

A Role for Apology: Remedial Work by the Criminal Justice System

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ABSTRACT

Apologies are morally consequential and one of the principal ways the powerful—specifically actors in the criminal justice system—can remedy inevitable excesses of authority. In healthcare, commercial, and governmental settings, to name a few, the role of apology has assumed greater ethical weight. Calls are growing for increased use of apologies when people are injured by the criminal justice system, with the sentiment stated in its most elemental form: “Say you’re sorry when you hurt somebody.” Yet, of the thirty-seven state wrongful conviction statutes, not one mentions the word apology. The reality of apologizing is more complicated. Apologies are but one form of remedial work in response to transgression of societal norms encompassing a spectrum from retreat, in which the transgressor flees, through accounts and benevolent gestures, to a real apology with the attendant foundational elements of recognition, responsibility, remorse, and redress.

This paper will discuss the role of apology in the criminal justice system. Part One will briefly analyze the concept of norms and the moral imperative to do remedial work for transgression of such norms (e.g., injuries). The options for remedial work discussed will include, among others, apologies. Part Two will discuss the theory and practice of apologies and how real apologies should apply to the criminal justice system. Instructive examples of apologies—focusing on merit—in the political and governmental setting are discussed. Part Three will examine apology considerations in the criminal justice setting, including a series of examples offered by law enforcement, elected officials, and prosecutors. Part Three will also examine the dearth of empirical evidence on the role of apology by the criminal justice system. Part Four will discuss existing wrongful conviction statutes and how the sections in various state statutes support or inhibit the offering of apologies. Some policy arguments against apologizing by criminal justice actors will be refuted. Lastly, Part Five proposes a model wrongful conviction statute with provisions for apology as a novel section and additional statutory clauses necessary to support the offering of an apology.

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INTRODUCTION

Real apologies are one of the principal ways those in power can remedy inevitable excesses of privilege.¹ Calls are growing for increased use of apologies when people are injured by the criminal justice system.² The sentiment has been stated in its most elemental form: “Say you’re sorry when you hurt somebody.”³ The reality of apologizing is more complicated. Apologies are but one form of remedial work in response to transgression of societal norms—including injuries by the criminal justice system—encompassing a spectrum from retreat, in which the transgressor flees, through accounts and benevolent gestures, to a real apology with the foundational elements of recognition, responsibility, remorse, and redress.

This paper will discuss the role of apology in the criminal justice system. Part One will briefly analyze the concept of norms and the moral imperative to do remedial work for the transgression of such norms (e.g., injuries). The options for remedial work discussed will include, among others, apologies. Part Two will discuss the theory and practice of apologies and how real apologies should apply to the criminal justice system. Instructive examples of apologies—focusing on their merit—in the political and governmental setting are discussed. Part Three will examine apology considerations in the criminal justice setting, including a series of examples offered by law enforcement, elected officials, and prosecutors. Part Three will also examine the dearth of empirical evidence on the role of apology by the criminal justice system. Part Four will discuss existing wrongful conviction statutes and how the sections in various states might support the offering of apologies by statute. Some policy arguments against apologizing will be refuted. Lastly, Part Five includes a model statute with apology as a novel section and additional statutory clauses necessary to support the role of apology.

¹ I will use the term “real” apology while acknowledging there are many other terms from which to choose. See Michael Karson, *4 Parts of a Real Apology: Apology Is a Relational Process That Leads to Change*, PSYCHOL. TODAY (July 14, 2016), <https://www.psychologytoday.com/us/blog/feeling-our-way/201607/4-parts-real-apology> [<https://perma.cc/N6U4-ESX8>] (last visited Jan. 12, 2025).

² I will use the term “injured” for the individual or group that has sustained a harm (e.g., police involved shooting, wrongful death, wrongful conviction), and “transgressor,” after O’Hara, to define the individual or group (e.g., police department, detective, line prosecutor, district attorney) that has caused the harm in the context of the criminal justice system. See Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1123 (2002).

³ ROBERT FULGHUM, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN* 6 (Random House 2003) (1988).

I. NORMATIVE JUSTICE AND REMEDIAL WORK⁴

A. Normative Justice

As in all instances of social interaction, justice—including that meted out by law enforcement and prosecutors—is subject to norms, or guides for action.⁵ Preservation of societal order requires community commitment to societal norms.⁶ Transgression of societal norms impacts not only the injured and the transgressor, but the entire society. Norms have been distinguished as formal in the case of statutes and regulations that draw upon the authority of the state or informal as rules supported by some lesser authority.⁷ Norms oblige individuals to do or refrain from doing something to another and may lead the individual to anticipate an action that will be done (or not done) by that other.⁸ Such reciprocal actions may be considered rights by persons who experience transgression, and duties otherwise.⁹

Norms are often generalized, and transgression on one occasion is often perceived as indicative of transgressions in a whole class of events.¹⁰ Sanctions can be positive, but more importantly, in remedial interchanges, negative when transgressions occur.¹¹ The significance of negative sanctions is twofold: sanctions may be substantive, but they also say something to the injured and witnesses of the infraction about the moral status of the transgressor.¹² Sanctions may promote normative compliance and may be

⁴ I will use the term “remedial work” after Goffman. ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER, 108 (Routledge 2017) (1971). Schlenker uses the alternative phrase “remedial behavior,” BARRY R. SCHLENKER, IMPRESSION MANAGEMENT: THE SELF-CONCEPT, SOCIAL IDENTITY, AND INTERPERSONAL RELATIONS 134 (Brooks-Cole Publishing Co., 1980).

⁵ A thorough discussion of norms in criminal justice are beyond the scope of this paper. However, such norms are readily available for review and analysis. *See, e.g.*, American Bar Association, The Criminal Justice Standards for the Prosecution Function, Fourth Edition, https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/ [https://perma.cc/LN2Q-3BD6] (Last visited Jan. 12, 2025); American Bar Association, Standards on Prosecutorial Investigations, Prosecutorial Investigations, https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecutorial-investigations/ [https://perma.cc/R8QD-L2Q5] (Last visited Nov. 13, 2024). Law enforcement norms also exist. Model policies from the International Association of Chiefs of Police (IACP) National Law Enforcement Policy Center articulate norms of ethical conduct (noting access to model policy links is an IACP members only benefit). International Association of Chiefs of Police. Related Policies. <http://www.theiacp.org/ethicspolicies> [https://perma.cc/Z5YX-P5UF]. (Last visited Jan. 12, 2025).

⁶ Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 318 (2001).

⁷ GOFFMAN, *supra* note 4, at 95.

⁸ *Id.* at 96–97.

⁹ *Id.* at 98.

¹⁰ *Id.* at 97 (explaining that those upon whom normative infractions are inflicted, or those who witness such infractions, perceive the offender’s relationship to norms as defective, and by extension to normative justice in general).

¹¹ The establishment of norms does not make the application of negative sanctions any easier within in the law enforcement or prosecutorial realms. *See, e.g.*, The Innocence Project, Official Misconduct. <https://innocenceproject.org/official-misconduct/> [https://perma.cc/84DD-YVED] (Last visited Jan. 12, 2025); Philip Matthew Stinson, Sr. Police Integrity Lost: A Study of Law Enforcement Officers Arrested. <http://www.ncjrs.gov/pdffiles1/nij/grants/249850.pdf> [https://perma.cc/3F2H-XQNM] (Last visited Jan. 12, 2025).

¹² GOFFMAN, *supra* note 4, at 99–100.

formal or informal.¹³ Sanctions also impart a notion of how the individual in question and others assess deviation from a specific rule. One who fails to adhere to a norm—whether through a momentary lapse or a moral failing—has an additional responsibility to understand the transgression in the context of prevailing norms.

The sociologist Goffman tersely defines the concept of moral responsibility as “*why* the individual acted as he did, how he *could* have acted, how he *should* have acted, and how in the future he *ought* to act.”¹⁴ Should transgression of norms occur, the offender can be said to have a dual responsibility: to make amends and show true concern for corrective action.¹⁵ Once the violation of a relevant normative rule has been committed, and the offender has accepted responsibility for the infraction, another concern regarding normative justice is the requirement for communication of any analysis and corrective action. Such communication has been considered a performative utterance, a normatively enforceable obligation to communicate.¹⁶

B. Kinds of Remedial Work

Sociologists and psychologists distinguish a number of kinds of remedial work. Perhaps the most morally suspect is retreat, in which the transgressor tries to flee the transgression. Retreat occurs in most embarrassing situations but can turn the perception of a transgression, and can make things look worse for the transgressor in some scenarios.¹⁷ For example, a person committing a crime might flee at the sight of law enforcement closing in.¹⁸ Eventually, when caught, the transgressor will find the consequences of retreat more unpleasant.

1. Benevolent Gestures

For most circumstances, when individuals are injured by the criminal justice system, and events are still unfolding, benevolent gestures—oral or written statements or conduct expressing sympathy, condolence, compassion, or a general sense of benevolence—should be the prevailing response.¹⁹ One widely publicized example is the shooting of Breonna Taylor. Although statements reflective of benevolence were made, initial reports were factually incorrect.²⁰ In the case of recent or rapidly unfolding circumstances in

¹³ *Id.* at 95 (distinguishing formal sanctions as imposed by officially delegated agencies according to a schedule, and informal sanctions are done locally by individuals and are generally of a “rough, ready, and changing form”).

¹⁴ *Id.* at 99.

¹⁵ *Id.* at 100.

¹⁶ *Id.* at 101.

¹⁷ SCHLENKER, *supra* note 4, at 134–35.

¹⁸ *Id.*

¹⁹ See, e.g., ALM GL ch. 233, § 23D (2025).

²⁰ Tessa Duvall, *Factchecking 8 myths in Breonna Taylor case: Was she asleep when police shot her? Is there body-cam footage?* LOUISVILLE COURIER J. <https://www.savannahnow.com/story/news/2020/09/24/fact-checking-8-myths-in-breonna-taylor-case-was-she-asleep-when-police-shot-her-is-there-body-cam-f/114806548/> [https://perma.cc/F5E6-W6BE] (last visited Jan. 12, 2025)

the criminal justice system, an account or real apologies can be difficult to achieve in the absence of full recognition of the facts. Benevolent gestures have been widely adopted in the healthcare setting in an attempt to allow healthcare workers to express sympathy for unanticipated injuries while stopping short of admitting negligence. A similar rationale is used for Federal Rule of Evidence 409: “Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.”²¹ FRE 409 has been widely incorporated—often verbatim—into state rules of evidence.

2. Accounts

Accounts are explanations also designed to mitigate the severity of the transgression.²² There are three general kinds of account: innocence, excuse, and justification.²³ The three kinds of accounts are similar to affirmative defenses raised in criminal law.²⁴ Innocence is an account that the individual held out as the transgressor was not in fact the one responsible for the injury. One example of a plea of innocence is that of Michael Nifong—at the time Durham County District Attorney—infamously charged three Duke lacrosse players with rape but recused himself to answer ethics violations and eventually to have all charges dropped by the North Carolina attorney general.²⁵ Mr. Nifong clouded his first attempt at apology to the families of the Duke students and the North Carolina criminal justice system with statements that

(noting initial reports included substantial misinformation including but not limited to: Ms. Taylor worked as an Emergency Medical Technician (false); police entered the wrong residence (false); Ms. Taylor was in bed asleep (false); Ms. Taylor was living with a drug dealer (false); body camera footage was available for execution of the search warrant (false); an officer was shot by “friendly fire” (false); Ms. Taylor shot a rifle at police (false); the main suspect was in custody before the police raid on Ms. Taylor’s residence (“likely true”)); see also Tessa Duvall, *Fact Check 2.0: Separating the truth from the lies in the Breonna Taylor police shooting* LOUISVILLE COURIER J. June 16, 2020 <https://www.courier-journal.com/story/news/crime/2020/06/16/breonna-taylor-fact-check-7-rumors-wrong/5326938002/> [<https://perma.cc/5259-Z3UL>] (last visited Jan. 12, 2025). In addition, of the three law enforcement individuals who shot weapons, only one was charged. Nicholas Bogel-Burroughs, *Jury Deadlocks on Officer Charged with Violating Breonna Taylor’s Rights*, NY TIMES Nov. 17, 2023, at A19. It took the Department of Justice three years to issue a detailed report on the shooting and other issues identified in the Louisville Metro Government. U.S. Dep’t of Just., Civ. Rights Div., Investigation of the Louisville Metro Police Department and Louisville Metro Government (Mar. 8, 2023), <https://www.justice.gov/opa/press-release/file/1573011/download> [<https://perma.cc/85B3-4ZKA>] (last visited Jan. 12, 2025). Detective Brett Hankison was eventually convicted on federal civil rights charges after acquittal on similar state charges. Of three additional law enforcement individuals charged with obstruction and providing false information in the affidavit for the search warrant, one pleaded guilty and two await a trial date. Christina Morales & Kevin Williams, *Relief and Regret After Former Police Officer is Convicted*, N.Y. TIMES, Nov. 4, 2024, at A20.

²¹ FED. R. EVID. 409.

²² SCHLENKER, *supra* note 4, at 136–37 (noting that severity is twofold; undesirability of an event and the transgressor’s responsibility).

²³ *Id.* at 137–46 (discussing the three main kinds of account).

²⁴ See, e.g., STEPHEN J. MORSE, ADVANCED INTRODUCTION TO SUBSTANTIVE CRIMINAL LAW, 88–134 (EDWARD ELGAR PUBLISHING LTD, 2023).

²⁵ Duff Wilson, *Facing Sanction, Duke Prosecutor Says He Will Resign*, N.Y. TIMES June 16, 2007 at A1, A11 (His apology was criticized by one of the defense attorneys: “I believe it’s a cynical, political attempt to save his law license. His apology is far too late.”).

he did not lie, did not intentionally withhold evidence, and pleaded inexperience in handling felony cases (concentrating on traffic offenses). The ethical concerns have been discussed in detail.²⁶

Excuses focus not on who was responsible for an injury, but on the circumstances intended to minimize the severity of the transgression. An example of an excuse was provided by the Boston Police Department. In the early morning hours of October 21, 2005, Victoria Snelgrove died after being hit in the eye with a “non-lethal” FN303 pepper spray pellet by officers attempting to help quell a riot after the Boston Red Sox won a World Series.²⁷ O’Toole continued, “While I firmly and emphatically accept responsibilities for any errors... I condemn in the harshest words possible the actions of punks [Wednesday] night who turned our city’s victory into an opportunity for violence and mindless destruction.”²⁸

One may also attempt to justify the injury; the transgressor admits some responsibility but minimizes or denies undesirability.²⁹ On May 8, 2005, a call for service—gunshots fired—went out, and deputies from the Compton, California Sheriff’s Station attempted to contact a suspect.³⁰ At the end of a vehicle pursuit—complicated by the suspect’s erratic driving—the deputies fired 120 rounds at the suspect, who sustained two non-life-threatening bullet wounds. There were eleven bullet strikes to five homes in the vicinity of Butler Avenue.³¹ Gregory Emerson, an attorney for the deputies offered an “apology” and stated “[e]ach one of them, to a person, that stands here today, wishes that things would have been a little bit different . . . and certainly they wish it had not been necessary to fire so many shots.”³²

Initially provided accounts may evolve with time and investigation as communications occur between the injured and the transgressor.³³ In response to these concerns, one commentator has suggested that attorneys and clients consider crafting “safe” apologies to minimize the risk that they will be used as evidence of liability. Specifically, potential transgressors might offer

²⁶ Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure “To Do Justice”* 76 *FORDHAM L. REV.* 1339, 1341 (2007) (Settlement with the city of Durham was thought to be in excess of \$50 million); see also Anne Blythe, *City of Durham Settles Long-Running Lawsuit with Former Duke Lacrosse Players*, *CHARLOTTE OBSERVER*, May 16, 2014 <https://www.charlotteobserver.com/news/local/crime/article9122669.html> [<https://perma.cc/E7PS-36R4>].

²⁷ Donald K. Stern, Chair, *Commission Investigating the Death of Victoria Snelgrove*, May 25, 2005, https://www.cityofboston.gov/images_documents/sternreport_tcm3-8954.pdf [<https://perma.cc/U9Y7-EP9V>] (Last visited Jan. 12, 2025).

²⁸ Thomas Farragher & David Abel, *Postgame Police Projectile Kills an Emerson Student*, *A1, THE BOSTON GLOBE* Oct. 22, 2004.

²⁹ SCHLENKER, *supra* note 4, at 143.

³⁰ Off. of Indep. Rev., *The May 9, 2005 Compton Shooting: The Public Report* by the Los Angeles Office of Independent Review 3, http://shq.lasdnews.net/shq/LASD_Oversight/Compton_rpt.pdf [<https://perma.cc/FZ8S-8YKQ>] (Last visited Jan. 12, 2025) [hereinafter *L.A. County Compton Report*] (describing in detail the events of the pursuit and shooting, including review of an amateur videotape).

³¹ *Id.*

³² Richard Winton, *Through Lawyer, Deputies Issue Apology for Firing Hail of Bullets*, *L.A. TIMES* May 14, 2005 B3.

³³ SCHLENKER, *supra* note 4, at 152–53.

benevolent gestures—or “apologies lite”—that merely express sympathy, but do not admit fault, liability, or responsibility.³⁴

3. *Apologies*

Real apologies are the most arduous kind of remedial work, and consist of the elements recognition, responsibility, remorse, and redress.³⁵ Real apologies, then, are reserved for specific, egregious transgressions (e.g., wrongful conviction of the factually innocent) and therefore distinct from other types of remedial work.³⁶ Apology holds a special place in the universe of remedial work that is intended to express sympathy towards one who has sustained a criminal justice system-related injury. As one working definition, a real apology includes four elements: recognition, responsibility, remorse, and redress. However, real apologies have special linguistic weight and may prove a case of negligence.³⁷ The stance of commentators and other interested parties covers a wide spectrum of views on whether to apologize as a specific form of remedial work. In empirical research, evidence that “under the right circumstances, even a partial apology might be somewhat beneficial” has been reported.³⁸ However, “the effects of partial apologies on settlement decision making appear to be much more complicated than the effects of full apologies.”³⁹ Further, protective statutes may strip the apology of a moral dimension.⁴⁰ Disclosure and apology are both recommended. Disclosure without an apology leads the patient to assume the transgressor doesn’t care, while an apology without information about the event leads to dissatisfaction by the injured.⁴¹

³⁴ Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1042–46 (1999) (reviewing reasons for not apologizing more frequently).

³⁵ See Karson, *supra* note 1.

³⁶ GOFFMAN, *supra* note 4, at 99–100; NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 1–5 (1991, Stanford University Press). See also Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 ANN. REV. PSYCHOL. 133, 162–63 (1992); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REV. 46, 59 (1968).

³⁷ Steven E. Raper, *No Role for Apology: Remedial Work and the Problem of Medical Injury*, 11 YALE J. HEALTH POL’Y LAW ETHICS 267, 269 (2011).

³⁸ Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination* 102 MICH. L. REV. 460, 507 (2003).

³⁹ *Id.* at 506.

⁴⁰ Lee Taft, *Apology Within a Moral Dialectic: A Reply to Professor Robbennolt*, 103 MICH. L. REV. 1010, 1012 (2005) (explaining “What elevates [an apology] to a truly moral and corrective communication is the offending party’s willingness to accept the consequences that flow from the wrongful act.”); see also, Lee Taft, *Apology and Medical Error: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 62–67 (2005).

⁴¹ MICHAEL S. WOODS, *HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE* 33 (Joint Commission Resources 2004) (2007) (enumerating five elements of an effective medical injury apology (i.e., recognition, regret, responsibility, remedy, and remaining engaged)); see also Kathy Wire, *Apology Just First Step In Event Management*, 30 MEDICAL LIABILITY MONITOR 8, 8 (2007) (advising that when a clear error is made, the transgressor should accept responsibility for the error); but see Ken Braxton & Kip Poe, *How Should Hospital Policy Address Apologies to Patients?*, 9 HOSPITALS AND HEALTH SYSTEMS RX 22, 22 (2007) (advising “Hospitals must ensure that their risk management and legal staff fully understand applicable state law regarding ‘I am Sorry’ guidelines . . .”).

C. *Experience in Healthcare: Benevolent Gestures as “Apology” Laws*⁴²

In healthcare, no law mandates an apology. To emphasize the moral and ethical responsibilities of healthcare providers to those injured by medical treatment, laws intended to minimize fear of legal action have been enacted to protect certain statements. Although the legal system is adversarial—unlike healthcare—some lessons may still be relevant to the criminal justice system.

Spontaneous apologies are generally a bad idea, especially if admissions of error and fault are made.⁴³ The disclosure of medical error leading to injury is a complex process, and should include, at a minimum, that physicians should report adverse events to the hospital; healthcare organizational risk managers should conduct timely investigations with attention to patient safety lessons, findings should be conveyed to patients with compensation and apology offered proactively where it is determined that substandard care caused injury.⁴⁴ The experience of some early adopters of these “communication and resolution programs” hoped that fewer numbers of malpractice suits would be filed, more patients would be compensated for injuries, patient trust and satisfaction would be enhanced, and administrative and legal defense costs for providers would be significantly reduced.⁴⁵

Some commentators have endorsed the offering of “apologies” in the face of injury caused by medical treatment or other types of accident. The term “apology” has been treated somewhat dismissively in the healthcare setting, without consideration of what the offer of a real apology entails linguistically, if not morally.⁴⁶ Hence, to decrease the risks of saying “I’m sorry” in the health care setting, many state legislatures have enacted statutes intended to protect disclosures made by physicians.

⁴² A more thorough discussion of the reasons why apologies should be offered by the criminal justice system and the elements of a real apology will be discussed in Part Two *infra*.

⁴³ Raper, *supra* note 37, at 294.

⁴⁴ Michelle M. Mello, Yelena Greenberg, Susan K. Senecal, & Janet S. Cohn, *Case Outcomes in a Communication and-Resolution Program in New York Hospitals*, 51 (Suppl. 3) HEALTH SERVICES RES. 2583, 2584 (2016).

⁴⁵ Michelle M. Mello, Richard C. Boothman, Timothy McDonald, Jeffrey Driver, Alan Lembitz, Darren Bouwmeester, Benjamin Dunlap, & Thomas Gallagher, *Communication-And-Resolution Programs: The Challenges and Lessons Learned from Six Early Adopters* 33(1) HEALTH AFFAIRS 20, 20 (2014).

⁴⁶ Doug Wojcieszak, John Banja, Carole Houk, *The Sorry Works! Coalition: Making the Case for Full Disclosure* 32, JOINT COMM’N J. ON QUALITY AND PATIENT SAFETY 344, 345 (2006) (noting some apologies can both acknowledge and disavow responsibility).

D. *“Apology” Statute Concerns: Lessons for the Criminal Justice System*

1. *Wide Variability in Statutory Construction*

The experience in healthcare apology law has important implications for the criminal justice system. As previously noted, concerns over unprotected statements have led to the enactment of a variety of “apology” laws. Fear of litigation is a commonly cited barrier to communication between the injured and transgressor in the healthcare setting.⁴⁷ However, existing “apology” laws have two major flaws. The first major problem with medical injury (or other accident) “apology” laws is the bewildering variety of statutory constructions. Thirty-one states have statutes that expressly use the word apology—among other words—in attempting to provide some protection against admissibility for some statements.⁴⁸ Conversely, Hawai’i explicitly states apologies are admissible if they acknowledge or imply fault.⁴⁹ Six states and the District of Columbia have statutes that protect the admissibility of some statements, but do not use the word apology.⁵⁰ Only one state, Montana, defines apology as a “communication that expresses regret”, a very narrow interpretation of the word.⁵¹ It is unclear whether the remaining states, in their statutes, chose to avoid the word apology as making statements difficult to protect, intended only real apologies as expressing recognition, remorse, responsibility, and redress, or something in between. Thirteen states have chosen not to enact statutes protecting some expression of apology, sympathy, commiseration, compassion, or benevolence.⁵² Of these, Illinois once had protected expressions

⁴⁷ Jennifer K. Robbennolt, *Apologies and Medical Error* 467 CLINICAL ORTHOPEDICS & RELATED RES. 376, 467 (2009).

⁴⁸ For purposes of the text, the states will be identified by name, not individual statute section numbers. ALASKA STAT. § 09.55.544 (LexisNexis 2023); ARIZ. REV. STAT. § 12-2605 (2024); COLO. REV. STAT. § 13-25-135 (2024); CONN. GEN. STAT. § 52-184d (2023); DEL. CODE ANN. tit. 10, § 4318 (2023-2024); GA. CODE ANN. § 24-4-416 (2023); HAW. REV. STAT. ANN. § 409.5 (LexisNexis 2023); IDAHO CODE ANN. § 9-207 (2024); IND. CODE ANN. § 34-43.5-1-4 (LexisNexis 2023); LA. REV. STAT. ANN. § 13:3715.5 (2024); ME. REV. STAT. ANN. tit. 24 § 2907 (2024); MD. CODE ANN. CTS & JUD. PROC. § 10-920 (LexisNexis 2023); MASS. ANN. LAWS ch. 233, § 79L (LexisNexis 2024); MONT. CODE ANN. § 26-1-814 (2023); NEB. REV. STAT. ANN. § 27-1201 (LexisNexis 2024); N.C. GEN. STAT. § 8C-1 (LexisNexis 2023); N.D. CENT. CODE § 31-04-12 (2023); OHIO REV. CODE ANN. § 2317.43 (LexisNexis 2023-2024); OKLA. STAT. ANN. tit. 63 § 1-1708.1H (2024); OR. REV. STAT. ANN. § 677.082 (2023); PA. CONS. STAT. ANN. §§ 10228.2-3 (2023); S.C. CODE ANN. § 19-1-190 (2023); S.D. CODIFIED LAWS § 19-19-411.1 (2024); TENN. R. EVID. RULE 409.1 (LexisNexis 2024); UTAH CODE ANN. § 78B-3-422 (2023); VT. STAT. ANN. tit. 12 § 1912 (2024); VA. CODE ANN. § 8.01-581.20:1 (2023); WASH. REV. CODE ANN. § 5.64.010 (LexisNexis 2023); WIS. STAT. ANN. § 904.14 (2023-2024); W. VA. CODE ANN. § 55-7-11a (LexisNexis 2023); WYO. STAT. § 1-1-130 (2023).

