police unions to negotiate for officer indemnification," municipalities "bargain[] away tax dollars to cover police misconduct."[311] In 2018 alone, Chicago spent over $85 million on settling police misconduct lawsuits and an additional $28 million on external defense lawyers.[312] Wrongful convictions place a financial burden on cities and taxpayers, not the government officials responsible, thus ineffectively deterring misconduct going forward.[313]

More recently, Professor Schwartz further examined how municipalities and states budget for and pay judgments and settlements for claims against law enforcement officials.[314] Based on information about litigation budgeting practices in 100 jurisdictions across the U.S., she determined that "settlements and judgments are not always — or even usually — paid from jurisdictions' general funds; instead, cities, counties, and states use a wide range of budgetary arrangements to satisfy their legal liabilities."[315] Overall, half of the law enforcement agencies in her study "financially contribute in some manner" to the payout of claims brought against them.[316] Whether forcing departments to pay money out of their budgets to judgments and

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308. *See, e.g.*, Ramirez & Pinto, *supra* note 265, at 323–24.

309. Schwartz, *supra* note 37, at 890.

310. *See* Ramirez & Pinto, *supra* note 265, at 313.

311. *See id.* at 321.

312. *See* Jonah Newman, *Chicago Spent More than $113 Million on Police Misconduct Suits in 2018*, CHI. REP. (Mar. 7, 2019), https://www.chicagoreporter.com/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018/ [https://perma.cc/QSE2-Q6RF]. A former City of Chicago attorney acknowledged, "[w]hen you had to budget more for police tort liability you had less to do lead poisoning screening for the poor children of Chicago . . . Those kids were paying those tort judgments, not the police officers." Matthew Russell Lee, *Police Brutality Bonds Raise Questions About Investments by Federal Reserve and UN*, INNER CITY PRESS (June 6, 2020), https://www.innercitypress.com/policebrutality1munifinfedunicp060620.html [https://perma.cc/5DNU-28G6].

313. *See* Schwartz, *supra* note 33, at 1144; *see also* Ramirez & Pinto, *supra* note 265.

314. *See* Schwartz, *supra* note 33.

315. *See id.* at 1144.

316. *Id*. at 1148.

settlements imposes tangible financial burdens depends on the particularities of the jurisdiction's budgeting arrangements — which can lessen or eliminate the financial impact on agencies.[317] Notably, "[c]ities and combined city-county jurisdictions are most likely to pay settlements and judgments from central funds without contribution by the involved law enforcement agencies."[318]

Professor Schwartz found that almost 60% of large city law enforcement agencies contributed nothing to the satisfaction of successful claims against them.[319] Her study also found that agencies with 200 officers or fewer were more likely to depend primarily on private insurance or public entity risk pools, with premiums disbursed from central funds.[320] When it comes to large payouts, law enforcement agencies in cities like Chicago and New York are essentially "too big to fail," while smaller agencies that pay nothing toward lawsuits may cease to exist if liability insurers raise premiums or terminate coverage.[321] As evidenced by Los Angeles County, Washington D.C., and state patrols in California, Illinois, Michigan, Minnesota, Ohio, and Texas, "lawsuits can have tangible financial consequences for law enforcement agencies that pay settlements and judgments from their budgets, do not receive additional money from the government when they go over budget, and can use litigation savings for other department needs."[322] Professor Schwartz' findings are by no means comprehensive, but they do suggest that further experimentation with budgeting arrangements to incentivize more caretaking and accountability by law enforcement is another tool in the arsenal of police reform.

Furthermore, through absolute and qualified immunity, prosecutors are shielded from civil liability under Section 1983 for misconduct during a trial or otherwise closely associated with the judicial process.[323] Illustratively, in *Imbler v Pachtman*, the Court vacated a murder conviction because the prosecutor failed to disclose exculpatory evidence and either knew or should have known that the

317. *See id*. at 1148–49.
318. *Id.* at 1168.
319. *See id*.
320. *See id.* at 1171.
321. *Id.* at 1144, 1206.
322. *Id.* at 1184. The Illinois State Police typically under-budgets for settlements and judgments and may request additional funds from the government to cover litigation costs. *See id*. at 1183.
323. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976).

witness' testimony was misleading or false.[324] After years in prison for a murder he did not commit, Imbler sued the prosecutor Richard Pachtman and other officials for $2.7 million.[325] The Court dismissed the suit based on absolute immunity because, while it deprived genuinely wronged citizens of redress for their deprivation of liberty, "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest."[326] Because a post-trial decision in favor of the accused might result in civil liability, the Court reasoned that liability would curtail the "vigorous and fearless" performance of a prosecutor's duties and interfere with the functioning of the criminal justice system.[327] Accordingly, even when a conviction is vacated, defendants cannot sue prosecutors for civil damages arising out of actions associated with the prosecutorial function.

III. BUDGETING FOR EXONEREE COMPENSATION

Wrongful convictions and subsequent exonerations are a byproduct of over-policing in urban communities composed predominantly of communities of color. Thus, exoneree compensation might be conceptualized more broadly as reparations for police misconduct and racialized policing which wreaked havoc on those neighborhoods. Given the stark reality that most exonerees will never be compensated and those who are will likely be undercompensated by common standards today, exoneree compensation needs to be reconceptualized in society as a less adversarial process, with the goal of compensation for harm done by the state. This Note proposes doing so by: (1) passing legislative amendments to meaningfully increase the availability and amount of exoneree compensation for the wrongly convicted; (2) adopting budgetary arrangements in which law enforcement agencies bear the burden of settlements and judgments against them, thus facing financial constraints when litigation is costly; (3) establishing a state-sponsored Wrongful Conviction Trust Fund with annual contributions tied to rate of incarceration, and either diverted from or directly tied to law enforcement agency budgets; and (4) parallel prosecutorial reforms, including lobbying to legislatively establish such Trust Funds and to abolish harsh mandatory minimum sentencing, limiting over-charging practices, and establishing well-staffed Conviction Integrity

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324. *See id.*

325. *See id.*

326. *Id*. at 427.

327. *Id.* The Court was specifically concerned that such liability would prejudice prosecutors against defendants in post-conviction proceedings. *See id.*

Units (CIUs), to promote the cross-institutional adoption of procedural reform and minimize future wrongful convictions.

This proposal is premised on the objectives of preserving the lives and liberty of innocent people, access to victim compensation, reducing taxpayer liability, and prevention of police and official misconduct going forward. Police reform through a power lens aims to be reparative by shifting power to over-policed populations, promoting anti-subordination, and offsetting the state's monopoly on violence through democratic policing. More expansively, "the power lens brings a critical eye to the ways in which the construction of the notion of 'expertise' often denies agency to the people who most often interact with police in the streets and on the roads."[328] By prioritizing investment in communities instead of funding the perpetuation of the carceral state, exoneree compensation may work to redistribute power away from law enforcement agencies to those impacted by over-policing. The power lens allows for a reframing of the state's role in promoting safety and security today.

