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INNOCENCE IS NOT ENOUGH: ILLINOIS CERTIFICATES OF INNOCENCE & THE CASE OF WAYNE WASHINGTON

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In 2008, the Illinois State Legislature found that "innocent persons who have been wrongly convicted of crimes in Illinois and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law[.]" To correct this injustice, the General Assembly created a petition for a Certificate of Innocence ("COI"), which provides wrongfully convicted individuals the opportunity to obtain financial relief for time spent incarcerated. Petitioners must show that they "did not by [their] own conduct voluntarily cause or bring about [their] conviction." Notably, the legislature did not supply a definition for "voluntary," leaving courts free to impart their own. Despite the legislature's recognition that "substantive and technical obstacles" prevent wrongly convicted individuals from relief, Illinois courts have imposed such obstacles through the term "voluntary."

In some instances, courts ignore this critical term by entirely omitting it from statutory analysis; in others, courts use "voluntary" to deny COIs. In the judiciary's view, an individual "voluntarily cause[s] or bring[s] about" their conviction when they confess to a crime or accept a plea deal, regardless of the circumstances. This interpretation ignores the innocence of a person whose confession was coerced or accepted a plea deal under

* J.D. Candidate, Northwestern Pritzker School of Law, 2023. I am extraordinarily grateful to Professor James Lupo for his exceptional mentorship and immeasurable grace, wisdom, and guidance, particularly in my exploration of this topic and shaping the structure of this Comment. Thank you to Calvin R. Edwards, for inspiring me to write about this case, to Caitlin Capriotti, Sarah Turner, Zakiyah Dillard, Jackie O'Brien, Deidra McCall, Jesse Albrecht, Kameelah Pointer, Gaby Menashe, Paul Piazza, Grace Egan, Rachel Ensign, and Jordan Gerlach, for their meticulous edits and valuable comments, and to Amanda Gvozden, Liamarie Quinde, and Julia Nagle for their initial belief in this Comment. Finally, all my gratitude to my loved ones and friends for their unrelenting encouragement, fantastic cooking, and care. Any errors are my own.

circumstances disguised as a rational choice. Although granting a COI is "generally within the sound discretion of a court," the Illinois judiciary has improperly imposed a condition absent from the text that, carried to its logical conclusion, would deny COIs to innocent people.

This Comment explores the purpose of Section 2-702, contemplates "voluntary" conduct, and illuminates the implications of judicial frustration. The case of Wayne Washington exemplifies the judiciary's abuse of discretion and its imposition of substantive and technical obstacles that the Illinois legislature sought to overcome by enacting Section 2-702. Finally, this Comment argues that COIs are the only adequate remedy for wrongfully convicted individuals and proposes legislative and judicial solutions.

"In an age when social justice is the watchword of legislative reform, it is strange that society, at least in this country, utterly disregards the plight of the innocent victim of unjust conviction or detention in criminal cases."

—Edwin Borchard[†]

INTRODUCTION

In 2008, the Illinois State Legislature found that "innocent persons who have been wrongly convicted of crimes in Illinois and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law[.]"[1] The Illinois General Assembly attempted to remedy this problem by creating a Certificate of Innocence (COI), which confers two primary benefits. First, through expungement, a COI removes the legal consequences of a conviction.[2] Second, it provides limited financial compensation for the time a person spent wrongfully incarcerated.[3] In order to receive a COI, a petitioner must show by a preponderance of the evidence that he or she "did not by his or her own conduct voluntarily cause or bring about his or her conviction."[4] Despite the legislature's recognition that "substantive and technical obstacles"[5] prevent wrongly convicted individuals from obtaining relief, Illinois courts have nevertheless imposed them.

Although it is well established that granting a COI is "generally within the sound discretion of the court,"[6] the Illinois judiciary routinely abuses its discretion when it ignores the circumstances that often lead an individual to confess to crimes they did not commit, or accept a plea bargain to avoid lengthy prison sentences.[7] Although the resulting convictions appear

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[†] Edwin Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684, 684 (1912).

[1] 735 ILL. COMP. STAT. 5/2-702(a) (2021). See Part IV *infra* for a discussion of substantive and technical obstacles.

[2] *Id.* § 2-702(h).

[3] *See id.*, then 705 ILL. COMP. STAT. 505/8(c) (2018), which provides exclusive jurisdiction to the Court of Claims to determine and award funds in claims against the State for unjust imprisonment.

[4] 735 ILL. COMP. STAT. 5/2-702(g) (2021).

[5] *Id.* § 2-702(a).

[6] People v. Dumas, 2013 IL App (2d) 120561, ¶ 17, 988 N.E.2d 713, 717.

[7] *See, e.g.*, People v. Amor, 2020 IL App (2d) 190475, ¶ 4, ¶ 7, 180 N.E.3d 170, 173–74, *appeal denied*, 167 N.E.3d 629 (Ill. 2021) (affirming denial of Certificate even though

voluntary in the eyes of the court, many of them are not.[8] This approach ignores the power of the state to coerce an individual into relinquishing innocence, including false confessions obtained during custodial interrogations and plea bargains designed to disguise acceptance as a rational choice.[9]

The case of Wayne Washington exemplifies the imposition of substantive and technical obstacles by the courts that the legislature expressly intended to ameliorate. Last year, a divided Illinois appellate court affirmed the denial of Washington's Certificate because the majority determined that he caused his conviction by accepting a plea bargain.[10] Washington accepted the terms after seeing his co-defendant sentenced to seventy-five years for a murder neither of them committed.[11] The majority focused on Washington's voluntary acceptance of the plea as the determinative factor, yet indicated its preference not to struggle with "voluntarily" by omitting the term from its statutory analysis.[12] This approach is plainly incorrect.

The relevant inquiry should be whether Washington voluntarily accepted the terms of an agreement with prosecutors. It is a numbingly familiar concept that many defendants accept a plea bargain to reduce a potentially lengthy sentence.[13] By leveraging the risk of a severe sentence

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defendant's false confession, given during an interrogation in which detectives allowed defendant to be served with divorce papers, was found to be scientifically impossible); People v. Blouin, 2014 IL App (1st) 131603-U, ¶¶ 23–24 (denying Certificate for a vacated burglary conviction because defendant "acted voluntarily when he trespassed and therefore caused his own conviction," despite the lack of a trespass charge); People v. Dumas, 2013 IL App (2d) 120561, ¶¶ 18–19, 988 N.E.2d 713, 717 (finding that although the defendant's conviction was reversed because the State failed to prove beyond a reasonable doubt the defendant's possession of cocaine, the defendant voluntarily brought about his own conviction where he took steps to arrange a drug sale, leading to his arrest and conviction).

[8] *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 38 (1970) (perceiving no "material difference between a plea that refuses to admit commission of the criminal act and a plea . . . of innocence when . . . a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt."); People v. Reed, 2020 IL 124940, ¶ 33, 182 N.E.3d 64, 72 (finding it "well accepted that the decision to plead guilty may be based on factors that have nothing to do with defendant's guilt.").

[9] *See, e.g.*, United States v. Burge, 711 F.3d 803, 806–07 (7th Cir. 2013); *see also* notes and accompanying text *infra* Part I.B.2.

[10] People v. Washington, 2020 IL App (1st) 163024, ¶ 1, ¶ 22, 186 N.E.3d 1055, 1055, 1059, *appeal allowed*, 187 N.E.3d 707 (Ill. 2022).

[11] *Id.* ¶ 22, at 1059.

[12] *Id.* ¶ 25, at 1060 ("The plain and ordinary meaning of 2-702(g)(4) is clear. A defendant who has pled guilty "cause[d] or [brought] about his or her conviction" and is not entitled to a Certificate of Innocence.") (citation omitted).

[13] *See, e.g.*, cases cited *supra* notes 7–8.

imposed after an unpredictable jury trial, the prosecuting authority can induce a defendant to accept a plea bargain that they would not otherwise accept. Because a defendant cannot freely enter the terms of a plea bargain—disguised as a rational choice—their agreement cannot be voluntary. It follows that denying a COI based on these circumstances is erroneous.

This Comment argues that because a Certificate of Innocence is the only adequate remedy to vindicate a wrongfully convicted individual in Illinois, the judiciary actively frustrates the administration of justice by ignoring circumstances that culminate in a wrongful conviction. Part I introduces the case of Wayne Washington. Part II discusses the purpose of Section 2-702 and the meaning of "voluntary" in the context of confessions. It also explores judicial frustration of Section 2-702 through recent Illinois decisions and the creation of technical and substantive obstacles that the statute was designed to remedy. Part III discusses the inadequacy of post-conviction remedies and why COIs are the only adequate remedy for a wrongful conviction. Finally, Part IV proposes potential solutions the legislative and judicial branches could employ to solve this problem.

I. WAYNE WASHINGTON

In 1993, Wayne Washington and Tyrone Hood were arrested for the murder of Marshall Morgan, Jr., a young college basketball star.[14] Police initially arrested Tyrone Hood after identifying his fingerprints on two beer bottles among the trash found in Morgan Jr.'s vehicle.[15] Hood was taken into custody and interrogated for two to three days.[16] Police handcuffed Hood to the wall and "physically abused and verbally abused, kicked, choked, [and] punched" him before releasing him.[17] A few days later, Hood and Washington were arrested at a neighborhood convenience store and taken to the Area One Detective Division,[18] where detectives, including Kenneth Boudreau[19] and John Halloran, questioned them.[20] Washington told the

[14] *Washington*, 2020 IL App (1st) 163024, ¶ 3, 186 N.E.3d at 1057. The original convictions of both Hood and Washington are unpublished pursuant to Illinois Supreme Court Rule 23(e). *Id.* ¶ 1.

[15] People v. Hood, 2021 IL App (1st) 162964, ¶ 10; Hood v. Uchtman, 414 F.3d 736, 737 (2005).

[16] *Hood*, 2021 IL App (1st) 162964, ¶¶ 14–17; Complaint ¶¶ 40–49, Washington v. City of Chicago, 2016 WL 463972, No. 16-CV-01893 (N.D. Ill. Nov. 1, 2016), Dkt 1.

[17] *Hood*, 2021 IL App (1st) 162964, ¶ 14.

[18] *Washington*, 2020 IL App (1st) 163024, ¶ 13, 186 N.E.3d at 1058.

[19] *Id*.

[20] *Id.*; Complaint, *supra* note 16, ¶ 34, ¶¶ 40–49.

detectives he had no knowledge of the murder.[21] During Washington's interrogation, detectives used physical violence—"including punching and slapping him while he was handcuffed, and told him that" other witnesses' statements implicated him—until he agreed to cooperate.[22] Washington claimed that police promised him he could go home if he "said certain things."[23]

Those "certain things" included Washington taking responsibility for the murder in a signed confession.[24] At the subsequent trial in 1995, prosecutors presented Washington's confession as well as inculpatory statements from eyewitnesses that were recanted *before* the trial.[25] The jury failed to reach a verdict.[26] In early 1996, Tyrone Hood was convicted in a separate bench trial and sentenced to seventy-five years.[27] Prosecutors then offered Washington a sentence of twenty-five years in exchange for his guilty plea.[28] Washington testified that he accepted the deal because by taking it, he knew he would still have "'a chance at a life.'"[29]

The *New Yorker* published an investigative article detailing police misconduct in the murder of Marshall Morgan, Jr. in August 2014.[30] Subsequently, on February 19, 2015, the circuit court granted the State's motion to vacate Washington's conviction and granted him a new trial.[31] The State dropped the charges against Washington.[32]

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[21] *Washington*, 2020 IL App (1st) 163024, ¶ 13, 186 N.E.3d at 1058; Complaint, *supra* note 16, ¶ 41.

[22] Complaint, *supra* note 16, ¶ 43; *see also* Order at 4, People v. Washington, 2016 WL 11752849, No. 93-CR-14676 (Cir. Ct. Ill. Oct. 31, 2016).

[23] *Washington*, 2020 IL App (1st) 163024, ¶ 14, 186 N.E.3d at 1058; *id.* ¶ 49, at 1065 (Walker, J., dissenting).

