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ADVANCING THE ARGUMENT IN FAVOR OF STATE COMPENSATION FOR THE ERRONEOUSLY CONVICTED AND WRONGFULLY INCARCERATED

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Although erroneous convictions and wrongful incarcerations have been occurring since the advent of prison itself, these problems have taken on a new sense of urgency in recent years with the arrival of important scientific advances.[1] Between 1989, when the first exoneration by DNA evidence took place in the United States,[2] and 2003, there were 340 con-

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1. *See* Edward K. Cheng, *Reenvisioning Law Through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 649 (2005) ("In recent times, no development has transformed the practice of criminal justice as much as DNA evidence. In little over fifteen years, DNA profiling has produced nothing short of a paradigm shift."); *see also* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005) (referring to the first DNA exonerations as "the beginning of a revolution in the American criminal justice system. Until then, exonerations of falsely convicted defendants were seen as aberrational. Since 1989, these once-rare events have become disturbingly commonplace."); Torsten Ove, *State Doesn't Give Dime to the Innocent*, PITTSBURGH POST-GAZETTE, Aug. 7, 2005, at A-1 (quoting a Pennsylvania state legislator as saying "'[s]cience is catching up with law enforcement. We're finding that we do make mistakes .... We owe these folks more than a shrug and bus fare home.'").

2. Gross et al., *supra* note 1, at 523 (listing Gary Dotson of Illinois as the first prisoner exonerated on the basis of DNA identification). Deoxyribonucleic acid (DNA) is the common name for molecules that carry genetic information. Rob Warden, Ctr. on Wrongful Convictions, What is DNA? (Mar. 22, 2002), http://www.law.northwestern.edu/depts/clinic/wrongful/documents/DNA.htm. DNA is contained in almost every cell, so that a sample of a person's DNA can be found in their blood, hair, bones, saliva, and many other body parts and fluids. NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, UNDERSTANDING DNA EVIDENCE: A GUIDE FOR VICTIM SERVICE PROVIDERS (2001), *available at* http://www.ncjrs.gov/pdffiles1/nij/bc000657.pdf. No two people have the exact same DNA (with the exception of identical twins). *Id.* In addition, the DNA molecule is stable, making it available for testing long after a crime is first committed. Cheng, *supra* note 1, at 649; *see also* Walter F. Rowe, *Foreword* to EDWARD CONNORS ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, CONVICTED BY

firmed exonerations.[3] These convictions were overturned both on the basis of DNA evidence, as well as other means, but all were based on evidence of actual innocence.[4] Year by year, the number of exonerations has consistently risen, with numbers "increas[ing] rapidly in the last several years."[5]

This is due in large part to scientific and technological advances like the "DNA revolution."[6] Nearly half of those exonerated from 1989 to 2003 established their innocence through DNA evidence.[7] One example of such a case is that of Robert Clark.[8] Clark was convicted of rape, kidnapping, and armed robbery in 1982, and sentenced to life in prison.[9] The victim of the crime identified Clark as her assailant, saying there was "no doubt in her mind" that Clark was the offender.[10] In 2005, twenty-three

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JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xv, xv (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf. These features make DNA evidence an extremely important and effective tool for law enforcement agents, prosecutors, and defenders. *See* Janet Reno, *Message from the Attorney General*, *in* CONNORS ET AL., *supra*, at iii, iii; President's DNA Initiative, DNA and Forensic Identification, http://www.dna.gov/basics/forensicidentification (last visited Apr. 19, 2007).

DNA testing is done by comparing a suspect's DNA to DNA found at the scene of a crime. *See* Human Genome Project Information, DNA Forensics, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited Apr. 19, 2007). Because human DNA differs in 13 specific regions in every person, the variable regions of DNA found at the scene of a crime are used to create a DNA profile of the perpetrator. A profile is also created from the suspect's DNA, and the two are compared by looking for matches "based on sequence or on numbers of small repeating units of DNA sequence" between the profiles. *Id.* If the profiles do not match, the DNA at the crime scene could not have belonged to the defendant. *Id.* Because only one-tenth of one percent of DNA is different in every person, one or two matches between the samples would not be enough to conclude the suspect contributed the DNA at the crime scene. *See id.* Four or five matches, however, would provide very strong evidence that the suspect did contribute the DNA. *See id.* Although it is possible that another person could have the same DNA profile (because it is based on short sequences, and not on the person's entire DNA sequence), "the odds are exceedingly slim." *Id.*

DNA evidence first entered United States criminal courtrooms in 1987. CONNORS ET AL., *supra*, at 4. Since then, it has "revolutionized forensic science and the criminal justice system." Rowe, *supra*, at xv. DNA has also been a powerful tool in discovering and correcting erroneous convictions. *See* Gross et al., *supra* note 1, at 524.

3. *See* Gross et al., *supra* note 1, at 524.

4. *Id.* at 523-24 (showing that the 340 exonerations between 1989 and 2003 were based on evidence of actual innocence).

5. *Id.* at 527.

6. *See id.* at 528.

7. *See id.* at 524.

8. The Innocence Project, Know the Cases: Robert Clark, http://www.innocenceproject.org/Content/71.php (last visited Apr. 19, 2007).

9. *Id.*

10. *Id.*

years after he was convicted, DNA testing conclusively proved Clark's innocence,[11] and he was released from prison.[12]

Unfortunately, stories like this are not uncommon today.[13] Perhaps even more unfortunate is the fact that the majority of people exonerated in the United States receive no compensation for the erroneous deprivation of their freedom.[14] The majority of states have failed to enact legislation to compensate these individuals upon their release.[15] As the number of exonerations continues to increase, however, it is becoming more difficult for states to skirt this important issue.[16] State legislatures must devise

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11. *Id.* The tests proved that another man already in prison for a separate offense was the actual perpetrator of the crime. *Id.*

12. *Id.* On December 8, 2005, twenty-four years after he was put in prison, Robert Clark was released, becoming the fifth person exonerated by DNA evidence in the State of Georgia. *Id.*

13. *See* Gross et al., *supra* note 1, at 523-28; The Innocence Project, Know the Cases: Browse Profiles, http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Apr. 19, 2007).

14. *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE 230 (2000) (indicating that only thirty-seven percent of those wrongfully incarcerated receive any compensation).

15. *See* Life After Exoneration Program, Wrongful Conviction/Incarceration Compensation Statute Summary (2006), http://www.exonerated.org/files/Compensation%20Statutes%20chart.xls [hereinafter Compensation Statutes Chart]. Only twenty-one states and the District of Columbia currently have statutes that provide for compensation. *See id.* (listing the states with compensation statutes: Alabama, California, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Virginia, West Virginia, and Wisconsin). Five states have compensation legislation pending. These states are Hawaii, Michigan, Pennsylvania, Utah, and Vermont. *Id.* The federal government provides compensation for wrongful imprisonment as well, but does not require compensation on the part of state governments. *See* 28 U.S.C.A. § 2513 (West Supp. 2006). State compensation is still necessary, because federal compensation is only available for federal convictions. *See id.*

16. *See* Ove, *supra* note 1 (noting that states are "recogniz[ing] the growing issue"). One reason for the increase in exonerations is that post-conviction DNA testing has become available to prisoners through a number of different channels, including statutes and the work of independent organizations. *See* 18 U.S.C.A. § 3600 (West Supp. 2006) (providing for testing for federal convictions by written motion); President's DNA Initiative, About the Initiative, http://dna.gov/info/ (last visited Apr. 19, 2007) (stating that President Bush announced the $1 Billion "President's DNA Initiative" in March 2003, which is designed in part to increase access to post-conviction DNA testing); The Innocence Project, About the Innocence Project, http://www.innocenceproject.org/about/ (last visited Apr. 19, 2007) [hereinafter About the Innocence Project]. A number of states have enacted post-conviction DNA testing statutes, though the criteria regarding who may apply for testing under such statutes differs. *See* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 355-60 (2002); *see also* Nat'l Conf. of State Legislatures, Comparison of State Post Conviction DNA Laws, http://www.ncsl.org/programs/health/genetics/DNAchart.htm (last visited Apr. 19, 2007).

Private organizations have also helped increase access to DNA testing for prisoners. *See generally* About the Innocence Project, *supra*. The Innocence Project, the most widely

a response to ensure justice for the wrongfully incarcerated.[17]

Some states have already taken action by enacting compensation statutes; there are a number of legally and morally compelling arguments for doing so.[18] One argument is based on the theory of eminent domain—that when the government takes property from a private citizen, it must compensate that person.[19] Another common argument, the strict liability theory, considers it unfair that a few individuals should be forced to bear the burden of errors of the criminal justice system when everyone reaps the benefits of that system.[20] Simply put, many people feel that compensating someone for wrongful incarceration is "[t]he least the community can do."[21]

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recognized of these organizations, is a non-profit legal clinic that works to prove innocence through DNA evidence. *Id.* The Center on Wrongful Convictions provides representation to prisoners with claims of actual innocence. Ctr. on Wrongful Convictions, Our Mission, http://www.law.northwestern.edu/depts/clinic/wrongful/mission.htm (last visited Apr. 19, 2007). In some cases, the Center's investigation leads to DNA testing that proves the client's innocence. *E.g.*, Ctr. on Wrongful Convictions, Juan Rivera Wins New Trial, http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Rivera.htm (last visited Apr. 19, 2007).

As a result of increased access to post-conviction DNA testing, some commentators feel it is possible that the high rate of exonerations will continue, and more erroneously convicted individuals will seek redress. Ove, *supra* note 1 (quoting the opinion of a Pennsylvania state legislator: "'It's going to keep happening. . . . Science is the great equalizer.'"). However, some experts think that the number of exonerations is bound to decrease in the future. *See, e.g.*, 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, 714 (2004). Although access to DNA testing has increased, a prisoner's ability to prove his innocence through DNA is still dependent on other factors, such as whether crime scene evidence is still available. *See id.* at 713-15. As Professor Bernhard notes:

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

Id. at 715 n.68.

17. *See* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 101 (1999) ("Passage of indemnification legislation would create for all what already exists for some—an accessible, reliable and swift remedy triggered by the status of the claimant and the harm endured, rather than the negligence or wrongdoing of the individuals, or municipalities which inflicted the injury.").

18. Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 207-08 (1941).

19. *Id.* at 207; *see infra* notes 231-33 and accompanying text.

20. *See* Borchard, *supra* note 18, at 208; *infra* notes 234-36 and accompanying text.

21. Bernhard, *supra* note 17, at 112 (quoting EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE 392 (1932)).

However, there are also a number of reasons why the majority of states have not enacted compensation statutes.[22] Legislators are often concerned with the cost and manner of enforcing such legislation.[23] In addition, some commentators feel that the state is not at fault, and has no legal obligation to provide compensation.[24]

These arguments have traditionally been rebutted with the strict liability theory.[25] While the strict liability argument has been important to the compensation movement, it has not been entirely successful in convincing the majority of the states to enact compensation statutes.[26]

This Comment argues in favor of state compensation for the wrongfully convicted and incarcerated by offering further support to the notion that the state should be held strictly liable for compensating individual victims. In Part I, this Comment reviews the most common causes of erroneous conviction, and then examines the different compensation methods currently available to the wrongfully incarcerated. In Part II, this Comment finds that the state can enact measures to prevent the most common causes of erroneous conviction, and concludes that compensation statutes are the most effective way to ensure efficient and fair compensation. Next, this Comment discusses the arguments both for and against state compensation for the wrongfully incarcerated. Finally, in Part III, borrowing from the economic theory of the least cost avoider, this Comment concludes that states should be held strictly liable for compensating the wrongfully incarcerated. States, as opposed to individuals, are in the best position to prevent erroneous convictions in the first place. Consequently, the responsibility for providing compensation falls clearly in the hands of states. More effort must be made to convince legislatures in those states that do not offer compensation that it is the state's responsibility to do so, and the least cost avoider theory should be used in the process.

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22. Bernhard, *supra* note 16, at 713. Legislators cite the cost of enforcing such legislation and the concern that "undeserving individuals will recover" as two main deterrents from enacting compensation statutes. *Id.*

23. *See id.*

24. Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684, 695-96 (1913); *see also* Bernhard, *supra* note 17, at 92.

25. *See* John J. Johnston, Reasonover v. Washington*: Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411, 414 (2000) (contending that strict liability is "the most philosophically and procedurally sound [theory] for imposing liability on a state"); Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705, 715-17 (1976) (noting that the strict liability theory is "conceptually superior" to other theories supporting state compensation).

