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Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned

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EXONERATION AND THE ROAD TO COMPENSATION: THE TIM COLE ACT AND COMPREHENSIVE COMPENSATION FOR PERSONS WRONGFULLY IMPRISONED

By John Shaw

ABSTRACT

In recent years, the number of exonerations of persons wrongfully imprisoned has increased nationwide. With the number of exonerations continually on the rise, 27 states and the District of Columbia, have addressed the needs of exonerees with legislation that provides for the compensation of these individuals. A majority of these states offer basic monetary compensation. Basic monetary compensation, however, is not enough. The criminal justice system has failed these individuals in one way or another, and after years in prison, many are in need of more than money upon release.

Texas has been leading the country in exonerating wrongfully convicted individuals. In response to this recent development, the legislature took action by overhauling the current statutory compensation scheme. By increasing monetary amounts, and providing a wide range of services, Texas leads the nation in offering service to those individuals who have had their lives stripped from them for their respective wrongful imprisonment.

This Comment proposes that the Tim Cole Act, should serve as a model for other states to amend or create comprehensive compensation schemes. Part I of this comment introduces the story of Tim Cole, using that story as a background to examine wrongful convictions. Part II analyzes the main causes of wrongful convictions and common suggestions for preventing these causes in the future. Part III provides information on the three main avenues of recovery for exonerees and explains why legislation provides the best option. Part IV details the history of Texas's compensation legislation, providing the context in which the current legislation was enacted. Part V analyzes the current Tim Cole Act, outlining the recent changes and their importance in providing a comprehensive compensation scheme. Part VI offers comments for the use of the Tim Cole act as a model and suggestions for further reform, particularly in the area of attorney's fees.

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I. INTRODUCTION

During the mid-1980s, the campus at Texas Tech University was terrorized by a man identified in the media as the "Tech Rapist."¹ The man, described only as an African American male, abducted women from parking lots, driving them in their own cars to a remote location outside Lubbock where he proceeded to rape them and flee on foot.² One evening, Michele Mallin, the fifth victim, was abducted while moving her car and raped outside the Lubbock city limits.³ In the weeks after Mallin reported her rape to police, she would pick Timothy Cole's picture out of a photo lineup and later identify him again in a physical lineup.⁴ Cole was subsequently arrested, and on September 17, 1986 a jury found Cole guilty of rape, sentencing him to twenty-five years in prison.⁵ Throughout the trial and the following appeals, Cole's attorney, Mike Brown, advocated Cole's innocence, claiming that a man named Jerry Wayne Johnson had committed the crime.⁶

Johnson had been arrested for rape that had a similar pattern as that of the Tech Rapist.⁷ However, Brown's efforts to bring this fact to light fell on deaf ears.⁸ In 1990, during Cole's appeal, Brown at-

1. *Timothy Cole: A Tragic Story Begets Hope for the Future*, INNOCENCE PROJECT OF TEX., <http://www.innocenceprojectoftexas.org/index.php?action=timothy-cole> (last visited Feb. 14, 2011).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Elliott Blackburn, *Hope Deferred: Part II*, LUBBOCK ONLINE (June 29, 2008), http://www.lubbockonline.com/stories/062908/loc_297196667.shtml.

7. *Id.*

8. *Id.*

tempted again to advocate that Johnson was the ultimate perpetrator, but his attempt failed.⁹ After being incarcerated for 10 years, Johnson finally confessed in a letter to the district clerk in Lubbock.¹⁰ Sadly, his confession would go nowhere until twelve years later when he confessed in a letter to the Innocence Project of Texas.¹¹ Tim Cole would never have the opportunity to know that Johnson had confessed to committing the crime that was the basis for Cole's wrongful conviction and imprisonment.¹² Johnson's confession did not reach Cole or Cole's family until after Cole's death in prison from heart complications brought on by a lifelong problem with asthma.¹³ Finally, in 2009, after Johnson's confession and corroborating DNA evidence, a district judge handed down an order proclaiming Cole's innocence.¹⁴

The story of Timothy Brian Cole as described above provides an introduction to the problems of wrongful convictions and the need for compensating those individuals, and their respective families, who suffer the failure of the criminal justice system. Throughout this Comment a more comprehensive description of the events of Cole's story will be explained in an effort to show the reason for Texas's move to a holistic compensation scheme. This Comment proposes that Texas's legislation concerning compensation to persons wrongfully imprisoned should serve as a model for states nationwide. Part II will briefly explore the causes of wrongful convictions as well as some basic considerations for reforms to avoid these causes. Part III will describe the three basic avenues for recovery against a state for wrongful imprisonment. Part IV will detail the history of compensation legislation in Texas to provide an understanding of how the legislature, over time, recognized the moral obligation it owed to exonerees and their families by moving from a simple one-time payment to a more comprehensive, holistic compensation program. Part V will analyze the current Tim Cole Act, comparing it to other states, as well as to the Innocence Project's Model Legislation in an effort to show that Texas has gone beyond current states and models. Finally, Part VI will offer some suggestions for how Texas could implement some additional programs to cover more completely the needs of exonerees and continue to serve as the model compensation program.

9. *Id.*

10. *Id.*

11. *Timothy Cole: A Tragic Story Begets Hope for the Future*, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.*

II. THE PROBLEM OF WRONGFUL CONVICTIONS¹⁵

*"[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."*¹⁶

The road to being compensated for wrongful imprisonment necessarily begins with a wrongful conviction. The words of William Blackstone, from his *Commentaries on the Laws of England*, are as true in the 21st century as they were more than two centuries ago. During the investigation of a crime and the development of a case, before and during trial, many evidentiary problems surface that lead to a wrongful conviction.¹⁷ These causes have generally been divided into six categories: eyewitness misidentification; unvalidated or improper forensic science; false confessions or admissions; government misconduct; unreliable informants or snitches; and bad lawyering.¹⁸ These causes of wrongful convictions are all, in some way, linked to the government whether directly by investigative procedures or conduct of prosecutors, or indirectly where the state's criminal justice system failed to regulate properly. As such, a failure of a state run criminal justice system that results in a wrongful conviction that leads to wrongful imprisonment supports the idea that the state should accept responsibility and compensate those wronged.

A. *The Primary Cause of Wrongful Convictions: Eyewitness Misidentification*

Case studies of the first 225 DNA exonerations in the United States found that eyewitness misidentification was involved, at least in part, in 173 of those cases.¹⁹ In an additional study of the first 239 DNA exonerations, eyewitness misidentification was the central cause in 50% of the cases.²⁰ While eyewitness testimony can be valuable to a fact-finder during a trial, research in the area of social science has

15. This section is only meant to give a brief introduction into the main causes of wrongful convictions. For a more complete treatment of the main causes, see generally Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW & HUM. BEHAV.* 3 (2010); Gary L. Wells et al., *Eyewitness Evidence: Improving its Probative Value*, 7 *PSYCHOL. SCI. PUB. INT.* 45 (2006); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 *WIS. L. REV.* 615.

16. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *352.