[24] *Compare Washington*, 2020 IL App (1st) 163024, ¶ 14, 186 N.E.3d at 1058 (referring to Washington's confession as him "end[ing] up giving a statement to the police implicating himself), *with id.* ¶ 49, at 1065 (Walker, J., dissenting) (observing that Washington signed a statement written by an officer because "police threatened him, beat him, and promised he could go home if he signed" it.).

[25] *Washington*, 2020 IL App (1st) 163024 ¶¶ 36–38, 186 N.E.3d at 1062–63 (Walker, J., dissenting); *Hood*, 2021 IL App (1st) 162964, ¶¶ 37–39.

[26] *Washington*, 2020 IL App (1st) 163024, ¶ 49, 186 N.E.3d at 1065–66 (Walker, J., dissenting); *Hood*, 2021 IL App (1st) 162964, ¶ 33.

[27] *Washington*, 2020 IL App (1st) 163024, ¶ 3, 186 N.E.3d at 1057.

[28] *Id.*

[29] *Id.* ¶ 15, at 1058.

[30] Nicholas Schmidle, *Crime Fiction*, NEW YORKER (July 28, 2014), https://www.newyorker.com/magazine/2014/08/04/crime-fiction [https://perma.cc/7FBL-66Z9].

[31] *Washington*, 2020 IL App (1st) 163024, ¶¶ 3–6, 186 N.E.3d at 1057.

[32] *Id.* ¶ 6, at 1057.

In June 2021, the First District Appellate Court of Illinois denied Wayne Washington's petition for a COI under 2-702(g)(4), finding that he voluntarily caused his conviction.[33] Despite Washington's claims that police coerced him into signing a false confession in 1993, the majority determined that Washington's "testimony that his confession was the result of police coercion was not credible and otherwise uncorroborated."[34] Washington's lone testimony was seemingly dispositive for the majority, who found the circuit court acted within its discretion to discredit it.[35] Put another way, the court found that absent coercion, Washington voluntarily confessed.[36]

Yet reviewing an abuse of discretion requires an appellate court to decide whether a circuit court's factual determination is against the manifest weight of the evidence.[37] Is it? Washington's petition asserted that police unlawfully coerced his 1993 confession by beating him during arrest and interrogation, testifying that "police told him that if he said certain things he could go home."[38] Washington also testified that he only confessed after detectives Kenneth Boudreau and John Halloran beat and slapped him because he "couldn't stand the beatings any longer."[39]

Both the circuit court and appellate majority ignored statements from witnesses alleging police coercion.[40] One witness swore that his testimony against Washington was false because police threatened to beat him and

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[33] *Id.* ¶ 29, at 1061.

[34] *Id.* ¶ 26, at 1060; *see also id.* ¶ 35–40, at 1062–63 (Walker, J., dissenting) (finding that the record contained "overwhelming evidence that police coercion led to the wrongful conviction of Washington").

[35] *Washington*, 2020 IL App (1st) 163024 ¶ 23, 186 N.E.3d at 1059.

[36] *Id.*

[37] *See, e.g.*, Bauske v. City of Des Plaines, 148 N.E.2d 584, 591 (Ill. 1957); People v. Pollock, 2014 IL App (3d) 120773, ¶ 27, 21 N.E.3d 11, 15–16.

[38] *Washington*, 2020 IL App (1st) 163024, ¶¶ 13–15, 186 N.E.3d at 1058.

[39] Schmidle, *supra* note 30; *see also* Order, *supra* note 22, at 3 ("[O]n August 24, 1995, [Washington] testified under oath in front of Judge Bolan that he was slapped once in the face and the chair that he was sitting in was pushed."). Nicholas Schmidle interviewed Detective Bourdreau, who said "that allegations that he had beaten or coerced confessions out of people were "fucking ridiculous." Schmidle, *supra* note 30. Years earlier, Boudreau had said in a deposition, "The term 'excessive force' to me is relative. What may be excessive to one person may not be excessive to another." *Id.* In one affidavit, a convicted murderer, Kilroy Watkins, claimed that, during an interrogation in 1992 by Boudreau and Halloran, he was 'handcuffed to a ring in the wall' and 'choked and assaulted repeatedly by Detective Boudreau' until he was 'forced into signing a false confession.'" *Id.*

[40] *Washington*, 2020 IL App (1st) 163024, ¶ 36, 186 N.E.3d at 1062 (Walker, J., dissenting) (quoting statements of Richard Brzeczek, former Superintendent of Police for the Chicago Police Department, given in support of Tyrone Hood's COI petition).

charge him with murder.[41] Another witness stated that police paid him to give false testimony against Washington and threatened to implicate him in the murder if he did not cooperate.[42]

Still, the falsity of these statements was sufficient to reverse the denial of Tyrone Hood's petition.[43] The First District, in part, "clearly disregarded the complete absence of any evidence submitted to contradict or rebut Hood's testimony regarding his innocence."[44] The only difference between Washington and Hood is Washington's confession and guilty plea.[45]

II. SECTION 2-702

This Part discusses the purpose of Section 2-702, considers the meaning of "voluntary," and discusses instances in which judicial error or intention frustrated the purpose of Section 2-702 by disregarding the meaning of or ignoring the term "voluntary."

A. PURPOSE

While courts are traditionally hesitant to divine the purpose of a statute, Section 2-702 clearly defines the problem it attempts to solve. It provides that "innocent persons who have been wrongly convicted of crimes in Illinois and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law. . . ."[46] The General Assembly indicated that current legal nomenclature "compel[ling] an innocent person to seek a pardon for being wrongfully incarcerated" is misleading.[47] Thus, the purpose of Section 2-702 is to remove the "substantive and technical obstacles" between a wrongfully convicted individual and the legal and financial relief that only the State can provide.

The General Assembly also states its intent with respect to the court's treatment of evidentiary requirements. To obtain a COI, a petitioner must show it is more likely than not that:

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[41] *Id.*

[42] *Id.* ¶ 38, at 1063–64. When questioned about these allegations in a separate civil lawsuit, Detectives Bourdreau, Halloran, and O'Brien invoked their Fifth Amendment right against self-incrimination. *Id.* ¶ 39, at 1063. Justice Walker argued that drawing a negative inference from this invocation would have been permissible. *Id.* (referencing People v. Whirl, 2015 IL App (1st) 111483, ¶ 107, 39 N.E.3d 114, 135).

[43] *See* People v. Hood, 2021 IL App (1st) 162964, ¶ 11.

[44] *Id.* ¶ 29.

[45] *Washington*, 2020 IL App (1st) 163024, ¶ 10, 186 N.E.3d at 1057.

[46] 735 ILL. COMP. STAT. 5/2-702(a).

[47] *Id.*

> (1) the petitioner was convicted of one or more felonies by the State of Illinois and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence;
> (2)(A) the judgment of conviction was reversed or vacated, and the indictment or information dismissed or, if a new trial was ordered, either the petitioner was found not guilty at the new trial, or the petitioner was not retried and the indictment or information dismissed; . . . ;
> (3) the petitioner is innocent of the offenses charged in the indictment or information or his or her acts or omissions charged in the indictment or information did not constitute a felony or misdemeanor against the State; and
> (4) the petitioner did not voluntarily cause or bring about his or her conviction.[48]

In evaluating each requirement, the court is directed to exercise its discretion "in the interest of justice" and consider the "difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors" beyond the petitioner's control.[49] Thus, the court's role is clear: When determining whether a petitioner has satisfied the statute's evidentiary burden, it should consider the inherent difficulties of each case and attempt to alleviate frustrations posed by substantive and technical obstacles in the law.

B. WHAT IS VOLUNTARY?

Section 2-702(g) requires a successful petitioner to show that they did not voluntarily cause or bring about their conviction.[50] A court generally assumes that if an individual confessed or pled guilty, they did so voluntarily.[51] While confessions and plea deals are two acts that most frequently separate a wrongfully convicted individual from relief, it is unlikely that "voluntary" correctly describes confessions obtained during custodial interrogations and plea deals accepted under duress. It is more likely that these actions are not the type contemplated by the legislature in Section 2-702(g).

"Voluntary" describes an action that proceeds "from the will or from one's own choice or consent."[52] It also implies freedom in undertaking an action that is "unconstrained by interference" or "without external

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[48] 735 ILL. COMP. STAT. 5/2-702(g) (2021).

[49] *Id.* § 2-702(a).

[50] *Id.* § 2-702(g).

[51] *See* cases cited *supra* note 7.

[52] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1402 (11th ed. 2014). The word is also defined as "having power of free choice" and "acting or done of one's own free will without valuable consideration or legal obligation." *Id.*

compulsion."[53] A voluntary act is intentional, deliberate, and willing: A person is aware of its nature, and is ready or eager to accede to the wishes of another.[54] In other words, a person acts voluntarily when they exercise control over the action, and maintain the power to select an option, grant permission, or accept the consequences of a choice.

Without control, an individual cannot consent to an act. In the absence of this consent, the act is contrary to the individual's will.[55] Put another way, a voluntary act proceeds *only* in the absence of coercion. Indeed, to coerce means "to compel an act or choice" or "to achieve by force or threat."[56] Therefore, if an authority uses any type of coercion—physical, emotional, or otherwise—that removes an individual's ability to grant permission or forces them to act contrary to their will, the act is involuntary.[57]

The freedom of choice and ability to exercise intention reflects deeply held social norms. The sovereignty of the individual will is one of the earliest values found in contract law.[58] Classical contract theory supports individuals' freedom to bargain for an agreed-upon exchange of value.[59] An individual's ability to indicate and act upon a preference is so powerful that society accepts the use of the legal system to enforce a private contract as an artifact of the contracting parties' preferences and default rules governing the parties' conduct in the contractual relationship.[60] Contracts are presumptively enforceable because an agreement represents the parties' mutual assent to the terms of the exchange, and indicates the parties' individual sovereignty and ability to select a preference. This freedom to exchange means that an individual who enters a contract must do so freely; the twin pillars of intent and consent underly the presumptive enforceability of a contract.[61]

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[53] *Id.*

[54] *See id.*

[55] *Id.* at 659.

[56] *Id.* at 240.

[57] Brady v. United States, 397 U.S. 742, 755 (1970) (describing the standard to determine the voluntary nature of a plea, including that a person must be "fully aware of the direct consequences," and that the plea "must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises)," or improper promises) (citation omitted).

[58] JOSEPH M. PARILLO, CONTRACTS 7 (7th ed. 2014) (describing "promises [as] binding in natural law as well as in morality because failure to perform a promise made by a free act of the will was an offense against the Deity").

[59] Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1913–14 (1992).

[60] *See id.*; PARILLO *supra* note 58, at 10.

[61] PARILLO *supra* note 58, at 7 ("Intention is regarded as the keystone of contract law.").

An agreement contaminated by duress, undue influence, or misrepresentation, therefore, is void from its inception because these doctrines recognize that when an individual cannot freely assent to the terms of an agreement, their ability to indicate a true preference is compromised.[62] Because a plea bargain represents an agreed upon exchange of value between prosecutors and defendants, aspects of contract law principles are readily applicable in this context.

1. What Acts Did the Legislature Contemplate?

Many state innocence laws are based on the equivalent federal statute originally proposed in 1912 and enacted in 1938.[63] The federal condition analogous to Section 2-702(g) considers whether a defendant's action was voluntary: It requires a claimant to show that "he has not, either intentionally, or by willful misconduct, or negligence, contributed to bring about his arrest or conviction."[64] The use and history of this statutory language was first addressed by Judge Barksdale in *United States v. Keegan*.[65]

Facing a matter of first impression, Judge Barksdale dutifully researched the history of the statute. His research included a survey of the work of Professor Edwin Borchard, the author of the federal innocence statute and an early advocate for victims of wrongful conviction. Borchard indicated that "intentional or willful misconduct" referred to actions suggesting an intent to deceive authorities, such as attempting to flee, the voluntary making of a false confession, removing evidence, or "an attempt to induce a witness or expert to give false testimony or opinion, or an analogous attempt to suppress such testimony or opinion."[66] Judge Barksdale agreed that this requirement "carries out simply the equitable maxim that no one shall profit by his own wrong or come into court with unclean hands."[67]

Modern adjudication of the federal statute preserves the requirement of a defendant's voluntary action. In 1993, the Seventh Circuit considered the federal statute in *Betts v. United States*. There, the court held defendant-

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[62] Scott & Stuntz, *supra* note 59, at 1913.