26. *See* Compensation Statutes Chart, *supra* note 15 (indicating that twenty-two U.S. jurisdictions currently have statutes that provide for compensation).

I. THE CAUSES OF ERRONEOUS CONVICTIONS AND CURRENT REMEDIES AVAILABLE TO THE WRONGFULLY INCARCERATED

With the recent surge in exonerations and the scientific advancements of the past twenty years, society is now able to examine and discover the causes of erroneous convictions.[27] As a result of such research, the most common causes of erroneous convictions are now widely recognized.[28] With this knowledge in hand, states must act to ensure that those who are wrongfully incarcerated have an effective remedy available to compensate them for the erroneous deprivation of their liberty.[29]

A. Common Causes of Erroneous Convictions

There are a number of common causes of erroneous convictions. Three of the leading causes are mistaken eyewitness identification, crime lab error, and ineffective assistance of counsel.[30]

1. Mistaken Eyewitness Identification

The most common cause of erroneous conviction is mistaken eyewitness identification.[31] One example is the case of Ronald Cotton, who was convicted of rape and burglary in 1985.[32] Cotton was convicted primarily

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27. *See* Ronald S. Reinstein, *Commentary* to CONNORS ET AL., *supra* note 2, at xxi, xxi (acknowledging that DNA exonerations have provided invaluable research opportunities and insight into the causes of erroneous conviction); Brian Forst, Op-Ed., *The Cost of Errant Justice*, WASH. POST, Mar. 30, 2006, at A23 ("The use of modern management methods and more widespread availability of effective forensic technology could go a long way to solve more of these crimes and reduce both types of error. DNA evidence gives us a unique window into errors for those crimes for which the evidence is available and relevant."); *see also* Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1225 (2003) (concluding that DNA exonerations offer a new view of the criminal justice system, particularly in the case of capital convictions).

28. *See* The Innocence Project, Understand the Causes: The Causes of Wrongful Conviction, http://www.innocenceproject.org/understand/ (last visited Apr. 19, 2007) [hereinafter Causes of Wrongful Conviction]; *infra* Part I.A.1-3.

29. *See infra* note 139.

30. Causes of Wrongful Conviction, *supra* note 28.

31. BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 8 (1995); SCHECK ET AL., *supra* note 14, at 263 (indicating that in sixty-two exonerations by DNA evidence, mistaken identification was a factor in the original conviction fifty-two times, more than any other factor examined); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 1, 2 (1998) ("[C]ases of proven wrongful convictions of innocent people have consistently shown that mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined . . . .").

32. The Innocence Project, Know the Cases: Ronald Cotton, http://www.innocenceproject.org/Content/72.php (last visited Apr. 19, 2007).

on the basis of the eyewitness testimony of the victim.[33] During the attack, the victim "studied every single detail on the rapist's face"[34] in order to "make sure that he was put in prison."[35] The victim first identified Cotton among police photos and then again in a lineup.[36] She later stated, "I knew this was the man. I was completely confident. I was sure."[37] Eleven years after Cotton was convicted, DNA tests proved that another man, who was already in prison for an unrelated offense, was the actual perpetrator of the crime.[38]

Eyewitness testimony and identifications are an extremely important part of our legal system, as investigators and attorneys rely heavily on this type of evidence.[39] However, cases of mistaken identity in the criminal justice system are not uncommon; in the first 130 DNA exonerations in the United States, mistaken identification was a factor in 101 of the original wrongful convictions.[40] The Supreme Court has even recognized the risk of misidentification associated with eyewitness testimony, stating that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[41]

Because the problems with eyewitness identification are commonly recognized, there is a great deal of scientific research on the topic.[42] It is

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33. *See id.*

34. Jennifer Thompson, Op-Ed., *'I Was Certain, But I Was Wrong,'* N.Y. TIMES, June 18, 2000, § 4, at 15.

35. *Id.*

36. *Id.*

37. *Id.*

38. CONNORS ET AL., *supra* note 2, at 44; Thompson, *supra* note 34.

39. CUTLER & PENROD, *supra* note 31, at 6. The reliance stems partly from simple convention: "The legal system always has relied on the testimony of eyewitnesses." NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 1 (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf [hereinafter NIJ EYEWITNESS EVIDENCE GUIDE]. In addition, it is axiomatic that eyewitness identification is extremely helpful evidence—it has continuously played a vital role in investigating and charging criminal defendants. *See* CUTLER & PENROD, *supra* note 31, at 6; NIJ EYEWITNESS EVIDENCE GUIDE, *supra*, at iii.

40. Causes of Wrongful Conviction, *supra* note 28. In addition, a number of field experiments on eyewitness identification resulted in an average false identification rate of thirty-five point eight percent. CUTLER & PENROD, *supra* note 31, at 10-12. The authors note that one major difference between field research and actual crime victims is the absence of the emotional stress on the identifier in the research setting, and that "[t]he effects of emotional duress on eyewitness memory in general, and identification accuracy in particular" are not clear. *Id.* at 13. However, the authors are led "to believe that if there is any bias, the field studies overestimate the accuracy of eyewitness identifications." *Id.*

41. United States v. Wade, 388 U.S. 218, 228 (1967).

42. Wells et al., *supra* note 31, at 32 (noting that research in this area has been "extensive"); *see also* Jack P. Lipton, *Legal Aspects of Eyewitness Testimony*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 7, 7 (Siegfried Ludwig Sporer et al. eds., 1996) ("It is evident that psychologists have conducted more research dealing with eyewitness testimony than with any other question of law.").

now generally understood that due to psychological factors, the procedures used by law enforcement agents in obtaining eyewitness identifications commonly contribute to erroneous results.[43] Fortunately, however, recent research has shown that simple changes in these procedures can be extremely effective in preventing cases of mistaken identification.[44] Specifically, implementing "double-blind sequential lineup" procedures—in which the witness sees one lineup member at a time, rather than all at once[45]—can greatly reduce the odds of a mistake.[46] This procedure successfully decreases the probability of error by reducing the likelihood of relative judgment—a process by which a witness will choose the lineup member that most closely resembles the witness' memory of the perpetrator—on the part of the eyewitness,[47] and by reducing the possibility

43. *See* Wells et al., *supra* note 31, at 32-33.

44. Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 382-83 (2006).

45. David L. Feige, *"I'll Never Forget That Face": The Science and Law of the Double-Blind Sequential Lineup*, CHAMPION, Jan./Feb. 2002, at 28, 29. Sequential lineup procedures mandate that the eyewitness be presented with one lineup member at a time, as opposed to the traditional method of presenting all the lineup members at once. Klobuchar et al., *supra* note 44, at 388-89. Blind lineup procedures dictate that the lineup administrator be unaware of which lineup member is the suspect. The Innocence Project, Fix the System: Eyewitness Misidentification, http://www.innocenceproject.org/fix/Eyewitness-Identification.php (last visited Apr. 19, 2007). "This is known as a 'double-blind' procedure, because neither the administrator nor the witness knows who is the suspect." SHERI H. MECKLENBURG, ILL. STATE POLICE, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 4 (2006), *available at* http://www.psychology.iastate.edu/faculty/gwells/Illinois_Report.pdf.

46. Feige, *supra* note 45, at 28 ("Seeking an order for a double-blind sequential lineup affords a court the opportunity to employ a procedure shown to decrease the chances of an innocent person being wrongly identified by 50 percent, while being just as effective in correctly identifying criminal suspects.").

47. Klobuchar et al., *supra* note 44, at 388.

> [E]yewitnesses tend to compare lineup members using a process called relative judgment to determine which most closely resembles the eyewitness's memory of the perpetrator. Even when the true perpetrator is absent from the lineup, it is likely that one of the fillers used in the lineup will provide a better relative match to the witness's memory than the others. This process can increase the risk of a misidentification.

Id. (footnotes omitted). With sequential lineups, however, "[a]lthough the eyewitness could compare the person being viewed to those viewed previously, the eyewitness cannot be sure that the next person to be viewed will not be an even better likeness to the culprit. Hence, the eyewitness must rely more on an absolute judgment process." Wells et al., *supra* note 31, at 13. In attempting to thwart relative judgment, it is also important to instruct the witness that the perpetrator may or may not be present in the lineup, so that the witness does not "rely solely on a relative-judgment process." *Id.* at 11.

that the lineup administrator could influence the witness through clues, inadvertently or not.[48]

Some jurisdictions have implemented these procedures in response to the problems with eyewitness identification.[49] For instance, in 2001, New Jersey became the first state to officially adopt the procedures outlined by the U.S. Department of Justice in its *Eyewitness Evidence Guidelines*.[50] The New Jersey Attorney General noted two particularly important pro-

48. Klobuchar et al., *supra* note 44, at 389 ("[T]he double-blind . . . procedure helps to secure accurate eyewitness accounts by eliminating the potential for inadvertent influence by the officer conducting the lineup. A lineup administrator who does not know the identity of the suspect is unlikely to influence the witness through verbal or nonverbal cues." (footnote omitted)). As with sequential lineup procedures, explicit directions to the eyewitness also help to promote accuracy, because "notifying the witness that the officer does not know which lineup member is the suspect, affords the additional advantage that the witness is less likely to seek or infer cues from the officer's behavior." *Id.*

While a large body of research experiments has concluded that these procedures would reduce the likelihood of mistaken eyewitness identification, *see id.* at 382-83, at least one recent study finds otherwise. MECKLENBURG, *supra* note 45, at 61-62. The Illinois report compared data from both double-blind sequential lineups and traditional simultaneous lineups in three different jurisdictions. *Id.* at 24-25. Two of the three jurisdictions "recorded a statistically higher rate of known false identifications using the sequential, double-blind method than using the simultaneous method." *Id.* at 46. Accordingly, the report does not recommend the implementation of such procedures, but rather urges "the criminal justice system to explore other areas of improvement to eyewitness identification." *Id.* at 61-62.

Perhaps it is true, as one of the originators of the sequential double-blind procedure, Professor Gary Wells, has said: "'Fixation on the sequential procedure is creating a certain degree of myopia with regard to seeing the broad problems with lineups.'" *Id.* at 62 (quoting Professor Wells). In any case, it has been proven that mistaken eyewitness identification leads to more erroneous convictions than any other cause. Wells et al., *supra* note 31, at 2. Because of this fact, "'[w]e need to find ways to prevent mistaken IDs from happening in the first place.'" Amanda Paulson & Sara Miller Llana, *In Police Lineups, Is the Method the Suspect?*, CHRISTIAN SCI. MONITOR, Apr. 24, 2006, at 1 (quoting Professor Wells).

49. The Innocence Project, Fix the System: Eyewitness Misidentification, *supra* note 45 ("The state of New Jersey, large cities such as Minneapolis, MN and Seattle, WA and small towns such as Northampton, MA and others have implemented these practices . . . . Numerous other jurisdictions, such as the states of North Carolina and Illinois, as well as Boston, Massachusetts and other cities, are now beginning to implement these procedures.").

50. Memorandum from John Farmer, Attorney Gen. of N.J. (Apr. 18, 2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf [hereinafter Farmer Memorandum]. In response to the problems with mistaken identification, the U.S. Department of Justice assembled the Technical Working Group for Eyewitness Evidence, which produced a guide of recommended eyewitness evidence procedures for law enforcement in 1999. *See* NIJ EYEWITNESS EVIDENCE GUIDE, *supra* note 39, at 33-37. It should be noted that although the U.S. Department of Justice published this document and links to it on their website, it was not actually prepared by the Department, but "supported by a contract with the Bureau of Justice Assistance, United States Department of Justice. [Thus], [t]he opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice." *Id.*

cedural changes.[51] The first is that "whenever practical, someone other than the primary investigator assigned to a case [should] conduct both photo and live lineup identification."[52] Second, "sequential lineups should be utilized for both photo and live lineup identifications."[53] Although New Jersey is the first jurisdiction to officially implement these procedures, more and more states are beginning to recognize and adopt them as a means for improving the accuracy of eyewitness identification.[54]

2. Crime Lab Error

Another common cause of erroneous convictions is crime lab error.[55] Crime lab error is a rather broad category, consisting not only of innocent errors, such as contamination of evidence and misinterpretation of results, but also intentional ones, such as falsified results, falsified expert credentials, and statistical exaggeration.[56] In the case of Jimmy Ray Bromgard, the erroneous testimony of the prosecutor's forensic scientist proved pivotal in obtaining a conviction.[57] The expert testified that "there was less than a one in ten thousand . . . chance that the hairs [found at the scene of the crime] did not belong to Bromgard."[58] In 2002, after Bromgard spent more than fourteen years in prison, DNA tests performed on crime scene evidence conclusively proved his innocence.[59]

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51. Farmer Memorandum, *supra* note 50, at 1-2.

