

January 2019

## Rightful Compensation for a Wrongful Conviction: In Defense of a Compensation Statute in the State of Wyoming

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### Recommended Citation

Heneage, Meridith J. (2019) "Rightful Compensation for a Wrongful Conviction: In Defense of a Compensation Statute in the State of Wyoming," *Wyoming Law Review*: Vol. 19: No. 2, Article 8. Available at: <https://scholarship.law.uwyo.edu/wlr/vol19/iss2/8>

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COMMENT

**Rightful Compensation for a Wrongful Conviction:  
In Defense of a Compensation Statute in the State of Wyoming**

*Meridith J. Heneage\**

“The innocent person released after years of wrongful incarceration . . . they’re on the courthouse steps with their lawyers looking very triumphant. That person gets nothing from the state, no transportation home, no home, no apology, nothing.”<sup>1</sup>

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\* J.D. candidate, University of Wyoming College of Law, May 2020. I want to especially thank Professor Lauren McLane for her support and guidance throughout this process. This Comment is dedicated to Andrew Johnson, who bravely told his story and inspired this advocacy. And to all who have been wrongfully convicted and who continue to suffer—may you find justice and peace.

<sup>1</sup> *A Struggle for Basic Survival: Frederick Clay’s Life Post-Exoneration*, INNOCENCE PROJECT: NEWS (Sept. 26, 2018), <https://www.innocenceproject.org/frederick-clays-life-post-exoneration/> (quoting Sharon Beckman, Director of the Boston College Innocence Program) (explaining the story of Fred Clay who, after spending almost forty years in prison, survived on food stamps and struggled to find work without a college degree following his wrongful conviction at just seventeen years old).

## I. INTRODUCTION

On June 11, 1989, in Cheyenne, Wyoming, a 9-1-1 dispatcher received a distressed phone call from the second-floor tenant of a multiple story apartment building.<sup>2</sup> The tenant described aggressive knocking, footsteps, and glass breaking in the apartment above hers.<sup>3</sup>

When the police arrived, the third-floor tenant informed them that a man had broken into her apartment and raped her.<sup>4</sup> In the apartment, police found the driver's license of Andrew Johnson, an acquaintance of the victim who had been with her earlier that night.<sup>5</sup> The victim was taken to the hospital and underwent a sexual assault examination.<sup>6</sup> A few days later, based on identification from the victim and his driver's license being present at the scene, police arrested Johnson and charged him with aggravated burglary and first-degree sexual assault.<sup>7</sup>

At trial, a crime laboratory analyst testified that DNA results presented that Johnson was within the 5% of the population who could have been the source of the semen detected in the rape kit.<sup>8</sup> On September 27, 1989, a jury convicted Johnson, and the judge sentenced him to life in prison.<sup>9</sup> The Wyoming Supreme Court upheld his conviction and sentence in 1991.<sup>10</sup>

Throughout the years of exhausted appeals, Johnson always maintained his innocence.<sup>11</sup> In 2012, the Rocky Mountain Innocence Center (RMIC), which had been working on Johnson's case, discovered that the victim's fiancé at the time of the assault had been abusive.<sup>12</sup> Additionally, Johnson's original attorney had never investigated the fiancé's alibi to determine whether he was truly out of town as he had claimed.<sup>13</sup> RMIC subsequently filed for post-conviction DNA

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<sup>2</sup> Maurice Possley, *Andrew Johnson*, NAT'L REGISTRY OF EXONERATIONS (July 19, 2013), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4228>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Johnson v. State*, 806 P.2d 1282 (Wyo. 1991).

<sup>11</sup> Possley, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

testing of the semen from the rape kit.<sup>14</sup> The post-conviction DNA results both excluded Johnson as a source of the semen, and conclusively identified the victim's fiancé as the source.<sup>15</sup> Based on the post-conviction DNA results, Johnson filed a motion for a new trial in March of 2013.<sup>16</sup> On July 19, 2013, the Laramie County District Attorney's office dismissed the case. On August 7, 2013, over two decades after his wrongful conviction, the court granted Johnson the first order of actual innocence in the state of Wyoming.<sup>17</sup>

Andrew Johnson was wrongfully convicted at thirty-nine years old and was sixty-three years old when he finally regained his freedom.<sup>18</sup> Johnson left prison with severe health problems and entirely dependent on his relatives for support.<sup>19</sup> He did not have a job, health insurance, a car, or retirement income.<sup>20</sup> Since Wyoming is one of seventeen states without compensation legislation for exonerees of wrongful convictions, Johnson was not entitled to any compensation from the State for the loss of twenty-four years of his freedom.<sup>21</sup>

In response to the injustices that wrongful convictions and years of incarceration place on exonerees, this Comment advocates for the passage of a compensation statute in Wyoming.<sup>22</sup> This Comment advocates for the passage of such a statute by addressing concerns previously raised by the Legislature when a proposed compensation statute failed in 2014.<sup>23</sup> Part II of this Comment provides an overview of wrongful convictions, exonerations, and methods of compensation.<sup>24</sup> Part III covers Wyoming's innocence legislative history, focusing specifically on the compensation bill that was proposed in 2014 but failed.<sup>25</sup> Part

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<sup>14</sup> *Our Exonerees, Andrew Johnson*, ROCKY MOUNTAIN INNOCENCE CTR. (2019), <http://rminnocence.org/our-exonerees/andrew-johnson.html> (explaining the RMIC successfully motioned for DNA testing after previously passing a new law in Wyoming which allowed prisoners to petition for DNA testing in order to prove their innocence).

<sup>15</sup> Possley, *supra* note 2.

<sup>16</sup> *Our Exonerees, Andrew Johnson*, *supra* note 14.

<sup>17</sup> *Id.*

<sup>18</sup> Possley, *supra* note 2.

<sup>19</sup> Kerry Drake, *Wyoming Needs to Give a Fresh Start to Man Exonerated by DNA Evidence*, WYOFILE (Aug. 20, 2013), <https://www.wyofile.com/wyoming-dna-evidence/>.

<sup>20</sup> *Id.*

<sup>21</sup> *See Compensation Statutes: A National Overview*, INNOCENCE PROJECT (2017), [https://www.innocenceproject.org/wp-content/uploads/2017/09/Adeles\\_Compensation-Chart\\_Version-2017.pdf](https://www.innocenceproject.org/wp-content/uploads/2017/09/Adeles_Compensation-Chart_Version-2017.pdf). The sixteen other states without compensation legislation are Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Kentucky, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, and South Dakota. *Id.*

<sup>22</sup> *See infra* notes 89–160 and accompanying text.

<sup>23</sup> *See infra* notes 71–83 and accompanying text.

<sup>24</sup> *See infra* notes 27–61 and accompanying text.

<sup>25</sup> *See infra* notes 62–87 and accompanying text.

