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The Debt Paradox: In Debt but Society Owes You a Debt--An Exoneree's Path to Holistic Relief Through the Bankruptcy System

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THE DEBT PARADOX: IN DEBT BUT SOCIETY OWES YOU A DEBT

AN EXONEREE'S PATH TO HOLISTIC RELIEF THROUGH THE BANKRUPTCY SYSTEM

ABSTRACT

What do the bankruptcy system and the criminal legal system have in common? Both aim to provide fresh starts to those who have moved through them. The bankruptcy system does so by rewarding honest but unfortunate debtors with discharge from debt. The criminal legal system attempts to provide a fresh start through reentry programs to those exiting prison. Yet neither system successfully ensures a blank slate, which is in part due to the history of racial bias in both systems. A limited subset of debtors benefits from the bankruptcy system, while the criminal legal system makes reentry very difficult for convicted felons. The wrongfully convicted are also not provided the necessary tools to obtain a fresh start as they reenter society. With restricted access to reentry programs, further injury due to barriers they face upon reentry, and debt stemming from their wrongful conviction, exonerees require a more holistic approach to ensure that they have a fresh start. The bankruptcy system offers an opportunity to meaningfully improve reentry for the wrongfully convicted.

This Comment proposes that exonerees should be entitled to an expedited chapter 13 discharge of the debt stemming from their wrongful conviction. Further, this Comment argues that states should provide more holistic reentry programs that include access to bankruptcy attorney services. Discharging this debt would relieve exonerees and their families of some of the misfortune caused by wrongful conviction. By doing so, the bankruptcy system would promote its goal of providing a fresh start to the honest but unfortunate debtor.

INTRODUCTION

The United States bankruptcy system has long recognized two central aims: (1) providing a fresh start to debtors who are unable to pay their debt; while (2) recognizing the interests of creditors by maximizing total return through an efficient process.[1] The goal of providing a fresh start can also be found in the criminal legal system through programs that strive to support individuals as they reenter society after being released from prison. Yet the mechanisms in place to help ensure these fresh starts—the discharge provisions of the Bankruptcy Code and reentry programs in the criminal legal system—have elicited extensive criticism.

The fresh starts offered by the bankruptcy system and the criminal legal system have been limited by each system's history of racial bias. In the bankruptcy system, this is evident in the racial disparity between groups that have benefited most from the Code.[2] The complexity of the bankruptcy system also presents a huge challenge for pro se debtors, leaving unanswered the question of how many debtors choose not to file for bankruptcy due to the inaccessibility of the courts.[3]

The criminal legal system has an overt history of systemic racism, which is clear at every stage of the criminal legal process.[4] The United States incarcerates the highest population of any country in the word, which was fueled by the "war on drugs" and the "tough on crime" approach to criminal reform.[5] The prison population doubled between 1980 and 1988, with communities of color being incarcerated at a staggeringly high rate.[6] While these numbers have decreased by 34% since 2006, Black Americans are still disproportionately imprisoned.[7] At the end of 2018, Black Americans represented 33% of the prison population,

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[1] *See In re* Selinsky, 365 B.R. 260, 267 (Bankr. S.D. Fla. 2007) ("Bankruptcy is an equitable process. It is a process for debtors to get a fresh start. The goal of every bankruptcy case should be a discharge of debts and maximizing value for creditors.").

[2] *See* A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 638–39 (2012).

[3] *See id.* at 630–31; Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1115 (2016).

[4] *United States Profile,* PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/US.html (last visited Aug. 31, 2020); James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration.

[5] *Id*.

[6] Cullen, *supra* note 4.

[7] John Gramlich, *Black Imprisonment Rate in the U.S. has Fallen by a Third Since 2006,* PEW RSCH. CTR. (May 6, 2020), https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/.

although Black Americans make up only 12% of the United States population.[8] Black people are stopped more frequently on the street by police, have a higher likelihood of being subjected to the use of force, and are more likely to be arrested and to be arrested repeatedly in the same year.[9] Further, as the population of incarcerated Black Americans has decreased, these individuals leave prison with inadequate assistance to reenter society, as they face barriers with health, housing, and employment that stem from their status as convicted felons.[10] Thus, racial disparities within the criminal legal system are also pervasive in reentry systems.

Unsurprisingly, a system with such bias has led to a staggering number of wrongful convictions.[11] Exonerees, however, are often denied access to traditional reentry programs. The bankruptcy system provides an opportunity to assist exonerees as they reenter society. Many argue that exonerees should be compensated for the injuries they have suffered due to their wrongful conviction; "[t]he state whose actions have put individuals in prison for crimes they did not commit owes a debt to those who through no fault of their own have lost years and opportunity. The debt should be recognized and paid."[12] Yet who bears the burden of repaying the debt that society owes to the wrongfully convicted? This remains an open question. Some jurisdictions provide compensation to exonerees, but this system is unreliable and often inadequate.[13] Even when the exonerees have been compensated, the compensation schemes do not take into account all of the challenges they face when reentering society.[14]

For example, although mechanisms exist to compensate exonerees for the pain, trauma, and lost earning potential they suffered by being imprisoned for crimes they did not commit, exonerees and their families, on their own, must

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[8] *Id*.

[9] Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration,* PRISON POL'Y INITIATIVE (July 27, 2020), https://www.prisonpolicy.org/blog/2020/07/27/disparities/.

[10] ADIAH PRICE-TUCKER ET AL., SUCCESSFUL REENTRY: A COMMUNITY-LEVEL ANALYSIS 19–20 (2019), https://iop.harvard.edu/sites/default/files/sources/program/IOP_Policy_Program_2019_Reentry_Policy.pdf.

[11] *See Wrongful Convictions*, EQUAL JUST. INITIATIVE, https://eji.org/issues/wrongful-convictions/ (last visited Jan. 19, 2020) ("Thousands of people have been wrongly convicted across the country in a system defined by official indifference to innocence and error.").

[12] Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 74 (1999); *see generally* EDWIN BORCHARD & E. RUSSELL LUTZ, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (1932) (arguing wrongfully convicted should be compensated similarly to tort victims for the public wrongs they have endured).

[13] *See Compensating the Wrongfully Convicted,* INNOCENCE PROJECT, https://www.innocenceproject.org/compensating-wrongly-convicted/ (last visited Sept. 28, 2019) (contrasting state compensation statutes).

[14] Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 160 (2004) ("[C]ompensation can be structured to best remedy the very real physiological, psychological, and financial issues facing them upon their release.").

handle the debt that resulted from their wrongful conviction. Sources of such debt include court fees and fines, attorney fees, restitution payments, child support, taxes, increased debt and default created by the inability to make payments and pay bills while in prison, and barriers to obtaining employment after release from prison. Addressing this debt would provide a more holistic approach to reentry for exonerees.

Perhaps the most powerful mechanism within the Code is the discharge from debt, which provides freedom from personal liability of previous debts. The bankruptcy system could help supplement this holistic approach by providing an expedited discharge of the debt that stemmed from an exoneree's wrongful conviction. The hardship discharge of chapter 13 of the Code is explicitly reserved for the "honest but unfortunate debtor" and must be filed in good faith.[15] The hardship discharge gives relief to a debtor when: (1) the debtor is unable to complete plan payments "due to circumstances for which the debtor should not justly be held accountable"; (2) the value of the property distributed under the plan must not be less than the value distributed under a hypothetical chapter 7 liquidation; and (3) modification of the plan is "not practicable."[16] The debtor who receives the hardship discharge can reenter the economy without the former burden of debt.

The wrongfully convicted should satisfy these requirements. First, exonerees are victims of circumstances that are beyond their control and are the epitome of "honest but unfortunate" people, as they have served time and lost years of freedom due to a failure of the criminal legal system.[17] Wrongful conviction is tragic; "[a]mong the most shocking of . . . injuries and most glaring of injustices are erroneous criminal convictions of innocent people."[18] Second, because it is unlikely that an exoneree's bankruptcy estate will contain property of high value, creditors would be unlikely to receive more value under the liquidation provisions of chapter 7. Third, due to the many challenges that the wrongfully

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[15] 11 U.S.C. § 1325(a)(3) (2019). The Supreme Court has also recognized this principle:

> This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citations omitted).

[16] Alan M. Ahart, *Whether to Grant a Hardship Discharge in Chapter 13*, 87 AM. BANKR. L.J. 559, 562–63 (2013).

[17] *Hunt*, 292 U.S. at 244 (1934) (citations omitted).

[18] BORCHARD & LUTZ, *supra* note 12.

convicted face, modifying the plan would not be practicable. Thus, an exoneree should meet the requirements of the hardship discharge.

Allowing expedited hardship discharges to exonerees under chapter 13 would align with the long-purported mission of the bankruptcy system: to provide a fresh start to the "honest but unfortunate debtor." Moreover, if reentry programs provided access to bankruptcy attorneys, some of the financial burdens of the wrongfully convicted could be alleviated. By helping exonerees reintegrate into the economy, the bankruptcy system could supplement holistic approaches to reentry. In doing so, society could begin to relieve the enormous debt that is owed to the victims of wrongful conviction.

Part I of this Comment examines wrongful conviction and the need for a more robust approach to the financial component of reentry. It does so by providing a background on the history of wrongful conviction in the United States, exploring how reentry systems currently function, and discussing how an exoneree and his family members might accumulate debt while in prison and upon release. Part II scrutinizes the existing financial mechanisms that are available to compensate the wrongfully convicted in other areas of law. Part III then turns to the bankruptcy system. After first providing a primer on how the bankruptcy system functions, it delves into the requirements of the chapter 13 hardship discharge. Finally, Part IV proposes how to incorporate relief for exonerees into the bankruptcy system. It examines the benefits of discharging the debts of exonerees, considering both the benefit to the exoneree and the bankruptcy system. Part IV also responds to the implications and potential criticisms of granting exonerees hardship discharges.

I. WRONGFUL CONVICTION

This Section explores the history of wrongful conviction, examining both the past studies of wrongful conviction and the potential causes of wrongful conviction. Next, it considers the current landscape of reentry programs, the exclusion of exonerees from these programs, and the limited number of reentry programs that are available to exonerees. It concludes by considering the debt exonerees accumulate as a result of their wrongful conviction.

A. Background Facts on Wrongful Conviction

To fully understand the complexity and necessity of providing meaningful and holistic assistance to exonerees, it is important to first understand the backdrop of this issue. Determining the causes of wrongful convictions is

complex, and thus determining who bears the burden of remedying the effects of wrongful conviction is complicated. "[A] mistake has been made, whether in good faith or bad, and the question arises, who should bear the loss, the hapless victim alone or the community."[19] This complexity, however, does not relieve society of determining an effective way to aid those most significantly impacted by wrongful conviction.[20]

The United States criminal legal system has a history of wrongful conviction, which has long been studied.[21] Yet these studies have not necessarily led to a system that helps remedy the wrongs that stem from wrongful conviction. In 1932, Edwin Borchard suggested:

> [I]t seems strange that so little attention has been given to one of the most flagrant of all publicly imposed wrongs—the plight of the innocent victim of unjust conviction in criminal cases. Perhaps the indifference is attributable to the belief that such occurrences are too rare to justify public concern.[22]

Since Borchard made these remarks, the number of exonerations has dramatically increased as society's ability to identify wrongful conviction has increased.

The number of exonerations has risen as DNA testing has been refined, making the issue of wrongful conviction impossible to ignore.[23] Of the 2,678 exonerations that have occurred in the United States since 1989, 1,465 (54.7%) of those exonerations have occurred in this decade.[24] Likewise, the research into the causes of wrongful conviction, and the recognition of the complexity of these causes, has increased.[25] Wrongful convictions result from a "confluence of

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[19] BORCHARD & LUTZ, *supra* note 12, at 376–77.

[20] *See* Meggan Smith, *Have We Abandoned the Innocent? Society's Debt to the Wrongly Convicted*, 2 CRIM. L. BRIEF 3, 12 (2006) ("The fact that it is impossible to fully compensate an individual for the loss of years of his freedom does not absolve society of its duty to rectify the injustice inflicted on exonerees to the extent feasible.").

[21] *See, e.g.*, BORCHARD & LUTZ, *supra* note 12 (conducting a survey of sixty-five cases of wrongful conviction in 1932 in an effort to refute the misconception that wrongful convictions never happen or are a "physical impossibility.").

[22] BORCHARD & LUTZ, *supra* note 12.

[23] Armbrust, *supra* note 14, at 181.

[24] NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Oct. 14, 2020).

[25] Professor Findley and Professor Scott have performed groundbreaking work in this area, finding:

> Literally hundreds of additional exonerations in the last fifteen years alone have been based on evidence other than DNA . . . These exonerations have challenged the traditional assumption that the criminal justice system does all it can to accurately determine guilt, and that erroneous conviction of the innocent is, as the Supreme Court has assumed, 'extremely rare.' Further, they

factors," making it difficult to identify an exclusively responsible party.[26] Racial bias is pervasive in wrongful conviction, reflecting the systemic racism that fuels our criminal legal system.[27] Additional contributing factors include eyewitness misidentification, false confessions, forensic science error or fraud, governmental misconduct, or inadequate defense counsel.[28] "Tunnel vision" can also lead prosecutors and investigators to become so focused on one theory of the case that they might, consciously or unconsciously, begin to ignore evidence that points to another theory of the case.[29] Yet scholars have suggested that "a canonical list of factors" is limiting and might create "a stagnation" that slows "needed action to improve justice processes that generate inaccurate verdicts."[30]

Wrongful convictions wreak havoc on everyone: the exonerees, the victims of the crimes for which the exonerees were convicted, the families of the victims, the families of the wrongfully convicted, and society at large.[31] The longest

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> have opened a window for scholarly and institutional inquiry into the causes of wrongful convictions and the reforms that might prevent such miscarriages of justice in the future.

Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 WIS. L. REV. 291, 291–92 (2006).

[26] Stephanie Roberts Hartung, *The Confluence of Factors Doctrine: A Holistic Approach to Wrongful Convictions*, 51 SUFFOLK U. L. REV. 369, 370 (2018) (citation omitted).

[27] *See, e.g.*, *Race and Wrongful Conviction*, NAT'L REGISTRY OF EXONERATIONS (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (showing "innocent black people are about seven times more likely to be convicted of murder than innocent white people", a black person serving time for sexual assault is three-and-a-half times more likely to be innocent than a white person, and an innocent black person are about twelve times more likely to be convicted of a drug crime than a white person.). *See generally* Harvey Gee, *Eyewitness Testimony and Cross-Racial Identification*, 35 NEW ENG. L. REV. 835, 838–39 (2001) (reviewing ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996)).

[28] Hartung, *supra* note 26, at 370–71.

[29] Professor Findley and Professor Scott's research indicates that this effect can extend beyond just the prosecutors:

> This process leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion. Through that filter, all information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable.

Findley & Scott, *supra* note 25, at 292.

[30] Marvin Zalman & Matthew Larson, *Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation*, 79 ALB. L. REV. 941, 946, 952 (2015) (quoting Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008)).

[31] Wrongful conviction not only has a drastic effect on those who are wrongfully convicted, but also seriously affects the victims of the crimes for which the exonerees were convicted. SERI IRAZOLA ET AL., STUDY OF VICTIM EXPERIENCES OF WRONGFUL CONVICTION, at iii (2013); Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions after a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 836 (2010).

reported amount of time spent wrongfully incarcerated is forty-five years.[32] The National Registry of Exonerations estimates that exonerees have lost a total of 24,167 years as a result of wrongful incarceration.[33] This lapse of time represents time spent away from families, time that could have been spent as a productive member of society, and time that a crime victim thought his or her attacker was imprisoned. Additionally, studies indicate that incarceration can have a drastic effect on one's life expectancy.[34] On a larger scale, mass incarceration has stunted the average life expectancy in the United States as compared to other developed countries.[35]

Time in prison affects every aspect of one's life. A wrongfully convicted person's struggle is not remedied solely by the fact that he has been exonerated. At a minimum, society should provide meaningful assistance to exonerees once they reenter society.

B. Current Reentry Programs

After exonerees are released from prison, the failure of the criminal legal system continues to disrupt their lives. This disruption is immediately evident, as exonerees often do not have access to the already lackluster reentry programs available to people exiting prison. Many jurisdictions attempt to provide former offenders with a fresh start through the aid of various reentry programs, with the aim of deterring crime and reducing recidivism.[36] Reentry programs were developed to create a bridge between leaving prison and reentering society.[37]

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[32] Richard Phillips was wrongfully convicted of murder in 1972 at twenty-five years old. He was seventy-one years old when his conviction was vacated, and he was released from prison in 2017. *Case Description: Richard Phillips*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Aug. 31, 2020).

[33] *See* NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Oct. 14, 2020).

[34] Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/.

[35] *Id*.

[36] *See, e.g.*, U.S. DEP'T OF JUST., SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf; *Reentry Services Directory,* NAT'L REENTRY RES. CTR., https://csgjusticecenter.org/nrrc/reentry-services-directory/ (last visited Nov. 16, 2019).

[37] Professor Jonson and Professor Cullen have discussed reentry programs as part of the larger movement to facilitate a successful transition from prison to society:

> A key feature of the reentry movement is its focus on developing programs to facilitate the successful return of prisoners to the community. This emphasis is important because it ties reentry to the rehabilitative ideal. Implicit in the very idea of programming—whether conducted inside or outside the prison—is that offenders face personal and situational risks that, if left unaddressed, will likely lead them back into crime. Reentering prisoners are thus seen as being at risk for

These programs can be court-mandated or can be sought by the individual in need of services.[38] Reentry programs attempt to aid formerly incarcerated individuals by helping them secure employment, find housing, and gain access to educational tools that will help them succeed upon reentry.[39] Yet reentry programs are far from successful because the transition from prison to society presents challenging barriers.[40] In response to the high rate of recidivism, critics are calling for reentry programs to provide meaningful assistance by "tailor[ing] their services in order to address the unique needs of the populations they serve."[41]

To make matters worse, exonerees are not always able to receive assistance from reentry programs. Many of these programs are available to parolees, but because exonerees are not parolees, they do not qualify for these programs.[42] Thus, most exonerees are left without any guaranteed assistance during their reentry to society. And while parolees and exonerees share many reentry needs, exonerees have an additional set of needs that stem directly from their wrongful incarceration.[43] Just as reentry needs vary amongst parolees, reentry needs vary amongst exonerees. These needs depend on factors such as whether the person was exonerated before or after their release from prison, the length of wrongful incarceration, whether the exoneree has support from family and friends, and concerns regarding health and financial status.[44] Thus, exonerees face numerous obstacles to reentering the society from which they were wrongfully removed, and these obstacles must be addressed on an individual basis.[45]

> recidivating—but not destined to this fate. The challenge is thus to develop programs that work—which are effective and evidence based.

Cheryl Lero Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517, 522 (2015).

[38] Jeremiah Mosteller, *What Makes a Reentry Program Successful?*, CHARLES KOCH INST. https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/reentry-programs/ (last visited Sept. 5, 2020).

[39] *Id*.

[40] Jonson & Cullen, *supra* note 37, at 529; Gerald P. Lopez, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1, 62 (2014).

[41] PRICE-TUCKER ET AL., *supra* note 10, at 3; Jonson & Cullen, *supra* note 37, at 517.

[42] *The Problem*, AFTER INNOCENCE, https://www.after-innocence.org/the-problem (last visited Oct. 23, 2019); *see* Erik Encarnacion, *Backpay for Exonerees*, 29 YALE J.L. & HUMAN. 245, 248 (2017).

[43] *See* Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 373 (2017).

[44] *See id*.

[45] *Compensating the Wrongfully Convicted*, INNOCENCE PROJECT, https://www.innocenceproject.org/compensating-wrongly-convicted/ (last visited Sept. 5, 2020) ("The punishment continues after incarceration . . . [w]ith no money, housing, transportation, health services or insurance, and a criminal record that is rarely cleared despite innocence, the punishment lingers long after innocence has been proven. States have a responsibility to restore the lives of the wrongfully convicted. . . .").

Many steps are required to fulfill these goals and to successfully help an exoneree after he is released from prison. The Innocence Network provides an Exoneration Checklist, which demonstrates a number of the complicated but necessary steps to aid an exoneree before and after their release.[46] This list, however, is only a starting point. For example, it does not address instances where debt accumulated while an exoneree was in prison.

In addition to the minority of states that provide reentry assistance to exonerees through statutory schemes,[47] certain non-profit groups operate reentry programs to aid the wrongfully convicted.[48] For example, the Innocence Project has a social work department that begins working with exonerees before they are released from prison.[49] This program acknowledges the vast array of services needed for exonerees by "locating birth certificates and social security numbers[,] finding family members, securing housing or arranging for critical medical and psychological treatment."[50] While such programs provide services to some exonerees, there are still many exonerees left without assistance.

By failing to provide holistic reentry services to the wrongfully convicted, society perpetuates the error and harm that has already been inflicted on exonerees. To provide exonerees with a fresh start to a life that was derailed by the failure of the criminal legal system, a more holistic and individualized approach to reentry should be taken and provided to all exonerees. One aspect of that holistic approach could be to coordinate access to bankruptcy attorneys, who would consider and address the debt that results from wrongful conviction.

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[46] Prior to release from prison or exoneration, the list recommends: (1) assess the exoneree's social support and living situation by determining what he wants to do, where he wants to live, and what contacts can be made to support him; (2) locate and obtain the exoneree's personal documentation, including, if available, his prison ID, Social Security Card, birth certificate, State ID or driver's license, and documentation of Veteran status. If these items are not available, help the client and his family members apply for them; and (3) assess the client's health needs, including physical health, mental health, and determining any necessary medication or significant physical or mental health history. *Exoneration Checklist,* INNOCENCE NETWORK, https://innocencenetwork.org/exoneration-checklist/, (last visited Sept. 5, 2020). Following release or exoneration, the list recommends: (1) contacting continuing contact with any available support network; determining what public benefits the exoneree is eligible for, including food stamps, cash assistance, Medicaid, Veterans Benefits, or Supplemental Security Insurance; and (3) assessing what legal assistance the client needs. *Id.*

[47] *See infra* Section II(A).

[48] *See, e.g.*, *About Section*, AFTER INNOCENCE, https://www.after-innocence.org/aboutai (last visited Sept. 5, 2020) (providing "efficient re-entry assistance for America's wrongfully convicted, and advocates with exonerees for laws that provide them with meaningful compensation and effective re-entry support.").

[49] *Support the Exonerated*, INNOCENCE PROJECT, https://www.innocenceproject.org/Support/ (last visited Sept. 5, 2020).

[50] *Id*.

C. Measuring an Exoneree's Debt

There are many reasons why an exoneree might be in debt upon release from prison, including: lost income and work experience, domestic support obligations, education costs, family expenses, legal fees, court fees and fines, taxes, and barriers to obtaining employment after release from prison. These factors should not only be considered for the exoneree as an individual but also with respect to his family members. These potential debts are discussed in this Section.

1. Debt Due to Time in Prison

It is common for incarcerated individuals to accrue debt while serving time. The exoneree would not have had the opportunity to gain meaningful income while wrongfully incarcerated due to the nature of wages paid to those working a prison job. Further, he lost the opportunity to pay off the debt that may have accumulated prior to incarceration. Wages for employment in prisons are woefully below the minimum wage outside of prison and are typically capped by a maximum daily wage.[51] Some states do not pay prisoners for work on regular prison jobs.[52] Other states deduct expenses from wages, leaving some people with half of an already minimal paycheck.[53] This lack of meaningful income is compounded by the fact that, in forty-nine states, incarcerated individuals must pay for the costs of their incarceration—commonly referred to as "pay to stay" debt.[54] Lack of employment while incarcerated is another major contributing factor to the accrual of debt.

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[51] *Compare Prison Wages*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/blog/2017/04/10/wages/ (last visited Sept. 5, 2020) ("The average of minimum daily wages paid to incarcerated workers for non-industry prison jobs is now 86 cents . . . The average maximum daily wage for the same prison job had declined . . . to $3.45 today."), *and Prison Wage Policies*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/reports/wage_policies.html (last visited Sept. 5, 2020) (providing a detailed report of prison wages according to each state), *with* NAT'L CONF. STATE LEGIS., STATE MINIMUM WAGES, 2019 MINIMUM WAGE BY STATE, http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx#:~:targetText=The%20Georgia%20state%20minimum%20wage,state%20minimum%20wage%20of%20%245.15 (last visited Sept. 5, 2020).

[52] *See Prison Wages*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/blog/2017/04/10/wages/ (last visited Sept. 5, 2020) (showing Alabama, Arkansas, Florida, Georgia, and Texas do not pay regular prison job workers).

[53] *Id*. (providing the example of Massachusetts, which deducts at least half of every paycheck, with the other half going to a savings account to pay costs such as court fines and fees and victim witness assessments.).

[54] For example, Florida has implemented a "pay to stay" scheme in its prison system:

> The state of Florida, which pays inmate workers a maximum of $0.55 per hour, billed former inmate Dee Taylor $55,000 for his three-year sentence. He would have had to work 100,000 hours, or over 11 years nonstop, at a prison wage to pay for his three year incarceration. Even as a free man working at Florida's minimum wage of $8.25, he would have to work more than 6,666

An additional source of debt could stem from domestic support obligations. The exoneree might also owe taxes or child support if he has children.[55] Studies measuring the average amount of child support owed by incarcerated individuals demonstrate that these payments can be enormous.[56]

Another likely source of debt is an exoneree's attorney's fees.[57] These fees might extend to lawyers who provided advocacy prior to the exoneration. In a study of the first 250 DNA exonerations, researchers found that only 14% of these factually innocent people initially won a reversal on direct appeal.[58] Court costs and fees can also accumulate to extremely high amounts.[59] In other words, exonerations involve long legal battles, which can be incredibly expensive and can create a substantial source of debt.

Debt could also stem from being a parolee. If the exoneree was released from prison after serving a full sentence and was placed on parole before being exonerated, he will have parole fees and fines.[60] Parole might also include travel, curfews that limit the exoneree's ability to work certain hours, paying for supervision and drug and alcohol testing, and securing approved housing.[61] The cost of parole or other court supervision can be enormously high, and debt

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> hours—more than three regular work years—and not spend a penny on anything else to pay it back. These debts are impossible for the even hardest-working people to pay off.