A. Meaningfully Increase the Availability and Amount of Compensation

The lack of a constitutional remedy for exonerees is illustrative of the gap between rights and remedies which has become commonplace in American society. Many have argued that a wrongful conviction is a taking of an exoneree's labor under the Fifth Amendment and, thus, constitutionally entitles an exoneree to "just compensation."[329] Today, there are only fourteen outstanding states without exoneree compensation statutes.[330] However, with the current composition of the 6-3 conservative Court, a federal constitutional right to exoneree compensation likely is not in the cards. Furthermore, law professor Rachel Harmon suggests the Supreme Court lacks the institutional ability to enforce its decisions (apart from appeals reaching the Court), or the capacity "to undertake complex empirical analysis of policing or to constrain the police beyond identifying and enforcing constitutional

328. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 778 (2021).

329. Kelly Shea Delvac, *Liberty and Just [Compensation] for All: Wrongful Convictions as a Fifth Amendment Taking*, 53 CONN. L. REV. 981, 981 (2022).

330. Jeffrey Gutman, *States Must Rethink Wrongful Conviction Compensation Laws*, LAW 360 (Sept. 12, 2021, 8:02 PM), https://www.law360.com/articles/1419525/states-must-rethink-wrongful-conviction-compensation-laws [https://perma.cc/RJ4N-58P7].

rights."[331] Given that the Court has repeatedly abdicated itself from the responsibility of enforcing constitutional rights with meaningful scope, the solution to adequate exoneree compensation must be derived elsewhere.

As the public sentiment and knowledge around wrongful convictions grows, Congress might be able to act on its Section 5 power under the Fourteenth Amendment to abrogate sovereign immunity and codify just compensation so that exoneree compensation would become automatic instead of proceeding via litigation of claims.[332] However, until doing so, the onus is on state legislatures and courts to ensure exonerees are compensated for their loss of liberty.

Thus, state legislatures should focus on meaningfully increasing the availability and amount of exoneree compensation. First, legislators should increase access to awards for exonerees by removing or redrafting contributory provisions to create a rebuttable presumption that all confessions and pleas are the product of coercion. Second, legislators should increase the magnitude of awards to exonerees by increasing minimum yearly compensation for wrongful incarceration and ensure access to adequate re-entry services. Both legislative amendments and reconceptualizing the method of adjudicating claims may meaningfully increase compensation for a substantial number of exonerees. Notably, since wrongful convictions are largely concentrated in a few states, reform adopted in those states would likely have a disproportionately positive impact.

1. Legislative Amendments to Increase Compensation

In drafting or amending compensation statutes, legislatures should prioritize preserving optionality for exonerees because of varying needs. Exonerees should be permitted to select between a package of compensation and services provided quickly or proceed to litigate their qualification for compensation.[333] As proposed by Professor Gutman, these should include:

> 1. Transitional housing for an appropriate period of time and assistance accessing mortgage financing for a home thereafter;
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> 2. State-provided medical and dental insurance to cover treatment and therapy for conditions causally connected to their incarceration for an appropriate period of time;

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331. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764, 772–76 (2012).

332. *See* Delvac, *supra* note 329, at 1016; U.S. CONST. amend. XIV, § 2.

333. *See* Gutman, *supra* note 184, at 426–27.

> 3. Vocational and employment training services;
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> 4. Time-limited transportation vouchers;
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> 5. Expedited provision of state-issued identification cards;
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> 6. Tuition benefits at public universities or state educational institutions;
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> 7. Tuition benefits for children born prior to or during the wrongful incarceration at public universities or other state educational institutions;
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> 8. State payment of child support arrearages accrued during the period of incarceration;
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> 9. Low-interest state loans through existing state programs to begin a small business or a non-profit organization;
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> 10. Other services demonstrated by the claimant to be necessary to facilitate his or her particular reentry into the community;
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> 11. Reimbursement for costs, reasonable attorneys' fees, and expenses associated with criminal defense and post-conviction relief;
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> 12. Reasonable attorneys' fees incurred in advancing the civil claim;
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> 13. Recovery of lost wages and other economic losses;
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> 14. Expungement of the wrongful conviction;
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> 15. An immediate bridge payment to reentering exonerees for adequate living expenses until the full package is received;
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> 16. A non-taxable, pro-rata presumed, non-economic damage award of $200K per year of incarceration, doubled for time served on death row, and adjusted for inflation; and
>
> 17. A presumed non-economic damage award of $75K per year for time served post-release on probation, on parole, and/or as a registered sex offender.[334]

Besides the base monetary award,[335] exonerees should receive additional services, including immediate transitional finances for necessities, housing assistance, physical and mental health services, educational and/or vocational assistance, and legal services. Legal services should include record expungement (the sealing or destruction of a criminal record) which is often not automatically carried out by the state after exoneration. A criminal record often poses a significant barrier in the job search — which is already exacerbated by long gaps

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334. *Id.* at 427–29.

335. *See* Mandery et al., supra note 44, at 553 ("Exonerees who are compensated above a threshold amount of $500,000 commit offenses at a significantly lower rate than those who are either not compensated or compensated beneath the threshold.").

in employment from wrongful incarceration — especially because exonerees are unable to indicate on job applications that they were convicted but later exonerated.[336]

For those state statutes that exclude exonerees from obtaining compensation based on false admissions, legislative amendments easily remedy the problem to reflect the modern science around false admissions. Exemplifying the position that false admissions are not voluntary, but instead the product of a coercive process, Minnesota's statute expressly declares that false confessions and pleas do not preclude exoneree compensation.[337] Similarly, Washington's statute states that "[a] guilty plea to a crime the claimant did not commit, or a confession that is later determined by a court to be false, does not automatically constitute perjury or fabricated evidence under this subsection."[338] In 2020, West Virginia similarly amended their exoneree statute to remove language barring eligibility for those who falsely confessed or pled guilty but are factually innocent.[339] Nebraska's exoneree compensation statute contains a contributory provision that requires that a claimant did not commit perjury or make false statements, "except that a guilty plea, a confession, or an admission, coerced by law enforcement and later found to be false, does not constitute bringing about his or her own conviction."[340] Importantly, the language of the contributory provisions should minimize any ambiguity or deference to courts to interpret such provisions as barring those who gave a false admission in the coercive interrogation or bargaining process.

A burden-shifting approach may be more promising in assuring that courts provide compensation to exonerees and promote their ultimate task of evidence balancing. A burden shifting approach requires the court to look at evidence from multiple perspectives, rather than solely focusing on demanding the claimant dispel any doubts of innocence.[341] Law professor Adele Bernhard has suggested that "courts should presume all false confessions to be the product of coercion," as opposed to a claimant's contribution to their conviction, unless the state can show otherwise "by clear and convincing evidence."[342] This rationale and method can easily be extended to false guilty pleas as

336. *See* Gutman, *supra* note 184, at 427–29.
337. *See* MINN. STAT. ANN. § 590.11(5)(c) (West 2019).
338. WASH. REV. CODE §§ 4.100.010–.090 (2013).
339. *See* W.VA. CODE § 14-2-13a (2014).
340. NEB. REV. STAT. ANN. § 29-4603 (West 2009).
341. *See* Gutman, *supra* note 196, at 260.
342. *See* Bernhard, *supra* note 206, at 720.

well. A properly drafted rebuttable presumption both respects legislators' concerns about compensating undeserving individuals with taxpayer money, while more narrowly tailoring the contributory restriction so that it only bars the truly underserving from rewards. This language is also more in line with the presumption of innocence and the established social and psychological sciences around false admissions and plea-bargaining today.

