

1 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
EXONERATED, YET STILL PROVING INNOCENCE: THE
FIGHT FOR WRONGFUL CONVICTION COMPENSATION
IN LOUISIANA

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INTRODUCTION.....	1
I. Overview of Wrongful Conviction Compensation in the U.S.....	3
A. Review and Comparison of Existing Compensation Statutes.....	5
1. Federal Wrongful Conviction Requirements.....	6
2. Compensation in Other States.....	6
II. Wrongful Conviction Compensation in Louisiana.....	7
A. LA R.S. 15:572.8.....	8
B. Does Race Play a Role?.....	10
C. Past Legislative Attempts.....	11
III. How Louisiana Should Move Forward Today.....	14
A. Amount per Year, Caps, and Funding Source	15
1. Yearly Award Amount.....	15
2. Ten-Year Cap and Maximum Amount.....	16
3. Funding Source.....	16
B. Procedural Issues and Delays in Payments	17
1. Removal of the Proven Factual Innocence Provision.....	17
2. Implementation of an Official Misconduct Provision.....	18
3. Decreasing Time Delays.....	19
CONCLUSION.....	20

INTRODUCTION

“I am, at 59 years old, more of a retirement age, and I’m doing like a 20-year-old man’s job,” said Malcolm Alexander, who makes just over minimum wage working as a semi-skilled laborer.¹ For Alexander though, this was a

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¹ Meghan Keneally, Will the state pay you for a wrongful conviction? Depends on the state. ABC News (2019), <https://abcnews.go.com/US/state->

2 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
significant pay increase after previously working jobs that paid only 2 to 3 cents per hour at Louisiana State Penitentiary, commonly known as Angola.² Alexander spent 38 years in Angola, one of the most notorious prisons in the country, after being wrongfully accused of sexual assault.³ For Alexander, a 19-year-old high school drop-out, who had hopes of returning to school and becoming a mechanic or a long-haul trucker, being sentenced to life in prison, without the possibility of parole changed his life plan drastically.⁴ In 1980, after having a consensual encounter with a white woman who asked for money, Alexander was first accused of sexual assault.⁵ Although the accusation would ultimately go nowhere as it was uncorroborated, it did prompt the police to use Alexander's photo in a photo array shown to a victim whose rape had occurred four months prior.⁶ During that rape, the victim was attacked at gunpoint by a stranger and had little to no view of her assailant, who remained behind her the entire time.⁷ The victim tentatively identified Alexander as her attacker, which would lead the police to conduct a physical line-up three days later.⁸ During the physical line-up, Alexander was the only person who also appeared in the photo array, nevertheless it was written down that the victim said Alexander was only a "possible" and "tentative" match for her attacker.⁹ Despite this, when the lead detective would later record the victim's story, her confidence would be recorded as 98% sure that Alexander was the attacker, and at the trial the victim testified that there was no doubt that Alexander was the attacker.¹⁰ Alexander's attorney never filed the necessary pleadings to challenge the witness' identification.¹¹

pay-wrongful-conviction-depends-state/story?id=62436623 (last visited Oct 16, 2020).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ . Malcolm Alexander exonerated after 38 years in Louisiana's Angola prison, Innocence Project (2019), <https://www.innocenceproject.org/cases/malcolm-alexander/> (last visited Oct 13, 2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ . *Id.*

¹¹ . Malcolm Alexander exonerated after 38 years in Louisiana's Angola prison, Innocence Project (2019),

Additionally, there was blood in the rape kit that could have been tested, which would have proved that Alexander was not the assailant, but the attorney never sought to have it tested.¹² In 1996, the Innocence Project agreed to take on Alexander's case, but at that time it was already too late to try to use the DNA evidence in the rape kit to reverse Alexander's conviction, as the rape kit and other evidence had been destroyed just four years after his conviction.¹³ However, Alexander would continue to fight to prove his innocence, and in 2013 hair evidence that was recovered at the crime scene, was recovered at the Jefferson Parish crime lab.¹⁴ After the hair was tested and the profile did not match Alexander, and a conversation with the victim, the District Attorney agreed to move with the defense to vacate the conviction.¹⁵ Although his conviction had been vacated, that would not be the end of it for Alexander, as he still would have to go through another long and lengthy legal battle if he wanted to win compensation from the state for his wrongful conviction. Under Louisiana's wrongful conviction statute, if successful, Alexander could be awarded up to \$250,000 for his time spent wrongfully convicted.¹⁶ While this would drastically change Alexander's life as he would gain a newfound chance at financial freedom, it is still just a small amount when considering he lost thirty-eight years of his life, that would now be valued at only \$6,580 per year.¹⁷ This article seeks to look at the history of wrongful conviction compensation nationally and in Louisiana. I hope to identify various problems with Louisiana's current compensation model by looking at stories like Alexander's, in order to propose a plan for which Louisiana can modify its statute to not only meet national standards but exceed them.

<https://www.innocenceproject.org/cases/malcolm-alexander/> (last visited Oct 13, 2020).

¹² . *Id.*

¹³ . *Id.*

¹⁴ . *Id.*

¹⁵ . *Id.*

¹⁶ . Meghan Keneally, Will the state pay you for a wrongful conviction? Depends on the state. ABC News (2019), <https://abcnews.go.com/US/state-pay-wrongful-conviction-depends-state/story?id=62436623> (last visited Oct 16, 2020).