⁴⁹ HAW. REV. STAT. ANN. § 409.5 (LexisNexis 2023).

⁵⁰ CAL HEALTH & SAFETY CODE § 104340 (Deering 2024); D.C. CODE ANN. § 16-2841 (LexisNexis 2024); FLA. STAT. ANN. § 90.4026 (LexisNexis 2023); MICH. COMP. LAWS SERV. § 600.2155 (LexisNexis 2024); MO. REV. STAT. § 538.229 (2023); N.H. REV. STAT. ANN. 507-E:4 (LexisNexis 2023); TENN. R. EVID. RULE 409.1 (LexisNexis 2024); TEX. CIV. PRAC. & REM. CODE § 18.061 (2023).

⁵¹ MONT. CODE ANN. § 26-1-814 (2023).

⁵² Alabama, Arkansas, Illinois, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, and Rhode Island.

of grief, apology, or explanation, but this section was invalidated as part of an inseparability clause.⁵³

Eight states have statutes that do not explicitly mention health care providers or patients; instead, they choose to use the same standard of disclosure for adverse medical events as for car accidents or other civil tort actions.⁵⁴ The Vermont legislature saw fit to limit apologies and other statements to those made orally.⁵⁵ Most other states protect statements that include actions, gestures, and writings. Pennsylvania and Wisconsin only protect statements made prior to the commencement of a civil or liability action.⁵⁶

The state statutes also differ in who can make statements that are inadmissible. Most state statutes allow health care providers or health care professionals, as well as employees or agents of health care providers or health care professionals, to make protected statements.⁵⁷ Oregon requires the person by or on whose behalf statements are made to be a licensed professional and against whom a civil action is taken.⁵⁸ Louisiana and North Carolina restrict the making of protected statements to health care providers.⁵⁹ Under Vermont and Washington statutes, statements—including apologies—must be made within thirty days of when the provider knew or should have known of the consequences of the injury to be deemed admissible.⁶⁰ Utah awaits the bringing of a claim, and limits protective statements made by or on behalf of defendants who are health care providers, and defines patient as “any person associated with the patient.”⁶¹

Virginia has two statutes allowing statements made by health care providers or the agents of health care providers for wrongful death or unanticipated outcomes, respectively.⁶² West Virginia requires such statements to be made within twenty days of when the injury was known.⁶³ Only New Hampshire is completely silent on who can make a statement, which presumably means

⁵³ *Lebron v. Gottlieb*, 930 N.E.2d 895, 917 (Ill. 2010) (finding as unconstitutional 735 ILL. COMP. STAT. ANN. §§ 5/2 1704-2-1719 for limiting awards of non-economic damages. A “Sorry Works!” pilot program was subsequently repealed by Public Act 100-621. 710 ILL. COMP. STAT. ANN. 457. A statute was re-enacted, but basically conformed to FRE 408 and no protection for benevolent gestures was included. 735 ILL. COMP. STAT. ANN. 5/8-1901 (LexisNexis 2023)).

⁵⁴ CAL EVID. CODE § 1160 (Deering 2024); FLA. STAT. ANN. § 90.4026 (LexisNexis 2023); HAW. REV. STAT. ANN. § 409.5 (LexisNexis 2023); IND. CODE ANN. § 34-43.5-1-2 (LexisNexis 2023); MASS. ANN. LAWS ch. 233, § 23D (LexisNexis 2024); MO. REV. STAT. § 538.229 (2023); TENN. R. EVID. RULE 409.1 (LexisNexis 2024); TEX. CIV. PRAC. & REM. CODE § 18.061 (2023).

⁵⁵ VT. STAT. ANN. tit. 12 § 1912 (2024).

⁵⁶ PA. CONS. STAT. ANN. § 10228.3 (2023); WIS. STAT. ANN. § 904.14 (2023-24).

⁵⁷ ARIZ. REV. STAT. § 12-2605 (2024); COLO. REV. STAT. § 18-1-901 (2024); CONN. GEN. STAT. § 52-184d (2023); DEL. CODE ANN. tit. 10, § 4318 (2023-2024); D.C. CODE ANN. § 16-2841 (LexisNexis 2024); GA. CODE ANN. § 24-4-416 (2023); IDAHO CODE ANN. § 9-207 (2024); ME. REV. STAT. ANN. tit. 24 § 2907 (2024); NEB. REV. STAT. ANN. § 27-1201 (LexisNexis 2024); N.D. CENT. CODE § 31-04-12 (2023); OHIO REV. CODE ANN. § 2317.43 (LexisNexis 2023-2024); OKLA. STAT. ANN. tit. 63 § 1-1708.1H (2024); S.C. CODE ANN. § 19-1-190 (2023); W. VA. CODE ANN. § 55-7-11a (LexisNexis 2023); WYO. STAT. § 1-1-130 (2023).

⁵⁸ OR. REV. STAT. ANN. § 677.082 (2023).

⁵⁹ LA. REV. STAT. ANN. § 13:3715.5 (2024); N.C. GEN. STAT. § 8C-1 (LexisNexis 2023).

⁶⁰ VT. STAT. ANN. tit. 12 § 1912 (2024); WASH. REV. CODE ANN. § 70.41.380 (LexisNexis 2023).

⁶¹ UTAH CODE ANN. § 78B-3-422 (2023).

⁶² VA. CODE ANN. § 8.01-52.1 (2023); VA. CODE ANN. § 8.01-581.20:1 (2023).

⁶³ W. VA. CODE ANN. § 55-7-11a (LexisNexis 2023).

any individual is able to make a protected statement.⁶⁴ There is also variability in the persons to whom protected statements may be made. In all cases, the alleged injured individual (patient) is included, as are those persons defined as relatives and/or family members.⁶⁵ A subgroup of states has also included a variety of other representatives.⁶⁶ South Carolina requires that, in order to be protected, the statements must be made during a designated meeting to discuss the unanticipated outcome.⁶⁷

2. Challenges in Crafting “Safe” Statements

A second major problem with “apology” laws is the difficulty of crafting statements that are protected in whole or in part as “apologies.” Twenty states explicitly allow into evidence admissions of culpable conduct, fault, liability, or negligence.⁶⁸ Massachusetts allows contradictions in fact or opinion while under oath as admissible.⁶⁹ South Dakota allows admission of any statement—for purposes of impeachment—constituting an admission against interest.⁷⁰ Only thirteen states with “apology” laws have limited the admissibility of statements to include those that constitute admissions of liability, admissions against interest, culpable conduct, or negligence.⁷¹ Montana specifically excludes statements as evidence, including apologies, for any purpose.⁷² Oregon also precludes examination during depositions of Oregon Medical

⁶⁴ N.H. REV. STAT. ANN. 507-E:4 (LexisNexis 2023).

⁶⁵ Various states use terms including “victim” (CONN. GEN. STAT. § 52-184d (2024)), “patient” (ARIZ. REV. STAT. § 12-2605 (2024)), “plaintiff” (OKLA. STAT. ANN. tit. 63 § 1-1708.1H (2024)), and “person” (OR. REV. STAT. ANN. § 677.082 (2023)).

⁶⁶ Various states include “any individual who claims damages by or through that victim,” “legal representative,” “friend,” “health care decision-maker,” “representative,” or “decision maker for plaintiff.”

⁶⁷ S.C. CODE ANN. § 19-1-190 (2023).

⁶⁸ ALASKA STAT. § 09.55.544 (b) (LexisNexis 2023); CAL EVID. CODE § 1160 (A) (Deering 2024); DEL. CODE ANN. tit. 10, § 4318 (b) (2023–24); D.C. CODE ANN. § 16-2841 (LexisNexis 2024); FLA. STAT. ANN. § 90.4026 (2) (LexisNexis 2023); HAW. REV. STAT. ANN. § 409.5 (LexisNexis 2023); IDAHO CODE ANN. § 9-207 (2) (2024); IND. CODE ANN. § 34-43.5-1-5, (LexisNexis 2023); LA. REV. STAT. ANN. § 13:3715.5 (2024); ME. REV. STAT. ANN. tit. 24 § 2907 (2) (2024); MD. CODE ANN. CTS & JUD. PROC. § 10-920 (2) (Lexis 2023); MICH. COMP. LAWS SERV. § 600.2155 (2) (LexisNexis 2024); MO. REV. STAT. § 538.229 (1) (2023); NEB. REV. STAT. ANN. § 27-1201 (1) (LexisNexis 2024); N.H. REV. STAT. ANN. 507-E:4 (III) (LexisNexis 2023); PA. CONS. STAT. ANN. § 10228.3 (b)(2) (2023); TENN. R. EVID. RULE 409.1 (a) (LexisNexis 2024); TEX. CIV. PRAC. & REM. CODE § 18.061 (c) (2023); UTAH CODE ANN. § 78B-3-422 (3) (2023); VA. CODE ANN. § 8.01-52.1 (2023), VA. CODE ANN. § 8.01-581.20:1 (2023).

⁶⁹ “[U]nless the maker of the statement, or a defense expert witness, when questioned under oath during the litigation about facts and opinions regarding any mistakes or errors that occurred, makes a contradictory or inconsistent statement as to material facts or opinions, in which case the statements and opinions made about the mistake or error shall be admissible for all purposes.” MASS. GEN. LAWS ch. 233, § 79L (b) (LexisNexis 2024).

⁷⁰ S.D. CODIFIED LAWS § 19-19-411.1 (2024).

⁷¹ ARIZ. REV. STAT. § 12-2605 (2024); COLO. REV. STAT. § 13-25-135 (2024); CONN. GEN. STAT. § 52-184d (b)(2023); GA. CODE ANN. § 24-4-416 (b) (2023); N.C. GEN. STAT. § 8C-1 (LexisNexis 2023); N.D. CENT. CODE § 31-04-12 (2023); OHIO REV. CODE ANN. § 2317.43 (A)(1) (LexisNexis 2023-2024); OKLA. STAT. ANN. tit. 63 § 1-1708.1H (A) (2024); S.C. CODE ANN. § 19-1-190 (D) (2023); WASH. REV. CODE ANN. § 5.64.010 (2)(b)(i–ii) (LexisNexis 2023); W. VA. CODE ANN. § 55-7-11a (b)(1) (LexisNexis 2023); WIS. STAT. ANN. § 904.14 (2023–24); WYO. STAT. § 1-1-130 (a) (2023).

⁷² MONT. CODE ANN. § 26-1-814 (1) (2023).

Board licensed practitioners or those making statements on their behalf that have made expressions of regret or apology.⁷³

3. Recent Experience with Healthcare “Apology” Laws

I have argued that real apologies after medical injury due to error are problematic; not morally, but because the existing statutes are hard to decipher—especially for healthcare providers inexperienced in reading statutes—who risk running afoul of statutory provisions.⁷⁴ Despite the moral argument for the offering of apologies after medical injury due to error, much of the enthusiasm has waned.⁷⁵ In modeling the litigation consequences of healthcare disclosure of injury, researchers found that assertions of reduced litigation volume and cost did not withstand close scrutiny.⁷⁶ A review of the available data led others to conclude that apology laws do not appear to reduce malpractice rates or costs.⁷⁷ Contradicting earlier research, a study published data from a national malpractice insurer containing information on 90 percent of U.S. physicians, and the authors reviewed a total of 3,417 claims from 2004 through 2011.⁷⁸ The data showed that apology laws had little effect on surgeons but increased the likelihood of lawsuits in non-surgeon physicians by approximately 46 percent.⁷⁹ The data led the researchers to conclude that “apology laws may facilitate an increase in malpractice liability risk in spite of their stated goals.”⁸⁰ Remarkably, 65.5 percent of the claims were litigated, and only 7.1 percent initially settled.⁸¹ These percentages are out of line with other NPDB data, in which 96.9 percent of about 58,000 claim payments were from settlement and only 3.1 percent went to trial.⁸² Of litigated claims, about half resulted in a plaintiff’s verdict or settlement.⁸³ The researchers go on to state: “Because apology laws do not decrease the frequency of lawsuits

⁷³ OR. REV. STAT. ANN. § 677.082 (2023).

⁷⁴ Raper, *supra* note 37, at 292–93.

⁷⁵ Sorry Works! is a national organization fostering disclosure and apology of medical error whose CEO, Doug Wojcieszak, recently posted an editorial. *Rethinking Disclosure & Apology: Should Programs Be the Emphasis?*, SORRY WORKS! (Feb. 16, 2024), <https://sorryworks.net/blog/2024/2/16/rethinking-disclosure-amp-apology-should-programs-be-the-emphasis> [<https://perma.cc/7MGW-USMR>] (wondering if the disclosure movement needs to refocus/reprioritize our efforts”). See also Doug Wojcieszak, *Are We Making Disclosure & Apology/CRP Programs Too Difficult?*, SORRY WORKS! (Nov. 8, 2023), <https://sorryworks.net/blog/2023/11/8/are-we-making-disclosure-amp-apologycrp-programs-too-difficult> [https://perma.cc/E7Q7-UTBN] (last visited Jan. 12, 2025).

⁷⁶ See, e.g., David M. Studdert et al., *Disclosure of Medical Injury to Patients: An Improbable Risk Management Strategy*, 26 HEALTH AFFAIRS 215, 224 (2007).

⁷⁷ Nina E. Ross & William J. Newman, *The Role of Apology Laws in Medical Malpractice*, 49 J. AM. ACAD. PSYCHIATRY LAW 406, 412 (2021).

⁷⁸ Benjamin J. McMichael, et al., *Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk*, 71 STAN. L. REV. 341, 363 (2019).

⁷⁹ *Id.* at 377.

⁸⁰ *Id.* at 390.

⁸¹ *Id.* at 367.

⁸² Jessica B. Rubin & Tara F. Bishop, *Characteristics of Paid Malpractice Claims Settled In and Out of Court In the USA: A Retrospective Analysis*, 3 BRIT. MED. J. OPEN 1, 3 (2013).

⁸³ McMichael et al., *supra* note 78, at 390.

or the average payment for surgeons, and increase both for non-surgeons, they increase medical malpractice liability risk overall rather than reduce it.”⁸⁴

II. APOLOGIES AS A SPECIAL KIND OF REMEDIAL WORK

A. *Theory and Practice of Apologies*

Apologies should be crafted with great care. The moral philosopher John Langshaw Austin, in Harvard’s William James Lectures, specifically identified apologies as one type of *performative utterance*; apologizing is an action rather than a description of an action.⁸⁵ Terms for a comprehensive apology depend somewhat on the commentator.⁸⁶ In modern usage, apologizing means “to acknowledge and express regret for a fault without defense, by way of reparation to the feelings of the person affected.”⁸⁷ A number of legacy writers also articulate the definition of real apologies. One formulation consists of two fundamental requirements: “the offender has to be sorry, and has to say so.”⁸⁸ Or, yet another definition: “We apologize when we accept responsibility for an offence or grievance and express remorse in a direct, personal, and unambiguous manner offering restitution and promising not to do it again.”⁸⁹ Aaron Lazare, a psychiatrist and leading authority on apology, defines apology as “an encounter between two parties in which one party, the offender, acknowledges responsibility for an offense or grievance and expresses regret or remorse to a second party, the aggrieved.”⁹⁰ Goffman, an influential sociologist, defines an apology as “a gesture through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict and affirms a belief in the offended rule.”⁹¹

⁸⁴ *Id.* at 348.

⁸⁵ The term “performative” indicates that the issuing of the *utterance* is the performing of an action. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS: THE WILLIAM JAMES LECTURES DELIVERED AT HARVARD UNIVERSITY IN 1955* 46 (Marina Sbisa & J.O. Urmson eds., Oxford Univ. Press 2nd ed. 1975) (1962). “[T]o say something is to do something, or in saying something we do something, or even by saying something we do something.” *Id.* at 110. “I apologize” is expressly stated as an *explicit performative utterance*, to be distinguished from *half descriptive* (i.e., I am sorry), or merely *descriptive* (i.e., I repent). *Id.* at Table 84; see also Kenji Yoshino & David Glasgow, *How to Apologize*, BOSTON SUNDAY GLOBE, Feb. 5, 2023, at K3.

⁸⁶ Other terms include “authentic” apology. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L. J. 1135, 1140 (2000); “effective” apology, O’Hara & Yarn, *supra* note 2 at 1133 and TAVUCHIS, *supra* note 36 at 136; “full” apology, Robbenolt, *supra* note 38, at 486; “meaningful” apology, Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC’Y REV. 461, 469–70 (1986); “true” apology, HARRIET LERNER, *WHY WON’T YOU APOLOGIZE?: HEALING BIG BETRAYALS AND EVERYDAY HURTS* 15 (Touchstone 2017).

⁸⁷ THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (Oxford Univ. Press 1986) (1971).

⁸⁸ TAVUCHIS, *supra* note 36, at 1–5.

⁸⁹ JOHN KADOR, *EFFECTIVE APOLOGY: MENDING FENCES, BUILDING BRIDGES, AND RESTORING TRUST* 16 (Berrett-Koehler Pub. 2009).

⁹⁰ AARON LAZARE, *ON APOLOGY* 21 (Oxford University Press, 2004).

⁹¹ GOFFMAN, *supra* note 4, at 113.

Real apologies are dependent on societal norms but, “[w]e no longer have a way of convoking two [sic] hundred million Americans into the single kind of moral community that will respond to one set of signals.”⁹² In the case of apologies from one individual to another, the transgressor speaks for themselves and knows that they have been the source of injury. Those who apologize are expected to be remorseful in the case of personal apologies.⁹³ Although apologizing is simple, it is not easy, and yet, saying “I’m sorry” is not usually seen as a sign of weakness.⁹⁴

Does current theory regarding real apology and contrition apply to the criminal justice system? The area of crisis management has long been a contentious and difficult arena into which law enforcement leadership must frequently enter. With today’s media capabilities, the graphic visual imagery of police work daily permeates all media platforms viewed by the American public. Rarely a week seems to go by without a law enforcement agency caught up in the throes of a media crisis, and leadership either quickly defends the actions of the involved personnel or declines to comment until “further investigation” is completed.⁹⁵ The consequences for inadequate response can be severe. In many cases, inadequate responses by police leadership have resulted in significant organizational changes due to media coverage and the subsequent public outcry and political pressure.⁹⁶

B. Elements of a Real Apology

One straightforward formulation of the elements required for a real apology includes recognition, responsibility, remorse, and redress. Several commentators have identified additional elements or subdivided the four ‘R’s’. Additional descriptions of apology elements—among others—include those

⁹² Martin E. Marty, *Ethics and the Mass Media*, in 192 COMMUNICATION: ETHICAL AND MORAL ISSUES (Lee Thayer ed., Gordon & Breach Sci. Publ’rs 1973).

⁹³ KADOR, *supra* note 89, at 85–96.

⁹⁴ PATRICIA HAYES ANDREWS & JOHN E. BAIRD, JR., COMMUNICATIONS FOR BUSINESS AND THE PROFESSIONS 163–64 (Waveland Press 2005); Jonathan Turley, *The Lost Art of the Apology: Reagan was Deft at It. Clinton was the Grandmaster of Saying “I’m Sorry”. But Martha’s Attempt at Apologizing Was as Hollow as a Yellow Bell Pepper*, CHICAGO TRIBUNE July 18, 2004.

⁹⁵ Recent examples include a Maine sheriff’s department that knew of a reservist who went on a shooting spree, Nicholas Bogel-Burroughs & Chelsia Rose Marcus, *Police in Maine Knew Gunman Made Threats*, N.Y. TIMES, Oct. 31, 2023, at A1; jail deaths, Christopher Damien, *\$3.5 Million Settlement for Family in a Sacramento Jail Death*, N.Y. TIMES, Mar. 15, 2025 at A19; wrongful convictions, Alexandra E. Petri, *Citing New Evidence, Judge Frees Hawaii Man Wrongfully Convicted of ‘94 Murder*, N.Y. TIMES, Feb. 25, 2025 at A17; Lisa Lyon & Glen T. Cameron, *Fess Up or Stonewall? An Experimental Test of Prior Reputation and Response Style in the Face of Negative News Coverage*, 1:4 WEB J. MASS COMM. RES. (Sept. 1998), <https://wjmcrr.info/1998/09/01/fess-up-or-stonewall-an-experimental-test-of-prior-reputation-and-response-style-in-the-face-of-negative-news-coverage/> [<https://perma.cc/NLV7-BKBY>].

⁹⁶ Ray Surette, *The Media, the Public and Criminal Justice Policy*, 2 J. INST. OF JUST. INT’L STUD. 39, 45–47 (2003).

of Goffman,⁹⁷ Lazare,⁹⁸ O'Hara,⁹⁹ Orenstein,¹⁰⁰ Taft,¹⁰¹ Kador,¹⁰² Koehn,¹⁰³ and Wagatsuma and Rosett.¹⁰⁴ Given the nature of many injuries in the criminal justice system, a real apology is necessary but not sufficient if acceptance is expected. In some cases, even a real apology may not elicit acceptance or hopes of forgiveness by the injured party.

Anecdotal evidence suggests that an apology may provide significant benefits to the injured. Often, an apology takes away the desire for revenge.¹⁰⁵ One prosecutor refused to delay victim offender mediation (VOM) until after sentencing to preserve a "rabid" victim.¹⁰⁶ Apologies can also help to alleviate victim fear because they work to provide victims with assurance that the offender will not transgress in the future. If a victim can set aside their fear, anger, and bitterness, they are better able to go on with life. In fact, the civility that apology fosters may even provide tangible health benefits to the injured.¹⁰⁷ Apology can also provide significant benefits to transgressors, who often attempt

⁹⁷ GOFFMAN, *supra* note 4, at 113 (listing elements of apology as expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution).

⁹⁸ LAZARE, *supra* note 90, at 23 (identifying explicit parts to a true apology: acknowledgement of the offense; an explanation; and various attitudes and behaviors including remorse, shame, humility, and sincerity, and reparations).

⁹⁹ O'Hara & Yarn, *supra* note 2, at 1133 (asserting that an "effective" apology should contain most, if not all, of the following elements: 1) an expression of remorse and regret, 2) a manifestation of guilt for having transgressed socially proscribed conduct, 3) sympathy with the application of and approving sanction, 4) repudiation of the bad behavior and defamation of the self that so behaved, 5) espousal of the correct behavior and "an avowal henceforth to pursue that course," and 6) "performance of penance" and an offer of restitution).

¹⁰⁰ Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Least Expect It*, 28 SW. U. L. REV. 221, 239 (1999) ("At their fullest, apologies should: (1) acknowledge the legitimacy of the grievance and express respect for the violated rule or moral norm; (2) indicate with specificity the nature of the violation; (3) demonstrate understanding of the harm done; (4) admit fault and responsibility for the violation; (5) express genuine regret and remorse for the injury; (6) express concern for future good relations; (7) give appropriate assurance that the act will not happen again; and, if possible, (8) compensate the injured party.").

¹⁰¹ Lee Taft, *On Bended Knee (with Fingers Crossed)*, 55 DEPAUL L. REV. 601, 605 (2005).

¹⁰² KADOR, *supra* note 89, at 16 (listing recognition, responsibility, remorse, restitution, and repentition).

¹⁰³ Daryl Koehn, *Why Saying "I'm Sorry" Isn't Good Enough: The Ethics of Corporate Apologies*, 23:2 BUSINESS ETHICS QUARTERLY 239, 245 (Apr. 2013) (enumerating content elements for a real apology: speaker ethos, audience pathos, naming the wrongdoing, the apologizer taking responsibility, apologizing promptly, conveying a just character, creating a supportive context, apologizing in person, exhibiting empathy, and following through).

¹⁰⁴ Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 469-70 (1986) (listing 1) the hurtful act happened, caused injury, and was wrongful; 2) the apologizer was at fault and regrets participating in the act; 3) the apologizer will compensate the injured party; 4) the act will not happen again; and 5) the apologizer intends to work for good relations in the future).

¹⁰⁵ O'Hara & Yarn, *supra* note 2, at 1141 (discussing the emotions behind apology, including transgressors' attempts to ameliorate negative image of self).

¹⁰⁶ David M. Lerman, *Forgiveness in the Criminal Justice System*, 27 FORDHAM URB. L.J. 1663, 1670 (2000).