2. Rethinking Adversarial Compensation: Wrongful Conviction Funds

The goal that damages determinations might be made more cooperatively has run up against a key tenet of American litigation — adversarialism.[343] For many exonerees, the statutory process requires adversarial and delayed qualification determinations. The resulting compensation for the qualified is routinely non-individualized, subject to delay, and both comparatively and normatively unjust because of prescribed awards and caps. Hence, Professor Gutman has argued for a shift to alternative claims processing models which are less adversarial in nature and more likely to meaningfully increase access to compensation for exonerees.[344]

Such a structure can be seen in the National Childhood Vaccine Injury Act and the 9/11 Victim Compensation Fund.[345] In 1986, Congress passed the National Childhood Vaccine Injury Act, which replaced the conventional tort system for a small percentage of individuals who experienced adverse reactions to vaccines, with an adjudicatory process.[346] Prior to doing so, compensation was slow and difficult, while suits against vaccine manufacturers and healthcare providers caused domestic manufacturers to exit the market and threatened the supply of vaccines.[347] Petitioners were required to file claims for damages in U.S. Court of Federal Claims and demonstrate causation, but not fault.[348] Causation was presumed by reference to a Vaccine Injury Table developed with a list of qualifying side effects in

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343. *See* Gutman, *supra* note 184, at 415.

344. *See id.* at 412–19.

345. *See id*. at 412–15.

346. *See* Act of Nov. 14, 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-1–300aa-3). The National Vaccine Injury Compensation Programs comprises Part 2 of the National Childhood Vaccine Injury Act. *See id.*

347. *See generally* Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VCIP,* 163 U. PA. L. REV. 1631, 1655–58 (2015).

348. *See* Gutman, *supra* note 184, at 413.

a given time period.[349] Claims were to be decided within a 240-day deadline set in the Act, but in actuality only 5% of claims were resolved timely.[350] Under the Act, if claimants were dissatisfied with their petition results, they had the option to reject the award and file a civil action within 90 days.[351]

Similarly, the Air Transportation Safety and System Stabilization Act created the September 11th Victim Compensation Fund to provide monetary compensation to those injured and the families of those killed in the 9/11 attacks.[352] Potential claimants could choose between either pursuit of no-fault compensation from the Fund administered by a Special Master or bring a civil claim via an exclusively federal remedy created in the U.S. District Court for the Southern District of New York.[353] Under the statute, the Special Master was tasked with determining eligibility for compensation and authorized to make individualized determinations of compensation — accounting for both economic and non-economic harm.[354] While the Special Master was required to consider the individual financial circumstances of the claimants, the goal was to avoid "widely disparate awards . . . "[355] Additionally, the Special Master had 120 days after a claim was filed to make final determinations, which disincentivized any inclination to make time consuming, highly individualized determinations.[356] This system left open the claimant's ability to demonstrate exceptional need and extraordinary cases which might warrant an upward adjustment of the loss award.[357]

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349. *See* 42 U.S.C.A. § 300aa-14(a); 42 C.F.R. 100.3 (2017).

350. *See* Gutman, *supra note 184*, at 414.

351. *See* 42 U.S.C.A. § 300aa-21(a).

352. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended in scattered sections of 49 U.S.C.). A central purpose of the Act was to ensure continued operation of the airlines after concern that their insurance carriers might terminate coverage and insufficient funds would be available in the capital markets to fund such a potentially enormous liability. *See* 147 Cong. Rec. H5894-5902 (Sept. 21, 2001).

353. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 at 237–41 (2001).

354. *See id*. at 237–38.

355. *See* KENNETH R. FEINBERG, DEP'T OF JUST., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 6 (2004), https://www.ojp.gov/ncjrs/virtual-library/abstracts/final-report-special-master-september-11th-victim-compensation-fund [https://perma.cc/E977-W7LU].

356. *See id*. at 4; Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 at 239 (2001).

357. *See* 28 C.F.R. § 104.33(e)(2).

Drawing from these two examples, Professor Gutman has recommended that states create Wrongful Conviction Trust Funds, with a funding mechanism analogous to the National Vaccine Injury Compensation Program.[358] These Trust Funds would be "funded with an initial lump sum deposit sufficient to cover potential awards of current premature and pending claims."[359] After their establishment, states would make yearly "per-capita contributions based on the number of individuals committed to state incarceration each year, and they should account the expected number of future eligible claimants and anticipated pay-outs, including the costs of social and other services awarded to the exoneree."[360] A thoughtful state trust fund may aid in streamlining the compensatory regime from determination of whether the exoneree meets the conditions of the state compensation statute to the award of state compensation.[361]

Professor Gutman suggests that this "approach to financing wrongful conviction compensation trust funds may relieve states of budgetary worry" associated with large payouts.[362] A predictable, annual deposit to the Trust Fund and installment payments to exonerees from said Trust Fund provides a better way of reducing financial risks and the "breathing room necessary to increase the generosity of compensation payments to qualified exonerees."[363] Gutman's reasoning is bolstered by legal realists who argue "[a] legal right exists, in reality, only when and if it has budgetary costs."[364] "Moreover, a trust fund [approach] could also avoid delays inherent in states" with "cumbersome legislative appropriation of recommended awards," like Illinois and California.[365] Ideally, Trust Funds would have a cash cushion or offer partial payments so as to avoid months of delay that deserving exonerees experience in Illinois.[366] Professor

358. *See* Gutman, *supra* note 184, at 421. Louisiana appears to be the sole state with an explicit, statutorily created Innocence Compensation Fund dedicated to fulfilling awards under its exoneree statute. The fund comprises appropriated funds, "donations, grants, and other monies which may become available." LA. ACTS § 15:572.8N(1) (2019).

359. Gutman, *supra* note 184, at 421.

360. *Id.*

361. *See id.*

362. *See id.* at 422.

363. *Id.* at 422.

364. STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS 19 (2000).

365. *See* Gutman, *supra* note 184, at 422. In Alabama and Virginia, there is similarly no entitlement to compensation. Instead, payment is contingent on legislative approval, which can be denied. ALA. CODE § 29-2-165 (2018); 2022 Va. Acts §§ 8.01-195.10(A).

366. *See* Gutman, *supra* note 184, at 422–23.

Gutman offers an appealing and practical alternative to the traditional claims processing for exonerees which may promote more timely payments and availability to a broader number of claimants.[367]

However, this version of the trust fund approach fails to provide a mechanism to deter underlying officer misconduct and institutionalized procedures which lead to wrongful convictions. Wrongful convictions and lack of automatic compensation reify existing structures of power and systemic racism inherent in the criminal justice system. Exonerees are robbed of their liberty and in many cases their ability to build generational wealth and raise their children. Increased compensation alone is unlikely to break this cycle. States must adopt statutes that deter official misconduct and coercive procedures leading to wrongful convictions through cross-institutional procedural reforms to prevent false admissions in the future. By effectively allowing police to bargain away tax dollars, over-policed communities pay not only on the front end with the criminalization of urban space, but also upon exoneration, when tax dollars must be redirected from investing in communities to cover police liability.