[63] Act of May 24, 1938, ch. 266 §§ 1–4, 52 Stat. 438.

[64] *Id.*

[65] United States v. Keegan, 71 F. Supp. 623, 636–38 (S.D.N.Y. 1947) (discussing the statute under construction and determining that four prior decisions in the Court of Claims did not determine question of innocence).

[66] *Id.* at 638.

[67] *Id.* at 628 (citing Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 209 (1941) ("[T]he concealment of evidence, the voluntary making of a false confession, or any similar reprehensible act should operate as a bar to the claim.")).

attorney Betts in criminal contempt for failure to appear at multiple hearings.[68] Betts was arrested, tried, convicted, and sentenced to three months in prison.[69] Betts successfully appealed the conviction and petitioned for a Certificate of Innocence.[70] He won on appeal after the Seventh Circuit determined that Betts was factually innocent because his conduct "did not constitute a crime."[71]

Critically, the court concluded that Betts did not cause his own conviction because he did not "act[] or fail[] to act in such a way as to mislead the authorities into thinking he had committed an offense."[72] In fact, the court said that a defendant causes his conviction when he "has it within his means to avoid prosecution but elects not to do so, instead acting in such a way as to ensure it."[73] Though Betts failed to notify the court until the last minute that he could not attend a required hearing— and violated a condition of his bond twice by failing to appear in court—the court grounded its determination that Betts did not cause his conviction in the fact that he did not "mislead[] them as to his liability for criminal contempt."[74]

Although comparable language has been "described as 'rather indefinite,'"[75] the Illinois statute does not foreclose relief to individuals like Wayne Washington, whose capacity for voluntary action was overcome by improper state action.

2. The Presence of Coercion Nullifies a Voluntary Act

Confessions obtained during custodial interrogation and plea deals accepted under duress are inherently coercive and cannot be considered voluntary. Convictions resulting from either condition, therefore, should not be construed as "an affirmative act or an omission by the petitioner that misleads the authorities as to his culpability."[76]

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[68] Betts v. United States, 10 F.3d 1278, 1280–81 (7th Cir. 1993).

[69] *Id.*

[70] *Id.* at 1281–82.

[71] *Id.* at 1284.

[72] *Id.* at 1285.

[73] *Id.* (citing Borchard, *supra* note 667, at 209).

[74] *Id.* ("The last-minute character of the notice understandably perturbed the district court and the prosecutor; and perhaps, had the notice been more timely, the prosecutor would not have asked that [] Betts be arrested and the district court would not have pursued the contempt charge against Betts. But to whatever degree the late notice may have raised the ire of the prosecutor and the district court, it did not 'cause' or 'bring about' his prosecution in the sense of misleading them as to his liability for criminal contempt.").

[75] *Id.* at 1284 (citing *Keegan*, 71 F. Supp. at 638).

[76] *Id.* at 1285.

The custodial interrogation is inherently coercive. It is marked by an imbalance of power that nullifies an individual's capacity to grant consent and perform a voluntary act. During a custodial interrogation, police detain an individual in connection with a criminal investigation and generally do not permit the individual to leave.[77] The purpose of an interrogation is to solicit a confession or plea.[78] And while "agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion,"[79] overbearing the will of the defendant, patent maneuvering, or deceptive tactics often compel an individual to falsely confess to a crime.[80]

Consider John Burge, former Commissioner of the Chicago Police Department. Under his supervision, Chicago police detectives at Area 2 and 3 headquarters illegally obtained confessions from over one hundred Black men and women in custody though torture, racist verbal abuse, and psychological manipulation.[81] Over a period of twenty years, Burge and his men systematically extracted false confessions used to secure the convictions of victims, including eleven that resulted in death sentences.[82]

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[77] *Custodial Interrogation*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/custodial_interrogation [https://perma.cc/5MCQ-UJLR]; *see also* 705 ILL. COMP. STAT. 405/5-401.5(a) (defining custodial interrogation as "any interrogation (i) during which a reasonable person in the subject's position would consider himself or herself to be in custody and (ii) during which a question is asked that is reasonably likely to elicit an incriminating response").

[78] Brian Leslie, *How Coercive Interrogations Can Lead to a False Confession*, CRIM. LEGAL NEWS (Aug. 19, 2018), https://www.criminallegalnews.org/news/2018/aug/19/how-coercive-interrogations-can-lead-false-confession [https://perma.cc/V5WB-3AL7].

[79] Brady v. United States, 397 U.S. 742, 750 (1970).

[80] *Leslie*, *supra* note 78; *see also* People v. Amor, 2020 IL App (2d) 190475, ¶ 12, 180 N.E.3d 170, 174–75, *appeal denied*, 167 N.E.3d 629 (Ill. 2021) (dismissing defendant's COI petition on the basis that his confession—though scientifically impossible—was voluntary in spite of the fact that he was "served with divorce papers during the course of a homicide interrogation.")

[81] Joey L. Mogul, *The Struggle for Reparations in the Burge Torture Cases: The Grassroots Struggle that Could*, 21 PUB. INT. L. REP. 209, 209–10 (2015). The details are numerous and horrific. *See id.* The Chicago Police Torture Archive documents the experiences of the over 100 Black men and women who confessed to crimes they did not commit in order to survive Burge's torture. *See generally About the Archive*, CHI. POLICE TORTURE ARCHIVE, https://chicagopolicetorturearchive.com/about [https://perma.cc/9PD8-3RWM] (documenting Burge's violence from the 1970s to 1990s). Additionally, the Torture Inquiry and Relief Commission (TIRC) was an Illinois state agency empowered to gather evidence and provide relief to victims during Burge's tenure. *See About Us*, TORTURE INQUIRY & RELIEF COMM'N, https://tirc.illinois.gov/about-us [https://perma.cc/5VSC-Q6PP].

[82] Mogul, *supra* note 81, at 209; *see also id.* at 214–16 (describing victims' efforts to organize and campaign for relief, leading to Gov. Ryan's pardon of four victims on January 2, 2003, declaring a moratorium on the death penalty, and ultimate abolition in 2011).

When Burge was finally tried and sentenced for his crimes, Judge Joan Humphrey Lefkow admonished him for his "serious lack of respect for the due process of law and [his] unwillingness to acknowledge the truth in the face of all the evidence."[83] She continued:

> When a confession is coerced, the truth of the confession is called into question. When this becomes widespread, as one can infer from the accounts that have been presented here in this court, the administration of justice is undermined irreparably. How can one trust that justice will be served when the justice system has been so defiled?[84]

There is *some* hope for Illinois, long known as the "False Confession Capital of the United States."[85] Illinois recently became the first state to recognize the unique susceptibility of minors by banning the use of deceptive tactics during custodial interrogations.[86] The statute presumes that a minor's confession given during a custodial interrogation is inadmissible in criminal or juvenile court proceedings if the law enforcement officer "knowingly engages in deception" during the interrogation.[87] Although the state bears the burden to prove that the minor's confession was voluntary, a minor complainant still bears the burden to show an officer's "knowing" deception.[88]

However, the question remains for adult defendants: What does it mean to benefit from bringing about one's own conviction? To benefit is to receive help or an advantage.[89] What advantage does a defendant gain from a false confession? A confession ends emotional or physical coercion regardless of its falsity. Is this the type of "benefit" that the legislature intended to prohibit?[90] Taking action to end coercion by giving a false confession is not, in fact, voluntary—it is an act of desperation. It is the result of the police overcoming a person's will without persuasion. Guilty pleas unwillingly

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[83] Transcript of Proceedings—Sentencing at 7, United States v. Burge, No. 08-CR-846 (N.D. Ill. Jan. 21, 2011).

[84] *Id.*

[85] *Illinois Becomes the First State to Ban Police from Lying to Juveniles During Interrogations*, INNOCENCE PROJECT (July 15, 2021), https://innocenceproject.org/illinois-first-state-to-ban-police-lying [https://perma.cc/JX8K-K348].

[86] *Id.*; *see also* 725 ILL. COMP. STAT. 5/103-2.2 (2022).

[87] 725 ILL. COMP. STAT. 5/103-2.2(b) (2022).

[88] *See id.* § 103-2.2(c)-(d). *Compare id. with* 735 ILL. COMP. STAT. 5/2-702(g) (placing evidentiary burden on petitioner seeking a COI).

[89] *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 52, at 114.

[90] Consider a 2014 study by the Better Government Association which found that the City of Chicago spent $521.3 million to handle lawsuits related to police misconduct from 2004 to 2014. Andrew Schroedter, *Beyond Burge*, BETTER GOV'T ASS'N (Apr. 3, 2014, 7:05 PM), https://www.bettergov.org/news/beyond-burge [https://perma.cc/B6ZQ-FTA9].

given share the same characteristic: A prosecutor induces a defendant to exchange their claim of innocence for the possibility of a shorter sentence. Is this benefit of time—or life, or liberty—the kind that makes sense in light of Section 2-702?

3. No Reasonable Alternatives

A plea bargain is "the exchange of official concessions for a defendant's act of self-conviction."[91] Though a guilty plea is "an agreement between the state and defendant, in which both parties benefit and make concessions,"[92] the disparity in bargaining power between the state and defendant often results in an exchange that is largely unequal.

A state benefits from the swift "disposition of most criminal cases."[93] When a defendant admits guilt, a state avoids a trial and conserves "prosecutorial and judicial resources for cases in which there are substantial issues of proof."[94] Indeed, plea bargains enable prosecutors to expend a minimal amount of resources while obtaining "as much criminal punishment as possible."[95] Foreclosing trial relieves prosecutors of the burden to prove a defendant's guilt beyond a reasonable doubt.[96] Additionally, plea bargains are a tool that can extend a state's ability to punish and control crime.[97] In exchange, a state forgoes the possibility of further investigation, additional charges, and the opportunity to present all relevant evidence.[98]

On the other hand, defendants artificially benefit from a structure the state controls. Acting as agents of the executive, prosecutors have the discretion to adjust charges, which impacts the potential sentence.[99] For a defendant, then, the consequences of pleading guilty are grim.[100] Entering a

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[91] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3 (1979).

[92] People v. Reed, 2020 IL 124940, ¶ 25, 182 N.E.3d 64, 70; *see* Scott & Stuntz, *supra* note 59, at 1914–15.

[93] *Reed*, 2020 IL 124940, ¶ 25, 182 N.E.3d at 70.

[94] *Id.*

[95] Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 98 (2005); *see* Scott & Stuntz, *supra* note 59, at 1914–15.

[96] *See Reed*, 2020 IL 124940, ¶ 27, 182 N.E.3d at 71 ("[A] plea obviates the prosecution's burden of proof. It supplies both evidence and verdict, ending controversy.") (citation omitted).

[97] Wright, *supra* note 95, at 97–98, 98 n.58.

[98] *Reed*, 2020 IL 124940, ¶ 25, 182 N.E.3d at 70.

[99] *E.g.*, Scott & Stuntz, *supra* note 59, at 1962.

[100] *E.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.").

guilty plea results in a conviction and waives several federal constitutional rights, including the Fifth Amendment privilege against compulsory self-incrimination,[101] the Sixth Amendment's promise of a trial by jury, and the right to confront accusing witnesses and evidence.[102] However, defendants exercising such rights face a "trial penalty," reflected in the difference between the discounted sentences offered during pre-trial plea negotiations and increased (and uncertain) punishments post-trial.[103] In this context, faced with the prospect of life-long imprisonment or even death, pleading guilty seems reasonable.

Though courts purport to recognize that only "voluntary" pleas may be accepted,[104] the disparity in bargaining power between defendants and prosecuting authorities precludes truly voluntary pleas, a fact most courts fail to recognize.[105] Indeed, courts cannot accept pleas induced by physical harm or "mental coercion overbearing the will of the defendant."[106] Yet courts generally consider only whether a defendant "voluntarily and knowingly"[107] waived constitutional rights, not whether a defendant accepted a plea free from external compulsion.[108] This is likely because the requirements to

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[101] *Boykin*, 395 U.S. at 243 (citations omitted).