¹⁰⁷ MICHAEL S. WOODS, HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE 113 (Joint Commission Resources) (2007).

to deny or minimize facts, actions, intent, knowledge, or responsibility.¹⁰⁸ Once a transgressor recognizes the wrongfulness of their actions, a real apology helps prevent future deflection, denial, or minimization.¹⁰⁹

Psycholinguistic experts have classified apologies as illocutionary force-indicating devices (for example, “I’m sorry” or “I apologize”) and suggested a number of elements which may be part of an apology: an explanation of the cause which brought about the wrong, an offer of repair, a promise of forbearance, and an expression of the speaker’s responsibility for the offense.¹¹⁰ Research has shown that the appropriateness of a response to injury mediates the role of apologies and the need for punishment, and apologetic transgressors are likely to avoid some consequences regardless of reputation.¹¹¹

By saying “I apologize,” one makes an explicit performative utterance.¹¹² Speech acts (including apologies) are a form of communicative illocutionary utterance.¹¹³ Speech acts have been further classified into three distinct levels of action: locutionary, or the performance of an act of saying something (I apologize), illocutionary, or performance of an act *in* saying something (conveying the injury), and perlocutionary that always includes some consequences (the injured does or does not accept the apology).¹¹⁴ Florian Coulmas, an eminent sociolinguist, has described apologies as reactive, making reference to an object of regret.¹¹⁵ All apology strategies are intended to convey important information to the injured (e.g., wrongfully convicted) about the transgressor (e.g., the state), improving perceptions, reducing the intended sanctions, increasing emotions of remorse or regret, and enhancing the appropriateness of the apology.¹¹⁶ Apologies with no acknowledgement of responsibility are not indebteding and can merge into other kinds of remedial work, like accounts.¹¹⁷

Apology strategies which actually use the word “apology” make clear the transgressor’s intentions, and yet, in none of the first four strategies does the

¹⁰⁸ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2503 (2004) (citing Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1394, n.159 (2003)).

¹⁰⁹ See O’Hara & Yarn, *supra* note 2, at 1137 (noting that “effective” apologies, include—implicitly or explicitly—future forbearance).

¹¹⁰ Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RSCH. 127, 130–31 (1997).

¹¹¹ See David B. Wooten, *Say the Right Thing: Apologies, Reputability, and Punishment*, 19 J. CONSUMER PSYCH. 225, 233 (2009).

¹¹² Kent Bach, *Speech Acts and Pragmatics*, in BLACKWELL GUIDE TO THE PHILOSOPHY OF LANGUAGE, 149–52 (Michael Devitt & Richard Hanley eds., 2006).

¹¹³ See *id.* at 151–52 (apologizing is considered an acknowledgment; one of four types of communicative illocutionary acts (Constatives, Directives, Commissives, and Acknowledgements)).

¹¹⁴ AUSTIN, *supra* note 85, at 99–108 (parenthetical examples added).

¹¹⁵ Florian Coulmas, *Poison to Your Soul: Thanks and Apologies Contrastively Viewed, in CONVERSATIONAL ROUTINE: EXPLORATIONS IN STANDARDIZED COMMUNICATION SITUATIONS AND PREPATTERNED SPEECH* 69, 75–76 (Florian Coulmas ed., 1981) (distinguishing objects of regret as “a kind of damage, annoyance, or inconvenience which is predictable vs. unpredictable; indebteding vs. not indebteding”).

¹¹⁶ See Scher & Darley, *supra* note 110, at 130.

¹¹⁷ Coulmas, *supra* note 115, at 76.

speaker explicitly *say* that she is responsible for or that she regrets or is remorseful for the object of regret, though these two points are certainly contained in the meaning of the words *apology* or *apologize*. Linguist Bruce Fraser has identified four direct¹¹⁸ and five indirect¹¹⁹ strategies for apologizing in which the speaker explicitly states that an apology is at issue. Although an illocutionary force indicating device, an apology such as "I apologize" or "Pardon me," unaccompanied by an expression of remorse, does not convey the required information about the emotional state of the speaker.

Apologies have been described as a discrete form of remedial work, "a gesture through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict and affirms a belief in the offended rule."¹²⁰ Further, an apology brings heavy moral approbation down on the transgressor, and:

[h]as several elements: expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.¹²¹

Another definition of apology is "[A]n acknowledgement of some fault, injury, insult, etc., with an expression of regret and a plea for pardon."¹²² Apologies have been operationally defined as "admissions of blameworthiness and regret for an undesirable event, for example, a transgression, a harmful act, an embarrassing incident."¹²³ Such definitions leave no doubt as to the fact that apologies, as illocutionary acts, include a statement of fault.¹²⁴ Each of the four foundational elements of apology are next discussed in greater detail.

¹¹⁸ Bruce Fraser, *On Apologising*, in CONVERSATIONAL ROUTINE: EXPLORATIONS IN STANDARDIZED COMMUNICATION SITUATIONS AND PREPATTERNED SPEECH 259, 263 (Florian Coulmas ed., 1981) (describing four direct forms including the word apology or apologize: announcing that one is apologizing—"I (hereby) apologize for . . ."; stating one's obligation to apologize—"I must apologize for . . ."; offering to apologize—"I would like to offer my apology to you for . . ."; requesting the hearer accept an apology—"Please accept my apology for . . ."). See also OXFORD ENGLISH DICTIONARY, *supra* note 87.

¹¹⁹ *Id.* at 263 (expressing regret for the offense—"I (truly/very much/so . . .) regret that I . . ."; requesting forgiveness for the offense—"Forgive me for . . ."; acknowledging responsibility for the offending act—"That was my fault"; promising forbearance from a similar offending act—"I promise you that that will never happen again"; offering redress—"Please let me pay for the damage I've done").

¹²⁰ GOFFMAN, *supra* note 4, at 109 (describing the function of remedial work as "to change the meaning that otherwise might be given to an act, transforming what could be seen as offensive into what can be seen as acceptable . . ." and setting forth three types of remedial work: accounts, apologies, and requests).

¹²¹ *Id.* at 113.

¹²² WEBSTER'S NEW WORLD COLLEGE DICTIONARY 66 (Michael Agnes ed., 4th ed. 1999).

¹²³ Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCH., 742, 742 (1982).

¹²⁴ Bach, *supra* note 112, at 148.

1. Recognition

Recognition is the first of the four elements of a real apology and requires identification of the circumstances surrounding the injury (e.g., police-involved shooting, wrongful incarceration) as specifically and completely as possible. Recognition is the foundation for a real apology. As in account, mistakes must be clearly recognized through identification of the legitimacy of norms violated, who is at fault for the resulting injury, and who should admit fault, often—but not always—the same individual or entity.¹²⁵ An unbiased investigation including a detailed timeline of events, identification of norms (e.g., relevant laws, policies, and procedures), and where such norms were violated. Although in general, apologies should be kept short, they should be fact-based. Once identified, the recognized transgressions should be shared unflinchingly with the injured individuals and their representatives. There are many excellent examples of detailed event reviews recognizing how and why events leading to injury—wrongful or not—happened. However, such reviews of necessity take time and delay the ability to give real apologies.¹²⁶

Apologies can fail for several reasons at the stage of recognition.¹²⁷ The transgression may be unforgivable, for which no apology is adequate.¹²⁸ Transgressions must be clearly stated to avoid “mystifying” confusion and not vague or selective in information provided.¹²⁹ The focus must be on the actions of the transgressor, not the injured.¹³⁰ Use of the conjunctives “but,” “if,” or “however” makes the transgression conditional and signals a deflection, turning an apology into an excuse.¹³¹ Add-on words can turn recognition of a true injury into “not really sorry at all.”¹³² All relevant events must be identified and given appropriate weight to avoid minimization.¹³³ Conversely, taking the time to understand the chain of events can ensure that admissions to unavoidable aspects of the incident are not made.¹³⁴ Other impediments to recognition include using the passive voice, making the offense conditional, questioning whether the victim was injured, or

¹²⁵ Taft, *supra* note 86, at 1140; TAVUCHIS, *supra* note 36, at 12 (noting that “every social order depends . . . on some measure of commitment to norms . . .”).

¹²⁶ Examples include the Stern report, *supra* note 27, and the L.A. County Compton Report, *supra* note 30.

¹²⁷ Anna Orso, *The Anatomy of an Apology: Public Statements Analyzed*, PHILA. INQUIRER, Dec. 9, 2017 at A3 (analyzing failed celebrity apologies including examples of minimization, deflection, and conditional statements).

¹²⁸ TAVUCHIS, *supra* note 36, at 21 (citing Albert Speer who in his memoir *INSIDE THE THIRD REICH* recognized that involvement in the whole course of the war made apology impossible).

¹²⁹ See LERNER, *supra* note 86, at 19.

¹³⁰ *Id.* at 29.

¹³¹ *Id.* at 19; see also LAZARE, *supra* note 90, at 55–66 (providing many excellent examples of failed apologies).

¹³² LERNER, *supra* note 86, at 18.

¹³³ One example of minimization is from the “retirement” statement and apology of Judge Alex Kozinski (9th Circuit Court of Appeals) in response to several accusations of sexual harassment: “I’ve always had a broad sense of humor and a candid way of speaking to both male and female law clerks alike.” Debra Cassens Weiss, *Kozinski Announces His Immediate Retirement After More Women Accuse Him of Sexual Misconduct*, ABA JOURNAL (Dec. 18, 2017), https://www.abajournal.com/news/article/kozinski_announces_his_immediate_retirement_after_more_women_accuse_him_of [https://perma.cc/B3XR-XHQD].

¹³⁴ LERNER, *supra* note 86, at 20.

apologizing to the wrong party or wrong offense.¹³⁵ Many injuries—especially with extensive media coverage—lead to internal or external review. Reports of such events can serve as recognition of the events leading up to and beyond the injury. Unlike accounts that try to claim innocence, excuse, or justification, these reports should be factual and transparent as to the role of the transgressor.¹³⁶ In terms of recognition by a thorough report, significant time can elapse, leading to the recommendation to provide benevolent gestures in the early stages of the injury when a timeline and actions taken are not clear. Recognition leads to the ownership of wrongful action, allowing acceptance of responsibility.

2. Responsibility

Accepting responsibility is a second important element of a real apology. The fullest apologies include acceptance of responsibility, an admission of which may itself prove a case of negligence; hence, there is a need to consider some form of statutory protection. The consensus as to the requirement of admission of fault is also confirmed by empirical studies on the uses of apology in legal settlements.¹³⁷ Several senses of responsibility exist, including proximate causation, acting “knowingly”, and control of intention.¹³⁸ “Full acceptance of responsibility by the transgressor is the hallmark of a real apology.”¹³⁹ Transgressors “should also realize the wrongfulness of their acts, feel sorrow for their misdeeds, and accept responsibility.”¹⁴⁰ Recognition of the role of responsibility in the criminal justice system began with changes to the U.S. Sentencing Guidelines in 1994.¹⁴¹ “Owning” the transgression is therefore a necessary element of a real apology. Responsibility requires “the painful embracement of our deeds.”¹⁴²

Empirical research has shown that apologies may mitigate the injured’s judgment of the transgressor, and diminished anger was not related to responsibility.¹⁴³ Apologies may persuade the injured that by accepting responsibility, the transgression is not “a fair representation of what the actor

¹³⁵ LAZARE, *supra* note 90, at 86.

¹³⁶ See SCHLENKER, *supra* note 4, at 154 (noting an apology requires admitting blameworthiness).

¹³⁷ See Robbenolt, *supra* note 38, at 469 n. 36 (“[P]artial apology’ will be used to refer to a statement that expresses sympathy, but does not admit responsibility. These will be contrasted with ‘full apologies,’ in which the offender both expresses sympathy and accepts responsibility.”).

¹³⁸ GOFFMAN, *supra* note 4, at 98.

¹³⁹ MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 115 (1998); see also Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 980 (1998) (observing that failures to prosecute or seek apologies for acts of violence disrespect victims).

¹⁴⁰ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 148 (2004).

¹⁴¹ See Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1508 (1997) (citing U.S. SENT’G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT’G COM’N 1994)) (noting reduction of offense levels for an offender who “clearly demonstrates acceptance of responsibility for his offense”).

¹⁴² TAVUCHIS, *supra* note 36, at 19.

¹⁴³ See Mark Bennett & Deborah Earwaker, *Victims’ Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCH. 457, 461–63 (1994).

is 'really like' as a person".¹⁴⁴ Responsibility is critically important depending on outcome severity in conflict resolution, and the injured may use any of a number of attribution criteria to assign responsibility, including actor-outcome association, causality, foreseeability, intentionality, and justifiability.¹⁴⁵

An apology requires the transgressor to acknowledge responsibility for having committed some offending act and must express regret about the offense.¹⁴⁶ The admission of responsibility for the adverse event is a necessary feature of an apology because it conveys to the listener that the speaker is aware of the norms that have been violated, and therefore conveys that the transgressor will not repeat the transgression in the future.¹⁴⁷

Acceptance of responsibility can be difficult for several reasons. One qualitative analysis identified two categories of reasons people find it hard to accept responsibility. First, there is fear of negative reactions by the injured, including loss of regard, feelings of superiority (e.g., smugness), holding a grudge, withholding forgiveness, or humiliation.¹⁴⁸ Second, the transgressor worries about the risk of embarrassment or negative emotions like incompetence, defeat (i.e., being a 'loser'), guilt, shame, and loss of self-esteem.¹⁴⁹

3. Remorse

Recognition and responsibility are necessary but not sufficient for a real apology. Most people resist the self-knowledge that comes from remorse.¹⁵⁰ Expressing remorse, and the associated emotions of regret, guilt, sorrow, self-castigation, shame, and embarrassment, distinguishes apology from other forms of remedial work. Remorse has been described as "... the deep, painful regret that is part of the guilt people experience when they have done something wrong."¹⁵¹ Without remorse, there can be no real apology.

¹⁴⁴ *Id.* at 461 (citing SCHLENKER, *supra* note 4, at 154).

¹⁴⁵ F. Fincham & J. Jaspars, *Attribution of Responsibility to the Self and Other in Children and Adults*, 37 J. PERSONALITY & SOC. PSYCH. 1589, 1589, 1591 (1979) (citing JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (Collier Books, 2013) (1932); *see also* FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 113 (1958) (identifying responsibility-attribution criteria).

¹⁴⁶ Fraser, *supra* note 118, at 262.

¹⁴⁷ Scher & Darley, *supra* note 110, at 129–30; *see also* Jeremy C. Anderson, Wolfgang Linden, & Martine E. Habra, *Influence of Apologies and Trait Hostility on Recovery from Anger*, 29 J. BEHAVIORAL MED. 347, 348 (2006) (defining the elements of a "genuine" apology to include six verbal components: first, an explicit expression of remorse; second, a specific statement of why one feels remorse and being sorry for the right thing; third, one must accept responsibility for one's actions; fourth, a truthful explanation for the offensive behavior without trying to excuse the offence and shirk responsibility; fifth, a promise of forbearance (a statement that the offensive behavior is not reflective of the offender's true character, therefore the victim can trust the behavior will not recur); and, sixth, an offer of restitution).

¹⁴⁸ LAZARE, *supra* note 90, at 162–63.

¹⁴⁹ *Id.*

¹⁵⁰ THOMAS J. SCHEFF, *EMOTIONS, THE SOCIAL BOND, AND HUMAN REALITY: PART/WHOLE ANALYSIS* 66 (1997) (quoting in part from *The Buried Life* by Matthew Arnold:

"I knew the mass of men conceal'd
Their thoughts, for fear that if reveal'd
They would by other men be met
With blank indifference, or with blame reproved;").

¹⁵¹ LAZARE, *supra* note 90, at 107.

In distinction to the other elements of apology, remorse can be expressed not only in spoken or written words, but also in manifestations, or non-verbal cues, including gestures, displays of affect, and other paralinguistic practices.¹⁵² Tavuchis, another leading voice in defining the meaning of apology, speaks of the transgressor assuming vulnerability and “moral nakedness” without excuse or appeal to circumstance.¹⁵³ Taft goes so far as to broaden the definition of apology so that it closely approximates the religious concept of repentance.¹⁵⁴

Remorse requires self-examination, or “looking inward,” allowing the transgressor to remember who they were before injuring another, their standing in relation to the injured, and what has been lost.¹⁵⁵ Remorse requires reflection on past events.¹⁵⁶ One commentator goes so far as to say that for some apologies to be effective, the injured person needs to see the transgressor suffer.¹⁵⁷ Expressions of suffering are often evidence of sincerity; a manifestation of retributive justice.¹⁵⁸ Often, belief in individual responsibility can limit the empathy the injured feels and limit judgment about punishment.¹⁵⁹ Remorse is often enhanced by a dialogue, where the injures can face the transgressor and tell the nature and severity of suffering.¹⁶⁰ A remorseful apology should also include an understanding of the transgression on the injured.¹⁶¹ An apology without remorse seems to be perfunctory; the illocutionary force of apology without conveying information about the emotional state of the transgressor.¹⁶² A person typically can feel remorse only for some transgression they individually made. However, in the criminal justice setting, where the original transgressor(s) may not be present, remorse can manifest as helping the injured through restored dignity and disclosure of concrete steps made to avoid future transgressions against other people.

In many circumstances, the convicted are expected to show remorse and apologize, as part of a rehabilitative ideal.¹⁶³ It has been hypothesized that during plea bargaining a willingness to apologize and show remorse may

¹⁵² Richard Weisman, *Detecting Remorse and Its Absence in the Criminal Justice System*, 19 *STUD. L. POL. & SOC'Y* 121 (1999).

¹⁵³ TAVUCHIS, *supra* note 36, at 18.

¹⁵⁴ See Taft, *supra* note 86, at 1140.

¹⁵⁵ TAVUCHIS, *supra* note 36, at 20.

¹⁵⁶ E. Mark Stern, *The Psychotherapy of Remorse*, in *PSYCHOTHERAPY AND THE REMORSEFUL PATIENT 2* (E. Mark Stern ed., 1989) (noting remorse “maintains the reality of unique responsibility” and “. . . guilt and regret form its lattice.”); see also Thomas Moore, *Re-Morse: An Initiatory Disturbance of the Soul*, in *PSYCHOTHERAPY AND THE REMORSEFUL PATIENT* 90–91 (E. Mark Stern ed., 1989) (defining remorse as “. . . an inner intelligence, who gets our attention with his teeth” and “a path toward inferiority”); DON GIFFORD & ROBERT J. SEIDMAN, *ULYSSES ANNOTATED: NOTES FOR JAMES JOYCE'S ULYSSES 22* (Univ. of Cal. Press 1989) (1974) (noting that the Middle English phrase “agenbite of inwit” means “remorse of conscience”).

¹⁵⁷ LAZARE, *supra* note 90, at 44.

¹⁵⁸ *Id.* at 62.

¹⁵⁹ Shirin Bakhshay, *The Dissociative Theory of Punishment*, 111 *GEO. L.J.* 1251, 1279 (2023).

¹⁶⁰ See LAZARE, *supra* note 90, at 67–68 (providing several examples of listening to suffering experienced by those injured by the holocaust, FMLN atrocities in El Salvador, and apartheid).

¹⁶¹ STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 74, n.32 (2012) (noting cognitive dissonance and ongoing denial render expression of remorse and apology difficult).

¹⁶² Scher & Darley, *supra* note 110, at 130.

¹⁶³ FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY*, 25–42 (1964).

result in a more lenient plea.¹⁶⁴ To facilitate an apology, one “modest” proposal suggests that victims should be granted control to reduce a sentence by ten percent if offered by the transgressor.¹⁶⁵ Sentencing judges are admonished to be responsive to expressions of genuine remorse in the case of otherwise undiscovered offenses.¹⁶⁶ Responsive Censure is a slightly new formal justification for judicial responsiveness to apologies by suggesting remorse-based mitigation as appropriate for transgressors.¹⁶⁷ Remorse has been considered a legal good.¹⁶⁸ But an apology that consists of recognition, responsibility, and remorse is incomplete without redress.

4. Redress

A fourth important element to a real apology is the rehabilitative ideal, including redress of the injury.¹⁶⁹ In *Hoffner v. State*, a New York court held that, “The State . . . suggests that more compensatory than money is the apologetic gesture of a penitent society. It seems to the court that such an apology accompanied by a token payment would add a highhanded insult to an almost inconceivable injury.”¹⁷⁰ As so eloquently stated by Judge Young in 1955, in addition to the apology elements of recognition, responsibility, and remorse, material steps are required to redress an injury inflicted by the criminal justice system.¹⁷¹ As with most torts, money is usually the best the law can do. Direct monetary compensation could include lost wages, property damage, loss of future earnings, and costs of medical care for physical and mental illness because of the injury. Indirect costs may also be appropriate for pain and suffering, loss of privacy, loss of freedom, humiliation, reputational damage, and for relatives, loss of consortium, and wrongful death.

The injured and their representatives are left to file state tort or federal civil claims against the presumed transgressors. Facts arise only in the face of detailed event analysis, often taking months or years. In the case of the wrongfully convicted and incarcerated, pardons are associated with a greater frequency of compensation.¹⁷² However, not all pardons are for actual

¹⁶⁴ Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 19–20 (2003); but see Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295 (2007) (questioning whether prosecutors are swayed by apologies during the plea-bargaining process).

¹⁶⁵ Erin O'Hara O'Connor, *Victims and Prison Release: A Modest Proposal*, 19 FED. SENT'G. REP. 130, 133 (2006).

¹⁶⁶ United States Sentencing Commission § 5K2.16 Voluntary Disclosure of Offense (2024); see also Richard L. Lippke, *Remorse, Dialogue, and Sentencing*, 16 CRIM. L. & PHIL. 611, 613 (2022).

¹⁶⁷ HANNAH MASLEN, REMORSE, PENAL THEORY AND SENTENCING 203 (2015).

¹⁶⁸ MICHAEL PROEVE & STEVEN TUDOR, REMORSE: PSYCHOLOGICAL AND JURISPRUDENTIAL PERSPECTIVES 116 (2016).

¹⁶⁹ ALLEN, *supra* note 163, at 37 (noting “Measures which subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element . . .”).

¹⁷⁰ *Hoffner v. State*, 142 N.Y.S.2d 630, 631 (N.Y. Ct. Cl. 1955).

¹⁷¹ Yoshino & Glasgow, *supra* note 85, at K3.

¹⁷² Jeffrey S. Gutman & National Registry of Exonerations, *Compensation Under the Microscope: Pardons and Compensation*, GWU LEGAL STUDIES RESEARCH PAPER NO. 2023-08, Feb. 27, 2023, at 6 <https://ssrn.com/abstract=4372003> [<https://perma.cc/9ZC6-THHW>].

innocence and maintain the burden of proof on the injured.¹⁷³ Even with the best of intentions, compensation for the wrongfully convicted and incarcerated is often inadequate or not awarded at all. In one study, 38 percent of the eligible wrongfully convicted did not apply at all and only 44 percent of the injured were compensated with widely varying amounts based on state residence and the average compensation was many times smaller than that usually awarded in civil cases.¹⁷⁴ One hundred seventy-seven individuals on the National Registry of Exonerations who sought compensation under state statutes were denied.¹⁷⁵ The federal wrongful conviction statute is rarely used and seldom successful.¹⁷⁶

C. When Should Apologies Matter to the Criminal Justice System?

There are many commentators who assert that those injured by the criminal justice system want an apology.¹⁷⁷ Yet there is a dearth of empirical research to document the use of apology by transgressors in the criminal justice system. In fact, there is no empirical research on the opinions of prosecutors or law enforcement regarding apologizing to those injured by the criminal justice system. A truism in healthcare is that “if something can’t be measured, it can’t be improved.”¹⁷⁸ And yet, in the criminal justice system, there has been essentially no empirical study on the role of real apologies when the factually innocent are wrongfully convicted. Where studied, real apologies are important to the injured and by extension may also be important to the factually innocent exonerees. In one—albeit limited—study, 100 percent of interviewees stated exonerees should receive apologies and compensation.¹⁷⁹ The wrongfully convicted often want to hear apologies.¹⁸⁰

¹⁷³ *Id.* at 8.

¹⁷⁴ Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 437 (2017).

¹⁷⁵ Jeffrey S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 CLEV. ST. L. REV. 219, 281 (2021).

¹⁷⁶ *Id.*

¹⁷⁷ O’Hara & Yarn, *supra* note 2, at 1141; *see also* Jonathan R. Cohen, *supra* note 34, at 1042–46; Bibas & Bierschbach, *supra* note 140, at 132; Leslie C. Levin & Jennifer K. Robbennolt, *To Err Is Human, to Apologize Is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. LEGAL ETHICS 513, 528–36 (2021); Abigail Penzell, *Apology in The Context of Wrongful Conviction: Why the System Should Say It’s Sorry*, 9 CARDOZO J. OF CONFLICT RESOLUTION 145, 154–59 (2007); Wesley Parks & C.J. Larkin, *Unlocking Apology’s Potential in Resolving Disputes* 51 COLO. LAW 20, 27 (2022); McMichael, *supra* note 78, at 341; Lerman, *supra* note 106, at 1663; Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL’Y & L. 433, 442 (1998); Strang & Sherman, *supra* note 164, at 15; Leslie Paik & Chiara Packard, *Impact of Juvenile Justice Fines and Fees on Family Life: Case Study in Dane County, WI*, PHILADELPHIA, PA JUVENILE LAW CENTER (2019) at 27; Heidi R. Gilchrist, *Released, but Not Free: The Unexonerated*, 14 NE. UNIV. L. REV. 113 (2022); O’Hara, *supra* note 165, at 130; Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337 (2002).

¹⁷⁸ David Blumenthal & J. Michael McGinnis, *Measuring Vital Signs: An IOM Report on Core Metrics for Health and Health Care Progress*, 313 J. AM. MED. ASS’N. 1901, 1901 (2015).

¹⁷⁹ Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies* 75 ALB. L. REV. 1415, 1433–34 (2012). Eleven of the authors’ fifteen participants thought apologies should be public. *Id.* at 1434.

¹⁸⁰ Lakia Faison & Laura Smalarz, *Perceptions of Exonerees: A Review of the Psychological Science*, 83 ALB. L. REV. 1021, 1025 (2019).