17. See *The Causes of Wrongful Convictions*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited February 13, 2011); see also *Causes and Remedies*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/index.html> (last visited February 13, 2011).

18. *The Causes of Wrongful Convictions*, *supra* note 17.

19. *Id.*

20. *Eyewitness Misidentification*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited February 8, 2011).

proven that eyewitness identification can frequently be unreliable.²¹ Beginning in the 1970s, psychologists began studying eyewitness identification, publishing articles that warned the criminal justice system that the “validity of eyewitness reports depends a great deal on the procedures that are used to obtain the reports.”²² In analyzing those procedures used, researchers identified two groups of variables that impact the accuracy of eyewitness identifications: system variables and estimator variables.²³

System variables are those “affecting the reliability of eyewitness identifications that the criminal justice system could (or should) control.”²⁴ These variables include the procedures law enforcement agencies use to “retrieve or record” a witness’s memory such as live lineups, photo lineups, the selection of “fillers” (lineup participants who are not a suspect), the administration of the lineups, and instructing witnesses prior to viewing a lineup.²⁵ Estimator variables, on the other hand, include those variables that are outside the control of the criminal justice system.²⁶ Estimator variables include simple factors such as the lighting at the scene of the crime, the distance between the witness and perpetrator and various other environmental factors.²⁷ The more complex of the estimator variables includes such factors as a witness’s level of stress, the presence of a weapon, the race of the perpetrator, and a witness’s ability to retain information in the interval between the crime and police interview.²⁸ By taking steps to reform eyewitness identification procedures, this major cause of wrongful convictions could at the very least limit the frequency of eyewitness misidentification.

Estimator variables, by definition, are out of the control of investigating agencies, and cannot be affected by reform.²⁹ System variables, however, have a range of reform possibilities. Lineup procedure can be controlled by including only one suspect in the lineup.³⁰ Once that suspect is in the lineup, fillers should be carefully selected so the suspect does not stand out among them.³¹ Additionally, a “sequential lineup” should be used rather than the traditional “simultaneous lineup.”³² In a sequential lineup, the witness is presented with the lineup participants one at a time, as opposed to a simultaneous lineup

21. *Id.*

22. Wells et al., *supra* note 15, at 45.

23. *Id.*

24. Wells, *supra* note 15, at 616.

25. EYEWITNESS MISIDENTIFICATION, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php?phpMyAdmin=52c4ab7ea46t7da4197>.

26. *Eyewitness Misidentification*, *supra* note 20.

27. *Eyewitness Misidentification*, *supra* note 20.

28. Wells et al., *supra* note 15, at 52–54.

29. *Id.*

30. Wells, *supra* note 15, at 623.

31. *Id.* at 624.

32. *See id.* at 625–26.

where the witness views all participants at once.³³ During the administration of the lineup, the witness should be warned that the suspect may not be among the participants.³⁴ A “double-blind” procedure, one in which neither the administrator nor the witness is aware of who the suspect is, should be used to prevent the possibility of the administrator giving inadvertent clues as to the suspect’s presence.³⁵ Finally, at the conclusion of a lineup, the witness should give a “confidence statement” outlining their level of confidence in their choice.³⁶ These simple reforms, requiring no special personnel or money, provide investigating agencies with an opportunity to reduce this primary cause of wrongful convictions.³⁷

B. *The Remaining Common Causes of Wrongful Convictions*

Although there are five remaining main causes of wrongful convictions, their combined totals do not exceed the number of wrongful convictions caused by eyewitness misidentification.³⁸ Identifying these causes and their effects on wrongful convictions aids in understanding the need for compensation legislation.

Unvalidated or improper forensic sciences are those techniques that have not yet been developed through rigorous scientific research like DNA analysis.³⁹ These techniques include hair microscopy, bite mark analysis, firearm tool mark analysis and shoeprint comparisons.⁴⁰ A primary problem with these techniques is simply that, unlike DNA testing, they lack uniform scientific standards.⁴¹ Additionally, expert testimony regarding these techniques is often presented as scientific fact, leading to fact-finders putting more faith in these methods than is deserved.⁴²

False confessions are another troubling cause of wrongful convictions. False confessions are those confessions that are comprised of incriminating statements or pleas of guilty.⁴³ Confessions of these sorts are generally obtained during police interrogation and are the result of one or more possible factors.⁴⁴ Multiple pressures can be present during an interrogation including, coercion, duress, intoxica-

33. *Id.* at 625.

34. *Id.*

35. *Id.* at 629.

36. *Id.* at 631.

37. *Id.* at 632.

38. Wells et al., *supra* note 15, at 45.

39. *Unvalidated or Improper Forensic Science*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited Feb. 15, 2011).

40. *Id.*

41. *Id.*

42. *Id.*

43. *False Confessions*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Feb. 14, 2011).

44. *Id.*

tion, diminished capacity, or fear of violence.⁴⁵ In rare cases, actual physical harm to the suspect has been used to coerce a suspect to confess.⁴⁶ Other contributing factors include ignorance of the law and threats of a harsh sentence.⁴⁷ Giving a false confession in response to these factors is typically done with the belief that a confession will be more beneficial than maintaining innocence.⁴⁸ A simple reform for limiting false confessions, brought about by stifling the aforementioned factors, is to require the video recording of the confessions.⁴⁹

Government misconduct is a broad term encompassing actions of police agencies and the prosecutors who try cases.⁵⁰ Misconduct is not meant to cover instances where an honest mistake during investigation or trial has occurred, but rather where the police or prosecutors has “taken steps to ensure a defendant is convicted despite weak evidence or even clear proof of innocence.”⁵¹ The primary means of police misconduct comes in the form of suppression of exculpatory evidence, coerced confessions, and evidence fabrication.⁵² The primary means of prosecutorial misconduct are suppression of exculpatory evidence, use of false testimony, improper closing arguments and false statements to the jury.⁵³ As a subset of government misconduct, the use of informants, or “jailhouse snitches,” has led to a number of wrongful convictions.⁵⁴ The use of these witnesses can constitute misconduct when they offer testimony in exchange for deals of less time in prison, or, in rare cases, for monetary compensation.⁵⁵ This is not to say that law enforcement officers and prosecutors are untrustworthy; most are honest.⁵⁶ However, “criminal justice is a human endeavor and the possibility for corruption exists.”⁵⁷

Finally, some wrongful convictions have been linked to “bad lawyering” by defense counsel.⁵⁸ In the case of poor defendants, relying on court-appointed attorneys and public defenders, there is a possibility that the defendant will not receive as effective a lawyer as a defendant who is able to retain one.⁵⁹ The causes of ineffective counsel are

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Government Misconduct*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Feb. 14, 2011).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Informants/Snitches*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Feb. 14, 2011).

55. *Id.*

56. *Government Misconduct*, *supra* note 50.

57. *Id.*

58. *See Bad Lawyering*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Bad-Lawyering.php> (last visited Feb. 21, 2011).

