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The first legal determination of wrongful execution in the United States may very well be in the making in Texas. One of the state's district courts is in the midst of investigating whether Cameron Todd Willingham, who was executed in 2004, was actually innocent. The court's investigation has been interrupted by objections from Texas prosecutors, but if the court proceeds, this may very well become a bona fide case of wrongful execution. Texas, just like other jurisdictions, is ill equipped to provide any relief for such an egregious wrong, however. This Article identifies the difficulties that the heirs, families, and friends of wrongfully executed individuals face in attempting to obtain compensation for this wrong. The Article highlights that statutory compensation schemes overlook the issue of wrongful execution and the greater injustice it entails and urges that the statutes be amended in light of this grievous wrong that has come to the fore of American criminal justice systems.

The only statement I want to make is that I am an innocent man convicted of a crime I did not commit. I have been persecuted for twelve years for something I did not do. From God's dust I came and to dust I will return, so the Earth shall become my throne.

—Cameron Todd Willingham

INTRODUCTION

At 6:30 p.m. on February 17, 2004, Cameron Todd Willingham's heart stopped.¹ He had been executed by lethal injection for killing his three small children—Amber,² Karmon, and Kameron Willingham.³ Prior to Willingham's execution, though, evidence

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1. See David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, *NEW YORKER*, Sept. 7, 2009, at 63.

2. Amber was Willingham's stepdaughter. See Jennifer Emily, *Texas Forensic Science Commission Refuses to End Inquiry into Willingham Arson Case*, *DALLAS MORNING NEWS* (Sept. 18, 2010, 12:03 PM), <http://www.dallasnews.com/news/crime/headlines/20100917-Texas-Forensic-Science-Commission-refuses-to-8825.ece>.

3. See *id.* at 42.

began to surface that he had been wrongfully convicted.⁴ This evidence did not dissuade Texas from proceeding with Willingham's execution. And, after Willingham had been executed, the evidence of wrongful conviction became even more certain.⁵

In the wake of the exculpatory evidence coming to light, Willingham's relatives have made efforts to have Willingham posthumously exonerated.⁶ Their efforts have run straight into legal blockades, however.⁷ This is not unusual when dealing with individuals allegedly wrongfully executed.⁸ For a variety of reasons, it is extremely difficult to reach a legal determination of wrongful execution, and such a conclusion has never been reached in America's more than 400-year history of executing criminal defendants.⁹ If

4. See generally Report of Dr. Gerald Hurst at 1, 3–4, *Ex Parte* Cameron Todd Willingham, No. 24,4670 (Tex. Dist. Ct. Feb. 13, 2004) [hereinafter Report of Dr. Gerald Hurst], available at http://www.innocenceproject.org/docs/Willingham_Hurst_Report.pdf (pointing out “critical errors” in the fire investigation report in the Willingham case).

5. See Grann, *supra* note 1.

6. See Dave Montgomery, *Judge Orders Court of Inquiry into Willingham's Conviction, Execution*, FORT WORTH STAR-TELEGRAM, Sept. 27, 2010 (explaining that a Texas county court judge “ordered a court of inquiry to determine if Cameron Todd Willingham was wrongfully convicted and executed” after his relatives filed a petition requesting this action). Courts, scholars, journalists, and politicians use the term “exoneration” rather loosely. Some use the term fairly broadly when evidence that strongly suggests that a convicted individual is innocent has surfaced. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALL Concerning Capital Punishment*, 89 TEX. L. REV. 367, 409 (2010) (suggesting that even though some convicted individuals were “exonerated by DNA evidence,” they were unable to obtain relief); Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 690 (2010) (explaining that DNA evidence suggesting that a convicted individual is innocent does not necessarily lead to “formal” exoneration). Others use the term to refer only to instances in which the convicted individual has been acquitted on retrial, the charges against him have been dismissed on the ground of new evidence, or he has been pardoned on the ground of actual innocence. See James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1250–51 (2010); see also Steiker & Steiker, *supra*, at 408 (noting that “there is debate about what constitutes a full ‘exoneration’”); Wiseman, *supra*, at 694 & n.42 (explaining that there are variations in the meaning of the term and that he considers exoneration to be “only those cases that officially relieve a factually innocent, convicted individual of any guilt associated with the crime charged,” regardless of whether this is “through dropped charges, a dismissed indictment and vacated conviction, a reversal or acquittal that specifically declares the individual innocent or otherwise free of guilt and vacates the conviction, or an official pardon or similar executive exoneration granted on actual innocence grounds”). I will follow the latter trend in this Article, which seems to be the ordinary convention among legal scholars at least.

7. See *infra* text accompanying notes 74–83 (describing some of the difficulties Willingham's relatives have faced in trying to exonerate Willingham).

8. See *infra* Part II (setting forth some of the difficulties individuals face in seeking a determination of wrongful execution).

9. See *Kansas v. Marsh*, 548 U.S. 163, 188 (2006) (Scalia, J., concurring) (stating that if there were a clear case of an innocent person being executed, “we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby”); *Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/parti-history-death-penalty> (last visited Mar. 29, 2011) (“The first recorded execution in the new colonies was that of Captain George Kendall in the Jamestown colony of Virginia in 1608.”);

Willingham's relatives succeed in exonerating Willingham, however, or if any court reaches the determination that an individual has been wrongfully executed, there seem to be no real remedies available to the wrongfully executed individual or his family. Various immunities may protect potential defendants from liability in survival suits, wrongful death claims, and federal civil rights suits if one could even make out these claims under the applicable statutes. And unlike the instance of wrongful conviction and incarceration, there appear to be no legislative remedies targeting cases of wrongful execution, despite the fact that many would agree that wrongful execution constitutes an even more egregious wrong.¹⁰ This chasm in legislative remedies must be filled in order to make government officials and ordinary citizens face the significance of their death decisions.

This Article argues that the heinous wrong of executing innocent individuals should be statutorily recognized. Part I traces the story of Cameron Todd Willingham, a man who was executed in the face of evidence suggesting that he was innocent. It examines his relatives' recent attempts to clear his name and explains that his story is not yet over. Part II describes the difficulties of exonerating individuals who have been wrongfully executed. It explains how DNA is often essential to posthumous exonerations and notes prosecutors' reluctance to release DNA evidence for fear that it could undermine interests in the finality of convictions and even prosecutors' own convictions rates. Part III explores possible remedies for adjudged wrongful executions. This Part draws on remedies employed in the wrongful conviction and incarceration context and explains how common law tort and civil rights remedies are often unavailable to these types of defendants. It adds a layer of complexity, however, by explaining how a decedent's family, friends, and heirs must resort to wrongful death and survival suits to prevail under common law tort regimes. In each of these instances, the doctrines of governmental and official immunities will likely thwart any efforts to recover for the wrongful execution. Part III also explores how about half of the states have enacted statutory compensation schemes to provide relief for those who

infra Part II (setting forth some of the difficulties individuals face in seeking a determination of wrongful execution). *But see* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 72 (1987) (cataloging twenty-three cases in which the authors believe innocent individuals were wrongfully executed).

10. *See, e.g.*, John O'Connor, *Death Penalty Ban: It's Up to Quinn*, CHI. DAILY HERALD, Jan. 12, 2011, at 2 (quoting the parents of a minor rape victim who was murdered: "One of the most terrible events in our society is the wrongful conviction of an innocent person; even worse would be their execution.").

have been wrongfully convicted and incarcerated. These statutory schemes, though, fail to account for the harm of wrongful execution—an issue explored in Part IV. This Article concludes that amending these statutory compensation schemes to account for this greater wrong of executing an innocent individual would not only stay true to Supreme Court case law emphasizing that death is a worse punishment than even life imprisonment, but it would also encourage government officials to recognize the importance of their ratifying or acquiescing in determinations that individuals should be executed.

I. CAMERON TODD WILLINGHAM: A CASE OF WRONGFUL EXECUTION?

In early 1992, neighbors observed Willingham stumbling out of his Corsicana, Texas home, which was in flames.¹¹ He screamed for his babies who were still inside.¹² Firefighters arrived at the scene and had to hold Willingham back from trying to rescue his three daughters whom he had left in the house.¹³ Although rescue personnel tried to save the girls, all three of them succumbed to smoke inhalation.¹⁴

In the wake of this tragedy, fire investigators sought to determine the cause of the fire. The chief fire investigators in the case, Manuel Vasquez and Douglas Fogg, ultimately determined that the fire had been purposely set with an accelerant, and Willingham—the only individual at the scene who had survived the fire—became the prime suspect of the investigation.¹⁵ According to Fogg and Vasquez, there were numerous indicators of arson,¹⁶ including: (1)

11. Transcript of Record at 110–11, *State v. Willingham*, No. 24,467 (Tex. Dist. Ct. Aug. 18, 1992) [hereinafter *Willingham Transcript-Day 1*], available at http://www.scribd.com/full/37711169?access_key=key-qj16fty0v6hevk77kh.

12. *See id.* at 53–54, 76–77, 88, 103, 111. Although numerous commentators emphasize Willingham’s distress, reflected by his hysterical screaming, at least one witness suggested that this was contrived. *See id.* at 54 (stating that Willingham’s screaming started only once neighbors stepped outside of their homes to see what was going on).

13. *See id.* at 149. At least one witness suggested, however, that Willingham refused to enter the burning house despite her prompting. *See id.* at 58.

14. Transcript of Record at 82, 84, 104–05, *State v. Willingham*, No. 24,467 (Tex. Dist. Ct. Aug. 19, 1992) [hereinafter *Willingham Transcript-Day 2*], available at http://www.scribd.com/full/37711321?access_key=key-1whx4cvp7v1x12shu0ux.

15. *See Willingham Transcript-Day 1*, *supra* note 11, at 258, 261–62, 268.

16. Report of Dr. Gerald Hurst, *supra* note 4, at 1, 3–4. The fire investigators reported that there were over twenty indicators of arson, but their report stating this was not entered into evidence at trial. *See INNOCENCE PROJECT ARSON REVIEW COMM., REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASES OF STATE OF TEXAS V. CAMERON TODD*

puddle-shaped burn marks on the floors,¹⁷ (2) several burn areas suggesting multiple origins of the fire,¹⁸ (3) multiple “V” char patterns on the floors,¹⁹ (4) the charring of wood under the front door’s aluminum threshold,²⁰ (5) tiles burned from underneath,²¹ (6) “crazed glass” in the windows,²² (7) brown rings on the cement porch,²³ and (8) a laboratory result indicating the presence of kerosene.²⁴ Additionally, the fire investigators were suspicious that the refrigerator was partially blocking the home’s exit²⁵ and that Willingham’s bare feet were not burned during his escape from the fire.²⁶ After it became public that Willingham was considered to have intentionally set the fire that killed his three girls, witnesses began reporting that Willingham had failed to act as distraught as he should have when he watched his home burn to the ground and after his three daughters had passed away.²⁷ Further, one of Willingham’s fellow inmates while he was awaiting trial swore that Willingham had confessed to him.²⁸ While there was no clear motive for this crime, authorities relied on Willingham’s apparent indifference toward the death of his children²⁹ and the allegedly

WILLINGHAM AND STATE OF TEXAS V. ERNEST RAY WILLIS 17, 19 (2006), *available at* <http://www.innocenceproject.org/docs/ArsonReviewReport.pdf>.

17. See Willingham Transcript-Day 1, *supra* note 11, at 238–39, 242–43, 245, 250, 256–57.

18. See *id.* at 239, 254–55, 261.

19. See *id.* at 238–40.

20. See *id.* at 248–49, 251; Willingham Transcript-Day 2, *supra* note 14, at 48.

21. See Willingham Transcript-Day 1, *supra* note 11, at 243.

22. See Report of Dr. Gerald Hurst, *supra* note 4, at 2. There appears not to have been any mention of crazed glass at Willingham’s trial, however.

23. See Willingham Transcript-Day 1, *supra* note 11, at 248–49, 252–53.

24. See *id.* at 215–20.

25. See *id.* at 233; Transcript of Record at 35–36, State v. Willingham, No. 24,467 (Tex. Dist. Ct. Aug. 20, 1992) [hereinafter Willingham Transcript-Day 3], *available at* http://www.scribd.com/full/37711363?access_key=key-1cg940uxf858506lvfep; Transcript of Record at 28, State v. Willingham, No. 24,467 (Tex. Dist. Ct. Aug. 21, 1992) [hereinafter Willingham Transcript-Day 4], *available at* http://www.scribd.com/full/37711449?access_key=key-sn0ms7oyt7qu5zosl1i.

26. See Willingham Transcript-Day 1, *supra* note 11, at 266–67; Willingham Transcript-Day 2, *supra* note 14, at 52.

27. See Grann, *supra* note 1, at 45 (“Several, like Father Monaghan, initially portrayed Willingham as devastated by the fire. Yet, over time, an increasing number of witnesses offered damning statements.”); *see, e.g.*, Willingham Transcript-Day 1, *supra* note 11, at 106 (“It was not the attitude of people that just lost their children should have had. It was more of a laughing, cutting-up type attitude.”); *see also* Willingham Transcript-Day 1, *supra* note 11, at 111 (“He just—he wasn’t real excited.”).

28. See Willingham Transcript-Day 1, *supra* note 11, at 17–19.

29. See, *e.g., id.*, (suggesting that Willingham was not noticeably upset after his children had been killed in the fire), 111 (stating that, although his children were trapped inside the burning house, Willingham “wasn’t real excited”). Moreover, during the punishment phase of the trial, the prosecution painted Willingham as a “sociopath” who had a strong history of violence. *See, e.g.*, Transcript of Record (Punishment Phase Evidence) at 23–25, 35–36,

violent images he had placed on his bedroom walls to establish a tableau from which a jury could elicit motive.³⁰ Prosecutors offered Willingham a sentence of life imprisonment in exchange for a guilty plea, but Willingham refused, continuing to assert his innocence.³¹ After a two-day trial and just over an hour of jury deliberation, Willingham was convicted of three counts of capital murder and sentenced to death.³²

Willingham appealed his death sentence and petitioned for a writ of habeas corpus in both the state and federal courts. The courts denied all of his appeals and petitions, and, in December 2003, Willingham received word that his date of execution had been set:

[T]he Director of the Department of Criminal Justice at Huntsville, Texas, acting by and through the executioner designated by said Director . . . is hereby DIRECTED and COMMANDED, at some hour after 6:00 p.m. on the 17th day of February, 2004, at the Department of Criminal Justice in Huntsville, Texas, to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of said Cameron Todd Willingham.³³

Texas Governor Rick Perry, it seemed, had become Willingham's only hope at living past February 17, 2004.³⁴

In early 2004, new evidence arose that cast some doubt on Willingham's guilt. Willingham's relatives had contacted a well-known fire investigator, Dr. Gerald Hurst, and had asked him to review the evidence against Willingham.³⁵ Dr. Hurst agreed to take

92-94, *State v. Willingham*, No. 24,467 (Tex. Dist. Ct. Aug. 20, 1992), available at http://www.innocenceproject.org/docs/Willingham_Transcript/Willinghamv14.pdf (accusing Willingham of physically abusing his wife, recounting that Willingham had bragged about killing a dog, and suggesting that Willingham is an "extremely severe sociopath" who has no conscience and cannot be rehabilitated).

30. See Willingham Transcript-Day 3, *supra* note 25, at 47.

31. See Grann, *supra* note 1, at 48.

32. See Willingham Transcript-Day 4, *supra* note 25, at 28, 49; Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics: Fire that Killed His 3 Children Could Have Been Accidental*, CHI. TRIB., Dec. 9, 2004, at A1.

33. Grann, *supra* note 1, at 57.

34. See *id.* The Texas Constitution empowers the governor, "on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons," and also endows the governor with "the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days." TEX. CONST. art. 4, § 11(b).

35. Grann, *supra* note 1, at 57.

a look and concluded that the fire investigation report in Willingham's case contained "critical errors" and that "most of the conclusions reached by the Fire Marshall would be considered invalid in light of current knowledge" about fire investigation.³⁶ In particular, Dr. Hurst determined that at least eight of the indicators of arson that the fire investigation report identified were not, in fact, clear indicators of arson.³⁷ The puddle configurations or "pour patterns" that the prosecution had referred to at trial could have been caused regardless of whether accelerant was used to set the fire.³⁸ Indeed, in fires like the one that occurred at Willingham's home, it is "impossible to identify accelerant burns visually,"³⁹ as the fire investigators in Willingham's case had purported to do. The fire investigators' conclusion of multiple origins was "inappropriate," Hurst reported, even on the basis of the primitive arson science in use at the time of Willingham's trial.⁴⁰ Further, the multiple V-patterns on the walls of Willingham's burnt house were likely not indicators of multiple origins of the fire, Hurst stated, but instead reflected the fact that the fire had spread wildly and could have ignited various combustible items in its wake.⁴¹ Similarly, Hurst concluded that the fire investigators' theory that an accelerant had caused the wood under the aluminum threshold to burn and had caused tiles to burn from underneath was "clearly impossible" and again a remnant of outdated fire investigation theories.⁴² Moreover, "[t]he idea that crazed glass is an indicator of the use of a liquid accelerant . . . [is also now considered] an 'Old Wives Tale.'"⁴³ The brown rings on the cement porch, too, did not indicate the use of an accelerant, Hurst concluded.⁴⁴ This was merely "baseless speculation" on the part of the fire investigators.⁴⁵ Finally, Hurst found that the fire marshal had mischaracterized the evidence by reporting that kerosene was found by the doorway adjacent to the cement porch.⁴⁶ The chemical analysis on the sample instead revealed the presence of "'mineral spirits of kerosene,' which is not the same thing."⁴⁷ These

36. See Report of Dr. Gerald Hurst, *supra* note 4, at 1.

37. See *id.* at 2–5.

38. See *id.* at 3.

39. *Id.*

40. See *id.*

41. See *id.*

42. See *id.* at 3–4.

43. *Id.* at 4.