IV addresses the reasons for the bill's failure and provides recommendations for the Legislature to help draft a future compensation bill that is holistic, effective, and consistent with the best innocence legislation in the country.<sup>26</sup>

## II. AN "UNREAL DREAM:" BACKGROUND ON THE INNOCENCE MOVEMENT

The path to receiving compensation for a wrongful imprisonment is generally three steps: a wrongful conviction, an exoneration, and then ultimately compensation for wrongful imprisonment.<sup>27</sup>

### A. *Wrongful Convictions and Exonerations*

A wrongful conviction occurs when an innocent person is convicted of a crime they did not commit.<sup>28</sup> In 1989, the first DNA exoneration took place in the United States.<sup>29</sup> This exoneration alarmingly illustrated that wrongful convictions can and do occur, and are scientifically provable.<sup>30</sup> Wrongful convictions occur for a variety of reasons, the most common of which are eyewitness misidentification, perjury or false accusation, false confession, false or misleading forensic evidence, and official misconduct.<sup>31</sup>

An exoneration occurs when a court determines a convicted individual is factually innocent and relieves them of all consequences of the criminal conviction based on new evidence.<sup>32</sup> The Innocence Project, founded in 1992, is a national

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<sup>26</sup> See *infra* notes 89–160 and accompanying text.

<sup>27</sup> John Shaw, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593, 614 (2011).

<sup>28</sup> *Wrongful Conviction*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012).

<sup>29</sup> Gary Dotson, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/gary-dotson> (last visited Apr. 7, 2019) (detailing the story of Gary Dotson, who served ten years in prison for aggravated kidnapping and rape based on flawed serology, inaccurate hair analysis, and misidentification). Nine years after his conviction, Dotson's attorney had DNA tests conducted that were unavailable at the time of trial. *Id.* The tests revealed that the semen could not have come from Dotson and his conviction was overturned in 1989. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last visited Apr. 20, 2019); *Policy Reform*, INNOCENCE PROJECT (2019), <https://www.innocenceproject.org/policy/>.

<sup>32</sup> See *Glossary*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Feb 18, 2019). "A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related

leader in DNA exonerations and criminal justice reform.<sup>33</sup> To date, the Innocence Project is responsible for 365 DNA exonerations nationally, and has identified 160 actual criminals with the assistance of DNA tests.<sup>34</sup> Additionally, the National Registry of Exonerations provides a comprehensive collection of every known exoneration in the United States since 1989.<sup>35</sup> The database currently documents 2,426 known exonerations, including the DNA exonerations detailed by the Innocence Project.<sup>36</sup> Nationally, the wrongfully convicted will spend an average of fourteen years behind bars before being exonerated.<sup>37</sup> This accounts for more than 20,645 years of freedom lost.<sup>38</sup>

Founded in 2000, the Rocky Mountain Innocence Center (RMIC), affiliated with the Innocence Project, provides innocence work in Nevada,

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to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person's guilt." *Id.* Factually innocent means that "a person did not engage in the conduct for which he was convicted; did not engage in conduct constituting a lesser included or inchoate offense of the crime for which he was convicted; and did not commit any other crime arising out of or reasonably connected to the facts supporting the indictment or information upon which he was convicted." WYO. STAT. ANN. § 7-12-402 (2018).

<sup>33</sup> *About*, INNOCENCE PROJECT (2019), <https://www.innocenceproject.org/about/>. The Innocence Project litigation department works to address the leading causes of wrongful convictions and to advocate for legislative reform while promoting laws that ensure access to post-conviction DNA testing, evidence retention, and compensation for those wrongfully convicted and incarcerated. *Id.* The Innocence Project's social work department helps exonerees rebuild their lives after years of incarceration. *Id.*

<sup>34</sup> *DNA Exonerations in the United States*, INNOCENCE PROJECT (2019), <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>. As of the writing of this Comment, the actual perpetrators of these crimes have gone on to commit a total of eighty-two sexual assaults, thirty-five murders, and thirty-five other violent crimes while the wrongfully convicted were incarcerated. *Id.*

<sup>35</sup> *Our Mission*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/mission.aspx> (last visited Apr. 7, 2019). The Registry was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. *Id.* The Center for Wrongful Convictions has also been a leader in the nationwide movement to reform the criminal justice system since 1999. Ctr. on Wrongful Convictions, Bluhm Legal Clinic, *About Us*, NW. PRITZKER SCH. LAW, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/aboutus/> (last visited Apr. 7, 2019).

<sup>36</sup> *Exonerations by Contributing Factor*, *supra* note 31.

<sup>37</sup> *See Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <https://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited Apr. 7, 2019).

<sup>38</sup> NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Apr. 7, 2019).

Utah, and Wyoming.<sup>39</sup> RMIC is a non-profit organization that works to correct and prevent wrongful convictions.<sup>40</sup> RMIC plays a key role in advocating for criminal justice reform legislation in Wyoming, and were vital in exonerating Andrew Johnson.<sup>41</sup>

### B. *Compensating Exonerees*

After exoneration, an exoneree typically has three avenues to recover for a wrongful conviction: civil litigation, private legislation, or statutory compensation.<sup>42</sup>

For the civil litigation avenue, an exoneree may file a civil rights lawsuit when they believe state agencies are responsible for their incarceration because of unconstitutional acts.<sup>43</sup> However, these claims are rarely viable because many exonerees are wrongfully convicted without constitutional violations.<sup>44</sup> Plus, proving culpability in these claims can be extremely difficult, costly, and time consuming.<sup>45</sup>

For the private legislation avenue, state legislatures may pass private bills to directly compensate a specific individual.<sup>46</sup> Those who receive this type of compensation are often well-connected and have a case that has been highly publicized and politicized in the media.<sup>47</sup> For those without any political or legislative connections, this process can be lengthy, expensive, and even impossible.<sup>48</sup> Most exonerees lack these influential connections and are in need of money right away, rendering private bills an inefficient way to compensate exonerees.<sup>49</sup>

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<sup>39</sup> *Who We Are: Our Mission*, ROCKY MOUNTAIN INNOCENCE CTR. (2019), <http://rminnocence.org/who-we-are/mission.html> (explaining that no other organization provides innocence work in the Rocky Mountain region).

<sup>40</sup> *Id.* (estimating that there are hundreds of innocent prisoners in Nevada, Utah, and Wyoming, and explaining the RMIC's mission is to bring representation and legal services to those individuals).

<sup>41</sup> *Our Exonerees, Andrew Johnson*, *supra* note 14.

<sup>42</sup> Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 161 (2004).

<sup>43</sup> 42 U.S.C. § 1983 (2012).

<sup>44</sup> Armbrust, *supra* note 42, at 162.

<sup>45</sup> *Id.* at 161–66 (noting that many state actors are protected by qualified immunity doctrines).

<sup>46</sup> *Id.* at 166.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 167.

<sup>49</sup> *Id.*

Through the last avenue, exonerees in states with compensation statutes can file a claim for compensation directly through the statute.<sup>50</sup> Thirty-three states currently have compensation statutes.<sup>51</sup> Most wrongful conviction scholars support and prefer statutory compensation over civil claims and private bills for the reasons explained above.<sup>52</sup>

Compensation varies amongst the states and at the federal level.<sup>53</sup> Federally, exonerees have received compensation through a statute since 1948, which initially compensated exonerees up to \$5,000 per year of incarceration.<sup>54</sup> In 2004, Congress passed the Justice for All Act with bipartisan support, compensating exonerees \$50,000 for every year spent in prison and \$100,000 for every year spent on death row.<sup>55</sup> The Innocence Project also uses this federal scheme for its recommendation for states; however, it has adjusted the amount for inflation with a current recommendation of a fixed sum of \$63,000 per year of incarceration.<sup>56</sup>

State compensation rates vary significantly between the amount paid and how the amount is calculated.<sup>57</sup> On one end of the spectrum, some statutes do

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<sup>50</sup> *Id.*

<sup>51</sup> See *Compensation Statutes*, *supra* note 21.

