AMERICAN JOURNAL OF CRIMINAL LAW

VOLUME 51 FALL 2024 NUMBER 1

Published at The University of Texas School of Law

AMERICAN JOURNAL OF CRIMINAL LAW

Published at The University of Texas School of Law

VOLUME 51

SUBSCRIPTIONS

The *American Journal of Criminal Law* (ISSN 0092-2315) is published biannually (Fall, Spring) under license by The University of Texas School of Law Publications, P.O. Box 8670, Austin, Texas 78713. The Journal has been published triannually in the past, but to provide high quality articles without delay, the Journal has switched to biannual publication. The number of articles published will not be substantially changed as the summer issue has historically been devoted to student notes. The annual subscription price is $30.00; foreign delivery is $35.00. Please make checks payable to the *American Journal of Criminal Law*. Complete sets and single issues are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209.

MANUSCRIPTS

The *American Journal of Criminal Law* is pleased to consider unsolicited manuscripts for publication, but regrets that it cannot return them. One double-spaced, typewritten manuscript, in Microsoft Word format, should be submitted by electronic mail to eic.ajcl@gmail.com. WordPerfect submissions will not be accepted. Citations should conform to *The Bluebook: A Uniform System of Citation* (21st ed. 2020). Except when content suggests otherwise, the *American Journal of Criminal Law* follows the guidelines set forth in the *Texas Law Review Manual on Usage, Style & Editing* (15th ed. 2020). The *Journal* is printed by Joe Christensen, Inc., P.O. Box 81269, Lincoln, Nebraska 68501.

Editorial Offices:
American Journal of Criminal Law
University of Texas School of Law
727 Dean Keeton St., Austin, TX 78705-3299
Email: managing.ajcl@gmail.com
Website: http://www.ajcl.org

Circulation Office:
Melinda Heidenreich, Business Manager
School of Law Publications
University of Texas School of Law
P.O. Box 8670, Austin, TX 78713
(512) 232-1149
Website: http://www.texaslawpublications.com

AMERICAN JOURNAL OF CRIMINAL LAW

Published at The University of Texas School of Law

VOLUME 51 FALL 2024 NUMBER 1

Articles

The Core of Harvey Weinstein's Big Apple Reversal: A Closer Look at the Controversial yet Correct Application of *Molineux and Sandoval* by the New York Court of Appeals
Bruce R. Connolly 1

It's Payback Time: Improving Texas's Standard for Compensating the Wrongfully Imprisoned
Cameron Hekkert 36

The "Classic Penalty" Catch-22: The Current Circuit Split and Why States Should Adopt the Federal Approach to Supervised Release
Janelle Smith 71

Article

THE CORE OF HARVEY WEINSTEIN'S BIG APPLE REVERSAL: A CLOSER LOOK AT THE CONTROVERSIAL YET CORRECT APPLICATION OF *MOLINEUX AND SANDOVAL* BY THE NEW YORK COURT OF APPEALS

Bruce R. Connolly*

However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.[1]

The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring [their] guilt of the crime for which [they] are on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence . . . in order to prove [their] guilt, it is not permitted to show [their] former character, or to prove [their] guilt of other crimes, merely for the purpose of raising a presumption that [they] who would commit them would be more apt to commit the crime in question.[2]

* Assistant Professor and Director, Rodney L. Smith Business Law Institute, Ave Maria School of Law. I would like to send my thanks and appreciation to the following: First, to my research assistant, Cecilia Berutti, for her outstanding work in assisting with this article. Next, to Ulysses Jaen and the Ave Maria School of Law Library for their support and guidance. Third, to Tom Kenniff for his mentorship and friendship during our decade-long criminal defense partnership. Hooah! Finally, and most importantly, to my amazing wife, Megan, and my three wonderful daughters, Claire, Corinne, and Camryn, for all their love and support.

[1] Boyd v. United States, 142 U.S. 450, 458 (1892).

[2] People v. Shea, 41 N.E. 505 (N.Y. 1895).

I. Introduction 3
II. Testimony from the Weinstein Trial 4
A. Miriam Haley 5
B. Jessica Mann 6
C. Annabella Sciorra 7
D. The *Molineux* Witnesses 7
III. The *Molineux* Doctrine 9
IV. The *Sandoval* Doctrine 17
V. New York Common Law and the Federal Rules of Evidence 24
VI. The *Weinstein* Appellate Decisions 28
A. Appellate Division, First Department 28
B. Court of Appeals 30
VII. What Comes Next? 32
VIII. Conclusion 35

I. INTRODUCTION

While practicing criminal defense in New York State criminal courts earlier in my career, the words *Molineux* and *Sandoval* were ones I used daily. Sitting and waiting for calendar call in any courtroom at 100 Centre Street in Lower Manhattan, or any of the other courthouses where I practiced, those two words would repeat again and again as calendar judges would flip through pre-trial motions, make various decisions, and address *Sandoval*[3] and *Molineux*[4] applications in some fashion, usually reserving rulings for the trial judge. These two words went into every pre-trial motion I drafted, they were frequently used as talking points in negotiations with prosecutors, and they would be the subject of pre-trial hearings when a case was nearing trial.

After I transitioned out of practice and into the legal academy, I had not heard or given much thought to those two cases in quite some time until they appeared in a big way across my phone's news feed on April 25, 2024 in Naples, Florida. On that day, the New York Court of Appeals reversed the convictions of Harvey Weinstein and ordered a new trial based on errors the trial court committed with respect to these two legal standards.[5] A few years earlier, I kept apprised of this high-profile case, which took place in the very courthouse and courtroom where I had practiced for so many years. But while there was not much surprise or interest in the guilty verdict of 2020, the reversal by the Court of Appeals four years later was quite the opposite, and I took a renewed interest in these two words that I had not thought about for so long.

The Court of Appeals, the highest court in New York State, overturned Harvey Weinstein's convictions based on precedents set by the landmark New York cases of *Molineux* and *Sandoval*. The Court identified two main errors in the trial proceedings. First, it held that the trial court erroneously admitted testimony of uncharged, alleged prior sexual acts against persons other than the complainants of the underlying crimes because that testimony served no material, non-propensity purpose.[6] Second, it held that the trial court compounded that error when it ruled that Mr. Weinstein, who had no criminal history, could be cross-examined about those allegations as well as numerous allegations of misconduct that portrayed him in a highly prejudicial light.[7] The Court of Appeals stressed that the synergistic effect of these errors was not harmless and ordered a new trial.[8] The Court's reasoning in

---

[3] People v. Sandoval, 314 N.E.2d 413 (N.Y. 1974).

[4] People v. Molineux, 61 N.E. 286 (N.Y. 1901).

[5] People v. Weinstein, No. 24, 2024 WL 1773181 at *1 (N.Y. Apr. 25, 2024).

[6] *Id*.

[7] *Id.*

[8] *Id.* As of the date of this submission, the court has stated it will decide on a new trial date by January 29, 2025. Associated Press, *Harvey Weinstein's Retrial Moved to Next Year, Lawyer Plans to Hire a*

Weinstein may signal its future willingness to scrutinize *Molineux* and *Sandoval* issues more closely and to construe these rules more narrowly than it has done in recent years.