Chandra Bozelko & Ryan Lo, *You've Served Your Time. Now Here's Your Bill*, HUFFINGTON POST (Sept. 16, 2018), https://www.huffpost.com/entry/opinion-prison-strike-labor-criminal-justice_n_5b9bf1a1e4b013b0977a7d74.

[55] 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, 130 (2010).

[56] Mona Lewandoski, *Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191, 199 (2010) (citations omitted) ("One study estimated that thirty-two percent of Ohio inmates had child support obligations, as did seventeen percent of Illinois inmates and sixteen percent of Texas inmates. Studies of Colorado and Massachusetts inmates placed the average total child support debt at release around $16,000.").

[57] Calvin Willis's fees from trial and post-conviction proceedings totaled over $14,000. *Calvin Willis: Thank God For DNA*, in SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED 141 (Lola Vollen & Dave Eggers, eds., Verso ed. 2017) (discussing an interview with Calvin Willis that was conducted by editor Lola Vollen and foreword author Scott Turow); Kahn, *supra* note 55, at 129.

[58] Hartung, *supra* note 26, at 374 n. 32 ("appellate or postconviction courts reversed 14% of exonerees' convictions, or 9% if one excludes capital cases.") (quoting Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 98 (2008)).

[59] Lewandoski, *supra* note 56, at 198 (citations omitted).

[60] REBEKAH DILLER, JUDITH GREENE & MICHELLE JACOBS, MARYLAND'S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY 12 (2009), https://www.brennancenter.org/sites/default/files/2019-08/Report_Maryland%27s-Parole-Supervision-Fee.pdf (For example, in Maryland, "[t]he mean amount [of supervision fees] was $743 and the median was $560. . . . [I]t is not surprising that nine out of ten people on parole will have failed to pay the full amount of supervision fee debt when they exit the parole system." Further, a 17% charge for collection is applied when a debt is transferred at the end of a parolee's parole term.).

[61] Lewandoski, *supra* note 56, at 225 (citations omitted).

resulting from this court supervision should be considered in an exoneree's bankruptcy petition.

Another consideration is the cost of education. If the exoneree chose to pursue an education before or while in prison, he might have accumulated student loans. Further, his family members might have decided to pursue an education during the wrongful incarceration. The exoneree was denied the opportunity to assist with the cost of this education, resulting in further debt.

Beyond the exoneree's personal debt is the consideration of his family members and the debts that they might have accrued while he was in prison. Families often pay for the cost of making phone calls and visits to and from prison, as well as contributing to the commissary accounts of their loved ones.[62] The family may have also spent thousands of dollars on representation that did not prevent the wrongful conviction.[63] For example, Wilton Dedge spent twenty-two years in prison.[64] His parents used their retirement fund and took out a second mortgage to pay for his attorney's fees.[65] Vincent Moto spent nine years in prison before he was exonerated.[66] His mother spent $160,000 on legal fees.[67] Mr. Moto was exonerated in Pennsylvania, which does not yet have a compensation statute, leaving him without any aid to help his mother pay the fees after exoneration.[68] Due to their time in prison and the subsequent efforts that were made to obtain exoneration, exonerees and their families are left in financial distress. This financial distress is compounded by the lack of resources provided to exonerees when they leave prison.

2. Debt Due to Barriers Faced Upon Release from Prison

Exonerees also accrue debt due to the barriers they face once they are released from prison. While in prison, exonerees have missed the chance to

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[62] *Following the Money of Mass Incarceration,* PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/reports/money.html (last visited Nov. 6, 2020) (estimating that families spend $2.9 billion a year on commissary accounts and phone calls.).

[63] *See, e.g.*, SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED 141–57 (Lola Vollen & Dave Eggers, eds., Verso ed. 2017); *see also* Kahn, *supra* note 55, at 129.

[64] *Wilton Dedge,* INNOCENCE PROJECT, https://www.innocenceproject.org/cases/wilton-dedge/ (last visited Oct. 23, 2019).

[65] Audrey D. Koehler, Comment, *Exonerated, Free, and Forgotten: How States Continue to Punish the Wrongfully Convicted Through Procedural Hoops and Inadequate Compensation*, 58 WASHBURN L.J. 493, 489–99 (2019).

[66] *Vincent Moto*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/vincent-moto/ (last visited Oct. 23, 2019).

[67] Koehler, *supra* note 65, at 499.

[68] Koehler, *supra* note 65, at 499.

develop professionally, to build skills, and to successfully seek employment with robust experience on their resume. 47% of exonerees were twenty-five years old or younger at the time of their conviction.[69] Of those 1,267 exonerees, the average amount of time between conviction and exoneration was thirteen years.[70] Access to education within prisons has proven to be unsuccessful and unhelpful to gaining employment upon release from prison.[71] Thus, exonerees—whose young adult lives were spent in prison—will need access to holistic training and educational programs once they are released.[72]

Upon release from prison, exonerees face many barriers, including securing healthcare, housing, and employment.[73] The struggles stemming from these barriers are exacerbated by the scant support given to exonerees once released from incarceration. These barriers will likely impair an exoneree's ability to climb out of the debt he accumulated while in prison.[74] An exoneree might also face a range of mental health issues that stem from the trauma he endured while incarcerated.[75] The debts that stem from these issues should be discharged, as they resulted from wrongful conviction.

II. EXISTING FINANCIAL MECHANISMS TO RESPOND TO WRONGFUL CONVICTION

It has long been argued that exonerees should be granted indemnification for their wrongful incarceration.[76] Currently, financial remedies provided to

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[69] NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Oct. 14, 2020).

[70] *Id*.

[71] On the topic of education, Lewandowski notes:

> Prison education may not significantly improve employment prospects or income. One study found that a prison GED brought a modest earnings premium for only four years after release. A Florida study found little evidence of a prison GED providing any employment benefit, and then only for minority offenders, and an Ohio study found that a prison GED had "no effect" on the probability of employment.

Lewandoski, *supra* note 56, at 221 (citations omitted).

[72] Koehler, *supra* note 65, at 497.

[73] INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 8–10, https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf (last visited Sept. 28, 2019).

[74] Koehler, *supra* note 65, at 498.

[75] Leslie Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, 5 CRIM. L. BRIEF 10 (2010).

[76] These discussions have been taking place since at least 1932. Bochard and Lutz wrote in their seminal book:

exonerees are obtained through (a) a state's compensation statute; (b) a private compensation bill; or (c) civil lawsuits. Only thirty-five states, the District of Columbia, and the federal government offer compensation schemes.[77] The remaining fifteen states do not have compensation statutes, leaving exonerees without remedy unless they successfully petition the state legislature for a private compensation bill, file a section 1983 civil rights claim, or file a common-law tort claim.[78] These three methods of obtaining compensation are not a reliable or adequate form of providing indemnification to the wrongfully convicted. This Section examines the three financial mechanisms that are available to purportedly provide remedies to the wrongfully convicted.

A. Compensation Statutes

States with statutory schemes provide general and limited remedies for wrongful incarceration.[79] Some existing statutory schemes have been found to "all but guarantee" that exonerees "have no realistic opportunity to prove they are deserving of refunds."[80] The amount of money provided by compensation statutes varies wildly by state and can vary within each state.[81] Many statutes

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> [w]hen . . . by a misguided or mistaken operation of the governmental machine there is a miscarriage of justice and the helpless innocent is actually convicted, the public conscience is and ought to be revolted and dismayed. The least the community can do to repair the irreparable, is to appease the public conscience by making such restitution as it can by indemnity.

BORCHARD & LUTZ, *supra* note 12, at 392.

[77] *Compensating the Wrongfully Convicted,* INNOCENCE PROJECT, https://www.innocenceproject.org/compensating-wrongly-convicted/ (last visited Sept. 28, 2019).

[78] The fifteen states are: Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Kentucky, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming. *Id*. As of August 31, 2020, 256 exonerations have taken place in these states. NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Aug. 31, 2020).

[79] But, as Professor Gutman notes, the existing remedies are incomplete and insufficient:

> Such statutes largely ignore the nature, severity, and variation of injuries suffered while incarcerated; fail to account for post-release damages, such as ongoing psychological and medical harms; and overlook the pressing needs many exonerees have for social, vocational, medical, and educational services following what is often years of wrongful incarceration. In sum, most of these statutes reflect a begrudging rather than a restorative approach to remedying the harm done to the wrongly convicted.

Gutman, *supra* note 43, at 371–72.

[80] Nelson v. Colorado, 137 S. Ct. 1249, 1260 (2017) (Alito, J., concurring). The Exoneration Act of Colorado, and its requirement that defendants prove their innocence by clear and convincing evidence a second time in order to obtain the refund of fees paid pursuant to their wrongful conviction, violates due process. *Id.* at 1255. Justice Alito also questioned why the defendant should not be compensated for "all the adverse economic consequences of the wrongful conviction . . . [s]uch as attorney's fees, lost income, and damage to reputation." *Id*. at 1261 (Alito, J. concurring).

[81] NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.

place demanding burdens on the exonerees or cap the amount of award that can be given.[82] This Section considers the ineffectiveness of compensation statutes in providing meaningful remedies to the wrongfully convicted.

It is first helpful to examine the vast differences in compensation statutes across states.[83] While some states provide more comprehensive models of compensation, others fall woefully behind. Texas is one of the five states with the most exonerated individuals, with 389 exonerations thus far.[84] Texas has vastly improved its compensation scheme since the initial compensation legislation was passed in 1965.[85]

This improvement is found in the Tim Cole Act, which was passed after the posthumous exoneration of Timothy Cole. In 1986, Mr. Cole was convicted and sentenced to twenty-five years for a rape he did not commit.[86] Although the actual perpetrator wrote to police and prosecutors to confess in 1995, these letters were ignored.[87] Mr. Cole died in prison in 1999.[88] The court made four findings when it posthumously exonerated Mr. Cole in 2009, including that Mr. Cole would not have died in prison if the criminal legal system had not failed him.[89] When Texas passed the Tim Cole Act, compensation for exonerees was increased from $50,000 to $80,000 for every year spent in prison.[90] In the event of a posthumous exoneration, the Act also extends compensation, college tuition, and funds for personal and financial planning to the exoneree's heirs and legal representatives.[91]

While this compensation scheme offers more compensation to exonerees than other schemes, it is far from perfect. For example, Texas does not provide

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aspx (last visited Sept. 28, 2019).

[82] *Id*.

[83] Newton N. Knowles, *Exonerated, but Not Free: The Prolonged Struggle for a Second Chance at a Stolen Life*, 12 HASTINGS RACE & POVERTY L. J. 235, 259 (2015) ("[T]he lack of uniformity among the fifty states does little to enhance the integrity of our criminal justice system.").

[84] NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Oct. 14, 2020) (the other states in the top five are Illinois, New York, California, and Michigan). These states account for 49% of exonerations. *Id*.

[85] *Id*.; John Shaw, Comment, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593, 604–10 (2011).

[86] *Timothy Cole,* INNOCENCE PROJECT, https://www.innocenceproject.org/cases/timothy-cole/ (last visited Aug. 26, 2020).

[87] *Id*.

[88] *Id*.

[89] Shaw, *supra* note 85, at 600–01.

[90] TEX. CIV. PRAC. & REM. CODE. ANN. § 103.052 (West 2011).

[91] TEX. CIV. PRAC. & REM. CODE. ANN. § 103.001(c) (West 2011).

a cap on attorney's fees for the wrongfully convicted.[92] One Texas attorney, who represented thirteen wrongfully convicted clients, claimed he was owed $8 million from his clients.[93] While Texas at least recognized the egregious error made during Mr. Cole's case, there is significant room for improvement, such as providing reentry assistance for those who are still living when exonerated.

On the other end of the spectrum is New Hampshire, the state with both the lowest number of exonerations and the lowest cap on compensation.[94] New Hampshire has had two exonerations and caps compensation for exonerees at $20,000.[95] Does New Hampshire have such a low compensation cap because of the few exonerations that it has had? Or perhaps, do states rely on cases that are similarly horrific to Mr. Cole's case to find the motivation to provide a just and adequate compensation scheme to exonerees?

Only a few states provide reentry assistance to exonerees through statutory schemes.[96] Further, rather than guaranteeing certain services, some of these statutes provide limited assistance by capping the amount of compensation that can be directed to obtain reentry services.[97] Instead, many exonerees are left to locate non-profits that provide reentry assistance.[98]

To make matters worse, in states where compensation is capped, the wrongfully convicted are not consistently or equitably compensated.[99] In a study

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92 Shaw, *supra* note 85, at 614; *but see* IOWA CODE ANN. § 663A.1 (West 1997); ME. REV. STAT. ANN. tit. 14, § 8241 (1993); N.H. REV. STAT. ANN. § 541-B:14 (LexisNexis 2010); UTAH CODE ANN. § 78B-9-405 (LexisNexis 2008).

93 Shaw, *supra* note 85, at 614.

94 NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Oct. 14, 2020); *Compensation Statutes: A National Overview,* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf (last visited Sept. 28, 2019).

95 NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Oct. 14, 2020); N.H. REV. STAT. ANN. § 541-B:14 (LexisNexis 2010).