B. Indemnifying Exonerees, Not Officials

This Note proposes a two-step budgetary solution to hold officers financially accountable for wrongful convictions and misconduct which states may independently employ and further experiment with. First, law enforcement agencies would keep their budgets consistent year-over-year and adopt arrangements in which they bear the burden of settlements and judgments against them, thus facing budgetary constraints when litigation is costly. Second, states would statutorily establish Wrongful Conviction Trust Funds as proposed by Professor Gutman, but with annual contributions either diverted from or directly tied to law enforcement agency budgets. Such a budgetary arrangement provides financial incentives for police to minimize inaccurate convictions, adopt harm-efficient procedures, and establish the necessary reform to reduce future wrongful convictions. Furthermore, it may encourage law enforcement agencies and prosecutors to rethink their metrics of efficiency.

In isolation, budgetary financial accountability is unlikely to go far enough to change the culture within law enforcement which results in wrongful convictions.[368] However, budgetary accountability does provide long-term incentives to institutionalize procedural reform,

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367. *See id.*

368. *See* Schwartz, *supra* note 33, at 1208.

such as prohibiting trickery in interrogations, meaningfully preserving minors' *Miranda* rights, and instituting best practices for eyewitness identifications.[369]

1. Law Enforcement Agencies Should Not Receive Bailouts to Cover Litigation Costs

The first step to promote procedural reform in large, metropolitan jurisdictions is for law enforcement agencies to not increase their budget year-over-year and adopt arrangements so they bear the burden of settlements and judgments against them, thus facing budgetary constraints when litigation is costly.

In large cities, which encompass the overwhelming majority of the U.S. population and liability exposure, most law enforcement agencies are self-insured, so many agencies contribute absolutely nothing to the financial judgments and settlements against them.[370] While agencies in smaller towns or municipalities may either contribute to awards or be significantly impacted by increases in insurance premiums, enforcement agencies in cities like New York, Chicago, and Los Angeles are essentially "too big to fail."[371] Insurers are thus unlikely to provide a route to reform in large, self-insured cities. Consequently, it is essential to develop financial incentives to improve law enforcement accuracy and reduce misconduct in the conviction process in cities.

In San Francisco, Boston, and Chicago, overages for claims against agencies are taken from the jurisdiction's general funds, which forces the agency to ask the government for more money and thus suffer "political repercussions."[372] When law enforcement agencies in cities like Chicago can be bailed out by taxpayer funds for claims against them, the police essentially make citizens, particularly those in over-policed communities, pay twice. First, community members pay by the very real effects of over-policing in their neighborhoods. Then, they are penalized again when taxpayer money that could be invested in the community is redirected to fund the very misconduct unfolding on their

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369. *See* Marc L. Miller & Richard F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 781 (2004) (explaining that deterrent effects of lawsuits would be dampened when awards are paid from general funds as opposed to police department budgets "whether departments respond to monetary incentives, political incentives, or both — for tort judgments to shape institutional and individual behavior the defendants must bear the cost of the misbehavior").

370. *See* Schwartz, *supra* note 33, at 1168, 1210.

371. *Id.* at 1206.

372. *See id.* at 1207.

streets. Further, as discussed above, this system does nothing to resolve the procedural deficiencies or deter the official misconduct which led to the wrongful conviction.

Cities would be better off adopting budgetary arrangements in which agencies internalize the cost of their misconduct or harm-inefficient procedures. For example, in Los Angeles and Kansas City, law enforcement agencies bear the burden of settlements and judgments against them and face tighter budgets when litigation is expensive.[373] Under these arrangements, enforcement agencies benefit from extra funds when settlements and judgments against them decrease.[374] This approach better aligns law enforcement incentives with public safety.

Alternatively, Professor Schwartz has pointed out that cities may also promote budgetary accountability by adopting the smaller town approach and purchasing insurance as opposed to self-insuring.[375] This would allow insurers to take a more prominent role in the analysis of harm efficiency to limit liability and create pressure for procedural reform within the agency.[376] Law professors Ramirez and Pinto have argued that insurers are in a better position than the Court to quantitatively evaluate the costs and benefits of police techniques and to provide the financial pressure to promote procedural reform.[377] Just as other professionals carry insurance for protection against claims made by their clients, Professor Ramirez suggests "police officers carry insurance to mitigate police misconduct."[378] Hence, the agency pays an insurance premium, the victims are compensated, and officers with repeat episodes of misconduct might be priced out of work.[379] While this offers a promising way forward in smaller jurisdictions, the bulk of liability coverage across the country is not subject to such insurance constraints.[380]

2. Tie Wrongful Conviction Funds to Law Enforcement Agency Budgets

Second, states would statutorily establish Wrongful Conviction Trust Funds as proposed by Gutman, but with annual contributions

373. *See id.*
374. *See id.*
375. *See id*. at 1210.
376. *See id*. at 1207–10.
377. *See* Ramirez & Pinto, *supra* note 265, at 328–34.
378. *See id.* at 308.
379. *See id.*
380. *See* Schwartz, *supra* note 33, at 1168.

either diverted from or directly tied to law enforcement agency budgets. Gutman's proposal already accounts for the rate of incarceration by departments of corrections but fails to solve the issue of diverting money, which would otherwise be devoted to investment in community structural supports, to pay for police misconduct.[381] Instead of establishing Wrongful Conviction Trust Funds with state funds which would otherwise be allocated to public welfare, Trust Funds should be funded directly from the Law Enforcement Agencies to incentivize forward-looking accuracy in convictions. While most large cities do not ordinarily pay for civil judgments against them, the statutory scheme for exoneree compensation could simultaneously be used to establish trust funds that police are responsible for paying into.[382] Because yearly contribution to exoneree funds would be determined by wrongful conviction projections — which are directly tied to the number of citizens states place in incarceration annually — agencies would be incentivized to incarcerate fewer people.

For a more modest solution, instead of diverting funds from police budgets to wrongful conviction funds, annual exoneree fund contributions could be directly tied to police and state corrections budgets to incentivize budget reductions and further efforts to dismantle mass incarceration. For example, legislatures may statutorily prescribe the level of annual contributions that agencies must allocate to Innocence Trust Funds as "no less than X%" of their budget.

Importantly, Wrongful Conviction Trust Funds would still constitute a sliver of a state or municipality's spending on law enforcement agencies and corrections facilities. Therefore, the proverbial sky would not fall by diverting small amounts to budget for wrongful incarceration, a necessary byproduct of a carceral state. Indeed, exoneree compensation needs to be set at a meaningful level yearly to have any real impact on agency budgets. This proposal simultaneously ensures adequate funds are set aside for exoneree payments while providing a tangible path to defunding the police.

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381. *See* Gutman, *supra* note 184, at 421.

382. If police department budgets remain the same year-over-year, the implementation of these funds would effectively defund the police. *See generally* Bryce Covert, *"Defund" Isn't Dead*, 313 NATION 20 (2021) ("Though the phrase 'Defund the police' has been co-opted by the opposition to scare people away from the idea of police reform, the movement to find new ways to ensure public safety is winning a number of fights in cities across the country.").