This article explores how, in the *Weinstein* decision, the Court of Appeals has set clear guidelines for lower courts to follow when interpreting *Molineux* and *Sandoval*. It also explores how the *Weinstein* decision is both consistent with and different from the Court's previous jurisprudence on admission of and impeachment with prior uncharged crimes and prior bad acts. With this brief introduction setting the stage, Part II of this article will provide the factual background of the testimony offered at Weinstein's trial.[9] Parts III and IV will offer a history of *Molineux* and *Sandoval* since their appearance in 1901 and 1975, respectively, along with the doctrine they created.[10] Part V will provide a brief background and comparison between the relevant Federal Rules of Evidence and New York's common law counterparts.[11] Part VI will provide the analysis of the *Weinstein* Appellate Division and Court of Appeals decisions.[12] Part VII will offer predictions for the re-trial and perspectives on the road ahead, considering that New York legislators abruptly proposed changes to the state's evidence rules in the aftermath and public outcry of the Court of Appeals decision.[13] Finally, in Part VIII, this article concludes that the Court has laid substantial groundwork for the future interpretations of *Molineux* and *Sandoval* and has set clear guidance for lower courts to follow when addressing these issues at the trial and intermediate appellate levels. In other words, there is no need for the legislature to take further action if courts apply the correct standard set forth by the common law and renewed by the Court of Appeals.[14]

II. TESTIMONY FROM THE WEINSTEIN TRIAL

On January 6, 2020, Harvey Weinstein's criminal trial commenced in New York County Supreme Court, where he faced charges of one count of criminal sexual act in the first degree under Penal Law § 130.50, one count of rape in the first degree under Penal Law § 130.35, one count of rape in

Private Investigator, SPECTRUM NEWS (Oct. 23, 2024, 11:25 AM), https://ny1.com/nyc/all-boroughs/entertainment/2024/10/23/harvey-weinstein-retrial-update.

[9] *See infra* Part II.

[10] *See infra* Parts III and IV.

[11] *See infra* Part V.

[12] *See infra* Part VI.

[13] *See infra* Part VII.

[14] *See infra* Part VIII.

the third degree under Penal Law § 130.25, and two counts of predatory sexual assault under Penal Law § 130.95.[15]

Testimony at trial included the complainants, Miriam Haley, Jessica Mann, and Annabella Sciorra (hereinafter the Complainants), as well as three separate witnesses, Lauren Young, Dawn Dunning, and Tarale Wulff (hereinafter, the *Molineux* witnesses), who alleged that they had also been sexually assaulted by Weinstein.[16] The trial court permitted the statements from the three *Molineux* witnesses to ensure the jury understood the sexual assaults on Haley and Mann were not consensual even though their allegations included instances of consensual sex after the assaults took place.[17] The following sections provide a summary of the trial testimony from the complainants and the *Molineux* witnesses, as set forth in the Appellate Division opinion.

A. Miriam Haley

Miriam Haley first met Weinstein in 2004 at a movie premiere, and they reconnected in May 2006 at the Cannes Film Festival when she inquired about job opportunities with his production company.[18] They met at the Majestic Hotel in Cannes, and shortly after, Weinstein offered Haley a job as a production assistant on the TV show "Project Runway," which she accepted.[19] From then until July 2006, Haley and Weinstein would have various personal and professional encounters, and she ultimately accepted his offer to pay for her plane ticket to Los Angeles to attend a premiere in July 2006.[20]

On July 10, 2006, before her flight to Los Angeles, Weinstein asked Haley to meet him at his New York City apartment, where an incident occurred that led to the instant charge of criminal sexual act in the first degree.[21] After the two engaged in normal conversation, Weinstein attempted to kiss and touch Haley, who tried to push him away.[22] Weinstein eventually moved Haley to the bedroom and pushed her onto the bed while Haley tried to flee.[23] Weinstein pinned Haley down while she repeatedly told him "no." He ignored those words and forcibly performed oral sex on her,

---

[15] People v. Weinstein, 207 A.D. 3d 33, 39 (N.Y. App. Div. [1st Dept. 2022]); *see* Act of 2003, ch. 264 Stat.130.35 *repealed by* 2023 N.Y. AB 3340; §§ 130.35, 130.25, 130.95.

[16] *Id.* at 39; 47.

[17] *Id.* at 39–40.

[18] *Id.* at 42.

[19] *Id*.

[20] *Id.*

[21] *Id.* at 43.

[22] *Id.*

[23] *Id.*

which she decided to "endure" and did not report due to fear of immigration consequences and Weinstein's "power, resources, and connections."[24]

Two days after she arrived back in New York, Haley agreed to meet Weinstein at the Tribeca Grand Hotel in Manhattan, where he had repeatedly asked to meet.[25] There, Weinstein led Haley to his bedroom, where he proceeded to have sexual intercourse with her.[26] Haley testified she did not want to have intercourse with Weinstein that night.[27] For the next two years, Haley continued contact with Weinstein, including meeting him to pitch a TV show and sending him emails with her "love" and saying that it was "great" to see him.[28]

B. Jessica Mann

In early 2013, complainant Jessica Mann met Weinstein at a Hollywood party where he expressed interest in her acting career.[29] On a later date, at the Peninsula Hotel in Los Angeles, Weinstein suggested finishing dinner in his room, and Mann agreed.[30] He then removed some of his clothing and called Mann to join him in the bedroom.[31] Mann did so, and agreed to give the shirtless Weinstein a massage.[32] Over the following month, they went to coffee and award parties together.[33] On February 24, 2013, after drinks at the Montage Hotel in Los Angeles, Mann hesitantly agreed to go to Weinstein's hotel room so he could show her a screenplay.[34] In the hotel room, Weinstein grabbed Mann's arm and pulled her into the bedroom, closing the door.[35] Weinstein tried to kiss her, and when Mann tried to reach for the door, Weinstein tightened his grip on her arm to prevent her from leaving.[36] Weinstein performed oral sex on her, and she testified that she "decided to start a romantic relationship with the defendant" in an attempt "to 'undo' the incident."[37] During the weeks following this incident, Mann and Weinstein had consensual sexual relations.[38] On March 18, 2013, in New York, Weinstein took Mann to a room at the Doubletree Hotel in Manhattan. In

---

[24] *Id.*
[25] *Id.*
[26] *Id.* at 43–44.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 45.
[36] *Id.*
[37] *Id.*
[38] *Id.*

the hotel room, Mann tried to leave twice, and each time, Weinstein slammed the door shut.[39] Weinstein angrily told Mann to undress, and when she did not, he used her hand to force her to undress and then engaged in forcible intercourse with her.[40] This incident led to charges of rape in the first and third degrees against Weinstein.[41] Following that, in February 2014, at the Peninsula Hotel in Los Angeles, Weinstein forcibly had intercourse and oral sex with Mann after learning she was in another relationship.[42] After this incident, Mann continued to communicate with Weinstein, sent him flattering emails, and maintained a consensual sexual relationship with him.[43]

C. Annabella Sciorra

Complainant Annabella Sciorra acted in a film produced by Weinstein in 1993.[44] Later that year, Weinstein dropped Sciorra off at her apartment after an event they both attended in Manhattan, and shortly after, he returned to her apartment.[45] Despite being told to leave, Weinstein refused, and instead, unbuttoned his shirt, brought Sciorra to the bedroom, and pushed her onto the bed.[46] While Sciorra punched and kicked him, Weinstein had non-consensual sex with her.[47] Sciorra blacked out during the incident and later told a friend that she thought she had been raped by Weinstein.[48] Shortly before trial, the prosecution was granted permission to include this alleged rape incident as an alternate predicate to each of the two counts of predatory sexual assault.[49]

D. The *Molineux* Witnesses

Molineux witness Lauren Young, an aspiring actor, first met Weinstein in February 2013 at a bar in Los Angeles, where he encouraged her to participate in "America's Next Top Model," promised to arrange a meeting with his assistant the next day, and asked to continue the meeting in his hotel suite.[50] In the bathroom of the hotel suite, Weinstein undressed and pulled off Young's dress while Young repeatedly said "no," to which

---

[39] *Id.* at 45–46.
[40] *Id.* at 46.
[41] *Id*.
[42] *Id.* at 46–47.
[43] *Id.* at 47.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id*. at 39.
[50] *Id.* at 47–48.