96 Massachusetts and Illinois are among a small number of states who provide post-exoneration support services along with their monetary compensation schemes. Knowles, *supra* note 83, at 403; *see, e.g.*, MASS. GEN. LAWS ANN. ch. 258D, § 5 (West 2018) ("The court may include, as part of its judgment against the commonwealth, an order requiring the commonwealth to provide the claimant with services that are reasonable and necessary to address any deficiencies in the individual's physical and emotional condition"); *see also* VT. STAT. ANN. tit. 13, § 5574 (West 2015) ("[C]ompensation for any reasonable reintegrative services and mental and physical health care costs incurred by the claimant for the time period between his or her release from mistaken incarceration and the date of the award.").

97 LA. STAT. ANN. § 15:572.8 (2019) (providing up to $80,000 in "compensation for the loss of life opportunities resulting from the time spent incarcerated," including expenses relating to job skills training, education, housing, and any other reasonable services needed).

98 *See supra* Section I(B).

99 Gutman, *supra* note 43, at 403 ("States with compensation caps produce unjustifiable inequalities among exonerees within the state.").

of state statutory compensation, Professor Jeffrey Gutman divided different statutes into three categories: (1) statutes that provide a daily or annual cap on compensation without providing an overall cap on compensation; (2) statutes that provide a daily or annual cap on compensation with an overall cap on compensation; and (3) an overall cap on damages.[100] Gutman critiques each category: Category 1 and 2 "depersonalize" the process, "presuming that all wrongfully incarcerated persons suffer equally."[101] By providing a cap on total compensation, Category 2 "penalize[s] those incarcerated the longest."[102] If their total compensation is less than it would have been without the cap, they are essentially left without compensation for their later years in prison.[103] Similarly, in Category 3, those who have served lengthy sentences may not be compensated for their later years in prison due to the total cap.[104]

A further issue with state statutory compensation schemes is the burden they place on exonerees. Some states require the exoneree to prove that he did not engage in any misconduct that contributed to his prosecution.[105] In some states, the exoneree must receive a pardon from the governor, which is a procedural step that is not required for a person to be exonerated by law.[106] Other states require the exoneree to have been exonerated by DNA evidence.[107] This raises obvious issues in cases where there was no DNA evidence, the DNA evidence was destroyed or missing, or the case predated DNA testing and did not involve the collection of samples for testing.[108] Further, in Florida, exonerees with felony convictions prior to their wrongful conviction are ineligible to receive compensation through the statutory compensation scheme.[109] For example,

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100 Gutman, *supra* note 43, at 401–02.

101 Gutman, *supra* note 43, at 402.

102 Gutman, *supra* note 43, at 401–02.

103 Gutman, *supra* note 43, at 402.

104 Professor Gutman discusses the way Illinois implements this approach:

> Illinois, with the third-highest number of exonerees on the Registry . . . provides capped amounts for 0-5 years, 5-14 years, and over 14 years of incarceration . . . One 2010 exoneree received $85,350 for a 1.2-year wrongful incarceration, which exceeds $70,000 per year. Another man exonerated the same year after 23.1 years of wrongful imprisonment was awarded $199,500, or just over $8600 per year.

Gutman, *supra* note 43, at 402–03 (citations omitted).

105 Gutman, *supra* note 43, at 371 (citing D.C. CODE ANN. § 2-422(2) (West 2017); 735 ILL. COMP. STAT. ANN. 5/2-702(d) (LexisNexis 2017); N.J. STAT. ANN. § 52:4C-3(d) (West 2013); N.Y. CT. CL. ACT § 8-b(5)(d) (McKinney 2017); VA. CODE ANN. § 8.01-195.10B (2017)).

106 Gutman, *supra* note 43, at 371 n. 8 (Maine, Maryland, North Carolina, and Tennessee).

107 Gutman, *supra* note 43, at 371 n. 8 (Missouri and Montana).

108 Gutman, *supra* note 43, at 371.

109 Gutman, *supra* note 43, at 371.

Derrick Williams served eighteen years after he was convicted in Florida.[110] When Mr. Williams was released from his wrongful incarceration wearing only a prison uniform, he was ineligible to receive compensation due to a prior nonviolent felony conviction.[111]

It is incredibly unjust that someone who has been victimized by the criminal legal system should be expected to have lived a life free of mistakes prior to their wrongful conviction. Overall, the route to obtaining just compensation through state statutes is not a reliable, equitable, or just form of compensation to the wrongfully convicted.

B. Private Compensation Bills

The second avenue to receiving compensation is through a private bill. The exoneree must lobby the state legislature to pass a private bill in order to receive compensation from the state treasury.[112] Yet private bills present an unreliable, inequitable, and inadequate form of compensation.[113]

First, in many states where statutory compensation schemes do not exist, private bills are barred and therefore unavailable to exonerees.[114] Second, in states that have allowed private compensation bills, the amount paid to exonerees is not proportional to the length of time the exonerees spent in prison. For example, in Georgia, Clarence Harrison received $1 million from a private bill after serving nearly eighteen years in prison.[115] John Jerome White, who served more than twenty-two years, received $500,000 from a private bill.[116]

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[110] *Derrick Williams*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/derrick-williams/ (last visited Jan. 22, 2019).

[111] Koehler, *supra* note 65, at 496; *see also* Lewandoski, *supra* note 56, at 223 ("About two-thirds of corrections departments release inmates with their personal savings and cash known as 'gate money,' but often no more than $200.") (citation omitted).

[112] Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 510 (2011) (quoting Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665 (2002)).

[113] *See* Bernhard, *supra* note 12, at 94 ("Ultimately, the private bill remedy is an inadequate solution for individuals who have been wrongfully convicted.").

[114] *See, e.g.*, Gutman, *supra* note 43, at 372 n. 12.

[115] *Clarence Harrison*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3286#:~:text=Harrison%20was%20released%20from%20custody,%241%20million%20in%20state%20compensation (last visited Sept. 12, 2020) (While Mr. Harrison received significantly more than other Georgia exonerees, this Comment will later discuss how his award did not provide with the tools to successfully reenter the economy. *See infra* Section IV(B)(ii).).

[116] *John Jerome White,* THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3735#:~:text=After%20White%20was%20exonerated%2C%20prosecutors,%24500%2C000%20in%20compensation%20to%20White (last visited Sept. 12, 2020).

Third, the process relies on the political makeup of the legislature rather than on the legal system.[117] The exoneree must find a legislator who is not only willing to introduce the bill but also willing to find support in both houses.[118] Without a legislator who is well-connected and willing to fight for the bill, exonerees have a very slim chance of obtaining compensation through this avenue.[119] For example, also in Georgia, Sam Scott and Doug Echols did not receive compensation following their exoneration despite locating a legislator to lobby for them.[120] The district attorney who initially convicted the men wrote to the legislature to oppose the private bills, alleging that the vacatur of their convictions did not establish their innocence.[121] Although DNA exonerated them, Mr. Scott and Mr. Echols never received compensation, and their criminal records were never expunged.[122] Further, the district attorney was granted qualified immunity for his false statements to the state legislature.[123]

Fourth, and finally, the struggle to obtain compensation does not stop once the private bill has passed. For example, in one case, although two exonerees successfully passed a private bill, the process of actually obtaining the compensation spanned decades.[124] Overall, the process of obtaining a private bill is too challenging to be a reliable form of compensation. The process is "susceptible to manipulation by the unscrupulous since the decision to vote an award is based upon politicians' speeches made on the floor of the congress, not upon sworn testimony subject to cross examination at a fact-finding hearing."[125] This process takes virtually all control out of the exoneree's hands, as he is reliant upon the legislative body to make a decision that might ultimately be arbitrary rather than just. In sum, private bills are unreliable due to the procedure and politics that can slow down or even bar an exoneree from obtaining compensation.

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117 *See* Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403, 408 (2009).

118 *Id*.

119 *See* Bernhard, *supra* note 12, at 95.

120 ASSOCIATED PRESS, *Cleared by DNA, 1 Ga. Man Gets $1M, 2 Get Nothing*, DESERET NEWS (July 18, 2009, 10:29 AM), https://www.deseret.com/2009/7/18/20329691/cleared-by-dna-1-ga-man-gets-1m-2-get-nothing#in-this-april-11-photo-sammy-scott-right-describes-his-time-served-in-the-georgia-prison-system-at-his-home-in-pooler-ga-doug-echols-left-listens-on-both-echols-and-scott-served-over-a-decade-in-prison-before-being-exonerated-through-dna-evidence).

121 *Id*.; *see* Echols v. Lawton, 913 F.3d 1313, 1318 (11th Cir. 2019).

122 *Echols*, 913 F.3d at 1318.

123 *Echols*, 913 F.3d at 1326.

124 Bernhard, *supra* note 12, at 95 (It took more than twenty years for two men who were wrongfully convicted of murder and sentenced to death to receive compensation.).

125 Bernhard, *supra* note 12, at 95.

C. Civil Lawsuits

The third and final method of obtaining compensation is through civil lawsuits. Lawsuits are available for only a small number of cases, as they require an exoneree to prove he is a victim of intentional misconduct.[126] Although the National Registry reports that police, prosecutorial, or other government official misconduct contributed to 54% of reported wrongful convictions, many of these actors are protected by immunity.[127] Section 1983 claims are made more complicated by the fact that there is rarely one actor who has caused a wrongful conviction, leaving exonerees to somehow prove that "each individual defendant deprived him of a specific constitutional right and that the deprivation of this constitutional right, in turn, caused his injuries."[128] This is a huge hurdle to overcome.

Even when section 1983 lawsuits are successful, they span many years. Walter Swift, for example, spent twenty-six years in prison for a crime that he

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[126] *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, INNOCENCE PROJECT 12, https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf (last visited Sept. 12, 2020) ("In most cases, there is no intentional misconduct that caused the wrongful conviction, or at least, none that can be proven."). *See also* Teressa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 692–93 (2008). William O'Dell Harris was wrongfully convicted of sexual assault in West Virginia. When the court vacated the conviction six years later, it considered a report by the American Society of Crime Laboratory, which showed egregious misconduct on behalf of Fred Zain, the police serologist who testified at Mr. Harris's trial. The court stated:

> The acts of misconduct on the part of Zain included (1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory records; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results.

In re Investigation of W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 517–18 (W. Va. 1993). Later that year, the West Virginia Supreme Court of Appeals ruled that the results of all of the blood tests analyzed by Zain were invalid. *See Court Invalidates a Decade of Blood Test Results in Criminal Cases*, N.Y. TIMES, Nov. 12, 1993 at A.20, https://www.nytimes.com/1993/11/12/us/court-invalidates-a-decade-of-blood-test-results-in-criminal-cases.html (This case is an example of an extremely high standard being met due to the repeated and systematic misconduct of an actor in a case.).

[127] *See* NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Sept. 12, 2020); *see also* Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 630, 673 (finding that immunities may offer municipalities, and their "attached" officials, too much protection from liability); *see also* Bernhard, *supra* note 12, at 87.

[128] Ravenell, *supra* note 126, at 692–93.

did not commit.[129] Although he was released in 2008, he was not awarded $2.5 million until 2015.[130] This amount was the result of a settlement with the City of Detroit and was delayed due to the city's bankruptcy.[131] By the time Mr. Swift reached this settlement, he had spent seven years since his exoneration fighting legal battles.[132] One-third of his settlement money went to his lawyers for their efforts.[133] Mr. Swift is one example of how even "successful" section 1983 lawsuits can be unhelpful due to the costly and inefficient nature of litigation.

If an exoneree wishes to bring a civil tort claim, he must know or have reason to know of the tortious conduct, and the statute of limitations generally requires that the exoneree file the claim within one to three years from this knowledge.[134] The average amount of time between conviction and exoneration is nine years.[135] Since the average time of wrongful incarceration is significantly greater than the general requirement of the statute of limitations, it is unlikely that an exoneree will be able to meet the requirement of filing a civil tort claim in time.

Alternatively, if the exoneree wishes to bring a malicious prosecution claim, his claim must meet an incredibly high standard. Under the common law, an exoneree generally must show that (1) the prosecution initiated a proceeding against him; (2) the proceeding terminated in favor of the prosecution; (3) there was no probable cause for the proceeding; (4) the primary purpose of the prosecution involved malice; and (5) damage resulted from the prosecution.[136] Thus, "an exonerated claimant essentially alleges that a prosecutor maliciously brought criminal charges against [him] without probable cause and obtained a conviction that resulted in [his] wrongful incarceration as shown by [his] later exoneration."[137]

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[129] *Walter Swift*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3673 (last visited Sept 12, 2020).

[130] *Id*.

[131] Ed White, *Detroiter Cleared of Rape Settles with City for $2.5M*, DETROIT FREE PRESS (Feb. 3, 2015, 4:23 PM), https://www.freep.com/story/news/local/michigan/detroit/2015/02/03/walter-swift-detroiter-cleared-rape-settles-city/22811971/.

[132] *See id*.

[133] *Id*.

[134] Bernhard, *supra* note 12, at 87.

[135] *See* NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Oct. 14, 2020).

[136] Alberto B. Lopez, *$10 and A Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 693 (2002) (citing Dickey v. Kaiser Aluminum & Chem. Sales, Inc., 286 F.2d 137, 139 (5th Cir. 1960)).

[137] *Id*.