<sup>52</sup> 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, 123 (2010) (“[S]tate compensation statutes offer the best path to redress because they do not require the claimant to prove that the state was at fault for the wrongful conviction and because they are not susceptible to the same political influences as other methods of compensation.”).

<sup>53</sup> See generally *Compensation Statutes*, *supra* note 21; Deborah F. Buckman, Annotation, *Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration*, 53 A.L.R. 6th 305 (2010).

<sup>54</sup> 28 U.S.C. § 2513 (2012).

<sup>55</sup> Justice for All Act of 2004, 108 Pub. L. No. 405, 118 Stat. 2260 (2004). The Justice for All Act has been described as “[a] remedial act designed by a fair-minded government as a means of at least partially righting an irreparable wrong done to one of its citizens. It has the beneficent purpose of attempting to compensate, as well as money can compensate for such an injury, the plaintiff for the loss of his liberty through an error on the part of his government.” *Osborn v. United States*, 322 F.2d 835, 839 (5th Cir. 1963).

<sup>56</sup> *Compensating the Wrongly Convicted*, *supra* note 37.

<sup>57</sup> See generally *Compensation Statutes*, *supra* note 21. For example, Massachusetts compensates up to \$1,000,000 per year of incarceration. MASS. GEN. LAWS ch. 258D, §§ 1–9 (2019). Colorado pays \$70,000 per year of incarceration. COLO. REV. STAT. §§ 13-65-101 to -103 (2019). The District of Columbia pays \$200,000 per year of incarceration. D.C. CODE § 2-421 to -425 (2019). Other states do not set a standard amount, but instead pay in actual or fair and reasonable damages. N.Y. CT. CL. ACT § 8-b (McKinney 2019); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2019). Other states pay in relation to the actual salary of a claimant the year prior to conviction. N.J. STAT. ANN. §§ 52:4C1 to :4C-7 (West 2019). Others rely on the average annual nonagricultural salary. UTAH STAT. ANN. § 78-9-405 (West 2018). For an interactive comparison of state compensation rates, see Karen Brown, *Plotted from a Prison Cot, Wrongly Accused Man Whips Smoothie Dream Into Reality*, NPR (Feb. 20, 2019), <https://www.npr.org/2019/02/20/693465365/plotted-from-a-prison-cot-wrongly-accused-man-whips-smoothie-dream-into-reality>.

not provide much financial relief at all.<sup>58</sup> Equally on this end are the statutes that have difficult barriers to overcome in order for the exoneree to be eligible for compensation.<sup>59</sup> On the positive side of the spectrum, the best statutes provide comprehensive and significant relief without substantial barriers.<sup>60</sup> Since the quality of monetary support and reentry services vary greatly among the states, Wyoming is in a unique position to learn from both imperfect and effective compensation statutes.<sup>61</sup>

### III. WYOMING'S INNOCENCE LEGISLATIVE HISTORY: A TIMELINE

The Innocence Project examines states' statutes that prevent wrongful convictions and those that enable exonerations.<sup>62</sup> This is because, in many cases, in order for an exoneree to receive compensation for a wrongful conviction, statutory avenues must first exist to be exonerated for a wrongful conviction.<sup>63</sup> Wyoming provides two statutory avenues through which the wrongfully convicted can prove their innocence and overturn their convictions.<sup>64</sup>

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<sup>58</sup> See generally *Compensation Statutes*, *supra* note 21. For example, Montana only offers educational aid to exonerees and no monetary compensation. MONT. CODE ANN. § 53-1-214 (2019). Wisconsin offers \$5,000 per year of incarceration with a cap of \$25,000. WIS. STAT. § 775.05 (2018). Oklahoma pays only up to \$175,000. OKLA. STAT. TIT. 51, § 154 (2019).

<sup>59</sup> See generally *Compensation Statutes*, *supra* note 21. Tennessee gives exonerees only one year to file after exoneration. TENN. CODE ANN. § 9-8-108 (2019). Additionally, many states will only compensate if an exoneree is officially pardoned, regardless of innocence. ME. STAT. tit. 14, §§ 8241–8244; N.C. GEN. STAT. §§ 148-82 to -84 (2012).

<sup>60</sup> See generally *Compensation Statutes*, *supra* note 21. For example, in Texas, exonerees are paid \$80,000 per year of incarceration, including fractional sums for partial years incarcerated. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2017). The money is not paid in a lump sum, but rather through annuity payments. *Id.* Additionally, claimants are eligible for 120 hours of tuition, or a bachelor's degree, at a public Texas university. *Id.* Exonerees are extended temporary housing, career counseling, and other vital resources. *Id.* Uniquely, every exoneree in Texas is assigned a case manager who helps him obtain medical and dental services. *Id.* The case manager also provides support and assistance in filling out applications for federal entitlement programs, such as Medicare and Social Security. *Id.* Most importantly, the case manager helps the exoneree obtain vital mental health support and generally helps him transition back into the community. *Id.*

<sup>61</sup> See, e.g., Innocence Staff, *Governor Signs Gold-Standard Wrongful Conviction Compensation Law in Kansas*, THE INNOCENCE PROJECT: NEWS (May 15, 2018), <https://www.innocenceproject.org/governor-signs-wrongful-conviction-compensation-law-kansas/>. For example, Kansas is the latest state to enact a compensation statute. *Id.* Kansas was able to use the legislation from other various states to create a “gold-standard” statute. *Id.*

<sup>62</sup> *Wyoming*, INNOCENCE PROJECT: POLICY, <https://www.innocenceproject.org/policy/wyoming/> (last visited Apr. 9, 2019).

<sup>63</sup> *Id.* (describing the statutes the Innocence Project screens for eyewitness identification reform, recording of interrogations, post-conviction DNA testing, new non-DNA evidence and changes in science, evidence preservation, and exoneree compensation).

<sup>64</sup> WYO. STAT. ANN. §§ 7-12-303, -401, -407 (2018).