¹⁷ . *Id.*

4 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
I. *Overview of Wrongful Conviction Compensation in
 the U.S.*

In America, fairness and justice are the principles on which our criminal justice system has been built. However, the system does not always get it right and justice is not always served. According to the National Registry of Exonerations (Registry), there have been 2,678 exonerations since 1989.¹⁸ The Registry's database focuses on exonerations since 1989 because that is when Gary Dotson became the first person to be exonerated in the U.S. because of DNA evidence.¹⁹ Dotson spent 10 years in prison for a rape that never actually occurred, despite the victim coming forward six years later and confessing to the authorities that she had lied about the rape happening.²⁰ It was not until Dotson's attorney, who had heard about DNA testing being used in England, asked the Governor to order DNA testing, that the prosecution would consider that Dotson had been wrongfully committed, and ultimately vacate his conviction a year later.²¹ Following his release, Dotson was not awarded \$120,300 in compensation for his wrongful conviction until 2003, when he was pardoned based on innocence 14 years after his conviction was vacated.²² Dotson's case was a revolutionary moment in the criminal justice system because it showed that people are not only sometimes wrongfully convicted, and but it can now be scientifically proven they are innocent. Along with DNA evidence, the other leading factors that have contributed to these exonerations are perjury or false accusation, official misconduct, mistaken witness identification, false or misleading forensic evidence, and false confessions.²³ Out of these factors, the most prominent factors that lead to exonerations are perjury or

¹⁸ . Dustin Cabral, The National Registry of Exonerations - Exoneration Registry (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).

¹⁹ . Rob Warden, First DNA Exoneration Northwestern Pritzker School of Law, <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> (last visited Oct 10, 2020).

²⁰ . Dolores Kennedy, Gary Dotson, National Registry of Exonerations (2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3186> (last visited Oct 10, 2020).

²¹ . *Id.*

²² . *Id.*

5 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
false accusations, and official misconduct, which are intentional acts.²⁴ On average, those who are wrongfully convicted spend nine years in prison before exoneration, accounting for a total of 24,167 years that exonerees have lost since 1989.²⁵ In light of this fact, it is crucial that there be a system in place to fix these wrongs that occur through not only rehabilitations and re-entry to society programs, but monetary compensations for time spent behind bars. Four avenues of legal redress exist under which an exoneree may be able to receive compensation for time spent wrongfully imprisoned.²⁶ The first is through legislation, an exoneree may petition their state's legislature to pass a private bill awarding compensation in their case.²⁷ The next avenue is through filing a federal civil rights lawsuit.²⁸ Third, an exoneree can file a state tort lawsuit against the prosecutors, defense lawyers, or police officers.²⁹ The last option that an exoneree has, is to apply under their state's compensation statute, which will be the focus of this article.³⁰ Since 1989, states have paid about \$540 million in wrongful conviction compensation pursuant to state statutes, paying an average of less than \$20 million annually.³¹ 73% of exonerees who have filed for compensation under their state's statutes have succeeded, while 17% have not been awarded compensation.³² The remaining 9% have claims that are still pending.³³

²³ . Exonerations by Contributing Factor, The National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last visited Oct 10, 2020).

²⁴ . *Id.*

²⁵ . Dustin Cabral, The National Registry of Exonerations - Exoneration Registry (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).

²⁶ . Deborah M. Mostaghel, *Wrongfully Incarcerated, Randomly Compensated- How to Fund Wrongful-Conviction Compensation Statutes*, 44 Ind. L. Rev. 503 (2011)

²⁷ . *Id.*

²⁸ . *Id.*

²⁹ . *Id.*

³⁰ . *Id.*

³¹ . Jeffrey S. Gutman & Lingxiao Sun, Why Is Mississippi the Best State in Which to Be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted, 11 Ne. U.L. Rev. 694 (2019).

³² . *Id.*

³³ . *Id.*

Currently, the federal government, the District of Columbia, and thirty-five states have wrongful conviction statutes that provide various levels of compensation for the exonerated.³⁴ Wrongful conviction compensations statutes have existed in the United States since 1913, when Wisconsin enacted the first statute, with other states beginning to follow in the 1940s.³⁵ The federal government first enacted its compensation statute in 1948.³⁶ In some state, the statutes go above and beyond to correct the wrongs that have been done, and in others the statutes leave much to be desired.³⁷ One of the main issues with current statutes, are the prohibitory provisions that limit compensations because of things like, an exoneree needing to be factually innocent, preventing the compensation of individuals with unrelated felony convictions, and denying compensation to those deemed to have “contributed” to their wrongful convictions.³⁸

1. Federal Wrongful Conviction Requirements

Under 28 U.S.C.A. §2513, the federal government provides that exonerees are entitled to \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death, and \$50,000 for each 12-month period of incarceration for any other plaintiff.³⁹ In order to sue under this law, a claimant must prove that: (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was

³⁴ . Compensating the Wrongly Convicted, Innocence Project (2019), <https://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited Oct 10, 2020).

³⁵ . COMPENSATION STATUTES: A NATIONAL OVERVIEW, Exoneration-Innocence Project (2018), COMPENSATION STATUTES: A NATIONAL OVERVIEW (last visited Oct 10, 2020).

³⁶ . *Id.*

³⁷ . Rebecca Brown & Carlita Salazar, Taking a Closer Look at Compensation Laws in the U.S. Innocence Project (2017), <https://www.innocenceproject.org/wrongful-conviction-day-2017-taking-closer-look-compensation-laws-u-s/> (last visited Oct 10, 2020).

³⁸ . Compensating the Wrongly Convicted, Innocence Project (2019), <https://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited Oct 10, 2020).

³⁹ . 28 U.S.C.A. § 2513 (West).