52. *Id.*

53. *Id.* at 2.

54. *See supra* note 49; *see also* Paulson & Llana, *supra* note 48 ("Commissions in North Carolina, Wisconsin, Virginia, and California have recommended that approach, and other jurisdictions are considering it . . . . Boston switched to the sequential method in 2004, after a series of wrongful convictions that involved mistaken eyewitness identification made headlines.").

55. *See* The Innocence Project, News and Information: Crime Lab Oversight, http://www.innocenceproject.org/Content/312.php (last visited Apr. 19, 2007) [hereinafter Crime Lab Fact Sheet] ("The Innocence Project has found crime lab errors, both inadvertent and calculated, to be a leading contributor to wrongful convictions.").

56. *See* The Innocence Project, Understand the Causes: Forensic Science Misconduct, http://www.innocenceproject.org/understand/Forensic-Science-Misconduct.php (last visited Apr. 19, 2007) [hereinafter Forensic Science Misconduct]; Crime Lab Fact Sheet, *supra* note 55.

57. The Innocence Project, Know the Cases: Jimmy Ray Bromgard, http://www.innocenceproject.org/Content/61.php (last visited Apr. 19, 2007).

58. *Id.*

59. *Id.* After Bromgard's release, a panel of five forensic scientists reviewed the testimony of the prosecutor's scientist, finding that "[t]he witness's testimony . . . contains egregious misstatements not only of the science of forensic hair examinations but also of genetics and statistics. . . . His testimony is completely contrary to generally accepted scientific principles." RICHARD BISBING ET AL., PEER REVIEW REPORT: MONTANA V. JIMMY RAY BROMGARD (2004), *available at* http://www.innocenceproject.org/docs/bromgard_print_version1.html.

In recent years, crime lab problems have gained national attention.[60] In the DNA Sexual Assault Justice Act of 2004, Congress took measures to combat the problem.[61] Among other recommendations, the Act called for the Attorney General to appoint a National Forensic Science Commission to determine and disseminate the best practices for forensic analysis, and to increase the number of qualified forensic scientists.[62]

States are also responding to the crime lab problems.[63] In 2005, the Texas legislature enacted a law that establishes independent, expert oversight for Texas crime labs.[64] The bill provides for the creation of the Texas Forensic Science Commission, which will investigate all claims of professional negligence and require lab personnel to report any misconduct.[65] Although Texas is the first jurisdiction to take such active measures against crime lab error, it seems likely that other states will also take measures to fight the problem.[66]

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60. *See generally* Tomas Guillen & Eric Nalder, *Solutions to Problems are Clear*, SEATTLE TIMES, June 23, 1994, at A16 (calling for state and national level reforms); Steve McVicker, *HPD Admits It Failed to Review Suspect Lab Work*, HOUSTON CHRON., June 2, 2005, at B1 (citing "numerous problems" in the Houston Police Department's DNA, toxicology, ballistics, and serology divisions); Maurice Possley, Steve Mills & Flynn McRoberts, *Scandal Touches Even Elite Labs*, CHI. TRIB., Oct. 21, 2004, at 1 ("[E]vidence of problems ranging from negligence to outright deception has been uncovered at crime labs in at least 17 states"); *Paula Zahn Now: Reasonable Doubt: Can Crime Labs Be Trusted?* (CNN television broadcast Jan. 13, 2005) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0501/13/pzn.01.html) ("[A] joint investigation by CNN and the center for Investigative Reporting reveals serious flaws in modern forensic work."). In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court also recognized the potential for faulty scientific evidence, directing lower court judges to determine "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue" when they are faced with expert scientific testimony. Daubert v. Merrell Dow Pharm., 509 U.S. 579, 592-93 (1993). In so directing, the Court set out a number of guiding factors, such as whether the scientific technique used can or has been tested, what the technique's known or potential rate of error is, and whether the technique is "generally accepted" in the relevant scientific community. *Id.* at 593-95.

61. *See* 42 U.S.C.A. §§ 14136-14136d (West 2005).

62. *Id.* § 14136c; *see also* President's DNA Initiative, About the Initiative, *supra* note 16; NAT'L INST. OF JUSTICE, STATUS AND NEEDS OF FORENSIC SCIENCE SERVICE PROVIDERS: A REPORT TO CONGRESS 3-4 (2006), *available at* http://www.ncjrs.org/pdffiles1/nij/213420.pdf [hereinafter NIJ FORENSIC SCIENCE REPORT].

63. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.01 (Vernon Supp. 2006).

64. *See id.* art. 38.01, §§ 1-4.

65. *Id.*

66. *See generally* Ruth Teichroeb, *Call For a Review of State Crime Labs*, SEATTLE POST-INTELLIGENCER, Sept. 14, 2004, at B1 (reporting that one legislator was concerned about the state's crime lab problems, saying "'I'm going to ask for a review during this upcoming session of the Legislature . . . . People's lives are at stake,'" and noting that the director of the state crime lab system "said he'd welcome scrutiny from state legislators."); C.S. Murphy & Amy Upshaw, *Budget, Competing Pressures Hamstring Crime Lab*, ARK. DEMOCRAT-GAZETTE, Dec. 14, 2004, at 1A (quoting the head of the state crime lab's

3. Ineffective Assistance of Counsel

A third common cause of erroneous convictions is ineffective defense counsel.[67] One illustrative example is the case of Dennis Williams, who was convicted of murder in 1962 due to his defense attorney's "uninspiring performance."[68] The attorney did not object to the prosecution's racially motivated jury selection, failed to talk to forensic experts regarding crime scene evidence, and overlooked a simple timing problem in a key witness' testimony that may have helped avoid his client's conviction.[69] Williams was eventually granted a new trial and his new lawyers obtained a reversal of his conviction.[70] His original attorney was later disbarred.[71]

According to the unanimous Supreme Court decision of *Gideon v. Wainwright*, the right to counsel in a criminal proceeding is a fundamental constitutional right that must be enforced by state courts.[72] Practically, this means states are required to provide an attorney to any criminal defendant facing imprisonment who cannot afford one.[73] In addition, it has long been recognized that "'the right to counsel is the right to *effective* assistance of counsel.'"[74] Although this state obligation is clearly outlined in Supreme Court case law, many commentators believe that most of the indigent defense systems that exist today do not come close to meeting

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forensic biology section as saying "'[a]t some point the state of Arkansas or the powers that be in the Legislature have to decide what they're willing to invest to fight crime'").

67. SCHECK ET AL., *supra* note 14, at 187 ("Studies by the Innocence Project found that 27 percent of the wrongfully convicted had subpar or outright incompetent legal help.").

68. *Id.* at 183-85.

69. *Id.* at 184.

70. *Id.* at 185-86. Upon hearing the disbarment case of Williams' defense attorney Archie Weston, an astute justice on the Illinois Supreme Court remembered Williams as one of Weston's clients and convinced his fellow justices to rehear the case. *Id.*

71. *In re* Weston, 448 N.E.2d 236, 240 (Ill. 1982).

72. Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963). The Court concluded that "certain fundamental rights, safeguarded by the first eight amendments against federal action, are also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." *Id.* (quoting Grosjean v. Am. Press Co., 297 U.S. 233, 243-44 (1936)). The Court went on to say: "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Id.* (alteration in original) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).

73. Alabama v. Shelton, 535 U.S. 654, 658 (2002) (establishing the right to counsel for misdemeanors involving a suspended sentence); Argersinger v. Hamlin, 407 U.S. 25, 37-38 (1972) (establishing the right to counsel for misdemeanors involving possible imprisonment); *Gideon*, 372 U.S. at 344-45 (establishing the right to counsel for felony trials).

74. Strickland v. Washington, 466 U.S. 668, 686 (1984) (emphasis added) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

that obligation.[75] As a result, "[t]he poor person is often assigned a lawyer who lacks the knowledge, skills, or even the spirit to defend a case properly."[76]

In response to this "growing national crisis"[77] surrounding public defense systems, the American Bar Association (ABA) adopted the *Ten Principles of a Public Defense Delivery System* (*Principles*) as a guide for state officials seeking to develop or improve their public defense systems.[78] The *Principles* dictate that the state should make resources equally available to prosecuting attorneys and defense attorneys.[79] They also advise that the state should routinely review public defense attorneys to ensure quality and efficiency.[80]

In 2005, Montana became the first state to enact legislation specifically based on the *Principles*.[81] The Montana law creates a statewide public defender system that will provide services in all of the courts in the state.[82] It aims to ensure that qualified and competent attorneys are provided to those who cannot afford an attorney, and that sufficient public funding is made available to the new statewide system.[83] With Montana

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75. *See* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 N.Y.U. ANN. SURV. AM. L. 783, 784 (1997). According to The Constitution Project, nearly half of the states do not fund indigent defense systems primarily at the state level, but rather, leave the responsibility to counties. The Constitution Project, Right to Counsel Initiative, http://www.constitutionproject.org/righttocounsel/resources.cfm?categoryId=6 (follow hyperlink to footnote 1) (last visited Apr. 19, 2007) (noting that only twenty-two states fund indigent defense systems entirely at the state level, six states fund at least seventy-five percent of indigent defense costs, eighteen states rely primarily on county funding, and two states provide no funding at all at the state level). The group notes:

> [T]he states' abdication of their constitutional obligation has produced a myriad of indigent defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered. Documentation of the failure of states that do not fund at least 75 percent of indigent defense services grows with each passing day.

Id.

76. SCHECK ET AL., *supra* note 14, at 188; *see also* The Constitution Project, Right to Counsel Initiative, *supra* note 75 (giving examples of failures on the part of indigent defense systems in states where funding for those systems does not come primarily from the state).

77. Press Release, Am. Civil Liberties Union, ACLU Hails Montana's Public Defense Bill as Leading National Trend (June 8, 2005), *available at* http://www.aclu.org/crimjustice/indigent/10248prs20050608.html.

78. AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf [hereinafter ABA TEN PRINCIPLES].

79. *Id.* at 1, 3.

80. *Id.* at 3.

81. *See* Press Release, Am. Civil Liberties Union, *supra* note 77.

82. MONT. CODE ANN. § 47-1-102 (2005).

83. *Id.*

leading the way, there is "a clear trend among states to develop some sort of statewide oversight."[84]

These steps taken by the federal government and some states are significant improvements that can help reduce the rate of erroneous convictions and wrongful incarceration.[85] Although eliminating erroneous convictions in the first place should be the focus of policies in this area,[86] individuals who have been wrongfully incarcerated also deserve some attention and compensation from the state.[87]

B. Current Ways to Seek Compensation from the State for Wrongful Incarceration

Although state compensation for the erroneously convicted and wrongfully incarcerated individual is rare, there are currently three ways to seek indemnification for wrongful incarceration: tort suits against the government, private "moral obligation" bills, and general enabling statutes.[88]

1. Tort Suits Against the State

Fault-based governmental tort liability is one possible route to compensation.[89] However, the doctrine of sovereign immunity limits the chances of success of such actions.[90] This doctrine applies to both the state as an entity, as well as to most government officials, and provides that the government cannot be sued without its consent.[91] Some jurisdic-

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84. THE SPANGENBERG GROUP, STATEWIDE INDIGENT DEFENSE SYSTEMS: 2005 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf; *see also* Press Release, Am. Civil Liberties Union, *supra* note 77 ("Similar efforts to reform access to the court system are underway in Michigan, Louisiana and Virginia. In May, North Dakota passed a law creating a public defender commission to oversee indigent defense, which the ACLU says was due to the comprehensive reform effort in the neighboring state of Montana.").

85. *See infra* Part II.A.1-3.

86. *See* Causes of Wrongful Conviction, *supra* note 28 ("The lessons learned from these exonerations must be used to prevent all wrongful convictions . . . .").

87. *See* Bernhard, *supra* note 17, at 74 ("[S]ociety has a moral obligation to assist the wrongfully convicted . . . .").

88. Christine L. Zaremski, Comment, *The Compensation of Erroneously Convicted Individuals in Pennsylvania*, 43 DUQ. L. REV. 429, 433 (2005).

89. *Id.*

90. Bernhard, *supra* note 17, at 86-92; Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1099-1103 (1970). "[T]he concept of governmental immunity combined with the burdens placed upon litigants in these situations creates an almost impenetrable barrier for any possibility of success." Zaremski, *supra* note 88, at 433.