44. See *id.*

45. See *id.*

46. See *id.*

47. *Id.*

mineral spirits of kerosene would be expected in the wreckage of any fire, whether it resulted naturally or from arson.⁴⁸

Despite this new evidence, the Texas Board of Pardons and Paroles—which reviews clemency applications—unanimously denied Willingham’s petition for clemency on February 13, 2004.⁴⁹ This was just four days before Willingham was scheduled to be executed.⁵⁰ The Innocence Project swiftly sought access to the records from the Board and the governor’s office and discovered that these entities had received Dr. Hurst’s report but that no one had officially acknowledged it.⁵¹ According to the Innocence Project, “[t]his lack of action indicates that in the days and hours before Willingham was executed, the Governor’s Office and the Board of Pardons and Paroles ignored critical expert analysis—new scientific information—that cast serious doubt on whether the Willingham fire was arson.”⁵² Ultimately, Governor Perry failed to grant Willingham clemency or stay the execution, and Willingham was duly executed as scheduled on February 17, 2004.⁵³

After Willingham’s execution, the national media got wind of the story that Texas may have executed an innocent man.⁵⁴ The *Chicago Tribune* published an investigative report, which concluded that “Willingham was prosecuted and convicted based primarily on arson theories that have since been repudiated by scientific ad-

48. See *id.*

49. See Minutes, Texas Board of Pardons and Paroles (May 13, 2004), available at http://www.innocenceproject.org/docs/Willingham_foia.pdf; Letter from Maria Ramirez, Clemency Adm’r, Texas Board of Pardons and Paroles, to Walter Reaves, Jr., Attorney at Law (Feb. 13, 2004), available at http://www.innocenceproject.org/docs/Willingham_foia.pdf. According to reporter David Grann, Willingham’s attorney could not explain the Board’s decision:

[T]he board deliberates in secret, and its members are not bound by any specific criteria. The board members did not even have to review Willingham’s materials, and usually don’t debate a case in person; rather, they cast their votes by fax—a process that has become known as “death by fax.”

Grann, *supra* note 1, at 62.

50. Grann, *supra* note 1, at 62.

51. See MATERIAL FROM GOVERNOR PERRY’S OFFICE AND BOARD OF PARDONS AND PAROLES, OBTAINED THROUGH OPEN RECORDS ACT REQUESTS, INNOCENCE PROJECT (2006), available at http://www.innocenceproject.org/docs/Willingham_foia.pdf.

52. See *id.* at 2.

53. While Governor Perry had the power to stay Willingham’s execution, see *supra* note 34, he could not grant a reprieve to Willingham without the Board of Pardons and Paroles’ recommendation. See *id.*; see also *Ex Parte Lefors*, 303 S.W.2d 394, 400 (Tex. Crim. App. 1957) (suggesting that the governor may not grant clemency when the Board of Pardons and Paroles has not recommended it).

54. See, e.g., Grann, *supra* note 1, at 63; Mills & Possley, *supra* note 32.

vances.”⁵⁵ And the *New Yorker* published an investigative report similarly highlighting the defects in the arson evidence relied on at Willingham’s trial.⁵⁶ While much of the media coverage glossed over the other evidence against Willingham—such as the testimony of the jailhouse snitch who claimed that Willingham had confessed to him⁵⁷—the coverage highlighted the significance of the possibility of wrongful execution.

The Innocence Project is similarly convinced that Texas executed an innocent man. In 2006, the organization commissioned leading arson experts to study Willingham’s case and issued a report characterizing his execution as a “miscarriage[] of justice” and calling for better education among fire investigators, as well as other reforms.⁵⁸ The Innocence Project also submitted Willingham’s case to the Texas Forensic Science Commission (FSC), a group charged with “investigat[ing] complaints that allege professional negligence or misconduct by a laboratory, facility or entity . . . that would substantially affect the integrity of the results of a forensic analysis.”⁵⁹ The FSC agreed to investigate the case, but its review was repeatedly postponed. In 2009, for example, Governor Perry replaced the chairman and two other members of the FSC, forcing the deferral of a scheduled hearing on the case.⁶⁰ In January 2011, the FSC delayed issuing its final decision on the merits of the arson investigation in Willingham’s case after experts testified that “the fire investigators could not have determined that the house fire was arson.”⁶¹ The FSC stated that, before issuing its decision, it would be prudent to obtain the Attorney General’s advice on whether it had jurisdiction on the matter.⁶² On July 29, 2011, the Attorney

55. See generally Mills & Possley, *supra* note 32, at A1.

56. See generally Grann, *supra* note 1.

57. See *supra* text accompanying note 28. But see Petition to Convene a Court of Inquiry and for a Declaration to Remedy Injury to Mr. Willingham’s Reputation Under the Texas Constitution at 16–18, *In re Cameron Todd Willingham* (Tex. Dist. Ct. Sept. 24, 2010), available at http://standdown.typepad.com/WILLINGHAM-Court_of_Inquiry_Petition.pdf [hereinafter Petition to Convene a Court of Inquiry] (arguing that the jailhouse snitch’s testimony was unreliable).

58. ARSON REVIEW COMM., *supra* note 16, at 3.

59. *About Us*, TEX. FORENSIC SCI. COMM’N, <http://www.fsc.state.tx.us/about.html> (last visited Nov. 14, 2010).

60. Matt Smith, *Texas Governor Shakes Up Panel Probing 2004 Execution*, CNN (Sept. 30, 2009), http://articles.cnn.com/2009-09-30/justice/texas.execution.probe_1_willingham-case-cameron-todd-willingham-governor-perry?_s=PM:CRIME.

61. Erin Mulvaney, *Texas Forensic Panel Delays Final Decision in Willingham Arson Case*, DALLAS MORNING NEWS (Jan. 21, 2011, 9:33 AM), <http://www.dallasnews.com/news/state/headlines/20110121-texas-forensic-panel-delays-final-decision-in-willingham-arson-case.ece>.

62. See Letter from John Bradley, Presiding Officer, Texas Forensic Science Commission, to the Honorable Greg Abbott, Attorney Gen., Texas (Jan. 28, 2011), available at <http://www.fsc.state.tx.us/documents/FINAL.pdf>; see also Allan Turner, *Panel Questions its*

General informed the FSC that it did not have jurisdiction to consider evidence in the Willingham case,⁶³ but the FSC did issue a report urging the improvement of arson investigations in Texas.⁶⁴

On September 24, 2010, Willingham's relatives petitioned a Texas county court to hear evidence to determine whether Willingham was factually and legally innocent.⁶⁵ The presiding judge, the Honorable Charlie Baird, had, in the prior year, exonerated a different man named Timothy Cole, who had been convicted of rape but had died in prison ten years before his exoneration.⁶⁶ Employing a similar strategy as was successful in the Cole case, the attorneys for Willingham's relatives argued that Judge Baird had authority to convene a Court of Inquiry on the matter pursuant to Article 52.01(a) of the Texas Code of Criminal Procedure.⁶⁷ Article 52.01(a) provides:

own Jurisdiction in Willingham Review, HOUS. CHRON. (Jan. 21, 2011, 6:30 AM), <http://www.chron.com/default/article/Panel-questions-its-own-jurisdiction-in-1613301.php> (reporting that one of the commissioners moved to seek the attorney general's opinion on this matter).

63. See Letter from Greg Abbott, Attorney Gen., Texas, to Nizam Peerwani, Presiding Officer, Texas Forensic Science Commission (Jul. 29, 2011), available at <https://www.oag.state.tx.us/opinions/opinions/50abbott/op/2011/pdf/ga0866.pdf>.

64. See Addendum to the April 15, 2011 Report of the Texas Forensic Science Commission: Willingham/Willis Investigation, Oct. 28, 2011, available at <http://content.news8austin.com/auscontent/files/WillinghamWillisReport.pdf>; Report of the Texas Forensic Science Commission: Willingham/Willis Investigation, Apr. 14, 2011, available at <http://www.fsc.state.tx.us/documents/FINAL.pdf>; Erin Mulvaney, *Report on Arson Investigations is Approved*, DALLAS MORNING NEWS, Apr. 15, 2011, at A04.

65. See Petition to Convene a Court of Inquiry, *supra* note 57; Steven Kreytak & Chuck Lindell, *Willingham Lawyers Ask for Exoneration Hearing in Travis County*, AUSTIN LEGAL (Sept. 24, 2010, 3:45 PM), http://www.statesman.com/blogs/content/shared-gen/blogs/austin/courts/entries/2010/09/24/willingham_lawyers_ask_for_hear.html. Scholars have drawn a distinction between actual (or factual) and legal innocence, with the former meaning that the defendant did not actually commit the crime and the latter meaning that the prosecution failed to prove beyond a reasonable doubt, and without any violations of the defendant's constitutional rights, that the defendant committed the crime. See Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1084–89 (2011). Many of the assertions about Willingham's alleged wrongful execution relate to his factual innocence, but the petition to convene a court of inquiry focused on legal deficits in Willingham's case—primarily that the arson evidence that was central to the case was based on bad science. See generally Petition to Convene a Court of Inquiry, *supra* (outlining the questionable nature of the arson evidence used in Willingham's case). The Petition's focus on legal innocence is not surprising considering that such legal arguments are as effective, if not more so, than factual ones, and also that factual innocence is extremely difficult to prove and cannot easily be proven conclusively, especially when there is no DNA evidence.

66. See generally *In re A Court of Inquiry*, No. D1-DC08-100-051 (Tex. Dist. Ct. Apr. 7, 2009), available at <http://www.ipoftexas.org/pdf/OpinionOrderofCourt.pdf> (exonerating Timothy Cole).

67. See Petition to Convene a Court of Inquiry, *supra* note 57, at 3.

When a judge of any district court of th[e] state, acting in his capacity as magistrate, has probable cause to believe that an offense has been committed against the laws of th[e] state, he may request that the presiding judge of the administrative judicial district appoint a district judge to commence a Court of Inquiry.⁶⁸

The attorneys also contended that “[a] Court of Inquiry is an appropriate forum for investigating cases of wide public interest—such as this one—whether or not a criminal offense has been committed.”⁶⁹ But a criminal offense had been committed in the case, the attorneys asserted: Texas had committed “official oppression” by failing to recognize exculpatory evidence prior to Willingham’s execution and by subsequently refusing to acknowledge Willingham’s innocence.⁷⁰ This, the attorneys argued, amounted to “state officials . . . intentionally den[ying] or imped[ing] . . . Willingham’s and his survivors’ right to a remedy for injury to his reputation under Article 1, Section 13 of the Texas Constitution . . . and under Section 71.021(a) of the Texas Civil Practice and Remedies Code.”⁷¹ These provisions provide that “[a]ll courts shall be open, and every person for an injury done him, in his . . . person or reputation, shall have remedy by due course of law,”⁷² and that “[a] cause of action for personal injury to . . . reputation . . . does not abate because of the death of the injured person.”⁷³

The strategy worked, at least temporarily, as Judge Baird launched a Court of Inquiry to determine if Willingham had been wrongfully convicted and executed.⁷⁴ The District Attorney swiftly responded by filing a motion to disqualify or recuse Judge Baird.⁷⁵ The state based this motion on: (1) Judge Baird’s prior involvement in the case as a judge for the Court of Criminal Appeals that had upheld Willingham’s conviction on direct appeal and also had denied Willingham’s petition for state habeas relief, (2) Judge

68. TEX. CODE CRIM. PROC. ANN. art. 52.01(a) (West 2006).

69. Petition to Convene a Court of Inquiry, *supra* note 57, at 3 (citing *In re McClelland*, 260 F. Supp. 182, 184 (D. Tex. 1966)).

70. *See id.*

71. *Id.* at 4.

72. TEX. CONST. art. I, § 13.

73. TEX. CIV. PRAC. & REM. CODE ANN. § 71.021(a) (West 2008).

74. Dave Montgomery, *Judge in Willingham Case Goes Ahead with Court of Inquiry*, FORT WORTH STAR-TELEGRAM, Oct. 14, 2010.

75. *See* State’s Motion for Judge to Disqualify or Recuse the Honorable Charlie Baird, *In re Cameron Todd Willingham* (Tex. Dist. Ct. Oct. 4, 2010), available at http://standdown.typepad.com/Willingham-DA_Motion_to_Recuse-Ct_Inquiry.pdf.

Baird's possible bias in the case, and (3) Judge Baird's failure to follow appropriate procedures by commencing the Court of Inquiry himself rather than requesting the presiding judge of the administrative judicial district to appoint a district judge to do so.⁷⁶ In managing the motion, Judge Baird briefly postponed the Willingham hearing⁷⁷ but ultimately declined to rule on the motion because he concluded that the District Attorney lacked standing on the matter.⁷⁸ However, the Third Appeals Court of Austin stayed the proceeding,⁷⁹ and on December 21, 2010, it granted "a writ of mandamus to compel Judge Baird to follow the recusal procedure outlined [under Texas law] by either recusing himself or referring the motion to the presiding judge of the administrative judicial district."⁸⁰ Judge Baird said that he intended to forward the issue to the presiding judge,⁸¹ and it is unclear when the issue of the propriety of the Court of Inquiry will be resolved.

Questions continue to swirl around the Willingham case. Judge Baird retired at the end of 2010,⁸² injecting yet another complication into the Court of Inquiry procedure. Judge Karen Sage inherited the case, and the parties were scheduled to provide her with status reports on December 9, 2011, and January 9, 2012.⁸³

II. THE DIFFICULTIES OF ESTABLISHING WRONGFUL EXECUTION

The Cameron Todd Willingham case is one in which a determination of wrongful execution may be in the making. If the case

76. See *id.* at 3–5.

77. See Steven Kreytak, *Judge Postpones Willingham Case: Baird Says He Needs More Time to Review Motion Seeking His Recusal*, STATESMAN.COM (Oct. 6, 2010, 10:37 PM), <http://www.statesman.com/news/local/judge-postpones-willingham-case-958166.html>.

78. See Matt Smith, *Texas Judge Opens Hearing into Disputed 2004 Execution*, CNN (Oct. 15, 2010), http://articles.cnn.com/2010-10-14/justice/texas.execution.probe_1_willingham-case-texas-forensic-science-commission-cameron-todd-willingham?_s=PM:CRIME.

79. Dave Montgomery, *Court Blocks Ruling in Death-Penalty Inquiry*, FORT WORTH STAR-TELEGRAM, Oct. 14, 2010.

80. *In re* R. Lowell Thompson, No. 03-10-00689-CV, at 1 (Tex. App. Dec. 21, 2010), available at <http://www.3rdcoa.courts.state.tx.us/opinions/PDFOpinion.asp?OpinionId=19827>.

81. See Steven Kreytak, *Appeals Court Rebukes Baird in Willingham Case: With Judge Leaving Bench, Future of Case Unclear*, STATESMAN.COM (Dec. 21, 2010, 10:25 PM), <http://www.statesman.com/news/local/appeals-court-rebukes-baird-in-willingham-case-1139179.html>.

82. Further, Judge Baird has stated that he intends to run for the Travis County District Attorney post in March of 2012. See Steven Kreytak, *Former Judge Charlie Baird Weighs DA Run*, STATESMAN.COM (Jun. 14, 2011, 9:08 PM), <http://www.statesman.com/news/local/former-judge-charlie-baird-weighs-da-run-1540214.html?viewAsSinglePage=true>.