### A. 2008: Post-Conviction DNA Testing

In 2008, Wyoming became the 43rd state to enact a post-conviction DNA (PCDNA) statute.<sup>65</sup> The Joint Interim Judiciary Committee established Wyoming's bill with help from the RMIC.<sup>66</sup> The statute enables a convicted defendant to file a motion for post-conviction DNA testing if the evidence has the potential to establish the movant's actual innocence.<sup>67</sup> The Act also establishes a procedure for the preservation of biological material.<sup>68</sup> This statute is important for the wrongfully convicted who have evidence that has not been tested with the latest DNA technology.<sup>69</sup> Without this statute, Andrew Johnson would not have been able to prove his innocence and be exonerated.<sup>70</sup>

### B. 2014: Senate File 28 and Senate File 30

In 2014, the Joint Judiciary Interim Committee, again working alongside the RMIC, attempted to pass two more innocence statutes.<sup>71</sup> Senate File 30 (SF30), titled "Compensation for Persons Exonerated Based on DNA Evidence," would have been Wyoming's first compensation statute for exonerees.<sup>72</sup> Its companion bill, Senate File 28 (SF28), titled "Post-conviction Actual Innocence," would have

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<sup>65</sup> *Wyoming Legislature Passes DNA Testing Bill*, INNOCENCE PROJECT (Mar. 7, 2008), <https://www.innocenceproject.org/wyoming-legislature-passes-dna-testing-bill/>. Prior to this law, Wyoming inmates convicted before DNA testing had to prove their innocence through the standard appeals process. *Id.*

<sup>66</sup> See S.F. 65, 59th Leg., Budg. Sess. (Wyo. 2008); Drake, *supra* note 19.

<sup>67</sup> Post-Conviction DNA Testing Act, ch. 92, 2008 Wyo. Sess. Laws 304 (2008) (codified at WYO. STAT. ANN. §§ 7-12-302 to -315 (2018)); *Wyoming Legislature Passes DNA Testing Bill*, *supra* note 65. Prior to this law, Wyoming inmates convicted before DNA testing had to prove their innocence through the standard appeals process. *Id.* While not within the scope of this Comment, it is important to acknowledge that Wyoming's PCDNA statute is far from perfect, but it is a step in the right direction. See Aaron J. Lyttle, *Return of the Repressed: Coping with Post-Conviction Innocence Claims in Wyoming*, 14 WYO. L. REV. 555, 612–14 (2014).

<sup>68</sup> See WYO. STAT. ANN. § 7-12-303; Post-Conviction DNA Testing Act § 304. Related biological materials must now be preserved for as long as the person is incarcerated and can only be destroyed with notice to the attorney and offender. See WYO. STAT. ANN. § 7-12-304. The PCDNA also makes it a felony offense to tamper, destroy, or otherwise conceal biological evidence that would be necessary under the Act. *Id.*

<sup>69</sup> *Our Exonerees, Andrew Johnson*, *supra* note 14 (explaining the motivation behind the PCDNA was so that Johnson would have an avenue to retest the evidence from his case).

<sup>70</sup> *Id.*

<sup>71</sup> *House Committee Meeting Notices*, WYO. LEG. (Feb. 25, 2014), <https://wyoleg.gov/2014/Calendar/hcom0225.htm>; *Archived Floor Debate: 2014*, 62d Leg., Budget Sess. (Mar. 4, 2014), <https://wyoleg.gov/2014/Audio/house/h0304am1.mp3>.

<sup>72</sup> *House Committee Meeting Notices*, *supra* note 71.

provided a path for a new trial of a wrongfully convicted person based on newly-discovered, non-DNA evidence.<sup>73</sup>

When SF30 was first introduced in the Senate by the Joint Interim Judiciary Committee, the bill provided that a petitioner would be eligible for compensation if a court had entered an order of actual innocence and exoneration pursuant to Wyoming's PCDNA.<sup>74</sup> An order of actual innocence and exoneration would be granted through the PCDNA statute after DNA results came back to prove innocence.<sup>75</sup> The Senate increased compensation per day from \$75 to \$100, and capped the total at \$500,000.<sup>76</sup> The compensation would be given in the form of an annuity of \$50,000 per year until the total compensation amount had been paid.<sup>77</sup> Additionally, the petitioner could designate a beneficiary for the annuity in the event of his or her death.<sup>78</sup>

However, on the last day of the 2014 Budget Session, both SF28 and SF30 were met with many changes by the House Judiciary Committee.<sup>79</sup> First, an amendment to both bills was proposed that would require petitioners to first go through hearings to prove their innocence by a preponderance of the evidence, even after they already received an order of actual innocence and exoneration pursuant to Wyoming's PCDNA statute.<sup>80</sup> This amendment was supported because of concerns that the PCDNA statute did not properly screen for "true" innocence, specifically in the case of Andrew Johnson.<sup>81</sup> Second, an amendment

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<sup>73</sup> Wyo. Legislative Serv. Office, S.F. 28 Digest, 62d Leg., Budget Sess., WYO. LEG. (2014), <https://www.wyoleg.gov/2014/Digest/SF0028.htm> [hereinafter Wyo. S.F. 28 Digest]. This bill eventually failed. *Id.* However, it was arguably a precursor for the factual innocence bill that was passed in 2018. *See supra* notes 84–86.

<sup>74</sup> S.F. 30, 62d Leg., Budget Sess. (Wyo. 2014). The Wyoming Legislature enacted the factual innocence statute four years later. Post-Conviction Relief Act, ch. 77, 2018 Wyo. Sess. Laws 131 (2018) (codified at WYO. STAT. ANN. §§ 7-12-401 to -407 (2018)); *see also* WYO. STAT. ANN. § 7-12-310 (granting an order of actual innocence and exoneration from DNA results).

<sup>75</sup> WYO. STAT. ANN. §§ 7-12-401 to -407 (2018).

<sup>76</sup> S.F. 30, 62d Leg., Budget Sess.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Wyo. S.F. 28 Digest, *supra* note 73; Wyo. Legislative Serv. Office, S.F. 30 Digest, 62d Leg., Budget Sess., WYO. LEG. (2014), <https://www.wyoleg.gov/2014/Digest/SF0030.htm>; *see also* S.F. 28, 62d Leg., Budget Sess. (Wyo. 2014); S.F. 30, 62d Leg., Budget Sess. (engrossed version as passed by House, Mar. 5, 2014).

<sup>80</sup> Wyo. S.F. 28 Digest, *supra* note 79; S.F. 30, 62d Leg., Budget Sess. (engrossed version as passed by House, Mar. 5, 2014).

<sup>81</sup> Archived Floor Debate: 2014, 62d Leg., Budget Sess. (Mar. 4, 2014), <https://wyoleg.gov/2014/Audio/house/h0304am2.mp3>.

then lowered the maximum amount of compensation to \$250,000, so it would mirror the maximum claim amount allowed under the Governmental Claims Act.<sup>82</sup> The differences in SF30 between the Senate and the House caused the bill to fail, leaving Wyoming's wrongfully convicted and factually innocent without compensation.<sup>83</sup>

### *C. 2018: Determination of Factual Innocence*

Despite the failure of SF30 in 2014, Wyoming passed the Post-Conviction Determination of Factual Innocence Act (PCDFA) in 2018.<sup>84</sup> Under this statute, a wrongfully convicted person can file a petition of factual innocence even if they do not have DNA evidence in their case, but instead have other methods through which they can claim factual innocence.<sup>85</sup> An order of exoneration is granted through the PCDFA if "factual innocence" is proven by clear and convincing evidence.<sup>86</sup>

While both the PCDNA and PCDFA provide statutory avenues for the wrongfully convicted to prove their innocence, the state of Wyoming "should resist being lulled into complacency by the successes of the innocence movement and post-conviction DNA testing. The traumatic event of exoneration will remain isolated, rather than truly transformative, unless we attempt to remain faithful to it by continually pursuing new avenues for uncovering and correcting justice."<sup>87</sup> In order to do so, Wyoming must pursue the avenue of enacting legislation to compensate their exonerees.<sup>88</sup>

## IV. WYOMING MUST ADOPT A HOLISTIC COMPENSATION STATUTE

The Wyoming Legislature has made important strides for innocence work with respect to passing the PCDNA in 2008 and the PCDFA in 2018.<sup>89</sup> However,

<sup>82</sup> Wyo. S.F. 28 Digest, *supra* note 79; *see also* WYO. STAT. ANN. § 1-39-101.