To further glimpse the importance of empirical study when the factually innocent are exonerated, one must look elsewhere. Victim-offender mediation (VOM) has been most studied from an empirical standpoint. VOM studies assert benefits for both the injured and the transgressor.¹⁸¹ Mediation provides a setting in which the offender can apologize to the victim for his wrongdoing.¹⁸² In one study, victims desired a public apology or affirmation through a Criminal Injuries Compensation Board to redress wrongs suffered—even more than monetary compensation.¹⁸³ Courts are infrequently a venue for airing of apologies.¹⁸⁴ Most victims say that they agree to VOM in order to confront the offender, to better understand why the crime happened, and/or to obtain reparations.¹⁸⁵ One survey of 4000 individuals asked how to improve the criminal justice system.¹⁸⁶ Experimental evidence indicates that plaintiffs are much more likely to settle their suits if the defendant has sincerely apologized to the victim.¹⁸⁷ There is also evidence that apologies might affect recommendations for settlement by attorneys.¹⁸⁸ But lawyers may be unable to eliminate psychological barriers.¹⁸⁹

Japanese recipients of a hypothetical apology were sensitive to the cost of the apology.¹⁹⁰ Most of the work has involved semi-structured interviews and relatively low-level crimes. Paik asked youth offenders about writing a letter

¹⁸¹ Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 30–31 (2001) (noting that individualizing consequences of crimes tends to enhance satisfaction with criminal justice).

¹⁸² Mark S. Umbreit et al., *The Impact of Restorative Justice Conferencing: A Review of 65 Empirical Studies in 5 Countries*, 1, 7–9 (2002), <https://www.researchgate.net/publication/255647653> [<https://perma.cc/935R-AKFV>] (last visited Apr. 7, 2025).

¹⁸³ Des Rosiers et al. *supra* note 177, at 442 (finding that eighteen of twenty-four interviewees desired an apology or public affirmation of the wrong they suffered, and only three identified money as a motivating factor).

¹⁸⁴ See Strang & Sherman, *supra* note 164, at 29 (“[A] sincere expression of remorse is . . . something victims almost never have the chance to hear in the courtroom.”).

¹⁸⁵ Mark S. Umbreit & Robert B. Coates, *Victim Offender Mediation: An Analysis of Programs in Four States of the U.S.* 17 (1992). About 89 percent of transgressors thought offering an apology was important. *Id.* at 18.

¹⁸⁶ Strang & Sherman, *supra* note 164, at 28 (showing data that 86 percent of Canberra victims attending restorative justice conferences received apologies from their offenders, while only 16 percent received apologies if cases were resolved in court).

¹⁸⁷ Robbenolt, *supra* note 38, at 485–86 (showing that with a full apology, 73 percent of respondents would definitely or probably accept a hypothetical settlement, compared to 52 percent without an apology). Full apologies also improved the participants’ perceptions of the offender. *Id.* at 500.

¹⁸⁸ Jennifer K. Robbenolt, *Apologies and Settlement*, 45 CT. REV. 90, 94 (2009) (describing three possible role effects: attorneys, whether compensated by contingency or hourly fees may not wish lower settlements or fewer billable hours; attorneys are more analytical and more influenced by economic concerns; attorneys are more attuned to protection of clients’ legal rights).

¹⁸⁹ Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 110, 143 (1994) (concluding there are a number of psychological barriers to value-maximizing settlement efforts including personal feelings).

¹⁹⁰ Yohsuke Ohtsubo & Esuka Watanabe, *Do Sincere Apologies Need to Be Costly? Test Of a Costly Signaling Model of Apology*, 30 EVOLUTION & HUM. BEHAV. 114, 120 (2009) (noting a costly apology communicated sincerity); see also Ryo Oda & Kai Hiraishi, *Checking Boxes for Making an Apology: Testing the Valuable Relationships Hypothesis by a New Method*, 12 LETTERS ON EVOLUTIONARY BEHAV. SCI. 7, 9 (2021) (noting the instrumentality of the friend, a measure of how helpful that friend was to achieving one’s goals, explained how costly an apology one might offer that friend).

of apology as an alternative to a legal financial obligation.¹⁹¹ Often, empirical studies are from the victim-offender mediation literature. One study of victim-offender mediation (VOM) was done in four sites with juvenile offenders and their victims.¹⁹² A meta-analysis of 63 studies showed most participants found VOM satisfactory, with increased rates of restitution and lower levels of subsequent offenses.¹⁹³ An empirical survey of about 700 online responses on the role of apology in alternative dispute resolution showed that apologies decreased the initial settlement offer, among other findings.¹⁹⁴

Construction of real apologies must be done with meticulous consideration.¹⁹⁵ “Apology” laws as enacted in the healthcare setting would also be inappropriate in many criminal justice settings. If not done right, apologies might be deleterious to both the injured and the transgressor, with the needs of both better maintained by other forms of clear, explicit communication.¹⁹⁶ Apologies may actually threaten an injured’s sense of control.¹⁹⁷ The injured may feel coerced into communicating forgiveness, the conventional response to an apology.¹⁹⁸ Another important concept is the cultural notion of ‘face.’¹⁹⁹ The transgressor should, in any apology, indicate reluctance to encroach on the exoneree’s negative face, while affirming the exoneree’s positive face.²⁰⁰ Apologies need to acknowledge both types of face.²⁰¹ Arbel and Kaplan consider apology law reform the work of a “strong lobby” of legal scholars called “Legal Apologists” who have contributed to the philosophical, social, and psychological understanding of the role of apologies.²⁰² However, the “Legal Apologists” are taken to task for not considering the potentially harmful effects of apologies in effectively achieving “tort reform through the back door.”²⁰³

¹⁹¹ Paik & Packard, *supra* note 177, at 28 (concluding “[A] letter of apology is one thing on a long list of things youth are supposed to do.”); see also Leslie Paik, *Reflection on the Rhetoric and Realities of Restitution*, 4 UCLA CRIM. JUST. L. REV. 247, 248 n. 4, 250 (2020).

¹⁹² Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, W. CRIMINOLOGY REV., June 1998 (documenting victim and offender satisfaction, successful restitution completion, and reduced fear in crime victims).

¹⁹³ See generally Umbreit et al., *supra* note 185.

¹⁹⁴ Sunshine Yin, *The Power of Apology in Settlement Decision-Making: An Empirical Analysis*, 4 RESOLVED: J. ALTERNATIVE DISP. RESOL. 70, 88–89 (2014).

¹⁹⁵ Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1304 (2006).

¹⁹⁶ Gili Freedman et al., *Softening the Blow of Social Exclusion: The Responsive Theory of Social Exclusion*, FRONTIERS IN PSYCH., Oct. 10, 2016, at 12. I have substituted *injured* for target that Freedman et al. defines as one sustaining a harm (e.g., wrongful conviction) and *transgressor* for source, or by Freedman’s definition, the perpetrator (e.g., local, state, or federal government).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ PENELOPE BROWN & STEPHEN C. LEVINSON, *POLITENESS: SOME UNIVERSALS IN LANGUAGE USE* 13 (1987). “Face” refers to two types of desire. “Negative face” is the wish to be free of restraint in one’s activities (e.g., not to feel coerced into expressions of forgiveness). “Positive face” is the wish for approval (e.g., to be seen as innocent). Brown and Levinson use “speaker” as one giving the apology and “hearer” as the one to whom the apology is given. As elsewhere, I have substituted “transgressor” (e.g., local, state, or federal government) for “speaker,” and “injured” for “hearer.”

²⁰⁰ *Id.* at 187–89.

²⁰¹ *Id.* at 190 (indicating the state can be reluctant to encroach on the exoneree’s faces in several ways, but perhaps the best is to admit the encroachment: “I hope what I am about to say (or write) won’t trouble you too much.”).

²⁰² Yonathan A. Arbel & Yotam Kaplan, *Tort Reform through the Back Door: A Critique of Law and Apologies*, 90 S. CAL. L. REV. 1199, 1241 (2017).

²⁰³ *Id.*

Apology in the criminal justice setting has often been placed under the rubric of restorative justice.²⁰⁴ Restorative justice proponents have suggested “Apology Banks” be created to allow transgressors to apologize without violating rules against contacting the injured.²⁰⁵ There has even been an attempt to develop an “Apology Score Card.”²⁰⁶ Transgressors may need assistance in crafting a redemption story in an attempt to avoid repeat offenses.²⁰⁷ Real apologies, then, set a high bar for the transgressor.

III. APOLOGY CONSIDERATIONS IN THE CRIMINAL JUSTICE SETTING

A. Apologies on Behalf of the Criminal Justice System

Apologies have been and continue to be given by constituents of the criminal justice system with varying degrees of success. Such apologies are offered spontaneously as there is currently no statutory mandate. The wrongful conviction apologies discussed *infra* occur in a variety of circumstances—predominantly—and are instructive as to how real apologies should be offered. Apologies issued in public (e.g., news conferences) are “on the record” while those offered in private are not.

1. The Dugan Apology

Perhaps the most personal type of apology is from one individual to another. Gerald Dugan was the assistant district attorney who prosecuted fifteen-year-old Kevin Brinkley. A jury convicted Mr. Brinkley of murder and sentenced him to life without parole. Paroled in 2017 after *Miller v. Alabama*,²⁰⁸ Dugan had become concerned that Mr. Brinkley did not commit the crime, met face to face with Mr. Brinkley and family members, and apologized, expressing recognition of the event, responsibility, and remorse, but no redress.²⁰⁹

²⁰⁴ Bailey Maryfield et al., *Research on Restorative Justice Practices*, JUST. RSCH. STAT. ASS’N. RSCH. BRIEF, Dec. 2020, at 1.

²⁰⁵ *Id.* at 4–5; see also Sandra Pavelka & Anne Seymour, *Guiding Principles and Restorative Practices for Crime Victims and Survivors*, CORRECTIONS TODAY, Jan./Feb. 2019, at 43, and Pennsylvania Office of Victim Advocate, *Inmate Apology Bank*, <https://www.oiva.pa.gov/Restorative-Justice/InmateApologyBank/Pages/default.aspx> [<https://perma.cc/54FC-Z24X>] (advising that “Writing an apology letter is voluntary and has no effect on incarceration, release date and/or parole supervision.”).

²⁰⁶ Parks & Larkin, *supra* note 179, at 25 (offering ten criteria by which to score an apology: 1) A detailed account of the situation; 2) Acknowledged their role in the event/situation; 3) Took responsibility for their role; 4) Acknowledged the outcome (hurt/damage/consequences); 5) Described what they should or could have done differently; 6) Expressed sincere regret for their role and outcome; 7) Offered restitution, repair, or retribution; 8) Promised change/improvement with concrete a plan; 9) Listened to the aggrieved party; 10) Willing to answer question. A score of between one and five is possible in each category: 1 (poor), 2 (attempt), 3 (decent), 4 (good), and 5 (excellent), aggregated to tabulate an overall score).

²⁰⁷ Nicola Lacey & Hanna Pickard, *To Blame or to Forgive: Reconciling Punishment and Forgiveness in Criminal Justice*, 35 OXFORD J. LEGAL STUD. 665, 690 (2015) (requiring one to “forego satisfaction of our desire for full apology, repentance, suffering, and atonement.”).

²⁰⁸ *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

²⁰⁹ Samantha Melamed, *Former Prosecutor Apologizes to Lifer After His Parole*, PHILA. INQUIRER, Oct. 27, 2017, at A1, A14. The apology, in part, included the phrases “You have every

2. *The Long Apology*

Ronnie Long spent 44 years in prison after a wrongful conviction in 1976 and a pardon for actual innocence in 2020. He received a public apology:

*We are deeply remorseful for the past wrongs that caused tremendous harm to Mr. Long, his family, friends, and our community... While there are no measures to fully restore to Mr. Long all that was taken from him, through this agreement we are doing everything in our power to right the past wrongs and take responsibility. . . .*²¹⁰

3. *The Strickland Apology*

Jean Peters Baker, a Jackson County, Missouri prosecutor, publicly apologized in a press conference to Kevin Strickland for his wrongful conviction and incarceration for 43 years.²¹¹ Subsequently, on MSNBC, Rachel Maddow reported that “[B]eing a prosecutor is not the kind of job in which you ever hear an apology.”²¹² The report goes on to explain that the apology offered by Ms. Peters Baker is “unlike anything [Ms. Maddow had] ever seen before from a prosecutor, anywhere.”²¹³ The apology states:

I’m here advocating for Mr. Strickland’s freedom, and his conviction should be vacated. Most importantly though, I am advocating that this man must be freed immediately. My job is to protect the innocent . . . and today my job is to apologize. It is important to recognize when the system has made wrongs and what we did in this case was wrong. So, to Mr. Strickland, I am profoundly sorry, I am profoundly sorry for the harm that has come to you. It is not however just Mr. Strickland that I owe an apology to, it is to the victim’s family in this case. I suppose I could stop there, but harms like this extend beyond criminal defendants and those with the title of victim. It goes to the broader community, and to that end, I want to tell this community that I represent that I find this mistake in this system to be profound and to be one that I should take every ounce of energy I have to correct. I am sorry for this mistake made by this system.²¹⁴

Mr. Strickland was freed in November 2021 after the press conference in May of 2021. Strickland subsequently filed a lawsuit in Jackson County

right to hate me” and “there were a bunch of things I should have done that I didn’t do.” *Id.* The article says nothing about compensation.

²¹⁰ Michelle Boudin, *Ronnie Long, NC man who spent 44 years in prison for rape he didn’t commit, gets \$25M settlement*, WCNC (Jan. 9, 2024), <https://www.wcnc.com/article/news/investigations/concord-ronnie-long-wrongfully-convicted-rape-jury-tampering-pardon/275-0b835e32-0209-4bf0-96a8-2e572cf6d6c4> [<https://perma.cc/C659-TYKP>].

²¹¹ Rachel Maddow, *A ‘Profound’ Mistake: Prosecutor Fights to Free Wrongfully Convicted Man*, MSNBC (Jun. 18, 2021), <https://www.youtube.com/watch?v=r9gMSO3JKrk> [<https://perma.cc/KDH9-A5XW>].

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

Circuit Court against the Kansas City police department seeking compensation for his wrongful conviction.²¹⁵ The Missouri statute only considers exoneration by DNA evidence as proof of wrongful conviction.²¹⁶

4. *The Crabtree Apology*

Darwin Crabtree was exonerated in January 2018 after his conviction for child molestation in 1991.²¹⁷ He lost ten years and was required to register as a sex offender for life. The cause of his wrongful conviction was false testimony. He was invited to the office, where DA Mike Ramsey offered an in-person apology.²¹⁸ He received compensation through the California Victim Compensation Board.

5. *The Davis Apology*

Ricky Davis was exonerated in February 2020 after being convicted of murder in 2005. He lost twelve years of freedom. The causes of his wrongful conviction included false testimony and “overly aggressive interrogation.” He received compensation through the California Victim Compensation Board. Elected DA Vern Pierson held a press conference stating “Ricky Davis [was] falsely accused, brought to trial, convicted, and has spent the last fifteen some years in custody for a crime that I can tell you in all confidence he did not commit.”²¹⁹ Also, “I have personally apologized to Ricky Davis . . . for the mistakes in handling this case in the past.”²²⁰

6. *The Walker Apology*

Quedellis “Rick” Walker was wrongfully convicted of first-degree murder in December 1991.²²¹ There was no physical evidence connecting Mr. Walker to the crime; he was tried and sentenced to twenty-six years to life in prison. After years of futile appeals, DNA evidence came to light confirming that

²¹⁵ Ken Otterbourg, *Kevin Strickland*, THE NATIONAL REGISTRY OF EXONERATIONS, Apr. 12, 2023, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6081> [<https://perma.cc/5V34-RMRP>].

²¹⁶ MO. REV. STAT. § 650.058 (2025).

²¹⁷ NORTHERN CALIFORNIA INNOCENCE PROJECT, *Darwin Crabtree*, <https://ncip.org/darwin-crabtree/> [<https://ncip.org/darwin-crabtree/>] (last visited Mar. 13, 2025).

²¹⁸ Andre Byik, *Paradise Man Has Decades Old Molestation Convictions Overturned*, CHICO ENTERPRISE RECORD (Jan. 17, 2018), <https://www.chicoer.com/2018/01/17/paradise-man-has-decades-old-molestation-convictions-overturned/> [<https://perma.cc/QU9T-WNA2>].

²¹⁹ ABC 10, *Ricky Davis Exonerated After Serving Fifteen Years*, YOUTUBE (Feb. 14, 2020), https://www.youtube.com/watch?v=CfM8tTD3dNÅ&ab_channel=ABC10 [<https://perma.cc/2533-4UQM>].

²²⁰ Press Release, El Dorado County District Attorney, Michael Green Sentenced/New DA Interrogation Policy (Sept. 27, 2022), <https://www.eldoradoda.com/michael-green-sentenced-new-da-interrogation-policy/> [<https://perma.cc/99X3-4DUW>].

²²¹ Exonerated Nation, *Rick Walker*, <https://exoneratednation.org/rick-walker/> [<https://perma.cc/VS7Y-B38T>] (last visited Mar. 12, 2025).

Walker was not the perpetrator. Walker was set free in June of 2003 with an apology from Assistant District Attorney Karyn Sinunu, who stated “I apologized.”²²² He received \$100 per day for time served by legislation passed by the California State Legislature after a display of bipartisanship.²²³ Walker became a member of the Northern California Innocence Project’s Advisory Board. He died in 2020.

7. *The Hernandez and Solorio Apologies*

District Attorney George Gascon apologized to two individuals at a Los Angeles Hall of Justice press conference on December 13, 2023. The Juvenile Innocence and Fair Sentencing Clinic at Loyola Law School assisted the exoneration of Mr. Giovanni Hernandez and the Northern California Innocence Project assisted the exoneration of Mr. Miguel Solorio. Mr. Gascon’s apology, after recognition of the errors in prosecution, included in part:

This is the day when we publicly announce that they are factually innocent. . . . Mr. Hernandez, I know you have always maintained your innocence and I want to apologize to you and your family for this failure. Mr. Solorio, I am also sorry for you . . . and for what you have endured as a result of this wrongful conviction. . . . I hope that our apology is some small comfort for you as you begin your new life.²²⁴

D.A. Gascon’s apology covered three of the four elements of a real apology. First, the announcement came in a public forum. The injury was factually recognized, his office took responsibility, and anyone watching the video could feel the remorse in his words, as he also attempted to restore dignity to the recent exonerees. Regarding redress, Mr. Gascon noted the efforts being made not only to exonerate additional individuals, but also efforts toward better processes for photo lineups. Claims under the California wrongful conviction statute are proceeding and are facilitated by the public acknowledgment of factual innocence. Neither exoneree explicitly affirmed forgiveness.

IV. THE WRONGFUL CONVICTION STATUTES

A. *The Missing Word*

No wrongful conviction statute mentions the word apology, and yet apologizing to the wrongfully convicted is the one circumstance in which a real apology might be accomplished; the judicial record and application

²²² Harriet Chiang, *Dogged family friend wins man his freedom*, SFGATE (June 10, 2003), <https://www.sfgate.com/bayarea/article/Dogged-family-friend-wins-man-his-freedom-He-2578162.php> [<https://perma.cc/2VRY-ZCQU>] (last visited Mar. 13, 2025).

²²³ DVD: \$100 a Day (Gwen R. Essegian & Mark Ligon 2009) (on file with author).

²²⁴ LADAOffice, *12-13-23 News Conference: LADA Announces Exonerations of Two Men Wrongfully Convicted of Murder in Two Separate Cases*, VIMEO (Dec. 13, 2023), <https://vimeo.com/894312737> [<https://perma.cc/4K2H-GNMY>] (last visited Mar. 15, 2025).

provide recognition of the injury, responsibility can be assigned, remorse to the extent possible can be expressed, and redress through monetary compensation is a part of the statute, so apologies would be a small incremental step for the criminal justice system that would mean a great deal to the exonerees, specifically those exonerated for actual innocence. Adding apology would also enhance other redress, as none of the states truly have comprehensive statutory compensation for wrongful conviction.²²⁵ Large exoneree compensations may reduce the number of wrongful convictions without affecting guilty individuals' incentives and are unlikely to affect deterrence.²²⁶ Yet many statutes have parsimonious compensation provisions with caps or yearly compensation of less than ~\$50,000/yr.²²⁷ Wrongful conviction statutes are generally designed to acknowledge the government as the correct party to assume responsibility for wrongful conviction.²²⁸ Further, the intent of most statutes is to separate those that can prove actual innocence from those merely avoiding criminal liability.²²⁹ Wrongful conviction statutes generally require that a claimant must have been convicted of a crime, must have served time in prison, and, in the majority of cases, the claimant bears the burden of proof.

One frequent form of proof is a pardon. Alexander Hamilton, writing as Publius, explained the need for pardons: "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."²³⁰ Regardless of whether the pardon mentions innocence—as a review of pardon data and compensation show—those who receive a pardon are more likely to seek and to obtain compensation for a wrongful conviction than other wrongly convicted exonerees.²³¹ In the quest for pardon, further enhancing the need, apologies are often expected at the Minnesota Board of Pardons.²³²

²²⁵ Marissa Cohen, *How to Alleviate the Repercussions of Wrongful Convictions: Holistically Righting the Wrongs of Inadequate Compensation Statutes*, 44 CARDOZO L. REV. 2063, 2102 (2023).

²²⁶ Murat C. Mungan & Jonathan Klick, *Reducing Guilty Pleas Through Exoneree Compensation*, 59 J. L. & ECON. 173, 185 (2016).

²²⁷ Statutes with parsimonious compensation include: FLA. STAT. ANN. § 961.06 (2023) (not to exceed (NTE) \$2 million); IOWA CODE § 663A.1 (2023) (\$18,25 per year (\$50/da liquidated damages)) and lost wages if any NTE \$25,000; LA. REV. STAT. § 15:572.8 (2024) (NTE \$400,000); ME. REV. STAT. ANN. tit. 14 § 8242 (2024) (NTE \$300,000); MASS. GEN. LAWS. ch. 258D, § 5 (2024) (NTE \$1 million); MISS. CODE ANN. § 11-44-7 (2024) (NTE \$500,000); MO. REV. STAT. § 650.058 (2023) (NTE \$36,500 per year); NEB. REV. STAT. ANN. § 29-4604 (2024) (NTE \$500,000); N.H. REV. STAT. ANN. 541-B:14 (II) (2023) (NTE \$20,000); N.C. GEN. STAT. § 148-84 (2023) (NTE \$750,000); OKL. STAT. ANN. tit. 51, § 154 (B) (4) (2024) (NTE \$175,000); TENN. CODE ANN. § 9-8-108 (a) (7) (A) (2024) (NTE \$1 million); VT. STAT. ANN. tit. 13 § 5574 (2024) (no less than \$30,000 but no more than \$60,000 per year); WIS. STAT. ANN. § 775.05 (LexisNexis 2023-2024) (NTE \$25,000).

²²⁸ Deborah F. Buckman, *Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration*, 53 A.L.R. 6th 305, *2.

²²⁹ *Walden v. State*, 547 N.E.2d 962, 966 (Ohio 1989) (stating "a verdict or judgment of acquittal in a criminal trial is a determination that the state has not met its burden of proof on the essential elements of the crime. It is not necessarily a finding that the accused is innocent").

²³⁰ THE FEDERALIST NO. 74 (Alexander Hamilton).

²³¹ Gutman, *supra* note 172, at 8.

²³² Dan Barry, *10 Minutes to Plead for Grace*, N.Y. TIMES, Oct 16, 2023 at A1.

The addition of an apology to exonerees would not be a large administrative burden, given the small numbers involved. The National Registry of Exonerations (NRE) recorded 194 pardons as of September 2022, but not all pardons were based on actual innocence.²³³ Further, the number of compensated exonerees is small, making the addition of apologies to the redress a manageable endeavor. Detailed analyses of state compensation claims have been studied for six states (Table 1). A more comprehensive, if somewhat dated, analysis of all jurisdictions is available.²³⁴

TABLE 1: EXONEREE CLAIMS “UNDER THE MICROSCOPE” IN SIX STATES

| | NRE Wrongfully Convicted Exonerees | Eligible | Claims | Exonerees with Statutory Compensation | Law Enacted |
|---------------------------|---|----------|--------|---|----------------|
| Florida ²³⁵ | 83 | 72 | | 10 | 2008 |
| Indiana ²³⁶ | 41 | 40 | 14 | 3 | 2019 |
| Michigan ²³⁷ | 156 | 156 | 94 | 62 | 2017 |
| Virginia ²³⁸ | 65 | 60 | 42 | 36 | 2004 |
| Washington ²³⁹ | 51 | 47 | 22 | 9 | 2013 |
| Wisconsin ²⁴⁰ | 66 | 61 | 24 | 16 | 1913 |

The United States, thirty-eight states, and the District of Columbia have wrongful conviction statutes.²⁴¹ Twelve states currently do not have wrongful

²³³ Gutman, *supra* note 172, at 1 (reporting pardons are issued by independent boards in six states, the governor and state board share power in twenty-two states, and may consult a state board prior to issuing a pardon).

²³⁴ Gutman, *supra* note 174, at 439–40 (table).

²³⁵ JEFFREY GUTMAN, COMPENSATION UNDER THE MICROSCOPE: FLORIDA 4 (2022), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2891&context=faculty_publications [<https://perma.cc/9AND-T89G>] (last visited Jan. 12, 2025) (noting that five of six exonerees with connections to a conviction integrity unit have sought or received compensation).

²³⁶ JEFFREY GUTMAN, COMPENSATION UNDER THE MICROSCOPE: INDIANA 4 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203701# [<https://perma.cc/WYP5-F5L7>] (last visited Jan. 12, 2025).