83. See Register of Actions, *State v. Court of Inquiry*, No. D-1-DC-10-1000069 (299th Dist. C. 2010) (on file with U. Mich. J.L. Reform). There will likely be more activity in the case in February 2012, as this Article goes to press.

proceeds and if the Court of Inquiry indeed determines that Willingham was innocent of murdering his three children, this will be the first case in the United States in which an executed individual has been exonerated.⁸⁴ Although this would certainly be a landmark decision, it would not be the first time that there was a question about the guilt of an executed individual. Questions still linger about the guilt of other individuals who were executed prior to Willingham—both before and after jurisdictions adopted greater procedural protections for capital defendants in the aftermath of the Supreme Court’s 1972 *Furman v. Georgia* decision, which temporarily struck down the death penalty.⁸⁵ But still, no individual executed in the United States has been formally exonerated.⁸⁶

This dearth of exonerations among executed defendants is not necessarily the result of the exceptional accuracy of convictions in

84. See Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 404 (2006) (“Prior to this time period, there are likely instances of wrongful executions. Yet, there is no conclusive proof that any one of the more than one thousand inmates executed in modern times was innocent.”); see also *supra* note 65 (delineating the distinction between actual (or factual) innocence and legal innocence). While it is difficult to conclusively establish factual innocence, a Court of Inquiry found that Texas’s Timothy Cole was factually innocent in 2009. See *In re A Court of Inquiry*, at 10, 16, No. D1-DC08-100-051 (Tex. Dist. Ct. Apr. 7, 2009), available at <http://www.ipoftexas.org/pdf/OpinionOrderofCourt.pdf> (concluding that “[t]he evidence is crystal clear that [Cole] died in prison an innocent man”; finding “to a 100% moral, legal, and factual certainty that he did not commit the crime for which he was convicted”; and decreeing him “exonerated”); *supra* text accompanying note 66.

85. See generally Bedau & Radelet, *supra* note 9 (alleging twenty-three cases of wrongful execution and stating that, although, “[i]n the aftermath of *Furman v. Georgia*, statutory procedures in capital cases have been extensively revised,” these do not seem to have “been introduced with reducing the risk of executing the innocent as the paramount motive”). In 1987, Professors Hugo Adam Bedau and Michael L. Radelet published a study cataloging twenty-three instances in which they believed that innocent individuals had been wrongfully executed. See Bedau and Radelet, *supra* note 9, at 72. Paul Cassell and Stephen Markman responded by pointing out that a number of the cases that Bedau and Radelet had studied were pre-*Furman* cases and by undercutting the objectivity of their study. See Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121–22, 124, 126–28 (1988). Cassell and Markman concluded that there was “no credible evidence that any innocent person has been executed” after *Furman*. *Id.* Bedau and Radelet, however, stated that although, “[i]n the aftermath of *Furman v. Georgia*, statutory procedures in capital cases have been extensively revised,” these do not seem to have “been introduced with reducing the risk of executing the innocent as the paramount motive.” Bedau & Radelet, *supra* note 9, at 89.

86. See Wiseman, *supra* note 6, at 695–702 (explaining that only four individuals have been formally posthumously exonerated and that all of them died of natural causes while in prison); see also *Kansas v. Marsh*, 548 U.S. 163, 188 (2006) (Scalia, J., concurring) (“It should be noted at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent’s name would be shouted from the rooftops by the abolition lobby.”). But see Bedau & Radelet, *supra* note 9, at 91 (concluding that least twenty-three individuals had been wrongfully executed in the United States by 1985).

our criminal justice system; instead, it can be attributed to other factors. The attorneys and media that are often essential in bringing to light wrongful convictions tend to focus their resources on the stories of those who are still alive rather than those who have already been executed and thus cannot be saved.⁸⁷ Additionally, it generally becomes more difficult to prove a defendant's factual innocence as time passes because memories fade and evidence and witnesses disappear.⁸⁸ Perhaps the only way to persuasively establish innocence is through DNA evidence.⁸⁹ However, there is often no DNA evidence available for testing,⁹⁰ and even when it is available, this evidence degrades over time and could be useless by the time the defendant is executed.⁹¹

Considering DNA's central role in exonerations, it is noteworthy that those seeking posthumous DNA testing have had only limited success in gaining access to this material crucial to establishing a defendant's factual innocence.⁹² Prosecutors are often reluctant to allow DNA testing related to a case in which they have already obtained a conviction, which is likely due to their incentives to obtain and maintain convictions.⁹³ Prosecutors have a professional incentive to obtain convictions because prosecutors' offices often emphasize conviction rates and tie these to a prosecutor's profes-

87. See Kirchmeier, *supra* note 84, at 429. As one commentator has stated, "attorneys are appointed to represent living death row inmates, while courts do not provide resources for dead inmates." *Id.*

88. See *id.*

89. See Wiseman, *supra* note 6, at 689 (asserting that "DNA can offer—unlike the recanting of a jailhouse snitch or another individual's post-trial confession to the crime—conclusive evidence of actual innocence"). However, while DNA evidence can be "uniquely probative" of a defendant's innocence, see Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1647 (2008), it is not conclusive. For example, the defendant may not have left behind any of his DNA, and the trace DNA evidence examined could belong to his partner or an innocent individual. See Jonathan J. Koehler, *DNA Matches and Statistics: Important Questions, Surprising Answers*, 76 JUDICATURE 222, 224 (1993) (noting that a "reported [DNA] match may not be a 'true' match" because laboratories can make mistakes; that DNA patterns may be shared by other individuals; and that, "even if the defendant is the source of the trace, there may be an innocent explanation").

90. See Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1219 (2005).

91. See *id.* As one court has stated, "DNA testing may help prevent some . . . near-tragedies in the future; but it can only be used in that minority of cases involving recoverable, and relevant, DNA samples." *United States v. Quinones*, 205 F. Supp. 2d 256, 264 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

92. Anne-Marie Moyes, Note, *Assessing the Risk of Executing the Innocent: A Case for Allowing Access to Physical Evidence for Posthumous DNA Testing*, 55 VAND. L. REV. 953, 958–59 (2002).

93. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129–32 (2004) ("Empirical proof suggests that prosecutors have consented to DNA tests in less than fifty percent of the cases in which testing later exonerated the inmate.").

sional advancement.⁹⁴ Prosecutors have an incentive to maintain the convictions they have obtained because overturned convictions could undermine the credibility of the prosecutor's office and also that particular prosecutor.⁹⁵ These professional incentives are magnified by a political landscape in which most chief prosecutors at the municipal and county levels are elected and in which being viewed as tough on crime is often critical for reelection.⁹⁶ Psychological barriers may also come into play, as prosecutors may find it difficult to admit mistakes and acknowledge instances of wrongful conviction.⁹⁷ Further, prosecutors tend to become aligned with crime victims, which can skew their objectivity.⁹⁸

Like prosecutors, courts are often reluctant to provide access to DNA evidence for posthumous testing.⁹⁹ Plaintiffs seeking access to this material commonly rely on a state's Freedom of Information Act or its common law right of access to physical evidence in closed criminal cases.¹⁰⁰ This avenue for access has not always been successful, though, because it often depends to a significant extent on judicial discretion.¹⁰¹ While some courts have, on occasion, provided plaintiffs access to DNA evidence for posthumous testing—but more frequently when the government does not oppose it¹⁰²—other courts have refused to provide such access.¹⁰³ For example, when a Virginia judge was faced with a request for access to DNA evidence for posthumous testing, he concluded that no public interest justified granting such access and explained that, even if the DNA results established that the defendant had been wrongfully convicted, that “would have no bearing on the fairness of the death penalty as it is now administered or on the public confidence of the criminal justice system” today because greater procedural safeguards are in place today than at the time of the executed defendant's conviction.¹⁰⁴ An additional hurdle that a plaintiff must overcome in this regard is that, like prosecutors, courts' reputations are on the line in these cases, and a determination of

94. See *id.* at 134–38.

95. See *id.* at 136–38.

96. See *id.* at 151–57.

97. See *id.* at 138–47; Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted From the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 51–53 (2009).

98. See Medwed, *supra* note 93, at 145–46.

99. See Smith, *supra* note 90, at 1215, 1219.

100. See Moyes, *supra* note 92, at 961.

101. See *id.* at 970.

102. See *id.* at 971–72.

103. See *id.* at 964–67.

104. *Id.* at 967.

wrongful execution could significantly damage public confidence in the judiciary.¹⁰⁵

Plaintiffs have proceeded down other paths in the hopes of obtaining essential DNA evidence for posthumous testing. They have sought access under First Amendment “freedom of the press” arguments,¹⁰⁶ a state law granting judges discretion to donate evidence in closed criminal cases to charities,¹⁰⁷ and a state law providing judges authority to grant discovery or investigate a potential claim.¹⁰⁸ For the most part, these additional approaches have proved fruitless to those seeking to gain access to this biological material.

One of the primary reasons that courts have been hesitant to grant posthumous or any post-conviction DNA testing is the state’s interest in finality.¹⁰⁹ The Supreme Court has continuously reiterated in its habeas corpus cases, and courts have also articulated in the post-conviction DNA testing context, that finality is important for a number of reasons. It is central to deterring criminal activity because, if would-be offenders do not expect that they will swiftly and quite surely be punished after engaging in criminal activity, they are much more likely to commit criminal acts.¹¹⁰ This deterrent effect is diminished if the individual contemplating criminal activity believes there is a chance that he will “escape punishment through repetitive collateral attacks” on his conviction.¹¹¹ Finality also aids in the rehabilitation of criminals because, if an offender believes there is a chance that his conviction will be overturned,

105. See *id.* at 972.

106. See *id.* at 975–77.

107. See *id.* at 980–82.

108. See *id.* at 984; *cf.* Lois Romano, *When DNA Meets Death Row, It’s the System That’s Tested*, WASH. POST, Dec. 12, 2003, at A01 (noting that in September 2003, the Texas Attorney General’s office denied the Washington Post’s request to obtain DNA evidence in a death penalty case and that in December 2003, a judge agreed to dismiss all pending claims on the issue).

109. Although courts have identified a number of advantages to maintaining this interest in finality, see *infra* text accompanying notes 112–119, one scholar has argued that the new science of DNA evidence may have undercut many of these advantages. See Edward K. Cheng, *Reenvisioning Law Through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 650 (2005) (stating that, “[a]s a historical matter, a strict finality doctrine made practical sense” but that, “[w]hen the new evidence is DNA . . . the calculus changes”). Further, one might even argue that post-conviction DNA testing has the potential to further finality interests by confirming the guilt of those already convicted. See, e.g., Maria Glod & Michael D. Shear, *DNA Tests Confirm Guilt of Executed Man*, WASH. POST, Jan. 13, 2006, at A01 (reporting that the post-execution testing of Roger Coleman’s DNA confirmed that he was indeed guilty of the crimes for which he had been convicted and executed).

110. See *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986); see also *Teague v. Lane*, 489 U.S. 288, 309 (1989) (“Without finality, the criminal law is deprived of much of its deterrent effect.”).

111. See *Kuhlmann*, 477 U.S. at 452–53.

this could prevent him from accepting that he has been justly convicted and punished and that he needs to be rehabilitated.¹¹² Finality is likewise important in sparing victims the pain of having to endure further proceedings related to the crime that has affected their lives.¹¹³ It is also important in furthering what has been termed the government's "punitive interests."¹¹⁴ The government may face difficulties in attempting to retry a defendant who was freed on a successive petition due to witnesses' fading memories and the disappearance of other evidence resulting from the passage of time.¹¹⁵ And the government's inability to achieve a second conviction has been identified as an unacceptable result if the defendant was indeed guilty.¹¹⁶ Finality also frees judges, prosecutors, and attorneys from a deluge of collateral attacks so that they can instead focus their time and energy on trying criminal cases in the first instance.¹¹⁷ Lastly, finality is important in establishing stability in the criminal justice system so that imprisonment and punishment are not constantly under attack by appeal or new litigation.¹¹⁸

While difficulties such as gaining access to DNA evidence have undoubtedly contributed to the lack of conclusive determinations of wrongful execution in this country, there have been several instances in which a convicted defendant who died in prison of natural causes was posthumously exonerated. For example, Frank Lee Smith, who was convicted in 1985 for raping and murdering an eight-year-old girl, died of cancer while still on death row in 2000.¹¹⁹ He was exonerated approximately ten months later when the sole eyewitness in his case recanted and DNA results cleared his

112. *See id.*

113. *See* Seth F. Kreimer, *Truth Machines and Consequences: The Light and Dark Sides of "Accuracy" in Criminal Justice*, 60 N.Y.U. ANN. SURV. AM. L. 655, 655–56 (2005) (explaining that prosecutors regard the interest of finality as important in part because allowing a convicted criminal to continue to challenge his conviction is "a disservice to the victims").

114. *Kuhlmann*, 477 U.S. at 453; *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148–149 (1970) (arguing that the proliferation of collateral attacks wastes resources that would be better used for trying new cases).

115. *See Kuhlmann*, 477 U.S. at 453.

116. *See id.*

117. *See id.*; Friendly, *supra* note 114, at 148–49.

118. *See* Peter Gordon Ingram, *Justiciability*, 39 AM. J. JURIS. 353, 372 (1994) (noting that "integrity and stability of the system . . . is . . . the main justification of the principle of finality"); *see also* *Teague v. Lane*, 489 U.S. 288, 309 (1989) (stating that finality "is essential to the operation of our criminal justice system").

119. Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 551 (2002).

name.¹²⁰ Similarly, Louis Greco and Henry Tameleo, convicted of murder in 1965 and sentenced to death,¹²¹ both died in prison, but they were exonerated over a decade later when evidence came to light that the Federal Bureau of Investigation had assisted in framing them.¹²² John Jeffers was convicted of murder in 1975 and died from a drug overdose in 1983 while still imprisoned.¹²³ Nearly two decades later, in 2001, authorities reopened his case after another individual confessed to the crime, and Jeffers's name was cleared, although he was not officially exonerated.¹²⁴ In 2009, Texas exonerated Timothy Cole, who had spent thirteen years in prison for the crime of rape but had died when an asthma attack caused him to go into cardiac arrest in 1999.¹²⁵ DNA testing that was triggered by another's confession to the crime cleared Cole, and Judge Baird decreed Cole innocent and thus exonerated in 2009.¹²⁶ Governor Perry granted him a full posthumous pardon in March 2010.¹²⁷

In addition to these posthumous exonerations, there have been an overwhelming number of determinations of wrongful conviction. As of October 2011, there have been 289 documented post-conviction DNA exonerations in the United States.¹²⁸ Further, according to the Death Penalty Information Center, "over 130 people have been released from death row" since 1973 because significant evidence arose indicating that they were innocent.¹²⁹

120. *Id.* Smith was formally exonerated when a county circuit court judge granted the state's motion to vacate and set aside the conviction. *See* Wiseman, *supra* note 6, at 699 (citing Florida v. Smith, No. 85-4654 CF10A (Fla. Cir. Ct. Dec. 22, 2000)).

121. Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 41 (2002).

122. *Id.* at 41-43 & n.185. Greco was exonerated when the District Attorney's office filed a motion to "drop all charges against Greco posthumously," and Tameleo was supposedly exonerated in a similar manner. *See* Wiseman, *supra* note 6, at 700.

123. Eugene R. Milhizer, *Confessions after Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 16 n.91 (2008).

124. *Id.* There is no evidence that Jeffers was officially exonerated, although someone else has been convicted for the same crime for which Jeffers had been convicted more than twenty years before. *See* Wiseman, *supra* note 6, at 701.

125. *See* Wiseman, *supra* note 6, at 696; Peggy Fikac, *Perry Pardons Rape Convict Posthumously*, Hous. CHRON., Mar. 2, 2010, at B1.

126. *See* Wiseman, *supra* note 6, at 696-97.

127. *See id.* at 697.

128. *See Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Jan. 30, 2012) (providing a count of U.S. post-conviction DNA exonerations as of January 2012).

129. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY, (2010), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. Further, "[f]rom 1973-1999, there was an average of 3.1 exonerations per year," and "[f]rom 2000-2007, there has been an average of 5 exonerations per year." *Id.*

III. POSSIBLE REMEDIES FOR WRONGFUL EXECUTION

As DNA exonerations become even more prevalent, and as courts become more open to reviewing the validity of executions, there will be a question of what remedies are available to those wrongfully executed, or at least the families, friends, and legal heirs of those wrongfully executed. Indeed, depending on the outcome of the inquiry into Cameron Todd Willingham's innocence, Willingham's execution may soon push this question to the forefront of the Texas courts' and legislature's agendas.

Those wrongfully convicted and incarcerated have sought compensation through common law tort and federal civil rights claims, as well as wrongful conviction statutes if available within the relevant jurisdiction. As many scholars have explained, however, neither traditional tort actions nor civil rights suits have proven satisfactory in providing compensation for exonerees.¹³⁰ These litigants frequently are unable to establish liability, and even those who are able to overcome this substantial hurdle often recover very little.¹³¹ Those seeking a remedy for wrongful execution will likely have an equally, if not more, difficult time recovering. Not only will there likely be greater hurdles to establishing the executed individual's factual or legal innocence, but the common law tort and civil rights claims become more complicated when the individual at the center of the suit—he who was wrongfully executed—is deceased. Further, state and federal compensation statutes are not generally aimed at remedying wrongful executions.

A. Common Law Tort Claims

Exonerees who have sought redress through common law tort systems have faced significant barriers. First, it is often difficult to identify an individual or entity that can be blamed for one's

130. See Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 707 (2004) [hereinafter Bernhard, *Justice Still Fails*] (explaining that few exonerees have been compensated by way of torts or civil rights claims); Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86 (1999) [hereinafter Bernhard, *When Justice Fails*] (“Neither the common law torts of wrongful arrest nor malicious prosecution, nor the Civil Rights Act of 1871 provide redress.”); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35 (2005).