[102] *Id.* Consider though, that the coercive power of strong evidence creates no concern. These "easy cases" would have produced convictions even without guilty pleas. Wright, *supra* note 95, at 108. Notably, "The strength of the defendant's available defense does not matter at all." *Id.* at 93.

[103] Wright, *supra* note 95, at 109, 109 nn.85 & 86 (asserting that the difference in sentences offered pre-trial and post-conviction "could become so large that some defendants would not accurately weigh their options and would not dare go to trial, even with a strong defense"); *id.* at 113, 113 n.96 (estimating the size of the trial penalty).

[104] *Boykin*, 395 U.S. at 242 ("Admissibility of a confession must be based on a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.") (quotations and citation omitted); Brady v. United States, 397 U.S. 742, 750 (1970) ("[A]gents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."); ILL. SUP. CT. R. 402(b) ("The court shall not accept a plea of guilty without first determining that the plea is voluntary.").

[105] *E.g.*, Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 12–13 (2013); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) ("The overwhelming and dominant fact of the federal sentencing system . . . is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.").

[106] *E.g.*, *Brady*, 397 U.S. at 751.

[107] *See, e.g.*, *id.* at 745.

[108] *See id.* at 751 (declining to hold that a "guilty plea is compelled and invalid . . . whenever motivated by the defendant's desire to accept the certainty or probability of a lesser [pre-trial] penalty rather than face . . . possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged").

demonstrate a defendant's knowledge are easily achieved in open court, whereas determining whether a person acted voluntarily is not.[109]

Far from a foolproof method that purports to determine the factual validity and voluntariness of a conviction, the plea system asks a defendant to rationally weigh the state's evidence against him and compare it to evidence supporting his defense.[110] He must engage in a cost-benefit assessment and consider his chances of winning at trial (and a lesser sentence) compared to the certainty of a guilty plea and generally less severe punishment. Disguised as a rational choice, then, a "decision to plead guilty may be based on factors that have nothing to do with [a] defendant's guilt."[111] Even still, the Supreme Court in *Brady* satisfied itself that a guilty plea "is not invalid merely because [it was] entered to avoid the possibility of a death penalty."[112] It seems then, that a defendant's opportunity to engage in this cost-benefit assessment is enough to satisfy the voluntary requirement, despite the overwhelming associated costs that a defendant—often untrained in the law—is not often qualified to assess.[113]

Because statutory structures and mandatory sentencing regimes strip judges of discretion, innocent defendants have greater incentives to plead guilty in order to avoid trial. When the risk of losing at trial becomes too great, a plea bargain becomes the only alternative to avoid that risk. That accepting a guilty plea has become a reasonable choice for an innocent defendant in the United States should not negate one's innocence, nor should it indicate that acceptance was actually voluntary.[114]

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[109] *Compare* FED. R. CRIM. P. 11(b)(1)(A)–(O) (requiring a court to establish a defendant's knowledge through recitation of over a dozen terms) *with* FED. R. CRIM. P. 11(b)(2) (requiring a court to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)").

[110] Wright, *supra* note 95, at 107 & n.78.

[111] People v. Reed, 2020 IL 124940, ¶ 33, 182 N.E.3d 64, 72.

[112] *Brady*, 397 U.S. at 755.

[113] *See, e.g.*, *id.* at 752 (noting defendant's advantages as the slight possibility of acquittal and elimination of practical burdens of a trial); People v. Jones, 579 N.E. 2d 829, 841 (Ill. 1970) (recognizing hope for lesser sentence influential in defendant's decision to plead guilty); People v. Brown, 244 N.E.2d 159, 160 (Ill. 1969) (finding defendant pleaded due to his fear of a severe sentence); Wright, *supra* note 95, at 109, 109 n.86.

[114] Although courts traditionally discouraged guilty pleas and prohibited the use of incentives to induce a defendant to admit to a crime, today, incentives are the fundamental characteristic of modern plea bargains. In 1970, the *Brady* Court cited a 1966 study which estimated that 90 to 95% of criminal convictions and 70 to 85% of all felony convictions were obtained through guilty pleas. *Brady*, 397 U.S. at 752 n.10. In 2020, 97.8% of all federal convictions and 96.3% of convictions in the Seventh Circuit were obtained through guilty

4. Alford *Pleas*

An *Alford* plea allows a defendant to accept a guilty plea and the corresponding punishment while simultaneously asserting their innocence. In *North Carolina v. Alford*, the Court recognized that an accused person could "intelligently conclude" there was "absolutely nothing to gain by a trial and much to gain by pleading" guilty.[115] Put another way, when a defendant understands that going to trial brings with it the possibility of a severe punishment, accepting a guilty plea is voluntary and "quite reasonabl[e]."[116]

Whether Alford voluntarily pled guilty was the central question before the Court. In 1963, a grand jury indicted Alford for first-degree murder, a capital charge.[117] The evidence against him was strong, and his court-appointed attorney recommended that Alford plead guilty to the lesser charge of second-degree murder in order to avoid the maximum penalty.[118] At the time, North Carolina law imposed death for first-degree murder unless a defendant pled guilty, or a jury advised life imprisonment.[119]

Alford faced "the awesome dilemma of risking the death penalty in order to assert his right to a jury trial and avoid self-incrimination, or, alternatively, of pleading guilty to avoid the possibility of capital punishment."[120] Alford accepted his counsel's advice and pled guilty to second-degree murder, which carried a maximum penalty of thirty years. Alford continued to assert his innocence and appealed his conviction, arguing that his plea was invalid because it was unconstitutionally coerced.[121]

In 1968, a divided Fourth Circuit panel granted Alford habeas relief, finding without hesitation that his guilty plea was "demonstrably coerced"

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pleas. CHARLES R. BREYER, DANNY C. REEVES, PATRICIA K. CUSHWA & CANDICE. C. WONG, U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 tbl. 11.

[115] North Carolina v. Alford, 400 U.S. 25, 37–38 (1970) ("An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."); *see also* Brady v. United States, 397 U.S. 742, 749–51 (1970) (declining to determine the possibility of the death penalty or significant reduction in sentencing is not coercive enough to render a guilty plea invalid); ILL. SUP. CT. R. 402(a) (providing parameters for guilty pleas or "stipulation[s] that the evidence is sufficient to convict").

[116] *Alford*, 400 U.S. at 37–38.

[117] *Id.* at 26–27.

[118] *Id.*

[119] *Id.* at 27 n.1.

[120] Alford v. North Carolina, 405 F.2d 340, 344 (4th Cir. 1968), *vacated sub nom.* North Carolina v. Alford, 400 U.S. 25 (1970).

[121] *Id.* at 348.

and involuntary in light of North Carolina's statutory scheme.[122] Specifically, the court noted the "chilling effect" upon the Sixth Amendment right to a jury trial as well as the Fifth Amendment right against self-incrimination.[123] The Fourth Circuit reasoned that, under *United States v. Jackson*, the North Carolina statute was unconstitutional because it "needlessly penalize[d] the assertion of a constitutional right."[124]

Despite the fact that Alford's plea was principally motivated by fear of the death penalty, the Supreme Court reversed. [125] Writing for the majority, Justice White held that a guilty plea entered to avoid the possibility of the death penalty is valid when it represents "a voluntary and intelligent choice among the alternatives available to a defendant" and is not compelled as a result.[126] In light of the evidence against him, Alford clearly expressed his desire to waive his constitutional rights and "quite reasonably" chose to plead guilty to reduce the threat of death to a 30-year term of imprisonment.[127]

Dissenting from *Alford*, Justice Brennan acknowledged that duress negated Alford's ability to make a truly voluntary choice, writing that the facts "demonstrate that Alford was 'so gripped by fear of the death penalty' that his decision to plead guilty was not voluntary but was 'the product of duress as much so as choice reflecting physical constraint.'"[128]

Justice Brennan recognized that the presence of duress equal to physical constraint eliminates the possibility of a voluntary choice. The risk of trial and a heightened sentence causes defendants to experience duress. This pressure renders them unable to make a voluntary choice.[129]

C. JUDICIAL FRUSTRATION OF SECTION 2-702

Section 2-702 directs a court to exercise its discretion "in the interest of justice, giving due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence[,] or other factors" beyond the petitioner's control.[130] The court

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[122] *Id.* at 341.

[123] *Id.* at 344.

[124] *Id.* at 345 (quoting United States v. Jackson, 390 U.S. 570, 583 (1968)).

[125] North Carolina v. Alford, 400 U.S. 25, 37 (1970).

[126] *Id.* at 31.

[127] *Id.* at 37–38.

[128] *Id.* at 40 (Brennan, J., dissenting) (citing Haley v. Ohio, 332 U.S. 596, 606 (1948) (Frankfurter, J.)).

[129] *Id.*

[130] 735 ILL. COMP. STAT. 5/2-702(a) (2021).

should consider the inherent difficulties of each case and attempt to alleviate frustrations posed by substantive and technical obstacles in the law."[131]

Instead, Illinois courts have exercised discretion to frustrate the purpose of Section 2-702. The decision to couch the evaluation of a person's right to relief from a wrongful conviction in a statutory construction analysis focused on whether a person "voluntarily caused or brought about" his or her conviction allows the state to remain indifferent to the consequences of its errors.[132] Because statutory construction is a permissible technique by which a court can impartially state what the law is, its use creates the impression of a neutral—and therefore unassailable—outcome. But the veneer of neutrality vanishes when the judiciary devours the purpose of a statute through formalistic rules. Ignoring the purpose of a law is not a neutral application; rather, it reflects a choice about what should and should not be prioritized in the application of the law.

Indeed, the *Washington* majority's omission of the term "voluntarily" from its statutory analysis was a decision to ignore official misconduct, to prioritize the benefits of plea bargaining, and to use its power to shield the State from liability for its wrongdoing.[133] Denying Wayne Washington a COI based on a demonstrably incorrect reading of the relevant statute does not remove a technical obstacle the legislature sought to eliminate. On the contrary, it imposes an obstacle absent from the statute. Carried to its logical conclusion, this imposition denies innocent people relief and perpetrates flagrant injustice. This Section shares multiple instances in which the judiciary has applied this interpretation and denied relief to innocent people.

1. People v. Amor

In *People v. Amor*, the Illinois appellate court affirmed the denial of William Amor's petition for a COI.[134] The court determined that Mr. Amor

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[131] *Id.*

[132] *Id.* at § 2-702(g)(4); *see infra* Part III; *see also* John H. Wigmore, *The Bill to Make Compensation to Persons Erroneously Convicted of Crime*, Editorial, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 665, 665–67 (1913).

[133] *Washington*, 2020 IL App (1st) 163024, ¶ 25, 186 N.E.3d at 1060 ("The plain and ordinary meaning of 2-702(g)(4) is clear. A defendant who has pled guilty 'cause[d] or [brought] about his or her conviction' and is not entitled to a certificate of innocence . . . . We see no other way to interpret this provision.") (citation omitted).

[134] People v. Amor, 2020 IL App (2d) 190475, ¶ 1, 180 N.E.3d 170, 172, *appeal denied*, 167 N.E.3d 629 (Ill. 2021).

brought about his conviction when he voluntarily confessed to setting a fire that caused the death of his mother-in-law.[135]

In September 1995, while Mr. Amor and his wife Tina were gone for the night, a fire broke out in the apartment they shared with Tina's mother, Marianne.[136] Marianne died from smoke inhalation.[137] Police questioned Mr. Amor multiple times throughout September; he denied having any information about the fire or knowing whether Marianne had a life insurance policy.[138] In October 1995, Mr. Amor confessed[139] after being subjected to a fifteen-hour interrogation and served with divorce papers.[140] Police recorded Mr. Amor admitting he was after Marianne's insurance benefits[141]—even though neither he nor Tina were beneficiaries.[142] Prosecutors charged him with first-degree murder and aggravated arson.[143] The court denied Mr. Amor's motion to suppress the confession, and a jury found him guilty of both counts.[144]

In 2015, with assistance from attorneys at the Illinois Innocence Project,[145] Mr. Amor filed a successive petition for post-conviction relief, arguing that new evidence showed his actual innocence.[146] The trial court vacated the conviction, and held that although there was evidence of Mr. Amor's potential motive, intent, and consciousness of guilt, "the lynchpin of the State's case at trial was the defendant's confession, which the State and Defense experts today agree is scientifically impossible."[147] Casting aside the fact that Mr. Amor was served with divorce papers during a homicide interrogation, the court remanded for further proceedings.[148] At a bench trial

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[135] *Id.* ¶ 3, at 172–73.