59. *See id.*

many, but this problem can be controlled by oversight of the courts, and better funding of public defender programs.⁶⁰ As the preceding material points out, many of the causes of wrongful convictions are in some way attributable to a failure of the criminal justice system at some point. Accordingly, since the criminal justice system is primarily a function of the states, it follows then that states should be more willing to accept responsibility for that failure and offer a practical, holistic compensation scheme for those citizens who have been stripped of their liberties.

C. *System Failure in the Case of Tim Cole*

On June 26, 2008, Cole's family and Cole's alleged victim, Michele Mallin, filed a Petition for a Court of Inquiry⁶¹ in Lubbock, Texas for the purpose of getting a hearing and order to clear the name of Timothy Cole.⁶² The petition was denied and the petitioners took their claim to the 299th District Court in Travis County where a hearing was held, findings of fact made, reasons for Cole's wrongful conviction given, and an order issued exonerating Cole.⁶³ After the presentation of evidence and expert testimony regarding wrongful convictions in Texas and about matters specific to Cole's case, the court issued conclusions outlining the reason for Cole's wrongful arrest and eventual conviction.⁶⁴ The court made four findings regarding the reasons for Cole's arrest, misidentification, conviction, and why he died in prison.

First, the police investigation stumbled on Cole during surveillance of the area in which the crimes had taken place when Cole approached an undercover officer and initiated a friendly conversation.⁶⁵ Cole fit the description given by the victim and, from that point on, the police performed their duties with a lack of objectivity that resulted in an unsubstantiated focus on Cole.⁶⁶ Second, the police used lineup techniques that resulted in leading Mallin to the conclusion that Cole was her attacker although she never identified him with certainty.⁶⁷ Third, destruction of evidence, faulty work of the police, and the misidentification produced by police was the cause of Cole's conviction.⁶⁸ Lastly, and perhaps most disturbing, was the attitude of the

60. *See id.*

61. In some jurisdictions, a procedure that allows a magistrate to examine witnesses in relation to any offense that the magistrate has a good-faith reason to believe was committed. TEX. CODE CRIM. PROC. ANN. art. 52.01 (West 2006).

62. *In re a Court of Inquiry*, No. D1-DC 08- 100- 051, at 1 (229th Dist. Ct., Travis County, Tex. Apr. 7, 2009), <http://www.ipoftexas.org/pdf/OpinionOrderofCourt.pdf>.

63. *Id.*

64. *Id.* at 10-13.

65. *Id.* at 4.

66. *Id.* at 10.

67. *Id.* at 11-12.

68. *Id.* at 12-13.

courts to the confession of Jerry Johnson.⁶⁹ Despite Johnson's efforts to prove Cole's innocence as early as 1995, the courts and officials ignored his letters, never attempting to substantiate his claims.⁷⁰ It was not until a letter reached Cole's family and the Innocence Project of Texas that any serious inquiry was made.⁷¹ The court found that but for the failure of the criminal justice system to act when it was first notified by Johnson of the possibility Cole's innocence, Tim Cole would not have died in prison on December 2, 1999.⁷²

III. REMEDIES AVAILABLE FOR THE WRONGFULLY IMPRISONED

Upon release from prison, persons wrongfully convicted have three basic avenues for recovery: filing a civil rights lawsuit, obtaining special legislation, or obtaining relief through some statutory means. Of the three choices available, statutory compensation is the most likely to produce a favorable outcome for an individual wrongfully imprisoned, resulting in receiving compensation. Civil rights lawsuits have multiple barriers that make recovery difficult. Special legislation has more numerous and complex barriers than civil rights lawsuits. Understanding the difficulties with, and the typically inadequate remedies afforded by, civil rights lawsuits and special legislation provides the primary reasons for the necessity of structured, holistic statutory compensation schemes.

A. *Civil Rights Lawsuits: The §1983 Claim*

Section 1983⁷³ provides exonerees with a federal statutory basis to seek compensation from the agencies they feel are responsible for their wrongful imprisonment. Essentially, section 1983 allows exonerees to file suit against any person who, acting under color of state law, deprives a person of a constitutional right.⁷⁴ "The traditional definition of acting under color of state law that the defendant . . . exercised power 'possessed by virtue of state law and made possible only be-

69. *Id.* at 13.

70. *Id.*

71. *Id.*

72. *Id.*

73. 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

74. Alberto B. Lopez, *\$10 Dollars and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 691 (2002).

cause the wrongdoer is clothed with the authority of state law.”⁷⁵ Employment by the state is generally sufficient to “render the defendant a state actor.”⁷⁶ Further, it is firmly established that when a defendant abuses the position given to him, he acts under color of state law.⁷⁷ The primary parties that a plaintiff generally chooses to sue are the police and prosecutors that were responsible for the investigation and trial of the case.⁷⁸ However, if a plaintiff is able to show that they were deprived of a constitutional right by police officers or prosecutors, they must overcome the hurdles of qualified and absolute immunity.⁷⁹

In the case of police officers, once a warrant is obtained with a showing of probable cause, the officers possess qualified immunity from liability.⁸⁰ “Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost.”⁸¹ Additionally, a “peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.”⁸² Given that the threshold of probable cause is low, an action against police officers is unlikely to stand.

Suits against prosecutors have an even larger barrier to overcome, absolute immunity. At common law, a prosecutor, acting within his prosecutorial powers, is “absolutely immune.”⁸³ Support for the grant of absolute immunity for prosecutors is grounded in public policy.⁸⁴ The primary policy argument is that “the public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.”⁸⁵ Through a discussion of common law principles, the *Imbler* court extended the same absolute immunity to prosecutors in the case of section 1983 claims.⁸⁶

75. *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

76. *Id.*

77. *Id.* at 49–50.

78. *Lopez*, *supra* note 74, at 693.

79. *Id.* at 693–4.

80. *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

81. *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986).

82. *Pierson*, 386 U.S. at 555.

83. *Imbler v. Pachtman*, 424 U.S. 409, 421–24 (1976) (citing *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896)) (noting that the “common-law rule of immunity is well settled”).

84. *Id.* at 424.

85. *Id.* at 424–25.

86. *Id.* at 427.

B. *Special Legislation and Private Bills*

Special legislation is legislation that “affects only . . . a particular group of people.”⁸⁷ If a claimant attempts to obtain compensation through special legislation, they “must lobby their state legislature to pass a private bill that dispenses money from the state treasury directly to the lobbying individual as a remedy for the injustice of being wrongly convicted.”⁸⁸ Legislation of this type is limited in two major ways. First, few exonerees possess the political clout to push a private bill through a state legislature.⁸⁹ Second, and more problematic in some states, is that some state constitutions prohibit the passage of special legislation.⁹⁰

C. *Statutory Compensation in General*

In an effort to alleviate some of the problems with the difficulties of civil rights litigation and special legislation, twenty-seven states and the District of Columbia have passed some form of compensation legislation.⁹¹ The compensation statutes of the various states generally offer one of two ways to obtain compensation: the state will waive its immunity from suit, laying out the elements necessary to prove a claim⁹² or have an administrative filing procedure in lieu of filing suit.⁹³ Additionally, the compensation given by these states is disbursed in three primary ways. First, some states give only a monetary payment with a cap on the total, occasionally including attorney’s fees.⁹⁴ Second, some states offer monetary compensation with limited reentry services.⁹⁵ The last variation on compensation involves large sum payments and extensive reentry and reintegration assistance.⁹⁶

While civil rights lawsuits and special legislation are possible ways of gaining compensation for wrongful imprisonment, they are lacking in one primary way. Obtaining a judgment or private bill only grants an exoneree monetary damages. In the case of many exonerees, life services and reentry services are needed upon release from confine-

87. BLACK’S LAW DICTIONARY 918 (8th ed. 2004).

88. Lopez, *supra* note 74, at 698.

89. *Id.* at 700.