131. See Garrett, *supra* note 130, at 49. Some claimants, though, have received substantial verdicts or settlements. See *id.* at 35.

wrongful conviction and incarceration.¹³² Ordinarily, it is a confluence of factors that leads to a wrongful conviction.¹³³ This creates difficulties in determining whom to name as defendants. While this confluence of factors problem could hinder an exoneree's proof of but-for causation, tort law ordinarily allows liability based on the substantial factor test as well.¹³⁴ Thus, if an exoneree could establish that the defendant's wrong was a substantial factor in bringing about the exoneree's injury—his wrongful conviction and incarceration—he could possibly prevail, so long as the defendant did not have a valid defense to the claim.¹³⁵ While the causation hurdle could possibly be overcome, finding an identifiable wrong on which to base the tort claim has proven problematic.

1. The Most Promising Tort Claims

Most exonerees that have pursued tort claims have based them on the wrong of malicious prosecution.¹³⁶ To prevail on such a claim, the exoneree must establish that he has been exonerated and also that the prosecutor initiated the proceeding with malice—meaning without probable cause and primarily for a purpose other than to bring an offender to justice.¹³⁷ Probable cause is a low standard, and the defendant-prosecutor will likely be able to establish this as a complete defense to the allegation.¹³⁸ Moreover, in many jurisdictions, the exoneree's underlying conviction, even if reversed, constitutes conclusive evidence that there was probable cause for the initial prosecution.¹³⁹ Aside from probable cause, the plaintiff also faces the difficult task of establishing that the prosecutor initiated the prosecution for a nefarious purpose—an

132. See Bernhard, *Justice Still Fails*, *supra* note 130, at 722–23; Bernhard, *When Justice Fails*, *supra* note 130, at 86.

133. See Bernhard, *When Justice Fails*, *supra* note 130, at 86.

134. See Teresa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 719–21 (2008).

135. See *id.* But see Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 150 n.96 (2010) (expressing doubt that showing defendant was a substantial factor in bringing about the injury would suffice to establish liability).

136. See Garrett, *supra* note 130, at 50–51.

137. RESTATEMENT (SECOND) OF TORTS § 653 (1977); see also Bernhard, *When Justice Fails*, *supra* note 130, at 86 (stating that, to establish claims for “malicious prosecution, claimants must prove not simply that they were arrested and prosecuted and that the proceeding was eventually terminated in their favor, but also that there was no probable cause for their arrest in the first place and that they were prosecuted with actual malice.”).

138. See Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439, 442 (2009).

139. See *id.*

element on which the evidence would likely be exceedingly sparse. If the plaintiff instead alleges malicious prosecution against a non-prosecutor defendant, such as a police officer, that defendant will likely argue that he did not initiate the prosecution.¹⁴⁰ While in extreme cases a police officer could be considered to have initiated the prosecution despite not being a prosecutor, this is really the case only if the plaintiff can establish, for example, that the officer deliberately misrepresented or omitted material facts to the prosecutor and the prosecutor was not aware of this misrepresentation such that the prosecution was proximately caused by the officer's misconduct.¹⁴¹

Some exonerees pursue other common law tort claims such as false imprisonment,¹⁴² intentional infliction of emotional distress,¹⁴³ or legal malpractice.¹⁴⁴ To establish a false imprisonment claim, the exoneree must ordinarily prove that the named defendant intended to confine him, that this defendant's act caused the confinement, and that the exoneree was conscious of the confinement or was harmed by it.¹⁴⁵ Although it would seem relatively easy for one who was wrongfully convicted and incarcerated to establish these elements, the defendants in these types of cases usually have a valid claim of privilege.¹⁴⁶ The confinement is so privileged if there was probable cause for the arrest, which, as in the malicious prosecution context, is a relatively low standard.¹⁴⁷

Exonerees have a similarly difficult time establishing a claim for intentional infliction of emotional distress, for which they generally must show that the defendant intended to inflict emotional distress, that he engaged in extreme and outrageous conduct, and

140. *See id.*

141. *See id.*

142. *See* Bernhard, *When Justice Fails*, *supra* note 130, at 86.

143. *See* *Limone v. United States*, 497 F. Supp. 2d 143, 226–29 (D. Mass. 2007).

144. *See* Bernhard, *When Justice Fails*, *supra* note 130, at 86. In the Willingham Petition to Convene a Court of Inquiry, the petitioners seemed to allege a tort somewhat more peripheral to the wrong of execution: injury to reputation. *See* *Petition to Convene a Court of Inquiry*, *supra* note 57, at 2–4, 57; *supra* text accompanying notes 71–73.

145. *See* RESTATEMENT (SECOND) OF TORTS § 35 (1965).

146. *See* Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 133 (2010) (“Because actions for malicious prosecution and false imprisonment both require a showing of intent on the part of the government, as well as an absence of probable cause for the arrest, and are limited by the same immunity protections as § 1983 claims, they are exceedingly difficult to maintain.”); RESTATEMENT (SECOND) OF TORTS §§ 118, 145 (1977); *see also* *Wallace v. Kato*, 549 U.S. 384, 389 (2007) (“The sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process* . . .”).

147. *See* Bernhard, *When Justice Fails*, *supra* note 130, at 86.

that this conduct caused severe emotional distress to the plaintiff.¹⁴⁸ While intentional infliction of emotional distress is difficult to establish in any case,¹⁴⁹ it can be especially difficult when exonerees or their heirs must prove that defendants such as government officials intentionally tried to cause a wrongful conviction or fear of one. This is similar to the difficulty of establishing malice in the malicious prosecution context.¹⁵⁰ That said, at least one court has found the government liable for intentional infliction of emotional distress when FBI agents were found to have intentionally framed individuals who were later exonerated.¹⁵¹

Exonerees again run into difficulties in trying to pursue legal malpractice claims—where they are attributing their wrongful convictions and incarcerations to their defense attorneys’ ineffectiveness. An exoneree is unlikely to prevail on such a claim because, in addition to establishing that his attorney was ineffective in representing him, the exoneree must establish that this defect caused the wrongful conviction and incarceration—an element notoriously difficult to establish in any legal malpractice suit.¹⁵²

2. Immunities

Aside from exonerees’ difficulties in establishing *prima facie* common law tort claims, their chances of prevailing on any of these claims are even slimmer because, for the most part, all of the individuals and entities that they might allege as defendants enjoy some type of immunity. The common law doctrine of sovereign immunity¹⁵³ ordinarily insulates state and federal governments

148. See RESTATEMENT (SECOND) OF TORTS § 46 (1977). Recklessness ordinarily satisfies the intent requirement for this tort. See *id.*

149. See Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 582 (2003) (noting that “it is difficult to prove intentional infliction of emotional distress”).

150. See *supra* text accompanying notes 136–141.

151. See *Limone v. United States*, 497 F. Supp. 2d 143, 226–29 (D. Mass. 2007) (concluding that the plaintiffs, which included Tameleo and Greco, see *supra* text accompanying notes 121–122, established a claim of intentional infliction of emotional distress against the government).

152. See Bernhard, *When Justice Fails*, *supra* note 130, at 90–92.

153. Some courts have distinguished “sovereign immunity” from “governmental immunity,” and other courts have used the labels interchangeably. See, e.g., *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003) (stating that sovereign immunity and governmental immunity “involve two distinct concepts”—the former referring to the State’s and its divisions’ immunity from suit and liability and the latter referring to the protection of “political subdivisions of the State”—yet “[c]ourts often use the terms . . . interchangeably”); *Yanero v. Davis*, 65 S.W.3d 510, 517–19 (Ky. 2001) (describing “sovereign immunity” as a common law-derived concept that precludes suits against the state and its public officials unless the government has waived the immunity; describing “governmental immunity” as

from suit unless the immunity has been statutorily or judicially waived.¹⁵⁴ Although the vast majority of states have enacted statutes waiving this traditional blanket of immunity, most states retain immunity in particular circumstances.¹⁵⁵ Texas, for example, allows suits against it when “a condition or use of tangible personal or related property” caused personal injury or death and the state would, if it were a private person, be liable to the claimant under Texas law.¹⁵⁶ And the federal government has limited its sovereign immunity under the Federal Tort Claims Act, providing that it may be held liable for injuries “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable.”¹⁵⁷ However, the federal government has not waived its immunity in the instance that the claim arises from the employee abiding by a government statute or regulation or that employee’s exercise of a discretionary function on behalf of the government.¹⁵⁸

Not only do the state and federal governments enjoy immunity, but the government officials whom an exoneree might want to target in a common law claim are also often immune from suit. Judges have absolute immunity for anything carried out in their

“the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency”; and stating that a number of courts use the terms interchangeably). For purposes of this Article, any differences between the two labels are unimportant.

154. See DAN B. DOBBS, *THE LAW OF TORTS* 715–16 (2000).

155. See *id.* at 716.

156. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2009) (providing that the state is liable for damages and injuries “proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if” it “arises from the operation or use of a motor-driven vehicle or motor-driven equipment” and “the employee would be personally liable to the claimant according to Texas law,” or, it is “caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law”).

157. 28 U.S.C. § 1346(b)(1) (2006).

158. See 28 U.S.C. § 2680(a). This provision of the Act provides that the waiver of immunity does not apply to:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. The Supreme Court has clarified this discretionary function exception somewhat by stating that it “insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.” *Berkovitz v. United States*, 486 U.S. 531, 537 (1988).

official capacities.¹⁵⁹ Thus, a judge cannot be sued by an exoneree for a questionable decision on the bench. Prosecutors have absolute immunity for acts committed within their traditional roles of initiating, instituting, or continuing criminal proceedings.¹⁶⁰ Similarly, testifying witnesses enjoy absolute immunity.¹⁶¹ Police officers often have qualified immunity when acting within the scope of their authority.¹⁶² Under federal law, officers are immune from suit unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁶³ Some jurisdictions have even cloaked public defenders with immunity in order to acknowledge their often limited resources and to encourage their unfettered professional discretion on matters.¹⁶⁴

3. Survival and Wrongful Death Suits

While individuals who have been wrongfully convicted and incarcerated have at least occasionally prevailed on their claims of malicious prosecution, false imprisonment, intentional infliction of emotional distress, and legal malpractice, it is unclear whether those filing claims on behalf of or in relation to individuals wrongfully executed would have similar success. Unlike the claims of those wrongfully convicted and incarcerated, common law tort claims related to those wrongfully executed would most likely have to be pursued through survival and wrongful death suits.

Although historically an individual’s claim in tort died with him, states have enacted survival suits under which a decedent’s estate may recover for the tortious act that caused the decedent’s death.¹⁶⁵

159. See RESTATEMENT (SECOND) OF TORTS § 895D(2) (1997).

160. See RESTATEMENT (SECOND) OF TORTS § 656 (1997); RESTATEMENT (SECOND) OF TORTS § 653, cmt. e (1997).

161. See RESTATEMENT (SECOND) OF TORTS § 588 (1997) (providing immunity to defamation claims). The Restatement (Second) asserts that testifying witnesses are essential to the administration of justice, therefore absolute immunity is vital so that they are truthful and not in fear of defamation suits as a result of their testimony. See *id.*, cmt. a.

162. See RESTATEMENT (SECOND) OF TORTS § 895D(3) (1997).

163. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see Bernhard, *Justice Still Fails*, *supra* note 130, at 725.

164. See, e.g., Dziubak v. Mott, 503 N.W.2d 771, 777 (Minn. 1993) (stating that providing immunity for public defenders “best serves the indigent population” by preserving public defender resources; “aids in the recruitment” of qualified public defenders; and “preserves the criminal justice system which relies upon the judge, prosecutor and public defender as essential participants”); Scott v. City of Niagara Falls, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978) (“We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders.”).

165. See DOBBS, *supra* note 154, at 803–04.

Thus, survival statutes extend the life of the tort claim that the decedent would have had against the tortfeasor so that the decedent's estate may recover what the decedent could have recovered had he sued at the time of his death.¹⁶⁶ Recovery under a survival statute varies by jurisdiction, but such recovery could include damages for the decedent's pain and suffering resulting from the defendant's tort, funeral expenses, and even punitive damages.¹⁶⁷ Moreover, some jurisdictions have included in pain and suffering damages those resulting from the decedent's awareness that he would soon die.¹⁶⁸ Under the survival statute in Willingham's home state of Texas, courts have allowed recovery for the decedent's pain and suffering just prior to his demise, his mental anguish prior to his death, property damage, punitive damages, and medical and funeral expenses when they are paid by the decedent's estate.¹⁶⁹

It seems, then, that in most jurisdictions the wrongfully executed individual's estate would be able to step into the decedent's shoes and pursue the common law tort claims that the decedent would have had. In this sense, the estate's claims would closely resemble the claims of those wrongfully convicted and incarcerated: claims of malicious prosecution, false imprisonment, intentional infliction of emotional distress, and legal malpractice. What exactly the decedent's estate could recover is less certain. Damages for pain and suffering, when available, could potentially be significant. Researchers have studied the emotional trials that death row inmates suffer, which are often in excess of what an ordinary inmate suffers.¹⁷⁰ Punitive damages, too, might be even greater in a wrongful

166. See *id.* at 804–05.

167. See *id.* at 805–06.

168. See, e.g., *Nelson v. Dolan*, 434 N.W.2d 25, 30 (Neb. 1989) (“A decedent’s representative unquestionably may recover for pain and suffering experienced in a brief interval between injury and death We see no intrinsic or logical barrier to recovery for the fear experienced during a period in which the decedent is uninjured but aware of an impending death” (citations omitted)).

169. See Karl L. Rubinstein, *Personal Injuries and the Texas Survival Statute: The Case for Recovery of Damages for a Decedent’s Lost Future Earnings*, 12 ST. MARY’S L.J. 49, 53–54 (1980).

170. See Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 162–63 (1998) (explaining that “mental strain is the most obvious collateral consequence experienced by capital defendants on death row for an inordinate period of time,” that “research on the impact of [the typical conditions of death row] confinement indicates that inmates exhibit several emotional and psychological stages,” and that “capital defendants have been described as experiencing a ‘living death’”); Avi Brisman, “*Docile Bodies*” or *Rebellious Spirits*?: *Issues of Time and Power in the Waiver and Withdrawal of Death Penalty Appeals*, 43 VAL. U.L. REV. 459, 475–77 (2009) (explaining that “the prolonged anticipation of death in a (relatively) known manner at an uncertain time under . . . austere conditions . . . may be considered one of the most stressful of all human experiences.”); see also Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1751784> (noting

execution case due to the severity of death as a punishment. Medical damages would likely be insignificant so long as the decedent was kept healthy prior to that final moment of lethal injection or other deadly act.¹⁷¹ But the availability of any of these damages is uncertain, considering that a wrongfully executed individual's estate would still face the same difficulties in recovering in tort as those wrongfully convicted and incarcerated.

While survival statutes provide a means by which an individual's tort claims may survive his death, wrongful death statutes provide an avenue by which a decedent's survivors may recover for their own injuries arising out of the decedent's death.¹⁷² For example, the widow of a decedent could possibly bring a wrongful death suit against a defendant for pecuniary harms she suffered as a result of her husband's death.¹⁷³ These damages could include his loss of earnings and even funeral expenses.¹⁷⁴ Under the Texas wrongful death statute, for example, courts allow recovery for the portions of lost earnings that the decedent would have likely contributed to the beneficiaries, as well as personal expenses, such as medical and

that "some offenders suffer guilt or distress as a result of committing their crimes" and that "they are often stigmatized, especially when criminally convicted"). See generally Amy Smith, *Not "Waiving" But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237 (2008) (describing the psychological experiences of death row inmates and advocating that further research be conducted in the area). The particular psychological and emotional injuries that death row inmates suffer are characterized as symptoms of the "death row syndrome." See Smith, *supra*, at 242; Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1919 (2006) (defining the "death row syndrome" as "the psychological effect on capital defendants serving extraordinarily lengthy stays on death row under a putative sentence of death, whether or not execution ever actually occurs"). While this syndrome has not been recognized by the American Psychiatric Society or the American Psychological Association, and while it has not been included in the Diagnostic and Statistical Manual of Mental Disorders-IV, the syndrome, and its relative, the "death row phenomenon," have been recognized by scholars and international courts. See, e.g., Smith, *supra*, at 242 (discussing the syndrome), Steiker & Steiker, *supra*, at 1919 (same); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 44–45 (1989) (refusing to grant an extradition to the United States because of the probability that the defendant would significantly suffer from the "death row phenomenon").

171. *But see* Brief for Petitioners at 43–45, *Baze v. Rees*, 553 U.S. 35 (2008) (arguing that that the three-drug cocktail of sodium pentothal, pancuronium bromide, and potassium chloride—which is commonly used to carry out lethal injection—"create[s] an unnecessary risk of excruciating pain" because administering potassium chloride to an individual who is not anesthetized will cause severe pain; state procedures for administering the anesthetic of sodium pentothal were likely often ineffective; and the administration of pancuronium bromide would cause the individual to appear "peaceful and relaxed, even while experiencing the terror and agony of conscious suffocation").