91. King, *supra* note 90, at 1099.

The concept of sovereign immunity is solidified in the Eleventh Amendment, and has been interpreted to bar suits brought by a citizen in federal court against (1) his or her own state, and (2) state officials acting within the scope of their authority. Suits against a state or its officials are generally barred in state courts due to a lack of juris-

tions have partially waived immunity,[92] allowing an erroneously convicted and incarcerated individual to sue the state or one of its agents on the basis of common law tort.[93]

Individuals who have attempted to seek redress in this manner have done so most commonly under the tort theories of false imprisonment and malicious prosecution.[94] However, the legal requirements placed on a plaintiff in these suits usually serve as an insurmountable barrier to relief.[95] Both of these theories require evidence that there was no probable cause for the defendant's actions.[96] False imprisonment requires evidence that the confinement was obtained through an unlawful arrest.[97] Therefore, if there was probable cause for the arrest, the defendant (the state agent or entity responsible for the harm) is relieved of liability.[98] A defendant is guilty of malicious prosecution only if "he initiates or procures the proceedings without probable cause."[99] A conviction, however, conclusively establishes probable cause unless the plaintiff can show it was obtained by fraud, perjury, or corruption.[100] Because of such lofty requirements, success is generally unlikely in tort suits like these.[101]

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diction being conferred to the judiciary over such suits. In the absence of an express waiver in the form of a legislative act, aspirations of recovery on the basis of tort-liability are basically fruitless.

Zaremski, *supra* note 88, at 435-46 (footnotes omitted).

92. King, *supra* note 90, at 1103. "Waiver of sovereign immunity has been accomplished through both judicial abrogation and legislative waiver." *Id.* Most commonly, waiver of immunity is accomplished through statutes that create a cause of action against the state or private bills. *See id.* n.100.

93. Bernhard, *supra* note 17, at 86-87. An additional remedy is found in the Federal Civil Rights Act of 1871. *Id.* at 86; *see* 42 U.S.C. § 1983 (2000). The Act "creates the statutory basis for federal actions against state and local police officers for the deprivation of civil rights." Bernhard, *supra* note 17, at 86. But, once again, this cause of action is only available "when a claimant can establish that the person or entity responsible for the harm was negligent." *Id.* Thus, a majority of the suits under the Federal Civil Rights Act tend to yield the same outcome as those brought in common law tort. King, *supra* note 90, at 1101-02.

94. *See* Bernhard, *supra* note 17, at 86; King, *supra* note 90, at 1101; Zaremski, *supra* note 88, at 433-34.

95. Zaremski, *supra* note 88, at 433.

96. *See* Bernhard, *supra* note 17, at 86; Zaremski, *supra* note 88, at 433-45.

97. *See* Zaremski, *supra* note 88, at 435.

98. Bernhard, *supra* note 17, at 86.

99. RESTATEMENT (SECOND) OF TORTS § 653 (1977).

100. *Id.* § 667.

101. King, *supra* note 90, at 1102-03; Zaremski, *supra* note 88, at 433.

2. Private Legislative Bills

Legislative "moral obligation" bills are another means for seeking state compensation.[102] These are acts directed at compensating specific individuals in cases where the individual cannot sustain a legal claim.[103] These acts allow state legislatures to recognize a debt the state should pay on the basis of equity and fairness, rather than as a matter of law.[104] Like tort suits, however, it is rare that this avenue to compensation results in success because these bills are applied infrequently and inconsistently.[105]

3. Compensation Statutes

The third and final way to get compensation from the state is through a statute enacted by that state's legislature.[106] These general compensation statutes allow someone who has been wrongfully incarcerated to pursue a claim against the state.[107] Twenty-one states, the District of Columbia, and the federal government have enacted compensation statutes.[108]

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102. Bernhard, *supra* note 17, at 93-94. An example of such a bill was enacted in Florida on December 9, 2005 to compensate Wilton Dedge. *See* 2005 Fla. Laws 354. Dedge spent twenty-two years in prison after being erroneously convicted of sexual battery and burglary. Carrie Johnson & Steve Bousquet, *State to Pay $2M for 22 Lost Years*, ST. PETERSBURG TIMES, Dec. 9, 2005, at 1B. The bill awarded Dedge two million dollars in compensation, acknowledging the damages he suffered due to the deprivation of his liberty and the legal bills incurred by his family in defending him. 2005 Fla. Laws 354. It is interesting to note that Dedge originally sought compensation through the courts, but the suit was dismissed on the basis of sovereign immunity. *Id.*

103. *See* Bernhard, *supra* note 17, at 93.

104. *Id.*

105. *See* AM. BAR ASS'N SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 4 (2005), *available at* http://www.abanet.org/crimjust/policy/my05108a.pdf [hereinafter ABA REPORT]; Bernhard, *supra* note 17, at 94.

106. Zaremski, *supra* note 88, at 433.

107. Johnston, *supra* note 25, at 419.

108. *See* 28 U.S.C. § 1495 (2000); 28 U.S.C.A. § 2513 (West Supp. 2006); ALA. CODE §§ 29-2-150 to -165 (LexisNexis 2003); CAL. PENAL CODE §§ 4900-4906 (West 2000 & Supp. 2006); D.C. CODE § 2-421 to -425 (2001); 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2006); IOWA CODE ANN. § 663A.1 (West 1998); LA. REV. STAT. ANN. § 15:572.8 (Supp. 2006); ME. REV. STAT. ANN. tit. 14, § 8241-8244 (1964); MD. CODE ANN. STATE FIN. & PROC. § 10-501 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 258D, §§ 1-9 (West Supp. 2006); MO. ANN. STAT. § 650.055 (West 2006); MONT. CODE ANN. § 53-1-214 (2005); N.H. REV. STAT. ANN. § 541-B:14(II) (LexisNexis 2006); N.J. STAT. ANN. §§ 52:4C-1 to -6 (West 2001); N.Y. CT. CL. ACT § 8-b (McKinney 1989); N.C. GEN. STAT. § 148-82 to -84 (2005); OHIO REV. CODE ANN. § 2743.48 to .49 (LexisNexis Supp. 2006); OKLA. STAT. ANN. tit. 51, § 154 (West Supp. 2006); TENN. CODE ANN. § 9-8-108(a)(7) (Supp. 2006); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 to .003 (Vernon 2005); VA. CODE ANN. §§ 8.01-195.10 to 195.12 (2000 & Supp. 2006); W. VA. CODE ANN. § 14-2-13a (LexisNexis Supp. 2006); WIS. STAT. ANN. § 775.05 (West 2001); *see also* ABA REPORT, *supra* note 105, at 5 (noting that "nearly two thirds of the states do not have indemnification statutes").

However, the statutes vary widely in conditions precedent to recovery and compensation levels.[109]

One major difference among the statutes is that some of them (nine of twenty-three) allow for recovery only if the individual has been convicted of a felony.[110] The ABA recommends that compensation be available to all individuals wrongfully imprisoned, regardless of the level of the conviction.[111] Any individual who has been erroneously convicted deserves recognition and compensation for the harm caused.[112]

Another important difference is that some statutes (five of twenty-three) require a pardon from the governor before an individual can file a claim.[113] This requirement is an attempt on the part of legislators to ensure that only the innocent are compensated.[114] The ABA does not recommend this provision, however, because the discretionary nature of gubernatorial pardons would most likely thwart the goal of uniform compensation.[115]

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109. *See* Zaremski, *supra* note 88, at 436-37.

110. *See* ALA. CODE § 29-2-156 (allowing for compensation in the case of an erroneous felony conviction or at least two years of pretrial incarceration on a felony charge); CAL. PENAL CODE § 4900; MASS. GEN. LAWS ANN. ch. 258D, § 1(C)(ii); MO. ANN. STAT. § 650.055(9)(1); MONT. CODE ANN. § 53-1-214(1); N.C. GEN. STAT. § 148-82; OHIO REV. CODE ANN. § 2743.48(A) (including aggravated felony); OKLA. STAT. ANN. tit. 51, § 154(B)(1); VA. CODE ANN. § 8.01-195.10(B).

111. ABA REPORT, *supra* note 105, at 6. The ABA report is important, and serves as a useful guideline for states drafting compensation statutes, because the ABA is a well-respected organization made up of legal professionals that provides "programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public." Am. Bar Ass'n, About the American Bar Association, http://www.abanet.org/about/ (last visited Apr. 19, 2007). Lawmakers have followed ABA recommendations in the past, as in the case of the ABA's Model Rules of Professional Conduct. *See* Am. Bar Ass'n, Ctr. For Prof'l Responsibility, Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Apr. 19, 2007) (noting that the ABA Model Rules of Professional Conduct "serve as models for the ethics rules of most states"). In addition, judges respect ABA recommendations and standards, and often cite to them in opinions. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 346 n.11 (1980) (citing the ABA Code of Professional Responsibility and Project on Standards for Criminal Justice in defining "conflict of interests"); *In re* Clyne, 581 A.2d 1118, 1125 n.11 (Del. 1990) (citing the ABA Standards for Imposing Lawyer Sanctions in considering an attorney's disbarment).

112. *See* ABA REPORT, *supra* note 105, at 6; *see also* Bernhard, *supra* note 17, at 93 ("Basic fairness requires compensation for all if there is compensation for some.").

113. *See* CAL. PENAL CODE § 4900; 705 ILL. COMP. STAT. ANN. 505/8(c); ME. REV. STAT. ANN. tit. 14, § 8241(4); MD. CODE ANN. STATE FIN. & PROC. § 10-501(b); N.C. GEN. STAT. § 148-82.

114. *See* Bernhard, *supra* note 17, at 103 ("There is no justifiable reason to condition relief upon the acquisition of a pardon. Careful drafting can accomplish the same goal—ensuring that only the innocent recover.").

115. ABA REPORT, *supra* note 105, at 6 (noting that gubernatorial pardons are "highly discretionary, and are often subject to political considerations."). *Id.*; *see also* Bernhard, *supra* note 17, at 102 ("Experience shows that the pardon requirement can be an insurmountable barrier to recovery for deserving claimants because executive clemency is en-

Furthermore, some compensation statutes (ten of twenty-three) prohibit compensation where the claimant entered a guilty plea or confessed to the offense for which he was erroneously convicted.[116] This requirement is imposed to ensure that the person seeking compensation did not do anything to bring about his own conviction.[117] However, the ABA does not recommend this provision either, because there are a number of logical reasons why individuals might falsely confess or plead guilty, including police coercion and the possibility of a lesser sentence.[118]

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tirely discretionary. No one has the right to a pardon. A person may have been completely exonerated and nonetheless unable to obtain a pardon." (footnotes omitted)).

116. *See* 28 U.S.C.A. § 2513(a)(2) (West Supp. 2006) (requiring that the claimant "did not by misconduct or neglect cause or bring about his own prosecution"); CAL. PENAL CODE § 4903 (requiring that the claimant "did not, by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of his arrest or conviction for the crime with which he was charged"); D.C. CODE § 2-422(2) (2001) (requiring that the claimant "did not, by his misconduct, cause or bring about his own prosecution"); IOWA CODE ANN. § 663A.1(b) (West 1998) (requiring that the claimant "did not plead guilty to the public offense charged, or to any lesser included offense"); N.J. STAT. ANN. § 52:4C-3(c) (West 2001) (requiring that the claimant "did not by his own conduct cause or bring about his conviction"); N.Y. CT. CL. ACT § 8-b(5)(d) (McKinney 1989) (requiring that the claimant "did not by his own conduct cause or bring about his conviction"); OHIO REV. CODE ANN. § 2743.48(A)(2) (LexisNexis Supp. 2006) (requiring that "[t]he individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved"); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(b) (West Supp. 2006) (requiring that "the individual did not plead guilty to the offense charged, or to any lesser included offense"); VA. CODE ANN. § 8.01-195.10(B) (Supp. 2006) (defining "wrongfully incarcerated" to include that "the person incarcerated must have entered a final plea of not guilty, or regardless of the plea, any person sentenced to death, or convicted of a Class 1 felony, a Class 2 felony, or any felony for which the maximum penalty is imprisonment for life"); W. VA. CODE ANN. § 14-2-13a(e) (LexisNexis Supp. 2006) (requiring that the claimant "did not by his own conduct cause or bring about his conviction").