Civil lawsuits present difficult procedural and legal standards that are compounded by the fact that the Sixth Amendment does not guarantee representation in civil proceedings.[138] This leaves exonerees to navigate this avenue to compensation with potentially no representation. Unsurprisingly, only 28% of lawsuits pursued by DNA exonerees have been successful in obtaining compensation.[139] Civil lawsuits are another inadequate mechanism to obtain just compensation for wrongful conviction.

III. OPPORTUNITY FOR A FRESH START THROUGH THE BANKRUPTCY CODE

The financial support given to exonerees is inadequate. Although the current methods to receive compensation are not effective, there is an existing system that could aid exonerees in obtaining financial relief: the bankruptcy system. The Code strives to grant a "fresh start" to the "honest but unfortunate debtor."[140] Bankruptcy provides an opportunity to aid the wrongfully convicted with the financial difficulties they suffer as a result of their wrongful incarceration.

A. Bankruptcy Basics

To understand an exoneree's path to relief through the bankruptcy courts, it is important to first consider the basics of a bankruptcy proceeding. Generally, a debtor begins the bankruptcy proceeding by filing a bankruptcy petition.[141] The filing of the petition creates the bankruptcy estate.[142] The petition is accompanied by additional documents, which provide insight into the assets of the estate, as well as what is owed by the estate.[143] This includes a list of creditors, with the amounts and nature of their claims, the source, amount, and

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[138] *See* Eve Brensike Primus, THE ILLUSORY RIGHT TO COUNSEL, 37 OHIO N.U. L. REV. 597, 606 (2011) (citing Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

[139] INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 4, https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf (last visited Sept. 28, 2019).

[140] Grogan v. Garner, 498 U.S. 279, 286–87 (1991).

[141] 11 U.S.C. § 301(a) (2019).

[142] *Id*. § 541(a).

[143] With the filing of the petition, most debtors must also file a schedule of assets and liabilities, current income and expenditures, executory contracts and unexpired leases, and a statement of financial affairs. FED. R. BANKR. P. 1007(b). In addition, the debtor must file a certificate of credit counseling, a copy of any debt repayment developed through that credit counseling, if applicable, any evidence of payment from employers received sixty days before filing, a statement of monthly net income and any anticipated increase in income or expenses after filing, and a record of any interest the debtor has in federal or state qualified education or tuition accounts. 11 U.S.C. § 521. The debtor will also provide the chapter 13 trustee with a copy of tax returns for the most recent tax year or years that tax returns for prior years that had not been filed by the time the bankruptcy case began. *Id*. § 521(e)(2)(A)(i).

frequency of the debtor's income, a list of all of the debtor's property, and a detailed list of the debtor's monthly living expenses.[144]

Filing the bankruptcy petition not only creates the bankruptcy estate and begins the proceedings, but also initiates the automatic stay.[145] The automatic stay is a "fundamental protection afforded by the Bankruptcy Code" that stops collection actions outside of the bankruptcy forum against the debtor of the estate.[146]

> The automatic stay is designed to effect an immediate freeze of the *status quo* by precluding and nullifying post-petition actions, judicial or nonjudicial, in nonbankruptcy fora against the debtor or affecting the property of the estate . . . [and] ensures that all claims against the debtor will be brought in a single forum, the bankruptcy court.[147]

The automatic stay provides a shield to the debtor from any other action against him, making it a very important aspect of the fresh start provided by the Code.[148]

Certain aspects of the filing of a bankruptcy petition need special consideration in the case of an exoneree. For example, the automatic stay does not apply to ongoing criminal actions involving the debtor.[149] Therefore, the automatic stay would protect an exoneree from any collection action claims, while allowing him to pursue any ongoing proceeding related to his exoneration or compensation.[150] Another consideration is whether, if married, an exoneree would prefer to file individually or file jointly with a spouse.[151] On the other hand, the exoneree might not wish for the inclusion of his spouse's assets in the valuation of the bankruptcy estate, as this would entail incorporating more assets into the debtor's repayment plan.[152]

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144 *Id*. § 521.

145 *Id*. § 1302(b).

146 *In re* Wingard, 382 B.R. 892, 899 (Bankr. W.D. Pa. 2008) (citations omitted).

147 Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 585 (9th Cir. 1993) (citations omitted).

148 *See* Robert J. Bein, *Subjectivity, Good Faith and the Expanded Chapter 13 Discharge*, 70 MO. L. REV. 655, 658 (2005).

149 An exception to the automatic stay is "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b)(1).

150 A party can request, after notice and hearing, that the court grant relief from the automatic stay through termination, annulment, modification, or conditioning of the stay for cause. *Id*. § 362(d)(1). Courts have discretion in granting these motions. Cause, which is not defined by the Code, has been found to permit litigation to continue in a different, more appropriate forum. *In re* Scarborough-St. James Corp., 535 B.R. 60, 67–68 (Bankr. D. Del. 2016).

151 *Id*. § 302(a).

152 If the exoneree does not wish to file a joint petition, his spouse may will not automatically be entitled to discharge in a separate bankruptcy proceeding. *See In re* Elkins, 562 B.R. 685, 691 (N.D. Ohio 2016). The

Chapters 7, 9, 11, 12, 13, and 15 create different forms of bankruptcy proceedings for different types and needs of debtors.[153] Individuals are eligible to file in chapters 7, 11, 12, 13, and 15 bankruptcy.[154] This section explains why chapter 13 would be the preferable chapter for an exoneree, and how an exoneree would move through such a proceeding.

B. Chapter 13 Bankruptcy

There are many reasons for an exoneree to file for bankruptcy under chapter 13 over the other chapters. First, "[t]he purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts."[155] Second, chapter 13 allows debtors to keep their property throughout the bankruptcy proceedings.[156] By contrast, a chapter 7 case requires debtors to surrender all pre-bankruptcy property.[157] The chapter 7 case divides all-pre bankruptcy property and distributes it to the creditors in the case.[158] Third, chapter 13 discharge is broader than the discharge

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former spouse of a wrongfully convicted man moved to reopen her separate bankruptcy case. She argued that the trustee of her estate should be allowed to file an amended tax return due to a change in federal law that allows exonerees to exclude money obtained through civil damages, restitution, or other monetary award due to wrongful conviction from their tax filings. She argued that she was entitled to this tax refund as well. The district court stated, "[t]he bankruptcy court properly interpreted § 139F and determined that claims or suits for refund would be futile because the Debtors are not wrongfully incarcerated individuals; therefore, they may not avail themselves of the exclusion from gross income set forth in § 139F as a matter of law." *Id.*

[153] 11 U.S.C. §§ 701–784 (Chapter 7 provides for liquidation proceedings. Chapter 7 can be filed for by individuals and corporations and is the most common type of bankruptcy case); *id*. §§ 901–946 (Municipalities and other governmental entities file for chapter 9 bankruptcy); *id*. §§ 1101–1174 (Chapter 11 proceedings are reorganization proceedings and are typically pursued by legal entities, not individuals); *id*. §§ 1201–1232 (Chapter 12 is a debtor who is a family farmer or fisherman with a regular income); *id*. §§ 1301–1330 (Chapter 13 allows for the adjustment of debts of an individual with regular income); *id*. §§ 1501–1532 (Chapter 15 is reserved for ancillary and cross-border cases).

[154] *Id*. §§ 701–784 (Chapter 7 provides for liquidation proceedings. Chapter 7 can be filed for by individuals and corporations and is the most common type of bankruptcy case); *id*. § 901–946 (Municipalities and other governmental entities file for chapter 9 bankruptcy); *id*. §§ 1101–1174 (Chapter 11 proceedings are reorganization proceedings and are typically pursued by legal entities, not individuals); *id*. §§ 1201–1232 (Chapter 12 is a debtor who is a family farmer or fisherman with a regular income); *id*. §§ 1301–1330 (Chapter 13 allows for the adjustment of debts of an individual with regular income); *id*. §§ 1501–1532 (Chapter 15 is reserved for ancillary and cross-border cases).

[155] *In re* Pierre, 468 B.R. 419, 424–25 (Bankr. M.D. Fla. 2012) (quoting H.R. REP. NO. 95-595 (1977)).

[156] Bein, *supra* note 148, at 667–68.

[157] *Compare Chapter 13–Bankruptcy Basics,* UNITED STATES COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Sept. 19, 2020) (Chapter 13 allows a debtor to pay debt over 3-5 years and keep property), *with Chapter 7–Bankruptcy Basics,* UNITED STATES COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Sept. 19, 2020) (A chapter 7 Bankruptcy proceeding requires debtors to sell their nonexempt property and distribute the proceeds to creditors).

[158] *See* 11 U.S.C. § 101(10)(A)–(C) (2019) (A "creditor" is "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; [an] entity that has a claim against

available in chapter 7, leaving a greater opportunity for more of the debtor's debt to be discharged.[159] While chapter 13 cases are typically longer than chapter 7 cases and thus require more legal fees, this Comment argues that an exoneree should be entitled to both an expedited discharge and a bankruptcy attorney at no cost.[160] With a bankruptcy attorney assigned cost-free to the exoneree, chapter 13 offers the best way for him to achieve a fresh start.

1. Eligibility for Chapter 13

To be eligible for chapter 13, a debtor must (1) be an individual; (2) have a regular income; and (3) meet certain debt limitations.[161] Courts have not required a particularly strong showing of regular income, and the exoneree could potentially argue that pending compensation could meet this standard.[162] Chapter 13 also requires that both bankruptcy petitions and payment plans be filed in good faith.[163] Good faith is considered by using a subjective test that considers the totality of the debtor's circumstances.[164] If the court determines a lack of good faith, it may dismiss the case or convert the case to chapter 7.

Courts first consider whether the bankruptcy petition was filed in good faith. Factors considered by courts include:

> The nature of the debtor's debts; the timing of the petition; how the debts in question arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.[165]

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the estate . . . or an entity that has a community claim.").

159 Bein, *supra* note 148, at 668.

160 Dickerson, *supra* note 2, at 629.

161 Currently, individuals with assets less than $394,725 in unsecured debt and $1,184,200 in secured debt may filed for chapter 13 relief, though the amount is amended by Congress occasionally. 11 U.S.C. § 109(e).

162 If the exoneree has been unable to secure employment, the Chapter 13 proof of income requirement could also be satisfied by a spouse if the petition is filed jointly. *See* Robert G. Drummond, *Disposable Income Requirements Under Chapter 13 of the Bankruptcy Code*, 57 MONT. L. REV. 423, 424 (1996) ("[T]he disposable income requirement is a flexible concept which has challenged the interpretive power of the courts.").

163 11 U.S.C. § 1325(a)(3).

164 Bein, *supra* note 148, at 657 ("The evaluation of a debtor's good faith, which relies not on the application of a mechanical or mathematical test, but instead on a judge's assessment of whether the facts and circumstances, in their totality, meet a broadly defined conceptual standard, is inherently subjective.").

165 Bein, *supra* note 148, at 671 (citing *In re* Lilley, 91 F.3d 491, 496 (3d Cir. 1996); *In re* Cabral, 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002); *In re* Kerschner, 246 B.R. 495, 497 (Bankr. M.D. Pa. 2000); *In re* Goddard, 212 B.R. 233, 237–38 (D.N.J. 1997)).

The good faith test is "one of the central, perhaps the most important confirmation finding to be made by the court in any chapter 13 case."[166] The burden of proving good faith lies with the debtor.[167] If an exoneree were to file for bankruptcy, these factors would help a court evaluate the reason he filed the chapter 13 petition.

The exoneree's wrongful incarceration will affect a court's analysis of the factors. For example, the timing of filing the petition is often at issue. If a debtor files a petition too long after the accrual of the debt, a court might weigh that fact against them when considering his eligibility for chapter 13. But an exoneree would have a strong counterargument because it is nearly impossible to file a bankruptcy petition from prison. Similarly, a debtor must meet with his appointed trustee and creditors.[168] Neither the debtor nor the court can waive this meeting.[169] Courts have held that missing a deadline or failing to file a motion properly due to incarceration is not justifiable.[170] But incarcerated individuals are almost always unable to file bankruptcy due to these limitations.[171] Exonerees should not be further punished for their wrongful incarceration because they could not overcome these limitations while in prison.

The next question to be analyzed is whether the chapter 13 payment plan was proposed in good faith. The court analyzes the following factors:

> The amount of the proposed plan payments and the amount of the debtor's surplus; the duration of the plan; the percentage of payment to unsecured creditors; whether the debtor has stated his debts and expenses accurately; the debtor's employment history, ability to earn, and likelihood of future increases in income; the frequency with which the debtor has sought relief under the Bankruptcy Code; the existence of special circumstances (such as inordinate medical expenses); the nature of the debt sought to be discharged; the debtor's motivation and sincerity in seeking chapter 13 relief; the extent of preferential treatment between classes of creditors; whether the debtor has unfairly manipulated the Bankruptcy Code; whether the debt to be discharged would be nondischargeable in a case under chapter 7; whether the debtor has made any fraudulent misrepresentations to mislead the bankruptcy court; the extent to which secured claims are modified; and

166 Bein, *supra* note 148, at 673 (citiation omitted).
167 Bein, *supra* note 148, at 674 (citations omitted).
168 Lewandoski, *supra* note 56, at 201 (citing 11 U.S.C. § 341(d)).
169 Lewandoski, *supra* note 56, at 201 (citing 11 U.S.C. § 341(d)).
170 Lewandoski, *supra* note 56, at 201.
171 Lewandoski, *supra* note 56, at 203.