Weinstein replied, "[H]ow am I going to know if you can act[?] . . . " and "This is what all actresses do to make it" while masturbating and touching Young's breast.[51]

Molineux witness Dawn Dunning encountered Weinstein in 2004 or 2005 while working in a Manhattan club, and when she told him she was an actress, he offered to help her career.[52] The two would go on to meet for lunch, and she participated in screen tests for his company and accepted several of his party invitations.[53] In the Spring of 2004 or 2005, Dunning met Weinstein in a Soho hotel where he digitally penetrated her.[54] She "froze" and he apologized, assuring her that it would not happen again.[55] Weeks later, they met at a hotel where Weinstein, in a bathrobe, presented a stack of contracts for three movies that he agreed to sign if she had sex with him and his assistant.[56] Weinstein told Dunning, "this was 'how this industry works," and yelled at her when she refused and ran from the room.[57]

Finally, *Molineux* witness Tarale Wulff met Weinstein in 2005 while working at a New York restaurant and told him she was an actress.[58] Fifteen minutes later, Weinstein grabbed Wulff and led her upstairs to an unoccupied terrace, where Weinstein masturbated while Wulff insisted she needed to go back to work.[59] About a week later, Wulff went to an audition in Weinstein's office where she was given a screenplay. She was then told a car was waiting for her. She entered the car, which drove her to Weinstein's apartment in Manhattan.[60] At his apartment, he put her onto his bed, and she said, "I can't," and then froze and looked away while he had intercourse with her.[61] After the incident, Weinstein took Wulff to his office, where he gave her another copy of the screenplay and told her to return when she was ready to audition.[62]

In addition to the testimony from these *Molineux* witnesses, the trial court also permitted testimony from the complainants about the Montage Hotel and Peninsula Hotel incidents between Weinstein and Mann, along with Mann's testimony about other threatening behavior she witnessed

---

[51] *Id.* at 48.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 48–49.
[57] *Id.* at 49.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 49–50.
[62] *Id.* at 50.

from Weinstein at various encounters, such as bullying staff at a restaurant and threatening to assault Mann's father.[63]

Weinstein decided not to testify at trial, but had he chosen to do so, the prosecution planned to cross-examine him on evidence intended to impeach his credibility.[64] This evidence was introduced through a *Sandoval* motion of twenty-eight separate bad acts spanning the past thirty years.[65] These instances included using a friend's Social Security number to obtain a passport, instructing individuals to lie to his wife, telling an intelligence firm to lie on his behalf, scheduling a business meeting with a woman in 2012 under false pretenses, encouraging executives to lie on his behalf, threatening violence against employees who worked for him, abandoning a colleague on the side of a road in a foreign country, and other incidents of bullying and deception.[66]

Weinstein was acquitted of the first-degree rape charge against Mann and both counts of predatory sexual assault, but was convicted of rape in the third degree against Mann and criminal sexual act in the first degree against Haley.[67] On March 11, 2020, he was sentenced to twenty-three years in prison.[68] Mr. Weinstein appealed the convictions on various grounds, but central to his argument was that the trial court unduly prejudiced him by admitting the testimony of the three *Molineux* witnesses regarding sexual offenses allegedly committed against them.[69] In addition, Weinstein argued that the trial court granted the People's *Sandoval* application without regard to the fact that the sheer number of bad acts would preclude him from taking the stand in his own defense.[70] The history of the *Molineux* and *Sandoval* doctrines will now be explored.

III. THE *MOLINEUX* DOCTRINE

While this article makes no attempt to conquer the vast and complex subject of character evidence, some limited introduction is warranted, and the subject will be revisited throughout the sections below.[71] It is well-established that the constitutional safeguards of the presumption of innocence and the burden of proof are paramount when it comes to the rights of criminal defendants. Therefore, courts and the legislature have established rules that serve to prevent courts from convicting defendants based not on

---

[63] *Id.* at 47.
[64] *Id.* at 40.
[65] *Id.* at 68.
[66] *Id.*
[67] *Id.* at 41.
[68] *Id.* at 72.
[69] *Id.* at 41.
[70] *Id.*
[71] *See infra* Part V.

actual crimes charged but on the rationale that if the defendant committed crimes in the past, he is more likely to have committed the one at hand.[72] Thus, rules of evidence and case law take special care to guard against the danger of admission of "propensity" evidence at trial.[73] Generally, evidence of uncharged prior bad acts is inadmissible for the sole purpose of establishing that the prior offenses make it more likely a defendant committed the offense charged.[74]

There are instances where New York courts (and the Federal Rules of Evidence) *do* allow the prosecution to admit propensity evidence in their case-in-chief regardless of the general prohibition against using such evidence. In the landmark New York case of *People v. Molineux*, the Court of Appeals established that prior uncharged crimes could be admissible as evidence for specific non-propensity reasons,[75] which will be enumerated and discussed below.

In this case, defendant Roland Molineux was charged with first-degree murder, and the prosecution attempted to admit evidence showing that he was responsible for an alleged previous murder to prove his guilt in the charged crime.[76] On December 24, 1898, Harry S. Cornish received a Christmas gift in the mail, allegedly sent by the defendant, labeled Bromo Seltzer, but which was actually cyanide mercury.[77] On December 28, 1898, Cornish innocently administered its contents, thinking it was Bromo Seltzer, to Katharine J. Adams, causing her death.[78] The defendant had sufficient chemistry knowledge, a good chemical library, and a well-equipped

---

[72] *See* People v. Brewer, 342, 66 N.E.3d 1057, 1060 (N.Y. 2016) ("When we limit *Molineux* or other propensity evidence, we do so for policy reasons, due to fear of the jury's 'human tendency' to more readily 'believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime.'").

[73] *Weinstein*, 2024 WL 1773181, at *9.

[74] The *Weinstein* Court referenced some long-established jurisprudence to stress these points. *See* Coleman v. People, 55 N.Y. 81, 90 (N.Y. 1873) ("a person cannot be convicted of one offence upon proof that they committed another, however persuasive in a moral point of view such evidence may be."); *see also* People v. Sharp, 14 N.E. 319, 343 (N.Y. 1887) ("the general rule is that when a person is put upon trial for one offense [they are] to be convicted, if at all, by evidence which shows that [they are] guilty of that offense alone, and that, under ordinary circumstances, proof of their guilt of one or a score of other offenses in [their] lifetime is wholly excluded."); *see also* People v. Shea, 41 N.E. 505, 511 (N.Y. 1895) ("the impropriety of giving evidence showing that the accused had been guilty of other crimes merely for the purpose of thereby inferring [their] guilt of the crime for which [they are] on trial may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence . . . in order to prove [their] guilt, it is not permitted to show [their] former character or to prove [their] guilt of other crimes, merely for the purpose of raising a presumption that [they] who would commit them would be more apt to commit the crime in question.").

[75] *Molineux*, 61 N.E. at 294.

[76] *Id.* at 293. The *Molineux* facts, including poison and a love-triangle, are interesting and bizarre and are worth a quick summary.

[77] *Id.* at 287.