²³⁷ JEFFREY GUTMAN, COMPENSATION UNDER THE MICROSCOPE: MICHIGAN 2 (2023), <https://www.law.umich.edu/special/exoneration/Documents/Michigan%20denials%20v.%20%281%29.pdf> [<https://perma.cc/5DW2-2R7P>] (last visited Jan. 12, 2025) (listing sixty-two as awarded state compensation and twenty-eight with civil rights compensation).

²³⁸ JEFFREY GUTMAN, COMPENSATION UNDER THE MICROSCOPE: VIRGINIA 3 (2023), <https://www.law.umich.edu/special/exoneration/Documents/Virginia%20v.%20%281%29.pdf> [<https://perma.cc/B3SL-TD6H>] (last visited Jan. 12, 2025).

²³⁹ JEFFREY GUTMAN, COMPENSATION UNDER THE MICROSCOPE: WASHINGTON 8 (2022), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2899&context=faculty_publications [<https://perma.cc/T4LQ-BXJP>] (last visited Jan. 12, 2025).

²⁴⁰ JEFFREY GUTMAN, COMPENSATION UNDER THE MICROSCOPE: WISCONSIN 2 (2023), <https://www.law.umich.edu/special/exoneration/Documents/Under%20The%20Microscope%20Wisconsin.pdf> [<https://perma.cc/7FBL-ADRT>] (last visited Mar. 11, 2025).

²⁴¹ For details regarding statutory construction in states with wrongful conviction statutes see *infra* Table 2.

conviction statutes.²⁴² There is an Arkansas State Claims Commission not specifically for wrongful convictions but with jurisdiction over claims otherwise barred by sovereign immunity.²⁴³ A Montana wrongful conviction statute expired in 2023.²⁴⁴ Many states have additional sections in wrongful conviction statutes that would make the provision of apologies easier to the injured exonerees. That apologies should be made public is exemplified by the Virginia experience.²⁴⁵ Virginia's General Assembly—often after hearing from the injured in open session—enacts legislation then signed by the governor; an explicit public process that some exonerees feel is an important step in recovery.²⁴⁶ Wrongful conviction statutes have recently been studied collectively for state harm, compensation, and the aftermath of exoneration.²⁴⁷ There are several other elements to the various state statutes that should be considered to strengthen protections when apologies are offered to the actually innocent who are wrongfully convicted and incarcerated.

B. Release and Waiver

Connecticut requires those eligible for compensation to voluntarily relinquish any right to pursue any other action or remedy at law or in equity arising out of the wrongful conviction and incarceration.²⁴⁸ Florida requires a waiver forever releasing the state or any agency, instrumentality, or any political subdivision thereof, or any other entity.²⁴⁹ Florida also bars a wrongfully incarcerated person from applying for compensation if that person has a lawsuit pending against the state or any agency, instrumentality, or any political subdivision thereof, or any other entity.²⁵⁰ Lastly, Florida states that any award of wrongful conviction compensation does not constitute a waiver of sovereign immunity or increase the limit of state liability.²⁵¹ The Court of Claims Act bars the State of Illinois from being named as a defendant or party

²⁴² Alaska, Arizona, Arkansas, Georgia, Kentucky, Montana, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Wyoming.

²⁴³ ARK. CODE ANN. § 16-112-201 (2024) (allowing a writ of habeas corpus for new scientific evidence—including DNA testing—that establishes actual innocence); *but see* BUREAU OF JUST. ASSISTANCE, *Identifying, Remediating, and Preventing Wrongful Convictions in Arkansas* <https://bja.ojp.gov/funding/awards/15pbja-21-gg-03613-wrng> [<https://perma.cc/M8D6-YSEV>] (last visited Jan. 12, 2025) (stating there has been no concerted effort to review and litigate post-conviction innocence claims in Arkansas. The Midwest Innocence Project has processed 177 applications, while eleven are currently being further screened).

²⁴⁴ The prior statute (Chapter 32 Wrongful Conviction Part 1 Proceedings for Compensation §§ 46-32-101–04, 106–08) was repealed effective Jun. 20, 2023. A new bill was introduced Feb. 6, 2023, passed by the legislature on Apr. 26, 2023, was vetoed by the Governor on May 12, 2023, and the legislature failed to override the veto on June 9, 2023.

²⁴⁵ VA. CODE ANN. §§ 8.01-195.10 - 8.01-195.13 (2023).

²⁴⁶ Gutman, *supra* note 238, at 2 (noting innocence must be found by the governor or a court).

²⁴⁷ Andrew J. Madrigal & Robert J. Norris, *The Good, the Bad, and the Uncertain: State Harm, the Aftermath of Exoneration, and Compensation for the Wrongly Convicted*, 30 CRITICAL CRIMINOLOGY 30:895, 903–09 (2022).

²⁴⁸ CONN. GEN. STAT. § 54-102UU (g) (2023).

²⁴⁹ FLA. STAT. ANN. § 961.06 (5) (2023).

²⁵⁰ § 961.06 (6).

²⁵¹ *Id.* at § 961.06 (7).

in any court.²⁵² Indiana requires that persons entitled to compensation must forever release, discharge, and waive all claims against the State of Indiana and a number of other individuals.²⁵³

Massachusetts requires that written acceptance by a claimant is final, constitutes a complete release of any claim, and is a complete bar to claims against the commonwealth.²⁵⁴ Michigan includes, in addition to a release and bar to claims, a clause that any compromise or settlement is final and conclusive.²⁵⁵ Minnesota is much the same.²⁵⁶ Mississippi allows the pursuit of a claim in lieu of a tort action, but an award for such a claim requires a written release and bars subsequent awards in state court.²⁵⁷ Missouri allows restitution for DNA exoneration only, and prohibits other civil redress from the state, its departments or agencies, and employees.²⁵⁸ Nebraska disallows against the state, in claims with compensation, any claims based on other theories of recovery or law.²⁵⁹

In Rhode Island, written acceptance must include a provision voluntarily relinquishing all rights to pursue any other action or remedy at law or in equity arising out of wrongful conviction.²⁶⁰ In addition to disallowing any action on the same subject matter, if a claimant receives compensation in Texas claims involving arrest, conviction, or length of confinement may not be brought.²⁶¹ Utah considers payment under the statute full and conclusive.²⁶² Vermont requires written acceptance of compensation as final and conclusive, including a release and bar to further actions. Virginia also requires a successful claimant to execute a release and waiver of present and future claims against the Commonwealth and other entities and individuals.²⁶³ Lastly, Washington state requires that all remedies and compensation shall be exclusive to all other remedies at law and in equity against the state or any political subdivision of the state.²⁶⁴

²⁵² 745 ILL. COMP. STAT. ANN. 5/1- (LexisNexis 2023).

²⁵³ IND. CODE ANN. § 5-2-23-4 (LexisNexis 2023) (including political subdivisions, applicable state agencies, current, former or successor officials; members, officers, agents, or employees).

²⁵⁴ MASS. GEN. LAWS. ch. 258D, § 4 (2024).

²⁵⁵ MICH. COMP. LAWS. SERV. § 691.1755 (8) (LexisNexis 2024).

²⁵⁶ MINN. STAT. § 611.365 Subdiv. 4 (2023).

²⁵⁷ MISS. CODE ANN. §§ 11-44-7 (4) (2024); MISS. CODE ANN. § 11-44-15 (2024).

²⁵⁸ MO. REV. STAT. § 650.058 1. (4) (2023).

²⁵⁹ NEB. REV. STAT. ANN. § 29-4608 (2024).

²⁶⁰ R.I. GEN. LAWS § 12-33-4 (E)(1) (2024).

²⁶¹ TEX. GOV'T CODE ANN. § 103.153 (b) (2023); *but see* State v. Oakley, 227 S.W.3d 58, 63-64 (Tex. 2007) (holding that compensation from the state bars claims against other governmental units, but if a local government entity settlement is already reached, the state is not protected from adding to compensation).

²⁶² UTAH CODE ANN. § 78B-9-405(11)(a) (2023).

²⁶³ VA. CODE ANN. § 8.01-195.12 (B) (2023) (including any agency, instrumentality, officer, employee, or political subdivision thereof, any legal counsel and all other parties of interest).

²⁶⁴ WASH. REV. CODE ANN. § 4.100.080 (1) (LexisNexis 2023) (adding that claimant must waive all other remedies, causes of action, and other forms of relief or compensation against the state, any political subdivision of the state, including officers, employees, agents, and volunteers related to the claimant's wrongful conviction and imprisonment, and execute a valid release prior to the payment of any compensation).

C. Additional Lawsuits

Several states' statutes address the issue of additional lawsuits and allow for federal civil rights suits under 42 U.S.C. § 1983. In the context of recognition as an element of apology, a lack of statutory protection can lead to multiple claims in a given circumstance.²⁶⁵ Colorado does not limit the ability to otherwise pursue damages against an entity that is not an employee, agent, or agency of the state government.²⁶⁶ Iowa does not preclude or otherwise limit any action or claim for relief based on any negligent or wrongful acts or omissions that arose during the period of the wrongful imprisonment not related to the facts and circumstances underlying the conviction or proceedings to obtain relief from the conviction.²⁶⁷ Nothing in the Nebraska statute limits a claimant from making any other claim available against any other party or based upon any other theory of recovery.²⁶⁸ Adjudication by the Board of Claims or the Superior Court in New Hampshire does not deprive the claimant of any other legal rights they may have against other parties.²⁶⁹ The Washington statute explicitly states that if a wrongfully convicted person elects not to pursue a claim under the wrongful compensation statute, they are not precluded from seeking relief through any other existing remedy.²⁷⁰

D. Statutory Considerations for Immunity (*Absolute/Qualified*)

Governmental actors have been said to be protected by absolute,²⁷¹ or qualified immunity.²⁷² Detailed analyses of the immunity doctrines are beyond the scope of this paper. Both absolute and qualified immunity for some governmental actors is under attack. Pattern or practice strategies have been suggested to pierce prosecutorial absolute immunity.²⁷³ Several examples will

²⁶⁵ One recent example is the case of Ronnie Long who was pardoned in 2020 after a federal appeals court vacated his sentence. Long v. Hooks, 972 F.3d 442, 446 (4th Cir. 2020). Under North Carolina statute N.C. GEN. STAT. § 148.82 (2023), Mr. Long was awarded \$750,000. However, in the absence of a statutory bar to additional claims, Mr. Long also sued the city of Concord, the detectives who worked his original case, and the city's current and former police chiefs. A settlement paid \$22 million on behalf of the city of Concord, and the State Bureau of Investigation for \$3 million. Michelle Boudin, *Ronnie Long, NC man who spent 44 years in prison for rape he didn't commit, gets \$25M settlement*, WCNC (Jan. 9, 2024), <https://www.wcnc.com/article/news/investigations/concord-ronnie-long-wrongfully-convicted-rape-jury-tampering-pardon/275-0b835e32-0209-4bf0-96a8-2e572cf6d6c4> [https://perma.cc/EJ8S-DU76] (last visited Jan. 12, 2025); see also Michael Levinson, *Unjustly Convicted Man gets \$25 Million*, N.Y. TIMES Jan. 12, 2024 at A13.

²⁶⁶ COLO. REV. STAT. § 13-65-103(9)(b) (2024).

²⁶⁷ IOWA CODE § 663 A.5 (2023).

²⁶⁸ NEB. REV. STAT. ANN. § 29-4608 (2024).

²⁶⁹ N.H. REV. STAT. ANN. § 541-B:15 (2023).

²⁷⁰ WASH. REV. CODE ANN. § 4.100.080 (1) (LexisNexis 2023).

²⁷¹ Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

²⁷² Saucier v. Katz, 533 U.S. 194, 206 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2009).

²⁷³ Thomas P. Hogan, *Power v. Power: Federal Pattern-or-Practice Enforcement Actions Applied to Local Prosecutors*, 76 ME. L. REV. 1, 30 (2024); see also Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 49 HOFSTRA L. REV. 315, 316 (2021) ("There is an increasing sense that unrestrained prosecutors in

also suffice to show that qualified immunity doesn't necessarily protect state actors, especially if inculpatory statements are made in attempts to provide a real apology to the injured. Recently, attempts to pierce qualified immunity protections have also assumed greater significance.²⁷⁴

Florida requires that any compensation under statute does not constitute a waiver of any defense of sovereign immunity or an increase in the limits of liability on behalf of the state or any person.²⁷⁵ Hawai'i limits waivers of sovereign immunity by the State only for the statutory wrongful conviction claim.²⁷⁶ All provisions of existing Idaho law relating to absolute or qualified immunity apply to any wrongful conviction action.²⁷⁷ In Louisiana, court findings in wrongful conviction claims are inadmissible in any judicial proceeding and do not form the basis for any cause of action by the petitioner or any other person.²⁷⁸ Notwithstanding any immunity of the state of Maine from suit, including the Maine Tort Claims Act, the state is only liable for the wrongful imprisonment of a person.²⁷⁹ An award of compensation under Michigan's act is not admissible in evidence in a civil action that is related to the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment.²⁸⁰

The immunity of Mississippi and its political subdivisions is waived with respect to claims described in the wrongful conviction chapter.²⁸¹ Missouri does not waive sovereign immunity for any purposes other than restitution under the wrongful conviction statute.²⁸² Nevada waives its immunity from liability for wrongful conviction and consents to have its liability determined under the same rules of law as for civil actions against natural persons and corporations.²⁸³ Further, all provisions of existing Nevada law relating to the absolute or qualified immunity of any judicial officer, prosecutor, or law enforcement officer, including all applicable provisions of federal and state

the United States are a problem"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor.").

²⁷⁴ See William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 77 (2018) (noting "the real problem with qualified immunity is that it is so far removed from ordinary principles of legal interpretation.").

²⁷⁵ FLA. STAT. ANN. § 961.06(7) (West 2024) (adding that the statute does not interfere with the provisions of FLA. STAT. ANN. § 768.28 (West 2024) or other applicable law).

²⁷⁶ HAW. REV. STAT. ANN. § 661B-6 (LexisNexis 2024) (stating also that Hawai'i "makes no other waiver of sovereign immunity [outside of this chapter, which governs redress for wrongful conviction], and fully retains its sovereign immunity as to all other claims, however denominated, that seek compensation of any kind or nature that are a result of, related to, or arise from a conviction and imprisonment for crimes for which the claimant alleges actual innocence. This section shall be broadly construed in favor of the State and against any waiver of sovereign immunity.").

²⁷⁷ IDAHO CODE ANN. § 6-3502 (West 2024).

²⁷⁸ LA. REV. STAT. § 15:572.8(M) (West 2024).

²⁷⁹ ME. REV. STAT. ANN. Tit. 14 § 8241(1) (West 2024).

²⁸⁰ MICH. COMP. LAWS ANN. § 691.1755(7) (West 2025) (noting also an award of compensation is not a finding of wrongdoing against anyone).

²⁸¹ MISS. CODE ANN. § 11-44-7(5) (West 2024).

²⁸² MO. REV. STAT. § 650.058(1)(4) (West 2024).

²⁸³ NEV. REV. STAT. ANN. § 41.920(1) (West 2025).

law apply.²⁸⁴ Ohio consents to be sued by a wrongfully imprisoned individual because the imprisonment was wrongful, and to liability on its part because of that fact, only as provided in its wrongful conviction statute.²⁸⁵ And Oklahoma expressly adopts the doctrine of sovereign immunity against liability for torts within its wrongful conviction statute.²⁸⁶

E. Compensation Offsets

Some states have included provisions that limit multiple sources of compensation. Such provisions can also mitigate any losses due to real apologies. In addition to release and waiver of claims, offset provisions are sometimes incorporated to spare taxpayers from enduring “two bites of the apple.” Even if the compensation awarded under wrongful conviction statutes is offset by other claims, the apology remains an important part of redress. In Kansas, claimants awarded monetary compensation or entering a settlement agreement in a civil action related to a wrongful conviction claim are required to reimburse the state for the sum paid under the judgment entry.²⁸⁷ Maryland also requires a reduction in or reimbursement of compensation if individuals—before or after receiving compensation under the wrongful conviction statute—received a civil award or entered into a settlement agreement.²⁸⁸ Going further, Maryland may obtain a lien against other monetary awards.²⁸⁹ New Jersey and Delaware also require an offset for any damages awarded under their respective acts.²⁹⁰

Tennessee allows a right of subrogation against individuals who willfully and intentionally commit acts that result in or contribute to a wrongful conviction.²⁹¹ Virginia requires that any previous monetary awards against the Commonwealth will result in deductions pursuant to the wrongful conviction statute.²⁹² If a release is held invalid in Washington and a claimant receives additional compensation in a tort claim, the claimant is required to reimburse the state.²⁹³

²⁸⁴ *Id.* at § 41.920(3).

²⁸⁵ OHIO REV. CODE ANN. § 2743.48(F)(6) (Baldwin 2025) (conditioning the waiver of liability of the state or of its employees to a wrongfully imprisoned individual on a claim not based on the fact of the wrongful imprisonment, including, a claim for relief that arises out of circumstances occurring during the wrongfully imprisoned individual’s confinement in the state correctional institution).

²⁸⁶ OKLA. STAT. ANN. Tit. 51, § 152.1(A) (West 2024). *But see id.* at § 152.1(B) (stating further that the state, only to the extent and in the manner provided in the Governmental Tort Claims Act (including wrongful conviction, OKLA. STAT. ANN. Tit. 51, § 154(B) (West 2024)), waives its immunity and that of its political subdivisions; and that, in so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.).

²⁸⁷ KAN. STAT. ANN. § 60-5004(f)(2) (West 2024) (implying that federal civil claims would also require reimbursement).

²⁸⁸ MD. CODE ANN., STATE FIN. & PROCUREMENT §§ 10-501(a)(3)(i)–(ii) (West 2024).

²⁸⁹ *Id.* at § 10-501(a)(3)(ii)(3).

²⁹⁰ N.J. STAT. ANN. § 52:4C-2(b) (2024); DEL. CODE ANN. Tit. 10, § 7005(h)(i) (West 2025).

²⁹¹ TENN. CODE ANN. § 9-8-108(a)(7)(G) (West 2024).

²⁹² VA. CODE ANN. § 8.01-195.12(A) (West 2024).

²⁹³ WASH. REV. CODE ANN. § 4.100.080(1) (LexisNexis 2024).

F. Federal Considerations

One additional avenue for redress after exoneration for a wrongful conviction is a 42 U.S.C. § 1983 federal civil rights claim if a case can be made for deprivation of a constitutional right.²⁹⁴ Some states specifically do not limit federal claims. Colorado does not limit the ability to pursue damages against an entity that is not an employee, agent, or agency of the state government.²⁹⁵ The Michigan statute does not act as a waiver of, or bar to, any action in federal court against an individual alleged to have been involved in the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment.²⁹⁶

Some states have language in the wrongful conviction statutes that is intended to bar federal claims for the same facts of wrongful conviction. In Florida, a wrongfully incarcerated person may not submit an application for compensation if the person has a lawsuit (or claim bill) pending against the state or any agency, instrumentality, or any political subdivision thereof, in state or federal court requesting compensation arising out of the facts in connection with the claimant's conviction and incarceration.²⁹⁷ The Rhode Island statute states that if either the claimant has won a monetary award, or if after the time of judgment the claimant wins a monetary award as the result of a federal civil rights lawsuit under 42 U.S.C. § 1983, the claimant shall reimburse the state for the sum of money paid under the state judgment.²⁹⁸

Texas bars federal claims after compensation under its wrongful conviction statute—"The Tim Cole Act."²⁹⁹ The plaintiff in *Brown v. City of Houston* pursued a 42 U.S.C. § 1983 claim in federal court; however, the Fifth Circuit held that the federal suit was barred by the Texas wrongful conviction statute.³⁰⁰ Therefore, the federal courts seem to accept bars to federal claims based on state statutory construction. The Virginia statute also allows compensation against the Commonwealth for certain intentional acts by a court of competent jurisdiction, including, by implication, federal courts for § 1983 claims.³⁰¹ Lastly, the Washington statute requires that a person must execute

²⁹⁴ 42 U.S.C. § 1983 (LexisNexis 2024) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

²⁹⁵ COLO. REV. STAT. § 13-65-103(9)(b) (West 2025).

²⁹⁶ MICH. COMP. LAWS SERV. § 691.1755(8) (LexisNexis 2025).

²⁹⁷ FLA. STAT. ANN. § 961.06(6)(a) (West 2024).

²⁹⁸ R.I. GEN. LAWS §§ 12-33-4(g)(1)-(2) (West 2024).

²⁹⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 103.153(b) (West 2023); see also *Brown v. City of Houston* 660 S.W.3d 749, 751 (Tex. 2023). But see *Brown v. City of Houston* 660 S.W.3d 749, 760 n.5 (Tex. 2023) (recognizing in dictum that Brown argued to the federal courts that federal law authorizes the § 1983 lawsuit to proceed regardless of any provisions of Texas law that may forbid such action).

³⁰⁰ *Brown v. City of Houston, Texas*, 65 F.4th 774, 777 (5th Cir. 2023).

³⁰¹ VA. CODE ANN. § 8.01-195.13(A) (3) (2023).

a legal release from other claims, including federal 42 U.S.C. § 1983 claims, prior to payment.³⁰²

G. Arguments Against Apologies

As expected, some may argue against a statutory mandate for an apology. Saying one is sorry for transgression of norms and injury belies a complex process.³⁰³ In a study of children, a transgressor's reputation and offer of an apology were important factors in the child observer's reactions to a transgression—specifically damaging a bicycle.³⁰⁴ Apologies were taken at face value by the child observers and decreased the transgressor's social predicament, reducing punishment, and making the transgressor seem more likable.³⁰⁵ However, transgressors portrayed as having bad reputations were seen as more worried about punishment and were thought to apologize merely to avoid punishment.³⁰⁶ Responses in social interactions are limited by social convention; apologies may threaten an injured's sense of control.³⁰⁷ One theory suggests that apologies might be deleterious to *both* the injured *and* the transgressor, with the needs of both better maintained by clear, explicit communication.³⁰⁸ Another important concept is the notion of “face.” Face consists of two desires: to be unimpeded in one's actions, “negative face,” and one's desire for approval, “positive face.”³⁰⁹ Apologies may actually threaten an injured's sense of control or their negative face.³¹⁰ The injured may feel coerced into communicating forgiveness, the conventional response to an apology.³¹¹ Only if the apology is adequate might the injured accept it.³¹² The transgressor should, in any apology, indicate reluctance to encroach on the exoneree's negative face, while affirming the exoneree's positive face.³¹³ The need to acknowledge both types of face can be incorporated into the apology.³¹⁴ Additional research has explored how particular kinds of speech may be “face-threatening acts.”³¹⁵

³⁰² WASH. REV. CODE ANN. § 4.100.080(1) (LexisNexis 2024).

³⁰³ See Freedman et al., *supra* note 196, at 12 (for example, apologies may have some negative effects like diminishing the injured's sense of control and increasing pressure to forgive.).

³⁰⁴ Darby & Schlenker, *supra* note 123, at 356.

³⁰⁵ *Id.* at 356–60.

³⁰⁶ *Id.* at 358.

³⁰⁷ BROWN & LEVINSON, *supra* note 199, at 26.

³⁰⁸ Freedman et al., *supra* note 196, at 12 (explaining The Responsive Theory of Exclusion that proposes that both injured and transgressor will fare better when responsive to the injured's needs).

³⁰⁹ BROWN & LEVINSON, *supra* note 199, at 13–15.

³¹⁰ *Id.* at 70.

³¹¹ *Id.* at 67–68.

³¹² *Id.* at 76.

³¹³ *Id.* at 236.

³¹⁴ *Id.* at 187–90 (indicating, for example, the state can show reluctance to encroach on the exoneree's faces in several ways, but perhaps the best is to admit the encroachment: “I hope what I am about to say (or write) won't trouble you too much.”).

³¹⁵ *Id.* at 25–27 (declaring the state can indicate reluctance to encroach on the exoneree's face in several ways, but perhaps the best is to admit the encroachment: “I hope what I am about to say (or write) won't trouble you too much.”)

Further, requiring a state transgressor—*de jure*—to apologize may impose moral burdens. “Remorse and apology are fundamentally moral, and the law cannot force them. Offenders and victims enjoy freedom of conscience, and they have the right to remain defiant.”³¹⁶ Therefore, although the legislature and courts can mandate an apology, it will be difficult to mandate remorse, one of the cornerstones of a real apology. Regardless, compelling reasons for requiring apologies by some courts—if not legislatures—have been described and required in both the civil and criminal setting.³¹⁷ Often, a simple apology expressing remorse is considered mitigation.³¹⁸ The Tennessee Advisory Commission on the Tennessee Rules of Evidence has commented that “a simple apology may go a long way toward making an injured party feel more comfortable with a nonjudicial settlement of the matter.”³¹⁹

Additional concerns include, importantly, First Amendment violations and piercing long-standing criminal justice immunities.

1. First Amendment Considerations

The First Amendment in the United States Constitution’s Bill of Rights protects “[t]he right of freedom of thought and of religion as guaranteed by the Constitution against State action,” which includes “both the right to speak freely and the right to refrain from speaking at all.”³²⁰ Regarding a statutory mandate for an apology to the wrongly convicted and imprisoned, First Amendment concerns about compelled speech can be justifiably, if not easily, dismissed.³²¹ Although the First Amendment has protections against compelled speech, the U.S. Supreme Court has affirmed compelled speech in certain cases. For instance, it has upheld the requirement that a doctor obtain informed consent to perform an operation as “firmly entrenched in American tort law.”³²² Further, the law regulates speech only “as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State.”³²³

³¹⁶ Bibas & Bierschbach, *supra* note 140, at 148 (going on to say “[T]he law can remove roadblocks to remorse, provide opportunities and venues, and encourage offenders and victims to speak face to face. Prosecutors, defense counsel, and judges can all come to see themselves as players in a human moral drama”).