117. Bernhard, *supra* note 16, at 717-18.

118. ABA REPORT, *supra* note 105, at 7 ("[C]onfessions per se should not preclude recovery since some of them may be coerced . . . . Similarly, guilty pleas should not automatically bar recovery, since innocent individuals may plead guilty in exchange for a shorter sentence, rather than face a much lengthier sentence if convicted."); *see also* Richard P. Conti, *The Psychology of False Confessions*, 2 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 14, 20-23 (1999) (describing different types of false confessions). In addition, false confessions are often a contributing cause of erroneous convictions. *See* Gross et al., *supra* note 1, at 544 ("In fifty-one of the 340 exonerations between 1989 and 2004 . . . the defendants confessed to crimes they had not committed."); ROB WARDEN, CTR. ON WRONGFUL CONVICTIONS, THE ROLE OF FALSE CONFESSIONS IN ILLINOIS WRONGFUL MURDER CONVICTIONS SINCE 1970 (2003), http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm ("Since 1970, 42 wrongful murder convictions have been documented in Illinois. Twenty-five of the convictions, or 59.5%, rested in whole or part on false confessions."); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 891 (2004) (analyzing 125 cases of "proven interrogation-induced false confessions").

The amount of compensation also varies greatly among statutes. Wisconsin's statute allows for a maximum award of $25,000,[119] while the North Carolina law provides a maximum award of $500,000.[120] Some statutes give greater compensation for a greater sentence received—for instance, the federal compensation statute awards $100,000 per year of incarceration for a wrongful death sentence, and $50,000 per year for any other sentence.[121] Montana's compensation statute is unique in that it offers no monetary compensation at all.[122] Instead, it provides only for educational aid from the state.[123]

While many experts on compensation feel that most of the statutes currently in existence "need modernization,"[124] the fact that these states have enacted such legislation at all is an important first step toward justice for the wrongfully incarcerated.[125] Regardless of the statutory differences, the common theme evinced by the existence of these statutes is that legislators in these states recognize the state's responsibility to compensate the wrongfully incarcerated.[126] Next, it is necessary to convince legislatures in states without compensation statutes that such laws should be enacted to protect the innocent.[127] One possible way to convince legislators that compensation is the state's responsibility is by using the economic theory of the least cost avoider; a state legislature may be willing to accept the premise that where both parties are innocent, the party that

119. WIS. STAT. ANN. § 775.05(4) (West 2001).

120. N.C. GEN. STAT. § 148-84 (2005).

121. 28 U.S.C.A. § 2513(e) (West Supp. 2006). The rationale for raising the limit of compensation for a death sentence seems to be to offer greater compensation for greater harm, as the Act was amended in 2004 to raise the amount of compensation offered, and to include this distinction between sentences. *See generally id.*

122. MONT. CODE ANN. § 53-1-214 (2005).

123. *Id.* Unfortunately, Professor Bernhard notes that the reasoning for this type of statute may be to give the appearance that the state is offering support to the wrongfully incarcerated without having to actually offer any substantive support. Bernhard, *supra* note 16, at 706.

124. ABA REPORT, *supra* note 105, at 5; *see also* Bernhard, *supra* note 16, at 704-05 (noting that since the publication of her 1999 article when she found that most compensation statutes "offered compensation so skimpy as to be insulting," the modernization of these statutes that she expected has not occurred).

125. *See* Bernhard, *supra* note 17, at 93 (arguing that the state has a moral obligation to compensate those wrongfully incarcerated, and that by fulfilling that obligation, states satisfy "[b]asic fairness").

126. *See* Zaremski, *supra* note 88, at 443 ("[E]ach of these statutes represents a recognition of the hardships faced by a wrongfully imprisoned individual, as well as an attempt to redress egregious wrongs committed.").

127. *See* Bernhard, *supra* note 16, at 707 (understanding the need to convince state legislators that these statutes should be enacted, Professor Bernhard aims "to motivate state legislators to enact responsible, practical compensation statutes" through her articles).

suffers the greater harm should benefit from the party who has the greater ability to prevent that harm.[128]

C. The Least Cost Avoider Theory Can Advance the Argument in Favor of State Compensation

The theory of the least cost avoider is an economics-based theory most commonly applied in cases that are largely value neutral—where neither party engaged in wrongful conduct nor committed an inherently bad act.[129] It is a simple and rational theory stating that whichever party to a dispute was in the best position to avoid the accident is the party who should be held liable.[130] "The logic behind this theory is that liability will encourage the least cost avoider to prevent the accident."[131]

An example involving a misunderstanding over a purchase order is illustrative.[132] In *Extrusion Painting, Inc., v. Awnings Unlimited, Inc.*, the buyer company wrote the number of feet of the product it wished to order in the quantity field of the order form, rather than the number of units it wished to order.[133] When the buyer received much more of the product than expected, it did not want to pay for the extra, and the seller company did not want to take the extra product back.[134] The court held that the buyer company, not the seller, must be held liable because it was best able to avoid the accident in the situation; "it could simply have exercised greater care in drafting its purchase order."[135] Although neither party engaged in any wrongful conduct, avoidance of the accident was most easily within the buyer's, as opposed to the seller's, control, so the buyer is liable under the least cost avoider theory.[136]

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128. *See infra* Part I.C. (discussing the least cost avoider theory and its underlying rationale).

129. *See, e.g.*, Extrusion Painting, Inc. v. Awnings Unlimited, Inc., 40 F. App'x 97, 101-02 (6th Cir. 2002) (applying the least cost avoider theory to a situation in which neither party committed a wrongful act). *See generally* H. Marlow Green, Note, *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT'L L.J. 541, 581 (1997) ("The least-cost avoider consideration was introduced in scholarly efforts to develop an instrumental framework to replace or to supplement negligence's case by case analysis.").

130. *See* Jackson v. PKM Corp., 422 N.W.2d 657, 665 (Mich. 1988).

131. *Id.*; *see also* David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Measures and Precautions*, 36 ARIZ. L. REV. 357, 365 (1994) ("If the imposition of liability on a defendant or denial of recovery of damages by a plaintiff creates incentives for the respective parties to take precautions, the law governing tort liability must be designed to impose liability on the party best able to minimize costs.").

132. *Extrusion Painting*, 40 F. App'x at 98-99.

133. *Id.*

134. *Id.* at 99.

135. *Id.* at 101-02.

136. *Id.*

The underlying goal of the theory is the application of preventive measures in the future; "'[p]lacing liability with the least-cost avoider increases the incentive for that party to adopt preventive measures and ensures that such measures would have the greatest marginal effect on preventing the loss.'"[137]

II. THE STATE MUST ACT TO PREVENT ERRONEOUS CONVICTIONS AND COMPENSATE THE WRONGFULLY INCARCERATED

As discussed above, there are measures the state can take to stop erroneous convictions and wrongful incarceration in the first place.[138] Until that happens, however, the state must deal with the reality that many individuals have suffered the injustice of wrongful incarceration.[139]

A. The State Can Reduce the Likelihood of the Most Common Causes of Erroneous Conviction

There are numerous preventive measures the state can take to combat the most common causes of erroneous conviction.[140] Some states have already taken these measures, and other states should be encouraged to do so.[141]

1. New Eyewitness Identification Procedures

Psychological research has conclusively shown that employing double-blind lineup procedures reduces the likelihood of mistaken eyewitness identification.[142] This is something that is clearly within the state's control.[143] In fact, it would be easy for states to adopt these practices, as implementation is "extremely efficient," and can be done at "minimal cost."[144]

The Department of Justice notes in its *Eyewitness Evidence Guide* that "[s]cientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual

137. Conoco, Inc. v. J.M. Huber Corp., 289 F.3d 819, 826 n.6 (Fed. Cir. 2002) (quoting Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat'l Bank of Wash., D.C., 5 F.3d 554, 557 (D.C. Cir. 1993) (Silberman, J., concurring)).

138. *See supra* Part I.A.1-3.

139. *See* Bernhard, *supra* note 17, at 74 ("Until recently, the assertion that innocent people are routinely and frequently convicted was supported only by anecdotal witness interviews and historical research. . . . Today recent developments in the forensic sciences—particularly in DNA profiling—prove, beyond a shadow of a doubt, that mistakes occur and that the innocent are convicted everywhere, in sizable numbers . . . . Certainty compels action.").

140. *See supra* Part I.A.1-3.

141. *See supra* Part I.A.1-3.

142. Feige, *supra* note 45, at 28-29, 31.

143. *See generally* Farmer Memorandum, *supra* note 50, at 1-3.

144. Klobuchar et al., *supra* note 44, at 409.

lineup members or photographs are shown to the witness sequentially . . . rather than simultaneously."[145] States must be encouraged to adopt these simple procedures that could have a profound impact on reducing the most common cause of erroneous conviction.[146]

2. Increased State Regulation of Crime Labs

Crime lab error, both innocent and intentional, is also contributing to our justice system's failures.[147] Scientific evidence provides new ways of establishing guilt or innocence, and its presence and prominence in the courtroom has increased in the last quarter century.[148] Such evidence, often viewed as foolproof,[149] inspires confidence on the part of judges, juries, lawyers, and the public alike that the decision reached at the end of a trial is the correct one.[150] However, recent scandals have brought to light the fact that neither science, nor the scientist, is infallible.[151] Now

145. NIJ EYEWITNESS EVIDENCE GUIDE, *supra* note 39, at 9. Although the Department of Justice has not stated that sequential lineups are preferable to simultaneous ones, the agency does identify lineup procedures as an "area[] of potential change." *Id.* at 8-9.

146. *See* Melissa Dittman, *Accuracy and the Accused*, MONITOR ON PSYCHOL., July/Aug. 2004, at 74 (stating that Professor Gary Wells recommends that police use a sequential, rather than simultaneous lineup because his research indicates the procedure reduces the likelihood of a witness confusing different suspects' faces).

147. *See supra* Part I.A.2.

148. *See* CONNORS ET AL., *supra* note 2, at iii.

149. *See* Harvey A. Silvergate et al., *Forensic Evidence, the 'Infallible' Death Penalty, and the Green Beret Murder Case*, BOSTON PHOENIX, Oct. 10, 2003 (reporting that Massachusetts Governor Mitt Romney is seeking to reinstate the death penalty in the state "based on 'incontrovertible' scientific evidence that, as he says, will 'guarantee that we've identified the guilty,'" and relating the story of Army Captain Dr. Jeffrey MacDonald, one man erroneously convicted on the basis of such scientific evidence).

150. *See id.*; *CNN Presents Classroom Edition: Reasonable Doubt: Can Crime Labs Be Trusted?* (CNN television broadcast Mar. 13, 2006) (program overview available at http://www.cnn.com/2005/EDUCATION/10/19/cnnpce.reasonable.doubt/index.html) (noting that forensic evidence is often "decisive" in criminal court because it "can turn a questionable case into a slam-dunk conviction"). This perception of infallibility makes the crime lab problem different from other failings of the criminal justice system. "The far-reaching crime lab scandals roiling the courts are unlike other flaws in the criminal justice system . . . because for years the reputation of the labs had been unquestioned." Possley, Mills & McRoberts, *supra* note 60.

151. *See* Possley, Mills & McRoberts, *supra* note 60 ("Revelations of shoddy work and poorly run facilities have shaken the criminal justice system like never before, raising doubts about the reputation of labs as unbiased advocates for scientific truth."); *see also* Beth Daley, *Foolproof Forensics?: Even Science May Not Make a Death Sentence Infallible*, BOSTON GLOBE, June 8, 2004, at E1 (quoting a criminology professor as saying "'[t]he premise is interesting that scientific evidence is more reliable than other evidence. . . . It would be nice if it were true, [but i]n the cases of wrongful conviction that we know about, scientific evidence is a very significant factor.'" (first omission in original)).

that the problem has been recognized, it is in the hands of the states to resolve it.[152]

There are measures a state can take to reduce the incidence of crime lab error.[153] First and foremost, crime labs should be regulated in the same way as medical labs.[154] Medical labs are closely regulated at both state and federal levels, and inspectors can revoke or suspend a lab's license for misconduct.[155] "No such rules apply to crime labs."[156] Regulation of crime labs would serve to ensure the accuracy of scientific evidence and decrease the likelihood of professional malpractice.[157]

In many states, state law enforcement agencies operate crime laboratories.[158] Another recommendation designed to reduce crime lab error is that the state remove the administration of crime labs from the jurisdiction of police agencies.[159] Creating a separate agency to administer crime labs would ensure that someone is fighting for the best interests of the lab,[160] ensure that lab employees work with and for both the prosecution

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152. *See* Guillen & Nalder, *supra* note 60 (noting that proposed solutions to crime lab problems "fall into three categories: regulation, administration and resources," all things within state control); *see also* Crime Lab Fact Sheet, *supra* note 55 (listing the "necessary components [that states must implement to] ensur[e] crime lab quality").