[78] *Id.*

laboratory where cyanide of mercury could be produced.[79] Cornish was an athletic director of the Knickerbocker Athletic Club at the time, and the defendant was a club member.[80] From 1896 until the defendant resigned from the club on December 20, 1897, the pair had a tumultuous relationship.[81] Those facts were relied upon by the prosecution as evidence of Mr. Molineux's motive and intent to kill Cornish.[82]

The prosecution sought to introduce evidence that Mr. Molineux was responsible for the previous murder of Henry C. Barnet, who died at the Knickerbocker Athletic Club on November 10, 1898.[83] Barnet fell ill after taking purported "Kutnow" powder, which he had received in the mail.[84] It was later concluded that the "Kutnow" powder contained cyanide of mercury and caused Barnet's death.[85] Here, Molineux's motive for killing Barnet was jealousy concerning a Ms. Cheeseborough, whom the defendant was in love with.[86] Barnet and the defendant were both members of the Knickerbocker Athletic Club, and there had been exchanges between Barnet and Cheeseborough indicating some romantic involvement. [87] Moreover, Cheeseborough had previously declined Molineux's marriage proposal but then decided to marry him just nineteen days after Barnet's death.[88] The Court of Appeals found that the trial court erred in admitting evidence of this alleged prior murder of Barnet, reversed the conviction, and ordered a new trial.[89]

The *Molineux* court reaffirmed the general rule of evidence that "the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged."[90] The Court of Appeals in 1901 cited to the Magna Carta, describing the principle as "so universally recognized and so firmly established in all English-speaking lands" and "the product of that same humane and enlightened public spirit . . . that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt."[91] *Molineux* delineates five specific exceptions for which un-

---

[79] *Id.* at 288.
[80] *Id*.
[81] *Id.* at 289.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 290.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 290–91.
[89] *Id.* at 316.
[90] *Id.* at 293–94.
[91] *Id.* at 293–94.

charged crimes are generally admissible: "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; [and] (5) the identity of the person charged with the commission of the crime on trial."[92] In *Molineux*, the evidence of the defendant's prior murder did not meet one of these five non-propensity exceptions,[93] and thus, the Court of Appeals created New York law that would remain strong for the next century and would be re-stated and clarified by the *Weinstein* decision.[94]

An alternate way of analyzing these exceptions is how the *Weinstein* court describes them: "In order to be admissible, *Molineux* evidence must 'logically be connected to some specific material issue in the case' and be 'directly relevant' to it.'"[95] So, evidence of the "uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case and tends only to demonstrate the defendant's propensity to commit the crime charged."[96] Therefore, when potential *Molineux* evidence is relevant to some material fact in the case (such as one of the delineated exceptions),"other than the defendant's propensity to commit the crime charged, it is not to be excluded merely because it shows the defendant had committed other crimes."[97] The Court of Appeals will allow this evidence as long as it serves some other non-propensity purpose.

The Court of Appeals engages in a two-step process when reviewing a *Molineux* ruling. First, it evaluates whether the prosecution has identified some issue, other than mere criminal propensity, to which the evidence is relevant, such as the five *Molineux* exceptions.[98] Second, if that test is met, the Court determines whether its probative value exceeds the potential for prejudice to the defendant.[99] At this second step, the Court of Appeals reviews the decision for an abuse of discretion as a matter of law.[100] Finally,

---

[92] *Id.* at 294. The non-propensity justification set forth by the prosecution in *Weinstein* was intent.

[93] *Id*. at 303.

[94] It is worth pointing out, early on, that the *Molineux* rules involve evidence that the prosecution seeks to introduce in their case in chief. *Sandoval*, discussed later, deals with impeachment evidence when a defendant testifies on his own behalf. *See infra* Part IV.

[95] *Weinstein*, 2024 WL 1773181 at *9 (citing People v. Cass*,* 965 N.E.2d 918, 923 (N.Y. 2012)). In the author's view, this type of evidence is often valuable in a trial, such that courts are likely to exercise great care to protect the defendant's rights in determining whether to admit it.

[96] *Id.* at *7 (citing People v. Denson*,* 42 N.E.3d 676, 681 (N.Y. 2015)). *See also* People v. Resek, 821 N.E.2d 108, 110 (N.Y. 2004) ("[U]nder our *Molineux* jurisprudence, we begin with the premise that uncharged crimes are inadmissible and, from there, carve out exceptions.").

[97] *Weinstein*, 2024 WL 1773181 at *9 (quoting *Denson*, 42 N.E.3d at 681).

[98] *See also* People v. Telfair, 231 N.E.3d 385, 389-90 (N.Y. 2023) (when reviewing if prosecution has identified some issue other than criminal propensity, it is a question of law, not discretion).

[99] *Weinstein*, 2024 WL 1773181 at *9 (citing *People v. Alvino*, 519 N.E.2d 808, 812 (N.Y. 1987)). *See also* People v. Stanard, 297 N.E.2d 77, 79 (N.Y. 1973) (substantial doubt in the balance of probative value versus possible prejudice should weigh in favor of the defendant).

[100] *Weinstein*, 2024 WL 1773181 at *9 (citing People v. Morris, 999 N.E.2d 160, 166 (N.Y. 2013)).

if the Court finds that the trial court committed an abuse of its discretion and admitted *Molineux* evidence, the Court must determine whether the error was harmless or requires a new trial.[101]

New York Courts throughout the past century have continuously reaffirmed, reapplied, and reinforced *Molineux*, and the *Weinstein* court took these hundred years of jurisprudence into account when making what they undoubtedly knew would be a controversial and unpopular decision.[102] Since the prosecution in *Weinstein* attempted to bypass *Molineux* by using the intent exception, the nuances of this exception must be explored and discussed in more detail. Just twelve years after *Molineux*, the New York Court of Appeals clarified in *Katz* that when an essential ingredient for a crime charged is intent, evidence of similar crimes committed by the defendant at the same time may be admissible.[103] But, the Court clarified that if intent can be inferred by the charged act itself, that act must be judged on its own circumstances.[104] As such, the Court prohibited the prosecution from using the intent exception as an end-around the *Molineux* standard. The Court of Appeals in *Katz* reiterated that evidence is inadmissible as intent when the *actual charged crime itself* tends to show the defendant's guilt (emphasis added).[105] This was a foreshadowing of the *Weinstein* decision, which said, one hundred years later, that if the charged crime is sufficient to establish intent on its own, the prosecution cannot use intent to back their way into admitting prior criminal evidence.[106] In other words, as will be explored later, the charges in *Weinstein* were more than sufficient to establish the requisite intent, and the Prosecution's attempt to admit uncharged crimes to establish Weinstein's intent was improper, unnecessary, and contrary to established New York law.[107]

Fast-forward forty years and *Molineux* continued to flourish. In *People v. McKinney*, the Court of Appeals explained the second step of *Molineux* and emphasized the need to balance the probative value of prior uncharged

---

[101] *Id.* (citing People v. Leonard, 73 N.E.3d 344, 348–49 (N.Y. 2017)).

[102] *See generally Weinstein*, 2024 WL 177318 at *7 (considering *Molineux* in review of Weinstein's argument that testimony from witnesses detailing sexual assaults he allegedly committed against them were afoul of *Molineux* and its progeny).

[103] People v. Katz, 103 N.E. 305, 309–10 (N.Y. 1913).

[104] *Id.*

[105] *Id.*

[106] *Weinstein*, 2024 WL 1773181 at *10 (quoting *Alvino*, 71 N.Y.2d at 242).