90. *Id.* at 699.

91. *Reforms by State*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawView1.php> (last visited Feb. 23, 2011).

92. See generally LA. REV. STAT. ANN. § 15:572.8 (Supp. 2011); UTAH CODE ANN. § 78B-9-405 (LexisNexis 2008); W. VA. CODE ANN. § 14-2-13a (LexisNexis 1987).

93. See generally M.D. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2003); TEX. CIV. PRAC. & REM. CODE 103.001 (West Supp. 2010); WIS. STAT. ANN. § 775.05 (West 1988).

94. See IOWA CODE ANN. § 663A.1 (West 1997); ME. REV. STAT. ANN. tit. 14, § 8241 (1993); N.H. REV. STAT. ANN. § 541-B:14 (Supp. 2010); UTAH CODE ANN. § 78B-9-405 (LexisNexis 2008).

95. See 20 ILL. COMP. STAT. ANN. 1015/2 (West Supp. 2008); N.C. GEN. STAT. § 148-82 (1997 & Supp. 2010); VA. CODE ANN. § 8.01-195.10 (2004 & Supp. 2010).

96. TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–.154 (West Supp. 2010).

ment. Those services are of the type that can be addressed by a comprehensive statutory compensation scheme. However, comprehensive compensation legislation is far from the norm.

IV. THE HISTORY OF TEXAS'S COMPENSATION STATUTES

Texas has constantly changed its compensation legislation since the statute was adopted for the first time in 1965.⁹⁷ As a result of these changes, the Texas statute has, at one time or another, been each of the general variations described above. In an effort to better explain those variations and to show the progression of compensation legislation in Texas, this section will detail the history of compensation legislation in Texas.

Texas has traditionally been viewed as a hard-line state when it comes to criminal punishment. This view evolved because of Texas' large number of executions from 1923 to 1973⁹⁸ and the large number from December 7, 1983 to the present.⁹⁹ While a recitation of execution statistics does not have a direct relation to a discussion of compensation, it serves as a backdrop to show that despite being a system that is unsympathetic at first glance, Texas recognized a need for compensation legislation in 1956. In 1956, Article III of the Texas Constitution was amended by adding section 51-c which states:

The Legislature may grant aid and compensation to any person who has heretofore paid a fine or served a sentence in prison, or who may hereafter pay a fine or serve a sentence in prison, under the laws of this State for an offense for which he or she is not guilty, under such regulations and limitations as the Legislature may deem expedient.¹⁰⁰

In *State v. Clements*, amendment 51-c was used for the first time as an avenue to compensation for wrongful imprisonment¹⁰¹. Clements sued the state for false imprisonment after serving two years of a five year sentence before receiving a full pardon from the Governor.¹⁰² The trial court awarded Clements \$149,500 and the State appealed.¹⁰³ Clements' judgment was overturned when the appeals court found

97. See Act of June 16, 1965, 59th Leg., R.S., ch. 507, §§ 1–9, 1965 Tex. Gen. Laws 1022 (amended 2001) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–.154 (West Supp. 2010)).

98. *Racial and Gender Breakdown of Death Row Offenders 1923–1973*, TEX. DEP'T CRIM. JUSTICE, <http://www.tdcj.state.tx.us/stat/prefurman/racial.htm> (last updated June 25, 2001) (during the fifty-year period, Texas executed 506 people).

99. *Executions: December 7, 1982 through February 15, 2011*, TEX. DEP'T CRIM. JUSTICE, <http://www.tdcj.state.tx.us/stat/annual.htm> (last updated Feb. 16, 2011) (during this period, Texas executed 465 people).

100. TEX. CONST. art. III, § 51-c.

101. *State v. Clements*, 319 S.W.2d 450 (Tex. Civ. App.—Texarkana 1958, writ ref'd).

102. *Id.* at 451.

103. *Id.*

that the amendment was not self-executing.¹⁰⁴ If an amendment is self-executing, the language is addressed to the courts, requiring no further legislation to carry it into effect.¹⁰⁵ Although the amendment 51-c opened the door for compensation legislation, the amendment alone conferred no right to compensation directly or through judicial action.¹⁰⁶ It would take nine years for the legislature to act, providing a statutory right for a claimant to receive compensation for wrongful imprisonment.

A. *Texas's First Compensation Statute*

In 1965, the legislature finally spoke when it enacted Article 1176a of the Penal Code.¹⁰⁷ The Legislature found that the people of Texas adopted the policy that persons who had been wrongfully imprisoned should be compensated for their imprisonment pursuant to amendment 51-c.¹⁰⁸ Article 1176a would become the first statute that granted compensation to persons wrongfully imprisoned and laid out the procedure for obtaining compensation. Under the article, a claimant was entitled to compensation if: (1) they served, in whole or in part, a prison sentence under the laws of the State; and (2) plead “not guilty” to the charge for which they were imprisoned; and (3) they were not guilty of the charge; and (4) they received a full pardon for the crime and punishment.¹⁰⁹ The power to grant pardons in criminal cases is “vested solely in the Governor.”¹¹⁰ Once a pardon had been granted it was admissible, and required, as evidence in the suit brought by the claimant seeking compensation.¹¹¹ The compensation was acquired through a judicial proceeding. Article 1176a limited the State’s power in two important ways—waiver of the State’s immunity in proceedings under the Article and preventing the conviction of the claimant in the original trial from being used as a defense in the suit against the state.¹¹² The waiver of immunity was the most important

104. *Id.* at 453 (quoting 16 C.J.S. *Constitutional Law* § 48 (2005) (current version at 16 C.J.S. *Constitutional Law* § 89 (2010))) (“Whether or not a provision is self-executing depends on whether the language is addressed to the courts or to the Legislature, — whether it indicates that it is intended as a present enactment, complete in itself as definitive legislation, or contemplates subsequent legislation to carry it into effect.”).

105. *Id.*

106. *See id.*

107. Act of June 16, 1965, 59th Leg., R.S., ch. 507, §§ 1–9, 1965 Tex. Gen. Laws 1022 (amended 2001).

108. *Id.* § 1.

109. *Gilbert v. State*, 437 S.W.2d 444, 446 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref’d n.r.e.).

110. *Id.* (citing TEX. CONST. art. IV, §11(b)).