> the burden which the plan's administration would impose on the trustee.[172]

Under this analysis of good faith, the debtor's pre-petition behavior is heavily weighted.[173] Some of these factors for exonerees—such as employment history, the existence of special circumstances, motivation and sincerity in seeking chapter 13 relief, and the nature of the debt sought to be discharged—will look much different than they would for an ordinary debtor. An exoneree will not have the same ability to demonstrate a productive employment history or credit history due to his wrongful incarceration.

Courts have also emphasized how chapter 13 focuses on the accountability of the debtor.[174] Although the hardships endured by an exoneree reentering society are foreseeable, they are also the result of a "sufficient and proximate cause."[175] An exoneree's wrongful conviction is the proximate cause of many financial and personal difficulties he faces upon release from prison.[176] An exoneree should not be held accountable for debts that were outside of his control while he was wrongfully incarcerated, nor should he be held accountable for debts that accumulated as a result of wrongful incarceration.

Within fourteen days of filing a bankruptcy petition, the debtor must file a repayment plan unless granted an extension by the court.[177] The chapter 13 plan must propose a strategy to repay a portion, or in rare circumstances, all of the debtor's debt, over the course of three to five years.[178] Regardless of whether the plan has been approved by the court, the debtor must begin making plan payments to the trustee within thirty days of filing the bankruptcy petition.[179] The chapter 13 plan may be modified either before or after confirmation by the court.[180]

A chapter 13 case ends in a few different circumstances: (1) the plan has been successfully completed; (2) the case has been converted to chapter 7; or (3)

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172 Bein, *supra* note 148, at 675 (citations omitted).

173 Bein, *supra* note 148, at 674.

174 *In re* Grice, 319 B.R. 141, 146 (Bankr. E.D. Mich. 2004) (The court declined to "elevate this statutory requirement and does not see any policy that would be served by reading into the statute a more heightened showing" under the factual circumstances of the case.).

175 *In re* Bandilli, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999).

176 *See supra* Section I(C).

177 FED. R. BANKR. P. 3015(b).

178 11 U.S.C. §§ 1322(a)(1), 1322(d) (2019).

179 *Id.* § 1326(a)(1).

180 *Id.* §§ 1323, 1329(a).

the debtor receives a discharge from his debt.[181] The debtor will receive a discharge only if the plan has been confirmed and payments under the plan have been made or have been judicially excused.[182] One path to judicial excusal is through the hardship discharge, which is analyzed below.

2. The Hardship Discharge

The general discharge mechanism is one of the greatest benefits of chapter 13 bankruptcy and is reserved for those who are deserving of a fresh start:

> [w]hen put to the test, bankruptcy law turns to the subjective application of moral principles in order to satisfy society's need for the just and equitable balancing of the debtor's interest in a fresh start with society's desire to deny the privileges of discharge to those who have behaved reprehensibly and have failed to act to remedy their wrongdoing.[183]

Chapter 13 of the Code allows for the discharge of debt for natural persons after the following occurs: (1) the filing of the bankruptcy petition; (2) objections from the creditors to the debtor's eligibility for a chapter 13 bankruptcy; (3) proofs of claims filed by the creditors; (4) a plan, as proposed by the debtor; (5) confirmation of the plan by the court; (6) fulfillment of the plan by the debtor; and (7) discharge of debt.[184] Chapter 13 allows "an insolvent individual to discharge certain unpaid debts toward that end."[185]

If the chapter 13 plan is confirmed, but the debtor is unable to fulfill the obligations of the plan, he may request a hardship discharge.[186] The discharge is instrumental to the "fresh start" policy because it generally protects debtors from efforts to collect pre-petition debt and also voids any personal liability for discharged debt.[187] Section 1328(b) of the Code provides that, in order to

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[181] If a chapter 13 debtor is unable to complete plan payments, he may request that the case be converted to chapter 7 and that his estate be liquidated. *Id.* § 1307(a). If the case is converted, the confirmation plan is effectively vacated. The goal of an exoneree filing for bankruptcy is likely not to liquidate his estate and surrender his property, so it is unlikely that the exoneree would make such a request. Ahart, *supra* note 16, at 584 n.132. *But see In re* Dudley, 405 B.R. 790, 799 (Bankr. W.D. Va. 2009) (citing *In re* Fox, 370 B.R. 639, 647–48 (Bankr. D.N.J. 2007)).

[182] *See* 11 U.S.C. § 1328.

[183] Bein, *supra* note 148, at 687 (citations omitted).

[184] 164 AM. JUR. PROOF OF FACTS 3d 239 (2017).

[185] Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367 (2007); *see* Thomas B. McNamara, *Fresh Start at the Bankruptcy Court*, 47 COLO. LAW. 12, 12 (2018) ("The cornerstone of American bankruptcy law is the chance for a 'fresh start.'").

[186] 164 AM. JUR. PROOF OF FACTS 3d 239 (2017).

[187] Bein, *supra* note 148, at 658 (citing 11 U.S.C. § 524(a) (2019)).

successfully obtain a hardship discharge, the debtor must demonstrate: (1) he cannot make all payments due to circumstances for which the debtor "should not justly be held accountable"; (2) the value of property distributed under the plan would be no less than what would be distributed in a chapter 7 case; and (3) modification under section 1329 "is not practicable."[188] The right to discharge "is statutory and should be liberally construed so as to give the honest but unfortunate debtor a fresh start in life."[189] Further, while creditors may object to the dischargeability of debt, the grant or denial of a request for a hardship discharge is ultimately left to the discretion of the bankruptcy court.[190]

Although a chapter 13 plan typically lasts three to five years, this Comment argues that, due to the dire nature of their circumstances, exonerees should be entitled to an expedited hardship discharge. By virtue of being wrongfully convicted, an exoneree has spent unjustified time in the criminal legal system, through the process of investigation and conviction, appeals, wrongful incarceration, and exoneration. Thus, it is important that an exoneree not only have the choice to enter into a chapter 13 bankruptcy proceeding, but also that an exoneree be entitled to an expedited hardship discharge of his debt. The exoneree should have the choice of whether he would like to engage further with the United States court system. Although litigation could end in financial relief for the exoneree and his family, his trust in the legal system is not likely to be high. An exoneree should meet the requirements set forth by section 1328(b), qualifying them for a hardship discharge, as analyzed below.

a. Circumstances Beyond the Exoneree's Control

The first prong of the hardship discharge is whether the debtor cannot make all plan payments because of circumstances that are beyond his control. Due to the barriers exonerees face throughout reentry, obtaining employment and successfully completing a payment plan would be challenging. These barriers stem from their wrongful incarceration, which was a circumstance beyond their control. Courts have interpreted this element of the hardship discharge differently.[191] Courts rely on a fact-driven analysis of whether the debtor should be held justly accountable, including factors such as:

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188 11 U.S.C. § 1328(b) (2019).

189 *In re* Lambert, 10 B.R. 223, 226 (Bankr. E.D.N.Y. 1981).

190 *In re* Bandilli, 231 B.R. 836, 838 (B.A.P. 1st Cir. 1999); Bein, *supra* note 148, at 663 (citing 11 U.S.C. § 727(a)); *see* Ahart, *supra* note 16, at 583.

191 *See In re Bandilli,* 231 B.R. at 839–40 ("[M]ost bankruptcy courts that have addressed the issue have allowed a hardship discharge only when a debtor has suffered from catastrophic circumstances that directly cause the debtor to be unable to complete plan payments . . . We are unwilling to read the word catastrophic into

a) whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;
b) whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;
c) whether the intervening event or events were reasonably foreseeable at the time of confirmation of the chapter 13 plan;
d) whether the intervening event or events are expected to continue in the reasonably foreseeable future;
e) whether the debtor had control, direct or indirect, of the intervening event or events; and
f) whether the intervening event or events constituted a sufficient and proximate cause for the failure to make the required payments.[192]

The most difficult element of the hardship discharge for the exoneree to satisfy will likely be that the debtor must be unable to complete the bankruptcy plan payments due to circumstances that did not exist and were not foreseeable at the time of the plan confirmation.[193] Clearly, if an exoneree is arguing that his wrongful conviction is the "intervening event" that justifies his motion for a hardship discharge, the "intervening event" happened long before filing for bankruptcy and was thus foreseeable.

Yet an exoneree could argue that he should be eligible for a hardship discharge despite the timing of the intervening event. Chapter 13 discharge is left to the court's discretion.[194] A study examining whether "non-law determinations" influenced judicial rulings on the discharge of debt indicates that more sympathetic causes of debt might make a judge more likely to discharge debt.[195] Surely a wrongful conviction warrants judicial sympathy.

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the statute.") (internal citations omitted).

[192] *Id.* at 840.

[193] *See In re* Edwards, 207 B.R. 728, 731 (Bankr. N.D. Fla. 1997).

[194] *In re Bandilli*, 231 B.R. at 838.

[195] This study included 201 bankruptcy judges (who represented 57% of all sitting bankruptcy judges at the time) who were presented with a question of the discharge of credit card debt in a chapter 7 bankruptcy case. This study presented four different conditions for the accumulation of the debtor's recent debt: (1) a "vacationer," who incurred the debt while on spring break in Florida. The vacationer paid for a hotel room, meals, and drinks with friends; and (2) a "caretaker," who accumulated the debt while visiting her mother in Florida because her mother was fighting cancer, did not have health insurance, and needed help recovering from surgery. Scenarios 3 and 4 included a vacationer and caretaker debtor, but of a different gender. Although in all scenarios the debt was incurred knowing that it could not be repaid, only 32% of judges discharged the vacationer's debt and 52% of judges discharged the caretaker's debt. The study found that the judges "apparently allowed their sympathy or respect for the debtor who fraudulently incurred the credit card debt to care for his or her mother to influence their decisions." Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges*

b. Chapter 7 Analysis

The second prong of the hardship discharge requires the value of property distributed under the plan to be no less than what would be distributed in a chapter 7 case. This prong is also known as the Best Interests Test, which works to ensure that chapter 13 unsecured creditors are no worse off at the end of the case than if the debtor had filed a chapter 7 petition.[196] In a chapter 7 case, if the lower priority, unsecured creditors are not paid through the operation of the plan, the debtor's remaining assets can be liquidated to make up for this deficit.[197] Thus, in chapter 13, the value of the property to be distributed to each allowed unsecured claim must be greater than or equal to the amount that would be paid on the same claim if the estate of the debtor were liquidated under chapter 7.[198] This test promotes the twin aims of the bankruptcy system, as it functions as a safeguard for creditors in chapter 13 cases.[199]

However, due to the amount of debt incarcerated individuals can accumulate during prison and the amount of lost opportunity to earn meaningful wages while incarcerated and after release, it is unlikely that the bankruptcy estate will have any value.[200] If this is true, the second prong of the hardship discharge test will be satisfied.[201] Courts have held that a chapter 13 plan will qualify for a hardship discharge if an estate's value is so low it would not allow distribution to unsecured creditors. [202] This prong of the hardship discharge should not be difficult for the exoneree to satisfy because his estate is likely to be of little value due to his time in prison.

Follow the Law or Follow Their Feelings, 93 TEX. L. REV. 855, 887–90 (2015).

196 11 U.S.C. § 1325(a)(4) (2019); Midstate Fin. Co., Inc. v. Peoples, 587 B.R. 685, 691 (E.D. Tenn. 2018).

197 11 U.S.C. § 726.

198 *Id.* § 1325(a)(4); *see In re* Chavis, 47 F.3d 818, 824 (6th Cir. 1995).

199 Lewandoski, *supra* note 56, at 196 ("Bankruptcy's great economic virtue is that it avoids the collective action problem among creditors who would otherwise compete against one another for the debtor's funds; it instead benefits creditors by allowing them to recover or write off debt in an orderly, predictable, and cost-effective manner.").

200 *See supra* Section I(C).

201 *See* Matter of Mixson, 2016 Bankr. LEXIS 1674, at *3 (Bankr. N.D. Ala. Apr. 14, 2016) (holding that as the sole provider of her family due to her ex-husband's incarceration, she should not be held accountable for funding a payment plan while her husband is incarcerated and unemployed).

202 *In re* Watkins, 379 B.R. 403, 407 (Bankr. D. Mass. 2007) ("Because the liquidation of the [] estate in a hypothetical chapter 7 case would yield no funds for distribution to unsecured creditors, regardless of the validity of the Debtor's claimed exemptions, the Trustee's objection to the Debtor's claimed exemptions is MOOT and the Objection to the Plan . . . must be overruled."); *In re* Marrero, 7 B.R. 589, 590 (Bankr. D. P.R. 1980) (although hardship discharge was denied for other reasons, the debtor met the chapter 7 requirement of the hardship discharge because of a zero-asset estate.); *In re* Cummins, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001).

c. Modification of the Plan

The third prong of the hardship discharge evaluates whether modification of the payment plan is practicable. If the debtor is unable to make the plan payments, he can move the court to adjust the plan, which would allow him to make smaller payments.[203] If the debtor's living expenses exceed his earned after-tax income, further plan payments can be deemed impossible.[204] Plan modifications or adjustments are unlikely to be allowed unless there is a clear, effective remedy for the debtor.[205] Courts have held that it is not practicable to change a plan where there is no source of income to fund the modified plan.[206] This is especially true in the case of an exoneree, considering the many challenges that he faces.[207]

d. Exceptions to Discharge

Certain types of debt are excepted from chapter 13 discharge, yet there is a clear argument to allow these exceptions in light of the extreme circumstances surrounding wrongful conviction. For example, student loans are consistently excluded from chapter 7 and chapter 13 discharge. It is possible that an exoneree accumulated both student loans and interest on his student loans before or during his time in prison. Courts have allowed the discharge of student loans in the event of undue hardship.[208]

The undue hardship discharge for student loan claims relies on a demanding test, for which "only the most sympathetic can qualify."[209] This test is articulated in *Brunner*, and requires that the debtor: (1) cannot maintain a "minimal" standard of living; (2) has additional circumstances exist that would prevent this "minimal" standard of living to change for a significant portion of the repayment period of student loans; and (3) must have made good faith efforts to repay the loans.[210] Perhaps helpfully, "[s]ome courts have held that a criminal record, because of its negative effect on earning capacity, can help the debtor meet the

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203 11 U.S.C. § 1329(a)(1)–(2).