<sup>83</sup> *See* S.F. 30, 62d Leg., Budget Sess. (engrossed version as passed by House, Mar. 5, 2014); Wyo. S.F. 28 Digest, *supra* note 79.

<sup>84</sup> Post-Conviction Relief Act, ch. 77, 2018 Wyo. Sess. Laws 131 (2018) (codified at WYO. STAT. ANN. §§ 7-12-401 to -407 (2018)). The proposed Act was championed by the RMIC. *Governor Signs Factual Innocence Law to Help Wrongfully Convicted in Wyoming*, INNOCENCE PROJECT (Mar. 13, 2018), <https://www.innocenceproject.org/governor-signs-factual-innocence-law-to-help-wrongfully-convicted-in-wyoming/>.

<sup>85</sup> WYO. STAT. ANN. §§ 7-12-401 to -407.

<sup>86</sup> *Id.*

<sup>87</sup> Lyttle, *supra* note 67, at 632.

<sup>88</sup> *See infra* notes 89–160.

<sup>89</sup> *See supra* notes 84–87 and accompanying text; *see also Wyoming Legislature Passes DNA Testing Bill*, *supra* note 65 (explaining that Wyoming became the forty-third state with a statute

the Legislature failed to fulfill its duty to compensate the wrongfully convicted when it failed to pass SF30 in 2014.<sup>90</sup> As explained above, SF30 failed because the Legislature had three primary concerns: (1) uncertainty as to how much compensation a claimant should receive; (2) uncertainty as to the procedure and burden to place on the claimant; and (3) uncertainty as to whether the only known eligible claimant, Andrew Johnson, is “actually” innocent.<sup>91</sup>

### A. *Compensation Should Be Holistic*

When SF30 was in the House, a legislator proposed to lower the cap to \$250,000—the same amount as the Governmental Claims Act.<sup>92</sup> The idea of lowering the cap to parallel the Governmental Claims Act was rejected by many.<sup>93</sup> Two over-arching questions arose out of these debates: (1) what should compensation include, and (2) how much compensation should the exoneree be entitled to.<sup>94</sup> To answer these questions, this Comment proposes that a compensation statute should provide holistic services on top of generous funds without being capped.<sup>95</sup>

granting post-conviction DNA testing); *Governor Signs Factual Innocence Law to Help Wrongfully Convicted in Wyoming*, *supra* note 84 (praising Wyoming for the PCDEFA statute and asserting it can be used as a national model). SF28 also failed in 2014, but the Legislature was able to pass similar legislation in the PCDEFA statute in 2018. SF30 has yet to be reintroduced or passed.

<sup>90</sup> Lyttle, *supra* note 67, at 627 (asserting that SF30 represents an important step for Wyoming in addressing the consequences of wrongful convictions); Kerry Drake, *Wyoming Continues Down Path of Punishing the Innocent*, WYOFILE (Apr. 7, 2015), <https://www.wyofile.com/wyoming-continues-path-punishing-innocent/> (contending that Wyoming continues to “punish the innocent” in wake of SF30’s failure).

<sup>91</sup> See *supra* notes 79–83 and accompanying text; see also *Give Johnson the Money He Deserves*, CASPER STAR-TRIB. (Mar. 18, 2014), [https://trib.com/opinion/editorial/editorial-board-give-johnson-the-money-he-deserves/article\\_b59a0289-3a7b-553d-a9fa-6697efdb3671.html](https://trib.com/opinion/editorial/editorial-board-give-johnson-the-money-he-deserves/article_b59a0289-3a7b-553d-a9fa-6697efdb3671.html) (explaining that amendments to the bill added a burdensome procedure for claimants while also implying that representatives questioned Andrew Johnson’s deservingness of compensation).

<sup>92</sup> *Archived Floor Debate: 2014*, 62d Leg., Budget Sess., *supra* note 81 (at 00:06:40).

<sup>93</sup> *Archived Floor Debate: 2014*, 62d Leg., Budget Sess., *supra* note 81 (at 00:08:30).

<sup>94</sup> See *Archived Floor Debate: 2014*, 62d Leg., Budget Sess., *supra* note 81.

<sup>95</sup> See generally *Compensating the Wrongly Convicted*, *supra* note 37 (explaining ideal factors in a compensation statute).

### 1. *What Compensation Should Include: It is not Just About Money*

Compensations serves many purposes, only one of which is to compensate exonerees for time spent outside of the labor force.<sup>96</sup> More significantly, the purpose is to compensate for time spent outside of a free life.<sup>97</sup> Exonerees have experienced profound and irreplaceable losses of liberty, life, relationships, and reputation.<sup>98</sup> Exonerees often carry incalculable amounts of mental suffering and psychological harm, including enduring personality changes, post-traumatic stress disorder, depression, and other mood disorders.<sup>99</sup> One court has described an exoneree's experience as follows:

the claimant has been humiliated, degraded, shamed, and suffered a loss of reputation and earnings. For this he must be paid, and for this money damages can be compensatory. But all the wealth of the State of New York could not compensate the claimant for the mental anguish suffered through nearly twelve years of false imprisonment, under the impression that he would be there for the rest of his life. How can a man be repaid . . . ?<sup>100</sup>

To cope with these mental and tangible losses after being released from prison, exonerees need immediate access to housing, transportation, and general living expenses.<sup>101</sup> Additional costs include medical and mental health care, retirement funds, insurance, education, job training, and other financial support

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<sup>96</sup> See generally Leslie Scott, "It Never, Ever, Ends": *The Psychological Impact of Wrongful Conviction*, 5 AM. UNIV. CRIM. L. BR. 10, (2010), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1063&context=clb> (detailing the extreme mental health and personal costs that stem from wrongful conviction). See also Adele Bernard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 107 (1999) ("Here the Court is called upon to determine the value of freedom as to this individual claimant in his enduring quest for freedom . . . . How does one place a monetary value on seemingly mundane things like sleeping in one's own bed; a stroll through a park or a hug from a loved one. Yet, those are among the very things one longs for, and which are denied to a person in prison." (alteration in original) (quoting *McLaughlin v. State*, No. 75123 (N.Y. Ct. Cl. Oct. 16, 1989))).

<sup>97</sup> See Scott, *supra* note 96, at 12–13.

<sup>98</sup> See generally Teresa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 691 (2008) ("Although wrongful convictions may be an inevitable consequence of our criminal justice system, it would seem that a person wrongly deprived of his liberty is entitled to a civil remedy to compensate for the mistakes of the criminal system."); see also Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165 (2004).