[136] *Id.* at 172.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 173. He "put his head on the table and said that the fire was his fault." *Id.*

[140] *William "Bill" Amor*, ILLINOIS INNOCENCE PROJECT, https://www.uis.edu/2021-illinoisinnocenceproject/bill-amor [https://perma.cc/2HXV-NFWA].

[141] *Amor*, 2020 IL App (2d) 190475, ¶ 3, 180 N.E.3d at 173.

[142] Maurice Possley, *William Amor*, NAT'L REGISTRY OF EXONERATIONS (May 5, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5283 [https://perma.cc/XWY7-RFKL].

[143] *Amor*, 2020 IL App (2d) 190475, ¶ 4, 180 N.E.3d at 173.

[144] *Id.* Mr. Amor was denied postconviction relief in 2002. *Id.* ¶ 5, at 173.

[145] William "Bill" Amor, *supra* note 140.

[146] *Amor*, 2020 IL App (2d) 190475, ¶ 6, at 173.

[147] *Id.* ("Whatever the reasons for the defendant's scientifically impossible confession, the new evidence places the evidence presented at trial in a different light and undercuts this Court's confidence in the factual correctness of the guilty verdict.").

[148] *Id.* ¶¶ 6–8, at 173–74.

three years later, in 2018 and twenty-two years after Illinois wrongfully convicted him, Mr. Amor was found not guilty.[149]

Mr. Amor petitioned for a COI. The trial court denied it, characterizing the circumstances of Mr. Amor's confession as "somewhat unique" while remarking that "having the defendant served with divorce papers during the course of a homicide interrogation isn't something I've ever seen before, heard of, read about, or even seen on fictional TV."[150] Faithfully applying the statute, the judge focused exclusively on whether Mr. Amor voluntarily brought about his own conviction.[151] Although the judge found Mr. Amor's confession "unreliable," he also determined it was not "the product of any physical abuse or such verbal conduct or sleep deprivation or any other type of interrogation tactic that would bring about an involuntary confession."[152] This problematic conclusion suggests that illegal interrogation tactics are always necessary to produce involuntary confessions. So, the trial court deduced, because the police interrogating Mr. Amor did *not* do so illegally, his confession was voluntary.

The appellate court was similarly rigid. It rejected Mr. Amor's contention that the trial court misinterpreted Section 2-702, and instead supported the lower court's narrow and formalistic application.[153] The reviewing court clarified that the ruling did not mean "that the statute requires, in all cases, that a voluntary confession prohibits the issuance of a [C]ertificate of [I]nnocence."[154] Instead, it confirmed that Section 2-702 requires a narrow and deferential inquiry into whether a defendant voluntarily caused or brought about his conviction.[155]

However, the trial court's muddling the question of voluntary with the legality of police activity could be useful. After all, it is an acknowledgment

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[149] Matt Masterson, *Naperville Man Acquitted in Retrial 22 Years After Arson Murder Conviction*, WTTW (Feb. 21, 2018, 3:24 PM), https://news.wttw.com/2018/02/21/naperville-man-acquitted-retrial-22-years-after-arson-murder-conviction [https://perma.cc/H5SK-Q5D9].

[150] *Amor*, 2020 IL App (2d) 190475, ¶ 12, 180 N.E.3d at 175.

[151] *Id*.; 735 ILL. COMP. STAT. 5/2-702(g) (2021).

[152] *Amor*, 2020 IL App (2d) 190475, ¶ 12, 180 N.E.3d at 175.

[153] *Id*. ¶¶ 13–14, at 175 ("The trial court did not show any misunderstanding of the statute and tailored its decision per the statutory requirements.").

[154] *Id*. ¶ 14, at 175.

[155] *Id*. The court makes this distinction in order to review for abuse of discretion, a deferential standard of a district court's fact-based errors, rather than *de novo*, which concerns lower courts' legal errors. Though Mr. Amor argued the trial court made a legal error in interpreting the statute and deeming his confession "voluntary," the reviewing court declared that there was no "legal misinterpretation or improper legal conclusion." *Id.* ¶ 13–14, at 175.

that illegal tactics and voluntary confessions are likely mutually exclusive. But the reasoning also imposes a substantive obstacle: It would mean that every claim of innocence must include an allegation of official misconduct. If that were the case, then every COI granted would represent official misconduct. Inevitably, this would make a COI even more difficult to acquire. This seems like the sort of obstacle the legislature sought to abolish. Is this so far from reality? Does this inquiry best capture and advance the purpose of the statute?

No, it does not. The purpose of Section 2-702 is to provide legal redress to innocent persons wrongly convicted of crimes and frustrated by "technical obstacles in the law."[156] Yet here, the appellate court openly disregarded evidence of Mr. Amor's innocence—evidence that supported a "not guilty" determination in his second trial and resulted in his freedom.[157] Condoning the lower court's choice to disregard Mr. Amor's actual innocence reflects the judiciary's prioritization of a formal, rigid application of the law, dissolves the veneer of judicial neutrality, and snatches from Mr. Amor the relief Section 2-702 promises.[158]

Indeed, Section 2-702 requires a court to consider, in the interest of justice, "other factors" not caused by wrongfully convicted people.[159] Here, the court could have considered other factors such as the length and circumstances of Mr. Amor's interrogation in 1995; the unreliability and scientific impossibility of his confession; the evidence and adjudication of his actual innocence; and even that the lower court's reasoning would, carried to its logical conclusion, impose an obstacle the legislature sought to avoid.

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[156] *See* 735 ILL. COMP. STAT. 5/2-702(a) (2021) ("[I]nnocent persons who have been wrongly convicted of crimes in Illinois and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue to obtain a finding of innocence so that they may obtain relief through a petition in the Court of Claims.").

[157] *Amor*, 2020 IL App (2d) 190475, ¶ 15, 180 N.E.3d at 176 ("[T]his element of the cause of action for a certificate of innocence is not at issue before us . . . . [W]hat is abundantly clear is that the only basis upon which the trial court dismissed defendant's petition was that defendant brought about his conviction by his conduct. The trial court did not make any findings of fact or conclusions of law on the 'innocence' element, nor did it make any ruling on it that was detrimental to defendant's cause. If anything, we will assume—in the absence of such findings, conclusions, and rulings—that defendant *did* prove those other elements by a preponderance of the evidence.") (emphasis added).

[158] *Id*. ¶ 14, at 175.

[159] 735 ILL. COMP. STAT. 5/2-702(a).

Instead, the Illinois appellate court characterized the lower court's ruling as a decision without error and well within its discretion.[160]

Contrast the reasoning in Mr. Amor's case with *People v. Dumas*.[161] There, after successfully reversing his conviction for unlawful possession of a controlled substance, the appellate court denied James Dumas a COI because he voluntarily caused his conviction by taking multiple steps to purchase a kilogram of cocaine from an undercover police officer.[162] This reasoning acknowledges that Mr. Dumas exercised autonomy over his choices, acted voluntarily, and therefore, his conduct caused his conviction.

2. People v. Reed

Deciding Washington's case will require the Illinois supreme court to determine whether a guilty plea forecloses relief based on claims of coerced, involuntary confessions—in other words, when an individual maintains their innocence. Therefore, it is worth considering the reasoning in *People v. Reed*, which contemplated similar questions of innocence[163] arising under the Illinois Post Conviction Act.[164]

In *Reed*, the Fourth District Appellate Court narrowed the permissible bases upon which a petitioner could raise a freestanding post-conviction claim of actual innocence under the Illinois Post Conviction Act.[165] The court held that a post-conviction claim of actual innocence following a defendant's knowing and voluntary guilty plea is barred unless the claim attacks that element of the plea.[166] This is because a court can only accept a guilty plea if a defendant knowingly forfeits their constitutional rights and waives all non-

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[160] *Amor*, 2020 IL App (2d) 190475, ¶ 24, 180 N.E.3d at 178 ("This trial court did not surrender its discretion; it exercised its discretion after investigating the facts and law, and it made a decision. This decision was not an abuse of discretion. We find no error here.").

[161] People v. Dumas, 2013 IL App (2d) 120561, ¶¶ 11–12, 988 N.E.2d. 713, 716. Mr. Dumas' conviction for unlawful possession of a controlled substance with the intent to deliver was reversed because the State did not prove beyond a reasonable doubt that Mr. Dumas possessed the cocaine. *Id.* (citing People v. Dumas, 2011 IL App (2d) 100006-U, ¶ 27, ¶ 29).

[162] *Id.* ¶ 19, at 714.

[163] *Compare Reed*, 2019 IL App (4th) 170090, ¶ 21, 125 N.E.3d at 485 *with* People v. Washington, 2020 IL App (1st) 163024, ¶ 23, N.E.3d 1055, 1059.

[164] People v. Reed, 2019 IL App (4th) 170090, ¶ 26–27, 125 N.E.3d 480, 487, *aff'd but criticized by* People v. Reed, 2020 IL 124940, ¶ 37, 182 N.E.3d 64, 73 (affirming the denial of Reed's post-conviction claim based on actual innocence but rejecting the conclusion that accepting a guilty plea forecloses such relief).

[165] *Reed*, 2019 IL App (4th) 170090, ¶ 26, 125 N.E.3d at 487. The Act provides a cause of action to individuals whose constitutional rights were violated during proceedings that resulted in conviction. 725 ILL. COMP. STAT. 5/122-1(a) (2021).

[166] *See Reed*, 2019 IL App (4th) 170090, ¶ 26, 125 N.E.3d at 487.

jurisdictional challenges to conviction.[167] The court relied on this fact in its scathing conclusion: "Defendants cannot knowingly and voluntarily plead guilty in the trial court and then turn around and complain to a reviewing court that the trial court found them guilty. That would be paradoxical if not duplicitous."[168]

In espousing this distinction, the court acknowledged and dispensed with *People v. Knight*, a Third District decision that *permitted* a freestanding post-conviction claim of actual innocence following a guilty plea.[169] There, because the defendant attacked the legitimacy of his guilty plea in addition to claiming actual innocence, his petition was permitted to advance.[170]

What's the point? Courts grappling with "voluntary" suggest that the judiciary understands the importance of individual autonomy when it comes to accepting the consequences of a conviction and the knowing waiver of constitutional rights. Further, the judiciary knows how to engage with facts to determine whether a plea was voluntary.

This means that in cases like *Washington*, where the petitioner's claim to innocence is predicated on an illegally obtained and coerced confession, it would be reasonable for the Illinois Supreme Court to rule in his favor, as it ultimately did in *Reed*. Affirming on the merits but rejecting the appellate court's reasoning, the Illinois high court held that "defendants who plead guilty may assert an actual innocence claim under the [Illinois Post Conviction] Act."[171] It pointed to Supreme Court Rule 402, which permits courts to accept an *Alford* plea.[172] Concluding that "pleas are no more foolproof than trials[,]" the court resoundingly rejected the "legal fiction" of a guilty plea when "met with a truly persuasive demonstration of innocence."[173]

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[167] *Id.* ¶ 25; *see also* FED. R. CRIM. PRO. 11, *supra* note 109.

[168] *Reed*, 2019 IL App (4th) 170090, ¶ 26. The court also applies the "invited error" doctrine, claiming that constitutional deprivations in the context of a guilty plea are essentially self-inflicted wounds. *Id.* ("Assuming, for the sake of argument, that defendant's conviction of armed violence is a constitutional error because he really is innocent, it is an error he himself invited by pleading guilty to armed violence.") (citing People v. Kane, 2013 IL App (2d) 110594, ¶ 27, 5 N.E.3d, 737, 744).

[169] *Reed*, 2019 IL App (4th) 170090, ¶ 17, 125 N.E.3d at 483; People v. Knight, 937 N.E.2d 789, 798 (Ill. App. Ct. 2010).

[170] *Reed*, 2019 IL App (4th) 170090, ¶ 17, 125 N.E.3d at 483.

[171] People v. Reed, 2020 IL 124940, ¶ 41, 182 N.E.3d 64, 74.