³¹⁷ White, *supra* note 195, at 1301–02 (citing *Imperial Diner v. State Human Rights Appeals Bd.* 417 N.E.2d 525, 529 (N.Y. 1980)); *see also* *State v. Perkins*, 310 P.3d 1051 (Haw. Ct. App. 2013)) (the “Dawley Letter” is interesting reading, but unprintable here, about how *not* to write an apology); *United States v. Purchess* 107 F.3d 1261, 1269 (7th Cir. 1997).

³¹⁸ Paul H. Robinson, Sean E. Jackowitz, & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 746–47 (2012).

³¹⁹ TENN. R. EVID. 409.1 advisory commission comment (2003) (also cautioning that Rule 409.1 extends only to “benevolent gestures,” but does not exclude statements of fault).

³²⁰ *W. Va. State Bd. of Educ. v. Barnette* 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

³²¹ White, *supra* note 195, at 1298–1300.

³²² *Cruzan by Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269 (1990). *See generally* Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Consistent, and Independent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 3–45 (2020).

³²³ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992) (emphasis added), *overruled on other grounds by* *Dobbs v. Jackson Women’s Health Org.* 597 U.S. 215, 292 (2022).

Statutorily mandated apologies could also be considered compelled or forced speech.³²⁴ The legal apology literature suggests that most scholars feel that even compelled apologies have value.³²⁵ The federal government has long felt the need to apologize for grievous injury. Many political (or governmental) apologies have been offered.³²⁶ Such apologies should also require feelings of remorse and some form of redress.³²⁷ Many, if not most, political apologies are inadequate precisely because they lack the remorse and redress associated with personal apologies. Researchers have analyzed the apologies of nations and concluded that public apologies have a legitimate structure different from that of personal apologies.³²⁸ The political dimension of an apology requires the right context, both at the level of social and political conditions.³²⁹

Statutes administered by state civil rights agencies of the executive branch can call into question an agency's statutory authority to award injunctive relief.³³⁰ We must consider not only the desired impact of a state apology for prior injustice on the injured, but also the ways in which such apologies might trigger changes in the broader political culture. Apologies by the

³²⁴ Lesley Wexler & Jennifer Robbennolt, *Forced Apologies: Thinking About Ordinary, Restorative and Translational Justice*, VERDICT (Jun. 29, 2023), <https://verdict.justia.com/2023/06/29/forced-apologies-thinking-about-ordinary-restorative-and-translational-justice> [https://perma.cc/DB6S-R99Q].

³²⁵ See, e.g., Andrea Zwart-Hink, Arno Akkermans, & Kiliaan van Wees, *Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction*, 38 U.W. AUSTL. L. REV. 100, 120 (2014); Robyn Carroll, *You Can't Order Sorrow, So is there Any Value in an Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases*, 33 UNIV. N.S.W. L. J. 360, 369 (2010); Gijs van Dijk, *The Ordered Apology*, 37 OXFORD J. LEGAL STUD. 562, 565 (2017). But see Nick Smith, *Against Court-Ordered Apologies*, 16 NEW CRIM L. REV. 1, 7 (2013).

³²⁶ See Graham G. Dodds, *Political Apologies: Chronological List*, PENN NAT'L COMM'N (Jan. 23, 2003), <https://www.upenn.edu/static/pnc/politicalapologies.html> [https://perma.cc/Q5GG-SNXS] (last visited May 10, 2024) (listing many national and international political or government apologies); see also Peter Baker & Aishwarya Kavi, *Biden Apologizes for U.S. Abuse of Indian Children*, N.Y. TIMES, Oct 26, 2024, at A1.

³²⁷ See Edward C. Tomlinson, Brian R. Dineen, & Roy J. Lewicki, *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 J. MGMT. 165, 182 (2004) (noting "offenders should always give an explicit apology in the wake of a trust violation").

³²⁸ See Michel-Rolph Trouillot, *Abortive Rituals: Historical Apologies in the Global Era*, 2 INTERVENTIONS 171, 184 (2000).

³²⁹ See DANIELLE CELERMAJER, *THE SINS OF THE NATION AND THE RITUAL OF APOLOGIES* 247 (2009); 50 U.S.C.S. §§ 4201–51 (2024); Letter of apology from President Clinton (Oct. 1, 1993), <https://www.pbs.org/childofcamp/history/clinton.html> [https://www.pbs.org/childofcamp/history/clinton.html] (last visited Jan. 12, 2025); Alison Mitchell, *Clinton Regrets 'Clearly Racist' U.S. Study*, N.Y. TIMES, May 17, 1997, at § 1 p.10.; Apologizing for the Enslavement and Racial Segregation of African-Americans, H. R. Res. 194, 110th Cong. (2007) (enacted), <https://www.congress.gov/bill/110th-congress/house-resolution/194/text> [https://perma.cc/F36W-V636] (last visited Jan. 12, 2025); A Concurrent Resolution Apologizing for the Enslavement And Racial Segregation of African Americans, S. Con. Res. 26, 111th Cong. (2009) (enacted), <https://www.congress.gov/bill/111th-congress/senate-concurrent-resolution/26/text> [https://perma.cc/MG6A-9DVX] (last visited Jan. 12, 2025); Apology to Native Hawaiians for Overthrow of the Kingdom of Hawai'i, S.J. Res. 19, 103th Cong. (1993), <https://www.congress.gov/bill/103rd-congress/senate-joint-resolution/19/text> [https://perma.cc/YCP3-SVV3] (last visited Jan. 12, 2025); Radiation Exposure Compensation Act — Indemnification and limitation of liability, 42 U.S.C.S § 2210 (2024); California Involuntary Sterilization Act, CAL. HEALTH & SAFETY CODE §§ 24210–24217 (Deering 2024).

³³⁰ See Deborah Tussey, Annotation, *Requiring Apology as "Affirmative Action" or Other Form of Redress Under State Civil Rights Act*, 85 A.L.R. 3d 402 (2024) (collecting cases to date which concern a formal apology as a remedy or form of redress for violations of state civil rights statutes).

criminal justice system serve as exemplary political judgments; they may catalyze shifts in the culture of our yet imperfectly just society.³³¹ Apologies by the transgressor—for instance, the criminal justice system—are not like personal apologies, but also take on a political meaning and function.³³² By placing an apology on the public record, commitments not to repeat past errors would lead to political embarrassment or even legal challenge.³³³

The addition of an apology to other compensation in the case of wrongful conviction arguably qualifies as an essential operation, given the terrible injury to those innocent people wrongly convicted and incarcerated. Free speech protections are subject to a balancing test.³³⁴ Apologies in the aftermath of state wrongdoing—specifically the wrongful conviction and incarceration of the actually innocent—would seem to serve a compelling interest in strengthening the legitimacy of criminal justice institutions.³³⁵ Balancing a governmental interest “[I]n promoting the efficiency of the public services it performs through its employees,” which—if a statute requiring an apology to the wrongfully convicted were enacted—would qualify as “promoting the efficiency of the public services” and thus, while compelling an apology to the wrongfully convicted, prosecutors would be protected with absolute immunity.

Courts have often required apologies in a number of circumstances, including criminal cases,³³⁶ civil cases,³³⁷ and disciplinary actions.³³⁸ A Georgia

³³¹ See Mihaela Mihai, *When the State Says “Sorry”: State Apologies as Exemplary Political Judgments*, 21 J. POL. PHIL. 200, 220 (2013).

³³² See RICHARD VERNON, *HISTORICAL REDRESS: MUST WE PAY FOR THE PAST?* 83 (2012).

³³³ See *Id.*

³³⁴ See *Borzilleri v. Mosby* 874 F.3d 187, 194 (4th Cir. 2017) (quoting *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968); *City of San Diego v. Roe* 543 U.S. 77, 82 (2004)) (balancing against “interests as citizens ‘in commenting upon matters of public concern,’” and “the community’s interest in hearing employees’ informed opinions on important public issues.”).

³³⁵ See Stephen Winter, *Theorizing the Political Apology*, 23 J. POL. PHIL. 261, 273 (2015) (arguing for apology in cases of state wrongdoing to prevent undercutting the legitimacy of any political institution).

³³⁶ See, e.g., *Melvin v. Zappala*, No. 15-1225, 2016 U.S. Dist. LEXIS 47826, at *75 (W.D. Pa. Apr. 7, 2016) (describing that enforcement of an order for an apology letter was appropriate, but only after direct appeal was concluded); *Slayton v. State*, No. 49A04-1410-CR-463, at *3 (Ind. Ct. App. Apr. 22, 2015) (noting as a condition of probation court ordered apology letter); *State v. Whitfield*, 827 So.2d 1196, 1197 (La. Ct. App. 2002) (upholding sentence that included written victim apology); *State v. Lobato*, 611 N.W.2d 101, 103 (Neb. 2000) (affirming sentence that included written victims apology); *State v. Ogden*, 544 N.W.2d 574, 575 (Wis. 1996) (noting prior apology order).

³³⁷ See, e.g., *Desjardins v. Van Buren Community Hosp.*, 969 F.2d 1280, 1282 (1st Cir. 1992) (waiving First Amend. objection to a public apology for wrongful termination); *Imperial Diner v. State Human Rights Appeals Bd.*, 52 N.Y.2d 72, 76 (N.Y. 1980) (enforcing State Human Rights Division commissioner’s order for a written apology).

³³⁸ See, e.g., *Krim v. BancTexas Group.*, 99 F.3d 775, 776 (5th Cir. 1996) (sanctioning attorney for defects in complaint); *In re Swan*, 833 F. Supp. 794, 800 (C.D. Cal. 1993) (ordered to offer and prove written apology to assistant U.S. attorney), *rev’d on other grounds sub nom.* *U.S. v. Wunsch*, 54 F.3d 579, 1120 (9th Cir. 1995); *In re Gooch*, 250 B.R. 887, 900 (Bankr. S.D. Ohio 2000) (ordering apology to debtor); *People v. Piccone*, 459 P.3d 136, 163 (Colo. 2020) (ordering letter of apology to City Attorney); *In re Kraushaar*, 907 P.2d 836, 837 (Kan. 1995) (ordered to appear in open court to apologize to judge with a transcript); *In re Castellano*, 566 P.2d 1152, 1152 (N.M. 1977) (ordering respondent to apologize in writing to judges and attorney general); *In re Kemper*, No. 93CA15, 1994 Ohio App. LEXIS 619, at *9 (Ohio Ct. App. Jan. 31, 1994) (noting with approval letter of apology to a victim’s husband).

juvenile court ordered a defendant to write a 300-word letter of apology to a bailiff and an essay on appropriate courtroom behavior.³³⁹ A Nevada rule requires public officers subject to ethics complaints to issue a public apology.³⁴⁰ On the issue of court-imposed apologies, consider that not only is the desired impact of state apology for prior injustice on the injured, but also in the ways such apologies might affect improvement in the broader criminal justice system culture. Apologies by the criminal justice system can serve as exemplary political judgments, and may catalyze shifts in the culture of our yet imperfectly just society.³⁴¹ In a Hawai'i proceeding, parole revocation was held improper because the defendant complied with a timely letter of apology as a condition of probation.³⁴² Although the probation officer thought the defendant's initial letter was threatening rather than apologetic, the defendant timely submitted a second letter that both the parole officer and the judge found to be apologetic and satisfactory (but for the earlier letter).

The threat of criminal or civil action can interfere with transgressors' apologies to the injured; this is true of lawyer discipline.³⁴³ Defendants' lawyers and insurance companies are concerned that apologies could be used in court as evidence of guilt.³⁴⁴ Written apologies may implicate First Amendment rights against compelled speech.³⁴⁵ Fifth Amendment rights against self-incrimination may be abridged if a real apology were offered in later proceedings.³⁴⁶ Imposing an apology as a remedy may also raise substantive due process concerns.³⁴⁷ Restorative justice advocates are concerned that "A forced apology . . . will not suffice; indeed, it may even be counterproductive in eliciting a genuine change of attitude in the offender."³⁴⁸ There are significant reasons why the "therapeutic value" of apologies may be overrated.³⁴⁹

³³⁹ *In the Interest of P.W.*, 657 S.E.2d 270, 271 (Ga. Ct. App. 2008) (decided under former O.C.G.A. § 15-11-1).

³⁴⁰ See Nev. Rev. Stat. Ann. § 281A.785 (LexisNexis 2023).

³⁴¹ See Mihai, *supra* note 331, at 220.

³⁴² *State v. Perkins*, 310 P.3d 1051 (Haw. Ct. App. 2013) (interesting reading, but expletive-laden and unprintable here, for how *not* to write an apology).

³⁴³ See Levin & Robbenolt, *supra* note 177, at 528–36.

³⁴⁴ See Cohen, *supra* note 34, at 1042–46 (reviewing reasons for not apologizing more frequently).

³⁴⁵ See Kate Weisburd, *Rights Violations as Punishment*, 111 CAL. L. REV. 1305, 1358–59 (table) (2023).

³⁴⁶ See *id.* at 1312.

³⁴⁷ See *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (listing three criteria to determine if an imposed punishment crosses the line of grossly disproportional punishment: the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm, and sanctions imposed for comparable misconduct).

³⁴⁸ Lisa Forsberg & Thomas Douglas, *What Is Criminal Rehabilitation?* 16 CRIM. L. & PHIL. 103, 117 (2022) (citing JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 37 (1990)).

³⁴⁹ Arbel & Kaplan, *supra* note 202, at 1217 (noting five reasons: pressure, manipulation, misunderstanding of commercial apologies, how commercial apologies differ from interpersonal ones, and the importance to the injured of the apology).

Several courts have held that apologies were inappropriate as not within the scope of existing statutes under which relief was sought.³⁵⁰ However, the Supreme Court has ruled that a person could pursue a § 1983 claim as an action at law, suit in equity, or other proper proceeding for redress.³⁵¹ One court in dictum said, “[A written apology] is calculated to humiliate and debase its writer and will succeed in producing only his resentment—an emotion not particularly conducive to the advancement of human rights.”³⁵² An Illinois court vacated the requirement of an apology and booking photo in a local newspaper.³⁵³

2. *Piercing Absolute and Qualified Immunity*

An additional concern, along with the First Amendment argument against compelled speech in wrongful conviction statutes to mandate apologies, is the ongoing litigation attempting to cabin and perhaps eliminate both absolute and qualified immunity invoked by governmental actors.³⁵⁴ Detailed analyses of absolute and qualified immunity doctrines are beyond the scope of this paper. However, the absolute immunity prosecutors have previously enjoyed in the judicial phase of their functions is under attack.³⁵⁵ Suggesting

³⁵⁰ See *Birnbaum v. U.S.*, 588 F.2d 319, 335 (2d Cir. 1978) (holding that district courts have exclusive jurisdiction for claims under 28 U.S.C. § 1346 (b) for money damages only, not apologies); see also *Gray v. UAW Local 12 Jeep Comm.*, 2004 U.S. Dist. LEXIS 5877, at *7 (N.D. Ohio Mar. 16, 2004) (apology requested from union officials for discrimination was a form of injunctive relief—an extraordinary remedy in equity—not available under Americans with Disabilities Act 42 U.S.C.S 2000e-5(g)); *Pa. Human Relations Comm’n v. Alto-Reste Park Cemetery Ass’n*, 306 A.2d 881, 889 (Pa. 1973) (public apology requested for race-based discrimination would serve no appropriate purpose when private letter of apology already provided. Regardless, the Pennsylvania Human Relations Act 43 P.S. §§ 951–63 (1973) has broad remedial powers).

³⁵¹ See *L.A. County v. Humphries*, 562 U.S. 29, 37 (2010) (“Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers . . . [They can also be sued for] deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels.” (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1977)) (Internal references and citations omitted).

³⁵² *Minneapolis v. Richardson*, 239 N.W.2d 197, 205–06 (Minn. 1976), *superseded by statute on other grounds*, Minn. Stat. § 363.071, subd. 2 (1982) *as recognized in* *Huygen v. Plums Enterprises of St. Paul, Inc.*, 355 N.W.2d 149, 155 (1984) (believing “the legislature intended affirmative action orders to be used to eliminate existing and continuing discrimination, to remedy the lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination,” none of which are effectuated by letters of apology).

³⁵³ See *Illinois v. Johnson*, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (vacating requirement of a published apology as beyond intent of the relevant statute and in dicta possibly to “add[] public ridicule”).

³⁵⁴ See *Loftus v. Bobzien*, 848 F.3d 278, 292 n.5 (4th Cir. 2017) (noting “[q]ualified immunity protects [state actors] who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful.”).

³⁵⁵ See *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (noting “We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor’s responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate” (citation omitted)).

ethical behavior directed at prosecutors may not be the best strategy.³⁵⁶ As previously noted, “pattern or practice strategies” have been suggested to pierce “unrestrained” prosecutorial absolute immunity.³⁵⁷ Shields of absolute or qualified immunity do not necessarily protect state actors, especially if inculpatory statements are made in attempts to provide a real apology to the injured. As a further example of the weakening of the immunities, common law analysis has shown that in the past, high-ranking executive officers had absolute immunity, but now have only qualified immunity.³⁵⁸

The procedural safeguards known as absolute and qualified immunity have traditionally made it hard for the injured—including the wrongfully convicted—to bring action against those the criminal justice system.³⁵⁹ Even when the injured can clearly document unjust conduct by law enforcement, the doctrines of absolute and qualified immunity often defend law enforcement actors from liability for damages.³⁶⁰ Judges and grand jurors also enjoy absolute immunity for acting within the scope of their official capacity.³⁶¹ Prosecutors are also immune from liability, “We hold only that in initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit for damages under § 1983.”³⁶² Absolute immunity protects the prosecutor from, “concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties . . .”³⁶³ States are immune from suits for damages under 42 U.S.C. § 1983 in both state and federal court unless they waive their immunity and subject themselves to suit.³⁶⁴ While police officers only possess qualified immunity, their mistakes may be immunized.³⁶⁵ Some wrongfully convicted and incarcerated individuals have been successful in suing state actors for their wrongful

³⁵⁶ See Bibas, *supra* note 273, at 1016 (“Telling a prosecutor to behave ethically and consistently is far less fruitful than creating an environment that expects, monitors, and rewards ethical, consistent behavior.”).

³⁵⁷ See Hogan, *supra* note 273, at 2 (“There is an increasing sense that unrestrained prosecutors in the United States are a problem” (*quoting* Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 49 HOFSTRA L. REV. 315, 316 (2021))).

³⁵⁸ See Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1358–66 (2021).

³⁵⁹ See Penzell, *supra* note 177, at 154.

³⁶⁰ See Shawn Armbrust, *When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 164 (2004); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (observing “[q]ualified or ‘good faith’ immunity is an affirmative defense that must be pleaded by a defendant official.”); *Malley v. Briggs*, 475 U.S. 335, 343 (1986) (holding “[i]n the case of the officer applying for a warrant, the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity.”).

³⁶¹ See *Imbler*, 424 U.S. at 422–23; see also Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 7 U. CHI. L. SCH. ROUNDTABLE 73, 90 (1999) (noting “that [a] prosecutor acting within the scope of his duties as an advocate in pursuing a criminal prosecution is not amenable to suit”).

³⁶² *Imbler*, 424 U.S. at 431.

³⁶³ *Id.* at 422–23.

³⁶⁴ Bernhard, *supra* note 361, 723–24.

³⁶⁵ *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (holding “[s]omewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action, assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.”).

convictions under § 1983 federal civil rights or other civil claims.³⁶⁶ Compensation, if substantial, may help exonerees overcome the substantial barriers to reentry and considerably reduce post-release recidivism.³⁶⁷

However, other legal barriers make holistic recovery difficult.³⁶⁸ Even if immunity barring claims is upheld, prosecutors and other members of the criminal justice system who offer apologies can still face strong criticism from members of the court, the local bar, and politicians. Those who disagree with the findings of injury may not review in detail the materials reviewed by those who feel apologies are appropriate. The critique of unnecessarily defaming the system of justice by admitting a mistake can sting. Prosecutorial incentives for getting and maintaining convictions may be founded in deep personal and psychological beliefs in the correctness of verdicts, discounting the possibility that some post-conviction claims merit exoneration for innocence.³⁶⁹ Politics and sentiment about race could steer discussions down less productive paths. Complaints that such apologies should be done in private, not publicly, could make prior prosecutors look bad, and undermine faith in juries less willing to convict, which can all disincentivize apologies.

Recently, qualified immunity is under increased scrutiny, and the legal basis has been called into question.³⁷⁰ To defeat qualified immunity, a claim must satisfy a two-pronged test: first, showing a clearly established constitutional right was violated, and then whether that right was clearly established at the time of any alleged misconduct.³⁷¹ This two-pronged test, although often beneficial, is not mandatory and allows judges to exercise sound discretion in deciding how to address the qualified immunity analysis.³⁷² Further, the Fourth Circuit Court of Appeals has ruled that statutory immunity does not extend to gross negligence on the part of police officers.³⁷³ The Supreme Court of the United States, as of April 2024, denied certiorari in a case involving a 42 U.S.C. § 1983 claim.³⁷⁴

³⁶⁶ See, e.g., Ken Armstrong & Robert Becker, *Record Ford Heights 4 Payout May Not be End: Criminal Investigation Under Consideration*, CHICAGO TRIBUNE, Mar. 6, 1999, at C1. (discussing the Ford Heights Four, four men who were collectively incarcerated for 65 years after wrongful convictions received a \$36 million settlement from Cook County, Illinois); see also John Chase, *Angry DuPage Settles Cruz Suits: 3 Former Defendants to Split \$3.5 Million*, CHICAGO TRIBUNE, Sept. 27, 2000, at C1 (reporting that Rolando Cruz, Alejandro Hernandez, Stephen Buckley, and their attorneys received \$3.5 million from DuPage County, Illinois in a settlement that deeply divided the community and made no pretense of actual innocence.).

³⁶⁷ See Evan J. Mandery, Amy Shlosberg, Valerie West & Bennett Callaghan, *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 583 (2013).

³⁶⁸ Armbrust, *supra* note 360, at 161–66.

³⁶⁹ Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 182 (2004).

³⁷⁰ See Baude, *supra* note 274, at 49.

³⁷¹ See Saucier v. Katz, 533 U.S. 194, 201 (2001), overruled in part by Pearson v. Callahan, 555 U.S. 223 (2009).

³⁷² See Pearson, 555 U.S. at 236.

³⁷³ See Henry v. Purnell, 652 F.3d 524, 536 (2011), *cert. denied* Purnell v. Henry, 565 U.S. 1062 (2011).

³⁷⁴ Price v. Montgomery Cnty., 144 S. Ct. 2499 (2024).

V. MODEL STATE STATUTE FOR THE WRONGFULLY CONVICTED WITH APOLOGY

The idea of enacting or amending a wrongful conviction statute to include apology has merit and can provide guidance on how to offer an apology. One recent attempt at a model wrongful conviction statute has been proposed and addresses the need to include an apology, but there is no analysis of what an apology to the wrongfully convicted should look like in the context of the criminal justice system.³⁷⁵ The model statute described below includes additional clauses that would best provide support for statutorily mandated apologies.

*Model State Statute: Redress for Wrongly Convicted and Incarcerated Persons*³⁷⁶

1) Intent

The legislature recognizes that actually innocent persons wrongly convicted and incarcerated for crimes they did not commit have been uniquely injured. Suffering injustice by being deprived of liberty, often for years or decades, those who suffer wrongful conviction and incarceration are often doubly stigmatized as ex-convicts. The legislature intends to provide a remedy for the wrongly convicted and incarcerated that includes an apology recognizing the events leading to the conviction of an actually innocent person, assignment of responsibility, a measure of remorse, and redress, also with compensation for the lost years of their lives. The legislature further intends to address the unique challenges faced by the wrongly convicted and incarcerated after exoneration.

2) Eligibility

(A) Any person convicted and subsequently imprisoned for one or more felonies or misdemeanors of which they are actually innocent may file a claim for compensation against the state.

(B) For purposes of this statute, a person is:

- i) *Actually innocent* of a felony or misdemeanor if the claimant did not engage in any illegal conduct alleged in the charging documents; and
- ii) *Wrongly convicted* if they were charged, convicted, and subsequently incarcerated—for a term of one or more years—for one or more felonies or misdemeanors of which they are actually innocent.

³⁷⁵ Jacqueline Kamel, *A Model State Compensation Law for the Wrongfully Convicted*, 50 J. LEGIS. 179, 213–21 (2024) (noting in each section the phrase “[t]he state shall apologize,” without more).

³⁷⁶ Draft statute modeled in part on WASH. REV. CODE ANN. §§ 4.100.010–090 (LexisNexis 2023).

C) If the person entitled to file a claim is incapacitated and incapable of filing the claim, or if they are a minor, or a nonresident of the state, the claim may be filed on behalf of the claimant by an authorized agent.

D) A claim filed under this statute survives to the estate of the claimant.

3) Statute of Limitations

(A) A claim for redress under this statute must be commenced within two years after the grant of a pardon, the grant of judicial relief, and satisfaction of other conditions or release from custody, whichever is later.

(B) Any action by the state challenging or appealing the grant of judicial relief or release from custody tolls the two-year period.