111. Act of June 16, 1965, 59th Leg., R.S., ch. 507, §§ 1–9, 1965 Tex. Gen. Laws 1022 (amended 2001).

112. *Id.* §§ 3–4.

concession by the state, in that it aided the claimant in avoiding a difficult § 1983¹¹³ claim.

With the State's immunity waived and the requirements for the claimant clearly laid out, the final sections of Article 1176a provided for the compensation. Since a claim for compensation was suit against the state, the compensation reward, if any, was to be determined by the judge or jury.¹¹⁴ A claimant could be compensated for "physical and mental pain and suffering sustained by him as a proximate result" of the wrongful imprisonment.¹¹⁵ Additionally, the claimant would be compensated for "all reasonable and necessary medical expenses incurred" as a result of the wrongful imprisonment.¹¹⁶ Although the amount of the compensation was at the discretion of the finder of fact, there was a cap on the damages award. Under subsection (a), the damages for physical and mental pain, no amount beyond \$25,000 could be granted.¹¹⁷ Further, the total compensation awarded for a claim under the Article could not exceed \$50,000.¹¹⁸ It should be noted that those amounts, at the time were substantial, equaling approximately \$170,000 and \$340,000 respectively according to modern values.¹¹⁹

Article 1176a was the first attempt at compensating the wrongfully imprisoned. The clear requirements served as an appropriate starting point, but being forced to seek compensation through the courts still posed the problem of obtaining no guaranteed sum of money but also offered no services outside the monetary arena. The compensation scheme would undergo one major overhaul before arriving at the model compensation statute Texas has today.

B. *The Move to Civil Practice & Remedies Code and the Administrative Relief Option*

In 1963, the 58th Legislature passed SB 367, which ordered the creation of a permanent, ongoing statutory revision program.¹²⁰ The results of this program would be the gradual development of the code system that is currently in effect. In 1973, the Penal Code was updated¹²¹ and Article 1176a was moved to Texas Revised Civil Statutes

113. 42 U.S.C. § 1983 (2006).

114. Act of June 16, 1965, 59th Leg., R.S., ch. 507, §§ 1-9, 1965 Tex. Gen. Laws 1022 (amended 2001).

115. *Id.* § 6(a), 1965 Tex. Gen. Laws at 1023.

116. *Id.* § 6(b).

117. *Id.* § 6

118. *Id.*

119. *CPI Inflation Calculator*, U.S. BUREAU LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 21, 2011).

120. Act of June 10, 1963, 58th Leg., R.S., ch. 448, § 1, 1963 Tex. Gen. Laws 1152.

121. *Id.*

where it remained until it was repealed in 1985.¹²² In 1985, the Legislature promulgated the Civil Practice and Remedies Code, which contained a statutory scheme for compensating persons wrongfully imprisoned that was essentially identical in substance and content to its Penal Code predecessor.¹²³ This Section will explain the major changes to the compensation statutes¹²⁴ that occurred over the course of the twenty-two years before the Tim Cole Act in an effort to show the increase in awareness regarding the importance of this legislation. The provisions of the Civil Practice and Remedies Code remained largely unchanged until 2001 when the legislature made three significant amendments: changing the requirements for persons entitled to compensation, adding an administrative procedure as an alternative to filing suit, and increasing the compensation amount.¹²⁵

The new eligibility requirements put forth a more relaxed standard than the original Penal Code requirements. A claimant was entitled to compensation if they had served all or part of a prison sentence and either received a full pardon *on the basis of innocence* or had been granted relief on the basis of *actual innocence*.¹²⁶ The addition of the option of being “granted relief on the basis of actual innocence”¹²⁷ is relatively difficult to obtain. The evidence to prove that relief was granted based on actual innocence is most easily achieved when relief of a conviction is obtained through habeas corpus based on “actual innocence.”¹²⁸ The type of innocence claim that generally accompanies a writ of habeas corpus is a “bare” innocence claim.¹²⁹ A bare innocence claim is made when the applicant claims there is new evidence that shows, clearly and convincingly, that no reasonable juror would have convicted him.¹³⁰ The burden of proving a claim of this sort has been termed “a Herculean task” by the court of criminal appeals.¹³¹

122. Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 5, sec. 6252-25 Tex. Gen. Laws 995, *repealed by* Act of June 16, 1985, 96th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3307-08.

123. Act of June 16, 1985, 69th Leg., R.S., ch. 959, § 1, sec. 103.001-.007, 1985 Tex. Gen. Laws 3242, 3307-08 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 103 (West Supp. 2010)).

124. The explanations of changes in the remainder of this section will come from changes occurring in 2001 and 2007. For ease of explanation, the dates of the changes to Chapter 103 of the Texas Civil Practice & Remedies Code will be represented parenthetically following the footnote citations.

125. Act of June 15, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws 5280, 5280 (amended 2009) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West Supp. 2010)).

126. *Id.* (emphasis added).

127. *Id.*

128. *State ex rel. Abbott v. Young*, 265 S.W.3d 697, 705 (Tex. App.—Austin 2008, pet. denied).

129. *Id.*

130. *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002).

131. *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

The new administrative option, filing for compensation with the judicial section of the state comptroller's office,¹³² served to provide a more streamlined avenue to compensation for those defendants who were able rise to that challenge. The first set of requirements for application to the comptroller included filling out an application provided by the comptroller's office; presenting a verified copy of the pardon or court order justifying the application; and a statement provided by the Texas Department of Criminal Justice verifying the length of incarceration.¹³³ Upon application, the Comptroller, in her executive capacity, was to determine the eligibility of the claimant and the amount of compensation due, if any.¹³⁴ In the case of a denied claim, the claimant had ten days to file an application to cure any defect and the application was reconsidered.¹³⁵ Finally, if denied a second time, the claimant could bring an action for mandamus relief.¹³⁶ At the next legislative session, a fourth requirement was added—a certification of innocence signed by the attorney who prosecuted the claimant.¹³⁷

The final major change was increasing the amount of compensation that could be granted by either filing suit or through the administrative procedure. If the claimant filed suit against the state and was found to be entitled to compensation, the amount of compensation would be determined by addressing three categories.¹³⁸ First, compensation could be granted for expenses incurred as a result of all criminal proceedings and appeals, as well as costs associated with proving innocence post-conviction.¹³⁹ Second, the claimant was entitled to compensation for lost income (wages, salary, etc.) that was a direct result of his wrongful imprisonment.¹⁴⁰ Finally, the claimant was entitled to medical and counseling expenses incurred as a result of the wrongful imprisonment.¹⁴¹ The compensation from the administrative proceeding was a much clearer standard than the tort-like scheme developed for the lawsuit. Once the claimant was established to be entitled to compensation, he was granted \$25,000 for every year

132. Act of June 20, 2003, 78th Leg., R.S., ch. 1310, § 1, 2003 Tex. Gen. Laws 4748, 4748–49 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(a) (West 2009)).

133. *Id.*

134. Act of June 15, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws 5280, 5280.

135. *Id.*, § 2, 2001 Tex. Gen. Laws at 5283.