7 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction; and (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.⁴⁰ During President Bush's term along with Congress, the federal government recommended that states have a compensation statute that awards exonerees \$50,000 for every year spent in prison, with up to an additional \$50,000 for years on death row.⁴¹ When adjusted for inflation, the amount would be \$63,000 today.⁴²

2. Compensation in Other States

Each state varies with how much an exoneree may be awarded in compensation. Some states on the higher end of the spectrum are California, Texas, and New York. In New York, there is no overall maximum cap or yearly limit to how much exonerees may be award, in California allows up to \$140 per day to spent wrongly imprisoned to be recovered, and in Texas compensates at \$80,000 per year along with an annuity set at the same amount.⁴³ On the other end of the spectrum, there is New Hampshire, Wisconsin, and Oklahoma. New Hampshire has the lowest monetary compensation at just \$25,000 for the entire length of wrongful imprisonment.⁴⁴ Wisconsin is only a little better than New Hampshire, with an overall \$25,000 cap on compensation that can be paid out at up to \$5,000

⁴⁰ . *Id.*

⁴¹ . *Id.*

⁴² . *Id.*

⁴³ . Meghan Keneally, Will the state pay you for a wrongful conviction? Depends on the state. ABC News (2019), <https://abcnews.go.com/US/state-pay-wrongful-conviction-depends-state/story?id=62436623> (last visited Oct 16, 2020).; Rebecca Brown & Carlita Salazar, Taking a Closer Look at Compensation Laws in the U.S. Innocence Project (2017), <https://www.innocenceproject.org/wrongful-conviction-day-2017-taking-closer-look-compensation-laws-u-s/> (last visited Oct 10, 2020).

⁴⁴ . *Id.*

8 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] annually.⁴⁵ Oklahoma, like New Hampshire, does not have an annual cap, rather just caps compensation for the entire time spent in jail at \$175,000.⁴⁶ In the middle is Mississippi and Nebraska, who both have a cap of \$500,000, with Mississippi having an annual cap of \$50,000.⁴⁷ In stark contrast, Montana does not award any monetary amount, but instead will pay an exoneree's tuition, room, and board at a Montana community college.⁴⁸ Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Kentucky, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming, are the states that do not have wrongful conviction compensation statutes.⁴⁹

II. *Wrongful Conviction Compensation in Louisiana*

According to the Registry, there have been sixty-six exonerations in Louisiana since 1989, forty-one of which have happened since Louisiana enacted its wrongful conviction compensation statute in 2005.⁵⁰ Out of those forty-one exonerees, thirty-three have been awarded compensation under the statute.⁵¹ In, Louisiana, the average amount of time an exoneree spends wrongfully imprisoned is about fourteen and a half years, which is about five years higher than the national average.⁵²

A. LA R.S. 15:572.8

In 2005, Louisiana Revised Statute 15:572.8 was enacted to set out the requirements for an inmate to

⁴⁵ . *Id.*

⁴⁶ . *Id.*

⁴⁷ . *Id.*

⁴⁸ . *Id.*

⁴⁹ . *Compensating the Wrongly Convicted, Innocence Project* (2019), <https://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited Oct 10, 2020).

. 28 U.S.C.A. § 2513 (West) 28 U.S.C.A. § 2513 (2004).

⁵⁰ . Dustin Cabral, *The National Registry of Exonerations - Exoneration Registry* (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).

⁵¹ . Meghan Holmes, *New Legislation Means Increase In Compensation For La.'s Wrongfully Convicted* *The Louisiana Weekly* (2020), <http://www.louisianaweekly.com/new-legislation-means-increase-in-compensation-for-la-s-wrongfully-convicted/> (last visited Oct 13, 2020).

⁵² . Dustin Cabral, *The National Registry of Exonerations - Exoneration Registry* (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).

9 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
 recover compensation for wrongful conviction.⁵³ When the law was first enacted, payments were set at \$15,000 for each year incarcerated and was capped at a maximum of \$150,000, and there was an additional \$40,000 available for loss of life expenses.⁵⁴ Currently, the law provides that a petitioner may be entitled to compensation if they have served a sentence of imprisonment for a crime for which they were convicted and: (1) the conviction has been reversed or vacated; and (2) the petitioner has proven by clear and convincing scientific or non-scientific evidence that they are factually innocent of the crime for which they were convicted.⁵⁵ Once a petitioner has met those two requirements, then they may be awarded \$25,000 for every year spent incarcerated.⁵⁶ However, they can only be compensated for a max of ten years, and therefore can only receive up to \$250,000.⁵⁷ Additionally, the law provides that the petitioner is entitled to receive \$80,000 to compensate for loss of life opportunities while incarcerated such as, job skills training, education, housing, and other services that the petitioner may need.⁵⁸ Any awards for compensation that are awarded under this statute are paid from a special fund established in the state treasury, the Innocence Compensation Fund (ICF).⁵⁹ The ICF is funded through appropriations, donations, grants, and other monies which may become available for the purposes of the fund.⁶⁰ On June 24, 2003, Greg Bright and Earl Truvia were released from Angola, the Louisiana State Penitentiary, after spending 27 years in prison for a crime they did not commit.⁶¹ Truvia and Bright were given mandatory life sentences in 1976 for second-degree murder, for the killing

⁵³ . Vickie Welborn, *La. Fights Pay for Man Wrongfully Convicted of Murder* the *Shreveport Times* (2015), <https://www.shreveporttimes.com/story/news/local/2015/02/25/glenn-ford-compensation-louisiana-new-orleans-murder-caddo-parish-isadore-rozeman-jake-robinson/24039067/> (last visited Oct 11, 2020).