[172] ILL. SUP. CT. R. 402; *see* discussion *supra* Part II.

[173] *Reed*, 2020 IL 124940, ¶ 35, 182 N.E.3d at 72 (citing People v. Washington, 665 N.E. 2d 1330, 1336 (Ill. 1996)).

When it comes to Wayne Washington, the Illinois Supreme Court should continue to "refuse[] to turn a blind eye to the manifest injustice and failure of our criminal [legal] system that would result from the continued incarceration of a demonstrably innocent person."[174]

D. EXISTING OBSTACLES

Judicial frustration of Section 2-702 permits the imposition of additional obstacles and consequences that arise when an individual has a criminal record. This Section describes such obstacles.

1. Technical Obstacles and Collateral Consequences

"Collateral consequences" refer to a "host of sanctions and disqualifications that can place an unanticipated burden on individuals trying to reenter society and lead lives as productive citizens."[175] Without an affirmative statement of innocence, it is nearly impossible for an individual to move beyond an interaction with the criminal legal system. Regardless of an individual's offense, a conviction presents often insurmountable barriers in the form of collateral consequences. These consequences are the ostensibly non-punitive, non-criminal, normative consequences that flow from a criminal conviction, either automatically or as a matter of discretion. A conviction brings a range of consequences affecting nearly every aspect of a person's daily life, including employment and housing prospects, educational opportunities, and parental rights, to name a few.[176] Indeed, the consequences can be so systematic and so great that some scholars argue that a conviction amounts to a civil death.[177]

Collateral consequences can be automatic upon conviction, discretionary, or revealed in the form of a background check. For example, Illinois statutes and administrative regulations automatically impose nearly

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[174] *Id.* ¶ 41, at 73.

[175] Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, 272 NAT'L INST. JUST. J. 25, 25 (2013).

[176] *See, e.g.*, Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 327–28, 341–43 (2015) (discussing the exponential increase in collateral consequences and the inadequacy of expungement as a remedy).

[177] *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790–91 (2012) (arguing that the systematic loss of a legal status imposed by statutory and regulatory consequences flowing from a criminal conviction amounts to a civil death).

700 mandatory consequences for any offense.[178] And while most consequences apply to specific convictions, such as termination of employment benefits for a work-related felony,[179] other consequences apply regardless of the offense.[180] For example, any felony conviction is commonly recognized to prohibit a person from possession of a firearm.[181]

Although these well-known consequences have great implications for the convicted, everyday consequences have an arguably greater impact on daily life. In Illinois, any felony conviction restricts access to various employment opportunities, occupational licenses, and professional certifications.[182] Additionally, a felony conviction impacts access to government-sponsored student loans and grants.[183] Consequences extend beyond the individual to affect their families as well; a person experiencing incarceration is barred from receiving public assistance for their family,[184] and cannot serve as a personal fiduciary, or executor or administrator of an estate.[185] A felony conviction also impacts the greater community by limiting

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[178] *See Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences [hereinafter NICC] (cataloging collateral consequences of convictions according to laws and regulations at local, state, and federal levels) (under "Jurisdiction," select "Illinois," then under "Discretion," select "Mandatory/Automatic").

[179] 820 ILL. COMP. STAT. 405/602 (2016).

[180] *See* NICC, *supra* note 178 (under Jurisdiction, select "Illinois," then under "Offense type," select "Any felony"). The American Bar Association is compiling collateral consequences pursuant to a grant awarded by the National Institute of Justice (NIJ). *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510, 121 Stat. 2534, 2543 (2008) (requiring the NIJ Director to "compile the collateral consequences of convictions for criminal offenses in the United States, each of the 50 States, each territory of the United States, and the District of Columbia").

[181] 720 ILL. COMP. STAT. 5/24-1.1 (2021) (prohibiting possession of firearms); *see also*, *e.g.*, 225 ILL. COMP. STAT. 210/2005 (2019) (prohibiting granting licenses for the possession or use of explosives).

[182] *See*, *e.g.*, ILL. ADM. CODE tit. 68, § 870.210(c)(1)(B) (rendering an individual ineligible for Class C landfill operator certification).

[183] *See* Eve Rips, *A Fresh Start: The Evolving Use of Juvenile Records in College Admissions*, 54 U. MICH. J.L. REFORM 217, 237–38 (2020) (discussing the impact of criminal records in federal funding programs for higher education).

[184] 410 ILL. COMP. STAT. 225/5(d) (1990) (providing that a person currently "detained in a Federal, State, or local correctional facility as a result of being charged with or convicted of a criminal offense" is ineligible for public assistance.).

[185] 755 ILL. COMP. STAT. 5/28-3(b) (2015) (rendering an individual convicted of a felony ineligible to act as personal fiduciary); *id.* § 6-13(a) (ineligible to act as executor of an estate); *id.* § 9-1 (ineligible to act as administrator of an estate).

an individual's civic participation, including the ability to serve as a political party committeeperson[186] and the right to vote.[187]

Finally, collateral consequences are reflected in the over seventy-five Illinois statutes and regulations that require a criminal background check for employment, professional licensure, business licensure, and certifications.[188] While these statutes do not impose a penalty, most require an individual seeking employment to permit examination of their criminal record.[189] As the number of people in the United States with some type of criminal record grows alarmingly high, it is unsurprising that many individuals, families, and communities struggle with the serious collateral consequences of that record.[190]

2. Recidivism Statutes

Recidivism statutes provide another source of collateral consequences. These statutes serve multiple purposes by enhancing second or subsequent offenses to a conviction with a higher penalty,[191] or permit a prior conviction to serve as the basis for an extended sentence in excess of the maximum statutory authorization.[192] An extended sentence may only be imposed with

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[186] 10 ILL. COMP. STAT. 5/7-8(k) (2019).

[187] 10 ILL. COMP. STAT. 5/3-5 (2018). A person required to verify voter registration must "make oath and sign an affidavit" to the Board of Election Commissioners that affirms the individual has "never been convicted of any crime (or if convicted, state the time and when pardoned by the Governor of any State)." 10 ILL. COMP. STAT. 5/6-41 (2013). For a discussion on the disenfranchisement of minority communities as a result of disproportionate felony convictions, see Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587, 589–90 (2011).

[188] *See, e.g.*, 20 ILL. COMP. STAT. 2605/2605-330 (2021) (permitting the chief of a fire department or board of trustees to request a fingerprint-based criminal background check for firefighter applicants); ILL. ADM. CODE tit. 56, § 6000.100(a) (2020) (requiring background checks for carnival and amusement workers); ILL. ADM. CODE tit. 68, 1249.200 (2012) (requiring applicants seeking licensure as a cemetery manager to submit to a criminal background check).

[189] *See* statutes cited *supra* note 188.

[190] Roberts, *supra* note 176, at 327–28.

[191] *See, e.g.*, 720 ILL. COMP. STAT. 5/17-11 (2011) (elevating the second conviction of odometer fraud from a Class A misdemeanor to a Class 4 felony); 720 ILL. COMP. STAT. 5/26-1(b) (2020) (elevating the second conviction of disorderly conduct from a Class A misdemeanor to a Class 4 felony); 625 ILL. COMP. STAT. 5/11-501(2019) (permitting subsequent convictions of driving under the influence or alcohol or any intoxicating compound to accumulate into felonies).

[192] *See, e.g.*, 720 ILL. COMP. STAT. 570/408 (2012) (permitting an individual convicted of a second or subsequent offense of the Illinois Controlled Substances Act to be sentenced to a

the "legislature's clear expression of its intention to enhance the penalty based upon an aspect of the crime."[193] This includes the General Recidivism Provisions, which label an individual as a habitual criminal and permit the imposition of a natural life sentence if a person is twice convicted of an offense that contains the same elements as a Class X felony.[194] The only way for a person carrying a former conviction to exempt it from consideration is to show they received a "pardon granted for the reason that he or she was innocent."[195] This is exactly what a COI accomplishes.

3. Substantive Obstacles

While collateral technical obstacles flowing from a criminal conviction are enshrined in statutes and regulations, the most severe burdens imposed by a conviction and lack of an affirmative statement of innocence are barriers to stable housing, employment, and education.[196] The opportunity to support a family, achieve financial security, and access education are fundamental and deep-seated values in the United States.[197] The disproportionate incarceration of Black Americans means that barriers resulting from convictions have a greater injurious impact on these individuals, families, and communities.[198] The prospect of fully participating in society, cultivating a sense of self-worth, and experiencing economic security after successfully completing a sentence for a crime is critical to racial and economic justice, intergenerational stability, and individual and collective dignity.[199] Yet a criminal conviction creates long-term consequences and substantive obstacles that threaten access to an individual's ability to successfully move on with their life.

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term of imprisonment "up to twice the maximum term otherwise authorized, fined an amount up to twice that otherwise authorized, or both").

193 People v. Brock, 2015 Il App (1st) 133404, ¶ 37, 45 N.E.3d 295, 305.

194 730 ILL. COMP. STAT. 5/5-4.5-95(a)(5) (2021) ("Anyone who is adjudged a habitual criminal shall be sentenced to a term of natural life imprisonment.").

195 *Id.* § 5-4.5-95(a)(9).

196 *See, e.g.*, Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 966 (2013) (discussing the permanent impact of criminal records on communities and individuals of color); Rips, *supra* note 183, at 235–36 (discussing the use of criminal records in the college admissions process).

197 Sen. Barack Obama, *Remarks in Bettendorf, Iowa: "Reclaiming the American Dream"* (Nov. 7, 2007) ("Americans share a faith in simple dreams. A job with wages that can support a family. Health care that we can count on and afford. A retirement that is dignified and secure. Education and opportunity for our kids. Common hopes. American dreams.").

198 *See, e.g.*, Thompson, *supra* note 187, at 589; Pinard, *supra* note 196, at 966.

199 Pinard, *supra* note 196, at 966.

Employer access to criminal records of prospective employees makes it difficult to overstate the injurious impact of a criminal record on employment opportunities.[200] While the majority of criminal records involve non-violent, minor, or non-criminal offenses, data available to employers includes records of "arrest (or notice to appear in lieu of arrest); detention; indictment or other formal criminal charge[s] (and any conviction, acquittal or other disposition arising therefrom); sentencing; correctional supervision; and release of an identifiable individual."[201] More often than not, the combination of social stigma of a criminal record and racial bias excludes individuals of color from the labor market, rendering them "essentially unemployable."[202] This stigma and racial bias may explain why in 2010, for example, the unemployment rate of Black Americans was nearly double that of whites.[203] Still, for individuals who did find gainful employment, incarceration reduces annual earnings by an estimated forty percent, imposing what Professor William Stuntz calls the "human consequences" of disproportionate Black American incarceration.[204]

Another substantive obstacle is access to stable housing. Domestic stability is a critical determinant of whether an individual will successfully move past his or her involvement with the criminal legal system.[205] While federal law allows public housing providers to exclude a broad array of individuals with criminal records from access to housing, this vast discretion disproportionately affects poor individuals of color by removing viable options for stable housing.[206]

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[200] *E.g.*, James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 389–90 (2006) ("[A] criminal record has always been a disadvantage in obtaining employment.").

[201] Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 904 (2014) (citation omitted).

[202] Pinard, *supra* note 196, at 973; *see also* Paul-Emile, *supra* note 201, at 913–14 (discussing research showing "that the existence of a record can play a decisive role in the hiring process, reducing one's chance of receiving a callback or job offer by almost 50%"); Roberts, *supra* note 176, at 331–34 ("The combination of a criminal record and racial bias in the job market is particularly striking. One large-scale study showed how men with a felony drug conviction were 50 percent less likely than men without any record to receive a callback or be offered an entry-level job; Black men with a record who applied were twice as likely as white men to be saddled with this 'criminal record penalty.'") (citation omitted).

[203] Pinard, *supra* note 196, at 972 (citing WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 48 (2011)).

[204] *Id.*

[205] *Id.* at 975–76.