<sup>99</sup> See generally Grounds, *supra* note 98.

<sup>100</sup> *Hoffner v. State*, 142 N.Y.S.2d 630, 631–32 (Ct. Cl. 1955).

<sup>101</sup> See generally *Compensating the Wrongly Convicted*, *supra* note 37 (explaining ideal factors in a compensation statute).

to assist with obligations such as child support payments.<sup>102</sup> Financially, many exonerees will have spent large amounts of money funding appeals and hiring attorneys.<sup>103</sup> Emotionally, many exonerees will need ongoing treatment for post-traumatic stress disorder as they continue to suffer the consequences of wrongful conviction.<sup>104</sup>

When deciding what amount is appropriate to compensate an individual, Wyoming must examine each individual's specific situation and needs.<sup>105</sup> For example, in Minnesota, a three-person compensation panel, appointed by the Chief Justice of the Minnesota Supreme Court, decides compensation claims.<sup>106</sup> The panel considers economic damages, non-economic damages, and other reintegrative expenses.<sup>107</sup> The Minnesota Legislature must then approve the panel's findings and recommendations.<sup>108</sup> A procedure such as this allows for a more individualized approach to compensation, with each exoneree's specific needs being addressed.<sup>109</sup>

Additionally, Wyoming must offer holistic compensation for exonerees dependent on the needs and specific situation of the exoneree.<sup>110</sup> Holistic compensation examines the complex needs of exonerees and compensates for both financial and non-financial losses.<sup>111</sup> The Innocence Project advocates for holistic compensation that includes the following: immediate provision of funds, housing, transportation, food, psychological counseling, medical and dental care, job skills, training, education, legal services to expunge criminal records, and legal services to regain custody of children.<sup>112</sup> Wyoming can use similar services that are already being provided to parolees and simply extend these services to exonerees,

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<sup>102</sup> *See id.*

<sup>103</sup> *See* Armbrust, *supra* note 42 (noting that one exoneree that spent \$200,000 in appeals).

<sup>104</sup> *See* Baba-Ali v. State, 878 N.Y.S.2d 555, 563 (Ct. Cl. 2009) (explaining one exoneree's struggle with depression and post-traumatic stress disorder).

<sup>105</sup> *See* Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongfully Convicted*, 82 MO. L. REV. 369, 435 (2017) (explaining that different situations and needs benefit some exonerees but not others).

<sup>106</sup> MINN. STAT. § 611.365 (2019).

<sup>107</sup> *Id.* For example, this could include obtaining a college education for some exonerees who have time to start a career, or assistance obtaining social security and retirement benefits for older exonerees. *See id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See* Gutman, *supra* note 105.

<sup>111</sup> *See* Armbrust, *supra* note 42 (explaining that holistic compensation recognizes and tackles health problems and education).

<sup>112</sup> *See* Rebecca Brown & Carlita Salazar, *Wrongful Conviction Day 2017: Taking a Closer Look at Compensation Laws in the U.S.*, INNOCENCE PROJECT (Oct. 2, 2017), <https://www.innocence-project.org/wrongful-conviction-day-2017-taking-closer-look-compensation-laws-u-s/>.

such as immediate access to housing and counseling services.<sup>113</sup> Further, the statute must limit the taxation of the compensation, limit attorney's fees, and provide a claimant-friendly statute of limitations for filing, which is at least a two-year limitation.<sup>114</sup> A limit on attorney's fees and a generous statute of limitations are simple ways the State can ensure that the system will not take advantage of an exoneree again.<sup>115</sup>

## 2. *A Cap on Compensation is Unwarranted*

A limit on the amount of compensation is unnecessary and also unreasonably severe if a claimant has spent more time incarcerated than a sum of \$100 per day up to \$250,000.<sup>116</sup> Additionally, while \$250,000, or even \$500,000, are significant amounts of money, this compensation is going to be a rare payout.<sup>117</sup> This is not a negligence claim, but rather a wrongful loss of life and liberty claim.<sup>118</sup> A compensation statute is a new policy that the Legislature has the opportunity to make a difference to an exoneree who has suffered a wrongful incarceration, and there is no justification or rationale to rely on an unparalleled statutory scheme like the Governmental Claims Act.<sup>119</sup> In addition, these payouts would be rare.<sup>120</sup>

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<sup>113</sup> See generally *Reentry and Community Resources*, WYO. DEP'T CORR., <http://corrections.wyo.gov/home/reentry-and-offender-resources> (last visited Apr. 10, 2019).

<sup>114</sup> See Bernard, *supra* note 96 (asserting that two-year statutes of limitations are standard and reasonable, but six months statutes of limitations are too short).

<sup>115</sup> John Shaw, *supra* note 27, at 614 (explaining how one attorney who claimed \$8 million in attorney's fees from compensation claims in Texas fully took advantage of the exonerees).

<sup>116</sup> See Bernard, *supra* note 96 (explaining that limits on recoverable damages discourages claim filings and is based on unfounded fears of straining state budgets when the number of wrongful convictions in any state is not high enough to warrant such restrictions).

<sup>117</sup> See generally Radley Balko, Opinion, *Report: Wrongful Convictions Have Stolen at Least 20,000 Years from Innocent Defendants*, WASH. POST (Sept. 10, 2018), [https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/?noredirect=on&utm\\_term=.6754146ccefa](https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/?noredirect=on&utm_term=.6754146ccefa) (explaining the "enormous waste of human potential" wrongful convictions cause). See also Bernard, *supra* note 96 (contending that states may fear claims will strain state budgets, but the fear is unfounded due to the low number of wrongful convictions).

<sup>118</sup> See *Archived Floor Debate: 2014*, 62d Leg., Budget Sess., *supra* note 81 (at 00:08:30).

<sup>119</sup> *Id.*

<sup>120</sup> Wyo. Legis. Serv. Office, S.F. 30 Fiscal Note, 62d Leg., Budget Sess., WYO. LEG. (2014), <https://www.wyoleg.gov/2014/Fiscal/SF0030.htm> [hereinafter Wyo. S.F. 30 Fiscal Note] ("Wyoming experiences qualifying exonerations. Though there are no current measures that would allow for an accurate prediction of the number of individuals affected by the proposed legislation, it is assumed that the actual number of individuals affected would be very low.").

The national estimates of wrongful convictions are 1–3% of all convictions.<sup>121</sup> Current exoneration rates place Wyoming at below 1% of all convictions.<sup>122</sup> Additionally, because DNA testing is now standard in criminal cases with victims, DNA exonerations should lessen significantly over time, leading to fewer wrongful convictions and, in turn, future exonerations.<sup>123</sup> The criminal justice system is now aware of the leading causes of wrongful convictions, and as reform in these areas continue, wrongful conviction rates should fall along with exoneration rates, making compensation claimants more rare.<sup>124</sup> A cap is not warranted because the budget will rarely be affected due to an already low number of claimants and a cap is ultimately unfair to the claimants who spent more time in prison than the cap compensates for.<sup>125</sup>

### *B. The Process and Burden Placed on the Claimant Should be Minimal*

When SF30 was in the House, representatives proposed two amendments that would require a movant who had *already* obtained an order of actual innocence under the PCDNA statute to undergo an *additional* hearing to determine if the movant can prove that they are factually innocent.<sup>126</sup> An efficient compensation

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<sup>121</sup> See, e.g., *Exonerations by Contributing Factor*, *supra* note 31 (last visited Apr. 10, 2019) (estimating roughly one percent of the population). Another study conducted in 2007 estimates a 3.3% wrongful conviction rate. See D. Micheal Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY, 761 (2007). But see generally Paul G. Cassell, *Jurisdiction-Specific Wrongful Conviction Rate Estimates: The North Carolina and Utah Examples*, 60 ARIZ. L. REV. 891, 900–09 (2018) (extrapolating an estimated wrongful conviction rate between 0.017%–0.090% in North Carolina and Utah to other states' prison populations based on comparable incarceration rates).