153. *See generally* Guillen & Nalder, *supra* note 60; Crime Lab Fact Sheet, *supra* note 55; The Innocence Project, Fix the System: Crime Lab Oversight, http://www.innocenceproject.org/fix/Crime-Lab-Oversight.php (last visited Apr. 19, 2007).

154. *See* Guillen & Nalder, *supra* note 60; *see also* Crime Lab Fact Sheet, *supra* note 55 (recommending that states institute a system of accreditation and licensure and certification requirements for lab personnel).

155. Guillen & Nalder, *supra* note 60.

156. *Id.*

157. *See* TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4 (Vernon Supp. 2006) (requiring labs to report professional misconduct, and requiring the Forensic Science Commission to investigate all allegations of misconduct); *see also* NIJ FORENSIC SCIENCE REPORT, *supra* note 62, at 4 (noting that "publication of best practices guides [by the Forensic Science Commission] can improve the practice and acceptance of the forensic disciplines"); President's DNA Initiative, About the Initiative, *supra* note 16 (providing funding for forensic laboratories "to improve the use of DNA in the criminal justice system").

158. *See, e.g.*, Mass. State Police Crime Lab, Crime Lab Overview, http://www.mass.gov/?pageID=eopssubtopic&L=4&L0=Home&L1=Law+Enforcement+%26+Criminal+Justice&L2=Criminal+Investigations&L3=State+Police+Crime+Lab&sid=Eeops (follow "Crime Lab Overview" hyperlink) (last visited Apr. 19, 2007) (indicating the state crime lab is operated by the state police); *see also* Guillen & Nalder, *supra* note 60 ("The Washington State Patrol has operated the crime-laboratory system in this state for two decades.").

159. Guillen & Nalder, *supra* note 60; Forensic Science Misconduct, *supra* note 56 ("In some instances, labs or their personnel are too closely tied to police and prosecutors, and therefore not impartial.").

160. *See, e.g.*, Guillen & Nalder, *supra* note 60 ("The [Washington State Patrol] has been more interested in new patrol cars than in modern microscopes, and has not fought vigorously for money and facilities to support the crime lab.").

and the defense in each case,[161] and allow experts of different forensic disciplines to share information.[162]

These are just two examples of ways the state can combat crime lab error in the courts.[163] Although implementing these recommendations would cost the state some money, "it wouldn't be much."[164] A *Seattle Times* article reports that implementing these suggested improvements in the state of Washington would cost twenty-four million dollars, only three-tenths of one percent of that state's current budget.[165] Again, it seems there is little reason for states not to make relatively simple changes that could reduce the number of erroneous convictions.[166]

3. Effective Indigent Defense Systems

Ineffective defense counsel often contributes to erroneous convictions.[167] However, states can, and therefore must, remedy their inadequate indigent defense systems.[168] Both the U.S. Department of Justice and the ABA have promulgated standards for the creation and maintenance of quality indigent defense systems.[169]

One important step in the improvement of defense systems is the creation of local standards. The Department of Justice has noted that

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161. *Id.* (recommending that labs be removed from the control of the state police, and saying that "[t]he change also would make the lab system independent of law enforcement and, thus, equally answerable to prosecutors and defense attorneys").

162. *Id.* Forensic scientists themselves also support the sharing of information between agencies. *See* NIJ FORENSIC SCIENCE REPORT, *supra* note 62, at 28-29. Those in the forensic community also report a lack of sufficient resources available to crime labs today. *See id.* at 5-8. Particularly, staff shortages, equipment shortages, and a lack of necessary training programs are cited as the top concerns that must be addressed. *Id.* at 5-7.

163. *See* Crime Lab Fact Sheet, *supra* note 55 (listing other recommendations designed to reduce the likelihood of crime lab error).

164. Guillen & Nalder, *supra* note 60.

165. *Id.* ("[A]s a tax, it would mean only $4.58 from each state resident, much of it a one-time expense spread over 25 years. The more likely annual cost, per state resident, would be less than $1.50.").

166. *See generally id.* (noting the relatively low cost and beneficial effects of crime lab reform).

167. *See supra* Part I.A.3.

168. *See generally* MONT. CODE ANN. § 47-1-102 (2005) (attempting to fix the state's deficient public defender system).

169. *See generally* Mary Lou Leary & Nancy E. Gist, *Foreword* to 1 INST. FOR LAW & JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (2000), *available at* http://www.ojp.usdoj.gov/indigentdefense/compendium/pdftxt/vol1.pdf. It should be noted that although the U.S. Department of Justice published this document and links to it on their website, it was not actually prepared by the Department, but "supported by a contract with the Bureau of Justice Assistance, United States Department of Justice. [Thus], [t]he opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice." *Id.*; *see* STANDARDS FOR CRIMINAL JUSTICE § 5-1.1 (1992).

"[i]mplementation of standards governing all aspects of indigent defense systems can enhance the fairness and credibility of our justice system."[170] Clear and definitive standards would serve to inform both attorneys and the public as to what constitutes an adequate legal defense.[171]

Also, it is critical that public defense offices receive adequate resources and funds.[172] It is well recognized that parity of funding, resources, and workloads between defenders and prosecutors would increase the fairness of our criminal justice system.[173] However, only "[a] small minority of jurisdictions in the United States have created and funded good public defender offices . . . which secure capable lawyers and provide . . . adequate compensation . . . and investigative and expert assistance."[174] Access to resources must be improved,[175] funding must be raised,[176] and

170. Leary & Gist, *supra* note 169; *see also* SCHECK ET AL., *supra* note 14, at 190 ("To ensure high-quality defense services for the poor, performance standards should be enforced in every jurisdiction, with sanctions for individual lawyers or public defender organizations that fail to meet them.").

171. *See* Leary & Gist, *supra* note 169.

172. *See* STANDARDS FOR CRIMINAL JUSTICE § 5-2.4 (1992) ("Assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation."); ABA TEN PRINCIPLES, *supra* note 78, at 3 (listing examples of necessary resources: "benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts").

173. *See* ABA TEN PRINCIPLES, *supra* note 78, at 3; Scott Wallace, *Parity: The Failsafe Standard*, *in* 1 INST. FOR LAW & JUSTICE, *supra* note 169, at 13, 13-17.

174. Bright, *supra* note 75, at 784.

175. *See* Adele Bernhard, *Trends in Defense Service Standards*, *in* 1 INST. FOR LAW & JUSTICE, *supra* note 169, at 18, 19 (pointing out that "lack of resources is the primary cause of inadequate criminal defense services").

176. *See* SCHECK ET AL., *supra* note 14, at 188 (noting that some states impose a maximum fee that an attorney may receive for defending non-capital cases, and contending that in some places the maximum is so low that "[a] kid selling sodas on a summer weekend at Virginia Beach would make more money"). For a list of maximum compensation rates, see THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 3-12 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/compensationratesnoncapital2002-narrative.pdf; *see also* Bill Freehling, *Poor Defendants Get Shortchanged: Public Defender Salaries Low, Caseloads Heavy*, FREE LANCE-STAR, Sept. 3, 2006, at A1 (looking at pay differences between prosecutors and defenders in Virginia, and stating: "Many local governments pay prosecutors a supplement, but state law prevents public defenders from receiving the same, [so that a] recent study showed that there is an average pay difference of about 24 percent between public defenders and prosecutors in jurisdictions with a local supplement . . . .").

workloads must be kept to a reasonable level[177] in order for public defenders to fulfill their obligations to the community's poor.[178]

Although these types of reforms may be costly, they are imperative to our legal system.[179] States have a constitutional obligation to provide quality defense counsel to those who cannot afford it.[180] Justice demands that indigent defense systems live up to the responsibilities outlined by the Supreme Court, and states cannot avoid this duty.[181]

All the reforms suggested with regard to eyewitness identification procedures, crime labs, and defense systems can help reduce the rate of erroneous conviction by fighting the most common causes of error.[182] However, there are still citizens who have suffered the injustice of wrongful incarceration, and the state must take responsibility for compensating those individuals.[183]

B. The State Must Enact Compensation Statutes

Because tort suits and moral obligation bills are ineffective remedies, state legislatures must pass compensation statutes.[184] Such statutes are the best way to compensate individuals wrongfully incarcerated, because they offer a uniform (at least within each state), practical, and popular approach to the problem.[185]

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177. *See* ABA TEN PRINCIPLES, *supra* note 78, at 2 ("Defense counsel's workload is controlled to permit the rendering of quality representation.").

178. *See infra* note 179; The Innocence Project, Understand the Causes: Bad Lawyering, http://www.innocenceproject.org/understand/Bad-Lawyering.php (last visited Apr. 19, 2007) ("The resources of the justice system are often stacked against poor defendants. Matters only become worse when a person is represented by an ineffective, incompetent or overburdened defense lawyer.").

179. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

180. *Id.*; *See also* Mary Lou Leary & Nancy E. Gist, *Foreword* to 2 INST. FOR LAW & JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (2000), *available at* http://www.ojp.usdoj.gov/indigentdefense/compendium/pdftxt/vol2.pdf (quoting Attorney General Janet Reno as saying "this effort is essential if our nation is to fulfill our obligation under *Gideon v. Wainwright* to provide every criminal defendant charged with a serious crime with competent counsel").

181. *See* Bright, *supra* note 75, at 783 ("Attorney General Janet Reno recently observed that if justice is available only to those who can pay for a lawyer, 'that's not justice, and that does not give people confidence in the justice system.'").

182. *See supra* notes 142, 153, 170-72 and accompanying text.

183. *See* Bernhard, *supra* note 17, at 73.

184. *See* Bernhard, *supra* note 16, at 707-12.

185. *Id.*

1. Tort Suits Are Ineffective

As previously noted, the few tortious causes of action that offer the possibility of relief require a plaintiff to meet nearly impossible legal requirements.[186] In essence, an erroneously convicted individual can only bring a claim against the state or an individual if there is clear evidence of fault or negligence.[187] Liability under the available causes of action thus depends on finding an individual who was at fault.[188] However, in typical cases of erroneous conviction, "no single person can be described as having been negligent or at fault."[189]

Because the legal burdens on the plaintiff are so high in suits like these, failure is practically a foregone conclusion.[190] As a result, "[l]itigation based on governmental tort liability has only been successful in a limited handful of situations."[191] Thus, tort suits are an ineffective and inadequate remedy in almost all cases of erroneous conviction.[192]

2. Moral Obligation Bills Are Inadequate

The discretionary nature of moral obligation bills prevents them from being an effective means of compensation. As Professor Bernhard said, "[w]ere 'moral obligation' bills universally available and uniformly applied, there would be no need to pass general indemnification legislation. That is not the case."[193] In reality, private legislative bills offer compensation on an inconsistent basis,[194] and only to those lucky individuals whose cases garner the sympathy of some influential person.[195]

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186. *See supra* notes 94-101 and accompanying text.

187. Bernhard, *supra* note 17, at 86 (noting that the common law torts of false imprisonment and malicious prosecution, and the claim of legal malpractice, are available "only when a claimant can establish that the person or entity responsible for the harm was negligent"); *see also* Zaremski, *supra* note 88, at 433-35.

188. *See* Bernhard, *supra* note 17, at 86; Zaremski, *supra* note 88, at 434-35.

189. Bernhard, *supra* note 17, at 86.

190. *See id.* ("[O]nly those convicted in jurisdictions with an indemnification statute have a remedy at law for the harm suffered. Neither the common law torts of wrongful arrest nor malicious prosecution, nor the Civil Rights Act of 1871 provide redress." (footnotes omitted)); Zaremski, *supra* note 88, at 433 (stating that the burdens placed on claimants "greatly reduce any chance of success in obtaining compensation for their erroneous imprisonment").

191. Zaremski, *supra* note 88, at 433.

192. Bernhard, *supra* note 17, at 86.

193. *Id.* at 94.

194. *See* ABA REPORT, *supra* note 105, at 4 (referring to recovery under private bills as a "lottery").