[107] *Id.* at *12. This principle was affirmed ten years later, in *Harvey*, which said that even if a showing that a defendant committed prior bad acts may emphasize his intent to commit the charged crime, this alone is not enough to fall under the *Molineux* exception of intent. People v. Harvey, 139 N.E. 268. 274 (N.Y. 1923). The court emphasized that if a defendant's intent while committing the crime charged was apparent from the facts and circumstances of this case, then prior evidence to buttress intent further is not needed. *Id. See also* People v. Zackowitz, 172 N.E. 466, 469 (N.Y. 1930), where the prosecution attempted to convince the jury that the defendant's dangerous propensity made him more likely to have the requisite intent to deliberate and premeditate a murder. The court held that the prior crimes had no bearing on intent and were used solely for propensity.

crimes against the potential prejudice to the defendant.[108] Here, the prosecution presented evidence of previous and subsequent uncharged assaults on the victim by the defendant, in an effort to demonstrate intent.[109] The Court of Appeals reiterated that if evidence is considered admissible under the *Molineux* rule then there must also be a "balance between the probative value of such proof and the danger of prejudice which it represents to an accused."[110] Thus, evidence of uncharged crimes is admissible if it is probative of the charged crime, other than to show a criminal disposition, and if the probative value outweighs the danger of prejudice.[111] When intent for the actual, charged crime is equivocal, the probative balance generally warrants the admission of uncharged crimes as evidence.[112] In *McKinney*, the assault on the victim was unequivocal,[113] and the defendant's intent was easily inferred by the act itself, and thus evidence of the prior uncharged acts served no purpose other than to prejudice the defendant.[114] In cases where the defendant's guilt hinges on whether the jury believes the complainant's or the defendant's version of events, the admission of uncharged assaults is extremely prejudicial and poses an obvious danger that the defendant would be convicted of a crime solely because of the testimony concerning his previous uncharged assaults.[115] Therefore, when prejudice to the defendant cannot be considered a harmless error, the judgment is reversed, and a new trial must be granted.[116]

Other *Molineux* exceptions serve the same specific non-propensity purpose, but they will not be addressed in much detail, as the *Weinstein* trial court admitted the *Molineux* testimony for the purpose of establishing whether the defendant intended to commit the charged offenses and whether each of the complaining witnesses consented.[117]

---

[108] People v. McKinney, 247 N.E.2d 244, 246 (N.Y. 1969).

[109] *Id.* at 245. This type of evidence was very similar to the justification set forth in *Weinstein.*

[110] *Id.* at 246 (citing People v. Schwartzman, 247 N.E.2d 642, 646 (N.Y. 1969)).

[111] *Id.*

[112] *Id.*

[113] The Court of Appeals said something similar in *Weinstein*, which was basically that the extra evidence was superfluous and that the charged crimes were more than sufficient to establish the requisite intent. *Weinstein*, 2024 WL 1773181 at *10.

[114] *McKinney*, 247 N.E.2d at 247.

[115] *Id.*

[116] *Id. See also Alvino*, 519 N.E.2d at 809, where the court similarly held that evidence of prior uncharged crimes to establish the defendant's intent will be inadmissible if intent can be inferred by the crime charged itself. However, evidence of prior uncharged crimes may be relevant to the issue of intent when proof of the act falls short of demonstrating that the defendant's state of mind and admission of evidence of the prior uncharged act is relevant to that issue. For example, if the act is ambiguous and not accompanied by requisite criminal intent, this evidence would be probative.

[117] *Weinstein*, 2024 WL 1773181 at *5. The other enumerated *Molineux* exceptions are interesting but not directly relevant to this analysis. For example, if *Molineux* witnesses were introduced to show a repetitive sexual behavior or pattern, this might be permitted in cases where the defendant's identity is unknown. See People v. Allweiss, 396 N.E.2d 735, 736 (N.Y. 1979), where the trial court permitted six witnesses to testify who had previously been assaulted by the defendant using the same *modus operandi*

In *People v. Ventimiglia,* the *Molineux* rule was refined by including a procedural protection for the defendant, which required that the prosecution obtain a ruling on the admissibility of potential evidence outside the presence of a jury to avoid potential prejudice.[118] Additionally, any evidence not directly related to the charged crime should be excluded.[119] The refined *Molineux* procedure requires a hearing, away from the jury, to introduce evidence pursuant to the *Molineux* rule.[120] This is to ensure that the evidence's probative value outweighs its potential for unfair prejudice to the defendant.[121] The trial judge is responsible for evaluating the evidence, as it is considered unfair to the defendant when *Molineux* evidence is presented during trial after an objection without the basis of its admissibility being explained to the court.[122] It is crucial that the prosecution ask for a ruling on the admissibility of *Molineux* evidence away from the presence of the jury, either before the trial, at the start of the trial, or before the witnesses testify.[123] The trial court must then weigh the evidence and decide whether to admit or exclude all or part of the evidence due to potential prejudice to the defendant.[124]

Even when potential evidence appears to have a legitimate, non-propensity-related purpose, it remains subject to the strict balancing test of the trial court. In *People v. Hudy*, the trial court determined that the testimony regarding a prior alleged, uncharged crime committed by the defendant was admissible under the *Molineux* rule because it tended to rebut the defense's theory that the charges were a rumor or conspiracy.[125] On its face, this appears to be a legitimate, non-propensity purpose permitted under *Molineux.* However, the Court of Appeals held that this violated *Molineux*

---

as was used in the underlying homicide. The evidence established his identity as the murderer and was used for more than just propensity. Again, as noted earlier, if the uncharged crimes can show something specific or have their own unique purpose, this is separate and apart from mere propensity. Of course, this remains subject to the balance test, and in *Allweiss*, the Court of Appeals found that prejudice to the defendant was minimized and thus outweighed by the probative value of admitting the six witnesses to identify the killer. *See also* People v. Denson*,* 42 N.E.3d 676 (N.Y. 2015), where the Court of Appeals recently upheld the conviction based on *Molineux* evidence that resembled the pattern of behavior of the instant case, and more importantly, the defendant's acts were equivocal, so intent could not be inferred from the charged crime. This evidence highlighted the defendant's distinctive pattern of behavior and his intent to commit the crime for which he was charged.

[118] People v. Ventimiglia, 420 N.E.2d 59, 60 (N.Y 1981).

[119] *Id.*

[120] *Id.* at 63–64.

[121] *Id.* at 63.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 64. In Weinstein's case, pretrial *Molineux* and *Sandoval* hearings took place outside the presence of the jury, and closed to the press and public, on Monday, April 26, 2019. Colby Hamilton, *Weinstein Evidence Will Remain Sealed, Manhattan Appeals Court Rules*, New York Law Journal (2019), https://www.law.com/newyorklawjournal/2019/05/16/weinstein-evidence-will-remain-closed-manhattan-appeals-court-rules/ (last visited Dec. 23, 2024).