Since it is exceedingly difficult to institutionalize police reform,[383] budgetary responsibility may realign law enforcement's incentives. Internalizing some of the cost of shoddy policing practice will force police departments to do cost-benefit analysis and implement harm-efficient procedures and best practices. While not an exhaustive list, some proposed reforms include implementing best practices for eyewitness identifications,[384] legislatively prohibiting the use of police deception,[385] judicially excluding confessions when interrogators used manipulative techniques,[386] and enforcing a right to counsel for minors before allowing waiver of *Miranda* rights.[387] While imposing financial responsibility for wrongful convictions alone is unlikely to be sufficient to remedy the issue, financial responsibility and budgetary accountability may promote reform. When adopted in conjunction with procedures to minimize police and municipal liability going forward, Wrongful Conviction Trust Funds may incentivize agency accountability and help discontinue a legacy of over-policing in predominantly Black and Brown neighborhoods.

C. Prosecutorial Reform

Police officers' position as the frontline of law enforcement — selecting who gets policed and for what — puts them in an ideal position to reduce the chances of wrongful conviction by implementing

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383. *See generally* Samuel Walker, *Institutionalized Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 57–60 (2012) (examining "the issue of the continuity of accountability-related [police] reforms" amidst a long history of major police reforms that have faded away).

384. Many states have enacted legislation or implemented model policies since 2000, most of which adopts scientifically supported best practices to minimize system variables while conducting lineups such as double-blind administration, proper witness instructions, proper filler composition, witness confidence statements and procedures for maintaining lineup records. *See Eyewitness Identification Reform*, INNOCENCE PROJECT, https://innocenceproject.org/eyewitness-identification-reform/#:~:text=25%20states%20have%20implemented%20the,action%2C%20or%20substantial%20voluntary%20compliance [https://perma.cc/K8KE-4F9G] (last visited Mar. 30, 2023).

385. *See* Gohara, *supra* note 92, at 794–95.

386. *See, e.g.*, State v. Patton, 826 A.2d 783 (N.J. Super. Ct. App. Div. 2003) (holding Patton's confession *per se* inadmissible because police showed Patton a fabricated audiotape of an eyewitness identification claiming to have witnessed him committing the crime); State v. Cayward, 552 So.2d 971, 974 (Fla. Dist. Ct. App. 1989) ("Unlike oral misrepresentations, manufactured documents have the potential of indefinite life and the facial appearance of authenticity. A report falsified for interrogation purposes might well be retained and filed in police paperwork. Such reports have the potential of finding their way into the courtroom.").

387. *See* Sahdev, *supra* note 134, at 1233.

procedural reforms. Nevertheless, since a persuasive empirical and legal case can be made that prosecutors have enabled police misconduct overtly and covertly, reform must take an interorganizational view of these institutions and examine their shared culture and structures.[388] In fact, a special prosecutor recently announced a 14-count indictment against a pair of former Cook County prosecutors in connection with the 2020 retrial of Jackie Wilson — a case connected to the Jon Burge scandal — after they allegedly concealed crucial evidence.[389] Additionally, largely unfettered prosecutorial discretion has concurrently driven the boom in mass incarceration and thus prosecutors have a responsibility to attempt to dismantle the carceral state.[390] However, as the current system is not structured to support progressive prosecutors' missions, progressive prosecutors alone are not the solution.[391]

While the full complexities of these issues are beyond the scope of this Note, it is worth considering briefly how prosecutors may be impacted by the implementation of such Funds. Because prosecutors rely on police, they may seek to alleviate the annual cost of Wrongful Conviction Trust Funds on agencies by lobbying for sentencing reform which reduces the rate of incarceration, and the number of years people are incarcerated on average.[392] Hence, prosecutors may further the purposes of the Trust Funds by lobbying to abolish mandatory minimums and limiting over-charging, while devoting prosecutorial resources to establish CIUs to increase the efficiency and accuracy of

388. Trivedi & Van Cleve, *supra* note 163, at 928.

389. Matt Masterson, *2 Former Cook County Prosecutors Charged in Connection With Jackie Wilson Murder Trial*, WTTW (Mar. 8, 2023), https://news.wttw.com/2023/03/08/2-former-cook-county-prosecutors-charged-connection-jackie-wilson-murder-trial [https://perma.cc/LCZ5-Q8MS].

390. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 127 (2017) (arguing that contemporary accounts of mass incarceration overlook a major shift in prosecutorial behavior in the 1990s, which saw prosecutors file felony charges against defendants approximately twice as much as they had before, despite declining arrest and crime rates).

391. *See, e.g.*, Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164 (2022); Gyasi Lake, *There's No Such Thing as a "Progressive Prosecutor" in a System Designed to Criminalize Blackness*, BLACK YOUTH PROJECT (Aug. 8, 2022), http://blackyouthproject.com/theres-no-such-thing-as-a-progressive-prosecutor-in-a-system-designed-to-criminalize-blackness/ [https://perma.cc/Y8DZ-6HHY].

392. In fact, the two institutions are so interdependent that the elimination or significant defunding of one would undoubtedly destabilize the other. *See* Trivedi & Van Cleve, *supra* note 163, at 900–01, 909.

the investigative process.[393] Prosecutors may also play a pivotal role in lobbying for the statutory establishment of such Trust Funds in state legislatures.

Moreover, with significantly fewer police officers available to conduct surveillance, investigations, and arrests, racial disparity from proactive policing would likely diminish.[394] Fewer cases would be brought before prosecutors to press charges, lightening the caseload in a district attorney's office and, consequently, the caseload of public defenders, who are frequently under-resourced. Because the budget for prosecutors' offices tend to be fixed by state law, "[h]ow a local prosecutors' office will use that newfound slack in the line will depend on the principles the office chooses as the foundation for its new law enforcement paradigm."[395] Channeling prosecutors' discretion towards a transformative justice framework,[396] district attorney's offices may reimagine their duties to public safety while leveraging current expertise by pressing complaints brought by civilians[397] and participating in affirmative litigation which seeks to protect the indigent communities which have so long been underserved by law enforcement.[398] Institutional barriers rather than legal restraints are

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393. *See generally* CAROLINE RIORDAN, WHEN INNOCENT DEFENDANTS PLEAD GUILTY: A CASE ANALYSIS OF EXONEREES WRONGFULLY CONVICTED BY PLEA BARGAINING (2020).

394. *See* Note, *Prosecuting in the Police-less City: Police Abolition's Impact on Local Prosecutors*, 134 HARV. L. REV. 1859, 1868 (2021) ("[E]ven a municipality that adopts measures short of total abolition would force local prosecutors to adapt their practices. By reducing police funding or redirecting some public services from local police to other organizations or offices, reformers could diminish the capacity for police surveillance, and there is no guarantee that the institutional relationships between police and prosecutor would be transferred to any organization that takes over some responsibilities currently overseen by local police.").

395. *Id.* at 1870. The decision to create a local police department is typically within the authority of municipal government, whereas prosecutorial jurisdiction derives from either state statutory or constitutional law. Thus, while municipal governments often have the power to defund or even eliminate the police altogether, they "lack the power to abolish whatever prosecutor's office possesses jurisdiction over their cities." *See id.* at 1860–62.