195. *See* Bernhard, *supra* note 17, at 94 ("[T]he success of any such private bill depends more on the political connections of the person introducing the bill and the political climate of the day than on the merits of the case."). Professor Bernhard also relates the case of Edward Honaker, who did receive compensation through a legislative bill. *Id.* at 95. Mr. Honaker was fortunate enough to be assisted by an attorney who also happened to be

Even if an individual is lucky enough to catch the attention of the state legislature, this is a "lengthy" and "uncertain" process.[196] An individual wishing to have a bill passed on his behalf "must find a state representative to draft such legislation, introduce it, ensure its passage, and gain the governor's signature."[197] For these reasons, private legislative bills are not an easy or effective remedy for those wrongfully incarcerated.[198]

3. Compensation Statutes Are the Best Solution

Compensation statutes are the easiest and most effective way to offer compensation to those wrongfully incarcerated, despite the risk of undercompensation.[199] Professor Bernhard has stated:

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friends with one of the state legislators. *Id.* Professor Bernhard states that "[w]ithout [his] well-connected advocate, no bill would have passed and no money would have been forthcoming." *Id.*

196. *Id.* at 94.

197. ABA REPORT, *supra* note 105, at 4.

198. Bernhard, *supra* note 17, at 94 ("Ultimately, the private bill remedy is an inadequate solution for individuals who have been wrongfully convicted.").

199. Bernhard, *supra* note 16, at 708; Johnston, *supra* note 25, at 420; Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 704 (2002). Regarding the problem of undercompensation, it should be noted that the amounts awarded for claims brought under indemnification statutes are far less than the amounts generally awarded in false imprisonment actions against private parties:

> The minimal statutory sums available to the unjustly convicted stand in sharp contrast with the amounts potentially available to victims of the similar common law tort of false imprisonment. A federal court in Maryland awarded $850,000 to a young man who had been unjustly held for ten minutes in an Eddie Bauer store while a store security officer falsely accused him of shoplifting. If this young man had been wrongfully convicted of a federal crime and imprisoned, he would have been entitled to a maximum award of $5,000.

Id. at 705-06 (footnotes omitted). Although the federal compensation statute has been amended to offer a higher level of compensation ($50,000 per year of incarceration for any sentence but death), *see* 28 U.S.C.A. § 2513(e) (West Supp. 2006), Lopez's point that private false imprisonment awards are vastly greater than those offered by compensation statutes still stands. Perhaps even more so than the federal statute, some state compensation statutes "cap the amount of recovery at artificially low levels." ABA REPORT, *supra* note 105, at 3. Even some state officials recognize that compensation statutes do not offer enough money to those whose freedom has been taken from them. *See, e.g.*, John H. White, *Cheers, Tears End Men's 18-yr. Prison Ordeal*, CHI. SUN-TIMES, July 3, 1996, at 14 (quoting a state attorney as saying the $35,000 maximum compensation offered by the state is "'clearly inadequate'" to recompense four men who each spent eighteen years in prison).

Another major issue related to undercompensation is the lack of availability of reintegration programs to the erroneously convicted: "Most of those who are exonerated are not even entitled to the services given to people who are guilty of the crimes for which they were convicted." ABA REPORT, *supra* note 105, at 3. One reporter dubs this "the ultimate indignity," finding it unbelievable that "[a]fter they get out, most inmates are on parole or supervised release and have access to counseling, job services and other oppor-

> The necessary law is simple, clear and effective. The remedy is not expensive and does not require creation of new bureaucratic agencies. . . . Most importantly, a legislative remedy is the only reliable and fair response to the inevitable mistakes that occur as a byproduct of the operation of a criminal justice system as large as ours.[200]

In addition, compensation statutes are generally accepted among lawyers,[201] courts,[202] and the public.[203] "Popular support is largely responsible for the few new statues enacted in [recent] years."[204] It is clear then, that a general statute is the preferable means of compensation.

Accordingly, any state that does not have such a statute should enact one that complies with the guidelines offered by the ABA.[205] Any state that does have a compensation statute should work to improve the stat-

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tunities to improve themselves. . . . But in most states, the wrongly convicted get nothing." Ove, *supra* note 1.

In addition, the Life After Exoneration Program lists a number of other problems faced by those erroneously convicted and incarcerated:

> Exonerees face a host of legal problems that get in the way of rebuilding a life on the outside. Even after they win release on grounds of innocence, there is no automatic expungement of the wrongful conviction from the exoneree's criminal record. As a result, exonerees applying for jobs or housing are often disqualified after a background check reveals their past conviction.
>
> A [Life After Exoneration Program] survey of exonerees nationwide showed that nearly all emerge from prison with no assets, many having spent their life savings (and that of their family) on the legal battle to win their freedom. [One third of those surveyed] lost custody of a child during (and because of) wrongful conviction. As a result, many exonerees need on-going legal assistance with matters such as bankruptcy and child custody.

Life After Exoneration Program, Legal Issues, http://www.exonerated.org/legal.php (last visited Apr. 19, 2007).

200. Bernhard, *supra* note 17, at 73-74.

201. *See generally* ABA REPORT, *supra* note 105, at 1 ("The [ABA] urges federal, state, local and territorial jurisdictions to enact statutes to adequately compensate persons who have been convicted and incarcerated for crimes they did not commit.").

202. *See* Bernhard, *supra* note 16, at 726, 738 (examining recent cases in which courts have granted compensation based on "creative strategies," and asserting that "[i]n the absence of . . . compensation statutes . . . courts will not wait for the legislature to act").

203. *See id.* at 711 (noting that "the public overwhelmingly supports providing assistance to those who have been harmed by the criminal justice system through no fault of their own"); *see also* Ove, *supra* note 1; Editorial, *What Price for 18 Years?*, MILWAUKEE J. SENTINEL, Sept. 18, 2003, at 18A.

204. Bernhard, *supra* note 16, at 712.

205. *See generally* Bernhard, *supra* note 17, at 101-10 (recommending some of the reforms listed in the ABA report, such as not precluding claims where a guilty plea or false confession was involved, and eliminating the pardon requirement). The ABA report should serve as a guideline for enacting compensation statutes because the opinion of the ABA is respected in the legal community, and states have adopted their recommendations in the past. *See supra* note 111.

ute so that it, too, complies with the ABA recommendations.[206] State compliance with these guidelines will ensure that those wrongfully incarcerated are given a fair chance to seek compensation from the state.[207] A review of the most common arguments in the state compensation debate will reveal the reasons why some states have not yet enacted compensation statutes, and why others have.

C. Common Arguments on Both Sides of the State Compensation Debate

The debate surrounding state compensation of the wrongfully incarcerated began centuries ago.[208] Consequently, there are a number of convincing and well-formulated arguments on both sides of the discussion.

1. Practical Arguments

One practical argument against enacting compensation legislation is that the cost of implementing such legislation would be too great.[209] The fear is that the number of exonerations will continue to rise, and the state will be liable for paying out more than it can afford to those bringing claims under the statute.[210]

A second practical argument is that individuals who do not deserve to be compensated will receive money at the state's expense.[211] The main fear embodied in this argument is that individuals who have contributed to their own convictions should not be able to recover from the state.[212]

Both of these seemingly legitimate concerns are unfounded.[213] With regard to cost, "a compensation scheme need not bankrupt a state."[214] Among states with indemnification statutes, New York has one of the most generous.[215] Even so, the state budget has not been threatened—of

206. ABA REPORT, *supra* note 105, at 5. In particular, states should not "limit recovery to felony convictions." *Id.* at 6. States should codify the principle that "[a] false confession or guilty plea does not automatically bar recovery." *Id.* at 7.

207. *See* Bernhard, *supra* note 16, at 708-09 (explaining that compensation statutes are the most rational and easy way to ensure uniform and fair compensation).

208. Zaremksi, *supra* note 88, at 430 ("Evidence indicates that the movement for governmental compensation of wrongfully imprisoned individuals began to take shape in late eighteenth century France.").

209. Bernhard, *supra* note 16, at 713.

210. *Id.*

211. *Id.*

212. *See id.* at 717 ("[I]t is legitimate to guard against recovery by individuals whose behavior impeded the 'truth-seeking' function of a police investigation, just as the doctrine of comparative negligence works to limit damage awards for those who are partially responsible for their own injury.").

213. *Id.* at 713.

214. Gary Young, *No Easy Windfalls for Exonerated: Wrongfully Imprisoned Have Uphill Fight*, NAT'L L.J., Dec. 16, 2002, at A1.

215. *See* Lopez, *supra* note 199, at 720; Young, *supra* note 214.

214 claims filed since the statute was enacted in 1984, only 31 claimants have recovered, and the average award per case is only $457,000.[216]

The undeserving claimant theory is also without merit.[217] Legislatures can carefully draft a statute to prevent unwarranted claims from being considered.[218] For instance, including simple pleading requirements, such as having to prove that a claimant was convicted, sentenced, and imprisoned for a period of time, would reduce the number of claims.[219] In addition, requiring a claimant to prove that his conviction was overturned based on actual innocence, and clearly defining "actual innocence," will prevent those whose convictions were overturned on procedural grounds from recovering.[220]

In addition, it must be remembered that a compensation statute does not call for immediate and unquestioned state compensation; instead, such a statute merely creates a cause of action.[221] Actions brought under an indemnification statute are tried before judges who determine whether compensation should be awarded based on the merits of the case.[222] Judges are entrusted with many serious and influential tasks in our society; it follows that they can also determine which individuals are deserving of state funds.[223] In addition to these practical arguments, there are also important theoretical arguments regarding a state's responsibility

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216. Bernhard, *supra* note 16, at 715-16 (twelve claims prevailed in court, and nineteen settled out of court).

217. *Id.* at 713.

218. *See* Bernhard, *supra* note 17, at 97, 99-100 (analyzing crime victims' compensation statutes, "which were enacted to assist a similarly situated class of innocent injured people" as indemnification statutes, and noting that those "bills were carefully drafted to respond to [the] concerns" that such a system would be "unmanageable," so that as a result, the program has been a "success").

219. *See id.* at 101-02 (noting that this simple requirement is one way legislators aim to "ensur[e] that the truly innocent are compensated while simultaneously limiting the proliferation of non-meritorious claims.").

220. *See* ABA REPORT, *supra* note 105, at 6 ("Claimants must be able to show that their convictions were vacated or pardoned on a ground demonstrating actual innocence, which for this purpose requires that the claimant did not commit the crime, or the crime did not occur.").

221. *See, e.g.*, OHIO REV. CODE ANN. § 2743.48(D) (LexisNexis Supp. 2006) ("Notwithstanding any provisions of this chapter to the contrary, a wrongfully imprisoned individual has and may file a civil action against the state, in the court of claims, to recover a sum of money as described in this section, because of the individual's wrongful imprisonment. The court of claims shall have exclusive, original jurisdiction over such a civil action.").

222. *See, e.g., id.*; *see also* Bernhard, *supra* note 17, at 104.

223. *See* Bernhard, *supra* note 17, at 104-05 ("[T]here is a wealth of judicial experience applying [the New York statute]. The decisions illustrate that the New York Court of Claims has had no difficulty distinguishing—on the pleadings—between those petitions appropriate for determination on the merits and those which fail to state a claim.").

to compensate in the typical case of erroneous conviction where there has been no inherently wrongful act.

2. Theoretical Arguments

One argument against state compensation is that "the state in administering justice . . . can not be held accountable in law for the burdens which particular individuals may have to suffer."[224] The state has no legal obligation to compensate.[225] The reasoning behind this argument is that by choosing to live in a particular jurisdiction, a citizen assumes the risk that he may be required to bear burdens others are not asked to bear, such as erroneous conviction.[226]

A second argument is that there can be "no liability without fault."[227] The rationale behind this approach is that if the actor has no malicious intent and the injury was not foreseeable, then there is no fault,[228] and it is unfair to hold a faultless party responsible for accidental harm.[229] For these reasons, when the state obtained a conviction through normal legal channels, and did not intentionally incarcerate an innocent individual, it should not be held financially responsible for the error.

These arguments are most commonly rebutted with two theories supporting the idea that the state should allow individuals to seek compensation for wrongful incarceration—a takings argument and a strict liability argument.[230] The takings argument for compensation is based on the doctrine of eminent domain, embodied in the Fifth Amendment phrase, "nor shall private property be taken for public use, without just compensation."[231] The argument posits that this same principle should be applied to the taking of one's liberty because liberty is "a right at least as sacred as that of property."[232] Accordingly, when the state takes a person's liberty for public use—the public use being "the preservation of peace"—the state should compensate him.[233]

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224. Borchard, *supra* note 24, at 694.

225. *See* Bernhard, supra note 17, at 92 ("Clearly, states have no obligation, enforceable in law, to indemnify.").