⁵⁴ . *Id.*

⁵⁵ . La. R.S. § 15:572.8(A)(1)(2).

⁵⁶ . *Id.* La. R.S. § 15:572.8(H)(2).

⁵⁷ . *Id.*

⁵⁸ . La. R.S. § 15:572.8(H)(3).

⁵⁹ . *Id.* La. R.S. § 15:572.8(N)(1).

⁶⁰ . *Id.*

⁶¹ . Jake Clapp, Wrongfully convicted people are due compensation, but process is not a smooth one NOLA.com (2011), https://www.nola.com/news/crime_police/article_d044805d-dde4-5f31-935d-b8f61f50a201.html (last visited Oct 14, 2020).

10 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
of a fifteen year old boy, after an eyewitness claimed to have seen the men with the boy before the killing.⁶² After the prosecution presented their case centered around that one witness testimony, the jury deliberated for just twelve minutes before finding both men guilty.⁶³ Following their convictions, both men continued to piece together their case and tried to find a way to prove their innocence, but made little headway until 2001 when the Innocence Project took on their case.⁶⁴ Both men were later exonerated in 2003, and walked out prison with nothing to their names but the clothes they had on, a \$10 check from the state and garbage bags filled with legal paperwork.⁶⁵ However, that was not the end of their journey as the two would be among the first to try and receive compensation through Louisiana's lengthy and complicated process. When they were first released, Louisiana had no law that entitled those who were wrongfully convicted to compensation, however, under the 2005 statute, which Bright lobbied for, the men would be allowed compensation so long as they filed a petition within three years.⁶⁶ Although it may seem like Bright and Truvia's experience is unique, it is actually is all too common amongst Louisiana exonerees, as the process is very complex and does not always yield compensation right away. Like Truvia and Bright, Jerome Morgan shared a similar experience of having to wait years after his exoneration to actually receive his compensation.⁶⁷ From the time Morgan walked out of prison, to when he received his first payment of \$25,000, four and half years had passed.⁶⁸ At that point, the \$25,000 was not even enough to cover the debt he had accrued since being released.⁶⁹ When speaking about the compensation, Morgan said, "It's not enough money as it is. And then you break it down when you don't have access to it until you're in a lot of debt. You know and so all that ends up happening is you paying off part of the debt, not even the entire debt."⁷⁰

⁶² . Id.

⁶³ . Id.

⁶⁴ . Id.

⁶⁵ . Id.

⁶⁶ . Id.

⁶⁷ . Holmes, *supra* note 51.

⁶⁸ . Id.

⁶⁹ . Id.

⁷⁰ . Id.

It would be impossible to address any aspect Louisiana's of criminal justice system without discussing the impact of race. Although blacks only make up about 33%⁷¹ of Louisiana's population, African American make up 66% of Louisiana's prison population.⁷² It is likely that this has a direct correlation to the fact that the majority of exonerees are black. Which is why it is not shocking that currently, 54 (82%) out of the 66 people who have been exonerated in the state are black.⁷³ What is shocking however, is the disparity between the average number of years lost, and the total number of years lost between the races. In Louisiana, black exonerees have spent about 843 years behind jail for wrongful convictions, which equates to an average of 15.6 years lost per exoneree.⁷⁴ Which is a year more than Louisiana's overall average of 14.4, and more than six years above the national overall average of 9.1.⁷⁵ However, when looking at just white exonerees, the average goes down significantly to just 9.5 years lost on average, accounting for 104 years total. Which is much closer to the national overall average, and significantly lower than Louisiana's overall average.⁷⁶ While there is a similar trend when breaking down the national average, the disparity is not as large with whites losing 7.6 years, and blacks losing 10.6 years on average at the national level.⁷⁷ Furthermore when looking nationally at the total number of years lost, white exonerees lost a total of 7,426 years, while

⁷¹ . U.S. Census Bureau, *State & County Quick Facts: Louisiana*, <https://www.census.gov/quickfacts/LA> (last visited Nov. 20, 2020)

⁷² . Nicholas Chrastil, Report: 80 percent of people still in prison on non-unanimous jury verdicts are Black The Lens (2020), <https://thelensnola.org/2020/11/17/report-80-percent-of-people-still-in-prison-on-non-unanimous-jury-verdicts-are-black/> (last visited Nov 29, 2020). Nicholas Chrastil, Report: 80 Percent of People Still In Prison On Non-Unanimous Jury Verdicts Are Black The Lens (2020), <https://thelensnola.org/2020/11/17/report-80-percent-of-people-still-in-prison-on-non-unanimous-jury-verdicts-are-black/> (last visited Nov 29, 2020).

⁷³ . Dustin Cabral, The National Registry of Exonerations - Exoneration Registry (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).

Cabral, *supra* note 50.