396. "Transformative justice" is an abolitionist alternative to imprisonment. The term "transformative justice" may refer to two interrelated issues: It can be a method of responding to individual harm without relying on punishment, alienation, or State or systemic violence, and it can also refer to the processes of remedying the societal circumstances which lead to those individual harms. *See* GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE 5 (2007), http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Document.pdf [https://perma.cc/ST5V-HYZA].

397. *See Prosecuting in the Police-less City, supra* note 394, at 1867.

398. This might include, among other things, the increased enforcement of municipal ordinances and state laws that prohibit environmental harms, residential and

the primary impediment to the pursuit of transformative justice at the local level.[399] In fact, public plaintiffs are frequently in a better position to pursue impactful enforcement actions or precedent-setting impact litigation than individuals or even nonprofit organizations.[400] The civil counterpart to the San Francisco District Attorney's office provides a powerful example of a municipal entity engaging in affirmative litigation in the public interest and exemplifies how a prosecutor's role may be reconceptualized in a world with fewer police officers.[401]

1. Lobby Against Mandatory Minimums and Eliminate Over-Charging

Prosecutors may minimize the cost of Wrongful Conviction Funds on agency budgets by lobbying to legislatively eliminate mandatory minimums and establishing policies which limit over-charging in general. Since exoneree compensation is typically calculated on a yearly basis,[402] the cost of exoneree compensation would decrease the fewer citizens are incarcerated overall, thus encouraging sentencing reform. A mandatory minimum is a sentence created by a state legislature which the court must impose on a person convicted of a crime, regardless of the unique circumstances of the offender or

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employment discrimination, or predatory economic practices. *See* JILL HABIG ET AL., LOCAL ACTION, NATIONAL IMPACT: A PRACTICAL GUIDE TO AFFIRMATIVE LITIGATION FOR LOCAL GOVERNMENTS 6–13 (2019) https://www.sfcityattorney.org/wp-content/uploads/2019/04/A-Practical-Guide-to-Affirmative-Litigation-FINAL-4.13.19-1.pdf [https://perma.cc/DY37-8DAF]. For example, by targeting illegal dumping complained of in neighborhoods without political clout, local prosecutors may transform their practice from one that polices indigent communities to one that protects those communities. *See id.*

399. *See* Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, *in* WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 51, 52 (2008).

400. HABIG ET AL., *supra* note 398, at 5. Article III standing, forced arbitration, and limitations on class action litigation are among the doctrinal developments which prevent private plaintiffs from vindicating their rights in court. *See id*. at 10–15.

401. *See id*. The San Francisco City Attorney created a task force dedicated to affirmative civil litigation in 2006 and has continued to maintain a groundbreaking commitment to structural change through civil lawsuits. *See id.*

402. *See Compensation By State*, U. MICH. L. (May 21, 2018), https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf [https://perma.cc/N7CF-RVDN]; *Key Provisions in Wrongful Conviction Compensation Laws*, INNOCENCE PROJECT, https://www.law.umich.edu/special/exoneration/Documents/Key-Provisions-in-Wrongful-Conviction-Compensation-Laws.pdf [https://perma.cc/3UYA-ASQT] (last visited Feb. 18, 2023).

offense.[403] Federally, prosecutors use mandatory minimums in over half of all cases and all 50 states and D.C. have mandatory minimum sentencing laws.[404] Functionally, mandatory minimums make the prosecutor the ultimate decisionmaker regarding what crime to charge accused with, thus eliminating all judicial discretion to consider individual circumstances.[405] Importantly, a recent study found that prosecutors' power to file charges with mandatory minimums creates racial disparities.[406] Indeed, prosecutors brought charges with mandatory minimums 65% more often against Black defendants, all else equal.[407] Fundamentally, mandatory minimums provide a weapon for prosecutors to push defendants into what are effectively coerced plea bargains. Similarly, strategic over-charging is the practice of tacking on additional charges that the prosecutor knows he cannot prove to improve the prosecutor's plea-bargaining position.[408] Therefore, lobbying to eliminate mandatory minimums and limiting over-charging would simultaneously mitigate the coercive nature of plea-bargaining — thus reducing the chances of wrongful conviction — and decrease annual contributions to innocence funds from police budgets.

Additionally, prosecutors may be more demanding in the threshold level of evidence required from the police before charging suspects. "Progressive" prosecutor Kim Foxx has acknowledged this means "[s]ometimes [approving charges] takes longer than had been done before . . . But again, I am guided by a history in this county, which we have approved cases . . . in which the evidence did not support the crime."[409]

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403. *See End Mandatory Minimums*, BRENNAN CTR., https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums [https://perma.cc/7FZ5-M93J] (last visited Apr. 10, 2023).

404. *See id.*

405. *See id.*

406. *See generally* M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014).

407. *See id*. at 1323.

408. Stephanie Aurora Cardenas, The Influence of Prosecutorial Overcharging on Defendant and Defense Attorney Plea Decision Making: Documenting and Debiasing the Anchoring Effect (2021) (Ph.D. dissertation, The City University of New York) (arguing that strategic over-charging "undermines the Sixth Amendment right to trial by coercing defendants to plead guilty rather than face penalties disproportionate to their alleged misconduct").

409. *See* Andy Grimm, *Kim Foxx: I Won't 'Cut Corners' – Despite Crime Spike – In County with Long History of Wrongful Convictions*, CHICAGO SUN TIMES (Apr. 13, 2022), https://chicago.suntimes.com/crime/2022/4/13/23024209/kim-foxx-cook-county-states-attorney-wrongful-convictions-murder-police-cpd-justice-reform [https://perma.cc/M83R-CUFY].

2. Allocate Resources to Conviction Integrity Units

District Attorney's offices across the country have been establishing CIUs "since 2007, when the Dallas County District Attorney's office established a [] CIU [which] rapidly produced an unprecedented series of DNA and non-DNA post-conviction exonerations."[410] Today, most major metropolitan DA's offices house a CIU "within a prosecutorial office that investigates, post-conviction, possible miscarriages of justice" and seeks to increase the efficiency of the investigative process by conducting "internal audits, root cause analysis, sentinel reviews, and other efforts to learn from error."[411] CIUs should aim to investigate claims of innocence and substantiate claims of injustice without requiring that defendants overcome all the procedural roadblocks of the adversarial post-conviction litigation process.[412] By implementing an "interests of justice" orientation, stakeholders may re-orient their views on how to interpret evidence and promote accuracy through information sharing between the defense and prosecutor.[413] Such a framework functions as a "pragmatic response to the silos and strictures of post-conviction case law and discovery," which impede the consideration of new evidence, new scientific knowledge, and the structural pitfalls of our system.[414] Scheck argues that "[t]he most important best practice for a robust CIU re-

410. *See* Scheck, *supra* note 291, at 705–06.

411. *See id.*

412. A comparative law perspective contrasting the procedures around wrongful convictions in Canada and the United States illustrates that nonsensical restrictions which courts have placed on *habeas corpus* review and collateral attack are neither natural nor inevitable. In his essay, Roach argues that "like newly discovered evidence" in the United States, "fresh evidence" in Canada "must be credible, potentially decisive, and not have been obtainable at trial with due diligence, [but] the Supreme Court of Canada has consistently ruled that the due diligence requirement must yield where a miscarriage of justice would result." Under Canadian jurisprudence, the concern of Canadian courts with miscarriages of justice "can reach virtually any kind of error that renders a trial unfair in a procedural or substantive way," which includes but is broader than American courts' concern with "actual or factual innocence." *See* Kent Roach, *More Procedure and Concern About Innocence but Less Justice? Remedies for Wrongful Convictions in the United States and Canada*, *in* WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS 283, 287–88 (C. Ronald Huff & Martin Killias eds., 2013).