226. Borchard, *supra* note 24, at 694. The state cannot be expected to compensate every citizen forced to bear an unjust burden within its boundaries; "[c]ertain harms are simply accepted as part of life." *See* Bernhard, *supra* note 17, at 92-93.

227. Borchard, *supra* note 24, at 696.

228. Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 21-22 (1986).

229. *See* Borchard, *supra* note 24, at 696 ("This principle . . . has been incorporated into the civil or private law of all civilized countries . . . .").

230. Borchard, *supra* note 18, at 207-08; Zaremski, *supra* note 88, at 431.

231. U.S. CONST. amend. V.

232. Borchard, *supra* note 18, at 207.

233. Zaremski, *supra* note 88, at 431-32. Howard S. Master offers a new theory of how eminent domain applies in this context: instead of treating liberty as what was "taken,"

The strict liability theory assumes that in "any great undertaking . . . there are bound to be a number of accidents."[234] Because all citizens benefit from the operation of the criminal justice system (in the form of increased public safety), it is unfair that only one person should bear the cost of an error such as wrongful incarceration simply because he was the unlucky victim of the mistake.[235] Instead, everyone should bear the burden equally.[236]

The strict liability argument has been the most effective in diffusing the theories proffered by opponents. This is mainly due to technical problems in applying the eminent domain theory, such as how "property" is defined.[237] However, the strict liability theory has not proven strong enough to convince some states that compensation is necessary, as nearly half of all states still do not have statutes to compensate the wrongfully incarcerated.[238] The strict liability argument must be strengthened in order to further this cause.

III. BECAUSE THE STATE IS IN A BETTER POSITION THAN THE INDIVIDUAL TO PREVENT ERRONEOUS CONVICTION, IT SHOULD BE HELD RESPONSIBLE FOR COMPENSATING THE WRONGFULLY INCARCERATED

Contemporary science has provided a clear view of our criminal justice system's failures.[239] An understanding of these failures offers a new perspective on the compensation debate, and advocates of reform should use

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Master argues that "[t]he property that was 'taken' within the meaning of state or federal takings clauses was the value of the productive labor that was appropriated by government during imprisonment." Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 120 (2004).

234. Borchard, *supra* note 18, at 208.

235. *See id.*; Zaremski, *supra* note 88, at 432; *see also* Rosenn, *supra* note 25, at 716 ("The reparation of damages caused by erroneous criminal accusations, irrespective of how well founded they seemed, is properly a cost of the operation of the criminal justice system. It is difficult to see why the innocent victims should be forced to absorb this cost.").

236. *See* King, *supra* note 90, at 1093 n.14 ("Those who derive the benefit of such an undertaking . . . should share the loss incurred by the victim of that error.").

237. *Id.* at 1092-93. One reason the strict liability argument is generally favored is because "the eminent domain thesis raises a specter of technical obstacles to recovery obfuscating the more immediate issue of redress." *Id.* "This is due in part to restrictive definitions of 'property' for eminent domain purposes and the notion that the government should receive tangible benefit from the taking." *Id.* at 1093 n.15.

238. *See* Compensation Statutes Chart, *supra* note 15. The problem is not that the strict liability argument is defective, but that some states are simply "reluctan[t] to compensate." Bernhard, *supra* note 16, at 707. Thus, this Comment does not attempt to replace or fix the strict liability argument, but merely tries to add another element to help decrease reluctance among states.

239. *See supra* note 139.

the theory this Comment puts forth to convince legislators that compensation is indeed the state's responsibility.

A. The Least Cost Avoider Theory Can Be Applied to Errors of the Criminal Justice System

The least cost avoider theory posits that in cases of accidental harm, the party that was best able to avoid the harm by taking preventive measures must be held liable.[240] This creates an incentive to implement the cautionary measures in his control, thereby preventing, or at least decreasing, the likelihood of the accident in the future.[241]

In the context of the compensation debate, the accidental harm is the erroneous conviction and the subsequent loss of individual liberty.[242] Preventing this harm in the future is a noble and important goal, and the party best able to achieve it is the state.[243] With the advent of DNA testing came more exonerations, and thus, many more research opportunities to uncover the root causes of erroneous convictions.[244] The resulting evidence has conclusively revealed that the most common causes of erroneous conviction—mistaken eyewitness identification, crime lab error, and ineffective defense counsel—can all be decreased through state preventive actions.[245] As discussed, research has shown that implementing relatively simple lineup procedures can greatly reduce the likelihood of mistaken eyewitness identification.[246] Likewise, changes in crime lab administration and regulation can decrease the incidence of crime lab error.[247]

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240. *See* Extrusion Painting, Inc. v. Awnings Unlimited, Inc., 40 F. App'x 97, 101-02 (6th Cir. 2002).

241. Conoco, Inc. v. J.M. Huber Corp., 289 F.3d 819, 826 n.6 (Fed. Cir. 2002).

242. *Cf. Extrusion Painting*, 40 F. App'x at 98-102 (identifying that neither party committed an inherently bad act, but harm still resulted). Likewise, although neither the state nor the individual commits an inherently bad act in the case of most erroneous convictions, wrongful incarceration sometimes results.

243. *See* Bernhard, *supra* note 17, at 93 ("[S]ociety is in a better position to bear the cost of the injury than is the person who has been wrongly convicted . . . ."); *see also supra* Part II.A (illustrating that the state could take specific measures to reduce the likelihood of erroneous convictions). The state is in a better position to prevent the harm caused by erroneous conviction because it controls and administers the criminal justice system, whereas an individual defendant has no control over the causes of erroneous conviction. *See* Bernhard, *supra* note 17, at 93 ("What distinguishes the situation of the wrongly convicted from that of others who have been accidentally injured is the state's involvement. After all, it is the state, through operation of one of its most essential services—the criminal justice system—that has inflicted the harm.").

244. Reinstein, *supra* note 27, at xxi.

245. *See supra* Part I.A.

246. *See supra* notes 142-45 and accompanying text.

247. *See supra* notes 153-62 and accompanying text.

In addition, reform of indigent defense systems will result in a lower probability of receiving ineffective counsel at trial.[248]

With this information in hand, there can be no doubt that the state, as opposed to the wrongfully incarcerated individual, is best able to avoid the harm in this situation.[249] As in the case of the misunderstood purchase order, the state can simply use greater care in administering the criminal justice system, whereas the individual is powerless to change the inner workings of the legal system.[250] Following the least cost avoider theory to its end, holding the state accountable for this harm provides an incentive to implement the preventive measures in its control, thereby decreasing the number of erroneous convictions overall.[251]

It may be argued that once a state enacts the suggested preventive measures, erroneous convictions may still occur, and this theory will no longer serve to hold the state strictly liable.[252] Undoubtedly, even with improvements in the criminal justice system, the state is still in a better position than the individual to prevent erroneous convictions.[253] Liability

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248. *See supra* notes 168-78 and accompanying text.

249. *See supra* note 243.

250. *Cf.* Extrusion Painting, Inc. v. Awnings Unlimited, Inc., 40 F. App'x 97, 98-102 (holding that the buyer, as opposed to the seller is best able to avoid the accident by simply taking greater care). By analogy, it is clear that the state, as opposed to the wrongfully incarcerated individual, is the best able to prevent the accidental harm in this situation by simply taking greater care in administering criminal justice.

251. *See* Conoco, Inc. v. J.M. Huber Corp., 289 F.3d 819, 826 n.6 (Fed. Cir. 2002) (arguing that liability creates incentive); *supra* Part II.A (discussing how preventive measures can decrease the likelihood of erroneous convictions). As Howard S. Master said:

> Expansion of governmental liability for erroneous convictions may benefit society if it encourages government to take greater care in using the criminal justice system to obtain convictions. By shifting costs of error from the wrongfully convicted individual to the government that secured the wrongful conviction, a full compensation regime should encourage government agents to take precautions necessary to avoid wrongful convictions. Assuming that government actors will be motivated by the threat of public or individual liability for the criminal justice system's mistakes, provision of full compensation should cause prosecutors' motives to be properly aligned with their ethical duties to do justice and seek truth.

Master, *supra* note 233, at 110-11 (footnotes omitted).

This theory is particularly persuasive in this instance because there is "no risk of diminution in precaution on the part of the other party." Interview with Marin Scordato, Assoc. Professor of Law, The Catholic Univ. of America, Columbus Sch. of Law, in Wash., D.C. (Oct. 25, 2006).

In some cases where this theory is applied, there is a risk that the party not being held liable will be less careful in his endeavors because he knows he will not be held responsible for an accident. *Id.* Here, however, there is no such risk—the innocent defendant is not going to be more careless in his defense because he knows he will be compensated for time spent wrongfully incarcerated. *Id.* There is "no corresponding let down" on the part of the individual that results from holding the state responsible. *Id.*

252. Interview with J.P. Ogilvy, Professor of Law, The Catholic Univ. of America, Columbus Sch. of Law, in Wash., D.C. (Oct. 19, 2006).

253. *See* Bernhard, *supra* note 16, at 93; Interview with Marin Scordato, *supra* note 251.

still serves as an incentive for the state to research, test, and implement new and better methods and practices for use in the criminal justice system, whereas holding the individual liable would not serve any incentive purpose.[254] Consequently, the state must be held strictly liable for compensating the wrongfully incarcerated, and compensation statutes must be enacted to fulfill this duty.[255]

B. Convincing Legislatures that Compensation Is the State's Responsibility

Because the enactment of compensation statutes is solely within the hands of state legislatures, advocates must convince them that compensation is the state's responsibility.[256] The least cost avoider theory can be used to demonstrate the logic of holding the state strictly liable for compensation.[257] Previous arguments in favor of state compensation have been based mainly on moral and philosophical grounds,[258] generally appealing to one's sense of compassion and sympathy.[259] Such arguments have not proven sufficient to convince some states.[260]

Instead, it must be argued that it is not only a general "sense of justice and equity" that should compel states to compensate the wrongfully incarcerated.[261] Rather, the state must be held accountable because it is in a better position than the individual defendant to prevent erroneous convictions from taking place in the future.[262]

Most importantly, the end goal of the theory is to reduce the number of erroneous convictions by providing an incentive for the state to implement the preventive measures in its control.[263] Achieving this end is in the best interest of the state and its citizens because if people are not erroneously convicted, no one will have to bear the cost of wrongful incar-

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254. Interview with Marin Scordato, *supra* note 251. The individual simply has no control over the common causes of erroneous convictions. *Id.*

255. *See* Bernhard, *supra* note 17, at 101 (recognizing the "need for indemnification legislation and the persistent call to enact it"). Professor Bernhard notes that recent scientific advances prove that innocent people are convicted, and that such "knowledge . . . compels action." *Id.* at 112.

256. *See id.*

257. *See* Jackson v. PKM Corp., 422 N.W.2d 657, 665 (Mich. 1988) (explaining the logic of the theory); *see also supra* note 128 and accompanying text.

258. *See* Borchard, *supra* note 18, at 207-08 (stating that the takings argument is based on the idea that liberty is at least as sacred as property, and the strict liability theory is based on ideas of fairness).

259. *See* Bernhard, *supra* note 17, at 93.

260. *See generally* Compensation Statutes Chart, *supra* note 15.

261. Bernhard, *supra* note 17, at 93.

262. *See supra* Parts I.A., II.A.

263. *See* Extrusion Painting, Inc. v. Awnings Unlimited, Inc., 40 F. App'x 97, 101-02 (6th Cir. 2002).

ceration.[264] Accordingly, this theory further supports the argument that compensation of the wrongfully incarcerated is a state responsibility, which may convince legislators to enact compensation statutes.

IV. CONCLUSION

The recent increase in exonerations has produced a body of research proving that states have the power to reduce the rate of erroneous convictions through preventive measures. Consequently, the state should bear the burden of compensating those wrongfully incarcerated because the individual has no control over the situation, and because it would provide some incentive for the state to enact the preventive measures.

Unfortunately, most states have yet to recognize this responsibility. Thus, the fate of the wrongfully incarcerated lies in the hands of advocates, who must continue to work toward convincing legislators that compensation statutes are necessary to protect the innocent, and to work toward reducing the rate of erroneous convictions.

264. *Cf. id.* (finding that if the buyer had not made a mistake in filling out the purchase order, there would have been no harm and no resulting cost to either party). If erroneous convictions are eliminated, there would be no harm in the form of wrongful incarceration, and no cost to either the state or the individual. It is axiomatic that if there is no harm, no one will have to bear the cost.