204 Ahart, *supra* note 16, at 576–78.

205 *Id*. ("But nearly all courts have denied such a request.").

206 *See In re* Cummins, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001); *see supra* Section I for an explanation of the challenges that an exoneree might face that would make modifying a payment plan impracticable.

207 *See* Matter of Mixson, 2016 Bankr. LEXIS 1674, at *3 (Bankr. N.D. Ala. Apr. 14, 2016) (holding that modifying the payment plan of the ex-wife of an incarcerated man would not be practicable as she was unemployed on the Petition date, and her prospects of employment were minimal).

208 Lewandoski, *supra* note 56, at 210.

209 Lewandoski, *supra* note 56, at 210.

210 Lewandoski, *supra* note 56, at 210 n. 108 (citing Brunner v. NY State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987)).

undue hardship exception; others have emphatically rejected that reasoning."[211] If a criminal record has aided an undue hardship exception claim, then surely a criminal record that resulted from a wrongful conviction would be helpful in an undue hardship claim for student loans that accumulated as a result of wrongful conviction.

There are additional exceptions to the hardship discharge of section 1328(b), including those defined by section 523(a).[212] Exceptions to discharge underlie the notion that the Code attempts to provide equitable treatment to debtors and creditors.[213] Generally, the exceptions "can be loosely grouped into two categories: those implicating overriding policy issues and those implicating the debtor's own misconduct."[214] The first category of exceptions includes tax claims, child support or alimony, debts for injuries to person or property, debts to governmental units for fines and penalties, certain educational loans, and obligations affected by fraud or maliciousness.[215] The second category of exceptions:

> [I]s designed to advance the fundamental policy of affording relief only to the 'honest but unfortunate' debtor . . . including: debts arising from the debtor's fraudulent conduct; claims arising from willful and malicious injury caused by the debtor; criminal fines and restitution obligations; claims arising from injury or death caused by the debtor while driving while intoxicated; and claims for which discharge was denied in a prior bankruptcy case.[216]

Bankruptcy courts have found that a chapter 13 discharge does not discharge any debt that is listed as an exception set forth by the Code.[217]

Although these exceptions could present a barrier for the exoneree, there is still an avenue to relief through a hardship discharge. First, courts have held in favor of debtors in order to provide the fresh start that bankruptcy can give to a debtor.[218] Second, if eligible for relief, discharging attorney's fees would likely

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[211] Lewandoski, *supra* note 56, at 210 (citing *In re* Douglas, 366 B.R. 241, 257–59 (Bankr. M.D. Ga. 2007); *In re* Coman, 2003 Bankr. LEXIS 1361, at *3, *5 (Bankr. C.D. Ill. Oct. 23, 2003)).

[212] 11 U.S.C. § 523(a)(17) (2019) ("[F]or a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing").

[213] *See* Bein, *supra* note 148, at 665.

[214] Bein, *supra* note 148, at 665.

[215] 11 U.S.C. § 523(a); Bein, *supra* note 148, at 665.

[216] Bein, *supra* note 148, at 666 (citations omitted).

[217] 11 U.S.C. § 523; *id.* § 1328; *see In re* Humphries, 516 B.R. 856 (Bankr. N.D. Miss. 2014); *In re* Vasquez, 261 B.R. 654 (Bankr. N.D. Tex. 2001).

[218] *In re* Howard, 339 B.R. 913, 918 (Bankr. N.D. Ill. 2006) ("To advance the policy of giving the debtor a fresh start in bankruptcy, exceptions to discharge are construed strictly against the creditor and liberally in

provide an enormous amount of relief to the exoneree. Some courts have held that "pay to stay debt" is not excepted from discharge.[219] Discharging debt stemming from attorney's fees and the exoneree's family members during the time of his imprisonment would help all parties obtain a semblance of a fresh start through the bankruptcy system.

IV. INCLUDING EXONEREES IN THE BANKRUPTCY SYSTEM

This Section describes what providing the wrongfully convicted access to the bankruptcy system would entail. Part A proposes how exonerees could gain access to the bankruptcy system. Part B discusses the benefits of discharging the debts of exonerees, including the potential symbiotic relationship between the criminal legal system and the bankruptcy system. Finally, Part C addresses potential criticisms of the implications of including exonerees in the hardship discharge.

A. Proposal

Exonerees should be entitled to an expedited chapter 13 discharge. Further, states should provide more holistic reentry programs, including access to bankruptcy attorney services. This proposal outlines what providing an exoneree meaningful access to the bankruptcy system would entail.

Relief could be obtained through the hardship discharge provided by chapter 13 of the Code. An exoneree can obtain relief through the hardship discharge by passing the three-part test of section 1328(b).[220] An exoneree would also need to demonstrate that he filed his bankruptcy petition in good faith and that his proposed confirmation plan was filed in good faith. This subjective analysis of good faith would surely tilt in the exoneree's favor, as he is seeking discharge from debts that are a result of the miscarriage of justice that caused his wrongful conviction. For the reasons set forth above, exonerees should meet the requirements of this test.

While the bankruptcy system provides this opportunity to aid exonerees, exonerees need representation throughout these proceedings. If the exoneree is filing for bankruptcy following a prison term, it is unlikely that he has

favor of the debtor.").

[219] *In re* Milan, 546 B.R. 187, 198 (Bankr. D. Minn. 2016), *aff'd*, 556 B.R. 922 (B.A.P. 8th Cir. 2016) ("[T]he Incarceration Costs are compensation for actual pecuniary loss within the meaning of § 523(a)(7). As such, they are dischargeable and were discharged.").

[220] *See supra* pages 34–35; 11 U.S.C. § 1328(b).

accumulated wealth due to the many circumstances surrounding his wrongful conviction and the potential subsequent accumulation of debt. Exonerees face many challenges when reentering society; obtaining and paying for a bankruptcy attorney could seem impossible.

Reentry programs would help if properly tailored to address individualized needs. An exoneree would have a more meaningful opportunity to obtain financial relief if provided reentry services that guarantee access to bankruptcy attorney services. It would be even more beneficial for these programs to ensure that the exoneree has an attorney who specializes in bankruptcy law.[221] Finally, providing a bankruptcy attorney would avoid the issue of an exoneree being represented by his prior attorney, who is likely a claimant in the bankruptcy proceeding.

After Innocence is one model reentry program that coordinates access to bankruptcy representation for exonerees. This organization is dedicated to working with exonerees through a three-part program, including providing access to bankruptcy attorneys.[222] It recognizes the importance of a holistic approach to assisting exonerees with reentry and could be used as a model for future assistance given to exonerees. If states implemented similarly holistic reentry models, states could begin to reconcile the enormous debt owed to exonerees due to their wrongful conviction.

Sadly, no amount of compensation can rectify the damage inflicted by wrongful incarceration.[223] Yet if exonerees and their families received an expedited discharge from the debt accumulated during the period of wrongful incarceration, the bankruptcy system and the criminal legal system could help provide a fresh start for an exoneree's financial future.

B. Benefits of Discharging the Debts of Exonerees

Discharging the debts of exonerees would be beneficial to both the bankruptcy system and the criminal legal system. The first part of this section

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[221] *See, e.g.*, Pardo, *supra* note 3, at 1119–20 ("Accordingly, if a debtor is to successfully navigate the complex path that ultimately culminates in a discharge, it stands to reason that the assistance of an expert will be indispensable in doing so.").

[222] *Connecting Exonerees to the Support They Are Eligible For*, AFTER INNOCENCE, https://www.after-innocence.org/coordinating (last visited Oct. 23, 2019) (coordinating access to health care, social services, and legal representation for record expungement, restoration of rights and public benefits, housing issues, domestic support, and bankruptcy or tax problems.).

[223] Shaw, *supra* note 85, at 613 ("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 function as normal citizens.").

considers how the bankruptcy system and the criminal legal system could work collaboratively. The second part of this Section considers two exonerees' experience with financial distress and describes how proactively providing them with an expedited hardship discharge could have helped avoid this financial distress.

1. Symbiotic Relationship

Both systems share the common goal of providing a fresh start: the bankruptcy system attempts to provide this fresh start through the discharge of debt, while the criminal legal system attempts to provide this fresh start through reentry programs. Yet both systems rely on ineffective mechanisms to provide a clean slate. Some argue that "chapter 13, as currently constituted, is deeply debilitated."[224] Critics have pointed to the racial bias prevalent in the bankruptcy system:

> [s]pecifically, the debtor who benefits the most from the relief provided in the Code is married, has few non-dischargeable debts [], has stable employment and disposable income, and has wealth that is concentrated in assets that are protected from creditors[]. Given that, the "Ideal Debtor" is white [].[225]

Further, bankruptcy courts have a history of being inaccessible to indigent populations,[226] with lower-income debtors facing more bias than a middle-class debtor.[227] The likelihood of a pro se debtor being successful in bankruptcy court is staggeringly low, as contrasted with a debtor who has representation.[228] The

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[224] Lawrence Ponoroff, *Rethinking Chapter 13*, 59 ARIZ. L. REV. 1, 2 (2017); *see* Dickerson, *supra* note 2, at 629.

[225] *See* Dickerson, *supra* note 2, at 639.

[226] United States v. Kras, 409 U.S. 434, 457 (1973) (Stewart, J., dissenting) ("Congress may say that some of the poor are too poor even to go bankrupt. I cannot agree."); *see* Pardo, *supra* note 3, at 1115 ("[B]ankruptcy poignantly presents an affordability paradox: the system's purpose is to relieve individuals from financial distress, yet it simultaneously demands a significant commitment of resources to obtain such relief").

[227] On class biases in the bankruptcy system, Lewandowski notes:

> [B]ias in the Bankruptcy Code against low-income debtors' economic culture makes bankruptcy more burdensome for them than for middle-class debtors. These factors deter bankruptcy in marginal cases by increasing the debtor's perceived cost of filing, depriving debtors, creditors, and society of the benefits the Bankruptcy Code is designed to provide. Bankruptcy can be thought of as a public penance of austerity and submission to court authority that serves as a substitute for payment and acknowledges the legitimacy of the creditors' interests. Under this articulation, a more arduous performance is unfairly being required of lower-income debtors because of their economic status.

Lewandoski, *supra* note 56, at 228.

[228] Pardo, *supra* note 3, at 1115 (showing self-represented debtors have a 28.5% litigation success rate

complexity of the bankruptcy system creates an irony: someone experiencing financial distress is essentially barred from filing for bankruptcy if he is too poor. The debtor must navigate complex procedural barriers and faces a serious risk of denial of discharge despite the merits of his claim.[229]

The similarity between the twin aims of the bankruptcy system and the purpose of reentry programs for exonerees provides ample reason for the criminal legal system and the bankruptcy system to develop a collaborative process. The Supreme Court found that the purpose of the Bankruptcy Act of 1934

> has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.[230]

While the bankruptcy system presents a goal of providing relief to honest but unfortunate debtors, the current inaccessibility of bankruptcy courts renders this goal meaningless.[231] Further, "[t]he bankruptcy discharge is a powerful statutory right, but that right will have no value to intended beneficiaries who cannot vindicate it as a result of procedural barriers."[232] By discharging the debts that stem from wrongful conviction, the bankruptcy system would implement a tool that provides mutual benefit to both the criminal legal system and the bankruptcy system. The bankruptcy system would thus recommit to its intended purpose "to allow and encourage debtors, freed from their debts, to once again become productive members of society."[233] Meanwhile, the criminal legal system would greatly improve reentry assistance to exonerees.

2. Proactivity Rather than Reactivity

This Section considers two examples of exonerees experiencing financial distress. In both cases, had a bankruptcy attorney been provided to the exoneree

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while a similarly situated debtor with representation has a 56.2% success rate).

[229] Pardo, *supra* note 3, at 1116 ("Unfortunately, vindicating the right to a discharge has proved to be elusive for certain individual debtors, not so much as a result of substantive eligibility rules,' but rather because of procedural barriers that increase the complexity of accessing the right.").

[230] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citation omitted).

[231] Pardo, *supra* note 3, at 1180.

[232] Pardo, *supra* note 3, at 1180.