⁷⁴ . *Id.*

⁷⁵ . *Id.*

⁷⁶ . *Id.*

⁷⁷ . *Id.*

12 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] black exonerees lost a total of 14,120 years.⁷⁸ Additionally, Louisiana is likely to see a large influx of exonerees in the coming years due to the change in how Louisiana’s jury verdicts are decided, and a large portion of that influx will be black. Previously under Louisiana law, which dates back to the Jim Crow era, a person could be “convicted of serious offenses- and even spend their lives in prison- without the unanimous consent of a jury”.⁷⁹ Two years ago, the citizens of Louisiana voted to end non-unanimous jury verdicts, and just six months ago the U.S. Supreme Court found non-unanimous verdicts to be unconstitutional.⁸⁰ However, more than 1,500 people who were convicted by these unconstitutional juries are still behind bars in Louisiana, with 80% of those people being black.⁸¹ This is just yet another astonishing disparate statistic when looking at race in Louisiana’s criminal justice system. Currently, despite the statewide vote against non-unanimous juries and the Supreme Court vote, the 1,500 or so people would not be eligible for a retrial based on their verdicts.⁸² However, this could all soon be changing as the court is set to begin hearing arguments on December 2, 2020 on whether or not the previous ruling should be applied retroactively to people whose cases were initialized before 2019 or have exhausted their appeals.⁸³ Therefore, depending on the outcome of this case, Louisiana may see an even larger gap in the racial disparity of those who are exonerated.

C. Past Legislative Attempts

Comparatively, Louisiana’s limit on the amount of compensation per year and its overall maximum on

⁷⁸ . Dustin Cabral, The National Registry of Exonerations - Exoneration Registry (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).

⁷⁹ . *UNHEALED WOUNDS The People Still Imprisoned Due to Jim Crow Jury Verdicts, The Promise of Justice Initiative* (2020), <https://promiseofjustice.org/wp-content/uploads/2020/11/PJI-Jim-Crow-Jury-Status-Report.pdf> (last visited Nov 29, 2020).

⁸⁰ . Nicholas Chrastil, Report: 80 percent of people still in prison on non-unanimous jury verdicts are Black The Lens (2020), <https://thelensnola.org/2020/11/17/report-80-percent-of-people-still-in-prison-on-non-unanimous-jury-verdicts-are-black/> (last visited Nov 29, 2020).

⁸¹ . *Id.*

⁸² . *Id.*

⁸³ . *Id.*

13 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] compensation is one of the lowest in the nation.⁸⁴ Alternatively, Louisiana has the second highest average for years spent wrongfully imprisoned.⁸⁵ This is why Representatives Ted James and Tanner Magee co-sponsored a bill this past legislative season to try and address the shortcomings in Louisiana's current legislation, with the help of the Innocence Project New Orleans.⁸⁶ However, due to the Covid-19 pandemic, the bill never had the chance to make it to the legislative session.⁸⁷ The bill, had it been passed, would have raised Louisiana's award from \$25,000 per year to \$40,000 per year, would leave the one-time \$80,000 for loss of opportunities, and would have eliminated the overall \$250,000 maximum.⁸⁸ This is not the first time that legislatures have tried to address the wrongs with Louisiana's current compensation bill. In 2016, Shreveport law maker, Representative Cedric Glover, authored House Bill 1116, which did not focus on the amount of compensation, like the most recent bill, but rather addressed the provision that a person has to be "factually innocent".⁸⁹ Under the law, "factual innocence" means that, the petitioner did not commit the crime for which he was convicted and incarcerated nor did he commit any crime based upon the same set of facts used in his original conviction.⁹⁰ The bill did not make it out of the House judicial committee after those against the measure struggled with reworking the definition of "factual innocence" because they feared changing it would allow someone who committed a crime, but was not charged, to sue the state for money.⁹¹ The Louisiana District Attorney Association also spoke out in opposition to changing the current statute, citing that the statute was carefully crafted and if changed, would open the door to hundreds of new

⁸⁴ . Clapp, supra note 61.

⁸⁵ . Cabral, supra note 50.

⁸⁶ . Holmes, supra note 51.

⁸⁷ . *Id.*

⁸⁸ . *Id.*

⁸⁹ . MEGAN TRIMBLE, *Louisiana Lawmakers Halt Reworked Wrongful Conviction Payout Bill* *The Advocate* (2016), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_e76f7949-bebf-5c27-b138-d362f0111e1d.html (last visited Oct 12, 2020).

⁹⁰ . La. R.S. § 15:572.8

⁹¹ . Trimble, supra note 89.

14 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] and costly compensation cases.⁹² Glover, believes differently arguing that, by keeping the current definition of “factual innocence”, that the exonerated are sometimes still being unfairly penalized because this allows the courts to deny compensation when any offense was committed, even if it was not tied to the crime that got the person wrongfully convicted.⁹³ Glover, brought the bill in order to try to retroactively compensate Glenn Ford.⁹⁴ Ford was wrongfully imprisoned for 30 years after having been convicted of a 1983 murder, and was the nation’s longest serving death row inmate before his release.⁹⁵ The state strongly opposed Ford’s request for compensation arguing that under the “factually innocent” provision in the statute, Ford would not be entitled to the \$330,000 payout that was possible under the law. Ford was originally convicted in 1984, for the murder of a local jeweler, who was robbed and killed.⁹⁶ There were three other men arrested with Ford, but their charges were eventually dismissed, despite Ford repeatedly denying his involvement in the crimes and telling authorities it was the other men who committed the crime.⁹⁷ Ford continuously failed to succeed in any of his appeals, and it was not until a confidential informant in a different case, identified the other men as the real killers and not Ford, in 2013.⁹⁸ However, although Ford was not involved in the murder or the robbery, he is still barred from compensation because he committed two crimes based on the same set of facts as the murder, when he took possession of the jewelry from the robbery and tried to sell it.⁹⁹ Therefore, according to the state since Ford is not blameless to the events leading to his conviction, he is not entitled to any compensation.¹⁰⁰ Sadly, Ford passed away from aggressive lung cancer before his case was finished being adjudicated, so the question is still out on whether he

⁹² . *Id.*

⁹³ . *Id.*

⁹⁴ . *Id.*

⁹⁵ . Vickie Welborn, *Louisiana Opposes Pay For Wrongfully Convicted Man USA Today* (2015), <https://www.usatoday.com/story/news/nation/2015/02/28/la-fights-pay-man-wrongfully-convicted-murder/24186215/> (last visited Oct 12, 2020).