172. See DOBBS, *supra* note 154, at 804.

173. See *id.* at 808.

174. See *id.* at 808–10.

funeral expenses, if paid by the beneficiaries.¹⁷⁵ The decedent's spouse may recover for his or her loss of attention, care, counsel, and services;¹⁷⁶ and the decedent's children may recover for their loss of "nurture, care, moral and mental training, and education."¹⁷⁷ To establish a claim for wrongful death in any jurisdiction, though, the claimant must establish an underlying tort¹⁷⁸—not an easy feat in the instance of wrongful conviction, let alone wrongful execution.

B. Civil Rights Actions

Wrongfully convicted and incarcerated individuals have faced similar difficulties when bringing civil rights claims under 42 U.S.C. § 1983.¹⁷⁹ This section of the U.S. Code authorizes individuals to bring suit against "persons"¹⁸⁰ who, under the color of state law, have deprived them "of any rights, privileges, or immunities

175. See Rubinstein, *supra* note 169, at 53.

176. See *id.*

177. *Id.* Before 1963, there was some confusion in Texas about the distinction between wrongful death and survival suits. See *id.* at 52. The 1963 case of *Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33 (Tex. 1963), however, clarified that the two actions are distinct under Texas law. See *id.*

178. See, e.g., CAL. CIV. PROC. CODE § 377.60 (West 2011) (providing for a wrongful death claim against any individual whose "wrongful act or neglect" caused the death of a person); TEX. CIV. PRAC. & REM. CODE ANN. § 71.002(a) & (c) (West 2009) ("An action for actual damages arising from an injury that causes an individual's death may be brought if . . . the injury was caused by the person's . . . wrongful act, neglect, carelessness, unskillfulness, or default."); RESTATEMENT (SECOND) OF TORTS § 693 (1976) ("One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse, including impairment of capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment."). This requirement should not be confused with merging a wrongful death claim and survival claim, as some courts have determined that "wrongful death is a cause of action distinct from any underlying tort claims"; it "does not belong to the deceased or even to a decedent's estate." *Lawrence v. Manor*, 273 S.W.3d 525, 527 (Mo. 2009).

179. Bernhard, *When Justice Fails*, *supra* note 130, at 73 (noting that "people who have been convicted and incarcerated for crimes they did not commit are precluded from recovering damages in a court of law by the inflexibility of tort law and civil rights doctrine—despite later exoneration"); see Bernhard, *Justice Still Fails*, *supra* note 130, at 707 (noting how exonerees have been largely unsuccessful in receiving compensation through civil rights suits). Exonerees could also theoretically bring *Bivens* claims against the U.S. government, and approximately the same analysis as for § 1983 would apply. See, e.g., Goutam U. Jois, Pearson, Iqbal, and *Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901, 904–05 n.10 (2010) (noting that the qualified immunity analysis has been treated similarly in the § 1983 and *Bivens* contexts).

180. Courts have interpreted the term "person" to exclude states and the arms of the state, including state officials sued in their official capacities. See *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 64, 71 (1989).

secured by the Constitution and laws.”¹⁸¹ To establish a deprivation of rights on which to base a § 1983 action, exonerees typically rely on either the Fourth, Fifth, or Fourteenth Amendments, or a combination of these amendments’ constitutional guarantees.¹⁸² However, exonerees might also allege claims pursuant to the Eighth Amendment.¹⁸³ Regardless of the constitutional or statutory provision on which the § 1983 claim is based, the particular configurations of the claims remain somewhat amorphous and malleable. In theory, courts analyze many of these claims against a “background of tort liability.”¹⁸⁴ The circuits are divided, though, on whether this means that § 1983 claims are confined by the limitations of common law tort claims.¹⁸⁵

1. Due Process Claims

The Fifth and Fourteenth Amendments provide that no person shall be deprived “of life, liberty, or property, without due process of law.”¹⁸⁶ In the criminal context, these provisions have been interpreted to secure a defendant’s right to a fair trial, and § 1983 claimants have focused on this guarantee to allege a variety of claims including *Brady* violations, suggestive eyewitness identifica-

181. 42 U.S.C. § 1983 (2006).

182. Ravenell, *supra* note 134, at 701.

183. See *infra* text accompanying notes 231–245. Additionally, exonerees might allege claims pursuant to the First Amendment for a conviction that “was the result of retaliation by law enforcement against the exercise of rights of free expression.” See Avery, *supra* note 138, at 444–45.

184. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds by Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978)).

185. See *Pierce v. Gilchrist*, 359 F.3d 1279, 1286 (10th Cir. 2004) (“The Courts of Appeals have taken somewhat inconsistent positions regarding how close the connection must be between common law tort doctrine and claims under § 1983.”). But see SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:4 (2010) (stating that, while “[t]ort concepts may sometimes be helpful by analogy in determining the scope of liability under § 1983, . . . they should not be determinative” and asserting that “the Supreme Court has several times indicated in connection with the relationship of tort law to § 1983, federal law is ultimately what is being interpreted, federal purposes and interests are at stake, and these are often very different from tort law purposes and interests”). In *Pierce v. Gilchrist*, the Tenth Circuit joined the Fourth, Fifth, Seventh, and Eleventh Circuits in “rejecting the view that a plaintiff does not state a claim actionable under § 1983 unless he satisfies the requirements of an analogous common law tort.” 359 U.S. at 1290.

186. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

tion procedures, coerced confessions, and fabrication of evidence.¹⁸⁷

Under *Brady v. Maryland*,¹⁸⁸ the prosecution must provide the defense with all material exculpatory evidence.¹⁸⁹ Further, police officers may not misrepresent, fail to document, or hide such evidence from the defense.¹⁹⁰ To establish a *Brady* violation on which to base a § 1983 claim, an exoneree must show not only that exculpatory evidence was withheld but also that “there is a reasonable probability that, [had the evidence been disclosed to the defense], the result of the proceeding would have been different.”¹⁹¹ One scholar has described this requirement as akin to the typical “substantial factor” test of factual causation in tort law.¹⁹² When the most egregious evidence of innocence has been withheld, this causation element may be rather easy to establish,¹⁹³ but it becomes more difficult to make out this element as the evidence withheld becomes “more peripheral to the jury’s verdict.”¹⁹⁴ Moreover, a handful of federal courts have made it even tougher for exonerees to bring civil claims based on *Brady* violations in certain cases by requiring claimants to prove that, when the claim is alleged against police officers, the violation was made in bad faith.¹⁹⁵

187. See *Avery*, *supra* note 138, at 446–51; Bernhard, *Justice Still Fails*, *supra* note 130, at 726–38; Garrett, *supra* note 130, at 54–55.

188. 373 U.S. 83 (1963).

189. See *id.* at 87; see also Garrett, *supra* note 130, at 69. Courts have disagreed on whether these civil *Brady* claims are based on procedural or substantive due process guarantees. See *Avery*, *supra* note 138, at 446. One scholar has stated that “a cause of action for [the failure to disclose exculpatory evidence], at least in the opinions of the federal courts, is shrouded in doctrinal confusion.” *Id.* at 446.

190. See Garrett, *supra* note 130, at 69 (“This watershed case requires prosecutors to provide the defense with all material favorable evidence, and also prohibits police from misrepresenting, failing to document, or hiding evidence from the defense.”).

191. *United States v. Bagley*, 473 U.S. 667, 682 (1985); see also Garrett, *supra* note 130, at 71 (referring to this requirement as a showing of “materiality” or “prejudice”).

192. See Garrett, *supra* note 130, at 71.

193. See *id.* at 72.

194. *Id.*

195. See, e.g., *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004) (“*Brady* ensures that the defendant will obtain relief from a conviction tainted by the State’s nondisclosure of materially favorable evidence, regardless of fault, but the recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial.”); *Jean v. Collins*, 221 F.3d 656, 662 (4th Cir. 2000) (en banc) (“The difficulty of trying to sort out such everyday communications between prosecutor and police underscores the need to insist at a minimum that an actual bad faith deprivation of due process rights be alleged.”); see also Garrett, *supra* note 130, at 73. *But see* *Tennison v. San Francisco*, 570 F.3d 1078, 1088–89 (9th Cir. 2009) (stating that a § 1983 plaintiff need not show bad faith to establish a *Brady* violation by police officers but that the plaintiff must instead show “deliberate indifference to or reckless disregard for an accused’s rights or for the truth in withholding evidence from prosecutors”); *but cf.* *Jean*, 221 F.3d at 660 (explaining that “to speak of the duty binding police officers as a *Brady* duty is simply incorrect”).

Exonerees alleging § 1983 claims based on suggestive eyewitness identification procedures might similarly face difficulties in prevailing on these claims.¹⁹⁶ The Supreme Court has held that admission of evidence at trial that is derived from unnecessarily suggestive identification procedures may, depending upon the totality of the circumstances surrounding those procedures, violate a defendant's due process rights.¹⁹⁷ But, due to the small number of cases dealing with suggestive eyewitness identification procedures in the § 1983 context, some confusion surrounds the issue of what exactly an exoneree must establish to prevail on such a claim.¹⁹⁸ These claims are important, though, because "mistaken eyewitness identifications have long been the leading cause of wrongful convictions."¹⁹⁹ The suggestive nature of the identification, alone, does not necessarily mean a violation of due process rights. Instead, the Supreme Court has stated that the reliability of the resulting identification "is the linchpin" in determining the admissibility of the identification.²⁰⁰ In exoneration cases, though, this question of reliability becomes moot because the exoneree has been determined to be innocent.²⁰¹ Still, the question of causation remains: Did the suggestive procedures really cause the misidentification? While causation could be difficult to establish, one scholar has argued that this will be rare, because the exoneree's attorney can easily explain the harms of suggestive identification procedures, including how they increase the risk of misidentification.²⁰²

Exonerees might also bring § 1983 claims rooted in allegations of the fabrication of evidence. The prohibition on fabrication of evidence is fundamental to our criminal justice system,²⁰³ and, as

196. Just like in the context of *Brady* violations, courts have failed to clarify whether a claim based on a suggestive eyewitness identification procedure constitutes a violation of procedural or substantive due process rights. See, e.g., *Manson v. Brathwaite*, 432 U.S. 98, 113–14 (1977) (referring generically to "due process"); *United States v. Pickar*, 616 F.3d 821, 827–28 (8th Cir. 2010) (same); *Brisco v. Ercole*, 565 F.3d 80, 88 (2d Cir. 2009) (same).

197. See *Manson*, 432 U.S. at 113–14; see also *Stovall v. Denno*, 388 U.S. 293, 302 (1976), *overruled on other grounds by* *Griffith v. Kentucky*, 479 U.S. 314 (1987).

198. See *Garrett*, *supra* note 130, at 79–88 (noting that "few courts have dealt with civil suggestion claims" and concluding that, "[o]f all the due process rights in the criminal context, the law of suggestive identifications is the most confused").

199. *Id.* at 79.

200. *Manson*, 432 U.S. at 114. In *Niel v. Biggers*, 409 U.S. 188 (1972), the Court listed a number of factors on which lower courts should base their reliability determinations. See *id.* at 199–200. When this constitutional doctrine is translated into § 1983 terms, there is confusion among the courts as to whether a defendant's due process rights are violated if the identification evidence is not entered into evidence at trial. *Garrett*, *supra* note 130, at 79; see *Hernandez v. Terrones*, 397 Fed. App'x. 954, 969 (2010).

201. See *Garrett*, *supra* note 130, at 85.

202. See *id.*

203. See *Limone v. Condon*, 372 F.3d 39, 44–45 (1st Cir. 2004).

the Fifth Circuit has stated, it constitutes an “indisputab[le]” violation of a defendant’s due process rights.²⁰⁴ Fabrication of evidence claims take the form of police officers altering evidence or lying about its characteristics, officers testifying falsely, officers coercing confessions, or even laboratory technicians using questionable scientific standards or lying about the results of forensic tests.²⁰⁵ Regardless of the form such a claim takes, there is disagreement among courts about which constitutional provision provides the basis for such a claim.²⁰⁶ Some courts have found such fabrication to violate due process rights, although they have not all specified whether those rights are procedural or substantive in nature.²⁰⁷ Other courts have held that the claim of fabrication amounts to one of malicious prosecution in violation of Fourth Amendment rights.²⁰⁸ In either form, fabrication of evidence could theoretically be an excellent basis for a § 1983 claim; however, it is rare that a claimant has convincing evidence of the deliberate framing of an innocent person through the use of manufactured evidence.²⁰⁹ Still, one commentator has predicted that these claims may, in future years, “be at the forefront of efforts to reform shoddy scientific practices used by forensic crime labs responsible for many wrongful convictions.”²¹⁰

Those seeking to recover on behalf of an individual wrongfully executed might have a broader due process claim unavailable to those only wrongly convicted and incarcerated. In its 1993 case of *Herrera v. Collins*,²¹¹ the Supreme Court faced the question of whether a death row inmate was entitled to habeas corpus relief on the ground of newly discovered evidence suggesting that the inmate was possibly factually innocent. While the majority—unconvinced of the individual’s innocence—held that the death row inmate was not entitled to habeas relief in the case, Justices

204. *Castellano v. Fragozo*, 352 F.3d 939, 955 (5th Cir. 2003).

205. *See* Garrett, *supra* note 130, at 95–96.

206. *See* Avery, *supra* note 138, at 445.

207. *See, e.g.*, *Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008) (stating only that “the deliberate or knowing creation of a misleading and scientifically inaccurate serology report amounts to a violation of a defendant’s due process rights”).

208. *See, e.g.*, *Wilkins v. DeReyes*, 528 F.3d 790, 797–804 (10th Cir. 2008) (acknowledging that “Plaintiffs premised their § 1983 malicious prosecution claim on a violation of the Fourth Amendment” and concluding that “the alleged facts establish[ed] the elements of the constitutional tort of malicious prosecution”).

209. *See* Avery, *supra* note 138, at 446. One scholar has stated, however, that “such grave misconduct has occurred with surprising frequency, by one account in almost half of all exonerations, and has led to a series of civil rights lawsuits that may provide a deterrent in the future.” Garrett, *supra* note 130, at 94.

210. Garrett, *supra* note 130, at 94.

211. 506 U.S. 390 (1993).

Blackmun, Stevens, and Souter dissented, asserting that the execution of an innocent person would violate substantive due process rights.²¹² They concluded that, just as the Court had held that the conduct of police officers attempting to forcibly remove capsules from a suspect's mouth and forcibly pumping his stomach violated substantive due process guarantees, so too does executing an innocent man.²¹³ "Execution of an innocent person is the ultimate 'arbitrary imposition.' It is an imposition from which one never recovers and for which one can never be compensated."²¹⁴

Not all judges agree that executing a factually innocent individual violates due process guarantees, however. While the *Herrera* majority was not clear about whether there would be a due process violation if the defendant had actually been innocent, the Nebraska Supreme Court, surveying the constitutional landscape after *Herrera*, concluded that, since that case was decided, "some . . . courts have held that deprivation of life or liberty, in the face of persuasive evidence of the person's actual innocence, violates fundamental concepts of either procedural or substantive due process of law."²¹⁵ And at least one commentator has argued that "[s]ubstantive due process analysis is a particularly appropriate prism through which to focus" when dealing with issues of wrongful execution.²¹⁶ Other lower courts have interpreted *Herrera* more narrowly, though, to preclude such a due process claim.²¹⁷ In *People v. Washington*, for example, the Illinois Supreme Court concluded that "*Herrera* clearly states . . . that a freestanding claim of innocence is not cognizable as a fourteenth amendment [sic] due process claim."²¹⁸

212. See *id.* at 435–36 (Blackmun, J., dissenting).

213. See *id.* at 436–37.

214. *Id.* at 437 (citations omitted).

215. State v. Lotter, 771 N.W.2d 551, 564 (Neb. 2009) (citing *In re Bell*, 170 P.3d 153 (Cal. 2007) and *People v. Washington*, 665 N.E.2d 1330 (Ill. 1996)); see also, e.g., *Ex Parte Thompson*, 153 S.W.3d 416, 417, 421 (Tex. Crim. App. 2005) (granting habeas relief on a stand-alone innocence claim like the one presented in *Herrera*). Even Justice Scalia has indicated that there may be room for a claim of wrongful execution to be alleged under the Due Process Clause. See *Atkins v. Virginia*, 536 U.S. 304, 352 (2002) (Scalia, J., dissenting). In *Atkins*, he stated that the concern of a special risk of wrongful execution—due to the defendant's mental retardation, stupidity, or ugliness—could possibly be alleged in a due process claim, but certainly not an Eighth Amendment claim. See *id.* Justice Scalia emphasized, though, that he doubted that such a claim has any substance. See *id.*

216. Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359, 1366 (2004).