413. "Prosecutors and courts have explicit statutory or common law authority to vacate convictions or reduce sentences in the interests of justice" in some jurisdictions. Even without such authority however, such an orientation is "frequently an important factor when a CIU makes a judgment about whether relief is warranted when reconstructing what occurred in old cases where there is, as in most cases, a need to resolve issues with less than perfect information." *See* Scheck, *supra* note 291, at 727.

414. *See id.* at 736.

investigation process is an information sharing agreement between the CIU and an individual claiming innocence."[415] The Brooklyn Conviction Review Unit (CRU) created a template for these agreements that allows the petitioner to reveal all work product related to the evidence that the petitioner wishes the CRU to review in exchange for disclosure of the CRU file, including work product.[416] Because law enforcement's ability to ensure the accuracy of the criminal justice system is inherently limited, CIUs may provide a broader check on a system governed by police, judges, and juries, tasked with making subjective inferences and whose fairness and pursuit of just outcomes is critical to the appearance of a legitimate system.[417] Meaningfully reviewing convictions allows district attorney's offices to right past injustices and learn from mistakes made by preceding prosecutors to avoid making them in the future.

Co-founder of the Innocence Project Barry Scheck has advocated for and assisted with the implementation of many CIUs, arguing that they fulfill a purpose distinct from criminal trials because "[p]ost-conviction, there is more room for a non-adversarial, dialectical approach to assessing evidence, a safer space to gather more information from all stakeholders, and a unique opportunity to learn from error and 'near misses.'"[418] Scheck argues that to promote knowledge around shortcomings of the criminal legal system which lead to wrongful convictions, CIUs must focus on internal audits of cases based on previous findings of error or misconduct by prosecutors or police.[419] Like the Burge precinct which tortured more than 200 criminal suspects into confessing, the Los Angeles Rampart Division

415. *See id*. at 729.

416. *See id.* at 730. While this arrangement allows the defendant to see the entire prosecution file, including work product, the defense may protect privileged attorney-client information. The Brooklyn Conviction Review Unit recognized that a complete waiver of attorney-client privilege would be "a non-starter" for most defense attorneys. *See id.*

417. A conviction integrity program that attempts to implement a "just culture" and which focuses on learning from error is designed to increase the efficiency of the investigative process. Thus, a CIU advances "crime control" objectives while simultaneously promoting due process for criminal defendants. *See* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 140 (2008). This conception of CIUs exemplifies how reforms generated by the innocence movement have rendered the so-called tradeoff between "due process" and "crime control" to be false. *Cf.* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 228–33 (1968).

418. Scheck, *supra* note 291, at 718.

419. *See id.* at 720–22. Scheck also makes clear that at times, such an inquiry may involve investigation into someone in the prosecutor's office, in which case they should be recused from the investigation to maintain the CIU's integrity. *See id.*

planted fabricated evidence and committed perjury to achieve convictions, resulting in innocent people pleading guilty and being convicted by juries for crimes they did not commit.[420] While nearly all policework is group-based and officers' networks can impact behavior, the infamous Tulia drug bust in Texas demonstrates that even a single narcotics detective can contribute to a significant number of wrongful convictions.[421] "Once a homicide unit, detective, or police department 'goes bad' (has staff and/or supervisors who are engaging in deliberate rule breaking), wrongful convictions are bound to result . . . "[422] Thus, a systematic review and root cause analysis is necessary to determine whether there are miscarriages of justice as well as police corruption.[423]

Another important source of cases Scheck emphasized are those concerning forensic science errors.[424] As "new realizations that prior test methods and testimony of analysts were scientifically flawed" or impacted by their negligence or misconduct, crime laboratories have a duty to notify district attorneys, courts, and defendants and their counsel, and to correct scientific errors.[425] For example, in 2011, the Harris County Texas District Attorney's office — which encompasses Houston — crime laboratory confirmatory tests led to the revelation that more than a hundred people had pled guilty to narcotics charges in the absence of controlled substances in those cases.[426] The centralized, internal audit by the Conviction Review Unit has led to 119 crime exonerations in Harris County and recognition that there are likely thousands of wrongful convictions based on such field tests across the US.[427] In fact, statutes in California and Texas do away with procedural bars to facilitate court review of such outdated science,

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420. *See* Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRACTITIONER 121, 121 (2000).

421. *See* NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN 3–16 (2005). Tom Coleman worked undercover for 18 months with no supervision, during which time he made more than 130 drug buys from 46 dealers. But, when the arrests were made, none of the suspects were in possession of drugs, and "39 of the suspects were Black in a town with fewer than 300 Black residents." *See* Nate Blakeslee, *Bust Town*, 30 TEX. MONTHLY 46 (2002).

422. *See* Scheck, *supra* note 291, at 722.

423. *See id.*

424. *See id.* at 724.

425. *See id.*

426. *See id.* at 726.

427. *See* Ryan Gabrielson & Sander Topher, *How a $2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (Jul. 7, 2016), https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html [https://perma.cc/RB6B-H752].

which would otherwise go unheard.[428] CIUs are particularly well situated to review such cases because they are designed to function collaboratively with defenders and innocence organizations to audit cases and determine if new evidence requires the vacation of a conviction.[429]

Progressive prosecutors may reimagine the role of DAs in the exoneration process by providing substantial resources to CIUs. In Chicago, although progressive prosecutor Kim Foxx's CIU has exonerated more people than all her predecessors combined,[430] special prosecutors had been exclusively handling cases associated with Burge's torture crew until recently because of conflicts of interest with Foxx's CIU.[431]

Under Foxx, the purpose of the division is to examine cases for "new evidence [that] shows that an innocent person has been wrongfully convicted."[432] Unfortunately, cases are only eligible for review if the claimant is asserting "actual innocence" — requiring availability of conclusive evidence that defendant was wrongfully convicted — and said claim of actual innocence is "based on evidence that was not considered by the trier of fact during the proceedings that led to conviction."[433] When prosecutors so narrowly limit the scope of CIU review, it undermines its own purpose and largely replicates the procedural hurdles in other post-conviction proceedings.[434] Such a restrictive initial cutoff is somewhat arbitrary because it is often difficult to identify a pure "actual innocence" claim at the start of a case which could eventually involve a constitutional claim.[435] Further, deciding to stop investigating just because there is a viable

428. *See* TEX. CODE CRIM. PROC. ANN. art. 11.073 (West 2013); CAL. PENAL CODE § 1473(b) (West 2023).

429. *See* Scheck, *supra* note 291, at 725.

430. *See* Andy Grimm, *Kim Foxx: I Won't 'Cut Corners' – Despite Crime Spike – In County with Long History of Wrongful Convictions*, CHI. SUN TIMES (Apr. 13, 2022), https://chicago.suntimes.com/crime/2022/4/13/23024209/kim-foxx-cook-county-states-attorney-wrongful-convictions-murder-police-cpd-justice-reform [https://perma.cc/M83R-CUFY].