[125] People v. Hudy, 535 N.E.2d 250, 253 (N.Y. 1988).

and was inadmissible as it served no purpose other than to demonstrate propensity.[126] In other words, it was propensity evidence couched as a legitimate non-propensity purpose. Although such evidence of prior acts by the defendant may have minimal probative worth, it is inadmissible when there is no relevance to the specific charges.[127] The Court of Appeals stressed the two-part *Molineux* inquiry about propensity and the probative value versus prejudice balancing test.[128] In this case, the witness testimony did not have a legitimate bearing on the alleged offense.[129] While it may support the credibility of the complainants, it sheds no light on the truthfulness of the complainants' testimony other than to imply that the defendant has a criminal propensity, and is likely to engage in the conduct for which he was charged.[130] This is the type of highly prejudicial evidence that the *Molineux* rule was adopted to prevent.[131]

In sum, *Molineux* protects New York State criminal defendants through the core principles of presumption of innocence, proof beyond a reasonable doubt, and the limits of character evidence. While it may not be as clearly delineated as the Federal Rules of Evidence discussed later,[132] the *Molineux* rule is clear about prohibiting the admission of evidence for pure propensity purposes, and ensuring that its probative value outweighs the prejudice to the defendant. When courts do allow the prosecution to use such evidence, it will be for specific non-propensity reasons that directly relate to the case at hand. The *Weinstein* decision falls in line with these post-*Molineux* decisions, as the Court found no *Molineux*-supported reason to admit the testimony of the additional uncharged crimes beyond what was charged in the indictment. The intent argument was not a strong one, and the *Molineux* witnesses only buttressed the prosecution's propensity-related arguments and inflamed the jury. As of 2024, the common law *Molineux* standard is alive and well in New York State, and as such, the New York legislature should hesitate to change or codify the law and upend a century of jurisprudence due to one unpopular opinion.[133]

---

[126] *Id.* at 258.

[127] *Id.*

[128] *Id.* at 258–59.

[129] *Id.* at 259.

[130] *Id.*

[131] *Id. Cf.* People v. Leeson, 908 N.E.2d 885, 888 (N.Y. 2009), where the court permitted evidence of prior uncharged acts of sexual abuse involving the same victim that occurred during the same time period, as the charged acts were relevant to provide context and background information in the relationship between the defendant and the victim. According to the Court, this was a non-propensity purpose permitted under *Molineux*.

[132] *See infra* Part V.

[133] *See infra* Part VII.

IV. THE *SANDOVAL* DOCTRINE

While the *Molineux* rule dealt with the potential admission of uncharged crimes during the prosecution's case in chief, the flip side of this analysis addresses when the prosecution may impeach the defendant with evidence of prior bad acts if he decides to testify on his own behalf. Impeachment occurs when a witness's credibility is challenged to show that his testimony is not worthy of belief.[134] As mentioned previously, a deep dive of the laws, policy, and analysis of character evidence is beyond the scope of this article, but some explanation will occur in Part V, when the New York common law is compared to the Federal Rules of Evidence.[135] In short, a witness's character may be impeached through conviction of a crime, past untruthfulness, and other prior bad acts.[136] Most jurisdictions follow the Federal Rules of Evidence regarding the admissibility of prior bad acts for impeachment purposes.[137] However, New York is one of the few jurisdictions where admissibility of such evidence is governed by case law, predominantly through *Sandoval* and its progeny.[138]

In the landmark 1974 case, *People v. Sandoval*, the New York Court of Appeals reaffirmed that prior evil acts and convictions by the defendant, which serve no purpose other than to show the defendant has a criminal disposition and thus is likely to have committed the crime charged, are prohibited for use during cross-examination.[139] Instead, only evidence of prior bad acts that are logically and reasonably connected to the defendant's credibility may be admitted for cross-examination.[140] The trial judge has the discretion to weigh the probative value of the defendant's credibility against the prejudice to the defendant when determining the admissibility of prior crimes that may be used to impeach the defendant, should he decide to take the stand.[141] In *Sandoval*, the defendant, charged with murder, made a pretrial motion for the court to use its discretion to prohibit crimes or convictions to impeach his credibility if he were to testify.[142] The trial court permitted the prosecution to inquire into the underlying facts with respect to a 1964 conviction for disorderly conduct and a 1965 conviction for assault in

---

[134] Lenore Mckenna, *Admission of Prior Bad Acts in New York for Impeachment Purposes: A Movement with the Majority*, 9 St. John's J. Legal Comment. 265 (1993).

[135] *See infra* Part V.

[136] McKenna, *supra* note 134.

[137] *Id.* at 267.

[138] *Id. See also* New York State Unified Court System, *History of the Guide to NY Evidence*, https://www.nycourts.gov/JUDGES/evidence/0-TITLE_PAGE/HISTORY/Guide-History.shtml (last visited Dec. 23, 2024).

[139] *Sandoval*, 314 N.E. 2d at 416.

[140] *Id.* at 417.

[141] *Id.* at 418.

[142] *Id.* at 415.

the third degree.[143] However, the trial court did not allow the prosecution to use the following in cross-examination of the defendant: a 1960 charge of contributing to the delinquency of a minor, 1963 and 1965 convictions of driving while intoxicated, a 1965 arrest for felonious assault, a 1965 traffic violation, and a 1967 charge of gambling.[144] After the defendant was convicted, he argued that all prior convictions should have been inadmissible and that he was denied a fair trial.[145]

An overarching theme, as will be evident after a review of some post-*Sandoval* decisions, is that the Court of Appeals has been reluctant to interfere with lower courts on their *Sandoval* rulings, instead preferring to defer to the sound discretion of the trial court, who was in the best position to make the conclusion at the time it was made. The fact that the *Weinstein* decision strayed from this pattern makes it all the more interesting.

The *Sandoval* case established the procedure that allows New York criminal defendants to "obtain a prospective ruling limiting the prosecutor's reference, in cross-examination impeachment of [the] defendant, to prior specific criminal, vicious and immoral acts."[146] This pre-trial hearing gives the defendant notice of the scope of cross-examination about the defendant's prior criminal or immoral acts, allowing him to make an informed decision on whether to testify at trial.[147] "The trial court must strike a balance between the probative worth of the evidence on the defendant's credibility on the one hand, and on the other the risk of unfair prejudice to the defendant, measured by both the impact of such evidence and by the effect its probable introduction may have in discouraging the defendant from taking the stand."[148]

Since this type of evidence "will always be detrimental to the defendant," the trial court must be careful to balance the deterrent effect of the defendant taking the stand against denying the jury significant material evidence.[149]An important consideration is on the validity of the fact-finding process if the defendant does not testify out of fear of the impact of the potential impeachment testimony. For example, in the case of a "he-said-she said," the defendant himself may be the only available source of material testimony in his own defense, and if he is precluded from testifying based on fear from potential *Sandoval* material, it would impact the validity of the

---

[143] *Id.*

[144] *Id.*

[145] Robert M. Abrahams, *People v. Sandoval*, 3 Hofstra L. Rev. 168, 169 (1975).

[146] *Sandoval,* 314 N.E.2d at 415.

[147] *Id*. at 416. *See* Mckenna, *supra* note 134, at 280–81. *See Weinstein*, 2024 WL 1773181 at *13 (citing *Sandoval*, 314 N.E.2d at 413).

[148] *Weinstein*, 2024 WL 1773181 at *13 (quoting *Sandoval*, 314 N.E.2d at 413).

[149] *Id.*

trial process.[150] *Sandoval*, like *Molineux*, is reviewed for abuse of discretion.[151]

Just like *Molineux* testimony is allowed for limited and specific purposes when it offers non-propensity evidence, the justification for admitting *Sandoval* evidence is that it tends to show "a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of [their] individual self-interest ahead of principle or of the interests of society."[152] This is useful because the evidence may be relevant to suggest that the defendant will choose to do the same again on the witness stand.[153] The least ambiguous *Sandoval* evidence for the court to permit are acts of dishonesty, including perjury, fraud, bribery and similar offenses.[154] It is easy to imagine the prosecution cross-examining a defendant about a prior act of dishonesty and then stressing to the jury in summation that the prior dishonest act directly undercuts the oath he just took to tell the truth on the witness stand. That is a natural connection to make, but the more complicated *Sandoval* evidence emerges with other acts not directly related to dishonesty. There, the prosecution would argue that if a defendant committed a "ruthless" act "voluntarily and deliberately", then he may well disregard an oath and resort to perjury if he believed it to be in his self-interest.[155] This is a difficult balance for the trial court to make, but the central question must be "whether the evidence indicates a defendant's possible lack of in-court veracity" and "[i]f so, the evidence may be admitted, but only if not unduly prejudicial and for the limited purpose of attacking credibility."[156]

In the *Sandoval* case, the defense obtained a pre-trial ruling on the admissibility of prior acts or convictions that might be used to impeach the defendant's credibility during cross-examination.[157] The trial court did allow the prosecution to inquire into the underlying facts with respect to two prior convictions but prohibited questions on six other prior crimes and convictions.[158] The Court of Appeals emphasized that prospective hearings allowing for the limitation of prior convictions and bad acts that can be used to impeach the defendant's credibility are not an abuse of the trial

---

[150] *Id.* at *13 (citing *Sandoval*, 314 N.E.2d at 413).