217. See, e.g., *Robinson v. Johnson*, 151 F.3d 256, 267 (5th Cir. 1998) (rejecting the actual innocence dictum of *Herrera*); *Dowthitt v. Johnson*, 180 F. Supp. 2d 832, 842–43 (D. Tex. 2000) (emphasizing the *Herrera* Court's statement that "a claim of 'actual innocence' is not itself a constitutional claim").

218. *Washington*, 665 N.E.2d at 1335.

2. Other § 1983 Claims

Exonerees might also base their § 1983 claims on other constitutional grounds.²¹⁹ Some § 1983 claimants, for example, have alleged Fourth Amendment violations by analogizing to the common law tort of malicious prosecution.²²⁰ Lower courts disagree about whether this is a cognizable claim, but most jurisdictions have determined that a § 1983 plaintiff may prevail on such a claim because the exoneree was unconstitutionally seized by being subject to criminal prosecution.²²¹ To thus prevail, exonerees must establish the common law elements of malicious prosecution: (1) initiation of the criminal prosecution, (2) lack of probable cause, (3) malicious purpose, and (4) termination of the proceedings in the exoneree's favor.²²² Just as in the context of common law torts, though, the defendant can often easily negate liability by establishing that he did not initiate the prosecution or that probable cause existed.²²³

Exonerees have also sought civil relief under § 1983 for ineffective assistance of counsel under the Sixth Amendment, which is not surprising considering that poor defense counsel has been identified as a significant cause of wrongful conviction in nearly a

219. There may be a number of other bases for bringing § 1983 claims. For example, some exonerees have also sought relief based upon claims of retaliatory prosecution. *See Avery, supra* note 138, at 444–45. Due to space considerations, however, this Article will not discuss every possible claim.

220. *See, e.g., Gallo v. Philadelphia*, 975 F. Supp. 723 (E.D. Pa. 1997) (reporting that the plaintiff alleged a § 1983 claim rooted in the Fourth Amendment), *rev'd*, 161 F.3d 217 (3d Cir. 1998) (concluding that “the combination of restrictions imposed upon Gallo, because they intentionally limited his liberty, constituted a [Fourth Amendment] seizure”); *see also Albright v. Oliver*, 510 U.S. 266 (1994) (holding that an arrestee's § 1983 claim was rooted in the Fourth Amendment).

221. *See Avery, supra* note 138, at 441. This uncertainty about whether the Fourth Amendment applies to such a claim can be traced back to a 1994 Supreme Court decision in which the Court held that a claimant may not recover on a § 1983 claim by alleging that the Fifth Amendment is a guarantee against malicious prosecution. *See Albright v. Oliver*, 510 U.S. 266, 275 (1994). In this case, the Court failed to resolve whether the Fourth Amendment would provide the basis for such a claim. *See id.* This is somewhat similar to a § 1983 false arrest or false imprisonment claim, but the Court has determined that these claims cannot provide a remedy for wrongful conviction. *See Avery, supra* note 138, at 440. Section 1983 claims for false arrest and false imprisonment are premised on imprisonment without legal process, and because an individual who has been wrongfully convicted has had some legal process, his remedy for this wrong cannot lie in a § 1983 claim for false arrest or imprisonment. *See id.*

222. *See Avery, supra* note 138, at 441–42. Exoneration suffices for the element of termination of the proceedings in the exoneree's favor. *See id.* at 443.

223. *See supra* text accompanying notes 136–141.

quarter of these cases.²²⁴ The Sixth Amendment guarantees a defendant's right to the assistance of counsel in all criminal prosecutions—a right that the Supreme Court has interpreted to be a guarantee of *effective* assistance of counsel.²²⁵ As the Court made clear in its seminal ineffective assistance case of *Strickland v. Washington*,²²⁶ however, a conviction may be overturned only if counsel was so deficient that it “undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”²²⁷ This prejudice requirement is difficult to establish, even considering that most public defenders' offices are severely overburdened and the quality of representation offered is often described as substandard.²²⁸ Despite this, some claimants have had success on civil ineffective assistance claims, usually when the public defender's office had a policy in place that led to the ineffective assistance.²²⁹ For example, one exoneree was able to sufficiently state a claim for relief pursuant to § 1983 when he detailed that, as a result of a public defender's office's practice of assigning its least experienced attorneys as defense counsel in capital cases, he was wrongfully convicted.²³⁰

Finally,²³¹ § 1983 claimants might root their claims in the Eighth Amendment's prohibition on cruel and unusual punishments.²³² Traditionally, § 1983 claims based on the Eighth Amendment have focused on conditions of confinement.²³³ However, one could also argue that it is unconstitutionally “cruel and unusual” to punish an innocent person and, because the claimant was innocent, he

224. See Avery, *supra* note 138, at 451; Garrett, *supra* note 130, at 75 (“Poor lawyering was a major cause in almost a quarter of the cases in which innocent people were exonerated by DNA.”).

225. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)); see also U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

226. See *Strickland*, 466 U.S. at 686.

227. See *id.* at 686.

228. See Garrett, *supra* note 130, at 77; Kenneth Williams, *Why It Is So Difficult to Prove Innocence in Capital Cases*, 42 TULSA L. REV. 241, 244 (2006) (“While some public defenders perform admirably, many provide substandard representation to their clients.”).

229. See Garrett, *supra* note 130, at 77–78.

230. See *Miranda v. Clark County*, 319 F.3d 465, 467, 470–71 (2003); see also Garrett, *supra* note 130, at 78. These cases in which defendants have established that there was a policy that negatively affected the claimant are known as *Monell* claims. See, e.g., *Heaney v. Costigan*, No. 09–cv–01006–MSK–BNB, 2011 WL 4368837, at *9 (D. Colo. Sept. 16, 2011); *Pimentel v. Fresno*, No. 1:10–cv–01736–OWW–DLB, 2011 WL 4375046, at *2–3 (E.D. Cal. Sept. 19, 2011).

231. See *supra* note 219 (noting that this Article does not discuss every possible § 1983 claim that could be asserted in relation to wrongful conviction).

232. See U.S. CONST. amend. VIII.

233. See generally NAHMOD, *supra* note 185, § 3:28 (explaining that § 1983 is a claim frequently alleged by prisoners challenging the conditions of their confinement).

should be able to recover for a violation of his Eighth Amendment right.²³⁴ As of the date of this Article, there appear to be no cases in which a wrongfully convicted and incarcerated individual has prevailed on such a claim.²³⁵ However, in *Herrera*,²³⁶ Justices Blackmun, Stevens, and Souter indicated not only that executing an innocent man might constitute a due process violation,²³⁷ but also that it might violate the Eighth Amendment.²³⁸ While the majority emphasized that the inmate had failed to make a sufficient showing of factual innocence,²³⁹ the dissenters blasted that “it plainly is violative of the Eighth Amendment to execute a person who is actually innocent.”²⁴⁰ “Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience”²⁴¹ It “epitomizes ‘the purposeless and needless imposition of pain and suffering,’”²⁴² and it is “contrary to any standard of decency.”²⁴³ In the more recent Eighth Amendment case of *Atkins v. Virginia*,²⁴⁴ six majority Justices—Justices Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer—emphasized their fear of wrongful execution in reaching the conclusion that executing “mentally retarded” individuals constitutes unconstitutionally cruel and unusual punishment.²⁴⁵

3. Immunities, Survival Suits, and Wrongful Death Claims

In addition to the difficulties of establishing a prima facie § 1983 claim, exonerees have had to wrestle with the same additional hurdles that common law tort plaintiffs have faced. Section 1983 defendants may be insulated from liability under various doctrines of immunity. States cannot be held liable for damages under § 1983, nor can state officials be sued in their official capacities.²⁴⁶

234. See U.S. CONST. amend. VIII.

235. *But cf.* *Prost v. Anderson*, 636 F.3d 578, 606–07 (10th Cir. 2011) (listing courts that have had serious concerns that punishing an innocent individual could constitute cruel and unusual punishment under the Eighth Amendment).

236. *Herrera v. Collins*, 506 U.S. 390 (1993).

237. See *supra* text accompanying notes 212–214.

238. See *Herrera*, 506 U.S. at 430–35 (Blackmun, J., dissenting).

239. See *id.* at 417–19.

240. *Id.* at 431 (Blackmun, J., dissenting).

241. *Id.* at 430 (citation omitted).

242. *Id.* at 431–32 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

243. *Id.* at 435.

244. *Atkins v. Virginia*, 536 U.S. 304 (2002).

245. See *id.* at 321.

246. See *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989); NAHMOD, *supra* note 185, § 6:67.

Further, similar doctrines of absolute and qualified immunity apply to defendants such as judges, prosecutors, and police officers.²⁴⁷ Aside from immunity issues, claimants hoping to recover for wrongful execution most likely must pursue their § 1983 claims through state survival and wrongful death suits.²⁴⁸ As in the common law torts context, this leaves claimants with meager opportunities to prevail for wrongful execution under § 1983.²⁴⁹

C. Statutory Remedies

Presumably in light of these difficulties that exonerees face in bringing claims under the common law and § 1983,²⁵⁰ in 1913 some states began promulgating statutes to provide compensation for those wrongfully convicted and incarcerated.²⁵¹ Today, twenty-seven states, plus the District of Columbia and the federal government, statutorily provide compensation for wrongful conviction and incarceration.²⁵² These statutes vary in form, but, as a prerequisite for compensation, they ordinarily require that the claimant be convicted of a criminal offense, that he actually served time in prison, and that he is factually innocent of the crime charged.²⁵³ In Willingham's home state of Texas, for example, an individual is entitled to compensation if he was imprisoned and either received

247. See *supra* text accompanying notes 159–164; NAHMOD, *supra* note 185, § 7:1. Further, in *Polk County v. Dodson*, 454 U.S. 312 (1981), the Supreme Court concluded that a public defender cannot be held liable under § 1983 because “a public defender does not act under color of state law when performing the traditional functions of counsel to a criminal defendant.” *Id.* at 317 n.4.

248. See NAHMOD, *supra* note 185, § 4:64; *cf. supra* text accompanying notes 165–178 (explaining wrongful death and survival suits in the context of common law torts).

249. See *supra* Part III.A.

250. Although there is no legislative history for the first compensation bill passed in the United States, the first compensation statutes were likely passed in response to a number of high-profile exonerations. See Shelley Fite, Comment, *Compensation for the Unjustly Imprisoned: A Model for Reform in Wisconsin*, 2005 WIS. L. REV. 1181, 1194, 1211 (2005).

251. See Anders Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 109 U. PA. L. REV. 833, 845–46 (1961). The first American compensation statutes were promulgated in California and Wisconsin in 1913. See *id.* North Dakota followed suit four years later in 1917. See *id.* And in 1938, the federal government enacted its own compensation statute for wrongful conviction. See *id.* at 846.

252. See 28 U.S.C. § 2513 (2006); Deborah F. Buckman, *Annotation, Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration*, 53 A.L.R. 6TH 305, § 2 (2010); *Reforms by State*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawView1.php> (last visited Feb. 18, 2011). For a list of such compensation schemes, see the Appendix.

253. See Buckman, *supra* note 252, § 2. Compensation statutes often require the claimant to establish factual innocence by a preponderance of the evidence. See *id.* at Introduction & § 7.

a full pardon or was granted other relief based on his actual innocence.²⁵⁴ Some statutes require additional elements for a successful compensation claim, such as proof that the claimant suffered a pecuniary injury or that he did not contribute to his own conviction by, for example, providing a non-coerced confession or concealing another's guilt.²⁵⁵

While those who were wrongfully convicted and incarcerated are more likely to obtain compensation through these statutory remedies, a significant number of exonerees bringing claims under these statutes remain uncompensated. As one scholar has estimated, only about forty-one percent of exonerees have received any such statutory compensation.²⁵⁶ Moreover, even when exonerees prevail on their claims and are compensated, that compensation is often glaringly inadequate.²⁵⁷ A number of these compensation statutes assess damages based on the number of years that the claimant was wrongfully imprisoned. For example, in Texas, the wrongfully convicted and incarcerated individual is entitled to "\$80,000 multiplied by the number of years served in prison."²⁵⁸ The claimant may also receive certain tuition benefits in addition to this compensation.²⁵⁹ The less generous Louisiana statute sets the claimant's compensation at \$25,000 per year incarcerated, not to exceed a maximum total amount of \$250,000.²⁶⁰ The Louisiana statute also provides additional funds for tuition, job skills training, and the like.²⁶¹ Other statutes provide the states' courts with

254. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (West 2009). The individual is not entitled to compensation, though, if he was serving a concurrent sentence for a different crime and he was not also innocent of that crime. See *id.*; see also Appendix (outlining Texas's compensation statute).

255. See Buckman, *supra* note 252, § 2.

256. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 120 (2008).

257. See Adam Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 234-35 (2008); *infra* note 283 and accompanying text; see also Appendix (listing the compensation available under each state's compensation statute).

258. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2009). The claimant's entitled recovery also includes "compensation for child support payments owed by the person on whose imprisonment the claim is based that became due and interest on child support arrearages that accrued during the time served in prison but were not paid." *Id.* A claimant who was released on parole or required to register as a sex offender after release is entitled to additional compensation, based on the number of years he was obligated to live under these conditions. See *id.*

259. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.054 (West 2009) (providing for "tuition for up to 120 credit hours," so long as this benefit is "requested . . . before the seventh anniversary of the date the claimant received the pardon or was granted relief"); see also Appendix (outlining Texas's compensation statute).

260. See LA. REV. STAT. ANN. § 572.8 (2011); see also Appendix (outlining Louisiana's compensation statute).

261. See *id.*

discretion to determine the most appropriate amount of damages in these cases. The relevant New York statute, for example, provides that, “[i]f the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.”²⁶² Courts provided such discretion have based their damages determinations primarily on the exoneree’s lost wages while he was incarcerated.²⁶³ Some courts have also awarded non-pecuniary damages to exonerees.²⁶⁴ In *Baba-Ali v. State*,²⁶⁵ for example, the New York Court of Claims focused on the exoneree’s “loss of reputation, mental anguish and, above all, [his] loss of liberty.”²⁶⁶ Accounting for each of these factors, the court ultimately determined that, in addition to his lost wages, the exoneree was entitled to \$1.75 million in non-pecuniary damages.²⁶⁷

These statutes providing exonerees with some compensation for their wrongful convictions and incarcerations, however inadequate, have been justified on a number of grounds. Compensating victims of wrongful conviction and incarceration can be premised on the government’s failure to uphold its end of the bargain that it will provide protection from other individuals’ criminal conduct and the risk of wrongful conviction in exchange for each member of society submitting to the criminal law.²⁶⁸ Additionally, the gov-

262. N.Y. CT. CL. ACT § 8-B(6) (2011); *see also* Appendix (outlining New York’s compensation statute).

263. *See* Buckman, *supra* note 252, § 30.

264. *See id.*

265. 878 N.Y.S.2d 555 (Ct. Cl. 2009), *rev’d in part*, 907 N.Y.S.2d 432 (App. Div. 2010).

266. *Id.* at 560.

267. *Id.* at 570. The court classified the exoneree’s loss of reputation as great and emphasized that he was convicted of raping his own daughter—one of the most loathsome offenses in modern society. *See id.* at 561. Turning to the exoneree’s mental anguish, the court acknowledged that the exoneree’s wrongful conviction “just destroyed him” and that this anguish was exacerbated by his forced separation from his family and society. *Id.* at 560. Moreover, the exoneree tragically lost his close relationship with his daughter. *See id.* at 560–63. The court stated that the exoneree was subjected to “the miseries of prison life” and that these miseries were magnified by the fact that other prisoners generally targeted child rapists. *See id.* at 560–61 (quoting *Campbell v. State*, 62 N.Y.S.2d 638, 642 (Ct. Cl. 1946)). “[C]onfinement was doubly hard,” the court explained, “because he was innocent.” *Id.* at 561 (quoting *Campbell*, 62 N.Y.S.2d at 642–43). Finally, the court concluded that “imprisonment resulting from the unjust conviction of an innocent person is ‘the most serious deprivation of individual liberty that a society may impose.’” *Id.* at 564 (quoting REP. OF THE N.Y. LAW REVISION COMM’N TO THE GOVERNOR ON REDRESS FOR INNOCENT PERSONS UNJUSTLY CONVICTED AND SUBSEQUENTLY IMPRISONED, McKinney’s 1984 Sess. Laws of N.Y. 2899, 2903). “Liberty is absolute and the loss of it irreplaceable.” *Id.* at 564 (quoting *McLaughlin v. State*, 89 N.Y.L.J. 25 (Ct. Cl. 1989)). Taking all of these factors into account, the court awarded the exoneree non-pecuniary damages in the amount of \$1.75 million. *See id.* at 570. This amount was reduced to \$1 million on appeal. *See Baba-Ali v. State*, 907 N.Y.S.2d 432, 432 (App. Div. 2010).