⁹⁶ . *Id.*

⁹⁷ . *Id.*

⁹⁸ . *Id.*

⁹⁹ . *Id.*

¹⁰⁰ . *Id.*

15 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] ultimately would have been able to win against the state and receive compensation.¹⁰¹ Following his death, one of the prosecutors from Ford's original case, A.M. Stroud, wrote an article in which he apologized for his role in Ford's prosecution.¹⁰² Stroud went even further by saying this wrongful conviction is why the death penalty should be abolished because if the state had gone through with Ford's execution, it would have killed an innocent man.¹⁰³ Stroud also spoke out against the lengthy legal battle that took place preceding Ford's death saying, "Glenn Ford should be completely compensated to every extent possible because of the flaws of a system that effectively destroyed his life. The audacity of the state's effort to deny Mr. Ford any compensation for the horrors he suffered in the name of Louisiana justice is appalling."¹⁰⁴

III. How Louisiana Should Move Forward Today

While the legislation that Louisiana law makers have previously proposed would have been a step in the right direction for Louisiana, it is still not enough. By reviewing the current statutes of neighboring Southern States, the Innocence Project's proposed plan for compensating the innocent, and federal government's recommendation, this article will outline three areas in which Louisiana can focus on to improve its compensation statute. First will be a discussion of the amount per year that the state will pay, whether to keep a maximum number of years on can be compensated for, the cap on how much may be awarded, as well as determining if and what the other awards that the state will give will be. Secondly, this plan will address the procedural issues with the current statute, specifically the factually innocent provision and the role of

¹⁰¹ . Matt Schudel, Glenn Ford, *Wrongfully Convicted in Louisiana Murder Case, Dies At 65* The Washington Post (Jul. 04, 2015), https://www.washingtonpost.com/national/glenn-ford-wrongfully-convicted-in-louisiana-murder-case-dies-at-65/2015/07/04/0dfa3cec-2266-11e5-84d5-eb37ee8eaa61_story.html .

¹⁰² . *Id.*

¹⁰³ . A.M. "Marty" Stroud, Lead prosecutor apologizes for role in sending man to death row The Shreveport Times (Mar. 20, 2017), <https://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/>.

¹⁰⁴ . *Id.*

16 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] prosecutorial misconduct. Next, this plan will outline options to reduce the amount of time in between exonerees being released and when they receive their first compensation check. Lastly, this plan will address how to fund the suggested changes to the current statute. Wrongful conviction statutes should vary from state to state as the process will not be one-size-fits all because factors such as a state's incarceration rate, prison population, and the leading cause of exonerations. This proposed plan will be modeled after current statutes in place in neighboring southern states, Texas, Oklahoma, Mississippi, and Alabama. These states all have incarceration rates that are comparable to Louisiana¹⁰⁵, and provide a variety of different options for compensation plans.

A. Amount per Year, Caps, and Funding Source

1. Yearly Award Amount

The first step in modifying Louisiana's current compensation statute, is determining how much an exoneree should be awarded for each year spent wrongfully imprisoned. There are three options that the state has regarding this step, raise the amount to the national average or neighboring states, raise the award to the federal recommendation, or calculating a new number based off factors specific to Louisiana. The most recent legislation aimed at raising the compensation amount to just \$40,000 however, this is not enough of a raise.¹⁰⁶ The minimum that the state should consider raising its award amount to is \$50,000, which is what the federal government pays.¹⁰⁷ This would be the easiest amount to get passed by congress, although it does double the existing award amount. However, that amount is still too low considering the average number of years inmates lose in Louisiana, and the state's high rate of official misconduct in cases. Alternatively, the state could also raise the amount to the national average, which is \$70,000.¹⁰⁸ While

¹⁰⁵ . Danielle Kaeble & Mary Cowhig, Correctional Populations In The United States, 2016 Bureau of Justice Statistics (BJS) (2018), <https://www.bjs.gov/index.cfm?ty=pbdetail> (last visited Nov 30, 2020).

¹⁰⁶ . Holmes, *supra* note 51.

¹⁰⁷ . *Id.*

¹⁰⁸ . *Id.*

17 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
it is unlikely that the state legislature would agree to pay this amount, this amount is still too low to compensate Louisiana's exonerees. When thinking about why Louisiana's exonerees should be paid more than the national average, the answer is simple; all of Louisiana's rates and statistics are well above the national average and therefore it is only fitting that its compensation is as well. Louisiana exonerees have lost well over the average amount of years lost by other exonerees nationally, the state routinely competes for the title of highest incarceration rates and has official misconduct as a factor well over the national average in cases.¹⁰⁹ Therefore, the best option would be for Louisiana to raise its compensation award to \$80,000, the same as Texas. However, this is likely to large of a jump for the state legislature to agree to and a better option would be to increase the award to \$60,000, which is in between what the federal government pays, and the national average. As well as, keeping in place the existing provision allowing for an additional \$80,000 for job training, medical cost, and loss of life opportunities. Lastly, the provision should allow for an exoneree to receive free tuition for up to 120 credit hours at any state university or community college. This option both takes into consideration factors specific to Louisiana, as well as pulls in ideas from neighboring states.