[233] Giacomo Rojas Elgueta, Comment, *The Paradoxical Bankruptcy Discharge: Rereading the Common Law – Civil Law Relationship*, 19 FORDHAM J. CORP. & FIN. L. 293, 319 (2014).

following his release from prison, financial distress could have been preempted or greatly alleviated.

Financial literacy is already a struggle for many people in the United States.[234] This struggle is only exacerbated by time spent in prison and away from society and the economy. By allowing exonerees to take control of their financial status before they find themselves in financial hardship, the bankruptcy system could prevent more dire outcomes.

Recall Clarence Harrison.[235] While the $1 million he received was more than many exonerees in Georgia have been awarded,[236] his story illustrates how the current compensation structures in the United States are failing.[237] Mr. Harrison, who obtained three jobs after his release from prison, sold $735,000 of future payments for $272,000.[238] With a lack of credit history due to his incarceration, he owed 30% interest on the credit cards he obtained following his release.[239] Shortly thereafter, he was hit by a car and severely injured. [240] Mr. Harrison's wife's insurance only covered part of his hospital stay and left them with a $50,000 medical bill.[241] While in the hospital, he also lost his business.[242] Moreover, he learned that he owed the Internal Revenue Service $90,000 in taxes on an annuity that he had not known he would have to pay.[243] Mr.

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234 Dickerson, *supra* note 2, at 636.

235 *See supra* page 23. Mr. Harrison was released from prison in 2004 after serving nearly 18 years for a rape he did not commit. Eight months after his release from prison, he was awarded $1 million through a bill passed by the Georgia legislature. *See also Exonerees,* GEORGIA INNOCENCE PROJECT, https://www.georgiainnocenceproject.org/exonerees/ (last visited Sept. 11, 2020).

236 *See Calvin Johnson*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3329. (last visited Sept. 19, 2020) (Calvin Johnson, who served 16 years, received $500,000); *Douglas Echols*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3199. (last visited Sept. 19, 2020) (Douglas Echols, who served 5 years, received no compensation); *Samuel Scott*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3623. (last visited Oct. 12, 2020) (Samuel Scott, who served 15 years, received no compensation).

237 *See* Albert Samaha, *Exonerated and Out of Prison—And That's Where the Trouble Starts*, BUZZFEED NEWS, https://www.buzzfeednews.com/article/albertsamaha/exonerated-and-out-of-prison-and-thats-when-the-trouble-star#.jrjlbqnzL. (last visited Sept. 11, 2020).

238 *Id.*

239 *Id*.

240 *Id*.

241 *Id.*

242 *Id.*

243 *Id.* The Protecting Americans from Tax Hikes Act of 2015 ultimately created the Wrongful Incarceration Exclusion, which does not include in income any civil damages, restitution, or other monetary award received that relates to wrongful conviction. *See* IRS, *PATH Act Tax Related Provisions*, https://www.irs.gov/newsroom/path-act-tax-related-provisions (last visited Aug. 31, 2020); IRS, *Wrongful Incarceration FAQs*, https://www.irs.gov/individuals/wrongful-incarceration-faqs (last visited Aug. 31, 2020). While Mr. Harrison was eventually able to claim a refund, the initial payment undoubtedly contributed to his

Harrison's financial distress stemmed from circumstances beyond his control, including a lack of financial literacy that he might have obtained had he not been wrongfully incarcerated. Had Mr. Harrison been provided a holistic reentry program, including a bankruptcy attorney, he would have been able to take control of his financial status before falling into financial distress.

There is also the case of Theodore White, Jr., who was wrongfully convicted of sexually molesting his 12-year-old adopted daughter in Missouri in 1999.[244] He was exonerated six years later.[245] In 2010, the Eighth Circuit affirmed a 2008 judgment awarding $15 million to Mr. White.[246] This judgment was the result of an action brought against the parties responsible for Mr. White's exoneration.[247] Despite this seemingly large award, Mr. White was not equipped to reenter the economy. In 2014, Mr. White filed a voluntary chapter 7 bankruptcy petition following a record of financial difficulty.[248] A large consideration for the bankruptcy court was that Mr. White did not file for bankruptcy until three years after his debt had begun accumulating.[249] Mr. White's case is an example of an exoneree's bad experience in bankruptcy court. His property was repossessed, and his estate was liquidated. His interaction with the bankruptcy system was the result of a series of failed financial decisions. Had Mr. White been provided a bankruptcy attorney upon his exoneration, he would have reentered the society, and the economy, better equipped for success.

A reentry program that includes access to bankruptcy attorneys would provide exonerees the opportunity to take a proactive approach to obtaining financial freedom following their release from prison. Ideally, this would help exonerees avoid financial distress and further involvement with the bankruptcy system later in life, when their debts have become larger and more complicated.

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financial distress.

[244] *Theodore White, Jr.,* THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3737 (last visited Nov. 10, 2019).

[245] *Id.*

[246] *In re* White, 606 B.R. 908, 913 (Bankr. D. Utah 2019).

[247] *Id.*

[248] *In re* White, 2018 Bankr. LEXIS 95, at *2–3 (Bankr. D. Utah Jan. 17, 2018). Mr. White faced many financial difficulties, including at least $328,714.68 in non-priority, undisputed, non-contingent, liquidated, unsecured debt that accumulated before 2011 and remained unpaid when he filed for bankruptcy in 2014; Mr. White also faced repossession of his home, a boat, and two cars. *Id.*

[249] *Id.* at *3.

C. Implications

Over the course of different Code amendments and enactments, chapter 13 has elicited criticism.[250] The criminal legal system has also elicited criticism, as the system has attempted to reconcile the trauma inflicted by wrongful incarceration. This Comment addresses three criticisms of the bankruptcy system and the criminal legal system.

First, this Section discusses the criticism that the expansion of chapter 13 discharge might lead to an incentivization of the debtor to accumulate debt. Second, this Section responds to the argument that adopting this proposal would lead to an overly sympathetic treatment of debtors and exonerees. It looks to criticisms of the scope of chapter 13 discharge, which suggest that the discharge has been expanded to include too many types of dischargeable debts and too many types of debtors. Third, and finally, this Section addresses the question of whether giving a discharge to exonerees is a slippery slope towards providing too much financial assistance to the wrongfully convicted. This Comment argues that discharging the debt of exonerees and their families would not validate any of these criticisms.

1. Incentivizing the Accumulation of Debt

One critique of chapter 13 discharge is that "discharge creates a moral hazard because it grants debtors the equivalent of free insolvency insurance, thereby incentivizing them to take on more debts and strategically employ the fresh start benefit."[251] But allowing exonerees expedited access to chapter 13 would not be incentivizing families and exonerees to accumulate debt during the period of wrongful incarceration. There is no guarantee that a wrongfully convicted person will be exonerated. In fact, there are plenty of posthumous exonerations, such as in the case of Timothy Cole, that reinforce the idea that no person can rely on the criminal legal system to free him from a wrongful conviction in his lifetime.[252] Of course, many wrongfully convicted individuals are never exonerated.[253] Thus, incarcerated individuals are not likely to accumulate debt with the expectation that it will be relieved through a bankruptcy discharge. For these reasons, bankruptcy courts should not fear furthering criticism of the bankruptcy system by discharging the debts of exonerees.

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[250] *See, e.g.*, Ponoroff, *supra* note 224, at 2; Dickerson, *supra* note 2, at 629.

[251] Elgueta, *supra* note 233, at 323 (citations omitted).

[252] *See* Samuel Wiseman, *Innocence After Death,* 60 CASE W. RES. L. REV. 687 (2010).

[253] *See How Many Innocent People Are in Prison?,* INNOCENCE PROJECT, https://innocenceproject.org/how-many-innocent-people-are-in-prison/ (last visited Nov. 4, 2020).

2. Over-Inclusivity of Chapter 13 Discharge

Some critics have focused on a debtor's ability to discharge debt in chapter 13 that would not be dischargeable in chapter 7, questioning if chapter 13 could act as a "haven" for the "dishonest debtor" who seeks discharge of debt stemming from criminal activity, such as criminal restitution.[254] Yet exonerations are, by definition, "cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence."[255] Further, "[a]bsent conviction of a crime, one is presumed innocent."[256] This Comment argues that exonerees and their families should be relieved of the debts that stemmed from wrongful conviction because the debts are not a result of criminal behavior by the incarcerated person. Instead, these debts are the result of the failure of the criminal legal system.

Another criticism of chapter 13 suggests that the original goal of protecting the honest but unfortunate debtor has morphed to protect dishonest, over-indebted debtors.[257] As chapter 13 discharge has evolved,

> "a radical new reading of the expression 'honest but unfortunate' . . . now extends the concept of 'misfortune' to include all debtors who are unable to repay a debt, even when the debt originated as the result of a bad financial judgment, imprudence, or sometimes, a fraudulent act."[258]

But by discharging the debts of exonerees, the bankruptcy system would not be painting with too broad a brush with respect to what constitutes an unfortunate debtor. Exonerees suffer from one of the greatest misfortunes society can cause: the wrongful imprisonment of a person for crimes he did not commit. By allowing the discharge of debts that stemmed from wrongful incarceration, bankruptcy courts would not be making the discharge over-inclusive. Instead, bankruptcy courts would be allowing these honest but unfortunate debtors to obtain a fresh start.

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[254] *See, e.g.*, Susan Jensen-Conklin, *Nondischargeable Debts in Chapter 13: Fresh Start or Haven for Criminals*, 7 BANKR. DEV. J. 517 (1990); Ellen M. Horn, *Good Faith and Chapter 13 Discharge: How Much Discretion is Too Much*, 11 CARDOZO L. REV. 657, 657–58 (1990).

[255] *About the Registry*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Feb. 8, 2020).

[256] Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017).

[257] Elgueta, *supra* note 233, at 315–16 (arguing that the "super discharge" of Chapter 13 "reveals the enormous divide between the original rationale of the policy . . . and the modern version.").

[258] Elgueta, *supra* note 233, at 316 (quoting Douglas G. Baird, *Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law*, 73 U. CHI. L. REV. 17, 25 (2006)).

3. Slippery Slope of Aid to Exonerees

Critics have also questioned how much aid to give exonerees and at what point this aid becomes unproductive for society as a whole. For instance, Justice Alito, concurring in the recent Supreme Court opinion in *Nelson*, raised the issue of extending refunds to all costs associated with wrongful conviction.[259] He questioned, "if the *status quo ante* must be restored, why shouldn't the defendant be compensated for all the adverse economic consequences of the wrongful conviction?"[260] Justice Gorsuch also pointed out that costs associated with court fines and restitution will likely be "minor in comparison to the losses that result from conviction and imprisonment, such as attorney's fees, lost income, and damage to reputation."[261] As noted by this Comment, those losses are, indeed, huge, and are arguably the most important to address.[262] Not all of these losses can be addressed by the bankruptcy system; for example, the bankruptcy system cannot compensate an exoneree for harms due to lost earnings or damage to reputation. But it may provide an opportunity to extend restorative relief to exonerees by discharging the debt that stems from wrongful conviction.

Society has not begun to relieve itself of the debt it owes the wrongfully convicted without providing meaningful and substantial relief to exonerees. "[F]reedom alone is not enough for the person who has been chewed up by the criminal legal system and then spit out as wrongfully convicted, lacking compensation for the harm suffered."[263] The majority opinion in *Nelson* wrote, "[j]ust as the restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction."[264] In doing so, the Court constructed the notion that refunding these fines and fees was a form of restoration, rather than compensation. If an exoneree sought discharge from debt that stemmed from his wrongful conviction, he would also be seeking restorative relief.

CONCLUSION

Wrongful conviction presents a paradoxical problem: society owes exonerees a debt for the injuries its criminal legal system has inflicted on them.

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259 *Nelson*, 137 S. Ct. at 1260–61 (Alito, J., concurring).

260 *Id.*

261 *Id.*

262 *See supra* Section I.

263 John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property,"* 59 HASTINGS L.J. 515, 537 (2008).

264 *Nelson*, 137 S. Ct. at 1257.

Yet exonerees often leave prison having accumulated debt. This Comment argues that the bankruptcy system could solve this problem by providing exonerees, quintessential "honest but unfortunate" people, relief through expedited chapter 13 discharge. Further, states should provide reentry programs that are specific to the issues exonerees face. These programs should provide holistic support, including representation by bankruptcy attorneys. The programs should not be capped monetarily but should instead guarantee the services that exonerees need to successfully reenter society.

As the number of exonerations in the United States has increased, so has the need for systems that holistically support exonerees when they reenter society. The current compensation structure for the wrongfully convicted is insufficient and ineffective. Exonerees have lost years in which they could have been employed, and prison offers little opportunity to build experience to gain future, meaningful employment. To make matters worse, while exonerees are incarcerated, they and their families often go further into debt due to court fees and fines, long legal battles, and the inability to receive funds from the employment the exoneree could have had during his incarceration.

The bankruptcy system and reentry programs share a common goal: providing a fresh start to those who have been deemed honest but have endured unfortunate circumstances. While both systems do not currently function effectively, these systems could work in tandem to improve. If reentry programs were supplemented with access to representation in bankruptcy courts, the bankruptcy system could help promote holistic and successful reentry for exonerees while reaffirming its commitment to rewarding honest but unfortunate debtors with discharge from debt. By relieving exonerees of the debt that stemmed from their wrongful incarceration, society will begin to repay the debt that is owed to the wrongfully convicted.

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