431. *See* Megan Crepeau, *Judge Decides Kim Foxx's Office Can Handle Cases Involving Alleged Torture by Jon Burge, Detectives*, CHI. TRIBUNE (July 10, 2019), https://www.chicagotribune.com/news/criminal-justice/ct-special-prosecutor-jon-burge-20190710-c5bppaqrrzesnkjcip6k4wnfoq-story.html [https://perma.cc/R8Z6-87D4].

432. *See Conviction Integrity Unit*, COOK COUNTY STATE'S ATTORNEY, https://www.cookcountystatesattorney.org/conviction-integrity-unit [https://perma.cc/BBF9-TTTN] (last visited Mar. 30, 2023).

433. *See id*.

434. *See* Scheck, *supra* note 291, at 727.

435. *See id.* at 727–28.

constitutional claim jeopardizes the possibility of discovering persuasive evidence of innocence or misconduct by those involved in the investigation or trial, and finding the true perpetrator of the crime.[436]

Even more disquieting is the issue of limiting the post-conviction inquiry to "newly discovered" evidence of innocence which could not have been discovered by defense counsel exercising due diligence.[437] This entails not only "subjective judgments about the quality of lawyering required in a particular jurisdiction years earlier, but [also] speculation about what could have been discovered and what the lawyer in question actually knew."[438] Innocence cases are frequently years old and such evidence is difficult to uncover.[439] Moreover, "the time and effort spent on determining whether the new evidence could have been found with due diligence by the defense attorney detracts" from the importance of the new evidence and where it can lead.[440]

Altogether, Foxx has vacated 143 convictions of more than 105 individuals since 2017.[441] Her CIU has focused on exonerating those tied to the legacy of corrupt cop sergeant Ronald Watts, "who was convicted in 2011 for shaking down an FBI informant for cash, and who has been implicated in framing more than 100 residents of the Wells housing project on drug and other charges."[442] However, the CIU has generally failed to address those coerced confessions and subsequent wrongful convictions caused by Jon Burge's torture ring.[443] Moreover, Foxx has recently received backlash for appointing Aducci, a career prosecutor in the office, as the director of the CIU amidst accusations that Adduci withheld a mountain of evidence surrounding the 2011

436. *See id.*

437. *See id.* at 728.

438. *See id.*

439. *See id.*

440. *See id.*

441. *See Kim Foxx Moves to Resolve Convictions Tied to Former Sergeant Watts*, CHI. CRUSADER (Feb. 7, 2022), https://chicagocrusader.com/kim-foxx-moves-to-resolve-convictions-tied-to-former-sergeant-watts/ [https://perma.cc/H5ZC-NPH4].

442. *See id*; Grimm, *supra* note 430.

443. *See* Megan Crepeau, *Judge Decides Kim Foxx's Office Can Handle Cases Involving Alleged Torture by Jon Burge, Detectives*, CHI. TRIBUNE (July 10, 2019), https://www.chicagotribune.com/news/criminal-justice/ct-special-prosecutor-jon-burge-20190710-c5bppaqrrzesnkjcip6k4wnfoq-story.html [https://perma.cc/52J3-T2YH] (reporting that because the state's attorney's office is already handling 1,100 post-conviction matters, "a representative of Foxx's office agreed that Foxx has no conflict of interest but contended that Milan's office was in a much better position to deal with the pending Burge cases").

killing of a Chicago Police officer.[444] Scholars and advocates agree that best practices require "hiring someone from outside the office who has done defense work or innocence work" because of the pressures of prosecutors reviewing fellow prosecutors.[445] Foxx's CIU falls short of its promise by overly restricting cases eligible for re-investigation and demonstrates the risks of "conviction integrity" for publicity purposes instead of as a catalyst for any serious change in the criminal justice system.[446]

As traction for CIUs has grown, other reforms should naturally follow. For example, Scheck argues that "opposition to true 'open file' discovery on the front end of the process will diminish once it becomes clear that in the most troubling 'innocence' cases, the entire prosecution file, including work product, will be disclosed."[447] Likewise, the non-adversarial review of plausible innocence claims should illustrate to both sides that "just culture" reforms should be adopted in the criminal system to improve its operation and provide a more effective way to hold attorneys for both the defense and prosecution accountable.[448] Such reforms would "help identify other systemic problems involving police, forensic science service providers, the judiciary, and other stakeholders that require investigation and correction."[449]

When CIUs follow best practices as advanced by innocence advocates, CIUs fulfill a fundamentally independent role from adversarial post-conviction review on appeal or collateral attack. "In the traditional model, adversaries and the courts are continually narrowing the facts that need review and focusing on what will be determinative legal issues" — often procedural technicalities — while in a CIU review, "the factual record is continually expanding," and the emphasis is on the "reliability of the verdict."[450] Such an arrangement

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444. *See* Chip Mitchell, *Prosecution of Accused Cop Killers Raises Questions About Kim Foxx's Conviction Integrity Chief*, CHI. SUN TIMES (Dec. 12, 2022, 2:08 PM), https://chicago.suntimes.com/2022/12/12/23505525/nancy-adduci-clifton-lewis-kim-foxx-conviction-integrity-unit-operation-snake-doctor-spanish-cobras [https://perma.cc/G7XB-FW6J].

445. *See id*. ("Not only do you have all the pressures of prosecutors reviewing fellow prosecutors, but you're doing it in a case that also brings up the relationship of the office to the police department that you rely on to bring most of the cases.").

446. *See Rotten Apples – Or a Flawed System?*, CRIME REP. (Apr. 7, 2014), https://thecrimereport.org/2014/04/07/2014-04-rotten-applesor-a-flawed-system/ [https://perma.cc/B6MZ-V6V8].

447. Scheck, *supra* note 291, at 749.

448. *See id.* at 749–50.

449. *See id.* at 750.

450. *See id.* at 750.

allows prosecutors and defenders to see more broadly and work cooperatively in a "shared good faith dedication to ensuring just and reliable outcomes." [451]

CONCLUSION

Within the broader push for nationwide reform around compensation for wrongful incarceration, there is a pressing need to provide remedies to innocent people who falsely confessed or pled guilty. Otherwise, lawmakers squander an opportunity to increase police accountability going forward and further stack the deck against people who have already been failed by the system.

A less adversarial compensation scheme which not only meaningfully increases the availability of prompt compensation from the state, but also deters official misconduct and the unreliable techniques which have cumulatively eroded citizens' constitutional rights in the criminal justice system, provides a way forward. The state establishment of Wrongful Conviction Trust Funds which are tied to law enforcement budgets and coupled with procedural reforms around police interrogation and investigation promotes both sufficient exoneree compensation and law enforcement accountability. Prosecutorial reforms, like lobbying to abolish harsh mandatory minimum sentencing, limiting over-charging practices, and ensuring well-staffed CIUs on the post-conviction end, may further the objectives of such Funds where prosecutors have largely failed to promote police accountability. Such budgetary constraints provide long-term incentives for law enforcement to adopt procedures which increase accuracy in investigation and minimize the risk of wrongful conviction.

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451. *See id.*