2. Ten-Year Cap and Maximum Amount

Aside from the compensation amount already being too low, the next major issue with the current statute is that it places a cap on the number of years an exoneree can be compensated for, allowing an exoneree to only be compensated a maximum of \$250,000. As previously mentioned, the average amount of time an exoneree spends wrongfully imprisoned is fourteen and a half years, but Louisiana only compensates up to ten years. This means that the average exoneree in Louisiana is not receiving full compensation for time spent wrongfully imprisoned. One option to remedy this issue would be to raise the number of years that an exoneree may be

¹⁰⁹ . Danielle Kaeble; Mary Cowhig, *Correctional Populations In The United States, 2016* Bureau of Justice Statistics (BJS) (2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6226> (last visited Nov 30, 2020).

18 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] compensated for. However, it would be hard to determine what number that cap should be raised to as the amount of time spent wrongfully incarcerated ranges from months to almost forty-five years.¹¹⁰ Additionally, it would also be impractical and unnecessary to raise the maximum amount that an exoneree may be compensated because there is no set number that will cover every case.¹¹¹ Therefore, the best remedy would be for Louisiana to do away with its cap on the number of years, and the maximum total amount an exoneree may receive.

3. Funding Source

The biggest argument against compensation statutes is the financial aspect because of the burden that compensation places on each state.¹¹² Currently, the state pays about \$600,000 annually for compensation awards.¹¹³ While so far, there have been no issues raised with the current method funds are raised, it is likely that any legislation that proposes an increase to the award amount, will also need to propose additional funding sources. This article proposes to solve that issue in Louisiana by supplementing the Innocence Compensation Fund with revenue the state earns through its lottery.

B. Procedural Issues and Delays in Payments

On the procedural side, there are three issues that must be addressed in order to have a statute that properly ensures the wrongs are correct; the factually innocent provision, cases involving prosecutorial misconduct, and the amount of time in which an exoneree must be paid by.

¹¹⁰ . Dustin Cabral, The National Registry of Exonerations - Exoneration Registry (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).

¹¹¹ . COMPENSATION STATUTES: A NATIONAL OVERVIEW, Exoneration-Innocence Project (2018), COMPENSATION STATUTES: A NATIONAL OVERVIEW (last visited Oct 10, 2020).

¹¹² . Meghan Keneally, Will the state pay you for a wrongful conviction? Depends on the state. ABC News (2019), <https://abcnews.go.com/US/state-pay-wrongful-conviction-depends-state/story?id=62436623> (last visited Oct 16, 2020).

¹¹³ . JOHN SIMERMAN, Proof of innocence a hard road for many freed Louisiana inmates seeking state compensation NOLA.com (May. 28, 2016), https://www.nola.com/article_e26ccc08-30b4-567f-aacf-ed0a08594256.html.

1. Removal of the Proven Factual Innocence Provision

In the past, one of the biggest issues that legislators have grappled with when considering whether to change the current statute is the provision that in order to receive compensation, an exoneree must prove that he is factually innocent by clear and convincing evidence. This burden that the state places on exonerees is one of the highest in the nation and is an even stricter burden of proof required for an exoneration.¹¹⁴ While the best option to modify Louisiana's statute would be to do away with proving factual innocence provision all together, that is not realistic as lawyers have continuously denied legislation aimed at doing so. However, a more suitable option would be lowering the burden of proof that exonerees must meet in order to be awarded compensation to a preponderance of the evidence standard. This is the standard that is currently used in Texas.¹¹⁵ "The instinct for a lot of these laws is they don't want people who are actually guilty to get money, which is understandable. But you end up excluding a lot of actually innocent people," said Amol Sinha, state policy advocate for the New York-based Innocence Project.¹¹⁶ This is very much the case in Louisiana, as Attorney Generals have been able to twist and apply the law in a very conservative manner, as the Louisiana Supreme Court has never weighed in on the issue.¹¹⁷ In one specific case, under Louisiana's current Attorney General Jeff Landry, the Attorney General's office has been able to take the provision a step further, argued that not only must a defendant prove their innocence by a clear and convincing standard, but they must also show that the evidence "undermines the prosecution's entire case".¹¹⁸ Therefore, there must be a clear limitation set on what the "factual innocence" provision means, otherwise there can be no prosecutorial limitation set on what the burden of proof is,

¹¹⁴ . *Id.*

¹¹⁵ . COMPENSATION STATUTES: A NATIONAL OVERVIEW, Exoneration-Innocence Project (2018), COMPENSATION STATUTES: A NATIONAL OVERVIEW (last visited Oct 10, 2020).

¹¹⁶ . JOHN SIMERMAN, Proof of innocence a hard road for many freed Louisiana inmates seeking state compensation NOLA.com (May. 28, 2016), https://www.nola.com/article_e26ccc08-30b4-567f-aacf-ed0a08594256.html.

¹¹⁷ . *Id.*

¹¹⁸ . *Id.*

20 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
as it will continuously be at the attorney general's discretion how strictly to imply the provision. This should not be the case, and the burden of proof should never be higher than that which was necessary for an exoneree to be freed, and that is why the best option is to reduce the burden of proof to a preponderance of the evidence standard. Additionally, Louisiana, since it is unlikely that the factual innocence provision will be removed, Louisiana should consider rewriting the statute to exclude, ". . . nor did he commit any crime based upon the same set of facts used in his original conviction."¹¹⁹ By doing away with this provision, Glenn Ford, and others like him would then be allowed compensation for time they spent wrongfully convicted.