136. *Id.*

137. Act of June 20, 2003, 78th Leg., R.S., ch. 1310, § 1, 2003 Tex. Gen. Laws 4748, 4748–49.

138. Act of April 17, 2001, 77th Leg., R.S., ch. 1488, § 3, 2001 Tex. Gen. Laws 5280, 5283.

139. *Id.*

140. *Id.* § 1, 2001 Tex. Gen. Laws at 5282.

141. *Id.*

spent incarcerated with partial years expressed as a fraction.¹⁴² If the claimant spent twenty or more years in prison he was granted \$500,000, which was also the cap placed on compensation from filing suit.¹⁴³

In addition to making the compensation calculation easier when applied for administratively, the State also made its first attempt at providing a more holistic compensation.¹⁴⁴ The 2001 amendments gave the claimant the option to receive counseling from the Texas Department of Mental Health and Mental Retardation for one year at an agreed upon location.¹⁴⁵ In 2007, the compensation under the administrative proceeding was expanded again. The amount given for every year the claimant was incarcerated was increased to \$50,000, with \$100,000 per year being given to a claimant who was sentenced to death.¹⁴⁶ These amendments also marked the first time the legislature offered compensation to a claimant's family. In addition to the claimant's award, any child support that became due and the interest on those child support arrearages that accrued during the claimant's incarceration would be paid in a lump-sum to the state disbursement unit, for distribution to the obligee under the child support order.¹⁴⁷

The compensation statutes in Texas have been in flux since their inception in 1965. Beginning with a simple award achieved through a difficult law suit,¹⁴⁸ Texas moved toward the pre-Tim Cole act legislation that began the first shift to a more holistic compensation scheme geared toward offering not only compensation and services to exonerates¹⁴⁹ but also offering child support to those inmates who were unable to fulfill their child support responsibilities.¹⁵⁰ The 2007 amendments also saw the shift to the State's preference for the administrative proceeding. All of the services, the simplified monetary scheme, and the streamlined application procedure made the adminis-

142. *Id.* at 5281.

143. *Id.*

144. See generally Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157 (2004) (arguing that compensation should expand beyond only monetary compensation, offering a 'holistic' program with services including education, vocational training, and medical services).

145. Act of June 15, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws 5280, 5281 (amended 2009).

146. Act of June 15, 2007, 80th Leg., R.S., ch. 1190, § 2, 2007 Tex. Gen. Laws 4054, 4055 (amended 2009) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West Supp. 2010)).

147. *Id.* at 4054–55; see also TEX. FAM. CODE ANN. § 101.0302 (West 2009) (defining the state disbursement unit described in TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(d)).

148. Act of June 16, 1965, 59th Leg., R.S., ch. 507, § 6, 1965 Tex. Gen. Laws 1022, 1023 (amended 2001).

149. See Act of June 15, 2007, 80th Leg., R.S., ch. 1190, § 1, 2007 Tex. Gen. Laws 4054, 4054–55 (amended 2009).

150. See *Id.*

trative filing the optimal choice for compensation, and showed the State's willingness to accept moral responsibility for its actions. However, it would take a substantial lobbying effort and the death of an innocent man to finally push the State to pass the Tim Cole Act, offering the new, holistic approach to compensation for persons wrongfully imprisoned.

V. THE TIM COLE ACT AND COMPREHENSIVE LEGISLATION

In the order exonerating Tim Cole, the court asked "what can be done so that tragedies such as this can be prevented from happening?"¹⁵¹ The order further stated that "courts can, and frequently do, point out problems in the law that only the Legislature can fix."¹⁵² In addressing the legislature, three main problems were identified and discussed at length in the order: false witness identification, lack of access to the courts by the innocent, and compensating the innocent for their loss.¹⁵³ In addressing compensating the innocent, the court found it important for the Legislature to extend any benefits that a deceased person would enjoy to that individual's family, furthering the effort of taking responsibility for the failure of the system.¹⁵⁴ The story of Tim Cole, as evidenced by the act being named for him, was a driving force to change the way Texas handled the compensation for persons wrongfully imprisoned. The Tim Cole Act¹⁵⁵ marks the current changes to Texas's compensation legislation, making a move from a basic services and monetary compensation scheme to a holistic scheme, offering the innocent a broader range of important reentry services.

A. *Requirements of Filing and Extension of Rights to Heirs*

In the 2007 version of the compensation statute, a person was entitled to compensation if they: (1) served all or part of a prison sentence; (2) pleaded "not guilty" to the charge that led to their imprisonment; (3) is not guilty of the charge; and (4) has received a full pardon.¹⁵⁶ The Tim Cole Act has simplified the elemental requirements for being entitled to compensation.¹⁵⁷ A person is now entitled to compensation if they served all or part of a prison sentence and either received a full pardon on the basis of innocence or been granted relief on the basis of actual innocence.¹⁵⁸ The second notable

151. *In re a Court of Inquiry*, No. D1-DC 08- 100- 051, at 1 (229th Dist. Ct., Travis County, Tex. Apr. 7, 2009), <http://www.ipoftexas.org/pdf/OpinionOrderofCourt.pdf>.

152. *Id.* at 13.

153. *Id.* at 13-15.

154. *See id.* at 15.

155. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (West Supp. 2010).

156. Act of June 15, 2007, 80th Leg., R.S., ch. 1190, § 1, 2007 Tex. Gen. Laws 4054, 4054 (amended 2009).

157. *See* Tex. Civ. Prac. & Rem. Code Ann. § 103.001(a).

158. *Id.* § 103.001(a)(2)(A)–(B).

change to section 103.001 was the extension of benefits to a deceased innocent person's family.¹⁵⁹ If a deceased person who would have been entitled to compensation, including those receiving a posthumous pardon, the heirs, representatives and estate of the person are entitled to the lump-sum compensation that would be due the individual.¹⁶⁰ As a result of this provision, any family facing a tragedy of the kind the Cole family had to endure will be compensated by the State.

As part of the amendments, the option to file suit against the state or file for administrative compensation was taken out.¹⁶¹ This resulted in the state taking back its waiver of immunity to suit for wrongful imprisonment.¹⁶² However, the application procedure for the administrative compensation was streamlined, making the task substantially easier. The claimant first must obtain the Request for Wrongful Imprisonment Compensation form from the Judiciary Section of the State Comptroller's office.¹⁶³ The form is simple, consisting of only one page. The only information that need be filled in is the claimant's name, address, phone number, social security number, and Texas Department of Criminal Justice (TDCJ) number.¹⁶⁴ Additionally, there are check boxes to show that the documentation required by the statute is included in the application.¹⁶⁵ The statute requires that the application include a verified copy of the pardon or court order justifying compensation; a statement from the TDCJ and any county or municipality that incarcerated the claimant verifying the length of incarceration; if applicable, a statement from the Department of Public Safety verifying registration as a sex offender and the length of registration; if applicable, a statement from the TDCJ verifying length of time spent on parole; and, if claiming compensation for child support, certified copies of the child support orders and payment records.¹⁶⁶ The form ends by having the claimant list the total amount they are claiming based on the above information, certifying the information with a signature and listing the claimant's attorney if they are represented.¹⁶⁷

159. *Id.* § 103.001(c).