[151] *Id.* at *9, *13.

[152] *Id.* at *14 (quoting *Sandoval*, 314 N.E.2d at 413). *See also Weinstein*, 2024 WL 1773181 at *1 (quoting People v. Schwartzman, 247 N.E.2d 642, 646 (N.Y. 1969)) (stating "[w]hen evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded.").

[153] *Weinstein*, 2024 WL 1773181 at *14 (citing *Sandoval*, 314 N.E.2d at 413).

[154] *Id.* (citing People v. Bennette, 436 N.E.2d 1249, 1252 (N.Y. 1982).

[155] *Id.*

[156] *Id.* (citing *Sandoval*, 314 N.E.2d at 413 & n.1).

[157] *Id.* at 415.

[158] *Id.*

court's discretion.[159] The court in *Sandoval* exercised its discretion to find that some of the prior bad acts were relevant to the case at hand, while others served no purpose other than to show improper propensity.

The Court further emphasized that when a trial court uses its discretion to decide the admissibility of prior bad acts of the defendant, a "balance must . . . be struck between the probative worth of evidence of prior specific criminal, vicious, or immoral acts on the issue of the defendant's credibility on the one hand and, on the other, the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf."[160] Had the *Sandoval* court allowed all of the prior convictions to be admitted into evidence, this would have been unfair prejudice to the defendant and likely would have discouraged him from taking the stand.[161]

Sandoval is based on an attempt to limit the prejudice to the defendant due to irrelevant prior misconduct.[162] While the use of prior criminal or immoral acts on the defendant's cross-examination is a proper method to impeach his credibility,[163] evidence should only be admitted for its material probative value on the defendant's credibility as a witness.[164] It should not be admitted, even if it has probative value, if it would be highly prejudicial to the defendant.[165] The probative worth of questioning the defendant's credibility must still be balanced against the prejudice of answering about prior bad acts.[166] The *Sandoval* analysis remains a difficult one for the trial court to perform, and past examples demonstrate that trial courts must use sound discretion in performing the balancing test, which the Court of Appeals usually will not disturb.

In *People v. Duffy*, the Court of Appeals reaffirmed the *Sandoval* rule that prior bad acts may be used in cross-examination of a defendant when they reveal a "disposition or willingness on his part to place self-interest ahead of principle and society, proof that [is] relevant to suggest his readi-

---

[159] *Id.*

[160] *Id.* at 416.

[161] This is in line with what the *Weinstein* Court of Appeals inferred. By potentially allowing a "kitchen-sink" approach to all of Mr. Weinstein's prior bad acts, including random actions such as yelling, pushing, and leaving a colleague on the side of the road, this discouraged him from taking the stand, which was unduly prejudicial.

[162] *Id.* at 418.

[163] *Id.* at 417.

[164] *Id.* The introduction of evidence should be logically connected to the issue of the defendant's credibility, with consideration given to the lapse of time affecting materiality. *Id.*

[165] *Id.*

[166] *Id.* Evidence that only shows the defendant's "criminal bent or character and thus likely to have committed the crime charged" without a logical connection to their credibility is highly prejudicial. *Id.* at 416. Materially relevant acts with greater probative value include fraud, bribery, deceit, cheating, breach of trust, perjury, or other dishonesty-related crimes. *Id.* at 418.

ness as a witness to do so again."[167] But what that means in practice can be quite confusing. While the Court of Appeals emphasized that the prohibition on questioning the defendant regarding acts showing the defendant had a propensity to commit the crime charged is inflexible, it acknowledged that a defendant who chooses to testify can be questioned on past criminal or immoral acts to the extent that they bear on the defendant's credibility.[168]

This line of reasoning may lead one to question whether *all* crimes and prior bad acts reveal a willingness to put self-interest ahead of principle and society, but subsequent cases are careful to narrow this rule so that it is not abused by prosecutors seeking to admit voluminous and irrelevant prior bad acts a defendant has done, as the prosecution attempted in *Weinstein*.[169]

In 1982, the Court of Appeals in *Bennette* addressed the thorny issue of cross-examination regarding prior convictions that do not concern dishonesty yet nevertheless may indicate a disposition for the defendant to place his self-interest ahead of the interest of society and which are relevant to suggest his readiness to do so again on the witness stand.[170] The trial court be-

---

[167] People v. Duffy, 326 N.E.2d 804, 807 (N.Y. 1975). The defendant was convicted of grand larceny in the third degree and robbery in the third degree. *Id.* at 805. On appeal, the defendant argued there was an error in the cross-examination concerning his prior drug use. *Id*. The Court reaffirmed that questioning the defendant's previous drug use was not an abuse of discretion by the trial judge and the questioning was deemed relevant "to reveal a disposition or willingness on his part to place self-interest ahead of principle and society, proof that was relevant to suggest his readiness as a witness to do so again." *Id*. at 807. This Court clearly states that the trial court has the discretion to decide whether prior bad acts used for cross-examination affect the defendant's credibility. *Id*. The ruling on the admissible prior bad acts is not reviewable unless discretion is abused, which the Court decided was not in this case. *Id*. The counter-argument that drug offenses are not in the realm of dishonesty-related crimes and have nothing to do with the crimes at hand—larceny and robbery—is a sound one. However, the decision to admit such evidence to demonstrate the defendant's willingness to place his self-interest ahead of society is one that recurs throughout the *Sandoval* jurisprudence and one that the Court of Appeals upholds. The difference in the *Weinstein* case will be discussed later. *See infra* Part VI.

[168] *Id*. at 806.

[169] See People v. Wright, 359 N.E.2d 696, 698 (N.Y. 1976), where the court cautioned that where it allows evidence, the prosecution must tread lightly in how they use the evidence and may not suggest that prior bad acts indicate a propensity to commit the crime charged. Here, the prosecution improperly argued that the propensity to sell drugs in the past meant a propensity to commit the crime charged—criminal possession of a dangerous drug in the third degree. *Id. Cf.* People v Shields, 386 N.E.2d 257, 258 (N.Y. 1978), where the Court of Appeals deferred to the discretion of the trial court in excluding some evidence but admitting evidence of prior sexual assault to impeach the defendant when he testified. The defendant chose not to testify, but the trial court did not abuse its discretion with its *Sandoval* rulings. *Id.* The court reiterated that this analysis is "largely, if not completely, a matter of discretion which rests with the trial court and fact-reviewing intermediate appellate courts." *Id.* The Appellate Division expressed some concern about propensity purposes but this did not warrant a reversal and the Court deferred to the discretion of the trial court. *Id.*