<sup>122</sup> *Detailed List of Exoneration Cases*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (filter by "Wyoming") (last visited Apr. 10, 2019). There have only been five exonerees in Wyoming. *Id.*

<sup>123</sup> See generally WYO. STAT. ANN. § 7-12-303 (2018). Through its PCDNA statute, every case in Wyoming after 2000 has had access to DNA testing. Put another way, eligible claimants are becoming increasingly older, and the wrongfully convicted may have already been released or passed away. See also WYO. STAT. ANN. § 7-12-303(d) ("The court may not order DNA testing in cases in which the trial or a plea of guilty or nolo contendere occurred after January 1, 2000 and the person did not request DNA testing or present DNA evidence for strategic or tactical reasons or as a result of a lack of due diligence, unless the failure to exercise due diligence is found to be a result of ineffective assistance of counsel. A person convicted before January 1, 2000 shall not be required to make a showing of due diligence under this subsection.").

<sup>124</sup> See, e.g., *Causes of Wrongful Convictions*, NEW ENGLAND INNOCENCE PROJECT, <http://www.newenglandinnocence.org/causes-of-wrongful-convictions/> (last visited Apr. 10, 2019) (explaining eyewitness misidentification, unvalidated forensic evidence, false confessions, snitch testimony, police and prosecutorial misconduct, poor defense lawyering as the leading causes of wrongful convictions and how they can be solved).

<sup>125</sup> See *supra* notes 95–100 and accompanying text.

<sup>126</sup> Wyo. S.F. 28 Digest, *supra* note 79 (showing the addition of the "Establishment of Factual Innocence" provision).

statute should not impose this additional burden on the claimant who has already received an order of innocence and exoneration.<sup>127</sup>

For those who have received an order of innocence through the PCDNA and PCDFSA statutes, an additional hearing is redundant, a waste of resources, and unnecessary since these statutes already adequately address concerns of mistake or actual guilt.<sup>128</sup> The purpose of a compensation statute should not be to confirm innocence, but rather to simply compensate those already determined to be innocent.<sup>129</sup> Foremost, the PCDNA statute has significant hurdles for a claimant to qualify for post-conviction DNA testing.<sup>130</sup> Claimants must present a prima facie case showing that DNA testing would prove actual innocence before they can qualify for testing, and even then the court is not required to order testing.<sup>131</sup> That prima facie case requires the DNA evidence to produce new, non-cumulative evidence, among many other high burdens.<sup>132</sup> If a court grants the tests and the DNA results are inconclusive, the court must deny a motion for a new trial.<sup>133</sup> If the DNA results are consistent with the movant's claim of innocence,

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<sup>127</sup> Lyttle, *supra* note 67, at 629–30 (“As a matter of policy, requiring an exoneree to prove his or her innocence a second time is redundant and serves little purpose other than placing new burdens on people already irreparably harmed by the justice system . . . even worse, this procedure would shift all of the terrible costs of wrongful imprisonment onto an innocent person, presuming that person guilty until proven innocent and washing all of our hands of an injustice perpetrated on our behalf.”).

<sup>128</sup> WYO. STAT. ANN. §§ 7-12-303, -402.

<sup>129</sup> Lyttle, *supra* note 67, at 629–30.

<sup>130</sup> WYO. STAT. ANN. § 7-12-305 (“The movant shall be required to present a prima facie case showing that the evidence supports findings consistent with the facts asserted under W.S. 7-12-303(c) and DNA testing of the specified evidence would, assuming exculpatory results, establish: The actual innocence of the movant of the offense for which the movant was convicted; or [i]n a capital case: The movant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance; or [a] mitigating circumstance as a result of the DNA testing. If the court finds that the movant has presented a prima facie case showing that the evidence supports findings consistent with W.S. 7-12-303(c) and the evidence would establish actual innocence, the court may order testing, subject to W.S. 7-12-306.”).

<sup>131</sup> Lyttle, *supra* note 67, at 612–13 (“The statute's use of the word ‘may’ suggests the district court has discretion to order testing.”).

<sup>132</sup> WYO. STAT. ANN. § 7-12-303. To file for post-conviction DNA testing, the movant must explain why the DNA evidence is material, that “the evidence is still in existence and in a condition capable of testing”, the chain of custody of the evidence, that it can be tested, the specific type of DNA testing requested, that the DNA test “employs a reliable scientific method”, that “a theory of defense can be presented not inconsistent with theories asserted at trial,” that the evidence was not already tested, and that the movant did not have his trial after January 1, 2000, and the movant did not “request DNA testing or present DNA evidence for strategic or tactical reasons or as a result of a lack of due diligence, unless the failure to exercise due diligence is found to be a result of ineffective assistance of counsel.” *Id.*

<sup>133</sup> WYO. STAT. ANN. § 7-12-310(a).

that movant must then go through either a complete retrial with acquittal or a dismissal of the original charges before he or she can be declared innocent.<sup>134</sup> Despite the PCDNA statute being in place for eleven years, only one person has been successful in proving his innocence through this method.<sup>135</sup> The PCDNA statute already provides adequate safe-guards and procedures that an exoneree must adhere to in order to be proven factually innocent, all of which would occur *prior* to filing for compensation.<sup>136</sup>

The PCDEFA statute provides the second statutory method for proving innocence in Wyoming.<sup>137</sup> The PCDEFA statute was not enacted at the time SF30 was proposed, but it creates another high-bar and burden for a claimant to prove his or her innocence that aligns with the proposed amendments to SF30.<sup>138</sup> For petitioners to show a *prima facie* case of factual innocence under PCDEFA, a claimant must show “that they not have engaged in the conduct for which they were convicted,” that they “did not engage in conduct constituting a lesser included or inchoate offense of the crime for which they was convicted,” and that they “did not commit any other crime arising out of or reasonably connected to the facts supporting the indictment or information upon which they were convicted.”<sup>139</sup> A compensation statute must rely on innocence determinations made under the PCDNA and PCDEFA statutes, which already have effective procedural burdens in place designed to cull non-meritorious claims and therefore not require a second hearing.<sup>140</sup>

Aside from the statutes in place in Wyoming through which the wrongfully convicted can establish their innocence, there are many policy considerations that weigh against imposing additional processes and burdens on claimants.<sup>141</sup> First, the State, and not the claimant, has access to the evidence that resulted in the underlying conviction, requiring the claimant to go through the expense and burden of seeking further discovery or obtaining the prior evidence independently.<sup>142</sup> If the State loses the evidence or witnesses become unavailable, the burden becomes

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<sup>134</sup> WYO. STAT. ANN. § 7-12-310(a).