2. Implementation of an Official Misconduct Provision

In the United States, official misconduct was a factor in 54% of convictions where the defendant was later exonerated, and generally that rate is even higher when looking specifically at severe crimes.¹²⁰ For example, if the crime was murder, official misconduct was a factor in 72% of cases.¹²¹ Since this paper is also addressing various roles that race plays, it is important to note that, 53% of victims of official misconduct are black, whereas whites account for only 34% of victims.¹²² Additionally, when looking only at cases where official misconduct was a factor, the national average for years lost to wrongful imprisonment increased by two.¹²³ When looking at these same statistics for Louisiana specifically, the data and disparities in the data, are even more alarming. In Louisiana, official misconduct is a factor in 65% of exonerations, 10% higher than the national average.¹²⁴ When looking at murder cases only, the

¹¹⁹ . La. R.S. § 15:572.8

¹²⁰ . Maurice Possley, Kaitlin Jackson Roll & Klara Huber Stephens, *Government Misconduct and Convicting the Innocent The Role of Prosecutors, Police and Other Law Enforcement* (Samuel Gross ed., 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misc_onduct_and_Convicting_the_Innocent.pdf (last visited Nov 25, 2020).

¹²¹ . Dustin Cabral, *The National Registry of Exonerations - Exoneration Registry* (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).

¹²² . *Id.*

¹²³ . *Id.*

¹²⁴ . *Id.*

21 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII] rate of official misconduct skyrockets over twenty percent to 88%, almost is over 20% the national rate of misconduct in murder cases.¹²⁵ There is also a stark increase in the racial disparity when looking at who are the victims of official misconduct because in Louisiana, blacks account for 79% official misconduct victims, while whites account for only 19%.¹²⁶ Although misconduct is the leading factor in well over the majority of exonerations in Louisiana, there is little done in regard to discipline for the conduct.¹²⁷ In the cases of every Louisiana exoneree mentioned in this article, official misconduct was a factor in the exoneration.¹²⁸ However, as of 2018, there has only been a single prosecutor sanctioned for the egregious misconduct that occurred in Louisiana's wrongful conviction cases.¹²⁹ In that case, the sanction, a three-month suspension from the practice of law that was ultimately deferred, was just a slap on the wrist considering the prosecutor had another man's life in jeopardy, as it was a death penalty case.¹³⁰ Therefore, this plan proposes that there must be a provision regarding special damages that may be awarded if it were determined that official misconduct occurred and was a factor in the exoneration. This provision would serve as a deterrent to official misconduct by putting in place a procedural ground for disciplinary actions for the official who committed the misconduct.

3. Decreasing Time Delays

Lastly, Louisiana must adjust its procedural process that claimants must go through in order to receive compensations. Often times, the process takes up to two years before an exoneree receives their first check.¹³¹

¹²⁵ . *Id.*

¹²⁶ . *Id.*

¹²⁷ . Dustin Cabral, The National Registry of Exonerations - Exoneration Registry (2020), <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct 11, 2020).;

¹²⁸ . *Id.*

¹²⁹ . Alanah Odoms Hebert, Prosecutors must be held accountable for misconduct: Opinion NOLA.com (Aug. 3, 2018), https://www.nola.com/opinions/article_bd8404d8-a247-566c-9fef-c144f03c5e7b.html .

¹³⁰ . *Id.*

¹³¹ . Meghan Holmes, New legislation means increase in compensation for La.'s wrongfully convicted The Louisiana Weekly (Apr. 20, 2020), <http://www.louisianaweekly.com/new-legislation-means-increase-in->

22 *JOURNAL OF RACE, GENDER & POVERTY* [VOL. XII]
Innocence Project of New Orleans attorney, Kia Hayes said, “Those two years are a real struggle, when the newly released person has to rely on the community and loved ones, whom they often haven’t been in touch within years, and then when they finally receive compensation, it’s one of the lowest amounts in the country.”¹³² Louisiana owes it to these exonerees to make the process easier, because if not it is as if their conviction continues. Therefore, the statute should require that all cases be settled within a year of the exoneree applying for compensation. Additionally, to even further reduce the financial burden upon applying for compensation under the statute, each exoneree should automatically be awarded \$5,000, and in cases where prosecutorial misconduct was a factor, the amount should increase to \$10,000. This money is necessary because as discussed, several times in this article, there is a great financial need immediately once exonerees are released, and often exonerees go into a debt before even receiving their first compensation payment.

CONCLUSION

While the purpose of our criminal justice system is to carry out a fair and balanced system judicial system, in which those who are responsible for crimes are punished, that process is not always fair and just. There are times where the verdict handed down is wrong and those originally seen as guilty are later exonerated and released, which is why there also needs to be a system put in place for when these exonerations occur. To not do so, would be neglectful, and would go against the very reason why we have a criminal justice system, to serve justice. Nationally, and in Louisiana more specifically, there, has been an effort to compensate exonerees for their time wrongfully served, and while it is good that Louisiana has a foundational wrongful conviction compensation statute, the amounts received by previous exonerees have been nominal at best. Previous attempts at editing the policy have helped to alleviate some of the issues surrounding the wrongful conviction policy but there is still a lot to be desired in Louisiana’s current statute.

The current policy should be amended to correctly address issues such as yearly amounts received by exonerees, decreasing time delays, and removing the Proven Factual Innocence Provision. Reevaluating and editing Louisiana's wrongful conviction policy to remove bias based on race or ability would help to ensure that those who were wrongfully convicted receive the restitution they deserve while also saving the state time and money in the future. These are all vital steps that Louisiana must take in order to continue to ensure that justice is carried out, and the very principles on which our criminal justice system was built, are not neglected.