[206] *Id.*

A conviction also creates a substantive obstacle to accessing higher education. Colleges and universities collect applicants' criminal and juvenile history to use in their decision-making process.[207] While the purported reason for screening criminal history is to reduce on-campus crime or improve campus safety, the limited studies available generally do not suggest that campus safety is improved by inquiring about applicants' criminal history.[208] However, inquiring about an applicant's history can pose a bar to admission: when asked to consider whether an individual convicted of a particular crime would "probably or definitely not" be admitted, 80% of schools were unlikely to admit students convicted of physical assault, 72% were unlikely to admit a student convicted of distributing illegal drugs other than marijuana, 70% were unlikely to admit a student convicted of distributing illegal prescription drugs, and 64% were unlikely to admit a student convicted of distributing marijuana.[209]

A student's criminal history may also disqualify them for federal financial assistance for education including loans and grants.[210] Although the Free Application for Federal Student Aid ("FAFSA") does not provide clarifying language concerning the disclosure of an applicant's juvenile records, available federal guidance on completing the FAFSA explicitly instructs applicants: "Do not count any convictions that have been removed from your record or that occurred before you turned age 18, unless you were tried as an adult."[211] The fact that expunged and juvenile convictions will not result in a disqualification from financial aid implies that FAFSA may still disqualify applicants if they were convicted when tried as adults, or were over the age of 18.

III. INADEQUACY OF POST-CONVICTION REMEDIES

Most post-conviction remedies, such as an executive pardon, commutation, expungement, and exoneration, cannot overcome the combination of substantive and technical obstacles resulting from a person's wrongful conviction and imprisonment. Without an affirmative statement of innocence, overcoming the burden of a criminal record can be extremely

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[207] Rips, *supra* note 183, at 232–33.

[208] *Id.* at 231; *see also* Rebecca R. Ramaswamy, *Bars to Education: The Use of Criminal History Information in College Admissions*, 5 COLUM. J. RACE & L. 145, 158 (2015) ("No study has established a link between having a criminal record and being more likely to commit crimes on campus.").

[209] Rips, *supra* note 183, at 232.

[210] *Id.* at 237–38.

[211] *Id.* at 238.

difficult for many individuals. This Part discusses the inadequacy of post-conviction remedies before concluding that a COI is the only adequate remedy.

A. CLEMENCY POWER: EXECUTIVE PARDONS AND COMMUTATION

The clemency power is a "historic remedy employed to prevent a miscarriage of justice where the judicial process has been exhausted."[212] An express grant of broad discretionary authority rooted in a state's constitution, the clemency power is exclusively exercised by chief executives and "cannot be controlled by either the courts or the legislature."[213] Regarded as "an act of mercy or forgiveness by the executive branch," a pardon absolves a convicted individual of guilt and mitigates some or all legal consequences of a conviction.[214] For example, a pardon can restore an individual's right to vote or hold public office.[215]

Pardons can be full or partial: A full pardon is an unconditional liberation of an individual from all legal consequences of a conviction, including direct and collateral consequences, as well as punishment.[216] It functions as an affirmative statement of innocence. A partial pardon, on the other hand, mitigates only some legal consequences of a conviction.[217] For

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[212] People *ex rel.* Madigan v. Snyder, 804 N.E.2d 546, 560 (Ill. 2004). In 2003, Governor Ryan commuted the sentences of more than 160 inmates who had been sentenced to death by reducing them to life imprisonment, a maximum of life imprisonment, or 40 years. *Illinois Abolishes the Death Penalty*, NPR (Mar. 9, 2011, 1:35 PM), https://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty [https://perma.cc/ZYX6-AB32]. In 2011, Illinois legislators voted to abandon the death penalty which then-Governor Pat Quinn signed into law. *Id.* For a discussion on Governor Ryan's mass commutation, see John Charles Boger, *Foreword: Acts of Capital Clemency: The Words and Deeds of Governor George Ryan*, 82 N.C. L. REV. 1279 (2004).

[213] ILL. CONST. art. V, § 12 ("The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law."). In 2004, the Illinois Supreme Court determined this language "allows the legislature to regulate the process for *applying* for executive clemency. It does not purport to give the legislature the power to regulate the Governor's authority to *grant* clemency." *Madigan*, 804 N.E.2d at 552.

[214] Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 349 (2021).

[215] *Id.*

[216] *Madigan*, 804 N.E.2d at 557.

[217] *Id.*

example, a partial pardon might be a sentence commutation, which reduces a judicially imposed sentenced to a lesser, executively imposed one.[218]

While a partial pardon may result in an individual's release from custody, absent a full pardon, a freed individual remains branded by their wrongful conviction despite serving the permitted duration of their sentence. Put another way, this individual is deemed continually guilty. Without rightful compensation for the manifest harm done to them, and an affirmative statement of innocence, an individual carries tangible and financial burdens of a wrongful conviction.[219]

B. SEALING RECORDS AND EXPUNGEMENT

Expungement and sealing records are two statutory remedies designed to protect the disclosure of a criminal record. Under one definition, expungement refers to the physical destruction of an individual's criminal file by relevant authorities.[220] In practice, expungement often changes the legal status of an individual and functions as a decree that the offense did not occur.[221] Though an order of expungement directs the clerk of court to destroy physical copies of a record, they are not always destroyed.[222] Sealing a record, on the other hand, makes its contents unavailable to the public, but the records are "physically and electronically maintain[ed]."[223] Typically, the records are still available to law enforcement, prosecutors, and judges.[224] While state laws vary, this Section focuses on remedies provided by Illinois laws.

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[218] *Id.*

[219] Statement of Mary Flowers, 95th Ill. Gen. Assembly, House Proc. 7–8 (May 18, 2007).

[220] *Expungement of Record*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining expungement as "the removal of a conviction from a person's criminal record"); *see also* 20 ILL. COMP. STAT. ANN. 2630/5.2(a)(1)(E) (providing that "'expunge' means to physically destroy the records or return them to the petitioner and to obliterate the petitioner's name from any official index or public record, or both.").

[221] Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened Or Is There a Chance for a Second Act in America?*, 49 LOY. U. CHI. L.J. 1, 19 (2017).

[222] 705 Ill. COMP. STAT. 405/5-915(0.4) (2021); 20 ILL. COMP. STAT. 2630/5.2 (a)(1)(K) (2021).

[223] 20 ILL. COMP. STAT. 2630/5.2 (a)(1)(K) (2021) ("'Seal' means to physically and electronically maintain the records," unless they would otherwise be disposed of due to age, and "to make the records unavailable without a court order."). Note that records of minor traffic violations are not sealed unless the traffic stop resulted in an arrest. *Id.* § 5.2 (a)(3)(B) (2021).

[224] Rips, *supra* note 183, at 245–46.

The Illinois Criminal Identification Act permits individuals to petition the court to expunge certain criminal records at any time.[225] Eligible records include reports of arrest resulting in a person's release without charging, acquittal, or dismissal.[226] Convictions resulting in orders of supervision are eligible for expungement only after supervision is complete, and after a designated waiting period.[227] For example, an individual charged and convicted of operating a vehicle without insurance who receives supervision must wait five years before requesting expungement.[228] No waiting period applies to reversed or vacated convictions.[229]

Under the same statute, an individual requesting that his record be sealed must endure similar waiting periods.[230] Individuals who receive supervision and successfully complete it only may petition to have their record sealed beginning two years after the supervision is completed.[231] Convictions for drug-related crimes or certain felonies require an individual to wait at least three years after completing their sentence before requesting sealed records.[232] However, the statute provides that if a petitioner earned a GED, high school diploma, career certificate, vocational technical certification, or associate's or bachelor's degree during the period of his or her sentence or mandatory supervised release, the records may be sealed "upon termination of the petitioner's last sentence."[233]

In Illinois, certain offenses leave an indelible mark. Records of arrest or charges resulting in supervision or conviction for certain offenses are ineligible to be sealed, including most sex offenses, crimes against children,

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[225] 20 ILL. COMP. STAT. 2630/5.2(b)(1) (2021).

[226] *Id.*

[227] *Id.* § 5.2(b)(2)(B).

[228] *See id.* § 5.2(b)(2)(B)(i).

[229] *Id.* § 5.2(b)(2)(A).

[230] *Id.* § 5.2(c)(3).

[231] *Id.*

[232] Eligible crimes are arrests or charges "resulting in convictions, including convictions on municipal ordinance violations;" arrests or charges "resulting in orders of first offender probation under Section 10 of the Cannabis Control Act, Section 410 of the Illinois Controlled Substances Act, Section 70 of the Methamphetamine Control and Community Protection Act, or Section 5-6-3.3 of the Unified Code of Corrections;" and arrests or charges "resulting in felony convictions." 20 ILL. COMP. STAT. 2630/5.2(c)(2)(D)–(F). Additionally, records of convictions under the Arsonist Registration Act, the Sex Offender Registration Act, or the Murderer and Violent Offender Against Youth Registration Act may only be sealed once the petitioner is no longer required to register under the relevant Act. *Id.*

[233] 20 ILL. COMP. STAT. 2630/5.2(c)(3)(E) (2021). Note also the procedure requires a petitioner to include proof of a negative drug test within 30 days before the filing of the petition. *Id.* § 5.2(d)(3)(C).

violations of no contact orders, and crimes against animals.[234] In addition to their ineligibility to be sealed, any sexual offenses committed against a minor are also ineligible for expungement.[235]

The obvious critique of sealing an individual's record is that it is "[e]ssentially useless in our current information environment."[236] Access to criminal records is easy because "[a]lmost all states have publicly available Internet databases of criminal records."[237] Additionally, potential employers or landlords may go to private information vendors and for-profit websites that list arrest records and mug shots.[238] Even when a record is sealed or expunged, the potential for error is high. The FBI criminal database is notoriously inaccurate, and private information vendors or consumer reporting agencies do not always use reliable sources of information for their reports.[239]

C. EXONERATION

A person is exonerated when an agency or government official with the relevant authority to do so reexamines the evidence in a case and declares the person is "factually innocent."[240] A person is also exonerated when they are relieved of all consequences of a wrongful conviction through a government action, such as an executive pardon, acquittal of all charges related to the conviction, or the court or prosecutor with authority to dismiss all charges related to the conviction does so.[241] A pardon, acquittal, or dismissal must be based in part on evidence of innocence that was either not presented at the individual's trial, or, if the individual pled guilty, was unknown to the defendant, the defense attorney, and the court when the plea was entered.[242]

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[234] *Id.* § 5.2(a)(3)(A)(i) (excluding sex offenses against a minor); *id.* § 5.2(a)(3)(C)(i) (excluding sex offenses in Article II of the Illinois Criminal Code); *id.* § 5.2(a)(3)(C)(ii) (excluding criminal sexual abuse); *id.* § 5.2(a)(3)(C)(iii) (excluding violations of stalking and civil no contact orders); *id.* § 5.2(a)(3)(C)(iv) (excluding certain misdemeanors or felony offenses of the Human Care for Animals Act). Exceptions include prostitution. *See id.* § 5.2(j) (permitting any individual to request the vacation and expungement of "a prior Class 4 felony violation of prostitution").

[235] 20 ILL. COMP. STAT. ANN. 2630/5.2(a)(3)(B)(i) (2021).

[236] Roberts, *supra* note 176, at 341.

[237] *Id.* at 328.

[238] *Id.* at 328–29.

[239] *Id.* at 344–45.

[240] *Glossary*, NAT'L REGISTRY OF EXONERATIONS (Oct. 10, 2021), https://www.law.umich.edu/special/exoneration/Pages/glossary [https://perma.cc/93RD-LU9L].

[241] *Id.*

[242] *Id.*

Because of these lofty requirements, a person seeking exoneration is dependent upon the state's cooperation in the process.

While exoneration is an affirmative statement of innocence, it is an inadequate path to societal reentry because it does not address the substantive barriers a wrongful conviction creates. It is not a sole remedy to the financial harm associated with incarceration.[243] Individuals commonly accumulate debt while in prison and upon release.[244] While in prison, the opportunity to earn a meaningful income is all but impossible, as the average hourly wage is unlivable. In Illinois, the hourly wage for an individual working a regular prison job (such as a custodial, laundry, or food service position) ranges from $0.09 to $0.89. For jobs in state-owned businesses, where inmates produce items sold to government agencies, the hourly wage ranges from $0.30 to $2.25. Nationwide, state-owned "shops" employ about six percent of inmates.[245] Further, some states deduct living expenses from an individual's wages.[246] Additionally, court fines and attorney's fees can create substantial sources of debt, as not every case of exoneration is undertaken by pro bono attorneys. Families may also invest in an inmate's appeal or living expenses.[247] And while an individual's life outside of prison comes to a stop during incarceration, their financial obligations do not: Inmates are unable to reduce debt incurred prior to incarceration and may even accumulate additional debt through owed taxes or child support.[248] Although exonerees leave prison with a clean record, they must rebuild their lives with minimal support from the state, while dealing with potential health challenges and the psychological impact associated with wrongful incarceration.[249]

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[243] Dru Selden, *The Debt Paradox: In Debt but Society Owes You a Debt*, 37 EMORY BANKR. DEV. J. 95, 105–09 (2020).