<sup>135</sup> *Our Exonerees, Andrew Johnson*, *supra* note 14 (explaining Johnson is the only person who has been exonerated with the PCDNA statute).

<sup>136</sup> WYO. STAT. ANN. § 7-12-303.

<sup>137</sup> *Id.* §§ 7-12-401 to -407.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See generally* Kahn, *supra* note 52.

<sup>141</sup> *See id.*

<sup>142</sup> *Id.* at 148 (“Where this is the case, and all else being equal, the burden should be shifted to the party with the better access to evidence (i.e., the party with the lowest relative costs of production).”).

even greater.<sup>143</sup> Second, the State is in a better position to prove guilt than the claimant is to prove innocence.<sup>144</sup> Proving a negative—that the claimant did not commit the crime—is a significantly heavier burden than the burden of proof already required by the State at a criminal trial.<sup>145</sup> Finally, removing the burden from the claimant would save judicial resources for the State and money and time for the individual, who has already been significantly wronged and lost irreplaceable amounts of time.<sup>146</sup> To conclude, an additional hearing should not be required as it is inefficient, costly, and adds another layer of trauma on the exoneree.<sup>147</sup>

### C. *Andrew Johnson and the State's Responsibility to Compensate Exonerees*

During debate in the House, SF30 met many roadblocks, in part because of apparent doubt on the innocence of the only current eligible claimant, Andrew Johnson.<sup>148</sup> Despite DNA exonerations providing an empirically accurate showing of innocence, it can be difficult for many to accept that the criminal justice system wrongfully convicts.<sup>149</sup> This difficulty can be the greatest for those who have spent careers and lives dedicated to the law enforcement system.<sup>150</sup>

There is no doubt that the criminal justice system convicts innocent people.<sup>151</sup> Indeed, a compensation statute is not about *one* citizen; it is a larger

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<sup>143</sup> *Id.* at 149. “Because it would be easier for the state to prove guilt than it would be for the claimant to prove innocence, these same risks are less likely to plague the state if it had the burden of proof.” *Id.* at 152.

<sup>144</sup> *Id.* at 151–52.

<sup>145</sup> *Cf.* N.J. STAT. ANN. § 52:4C-1 (West 2019). One state openly recognized this in its compensation statute. *Id.* (“[I]t is the intent of the Legislature that the court . . . , in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability to witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.”).

<sup>146</sup> Kahn, *supra* note 52, at 152.

<sup>147</sup> *See id.*

<sup>148</sup> *Archived Floor Debate: 2014*, *supra* note 81 (at 00:46:24).

<sup>149</sup> Lyttle, *supra* note 67, at 603 (“DNA testing and the innocence movement force us to acknowledge the existence and dignity of innocent convicts.”).

<sup>150</sup> *Id.* at 607 (“Prosecutors face substantial institutional and psychological pressures to resist innocence and exoneration claims.”).

<sup>151</sup> *See, e.g.*, EDWARD CONNORS ET AL, U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1986); *Glossary*, *supra* note 32. *See generally* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004).

policy decision that reflects how Wyoming chooses to treat those who have been irrevocably wronged by the criminal justice system.<sup>152</sup> A compensation statute is not about blaming the State, but rather, recognizing that the State is the best party to assume liability for the most intrusive and worst form of state interference.<sup>153</sup>

Multiple policy reasons support governmental compensation for victims of wrongful convictions.<sup>154</sup> First, the government has the ability to shift the burden of a less-than-perfect criminal justice system from the wrongfully convicted individual to society as a whole.<sup>155</sup> Next, compensating individuals is an important way for the exoneree to see that the government is taking responsibility for its actions and wrongdoings.<sup>156</sup> In one study, compensated individuals were less likely to commit an offense after release, not only because they had compensation to meet practical needs, but also because they felt like they were valued and a part of the community.<sup>157</sup> Compensation can also address many of the systemic causes of wrongful convictions by ensuring the government does everything possible to prevent wrongful convictions in the first place.<sup>158</sup>

The State can bear the burdens of compensation, of a flawed criminal justice system, and of preventing wrongful convictions better than an individual can.<sup>159</sup> Wyoming will most likely have very few eligible claimants and the cost of compensating them will be relatively low compared to the State budget.<sup>160</sup>

## V. CONCLUSION

Finally, I've come to believe that the true measure of our commitment to justice, the character of our society, our commitment to the rule of law, fairness, and equality cannot be

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<sup>152</sup> As opposed to a private bill that would have been solely for Johnson. *See supra* notes 46–49 and accompanying text.

<sup>153</sup> Buckman, *supra* note 53.

<sup>154</sup> *See generally* Audrey D. Koehler, *Exonerated, Free, and Forgotten: How States Continue to Punish the Wrongfully Convicted Through Procedural Hoops and Inadequate Compensation*, 58 WASHBURN L.J. 493 (2019).

<sup>155</sup> *Id.* at 522.

<sup>156</sup> *Id.*

<sup>157</sup> Evan J. Mandery et al., *Criminology: Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 582 (2013).

<sup>158</sup> Lyttle, *supra* note 67, at 606 (“It may also impress the significance of the problem on the gatekeepers, including law enforcement, prosecuting and defense attorneys, legislators, and judges, who must play a role in stopping wrongful convictions. That may help pave the way for more systemic legal and attitudinal changes addressing the way we incarcerate people or characteristics that make it more difficult to stop wrongful convictions.”).

<sup>159</sup> *See supra* notes 154–58 and accompanying text.

<sup>160</sup> *See supra* notes 120–23 and accompanying text (relating to the estimated levels of wrongful convictions).

measured by how we treat the rich, the powerful, the privileged, and the respected among us. The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.<sup>161</sup>

A wrongful conviction devastates the criminal justice system while simultaneously harming the safety of the public, the victim, and the person held accountable for a crime they did not commit.<sup>162</sup> Wyoming owes a duty to compensate people who are wrongfully convicted through a failure of the criminal justice system.<sup>163</sup> To be sure, the State of Wyoming has taken great strides by providing the wrongfully convicted avenues of relief through the PCNDA and PCDFFA.<sup>164</sup> However, Wyoming must continue with these strides and implement a holistic and individualized compensation for its exonerees.<sup>165</sup> The failure of the previous compensation bill was unfortunate, but Wyoming now has the opportunity to create a more effective and holistic statute that can lead the nation in how the State treats its exonerees.<sup>166</sup>

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<sup>161</sup> BRYAN STEVENSON, *JUST MERCY* 29 (Spiegel & Gray 2015).

<sup>162</sup> *Causes of Wrongful Convictions*, *supra* note 124.

<sup>163</sup> *See supra* notes 89–90 and accompanying text.

<sup>164</sup> *See supra* notes 67–86 and accompanying text.

<sup>165</sup> *See supra* notes 126–47 and accompanying text.

<sup>166</sup> *See supra* notes 110–15 and accompanying text.