268. *See* Kaplan, *supra* note 257, at 243.

ernment can bear the costs of wrongful convictions more easily than exonerees and can spread those costs across the rest of society.²⁶⁹ Bearing these costs allows the government to strike the appropriate balance between pursuing suspected criminal offenders and protecting criminal defendants.²⁷⁰ Further, taking responsibility for wrongful convictions may inspire greater faith in the criminal justice system, thus dressing it in greater legitimacy, which could, in turn, inspire greater compliance with the law.²⁷¹ Perhaps most importantly, though, these compensation statutes may cause state agents to be more vigilant in ensuring reliable convictions and appropriate sentences so as to avoid unjust outcomes in the criminal justice system.²⁷² As one commentator put it, these “compensation statutes shift the costs of erroneous conviction from the wrongfully convicted individuals to the state forcing the government to internalize a substantial negative externality. Once these costs are internalized, the state will be motivated to take the proper level of care in order to prevent wrongful convictions.”²⁷³

However, there remain concerns that compensating individuals for wrongful convictions and incarcerations will impose significant costs on states and will negatively affect their criminal justice systems by, for example, causing police officers and prosecutors to be

269. See Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 208 (1941) (comparing such compensation to the workers’ compensation system, in which “society distributes the loss among its members”); Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705, 716 (1976) (explaining that, “[a]s between the accused and the state, it is more just to place the loss caused by the inevitable errors of the criminal justice system on the state” and that “the state is the ideal agency to spread the risk of loss over the entire society”); Kaplan, *supra* note 257, at 242; Note, *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615, 1627 (1961) (“The state . . . is better able to bear the loss than the injured party . . .”).

270. See Kaplan, *supra* note 257, at 243.

271. See *id.* at 241–42 (noting that “governments do care about the legitimacy of the criminal justice system”); Meghan J. Ryan, *Proximate Retribution* (S. Methodist Univ. Dedman Sch. of Law, Legal Studies Research Paper No. 67, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1751784 (explaining that when the criminal justice system is viewed as illegitimate, “it can . . . lead to individuals’ failures to comply with the law”).

272. See Rosenn, *supra* note 269, at 716 (suggesting that providing compensation for wrongfully accused individuals could “discourage police and prosecutors from bringing groundless prosecutions, or at least induce greater circumspection in invoking the machinery of the criminal justice system”). Aside from these justifications for compensation, Professor Rosenn explains that this compensation could be accomplished either through a fault-based tort regime, an eminent domain structure, or strict liability. See *id.* at 715–17.

273. Kaplan, *supra* note 257, at 241. Some have argued, though, that “governments do not internalize costs like private firms, so imposing liability for wrongful conviction may not result in the reforms desired.” *Id.*; see also Rosenthal, *supra* note 135, at 129–31 (arguing that “[t]he likelihood of the government undertaking efforts to reduce its exposure to liability is particularly remote” and that, if the government were to take measures to reduce the risk of wrongful conviction, the costs of these efforts could far exceed the benefits).

less diligent in pursuing criminal conduct, causing juries to be more hesitant in concluding that an individual has been wrongfully convicted and prosecuted, or swamping already over-burdened systems with additional claims.²⁷⁴ Further, some commentators argue that individuals have essentially assumed the risk of being wrongfully convicted by benefiting from the societal safety that the criminal justice system provides.²⁷⁵ Still, most commentators have determined that the benefits of statutory compensation outweigh these indefinite costs.²⁷⁶

Aside from the states that statutorily provide for compensating victims of wrongful conviction and incarceration, some states have allowed exonerees to push moral obligation laws through the state legislature.²⁷⁷ These laws are drafted and passed to address specific instances in which an individual or entity is entitled to state compensation.²⁷⁸ They honor “an obligation which, though lacking any foundation cognizable in law, springs from a sense of justice and equity, that an honorable person would entertain, but not from a mere sense of doing benevolence or charity.”²⁷⁹ While some exonerees have successfully navigated this difficult course to recover pursuant to moral obligation laws, obtaining compensation for wrongful conviction and incarceration in this manner is unpredictable.²⁸⁰ Some states, such as Texas and Oregon, constitutionally prohibit the enactment of moral obligation laws.²⁸¹ Further, obtain-

274. See Kaplan, *supra* note 257, at 236–38.

275. See *id.* at 238–39. These commentators also suggest that the individual—rather than the government itself—is often to blame for the individual’s wrongful conviction and incarceration. See *id.* at 240 (stating that one of the objections to statutory compensation “stems from the notion that many wrongfully convicted individuals are themselves to blame, and should not be rewarded”).

276. See Rosenthal, *supra* note 135, at 127.

277. See Bernhard, *When Justice Fails*, *supra* note 130, at 94–95 (describing how Edward Honaker—a man wrongfully convicted and incarcerated—was compensated in the amount of \$500,000 through a moral obligation bill passed by the Virginia legislature).

278. See *id.* at 93.

279. *Id.* (quoting *Koike v. Bd. of Water Supply*, 352 P.2d 835, 839 (Haw. 1960)).

280. See Bernhard, *When Justice Fails*, *supra* note 130, at 94–97.

281. See, e.g., OR. CONST. art. IV, § 24 (“Provision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution; but no special act authorizeing [sic] such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.”); *Rector v. State*, 495 P.2d 826, 826–27 (Okla. 1972) (holding unconstitutional the state legislature’s resolution waiving the state’s immunity for a particular plaintiff’s claim because it violated the state constitutional prohibition that, “where a general law can be made applicable, no special law shall be enacted”); *Adams v. Harris Cnty.*, 530 S.W.2d 606, 608 (Tex. Civ. App. 1975) (concluding that the Texas legislature lacked power to “waive its immunity from liability by means of special legislation for the benefit of a particular party, thus denying all citizens the equal protection of the law as guaranteed by the Texas Constitution”); see also Bernhard, *When Justice Fails*, *supra* note 130, at 94.

ing relief through these individualized bills can be considerably time-consuming, and, perhaps more importantly, achieving success by this method often depends on political connections²⁸²—something often far beyond the reach of those wrongfully convicted.

IV. THE NEED FOR COMPENSATORY STATUTORY PROVISIONS DIRECTED SPECIFICALLY AT WRONGFUL EXECUTION

Although exonerees have been much more successful in finding monetary relief through compensation statutes than through common law tort or civil rights claims, commentators have insisted that these compensation statutes do not provide sufficient compensation for exonerees.²⁸³ For example, Missouri limits an exoneree's award to approximately \$18,000 per year incarcerated, and Montana provides relief only in the form of educational aid.²⁸⁴ Considering the ordeals suffered by wrongfully convicted individuals, these amounts are entirely inadequate. After all, the criminal justice system has failed these exonerees by unjustly convicting and incarcerating them, and these innocent persons have lost at least two things that are priceless: time and liberty.

The statutes are also inadequate in that they address only the situations of those who have been wrongfully convicted and incarcerated; they do not explicitly account for individuals who have been wrongfully executed. Some states do provide for the survival of claims under their statutory compensation schemes, allowing an exoneree's compensation to be passed on to his heirs after the exoneree's demise. In Texas, for example, the compensation statute provides that, "[i]f a deceased person would be entitled to compensation under [the statute] if living, including a person who

282. See Berhard, *When Justice Fails*, *supra* note 129, at 94–96.

283. See Rosenthal, *supra* note 135, at 127 (“[I]n recent years, there has been widespread support for expanding the damages remedies available to those who have been wrongfully accused or convicted. Indeed, in the academy, there has hardly been a dissenting voice on the subject.”); see also, e.g., Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 703 (2002) (asserting that “the most glaring flaw in many of the statutory schemes” is the limit on monetary compensation, which essentially “mandates that a wrongly convicted person [will] be undercompensated for his injuries”); John Martinez, *Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property”*, 59 HASTINGS L.J. 515, 533 (2008) (explaining that most scholars have criticized these compensation schemes for imposing “so many procedural and substantive hurdles to recovery that most wrongfully convicted people are denied compensation”).

284. See MO. REV. STAT. § 650.058(1) (2010) (“The individual may receive an amount of fifty dollars per day for each day of post-conviction incarceration for the crime for which the individual is determined to be actually innocent.”); MONT. CODE ANN. § 53-1-214 (2010).

received a posthumous pardon, the person's heirs, legal representatives, and estate are entitled to lump-sum compensation [in equal amount]."²⁸⁵ A wrongfully executed individual's heirs could thus argue that they are entitled to some compensation for the wrong perpetrated against the decedent.

However, any compensation to which a wrongfully executed individual's heirs would be entitled would not truly compensate for the injustice of wrongful execution. The individual's heirs would instead be receiving compensation for only a collateral consequence of being sentenced to death under a system in which additional procedural protections are required when a capital sentence is at issue (likely a system more appreciated by a death row defendant than one in which such additional protections were not available). As a result of these procedural protections erected after the Court struck down the death penalty in *Furman*,²⁸⁶ death row inmates ordinarily spend a significant amount of time incarcerated before they are executed. Indeed, the average amount of time these inmates spend on death row before being executed is about thirteen years.²⁸⁷ At least in jurisdictions that premise statutory relief on the number of years wrongfully incarcerated,²⁸⁸ then, the heirs of individuals wrongfully executed would likely be entitled to some of the larger available monetary awards. Still, this compensation would not reflect the harm of the wrongful execution itself.

Further, it is far from clear that the heirs of wrongfully executed individuals would be able to recover even the inadequate compensation provided under statutory schemes allowing the survival of claims. One could argue—although perhaps not convincingly—that, because these individuals were not sentenced to any specific term of imprisonment,²⁸⁹ neither they nor their heirs should be able to collect under these statutes that premise recovery on an

285. TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(c) (West 2009).

286. 408 U.S. 238 (1972); see *supra* text accompanying note 85.

287. See Margaret Vandiver & David J. Giacomassi, *Geriatric Executions: Growing Old and Dying on Death Row*, 46 CRIM. L. BULL. NO. 3 (2010).

288. See *id.*

289. For example, under Texas Law, a defendant's sentence is the "part of the judgment . . . that orders that the punishment be carried into execution," TEX. CODE CRIM. PROC. ANN. ART. 42.02 (2010), and, in Willingham's case, the sentence that the judge imposed was "[d]eath," not death and the more-than-a-decade-long stay on death row that preceded it. Judgment on Jury Verdict of Guilty, *State v. Willingham*, No. 24,467 (Tex. Dist. Ct. Aug. 21, 1992). Even though Willingham's sentence was death alone, Texas law does provide that a defendant sentenced to death "shall be delivered to a jail or to the Texas Department of Criminal Justice when his sentence is pronounced." TEX. CODE CRIM. PROC. ANN. ART. 42.09 (2010).

innocent individual serving a *sentence* of imprisonment.²⁹⁰ One could also argue that, unlike individuals who were wrongfully convicted and incarcerated but not executed, individuals who have been put to death do not need financial assistance to transition back into society after incarceration and therefore should not be compensated at all. If courts find these arguments persuasive, a wrongfully executed individual's heirs could find themselves entirely without any statutory relief despite a jurisdiction's general provision for the survival of wrongful conviction claims.

Even if the heirs of wrongfully executed individuals are able to prevail under compensation statutes providing for the survival of claims, any such remuneration would fail to fully compensate the heirs because the current statutes do not acknowledge that death is a more significant harm than even life imprisonment.²⁹¹ The law routinely categorizes execution as the most severe punishment available. As the Supreme Court has explained, "death is different."²⁹² It is different by virtue of "its extreme severity. Death is . . . an unusually severe punishment, unusual in its pain, in its finality, and in its enormity."²⁹³ It is also unusual in the infrequency with which it is imposed.²⁹⁴ Capital punishment's status as the most severe penalty available under American law has led the Supreme Court to rule that the punishment must be reserved for the worst offenders. In *Roper v. Simmons*,²⁹⁵ for example, the Court stated that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"²⁹⁶ It has also led the Court to require greater procedural safeguards in capital cases than in other sentencing cases.²⁹⁷ Yet

290. See, e.g., LA. REV. STAT. ANN. § 15:572.8 (2010) (providing that an exoneree is entitled to compensation "if he has served in whole or in part a sentence of imprisonment"); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (West 2009) (stating that an innocent individual is entitled to compensation if he "served in whole or in part a sentence in prison").

291. Interestingly, not all cultures agree that the punishment of death is worse than life imprisonment. See Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 893 (2009) ("Many states, Yugoslavia included, hold the view that life imprisonment is crueler and more severe than capital punishment.").

292. See *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). But see Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 113 (2010) (noting that the Court's recent decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), may indicate that the Court's long-standing "death is different" principle no longer holds).

293. *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring).

294. See *id.* at 291.

295. 543 U.S. 551 (2005).

296. *Id.* at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

297. See Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 370–71 (2008); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two*

statutes attempting to compensate offenders who have suffered wrongful conviction and punishment leave wholly unaddressed this prevalent view that death is the worst available punishment.

Aside from the fact that all such compensation statutes fail to provide for this greater harm of execution, many of these statutes do not even allow a decedent's right of compensation to survive his death. Nebraska's compensation statute, for example, provides that "[a] claimant's cause of action under the act shall not be assignable and shall not survive the claimant's death."²⁹⁸ Similarly, Missouri's compensation statute provides that "[n]o claim or petition for restitution under this section may be filed by the individual's heirs or assigns" and that "[t]he state's obligation to pay restitution under this section shall cease upon the individual's death."²⁹⁹ This means that not only will wrongfully executed individuals not be entitled to greater relief due to this greater wrong, but their heirs likely will not be entitled to any relief whatsoever under these statutes.

Statutory compensation schemes, which are aimed at compensating innocent individuals for the terrible wrongs the government has perpetrated against them, should provide for the compensation of those wrongfully executed by reflecting the fact that individuals wrongfully executed suffer, at a minimum, the same injustice as those wrongfully convicted and incarcerated. In fact, these compensation schemes should reflect the death penalty's continuous characterization as a more severe punishment than incarceration³⁰⁰ by providing even greater compensation for those wrongfully executed than the mostly inadequate amounts provided to individuals wrongfully convicted and incarcerated. Certainly, individuals wrongfully executed will not benefit from statutory relief in the same way that those wrongfully convicted and incarcerated will; statutory relief provides monetary and other assistance to wrongfully convicted and incarcerated individuals that can help them transition back into society after a period of time behind bars,³⁰¹ whereas wrongfully executed individuals clearly have no need for this financial assistance for reintegration. But

Decades of Constitutional Regulation of Capital Punishment, 109 HARV. L. REV. 355, 370–71 (1995).

298. NEB. REV. STAT. ANN. § 29-4604(5) (2009).

299. MO. REV. STAT. § 650.058(3) (2010).

300. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (stating that "the death penalty is the most severe punishment").

301. Cf. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 259 (2004). Not only do innocent individuals benefit from such assistance, but criminal offenders who have served their time in prison also benefit from monetary and other assistance to help them reintegrate into society. See *id.* ("The ex-offender population has tended to recidivate due in part to an unavailability of economic and social supports.").

that does not mean that the families and friends of those wrongfully executed have no need for financial assistance, as they may have lost significant financial support as a result of the wrongful conviction and execution. Further, while statutory relief is not necessary to clear the name of a deceased loved one—something undoubtedly valuable to the friends and families of those wrongfully convicted³⁰²—simply clearing the name of an individual who has been wrongfully executed is not enough. Aptly named, these statutes are intended to *compensate* an individual for a wrong perpetrated by the government.³⁰³ This goal does not become obsolete once an individual has been wrongfully executed; indeed, it becomes of greater concern because an even more grievous injustice has been committed. These individuals have not only been unjustly convicted and incarcerated, but they have also been sentenced to death. And they have lost even more: They have lost their lives. This greater loss calls for greater compensation—even beyond that to which today's wrongfully convicted and incarcerated individuals may be entitled.

Amending compensation statutes to account for wrongful executions would not only acknowledge the more severe injustice imposed on those wrongfully executed than on those wrongfully convicted and incarcerated, but it might also cause individual actors to take their death decisions more seriously. Again, states, and even some scholars, are concerned that compensation statutes benefitting individuals wrongfully convicted and incarcerated could lead to high costs that states simply cannot afford.³⁰⁴ Other

302. See, e.g., Elliott Blackburn, *Church Asked Forgiveness by Convicted Rapist*, LUBBOCK AVALANCHE-JOURNAL, May 22, 2011, available at <http://lubbockonline.com/local-news/2011-05-21/church-asked-forgiveness-convicted-rapist> (explaining that Timothy "Cole's family was overjoyed" when someone else confessed to committing the crime for which Cole was convicted and later exonerated).

303. See Borchard, *supra* note 269, at 207 (quoting Wigmore); see also *United States v. Keegan*, 71 F. Supp. 623, 627 (S.D.N.Y. 1947) (quoting H.R. Doc. No. 974, at 31, 63rd Cong. (3d Sess. 1914)) (stating that, according to the relevant legislative history, the original federal compensation statute was designed to compensate an innocent individual for the "pecuniary injury he . . . sustained through his erroneous conviction and imprisonment"); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 385 n.266 (1995) (noting that "[i]nnocence compensation statutes are designed to provide citizens a remedy from the state or government for loss of liberty due to wrongful prosecution and/or wrongful imprisonment").