160. *Id.*

161. Act of June 15, 2007, 80th Leg., R.S., ch. 1190, § 4, 2007 Tex. Gen. Laws 4054, 4054-55.

162. *Id.*

163. This is not a public form and must be acquired by contacting the Judiciary section of the State Comptroller's office. The contact information is available at *Comptroller's Judiciary Section*, TEX. COMPTROLLER PUB. ACCTS. [hereinafter *Request for Wrongful Imprisonment Compensation Form*], <http://www.window.state.tx.us/judiciary/contact.html> (last visited Mar. 8, 2011).

164. *Id.*

165. *Id.*

166. TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(a) (West Supp. 2010).

167. *Request for Wrongful Imprisonment Compensation Form*, *supra* note 163.

B. *The Types of Compensation*

It is important to realize that “compensation” does not only mean money.¹⁶⁸ Compensation also comes in the form of reentry services.¹⁶⁹ “[T]he issues facing the wrongfully convicted are so unique and complex,” and as such “compensation should be holistic and take into account these financial, educational, and health problems.”¹⁷⁰ Holistic compensation schemes have been considered and argued for in various forms,¹⁷¹ and Texas has accomplished many of the suggested goals for comprehensive or holistic compensation.

The monetary compensation has been increased to \$80,000 for every year spent wrongfully imprisoned, with partial years expressed as a fraction.¹⁷² That sum is paid in a lump-sum payment and annuity payments “based on a present value sum equal to the amount to which the person is entitled. . . .”¹⁷³ In addition to the monetary compensation, the Act offers three types of non-monetary compensation or reentry and reintegration services.

A claimant is entitled to tuition for up to 120 credit hours at a “career center or public institution of higher education.”¹⁷⁴ Further, in an effort to assist exonerees with their reentry into society, the Tim Cole Act extended exonerees the benefits of the reentry and reintegration plan for offenders.¹⁷⁵ This reentry and reintegration program is the one the state uses to reintegrate guilty offenders after completion of their prison term or when they are released on parole.¹⁷⁶ Finally, the State also extends health services upon release.¹⁷⁷ The plan developed under the Health & Safety Code is more tailored for the needs of exonerees.

Upon release, the exoneree is assigned a case manager.¹⁷⁸ With the assistance of the case manager, the exoneree can gain access to “medical and dental services, including assistance in completing documents required for application to federal entitlement programs.”¹⁷⁹ Further,

168. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West Supp. 2010).

169. TEX. GOV'T CODE ANN. § 501.091 (West Supp. 2010); TEX. HEALTH & SAFETY CODE ANN. § 614.021 (West 2010).

170. Armbrust, *supra* note 144, at 171.

171. *See generally id.* (arguing that compensation should be holistic and take into account problems encountered upon release); Lopez, *supra* note 74 (arguing why statutory compensation is the most equitable and ready available remedy); Jessica R. Lonergan, Note, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405 (2008) (critiquing and proposing compensation statutes).

172. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West Supp. 2010).

173. *Id.* at § 103.053.

174. *Id.* at § 103.054.

175. TEX. GOV'T CODE ANN. § 501.091 (West Supp. 2009).

176. *Id.* § 501.092 (West 2003).

177. TEX. HEALTH & SAFETY CODE ANN. § 614.021 (West 2010).

178. *Id.* § 614.021(b).

179. *Id.*

exonerees are entitled to mental health treatment and related support services.¹⁸⁰ These services are obtained through the public mental health system and are provided as long as the exoneree requires assistance.¹⁸¹ Finally, the case manager helps in “obtaining appropriate support services . . . to assist the person in making the transition from incarceration into the community.”¹⁸² The use of a case manager aiding in obtaining these valuable reentry and reintegration services is vital to dealing with “the unique and complex” issues facing the wrongfully convicted.¹⁸³ The move to a comprehensive compensation scheme has shown marked improvements, but no law can be perfect, always leaving room for improvement.

VI. COMMENTS, SUGGESTIONS, AND LOOKING FORWARD

The Tim Cole Act brought a sweeping change to the compensation laws in Texas. While the Act offers the most comprehensive program in the United States, there is still room for some improvement. This Section will offer comments on the reasons for why Texas’s compensation scheme should serve as a model for other states and suggestions for additional improvements to the scheme as it now exists.

A. *Comments: Texas’s Compensation Scheme as a Model*

As previously noted, 27 states and the District of Columbia have enacted some sort of compensation statute. Those states that offer only monetary compensation are lacking the perhaps more important services for exonerees. The need for services such as these was succinctly expressed by one exoneree:

“It just doesn’t seem fair that after you take eighteen years of a person’s life and you think now you can send them into the world and everything’s going to be all right because now they have their freedom? Yeah, freedom is important, but you also have to have a lot of different things set up for people. . . You have to have programs for people who are wrongfully convicted because there are a number of people wrongfully convicted.”¹⁸⁴

Money is not what makes these individuals whole. The only way to truly restore these individuals to any semblance of their previous lives is to reintegrate them into society so they can function as normal citizens. Many states offer such minimal amounts of monetary compensation that it is impossible for exonerees to afford the medical and

180. *Id.* § 614.021(b)(2).

181. *Id.*

182. *Id.*

183. Armbrust, *supra* note 144, at 171.

184. *The Needs of the Wrongfully Convicted: A Panel Report*, NORTHWESTERN LAW (March 15, 2002), http://www.law.northwestern.edu/wrongfulconvictions/issues/after_exoneration/ilpanelrpt.html.

mental health services that many of them require as a result of their time in prison.

By following the model that Texas has developed, other states can integrate existing programs, such as reentry programs for parolees and other convicted offenders, to aid in the reentry of those who were wrongfully imprisoned. As many states stand now, the exonerated leave prison with less than those guilty individuals who leave on parole or after the conclusion of their sentence. By adapting compensation schemes similar to Texas, other states can begin to truly address this problem that is becoming more and more prevalent in today's criminal justice system.