[244] *Id.*

[245] Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages [https://perma.cc/E3KG-XBYL].

[246] *Id.*

[247] Selden, *supra* note 243, at 106–07.

[248] *Id*.

[249] INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 8–10 (2016), http://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf [https://perma.cc/S733-MM8P].

D. WHY CERTIFICATES OF INNOCENCE ARE THE ONLY ADEQUATE REMEDY

A COI is the only adequate remedy to correct the substantive and technical obstacles of a wrongful conviction. Similar to a full pardon, a COI absolves the legal consequences of a wrongful conviction and changes the legal status of an individual because it functions as an affirmative statement and tangible proof of an individual's innocence.[250] Compensating an individual for the wrong done to them by the state is an accepted principle of fairness in our society.[251] Indeed, the statements of Representative Mary Flowers of Illinois support this aspect of Section 2-702. Urging the passage of the bill, Rep. Flowers said, "These people are . . . entitled to the monies that they deserve. They are entitled to job training. They are entitled to therapy. They are entitled to be completely set free and given their good name back for a crime that they did not commit . . . ."[252] Because the State erred in a conviction, Rep. Flowers pressed, it is incumbent upon the State to correct it.[253]

IV. SOLUTIONS

This final Part considers possible legislative solutions to correct the inadequacies of existing post-conviction remedies, and requests that the judiciary consider the meaning of the word voluntary.

A. LEGISLATIVE REMEDIES

The first proposed solution is the simplest. The legislature ought to consider defining voluntary conduct, or expressly articulate particular acts that preclude an individual from obtaining a COI.

Professors Steven A. Drizin and Richard A. Leo suggest that limiting the duration of custodial interrogations would reduce the risk of false

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[250] *See* 735 ILCS 5/2-702(g)(3) (2021).

[251] *E.g.*, Wigmore, *supra* note 132, at 665–67 (discussing history of compensation statutes and urging Congress to compensate); Edwin Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3. J. AM. INST. CRIM. L. & CRIMINOLOGY 684 (1912) (the same); Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 202 (1941) (discussing Congress's May 1938 Act to Provide Relief to Persons Erroneously Convicted).

[252] Statement of Representative Flowers, Ill. H.R. Tran. 2007 Reg. Sess. No. 56 (May 18, 2007).

[253] *Id.*

confessions.[254] They advocate for the categorical inadmissibility of interrogations lasting longer than twelve hours and argue that interrogations lasting more than six hours should be admissible only if the prosecution can establish beyond a reasonable doubt that the interrogation was voluntary.[255]

The Illinois legislature should study the compensation statutes of other states to determine what conduct a court should consider in granting relief to wrongfully convicted individuals. For example, the equivalent Kansas statute requires that a claimant show they did not commit perjury, fabricate evidence, or cause or bring about their conviction.[256] Further, it provides that "[n]either a confession nor admission later found to be false or a guilty plea shall constitute committing or suborning perjury, fabricating evidence or causing or bringing about the conviction under this subsection."[257] Kansas also provides these individuals with tuition assistance, counseling, housing assistance, attorney's fees, and personal financial literacy assistance.

Other states expressly prohibit innocent people who pled guilty from obtaining COIs. These states do so expressly, with statutory language such as "plead guilty," "guilty plea," or "plea of guilty" to indicate exclusion.[258]

Next, the legislature could protect access to all criminal records. Jenny Roberts, Professor of Law at American University, argues for the effective regulation of information for companies that collect and sell criminal records for profit.[259] She suggests the possibility of preventing the erroneous publication of sealed or expunged records through the Fair Credit Reporting Act, which requires data brokers to take reasonable steps to "'assure maximum possible accuracy of the information concerning the individual about whom the report relates.'"[260] However, the potential for error remains

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

[255] *Id.*

[256] KAN. STAT. ANN. § 60-5004 (2018). An exhaustive comparison of analogous state statutes is beyond the scope of this Comment.

[257] *Id.*

[258] *See, e.g.*, IOWA CODE § 663A.1(1)(b) (1997) (requiring that petitioner "did not plead guilty to the public offense charged"); MASS. GEN. LAWS. ch. 258D, § 1(c)(iii) (2018) (requiring that petitioner "did not plead guilty to the offense charged"); OHIO REV. CODE ANN. § 2743.48(A)(2) (2019) (requiring that petitioner "did not plead guilty to, the particular charge or a lesser-included offense"); OKLA. STAT. ANN. 51, § 154(B)(2) (2021) (requiring that petitioner "did not plead guilty to the offense charged"); D.C. CODE § 2-425 (1981) (requiring that the petitioner's conviction did not result "from his entering a plea of guilty unless that plea was pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970)").

[259] Roberts, *supra* note 176, at 345–46.

[260] *Id.* (quoting 15 U.S.C. § 1681e(b)).

high because not all data brokers use reliable or accurate sources for their information.[261] Still, the legislature could attempt to ban the sale of criminal records and make it difficult for data brokers to peddle inaccurate or sealed information.[262]

Considering the impermissible intrusion on First Amendment principles that a government-mandated publication of a corrected criminal record creates, Professor Doris Del Tosto Brogan calls on journalists to voluntarily correct publications concerning an individual's erroneous criminal background.[263] Intertwining the correction of a public record as a matter of journalistic ethics and accountability could be an option, but Professor Brogan notes that even the *New York Times* takes a "restrained approach" to correcting reports of criminal activities, indicating that the *Times* will only do so "if the subject contacts the *Times* to say he or she was acquitted, or that charges were dropped."[264] Even then, the *Times* requires the subject to provide "related legal documents as proof."[265] These obstacles currently impede individuals' ability to correct publications about their wrongful convictions and again highlight the importance of COIs.

B. JUDICIAL CONSIDERATIONS

Several questions face the court when considering COIs. If we don't ignore the "voluntary" aspect of confessions and pleas, then how does the court analyze whether a conviction is actually voluntary? When does a confession or plea become voluntary? If a prosecutor is engaging in fraudulent inducement, is a defendant's action still voluntary? At what point does a defendant's participation become voluntary? An answer may be found if a court could consider the circumstances surrounding a confession and examine whether a defendant's will was overborne by the use of physical or emotional coercion.

1. The Use of "Voluntary" in Relevant State Statutes

Defining conduct that constitutes a voluntary act is not beyond the capacity of the Illinois legislature, nor is it beyond the judiciary's ability to consider. In fact, both have already done so. For example, Article 4 of the

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[261] *Id.* at 345.

[262] *Id.*

[263] Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?*, 49 LOY. U. CHI. L.J. 1, 50 (2017).

[264] *Id.* at 52.

[265] *Id.*

Illinois Criminal Statutes broadly outlines voluntary conduct and relevant mental states for the purpose of criminal acts. A voluntary act, a material element of any offense, is "[a]n omission to perform a duty which the law imposes on the offender and which he is physically capable of performing."[266] Possession, for example, is a voluntary act "[i]f the offender knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient time to have been able to terminate his possession."[267] This example links the concept of voluntariness with knowledge, awareness, and control over an object, capturing the multiple facets of a voluntary action.

The offenses defined in Article 9 further elevate the importance of a voluntary action in establishing a person's guilt. Indeed, the absence of a voluntary action can mitigate or reduce an individual's charge or liability. For example, second-degree murder applies when a person "commits the offense of first-degree murder . . . and [a] mitigating factor [is] present: at the time of the killing [the actor] is acting under a sudden and intense passion resulting from serious provocation by the individual killed [.]"[268] The statute defines serious provocation as "[c]onduct sufficient to excite an intense passion in a reasonable person."[269] This is an example where an external factor—serious provocation by the individual killed—reduces the liability of an actor because they were unable to act voluntarily. In other words, asserting that an action was the product of an external stimulus is essentially a defense.

Another example links intention with voluntariness and distinguishes a voluntary action. The statute defining involuntary manslaughter and reckless homicide provides that "[a] person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful cause death or great bodily harm to some individual, and he performs them recklessly."[270] The mental state of recklessness implicates voluntary conduct because to act recklessly is to "consciously disregard[] a substantial and unjustifiable risk that circumstances exist or that a result will follow" from one's conduct.[271] This means that a person who voluntarily chooses to disregard a known risk, but acts without intention to cause the resulting harm or injury, has not voluntarily killed someone. Rather, the voluntary act is the choice to disregard a risk, and the lack of intention relates to the outcome of death. The

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[266] 720 ILL. COMP. STAT. 5/4-1 (1962).
[267] *Id.* § 4-2.
[268] 720 ILL. COMP. STAT. 5/9-2(a)(1) (2018).
[269] *Id.* § 9-2(b).
[270] 720 ILL. COMP. STAT. 5/9-3 (2020).
[271] 720 ILL. COMP. STAT. 5/4-6 (2010).

ability of the legislature to make such a fine distinction is not beyond the capacity of the judiciary.

One final example of the distinction between voluntary action and a person's mental state concerns intoxication. A person is criminally responsible for their conduct, even when intoxicated or drugged, "unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."[272] This provision indicates that a person who did not voluntarily elect to experience an intoxicating condition cannot be responsible for their actions. In other words, an external actor or substance that created the intoxicating condition precludes liability for conduct undertaken in the involuntary state.

In determining whether a petitioner caused or brought about their conviction, the court might consider how the legislature has treated the role of a voluntary act in establishing an actor's culpability. In inquiring whether a petitioner voluntarily brought about their own conviction, the court could consider whether external factors such as duress and coercion were present during interrogation or confession. This inquiry would distinguish whether a person voluntarily chose the consequences of their confession, or instead elected to act in order to remove the pressure of external factors.

2. Other Considerations

The judiciary could also consider the actions of a defendant and whether a defendant "acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense."[273] In this context, examining whether a defendant truly benefits from a conviction would be beneficial. If there is a tangible, self-serving benefit brought about by the conviction such as money, status (in an organized crime unit or among others), the promise of protection for a person or their family, these circumstances could indicate a defendant's malfeasance or the presence of duress.

Importantly, the judiciary should ultimately consider if a defendant "means to avoid prosecution but elects not to do so, instead acting in such a way to ensure it."[274] If the defendant can avoid prosecution, what is the defendant enduring? Is there something else external to the adjudicatory process that would induce acceptance? For example, consider the relationship between a false confession and accepting a conviction that is not a product of voluntary action: the exchange of a false confession yields the

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[272] 720 ILL. COMP. STAT. 5/6-3 (2002).

[273] Betts v. United States, 10 F.3d 1278, 1285 (7th Cir. 1993).

[274] *Id.*

end of coercive tactics, and the acceptance of a guilty plea can yield a benefit of a plea deal, but are these exchanges fair? Is the end of coercive tactics truly a benefit of such legislative concern that accepting the indelible mark of a conviction is a categorical bar to innocence?

CONCLUSION

Although complexity is often seen as a liability,[275] observing and engaging with it is a way to preserve individuals' humanity, particularly in the case of wrongful convictions. It is not beyond the capacity of the judiciary or the legislature to fully consider the word "voluntary"; in fact, the state and federal constitutions obligate the performance of this task. We must cease to persist "in the self-deceiving assumption that only guilty persons are convicted. We have been ashamed to put into our code of justice any law which admits that our justice may err."[276] And when justice is imperfect and plainly seen, let us correct it through honorable and fair measures. This is the least we can do.

[275] *See, e.g.*, Carter et. al, *supra* note 214, at 334 ("Complexity is inefficient; it slows down the carceral machinery; it takes resources.").

[276] Wigmore, *supra* note 132, at 665.