304. See Bernhard, *Justice Still Fails*, *supra* note 130, at 713 (citing Interview with Ann Lambert, Legislative Counsel, ACLU of Mass. (Jan. 2004); Interview with Sharon Bivens, Alabama Legislative Fiscal Office Aug. & Sept. 2000) (explaining that one of the major grounds for opposing compensation statutes is the concern "that the statutes will be increasingly expensive as an ever larger number of exonerees petition for awards"); Bernhard, *When Justice Fails*, *supra* note 130, at 106 ("States may have limited awards out of fear that the sheer number of claims would strain state budgets."); cf. Borchard, *supra* note 269, at 209

scholars have responded that this concern is unwarranted,³⁰⁵ that states can better bear these costs than exonerees anyway,³⁰⁶ and that imposing these costs on the government will motivate the government to take greater care in ensuring the reliability of convictions.³⁰⁷ It would certainly be beneficial, especially in the context of capital punishment, to motivate the government to improve the reliability of convictions. Before resorting to the extreme punishment of execution, the government should be so certain about the propriety of its death decisions that the potentially extreme costs resulting from wrongful execution should be of little concern. Placing the state on the hook for this terrible injustice of wrongful execution might make the state and its actors take the punishment of death more seriously.³⁰⁸

Although widespread DNA exonerations have raised questions about the soundness of our criminal justice system, some governmental actors do not take these questions of wrongful convictions, or even wrongful executions, seriously enough. There are a number of cases in which evidence surfaced prior to an individual's ex-

(attempting to ameliorate concerns about burdens that compensation statutes could put on the "State treasury"); Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684, 694, 697 (1912) (noting that European states were initially reluctant to enact compensation statutes due to "the unwillingness to open already cramped treasuries to unlimited inroads and the inability of lower and upper houses of legislatures to agree upon the proper limitations of the right" and explaining that, once enacted, the compensation statutes limited indemnity "so that the burden on the State Treasury will not be oppressive"); Rosenn, *supra* note 269, at 725 (comparing "[t]he objection . . . that the costs of permitting recovery from the state for erroneous accusations will be astronomical" to the objection that indemnifying those wrongfully convicted and incarcerated will place too great of a burden on state treasuries); *supra* text accompanying note 274.

305. Bernhard, *Justice Still Fails*, *supra* note 130, at 713–16 (explaining how the increasing cost concern is unfounded); Bernhard, *When Justice Fails*, *supra* note 130, at 106 (arguing that the concern that compensation will too severely strain state budgets "is unfounded").

306. See Borchard, *supra* note 269, at 208 (explaining that one of the theories underlying compensation for wrongfully convicted individuals is akin to the workers' compensation system and that "society distributes the loss among its members" in this circumstance because it would be unfair for the injured individuals to bear their losses individually); *Postrelease Remedies for Wrongful Conviction*, *supra* note 269, at 1627 (asserting that "[t]he state . . . is better able to bear the loss than the injured party"); Rosenn, *supra* note 269, at 716 ("[T]he state is the ideal agency to spread the risk of loss over the entire society."); *supra* text accompanying note 269.

307. See Rosenn, *supra* note 269, at 716 (explaining that providing compensation for wrongful accusation could have the collateral benefit of "discourag[ing] police and prosecutors from bringing groundless prosecutions, or at least induc[ing] greater circumspection in invoking the machinery of the criminal justice system"); *supra* text accompanying notes 272–273.

308. Recall, though, that not all scholars agree that enacting compensation statutes for wrongful conviction and incarceration will successfully motivate government officials to act any differently. See *supra* note 273.

execution that strongly suggested that the individual about to be executed might be innocent.³⁰⁹ Cameron Todd Willingham was one of those individuals.³¹⁰ Just before Willingham was strapped to a chair and injected with the lethal cocktail of sodium pentothal, pancuronium bromide, and potassium chloride,³¹¹ Texas's Governor Perry was provided with information that the primary evidence against Willingham—the expert testimony that the fire that had killed his children resulted from arson—was very possibly based on faulty science.³¹² Yet Governor Perry neglected to halt or stay the execution until the matter could be further investigated.³¹³ Unfortunately, Governor Perry's actions are not exceptional among governors and others who have the authority to prevent or delay executions in which evidence of guilt is, or has become, questionable.³¹⁴ Yet courts routinely refer to governors' clemency powers as the principal, if not the only, safeguard in our criminal justice system.³¹⁵ Courts rely on this backstop in denying convicted

309. See, e.g., *Jones v. State*, 709 So.2d 512, 522, 524–25 (Fla. 1998) (explaining that prior to Leo Jones's execution, a key witness who had testified against Jones recanted and twelve other individuals said that they had seen a different man running with a rifle away from the crime scene or that they had heard that other man confess to the crime); Ed Pilkington, *Troy Davis Campaigners Vow to Fight 'Inhumane and Inflexible' Death Penalty*, THE GUARDIAN, Sept. 22, 2011, available at <http://www.guardian.co.uk/world/2011/sep/22/troy-davis-execution-death-penalty> (explaining that prior to Troy Davis's execution, evidence arose that seven key witnesses who had testified against Davis had recanted and that other witnesses had testified that another man was guilty of the murder for which Davis was convicted and sentenced to death).

310. See *supra* Part I.

311. Cf. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 97 n.322 (2007) (noting that, as reported in 2005, Texas's lethal cocktail contained "1.30 ml of solution containing 3 g of Thiopental Sodium (Sodium Pentothal); 2.50 ml of solution containing 100 mg of Pancuronium Bromide; 3.70 ml of solution containing 140 mEq of Potassium Chloride").

312. See MATERIAL FROM GOVERNOR PERRY'S OFFICE AND BOARD OF PARDONS AND PAROLES, *supra* note 51, at 2.

313. See Steve Barnes, *National Briefing South: Man Executed for Fatal Fire*, N.Y. TIMES, Feb. 18, 2004, at A16 (reporting that Willingham was executed in 2004); *supra* text accompanying notes 34 & 53. Again, Governor Perry's power to grant a reprieve is limited by the Texas Constitution. See *supra* notes 34 & 53.

314. See, e.g., Bill Rankin, *Mistaken Identity*, ATLANTA JOURNAL-CONSTITUTION, Oct. 2, 2011, at 1B (explaining that the Georgia Board of Pardons and Paroles declined to grant clemency to Troy Davis prior to his execution despite the fact that evidence had surfaced that cast doubt on Davis's guilt); Jackie Hallifax, *Lawyer Claims Medina Suffered, Asks Justices to Stop Next Execution*, MIAMI HERALD, Apr. 4, 1997, at 1B (reporting that, prior to Leo Jones's execution, one of the jurors in Jones's trial wrote to the Governor to ask that he grant clemency to Jones in light of the fact that someone else had confessed to the crime and one of the witnesses against Jones had recanted his testimony).

315. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 411–15 (1993) ("Executive clemency has provided the 'fail safe' in our criminal justice system," and "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.").

individuals relief when, for example, exculpatory evidence has come to light.³¹⁶ So long as the individual received a fair trial, courts have opined, the truth of the conviction is not a priority, because relief for what turned out to be an erroneous result at a fair trial should be left to the aegis that state governors provide.³¹⁷ As the Supreme Court has stated, executive clemency “is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted,”³¹⁸ and it is “the ‘fail safe’ . . . in our criminal justice system.”³¹⁹ Still, several Supreme Court Justices have intimated that the execution of a factually innocent individual is concerning and perhaps even rises to the level of a constitutional violation.³²⁰ Such an egregious wrong should not only be recognized by the current system but also mitigated by providing these victims, or their heirs, with some form of compensation.

CONCLUSION

The Willingham case is just one instance in which governmental actors have turned a blind eye to evidence suggesting that a convicted individual might be innocent. Regardless of why such evidence is ignored—whether because of a belief that trials always produce reliable results, a theory that criminal defendants are entitled to only procedural fairness but not necessarily the truth, or incredulosity that any convicted individual could actually be innocent—the overwhelming number of recent DNA exonerations suggests that numerous criminal convictions, and even death sentences, could have been unjustly imposed. While individuals wrongfully convicted and incarcerated face any number of difficul-

316. See *id.* at 415; see also, e.g., *Brown v. State*, 955 S.W.2d 901 (Ark. 1997) (denying a defendant’s petition to reinvest the trial court with jurisdiction to consider a petition for a writ of *coram nobis*, because the claim was not timely, and the defendant’s assertion that another party had confessed to the crime after the judgment was affirmed “may be addressed to the executive branch in a clemency proceeding”).

317. See, e.g., *Herrera*, 506 U.S. at 400 (“This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”); *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (“[W]hat we have to deal with is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”); *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999) (suggesting that “state clemency proceedings provide the proper forum to pursue claims of actual innocence based on new facts”); *Hauck v. Hiatt*, 141 F.2d 812, 813 (3d Cir. 1944) (“As to the last ground asserted by the appellant, if he can demonstrate his innocence, his application should be to the President of the United States for executive clemency.”).

318. *Herrera*, 506 U.S. at 412.

319. *Id.* at 415.

320. See *supra* text accompanying notes 212–214.

ties in seeking compensation for the governmental wrongs perpetrated against them, wrongfully executed individuals and their heirs, families, and friends are likely left with no compensation whatsoever. The compensation statutes that currently exist in twenty-seven states, the District of Columbia, and the federal system should be revisited with the interests of wrongfully executed individuals, and their beneficiaries, in mind. To compensate this forgotten group, not only should these individuals be explicitly accounted for in these statutes, but the statutes should also reflect that, according to Supreme Court death penalty jurisprudence, these individuals have each suffered an even greater wrong than those individuals who have been wrongfully convicted and incarcerated.

APPENDIX

Jurisdiction	Compensation Provision	Compensation Scheme
Alabama	Ala. Code. § 29-2-159	\$50,000 per year of wrongful incarceration, to be determined on a pro rata basis, plus any discretionary amount that the committee determines is appropriate, so long as the legislature approves it.
California	Cal. Penal Code § 4904	The California Victim Compensation and Government Claims Board shall recommend to the Legislature to indemnify the claimant in the amount of "one hundred dollars (\$100) per day of incarceration . . . and that appropriation shall not be treated as gross income"
Connecticut	Conn. Gen. Stat. § 54-102uu	"In determining the amount of such compensation, the Claims Commissioner shall consider relevant factors including, but not limited to" loss of earnings, loss of earning capacity, loss of reputation, physical pain and suffering, loss of familial relationships, etc.
Florida	Fla. Stat. § 961.06	"\$50,000 for each year of wrongful incarceration," to be determined on a pro rata basis and adjusted for inflation; plus, some education expenses, reasonable attorney's fees, and reimbursement for fines and court costs paid, etc. "The total compensation awarded . . . may not exceed \$2 million."
Illinois	705 Ill. Comp. Stat. 505/8 (2009)	"[T]he amount of the award is at the discretion of the court [but] the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than \$85,350; for imprisonment of 14 years or less but over 5 years, not more than \$170,000; for imprisonment of over 14 years, not more than \$199,150; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted." These limits shall be adjusted for inflation by the court as necessary.
Iowa	Iowa Code § 663A.1	Damages are limited to \$50 per day incarcerated and lost wages up to \$25,000 per year, plus fines and court costs paid, reasonable attorney's fees and costs, etc.
Louisiana	La. Rev. Stat. Ann. § 572.8	\$25,000 per year incarcerated, not to exceed a maximum total amount of \$250,000, plus up to \$80,000 in tuition, job skills training, counseling, etc.
Maine	Me. Rev. Stat. 14 §§ 8241 & 8242	"[T]he claim for and award of damages, including costs, against the State may not

		exceed \$300,000 for all claims arising as a result of a single conviction.”
Maryland	Md. Code Ann., State Fin. & Proc. § 10-501 (2010)	“[T]he Board of Public Works may grant to an individual erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit an amount commensurate with the actual damages sustained by the individual, and may grant a reasonable amount for any financial or other appropriate counseling for the individual, due to the confinement.”
Massachusetts	Mass. Gen. Laws ch. 258D § 5 (2010)	“[T]he court or the jury shall determine the damages that shall be payable to the claimant. In making such determination, the court or jury shall consider, but not be limited to, the consideration of:” lost earnings, length and conditions of confinement, etc. “A judgment against the commonwealth may not include punitive or exemplary damages. The total liability of the commonwealth for any judgment entered under this chapter shall not exceed \$500,000.”
Mississippi	Miss. Code Ann. § 11-44-7(2) (2010)	\$50,000 per year, but the total amount awarded may not exceed \$500,000. The exoneree is also entitled to some reasonable attorney’s fees for brining this civil claim.
Missouri	Mo. Rev. Stat. § 650.058(1) (2010)	“The individual may receive an amount of fifty dollars per day for each day of post-conviction incarceration”
Montana	Mont. Code Ann. § 53-1-214 (2010)	Educational aid.
Nebraska	Nb. Rev. Stat. § 29-4604 (2010)	Exoneree is entitled to “damages found to proximately result from the wrongful conviction,” but damages may not exceed \$500,000.
New Hampshire	N.H. Rev. Stat. Ann. § 541-B:14(II) (2010)	“If a claim is filed against the state for time unjustly served in the state prison when a person is found to be innocent of the crime for which he was convicted, such a claim shall be limited to an award not to exceed \$20,000.”
New Jersey	N.J. Stat. Ann. § 52:4C-5 (2010)	“Damages awarded under this act shall not exceed twice the amount of the claimant’s income in the year prior to his incarceration or \$20,000.00 for each year of incarceration, whichever is greater.” The claimant is also entitled to reasonable attorney’s fees.
New York	N.Y. Ct. Cl. Act § 8-B(6) (2007)	“If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.”

North Carolina	N.C. Gen. Stat. § 148-84(a), (c)	\$50,000 per year incarcerated, to be determined on a pro rata basis, but total amount awarded may not exceed \$750,000. Exoneree may also be eligible to receive job skills training and expenses for tuition and fees at any public North Carolina community college.
Ohio	Ohio Rev. Code Ann. § 2743.48(E)(2) (2010)	Exoneree may recover \$40,330 per year incarcerated, to be determined on a pro rated basis and to be adjusted for inflation; lost wages; fines, court costs, etc., paid; reasonable attorney's fees and costs. From this amount, exoneree's recovery is debited by the following costs incurred by the state: payment for services at a detention facility, such as for sick call visits; food and housing; supervision; and ancillary services provided.
Oklahoma	Okla. Stat. tit. 51, §§ 154(B)(4) & (C) (2010).	Any damages award "for wrongful criminal felony conviction resulting in imprisonment shall not exceed . . . \$175,000." And no award may include punitive or exemplary damages.
Tennessee	Tenn. Code Ann. § 9-8-108(7)(c) (2010)	"Compensation payable to such persons shall be determined by the board considering all factors the board considers relevant including, but not limited to, the person's physical and mental suffering and loss of earnings; provided, however, that the maximum aggregate total of such compensation shall not exceed one million dollars (\$1,000,000)." (limited survival, too)
Texas	Tex. Civ. Prac. & Rem. Code Ann. § 103.052 (2010), § 103.054 (2010)	\$80,000 per year, to be determined on a pro rata basis, plus child support payments owed and educational tuition and fees.
Utah	Utah Code Ann. § 78B-9-405(1) (2009)	For every year wrongfully incarcerated, but only up to a maximum of fifteen years, petitioner is entitled to "the monetary equivalent of the average annual nonagricultural payroll wage in Utah," to be determined on a pro rata basis.
Vermont	Vt. Stat. Ann. Tit. 13, § 5574(b)	Exoneree is "entitled to damages in an amount to be determined by the trier of fact for each year the claimant was incarcerated, provided that the amount of damages shall not be less than \$30,000.00 nor greater than \$60,000.00 for each year the claimant was incarcerated, adjusted proportionally for partial years served. Damages may also include economic damages, including lost wages and costs incurred for exoneree's criminal defense, etc.; reasonable reintegration fees; reasonable attorney's fees, etc.

Virginia	Va. Code Ann. § 8.01-195.11(A) & (C) (2010)	Exoneree wrongfully incarcerated for felony “may be awarded compensation in an amount equal to 90 percent of the Virginia per capita personal income . . . for each year, or portion thereof, of incarceration up to 20 years.” Exoneree may also receive a transition assistance grant of \$15,000, which is to be deducted from the prior amount, plus up to \$10,000 in tuition reimbursement after successful completion of a program within the Virginia community college system.
West Virginia	W. Va. Code § 14-2-13 (2010)	“If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.”
Wisconsin	Wis. Stat. § 775.05(4)	“[T]he claims board shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment.” This amount shall include any attorney fees, costs, etc. If the claims board finds that this total amount does not sufficiently compensate the exoneree, it shall submit a report to the legislature specifying the amount it considers adequate.
District of Columbia	D.C. Code Ann. § 2-423 (2001)	“Upon a finding by the judge of unjust imprisonment . . . the judge may award damages. Punitive damages may not be awarded.”
Federal Government	28 U.S.C. § 2513 (2010)	“The amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff.”