(C) If an individual can show that they were not provided with the information needed to initiate a claim, they have an additional twelve months beyond the statute of limitations to bring a claim under this statute.

4) Venue

(A) Actions for the cause of wrongful conviction and incarceration in the face of actual innocence shall be tried in the county court where the cause, or some part thereof, arose.

(B) Service of the summons and complaint is personal service. The summons shall be served by delivering a copy thereof, as per appropriate court rules.

5) Documentary Evidence

(A) In order to file an actionable claim for redress under this statute, and obtain a judgment, the claimant must establish by clear and convincing documentary evidence that:

(B) The claimant has been convicted of one or more felonies or misdemeanors in court and subsequently sentenced to a term of imprisonment of not less than one year, and has served all or part of the sentence;

(C) The claimant is not currently incarcerated for any crime;

(D) During the period of confinement for which the claimant is seeking redress, the claimant was not serving a term of imprisonment or a concurrent sentence for any crime other than the felonies or misdemeanors that are the basis for the claim;

(E) The claimant has been pardoned on grounds consistent with actual innocence for the felonies or misdemeanors that are the basis for the claim; or

(F) The claimant's judgment of conviction was reversed or vacated, and the charging document dismissed based on significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried, and the charging document dismissed.

(G) The claimant must state facts in sufficient detail for the finder of fact to determine that:

- (i) Illegal conduct did not occur, or the claimant did not engage in any illegal conduct alleged in the charging documents;
- (ii) The claimant did not commit or suborn perjury or fabricate evidence to cause or bring about the conviction;
- (iii) An Alford guilty plea to a crime the claimant did not commit, or a confession that is later determined by a court to be false, does not automatically constitute perjury or fabricated evidence; and,
- (iv) The claimant must verify the claim unless they are incapacitated, in which case the personal representative or agent filing on behalf of the claimant must verify the claim.

(H) Any pardon or proclamation issued to the claimant must be certified by the officer having lawful custody of the pardon or proclamation and be affixed with the appropriate seal of office or with the official certificate of such officer before it may be offered as evidence.

(I) In exercising its discretion regarding the weight and admissibility of evidence, the court must give due consideration to difficulties of proof caused by the passage of time or by release of evidence pursuant to a plea, the death or unavailability of witnesses, the destruction of evidence, or other factors not caused by the parties.

(J) If the district attorney or other appropriate prosecutor concedes that the claimant was wrongly convicted, the court must award redress as provided herein.

6) Redress

(A) If the right to a jury is waived and the court finds, or if a jury finds, by clear and convincing evidence that the claimant was wrongly convicted and incarcerated, the court must order the state to provide the actually innocent claimant the following redress, adjusted for partial years served and to account for inflation. The claimant may still receive an apology but may not be compensated monetarily for any period of time in which they were serving a term of imprisonment or a concurrent sentence for any conviction other than the felony or misdemeanors that are the basis for the claim.

(B) Redress, including monetary compensation under this statute constitutes a full and conclusive resolution by the claimant on the specific issue of claims of actual innocence.

(C) The state waives sovereign immunity by only for the claims brought pursuant to this statute. The state makes no other waiver, and fully retains its sovereign immunity as to all other claims that seek compensation of any kind or nature that are a result of, related to, or arise from a conviction and imprisonment for crimes for which the claimant alleges actual

innocence. This section shall be broadly construed in favor of the state and against any waiver of sovereign immunity.

(D) All provisions of existing law relating to absolute or qualified immunity shall apply to an action brought pursuant to the provisions of this section.

(E) Any finding by the court shall be inadmissible in any judicial proceeding and shall not form the basis for any cause of action by the claimant or any other person.

(F) Apology

(i) In open court or other proper public venue, the district attorney or other appropriate prosecutor will offer, verbally and in writing, an apology to consist of:

(ii) Recognition of the injury and a full account of the transgressions leading to wrongful conviction and incarceration;

(iii) Assignment of responsibility to appropriate transgressors;

(iv) A statement of remorse to include restoration of the individual's dignity and steps taken to prevent additional persons from suffering the same injury;

(v) Monetary compensation, to include:

(a) Fifty thousand dollars for each year of actual confinement including time spent awaiting trial and an additional fifty thousand dollars for each year served under a sentence of death. Partial years will be pro-rated;

(b) Twenty-five thousand dollars for each year served on parole, community custody, or as a registered sex offender pursuant only to the felonies or misdemeanors which are grounds for the claim. Partial years will be pro-rated;

(c) Child support payments owed by the claimant that became due and interest on child support arrearages that accrued while the claimant was in custody on the felonies or misdemeanors that are grounds for the claim. The funds must be paid on the claimant's behalf in a lump sum payment to the department of social and health services for disbursement as appropriate;

(d) Reimbursement for all restitution, assessments, fees, court costs, and all other sums paid by the claimant as required by pretrial orders and the judgment and sentence; and,

(e) Attorneys' fees for successfully bringing the wrongful conviction claim calculated at ten percent of the monetary damages award, plus expenses. However, attorneys' fees and expenses may not exceed seventy-five thousand dollars. Attorney's fees and expenses may not be deducted from the compensation award due to the claimant and counsel is not entitled to receive additional fees or expenses from the client related to the

claim. The court may not award any attorneys' fees to the claimant if the claimant fails to prove they were wrongly convicted.

(f) Redress may not include any punitive damages.

(g) The court may not offset redress with claimed expenses incurred by the state, the county, or any political subdivision of the state including, but not limited to, expenses incurred to secure the claimant's custody, or to feed, clothe, or provide medical services for the claimant. The court may not offset against the compensation award the value of any services or reduction in fees for services to be provided to the claimant as part of the award under this section.

(h) The redress compensation is not income for tax purposes, except awarded attorneys' fees.³⁷⁷

(i) Upon finding that the claimant was wrongly convicted, the court must expunge the claimant's record of conviction and seal any records related to the wrongful conviction and incarceration.

(k) Upon request of the claimant, the court must refer the claimant to the department of corrections or the department of social and health services for access to reentry services offered to other released convicts, if available, including but not limited to counseling on the ability to enter into a structured settlement agreement and where to obtain free or low-cost legal and financial advice if the claimant is not already represented, the community-based transition programs and long-term support programs for education, mentoring, life skills training, assessment, job skills development, mental health and substance abuse treatment.

(l) The department of corrections or the department of social and health services shall facilitate acquisition of proper identification, notary services, assistance with obtaining necessary forms, and correspondence as the claimant requires.

(m) The claimant and the state may initiate and agree to an annuity or other structured settlement for the awarded remedy compensation. The claimant must be given adequate time to consult with the legal and financial advisors of their choice during negotiation of the structured settlement agreement. Any structured settlement agreement binds the parties with regard to all compensation awarded. A structured settlement agreement entered into under this section must be in writing and signed by the parties or their representatives and must clearly state that the parties understand and agree to the terms of the agreement.

(n) Before approving any structured settlement agreement, the court must ensure that the claimant has an adequate understanding of the agreement. The court may approve the agreement only if the judge finds

³⁷⁷ Federal tax relief for state wrongful conviction compensation was also enacted, 26 U.S.C. § 139F (2015); see also *IRS Updates Frequently Asked Questions Related To Wrongful Incarceration*, IRS (Nov. 2023), <https://www.irs.gov/newsroom/irs-updates-frequently-asked-questions-related-to-wrongful-incarceration> [<https://perma.cc/X8YQ-DYU4>] (last visited Jan. 12, 2025).

that the agreement is in the best interest of the claimant and is actuarially equivalent to or exceeds the lump sum remedy compensation award. When determining whether the agreement is in the best interest of the claimant, the court must consider the claimant's age and life expectancy; claimant's marital or domestic partnership status; and the number and age of claimant's dependents under 18 years of age.

7) Documents To Which the Claimant Is Entitled:

(A) When a court reverses or vacates a person's conviction, consistent with the criteria established herein, the court must provide to the claimant a copy of documents confirming actual innocence at the time the remedy is granted.

(B) The clemency and pardons board or other appropriate review board, upon issuance of a pardon by the governor on grounds consistent with innocence must provide a copy of documents confirming actual innocence at the time the remedy is granted.

(C) Expungement and Sealing of Records³⁷⁸

(i) Upon request of the claimant, the court may order the claimant's record of conviction vacated if the record has not already been vacated, expunged, or destroyed under court rules. Other statutory requirements for vacating records do not apply.

(ii) A court that directs the state to provide redress to an exonerated person, or representative of an exonerated person, shall order all records relating to the exonerated person's wrongful conviction or adjudication to be expunged as if such events had never taken place and such records had never existed.

(iii) The court shall direct such an expungement order to the exoneratee and every person or agency that may have custody of any part of any records relating to the exonerated person's wrongful conviction or adjudication.

(iv) If a court issues an expungement order, the court, law enforcement agency, or other state agency that maintains records relating to the exonerated person's wrongful conviction or adjudication shall physically seal such records and thereafter treat the records as confidential.

8) Exclusivity of Remedy

(A) It is the intent of the legislature that the remedy of compensation provided under this statute shall be exclusive to all other remedies at law and in equity against the state or any political subdivision of the state.

(B) For redress under this statute, the claimant is required to waive, in a signed writing, all other remedies, causes of action, and other forms of relief or compensation against the state, any political subdivision of the state, and their officers, employees, agents, and volunteers related to the

³⁷⁸ Additional text modeled on COLO. REV. STAT. § 13-65-103(7)(a) (2024).

claimant's wrongful conviction and imprisonment as set forth in the account of events.

(C) The claimant's signed, written waiver shall also include all state, common law, and federal claims for relief, including claims pursuant to 42 U.S.C. § 1983.

(D) A wrongfully convicted and incarcerated person who elects not to pursue a claim under this statute may seek relief through any other existing venue for relief. The claimant must execute a legal release prior to the payment of any monetary compensation awarded under this statute. If the release is held invalid for any reason and the claimant is awarded remedy compensation under this statute and receives any tort or other civil award related to his or her wrongful conviction and incarceration, the claimant must reimburse the state for the greater of:

- (i) The amount of the wrongful conviction and incarceration monetary award, less any fees paid to attorneys or for costs in litigation;
- (ii) The amount received by the claimant under the tort award less any fees paid to attorneys or for costs in litigation;
- (iii) Regardless of waiver or offset, the apology remains in force.

(G) A release dismissal agreement, plea agreement, or any similar agreement whereby a district attorney or appropriate prosecutor's office or an agent acting on their behalf agrees to take or refrain from certain action if the accused individual agrees to forgo legal action against the county, the state, or any political subdivision, is admissible and should be evaluated considering all the evidence. However, any such agreement is not dispositive of the question of whether the claimant was wrongly convicted or entitled to a remedy under this statute.

9) Appeal

(A) If the district attorney or other appropriate prosecutor denies that the claimant was wrongly convicted and the court finds after reading the claim that the claimant does not meet the filing criteria set forth in herein, it may dismiss the claim, either on its own motion or on the motion of the district attorney or other appropriate prosecutor.

(B) If the court dismisses the claim, the court must set forth the reasons for its decision in written findings of fact and conclusions of law. Any party is entitled to the rights of appeal afforded parties in a civil action following a decision on such motions. In the case of dismissal of a claim, review of the court is de novo.

CONCLUSION

For evolving injuries in which remedial work is considered by actors in the criminal justice system, only benevolent gestures should be offered. Absolute prosecutorial immunity or qualified law enforcement immunity is under attack

and can't be relied upon in the future unless statutory protections are enacted. Matters of transgression by independent review through recognition of the event facts are important. Real apologies are appropriate in cases of wrongful conviction and incarceration. Recognition of events requires detailed analysis, through discovery in civil tort or federal civil rights claims, official inquiry, pardon applications, or evidence required by wrongful conviction statutes. This discovery process can assign responsibility for transgression by state actors.

Despite not being the actual transgressors, those in positions of power offering apologies to the injured can still show remorse by acknowledging attempts to restore dignity lost by state-caused injury. Statutory protections by legislative bodies to prevent admission of real apologies—including admissions of fault or statements against interest—into evidence. Statutory bars to additional litigation (e.g., civil tort claims, federal civil rights claims), thereby preventing two or more “bites of the apple,” have been enacted by several states with some success. Alternatively, legislative offset provisions can prevent the taxpayer from compensating the injured more than once for the same set of facts. In the case of legislative offset, even if compensation is returned by statute, the apology remains valid.

Lastly, real apologies for wrongful conviction should be in public, and the examples *supra* show venues including press conferences or other publicly available documents. Documentation by certificates of innocence or pardons, and expungement of records regarding the injury must be provided. In summary, remedial work by the criminal justice system is necessary to maintain societal norms. The kinds of remedial work should be tailored to the injury with benevolent gestures in a rapidly evolving series of events and accounts, when the factual record is complete. However, there is a role for apology—albeit restricted to the wrongfully convicted—by the criminal justice system.

TABLE 2: WRONGFUL CONVICTION STATUTES

| Jurisdiction & Funding Source | Statute | Showing Required of Claimant, Burden of Proof, Statute of Limitations (SOL) | Compensation | Additional Redress | Fees |
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| | Clauses for Immunity, Bars to Other Claims, or Compensation Offsets | | | | |
| United States United States Court of Federal Claims & General appropriation | 28 USCS § 2513 (LexisNexis 2024) Unjust conviction and imprisonment Tit. 28, Judiciary and Judicial Procedure, Pt. VI, Particular Proceedings, Chapter 165 United States Court of Federal Claims (1948, amd 1954, 1982, 1992, 2004). | Reversed or set aside on grounds of not guilty; or found not guilty in new trial or rehearing. Pardoned for innocence; Requires proof of facts by certificate of the court setting aside or reversing or pardon; Statute of Limitations (SOL) 6 yrs. | \$50,000/yr, \$100,000/yr death row for each 12 month period. | | |
| Alabama Committee on Compensation for Wrongful Incarceration & State Division of Risk Management | ALA. CODE §§ 29-2-150-65 (LexisNexis 2024) Committee on Compensation for Wrongful Incarceration Tit. 29 Chap. 2 Article 9 (2001). | Innocence, vacated or reversed & charges dismissed 'on grounds consistent with innocence'; served >2 years pretrial for state felony; SOL 2 yrs. | \$50,000/year prorated. | No offset for expenses by state, Committee can recommend additional funds through legislative bill if warranted; Survives to estate. | |
| Alaska | HB 55 did not advance to the House floor during the 29th legislative session. | | | | |
| Arizona | SB1694—erroneous conviction, damages, tuition assistance; Held in Committee. | | | | |
| Arkansas | | | | | |

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| California California Victim compensation board & if General Fund money available | CAL. PENAL CODE §§ 4900–06 (Deering 2024) Penal Code; Part 3 Of Imprisonment and the Death Penalty; Title 6 Reprieves, Pardons, and Commutations; Chapter 5 Indemnity for Persons Erroneously Convicted and Pardoned (1941 and many depending on § 2000; 2006; 2009; 2013; 2015; 2016; 2017; 2019; 2022). | Crime not committed, or, if committed, not by claimant; Pardon for innocent or being “innocent”; Declaration of factual innocence; Writ of habeas, motion to vacate, charges dismissed, acquitted on retrial, Burden of proof on government clear and convincing; SOL 10 yrs. | \$140/day; \$70/day parole or supervised release; updated by CPI West. | Not treated as state gross income. | |
| Colorado District Court in the county in which the case originated; & State court administrator | COLO. REV. STAT. §§ 13–65– 101–03 (2024) Title 13 Courts and Court Procedure, Judgments and Executions, Article 65: Compensation for Certain Exonerated Persons (2013 and 2018). | Actual innocence; Felony; not legal insufficiency or error; Clear and convincing evidence; SOL 2 yrs. | \$70,000/yr + \$50,000/yr on death row + \$25,000/yr parole, probation, registered S.O. prorated. | Reduce directions to writing; Tuition waivers (3 yrs), Child support, Financial management, Reduced \$10,000 in absence of health care; Expungement. | Reasonable attorney’s fees. |
| 13-65-103(9)(b) Does not limit ability to pursue damages against an entity that is not an employee, agent, or agency of the state government. | | | | | |

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| Connecticut Claims commissioner | CONN. GEN. STAT. § 54-102uu (2023) Compensation for Wrongful Incarceration Title 54, Chapter 961; Part IIc Post-Conviction Remedies (§§ 54-102jj–54-102uu) 2016. | (a)(2) Such person's conviction was vacated or reversed and (A) the complaint or information dismissed on grounds of innocence, or (B) the complaint or information dismissed on a ground citing an act or omission that constitutes malfeasance or other serious misconduct by any officer, agent, employee or official of the state that contributed to such person's arrest, prosecution, conviction or incarceration; Not if guilty plea (unless Alford) Pardon, or conviction vacated, or reversed, and the charges dismissed on grounds consistent with innocence. Preponderance of the evidence; SOL 2 yr. | Up to 200% state median household income/yr; prorated; ± 25% by Claims Commish; >\$20,000 Gen. Assembly reviews. | Employment training/ counseling, tuition/fees in state system of higher education, other services such person may need to facilitate community reintegration. | |
| | 54-102uu(g) | Voluntarily relinquishes any right to pursue any other action or remedy at law or in equity that such person may have arising out of such wrongful conviction and incarceration. | | | |

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| Delaware Wrongful Conviction Compensation Fund | Del. Code Ann. Tit. 10, §§ 7001–08 (2025) Tit. 10 Courts & Judicial Proceedings, Pt. IV Special Proceedings, Chap. 70 Delaware Wrongful Conviction Compensation and Services Act. | After conviction overturned, charge dismissed, or acquitted on retrial, and did not commit or no crime, Preponderance, SOL 6 yrs. | \$75,000/yr, \$100,000/yr death row, \$50,000/yr parole or S.O.; all prorated Proof of economic damages. | Emergency stipend, Community services, health, dental, SNAP. | Reasonable attorney's fees. |
| | § 7005 (i) Award acceptance does not preclude other relief under law. Awards of noneconomic and/or economic damages under § 7005 reduced by any civil action award or settlement agreement. | | | | |
| D.C. Superior Court & Director | D.C. CODE §§ 2-421–25 (2024) Division 1; Title 2, Chapter 4, Subchapter III. Unjust Imprisonment. (1981 amd. 2017). | Innocence and unjust conviction for felony; Clear and convincing; conviction reversed or set aside on the ground that claimant is not guilty; Alford plea; SOL 2 yr from certificate of innocence. | \$200,000/yr prorated; \$40,000/yr parole, probation, registered S.O. prorated; No punitive. | \$10,000 immediate; physical/behavioral care for life (DC Healthcare alliance); Tuition and fees (UDC, UDCCC; vocation); Child support; writing about how to get comp. | Reasonable attorney's fees. |

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| Florida Sentencing court & General Revenue Fund | FLA. STAT. ANN. §§ 961.01–07 (2023) Title XLVII Criminal Procedure and Corrections; Chapter 961 Victims of Wrongful Incarceration Compensation. (2008 and 2011, 2014, 2015, 2017 2023, 2024). | Actual innocence; If prosecuting authority does not certify, admin. law judge must find innocence by clear and convincing; Petition to court within 90 days after vacatur; application for compensation SOL 2 yr. | \$50,000/yr prorated (poss COLA); NTE \$2 mil; paid as annuities; parole/probation revocation restrictions; Does not follow to estate, but beneficiary in case of death. | Waiver tuition and fees Florida college system; waives fines, penalties, court costs; expungement. | Reasonable attorney's fees. |
| Georgia | 961.06(5) Release and waiver on behalf of the wrongfully incarcerated person, forever releasing the state or any agency, instrumentality, or any political subdivision thereof, or any other entity subject to § 768.28. (6)(a) A wrongfully incarcerated person may not submit an application for compensation under this act if the person has a lawsuit (or claim bill) pending against the state or any agency, instrumentality, or any political subdivision thereof, or any other entity subject to the provisions of § 768.28, in state or federal court requesting compensation arising out of the facts in connection with the claimant's conviction and incarceration. (7) Any payment made under this act does not constitute a waiver of any defense of sovereign immunity or an increase in the limits of liability on behalf of the state or any person subject to the provisions of § 768.28 or other law. HB1354 Wrongful conviction Compensation Act (Senate read and referred) Must lobby Gen. Assembly. | | | | |

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| Hawaii | HAW. REV. STAT. ANN. §§ 661B-1-7 (Lexis+2024) Div. 4; Tit. 36; Chapter 661B Redress for Wrongful Conviction and Imprisonment (§§ 661B-1-7) (2016). | Pardon or reversal or vacatur of conviction for actual innocence; Preponderance; SOL 2 yrs. | \$50,000/yr prorated; \$100,000 for 'extraordinary circumstances'. | Not subject to state tax. | Reasonable attorney fees NTE \$10,000. |
| | 661B-6 waiver of sovereign immunity by the State only for the claims brought pursuant to this chapter. The State makes no other waiver of sovereign immunity, and fully retains its sovereign immunity as to all other claims, however denominated, that seek compensation of any kind or nature that are a result of, related to, or arise from a conviction and imprisonment for crimes for which the claimant alleges actual innocence. This section shall be broadly construed in favor of the State and against any waiver of sovereign immunity. | | | | |
| Idaho District Court & Innocence fund | IDAHO CODE ANN. §§ 6-3501-05 (2024) Title 6 Actions in Particular Cases; Chapter 35 Idaho Wrongful Conviction Act (2021). | Felony; Factual innocence; Preponderance; Did not commit crime, if not retried charges dropped, re-tried not guilty; SOL 2 yrs. | \$62,000/yr + awaiting trial, \$75,000/yr death row, \$25,000/yr parole or S.O.; prorated. | Re-entry services; Certificate of innocence; state tax exempt. | Reasonable attorney's fees NTE \$25,000. |
| | § 6-3502 All provisions of existing law relating to absolute or qualified immunity shall apply to an action brought pursuant to the provisions of this section. | | | | |

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| Illinois Court of Claims | 705 ILL. COMP. STAT. ANN. 505/8 (c) (LexisNexis 2023) Court of Claims Act Chapter 705 Court of Claims (2018). | Pardon for innocence; conviction reversed or vacated; Certificate of innocence; Preponderance of the evidence; SOL 2 yr (705 ILL. COMP. STAT. ANN. 505/22 (c) (Lexis+ 2023) Time Limitations (2018 amd 2021, 2022). | At discretion of court but shall make no award ≤5 yrs., \$85,350 max, ≤14 yrs., \$170,000 max, >14 yrs., \$199,150 max, with COLA increase. | Certificate of innocence; 735 ILL. COMP. STAT. ANN. 5/2-702 (LexisNexis 2023) Petition for a certificate of innocence that the petitioner was innocent of all offenses for which he or she was incarcerated. Chap. 735 Civil Procedure; Code of Civil Procedure Art. II Civil Practice; Pt 7 Action for Declaratory Judgment (2021). | Reasonable attorney's fees NTE 25% of award. |
| | 745 ILCS 5/1 [A]s provided in the Court of Claims Act . . . the State of Illinois shall not be made a defendant or party in any court. | | | | |
| Indiana Indiana Criminal Justice Institute & Exonerated fund repealed | IND. CODE ANN. §§ 5-2-23-1-10 (LexisNexis 2023) Tit.5 State and Local Administration; Art 2 Law Enforcement Officers; Chap 23 Restitution for wrongfully incarcerated persons (2019 amd. 2021, 2022). § 5-2-23-4 A person . . . is entitled to compensation . . . only if the person forever releases, discharges, and waives any and all claims against The state of Indiana, a political subdivision, any applicable state agency, any current, former, or successor to officials, members, officers, agents, or employees. | Actual innocence; Pardon/ vacated/reversed/set aside Preponderance; SOL 2 yrs. | \$50,000/yr prorated (equal sums over 5 yrs); Doesn't pass to estate. | Mental health; Community transition; Reintegration. | |

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| Iowa District Court for liability; State Appeal Board or Civil Ct. for Damages | Iowa CODE § 663A.1 (2023) Wrongful Imprisonment- Cause of Action; Tit. XV Judicial Branch and Judicial Procedures; Subtit. 5 Special Actions; Chapter 663A (1997). | Conviction was vacated, dismissed, reversed, and no further proceedings held; Aggravated misdemeanor or felony; Clear and convincing; SOL 2 yrs. | Liquidated damages \$50/day; Lost wages NTE \$25,000/yr. Court costs. | Lost wages (economic) \$25,000/yr; court costs (e.g. fines). | Reasonable attorney's fees. |
| Kansas District Court & Attorney General | § 663A.1 An action doesn't preclude or otherwise limit actions or claims for relief based on any negligent or wrongful acts or omissions not related to the facts and circumstances underlying the conviction. KAN. STAT. ANN. § 60-5004 (2024) Compensation for Wrongful Conviction; Chap. 60 Procedure, Civil; Art. 50 Civil Action for Victims of Child (2018). | "Innocent of all crimes" Conviction reversed, vacated, charges were dismissed or not guilty on retrial; Preponderance of the evidence 2 yr SOL ; certificate of innocence. | \$65,000/yr; \$25,000 parole/post-release supervision or S.O.; Initial NTE \$100,000 rest as annuity NTE \$80,000/yr. | Non-monetary relief (e.g. housing); Tuition assistance; State health care benefit; re-entry services; Certificate of Innocence; Expungement. | Reasonable attorney's fees NTE \$25,000. |
| Kentucky | § 60-5004 If the claimant wins a monetary award enters into a settlement agreement against the state or any political subdivision related to the same subject, the claimant must reimburse the state for the sum of money paid under the judgment entry (less attorney fees or costs in litigating the other civil action). HB178 Wrongful conviction compensation (2nd reading to rules). | | | | |