B. *Suggestions: How to Improve the Current Program*

Although Texas has certainly come a long way in developing a comprehensive compensation scheme, there is room for minor improvement. The primary improvement is that of limiting attorney's fees. Following the passage of the Tim Cole Act, one attorney has been accused of taking excessive contingency fees related to aiding exonerees in obtaining compensation.¹⁸⁵ The attorney, who lobbied on behalf of his 13 wrongfully convicted clients, is claiming he is entitled to at least \$8 million from the exonerees.¹⁸⁶ The attorney's approach to his client's cases was an intention to file a civil rights claim in federal court.¹⁸⁷ During the trial preparations, the Tim Cole case was becoming resolved and the legislature was showing signs of change.¹⁸⁸ The attorney chose to hold off on the civil rights suits, instead helping to push what would become the Tim Cole Act through the legislature.¹⁸⁹

As one exoneree stated, "he hired a lawyer, not a lobbyist."¹⁹⁰ While a claim such as this is unique, in that the attorney is claiming his compensation for lobbying efforts, it is foreseeable that exorbitant claims will be made for the efforts of proving innocence and obtaining rightful exoneree compensation. The possibility of claims such as these can be avoided in the future by adding a provision capping the attorney's fees in exoneration cases.¹⁹¹ These limits are also addressed by the Innocence Project's Model Compensation Legisla-

185. Jeff Carlton, *Second DNA Exoneree Sues Lubbock Lawyer*, LUBBOCK ONLINE (Dec. 24, 2009), http://www.lubbockonline.com/stories/122409/loc_539156831.shtml. The lawsuit referred to above and in this news story was pending resolution as of the date of this comment.

186. *See id.*

187. *Id.*

188. *See id.*

189. *Id.*

190. *Id.*

191. *See, e.g.*, FLA. STAT. ANN. § 961.06(1)(d) (West Supp. 2011) (stating that reasonable attorney's fees will be calculated by the department responsible for disbursing compensation).

tion.¹⁹² Under this model, an attorney is entitled to compensation equal to ten percent of the compensation award not to exceed \$75,000 plus expenses.¹⁹³ Further, the attorney's fees are not to be paid out of the exoneree's compensation.¹⁹⁴ A limit is necessary as a final moral responsibility of the state. The possibility of exonerees being taken advantage of after finally attaining freedom is something that the state cannot allow.

C. Recent Development

Under the Tim Cole Act, the Comptroller's decision regarding a claimant's compensation is not appealable, but a claimant may seek review through an original mandamus proceeding.¹⁹⁵ In March of 2011, the Texas Supreme Court decided the first case interpreting the Act. In *Smith*, Billy James Smith initiated a mandamus proceeding following the Comptroller's decision to reduce his compensation amount.¹⁹⁶ This reduction resulted because in calculating the wrongful-imprisonment period, the Act excludes any period for which the claimant was serving a concurrent sentence.¹⁹⁷ At the time Smith was wrongfully convicted and incarcerated for aggravated sexual assault, he was on parole for a previous robbery conviction.¹⁹⁸ Upon Smith's wrongful conviction on August 7, 1986, his parole was revoked. As a result, Smith served a concurrent sentence from August 7, 1986, when the wrongful incarceration began, to June 11, 1987, when his concurrent sentence for the 1970 robbery was discharged.¹⁹⁹ The Comptroller calculated Smith's wrongful-imprisonment period beginning on June 12, 1987.²⁰⁰ Smith contended that the calculation should have been made beginning on August 7, 1986.²⁰¹

The question before the court was "whether a parolee, whose parole is revoked because of a wrongful conviction, is entitled to compensation under the Act for the period of imprisonment the parolee would have otherwise served out of prison on parole?"²⁰² The Comptroller interpreted the concurrent-sentence restriction to include time on parole because the restriction makes no exception for parolees, and the statute only requires a concurrent sentence.²⁰³ Smith, how-

192. *Model State Compensation Statute*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/docs/2010/Compensation_Model_Bill_2010.pdf (last updated Dec. 2009).

193. *Id.*

194. *Id.*

195. TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(e) (West Supp. 2009).

196. *In re Smith*, 2011 WL 761511 at *2 (Tex.)

197. TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(b) (West Supp. 2009).

198. *In re Smith*, 2011 WL 761511 at *3 (Tex.)

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at *4.

ever, argued “that the phrase ‘in prison’ is an indirect prepositional phrase modifying the object ‘sentence.’”²⁰⁴ Based on that construction, Smith contended that the restriction applies when a “person is serving a ‘concurrent sentence’ in prison, but not when the person has been released on parole.”²⁰⁵ Smith contended that but for the wrongful conviction, his parole would not have been revoked, and he would not have been incarcerated.²⁰⁶ Viewing the facts under that construction, Smith’s imprisonment was wrongful not only because of the conviction but also because of the wrongful conviction’s effect in revoking his parole.²⁰⁷

The Court found Smith’s “but for” construction to be appropriate, finding support for the holding in the distinction between probation and parole; an Attorney General Opinion interpreting the previous statute; and the legislative intent of the Act.²⁰⁸ The Texas Court of Criminal Appeals has “indicated that probation is essentially the power of parole extended to the judiciary.”²⁰⁹ Further, probation and parole are both essentially “criminal sentences,” but sentences served outside prison.²¹⁰ It is the “outside prison” that seemed controlling. Further, the Court noted that the Attorney General had used the same “but for” construction, as it applied to a probationer, in an opinion interpreting section 103.001(b) under the prior statute.²¹¹ Drawing no distinction between probationers and parolees for the purpose of the statute, the Court found the Attorney General Opinion on probationers persuasive, extending the reasoning to parolees.²¹² Finally, the Court found the legislative intent clear, and in support of the construction, because the “analysis is consistent with the Act’s apparent purpose which according to its title is ‘Compensation to Persons Wrongfully Imprisoned.’”²¹³

Although appeal of compensation decisions is no longer available, mandamus proceedings will likely continue producing judicial interpretations of the Act. However, judicial interpretations should continue to streamline the compensation process by taking interpretive questions out of the compensation equation. Hopefully, the end result will be faster, more efficient access to the services and monetary compensation exonerees need and deserve.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at *7.

209. *Id.*

210. *Id.* at *7–*8 (citing TEX. GOV’T CODE ANN. § 508.002 and BLACK’S LAW DICTIONARY 1322 (9th ed. 2009)).

211. *Id.* at *7.

212. *Id.* (citing Op. Tex. Att’y Gen. No. GA-0531 (2007)).

213. *Id.*

VII. CONCLUSION

The problem of wrongful imprisonment is not a recent one. However, as the number of exonerations continues to increase, the problem is one that is gaining the attention that it has long deserved. There are few things more frightening, or unsettling, than facing a term of imprisonment, unless someone is facing that imprisonment for a crime they did not commit. As DNA testing technologies have become more advanced, and innocence projects nationwide have gained momentum, wrongfully imprisoned individuals have a new opportunity to prove their innocence. Although proof of innocence and release from prison are, perhaps, the most important steps in the exoneration process, they are only half the battle exonerees must fight. After serving a prison term of years, depending on the individual, reentry to society is difficult. Without proper guidance and aid many exonerees find themselves in an almost impossible situation: they are free, but have nothing to help with their reentry.

Comprehensive statutory compensation schemes for exonerated individuals provide the fastest, most reliable form of aid. The Tim Cole Act provides a good framework from which states nationwide can begin to amend or create legislation to aid these individuals that have suffered the failure of their state's criminal justice system. By offering educational opportunities, healthcare, job training, and monetary compensation states can help exonerees regain some semblance of the life that was stripped from them. Where a state has failed one of its citizens, it is only right that the state take responsibility. Comprehensive compensation legislation is the best way for states to take a moral stance, providing for those that they have wronged.