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| Louisiana District Court of original conviction & Innocence Compensation Fund | LA. REV. STAT. § 15:572.8 (2024) Compensation for wrongful conviction and imprisonment; petition process; compensation; proof; assignment of powers and duties. Tit. 15; Chap. 5 Reprieve, Pardon, and Parole; Pt. 1 Reprieve and Pardon (2005, amd 2007, 2008, 2011, 2012, 2018, 2019, 2021). | Conviction reversed or vacated AND Proof of factual innocence; Clear and convincing; Compensation not limited by willful misconduct by state actors; SOL 2 yr. | \$25,000/yr NTE \$250,000; after 7/1/22 \$40,000/yr NTE \$400,000 or lump sum \$250,000; Over \$100,000 court may fund an annuity. | NTE \$80,000 for “loss of life opportunities”; Job/skills training, education, housing any other services. | |
| Maine Superior Court has original jurisdiction & General Fund | § 15:572.8(M) Findings by the court are inadmissible and will not form the basis for any cause of action. ME. REV. STAT. ANN. tit. 14 §§ 8241–44 (2024) Title 14 Court Procedure–Civil; Pt. 7 Particular Proceedings; Chap. 747 Wrongful Imprisonment (1993). | Full & free pardon with written finding by Governor (final if Governor does not issue writing of innocence, no judicial review) and court finds innocence; Clear and convincing; 2 yr SOL. | NTE \$300,000 total. | | |
| | § 8241(1) Notwithstanding any immunity, the State of Maine is liable for the wrongful imprisonment of a person. | | | | |

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| Maryland State's Administrative law judge & Board of Public Works | Md. CODE ANN., STATE FIN. & Proc. §§ 10-501-02 Payment to individuals convicted, sentenced, and confined in error; Div. 1 State Finance; Tit 10 Board of Public Works; Subtit. 5 Payment (1999 amd 2003, 2021, 2024). | Full pardon, reversed, vacated, innocent on re-trial; Erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit; Clear and convincing; No guilty plea or false confession; SOL 2 yr. | Days confined multiplied by a daily rate of the State's most recent annual median household income passes to estate. | State ID; Housing NTE 5 yrs; Education/ Training; Health & dental care (≥five years); Tuition and fees regional higher ed or BCCC; court fees. | Reasonable attorney's fees. |
| Massachusetts Superior Court in the county where the claimant was convicted or in Suffolk County & Funds appropriated by general court | Mass. GEN. LAWS. ch. 258D, §§ 1-9 (2024) Compensation for Certain Erroneous Felony Convictions Pt. III Courts, Judicial Officers, and proceedings in Civil Cases; Tit. IV Certain Writs and Proceedings in Special Cases; Chapter 258D (2004 amd. 2018). | Full pardon for innocence (governor states belief in innocence); vacated/ reversed felony conviction; not guilty on re-trial; Clear and Convincing right to jury trial; SOL 3 yrs. | Income would have earned; circumstances of the claimant's trial; length and conditions under which the claimant was incarcerated; any other factors deemed appropriate; NTE \$1 mil. | Services reasonable and necessary for deficiencies in the individual's physical and emotional condition; tuition and fees for the claimant from a state or community college in the commonwealth; expungement & sealing of records. | Reasonable attorney's fees. |
| § 10-501(a)(3)(i) Individuals who previously received a monetary award from a civil suit (or settlement) with the State for an erroneous conviction, will be reduced by the amount paid to the individual (less attorney's fees and costs). (ii) If, after receiving compensation under the erroneous conviction statute, monetary awards are received for an erroneous conviction, sentence, or confinement, the monetary reward shall reimburse the state the amount paid under this statute (less attorney's fees and costs). | | | | | |
| 258D § 4 Awards or settlements accepted must be in writing and are final and conclusive, constituting a complete release of any claims against the commonwealth and a complete bar to any action by the claimant against the commonwealth for the same subject matter. | | | | | |

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| Michigan Court of Claims & Wrongful Imprisonment Compensation Fund | MICH. COMP. LAWS. SERV. §§ 691.1751–57 (LexisNexis 2024) Chap. 691 Judiciary; Act 343 of 2016 (2016 amd. 2019, 2020). | Conviction reversed/ vacated and charges dismissed or on retrial the plaintiff was not guilty; New evidence (not witness recant without more) Clear and convincing; SOL 3 yrs. | \$50,000/yr + parole; < 1yr prorated; single or multiple (1st 20%); Child support 1st deducted. | Child support accrued during imprisonment; Expungement. | Attorney fees if plaintiff actually paid; Lesser of 10% or \$50,000. |
| Minnesota District Court | MINN. STAT. § 590.11 (2023) Order Determining Eligibility for Compensation Based On Exoneration; Remedies Controlling Personal Action; Chap. 590. Postconviction Relief. | Vacated, reversed, or set aside a judgment of conviction; Petition for order declaring eligibility; “On grounds consistent with innocence”; Pardon/ commutation for factual innocence after felony conviction SOL 2 yrs. | Not less than \$50,000/yr (NTE\$100,000/ yr); Not less than \$25,000 (NTE\$50,000/ yr) for supervised release/S.O.; passes to estate. | Economic damages; medical/dental expenses; Tuition and fees; Child support; reintegrative expenses NTE \$100,000/yr. | Reasonable attorney’s fees. |
| Minnesota Compensation Panel to commissioner of management and budget (submits to legislature for appropriation) | MINN. STAT. §§ 611.362–68 (2023) Imprisonment and Exoneration Remedies; Crimes; Expungement; Victims Ch. 611 Rights of Accused (2014 amd. 2019). | 60 days after order based on petition but SOL 3 yr if not notified. | | | |
| § 611.365 Subdiv. 4 Acceptance of an award, compromise, or settlement must be in writing and is final and conclusive. | | | | | |

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| Mississippi Circuit Court of the county in which the claimant was convicted | Miss. CODE ANN. §§ 11-44-1-15 (2024) Tit. 11 Civil Practice and Procedure; Chap. 44. Compensation to Victims of Wrongful Conviction and Imprisonment (2009). | Pardon for felony conviction; based on innocence; vacated/reversed; re-trial not guilty; Preponderance of evidence; SOL 3 yrs. | \$50,000/yr NTE \$500,000 passes to estate. | Economic damages; medical expenses; tuition and fees; child support; reintegration. | 10% for preparing and filing the claim; 20% for litigating the claim if contested by the Attorney General; and 25% if the claim is appealed, plus expenses. |
| \$ 11-44-7 (4) Claimants can pursue a claim under this statute in lieu of pursuing a tort claim against the State of Mississippi, but claimants who obtain an award by this statute can't obtain an award for the same subject. (5) Immunity of The State of Mississippi waives immunity with respect to the claims. Claimants who receive compensation must sign a release from all claims against the state regarding the compensated incarceration. | | | | | |
| Missouri Petition to sentencing court & Department of Corrections | Mo. REV. STAT. § 650.058 (2023) Individuals Who Are Actually Innocent May Receive Restitution, Amount, Petition, Definition, Limitations and Requirements — Guilt Confirmed by DNA Testing, Procedures — Petitions for Restitution — Order of Expungement; Tit. 40 Additional Executive Departments; Chap. 650 Department of Public Safety; DNA profiling analysis (2006 amd 2016, 2021). | DNA must show actual innocence of felony conviction; Finding of “actually innocent”, restitution, expungement; if DNA confirms guilt, liability for costs. | \$100/day NTE \$36,500/yr. | Expungement, records confidential. | Civil barred. |
| \$ 650.058 1(4) One receiving restitution is prohibited from seeking any civil redress from the state. The waiver of sovereign immunity doesn't extend to any purposes other than the provided restitution. | | | | | |

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| Montana | HB 93 “Died in Process” May 22, 2025 | Innocence of felony crimes by pardon; vacated/reversed/remanded; Clear and convincing; SOL 2 yrs. | NTE \$500,000; does not pass to estate | Nothing precludes state from providing services treated as advance on judgment; Court can extinguish defense lien. | Reasonable attorney’s fees and expense paid out of award. |
| Nevada | NEB. REV. STAT. ANN. §§ 29-4601–08 (2024) Chap. 29 Criminal Procedure; Art. 46 Nebraska Claims for Wrongful Conviction and Imprisonment Act (2009). § 29-4608 Nothing in the Neb. Wrongful Conviction and Imprisonment Act (NWCIA) limits the claimant from making any other claim against others. However, claimant who recovers under the NWCIA shall not have any other claim against the state. | Innocence (conduct or lesser included); Reversed/remanded; not guilty at re-trial; Pardon for innocence; Preponderance; SOL 2 yrs. | \$50,000/yr 1–10 yr; \$75,000/yr 11–20 yr; \$100,000/yr ≥21 yr; not less than \$25,000 parole/S.O. Round up to half-year. | Tuition/books/fees in Nevada higher ed (w/in 3 yr); Health exchange plan; Community re-entry (w/in 3 yr); housing NTE \$15,000/yr; Counseling; financial literacy; all NTE \$100,000; Certificate of innocence; sealing of records. | Reasonable attorney’s fees NTE \$25,000. |
| Nevada District court & Reserve for Statutory Contingency Account (approved by State Board of Examiners) | NEV. REV. STAT. ANN. §§ 41.900–70 (2023) Action for Wrongful Conviction; Tit. 3 Remedies; Special Actions and Proceedings; Ch. 41 Actions and Proceedings in Particular Cases Concerning Persons (2019 amd. 2021). § 41.920(1) Nevada waives immunity from liability [for wrongful conviction] and allows liability in accordance with the same rules of law as applied to civil actions against persons; (3) All provisions of existing law relating to the absolute or qualified immunity of any judicial officer, prosecutor or law enforcement officer, including all applicable provisions of federal and state law still apply. | | | | |

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| New Hampshire Board of Claims' Board majority vote; or Superior court judgment & Governor to draw from unappropriated funds | N.H. REV. STAT. ANN. 541-B:14 II (2024) Limitation on Action and Claims Tit. LV Proceedings in Special Cases; Chap. 541-B Claims Against the State; (1977 amd. 1993, 1995, 1996, 2003, 2007, 2018). | [A] person is found to be innocent of the crime for which he was convicted; SOL 3 yrs. | NTE \$20,000. | | Fees approved by board of municipality or superior court. |
| New Jersey Superior Court & Department of the Treasury | § 541-B:15 Adjudication on any claim does not deprive the claimant of other legal rights against other parties. | | | | |
| | N.J. STAT. ANN. §§ 52:4C-1-7 (2023) Tit. 52 State Government, Departments and Officers; Subtit. 1 General Provisions; Chapter 4C Mistaken Imprisonment (1997 amd. 2013). | Pardon; Did not commit crime or plead guilty; Clear and convincing; SOL 2 yr. | Twice income prior to incarceration or \$50,000 per year (may award annuity after \$1 million). | Certificate of innocence, vocational training, tuition assistance, counseling, housing assistance, and health insurance coverage. | Reasonable attorney's fees. |
| | § 52:4C-2(b) Damages awarded in an action against the State about the same subject matter are offset by any award of damages awarded under the statute. | | | | |
| New Mexico | SB407 "Died." | | | | |
| New York Court of Claims | N.Y. CT. CL. ACT § 8-b (2024) Claims for Unjust Conviction and Imprisonment (1984 amd. 2007, 2023). | Pardon for crimes due to innocence; reversed/ remanded/re-trial not guilty; Docket priority for DNA innocence Clear and convincing; SOL 2 yr. | "[A]ward damages in such sum of money as the court determines will fairly and reasonably compensate." | Records sealed; Health & dental benefit; CUNY or NY university tuition; All benefits due parolees. | Reasonable attorney's fees. |
| | N.Y. CT. CL. ACT § 12 (2024) Liability will not be implied against the state in any case. No judgment will be granted except upon legal evidence as for persons. | | | | |

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| North Carolina Industrial Commission & Contingency emergency fund (Director of Budget) | N.C. GEN. STAT. §§ 148.82–84 (2023) Ch. 148 State Prison System; Art. 8 Compensation to Persons Erroneously Convicted of Felonies (1947, amd 1973, 1997, 2001, 2008, 2010, 2012). | Pardon of innocence of all felony charges; or dismissal by three judge panel (sufficient evidence of factual innocence) SOL 5 yr. | \$50,000 each year prorated NTE \$750,000. | Job skills training for at least one year and tuition reimbursement at any NC community college or constituent institution of the UNC; Claimants are also entitled to assistance in meeting any admissions standards, including satisfying requirements for completion of secondary education. | |
| North Dakota | Chap. 12-57 Relief for Wrongful Imprisonment (Repealed). | | | | |
| Ohio Court of Common Pleas for liability; Court of Claims for damages & Emergency purposes special purpose account; | OHIO REV. CODE ANN. §§ 2743.48–49 (2023–2024) Tit. 27 Courts-General Provisions-Special Remedies; Ch. 2743 Court of Claims; Wrongful Imprisonment (1986, amd. 1989, 1994, 2003, 2012, 2013, 2018). | Felony or misdemeanor; Vacated/Dismissed/ Reversed; Brady violation; SOL 2 yr. | \$55,045/yr (adjusted by state auditor), prorated. | Court costs; Lost wages; Recovery of cost debts incurred while in custody. | Reasonable attorney's fees. |
| § 2743.48(F)(6) Ohio consents to be sued by a wrongfully imprisoned individual and to liability. The statute does not affect state liability on a claim for relief not based on the facts of the wrongful imprisonment. | | | | | |

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| Oklahoma Court of Competent Jurisdiction | OKL. STAT. ANN. tit. 51, § 154 (B) (2024) Extent of Liability Tit. 51 Officers; Ch. 5. The Governmental Tort Claims Act (1978 amd. 2003). | Actual innocence of felony; Full pardon ‘felony not committed’; Clear and convincing; 5 yr SOL (12 Okl. St. § 95(12)). | NTE \$175,000 | Certificate of Innocence; Sealed records. | |
| | § 152.1 A. Oklahoma adopts the doctrine of sovereign immunity. The state is immune from liability for torts. B. The state waives its immunity only for purposes of the wrongful conviction statute but not to waive any rights under the U.S. Constitution’s Eleventh Amendment. | | | | |
| Oregon Circuit court Marion county or county of conviction | OR. REV. STAT. § 30.657, 659 (2023) Tit. 3 Remedies and Special Actions and Proceedings; Chap. 30- Actions and Suits in Particular Cases; Actions for Compensation for Wrongful Conviction (2022 amd. 2023). | Felony Reversed/vacated/ dismissed on re-trial; Pardon; Preponderance; must file notice in 180 da. SOL 2 yr. | \$65,000/yr (+CPI adjustment); \$25,000 parole/ postprison supervision/S.O.; First payment NTE \$100,000 rest as annuity NTE \$80,000 Request Certificate of innocence. | Existing state, local or other programs for counseling, housing assistance, eligibility for medical assistance, educational assistance, job training, legal services to regain custody of children, assistance with food and transportation and personal financial literacy assistance; may request re-entry services. | Reasonable attorney’s fees. |
| | § 30.657(9)(a) If, when a judgment is entered, the claimant has previously won a monetary award against a public body in a separate civil action (or settlement) related to the same case, the amount of economic damages awarded is deducted from the sum of money awarded under the wrongful conviction statute, (less attorney fees, costs, and expert fees), (b) If, after a judgment is entered under the wrongful conviction statute the claimant wins a monetary award against a public body in a separate civil action (or settlement) about the same subject, the claimant must reimburse the state for the sum of money paid (less attorney fees, costs, and expert fees). | | | | |

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| Pennsylvania | SB 54 referred to Senate Judiciary Committee March 21, 2025. | | | | |
| Rhode Island Presiding justice of superior court & General Treasurer | R.I. GEN. LAWS §§ 12-33-1-7 (2024) Tit. 12 Criminal Procedure; Ch. 33 Claims for Wrongful Conviction and Imprisonment (§§ 12-33-1-7) (2021 and 2022). | Pardon; vacated; reversed (other than IAC); preponderance; SOL 3 yr. | \$50,000/yr (<1 yr prorated); deduct/ reimburse if award for 42 U.S.C. § 1983. | Release from child support; any services provided by the state for offenders residing in the community. | Reasonable attorney's fees NTE \$15,000. |
| | § 12-33-4 (E)(1) Claimant's acceptance must be documented in writing that voluntarily relinquishes all rights to pursue other actions from their wrongful conviction and incarceration. (G) If, before or after, the claimant wins a monetary award under a 42 U.S.C. § 1983 federal civil rights lawsuit, the award, shall be deducted from the sum of money to which the claimant is entitled under the wrongful conviction statute (less attorney's fees or litigation costs). | | | | |
| South Carolina | H 3566 "Failed." | | | | |
| South Dakota | | | | | |
| Tennessee Board of Claims | TENN. CODE ANN. § 9-8-108 (a)(7)(A-H) (2024) Tit. 9 Public Finances; Ch. 8, Board of Claims; Pt. 1 Establishment and Operation of Board (1984, amd. 1986, 1988, 2003, 2004; 2010; 2012; 2013, 2021). | After consideration of the facts, circumstances, and any newly discovered evidence to § 40-27-109 (exoneration by governor); SOL 1 yr. | NTE \$1 mil 'all factors considered relevant'; equal monthly installments; may fund annuity; Passes to surviving spouse/ children if any. | Expungement; restore rights of citizenship. | |
| | § 9-8-108(a)(7)(G) Tennessee has a right of subrogation for any amount awarded against anyone who acted willfully and intentionally or engaged in conduct that resulted in or contributed to the claimant's wrongful conviction and imprisonment. | | | | |

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| Texas Comptroller & State Disbursement Unit | Tex. Civ. Prac. & REM CODE ANN. A §§ 103.001–07; B §§ 103.051–54; C §§ 103.101–05; D §§ 103.151–54 (2023) Civ. Prac. & Rem. Tit. 5; Chap. 103 Compensation to Persons Wrongfully Imprisoned; Subchap. A Eligibility; Notice of Eligibility (§§ 103.001–07); Subchap. B Administrative Proceeding (§§ 103.051–54); Subchap. C Fees (§§ 103.101–05); Subchap. D Payments and Limitations (§§ 103.151–54) (1985 amd. 2001, 2009, 2011, 2023). | Pardon for innocence; Writ of habeas corpus finding of actual innocence; State’s attorney believes claimant actually innocent; SOL 3 yrs. | \$80,000/yr prorated; \$25,000/ yr parole/S.O.; annuity (except child support); May designate beneficiary. | Child support; Tuition and fees (if within 7 yrs); Group health benefit plan (monthly contribution); Tuition for career center or public university. | Attorney’s fees Reasonable hourly rate; Fee for application process. |
| § 103.153(b) A claimant receiving compensation under the wrongful conviction statute may not bring any action involving the same subject matter, including an action involving the person’s arrest, conviction, or length of confinement, against any governmental unit or an employee. | | | | | |

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| Texas | TEX. HEALTH & SAFETY CODE ANN. § 614.021 (2023) Services for Wrongfully Imprisoned Persons Health & Safety Code; Tit. 7 Mental Health and Intellectual Disability; Subtit. E Special Provisions Relating to Mental Illness and Intellectual Disability; Ch. 614 Texas Correctional Office on Offenders with Medical or mental Impairments (2009 amd. 2011, 2015). | | | Case management; Medical, Dental, & Mental health treatment; transition support. | |
| Texas | TEX. GOV'T CODE ANN. §§ 501.101-501.102 (2023) Gov't Code Tit. 4 Executive Branch Subtit. G Corrections; Ch. 501 Inmate Welfare; Subch. C Continuity of Care Programs; Reentry Program (2009 amd 2011). | Pardon, Actual innocence, SOL no later than third anniversary. | | Same programs and services for an inmate Life-skills, Reentry \$10,000, State ID. | |

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| Utah District Court of conviction & Crime Victim Reparations Fund | UTAH CODE ANN. § 78B-9-405 (2023) Tit. 78B Judicial Code; Ch. 9 Postconviction Remedies Act; Pt. 4 Post Conviction Determination of Factual Innocence (1953 amd. 2008, 2011, 2012, 2021). | Factual innocence of felony conviction; Averment for ineffective assistance of counsel; Clear and convincing; SOL 1 yr to bring petition for post-conviction relief § 78B-9-107. | Up to a maximum of 15 years, monetary equivalent of average annual nonagricultural payroll wage in Utah/yr prorated; Initial sum 20%; Survives to spouse. | Expungement; Letter of innocence to petitioner, no state tax, no offsets for expenses by state. | |
| Vermont Washington County Superior Court & State treasurer | § 78B-9-405(11)(a) Payments are a full and conclusive resolution of the claimant on the specific issue of factual innocence. V.T. STAT. ANN. tit. 13 §§ 5572-78 (2024) Tit. 13 Crimes and Criminal procedure; Pt. 3 Proceedings Before Trial; Chap. 182 Innocence protection; Subchap. 2. Compensation for Wrongful Convictions (§§ 5572-78) (2007 amd 2013; 2015, 2016). | Actual innocence of felony; Exonerated through conviction being reversed or vacated, the information or indictment being dismissed, the complainant being acquitted after a second or subsequent trial, or the granting of a pardon; ≥ 6 mos. incarceration; Clear and convincing; SOL 3 yrs. | ≥\$30,000 but ≤\$60,000/yr prorated. | Economic damages; Lost wages; 10 yrs state funded health care; reintegrative services. | Reasonable attorney's fees. |
| | § 5574(d) The claimant's acceptance of a damages award, compromise, or settlement because of a claim under the wrongful conviction statute must be in writing and is final and conclusive on the claimant. Acceptance also constitutes a complete release against the State and a complete bar to any action against the State about the same subject matter. | | | | |

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| Virginia Court of appeals & General Assembly appropriates funds; Comptroller | VA. CODE ANN. §§ 8.01-195.10-13 (2023) Tit. 8.01 Civil Remedies and Procedure; Ch. 3. Actions; Art. 18.2. Compensation for Wrongful Incarceration for a Felony Conviction (2004 amd. 2010, 2012, 2014, 2018, 2020, 2021, 2022). | Actual innocence; Felony conviction vacated (Chapter 19.2 or 19.3); 'absolute pardon'; pled not guilty (or Alford); SOL 2 yrs. | \$55,000/yr (pegged to C-CPI-U); 25% as lump sum, then annuity; Additional compensation for intentional state acts; Passes to estate, but no claim for estate or representative of decendent. | Transition assistance grant \$15,000; Tuition assistance \$10,000 VA CCs; Court costs. | Reasonable attorney's fees. |
| | § 8.01-195.12(B) As a condition of receiving compensation under the wrongful conviction statute, the claimant must execute a release and waiver. The waiver releases Virginia and other parties of interest from any present or future claims arising out of the same factual situation in connection with the conviction for which compensation is sought under this article. Also, the claimant receiving compensation cannot have been awarded a finally adjudicated judgment in a court of law against or (or settlement) for compensation or damages arising out of the same factual situation. | | | | |
| Washington Superior Court | WASH. REV. CODE ANN. §§ 4.100.010-90 (LexisNexis 2023) Tit. 4 Civil Procedure; Chap. 4.100 Wrongly Convicted Persons (2013). | Felony pardon for actual innocence; Pardon for grounds consistent with innocence'; reversed/ vacated/not guilty on retrial; 3 yr SOL. | \$50,000/yr; \$100,000/yr on death row; \$25,000/ yr parole/S.O.; Possible structured settlement; Passes to estate. | Child support; Court costs; Re-entry services (education, mentoring, life skills, job skill, mental health & substance abuse); Seal records on request, expunged. | Reasonable attorney's fees NTE 10% or \$75,000. |
| | WA § 4.100.080(1) Washington intends that the remedies provided under wrongful conviction statute are exclusive to all other remedies against the state. The claimant must waive, as a requirement to make a claim under the wrongful conviction statute, all other remedies, causes of action, and other forms of relief or compensation against Washington. The waiver includes all state, common law, and 42 U.S.C. § 1983 federal civil rights claims. If the wrongfully convicted person chooses not to pursue a claim for compensation under the wrongful conviction statute, they are not precluded from seeking relief through any other remedy. The claimant must execute a legal release prior to the payment of any compensation and receives a tort award related to their wrongful conviction and incarceration, they must reimburse the state for the lesser of the amount of the wrongful conviction compensation (less attorney's fees and litigation costs), or the amount received by the claimant under the tort award. | | | | |

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| West Virginia WV Legislative Claims Commission & Crime Victim's Compensation Fund | W. VA. CODE ANN. § 14-2-13a (LexisNexis 2023) Claims for unjust arrest and imprisonment or conviction and imprisonment; Chap. 14 Claims Due and Against the State; Art. 2. Claims Against the State § 14-2-13a. (1987 amd 2014, 2020). | Pardoned for innocence; Reversed/vacated/ not guilty in new trial/ not re-tried; Clear and convincing; SOL 2 yr. | "Court shall award damages in a sum of money as the court determines will fairly and reasonably compensate the claimant based upon the sufficiency of the claimant's proof at trial. The damages shall depend upon the unique facts and circumstances of each claim." | | |
| Wisconsin Claims Board | Wis. STAT. ANN. § 775.05 (LexisNexis 2023–24) Compensation for Innocent Convicts; Actions and Proceedings in Special Cases; Chap. 775 Actions Against State (1979 and 1987). 2014 SF 30 – failed. | Innocence; Clear and convincing. | NTE \$25,000 and \$5,000/yr; Claims board may petition legislature for more. | Includes attorney's fees. | |
| Wyoming | | | | | |