[170] *Bennette*, 436 N.E.2d at 1252. In this case, the trial court found that in order for the jury to assess the defendant's credibility, should he take the stand, the jury should consider his prior conviction of sodomy in determining his honesty and integrity. *Id.* at 1250. The Court of Appeals reiterated that the decision to preclude the use of prior bad acts or convictions for impeaching a defendant's credibility is largely up to the trial court's discretion. *Id.* at 1251. While allowing for cross-examination on the prior conviction of sodomy may lead to some prejudice, the Court deemed it relevant to determining the defendant's in-court veracity. *Id.* at 1251,1252. The Court of Appeals found the trial court was justified in its exercise

low found cross-examination about the defendant's prior sodomy conviction was relevant and probative to his credibility and not unduly prejudicial to the defendant.[171] The Court of Appeals determined that, absent a clear abuse of discretion—which it did not find—its role was to stand aside in cases such as this. *Bennette* is one of many examples of the Court of Appeals deferring to the trial courts on this issue.[172]

When the Court of Appeals does find an abuse of discretion, it is often due to the admission of sheer volume and/or random nature of the potential *Sandoval* impeachment evidence.[173] The Court of Appeals in *People v. Williams* held that when a trial court either abuses its discretion or exercises no discretion at all in a *Sandoval* ruling, it is not considered harmless.[174] Therefore, the trial court's failure to weigh the factors[175] in exercising its discretion in ruling on the defendant's *Sandoval* motion is not harmless.[176] In sum, as long as the trial court can point to some justification in making the decision it did, the Court of Appeals will typically not interfere.[177]

---

of discretion, as the cross-examination on the prior sodomy conviction was not unnecessary but rather was crucial evidence of the defendant's credibility, which was an important issue at the trial. *Id.* at 1252.

[171] *Id.* at 1252.

[172] *See, e.g.,* People v. Brown, 401 N.E.2d 177, 178 (N.Y. 1979) ("since the exclusion of prior convictions is a discretionary determination for the trial courts and fact-reviewing intermediate appellate courts, no further review by this court is warranted."); *People v. Mackey*, 401 N.E.2d 398, 403 (N.Y. 1980) ("under these circumstances, adherence to the ruling of the pretrial Judge is not such an exercise of discretion as, after affirmance by the Appellate Division, warrants reversal."); People v. Mattiace, 568 N.E.2d 1189, 1192 (N.Y. 1990) ("We have evolved a workable, staple proposition of law and review that the exclusion or inclusion of prior convictions for potential impeachment purposes is 'largely, if not completely' a discretionary determination for the trial courts and fact-reviewing intermediate appellate courts, and that generally no further review by this Court is warranted.").

[173] *See Weinstein*, 2024 WL 1773181 at *14.

[174] People v. Williams, 436 N.E.2d 1292, 1295 (N.Y. 1982). In this case, a ruling made prior to trial allowed for the prosecution to use twenty convictions and underlying facts of the other two convictions to impeach the defendant's credibility during cross-examination. *Id.* at 1293. The defendant understandably chose not to testify in his defense, and he was convicted of robbery in the second degree. *Id. But see* People v. Grant, 857 N.E.2d 52, 54 (N.Y. 2006) (a nonconstitutional *Sandoval* error "will be deemed harmless when the proof of guilt was overwhelming and there was no significant probability that the jury would have acquitted had the error not occurred").

[175] In this case, the failure of the trial court to engage in weighing these factors, beyond its mentioning the generic credo of "defendant's willingness to place his interests above those in society," poses a risk of the defendant being convicted of the crime charged due to his past criminal acts. *Williams*, 436 N.E.2d at 1294. The Court of Appeals makes it clear that the trial court has considerable discretion in the admissibility of prior convictions for cross-examining the defendant's credibility in a *Sandoval* ruling. *Id*. However, the trial court must perform an exercise of discretion. *Id.* at 1294.

[176] The Court of Appeals emphasized that while trial courts have discretion in admitting prior convictions for impeaching the defendant's credibility, they must still make an informed decision based on relevant factors, such as the "period of time since the conviction, the degree to which it bears on a defendant's veracity and credibility, and the extent to which any similarity between the prior conviction and the crime charged may 'be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility.'" *Id.* at 1294 (citing *Sandoval*, 314 N.E.2d at 418).

[177] In other words, the court must perform additional analysis beyond asking merely if the potential use of the prior convictions indicates a defendant's willingness to place his interests above those of society, which, in reality, every prior bad act would satisfy. It is more than that, and a trial court must use its

When there seems to be no exercise of discretion at all, as was the case in *Williams*, the Court of Appeals will find error and reverse a conviction.

Often, a trial court will compromise and offer a middle-ground solution to the *Sandoval* issue, especially when the prosecution seeks to enter voluminous prior bad acts.[178] In *People v. Walker*,[179] the Court of Appeals did precisely this. A *Sandoval* hearing was conducted to determine if the defendant's previous felony convictions and seventeen misdemeanors could be used in cross-examination to impeach his credibility, should he choose to testify.[180] The trial court allowed for cross-examination about the defendant's use of numerous aliases and dates of birth, which spoke directly to his veracity for truth, but the remaining prior convictions and misdemeanors were limited to only their number and dates, and the prosecution was prohibited from inquiring into their underlying facts.[181]

In 2002, the Court of Appeals continued its *laissez faire* approach and further qualified the rationale behind affording so much deference to the *Sandoval* analysis of trial courts. In *People v. Hayes*,[182] the prosecution sought to cross-examine the defendant on six prior convictions.[183] The defense argued that since the case had conflicting testimonies, bringing up these previous convictions would unfairly prejudice the defendant, who needed to testify on his own behalf to tell his side of the story.[184] The trial court compromised and allowed for a limited cross-examination of these convictions to their existence and nature but not their underlying facts.[185] The Appellate Division reversed the *Sandoval* ruling, finding that the trial court erred in allowing the defendant to be cross-examined regarding prior similar acts, noting that the defendant was the only witness who could refute the complainant's testimony and the *Sandoval* decision, in effect, pre-

discretion to analyze the potential crimes in the totality of the circumstances with the safeguarding of the defendant's constitutional rights at the forefront of the analysis.

[178] I have much anecdotal evidence of trial courts taking this middle ground and parsing through the prosecution's potential *Sandoval* material, admitting some and denying others.

[179] People v. Walker, 633 N.E.2d 472 (N.Y. 1994).

[180] *Id*. at 473.

[181] *Id*. The defendant decided not to testify, and the jury found him guilty of criminal sale of a controlled substance in the third degree. *Id.* The Court of Appeals stressed that further review of a trial court's *Sandoval* application is not usually necessary by the Court of Appeals, as the use of bad acts for impeachment of a defendant is largely at the discretion of the trial court, and the fact-reviewing Appellate Division. *Id.* at 474. The Court of Appeals further stressed that it will only intervene with the scope of cross-examination allowed if the trial court has either abused its discretion or exercised none at all. *Id.* Had the *Weinstein* court shown more selectivity in which of the twenty-eight prior bad acts it would have admitted, perhaps the Court of Appeals would have taken this approach and deferred to its discretion.

[182] People v. Hayes, 764 N.E.2d 963 (N.Y. 2002).

[183] *Id*. at 964.

[184] *Id*. at 964–65.

[185] *Id*. at 965. As a result, the defendant chose not to testify at trial and ultimately was found guilty on charges of rape and coercion in the first degree, burglary, unlawful imprisonment in the second degree, and assault in the third degree. *Id*. at 964.

vented him from taking the stand.[186] However, the Court of Appeals disagreed with the Appellate Division and stated that "[n]either the similarity of defendant's prior convictions nor the alleged singularity of his testimony (which the People dispute) required that impeachment be limited to the existence of defendant's prior convictions."[187] The Court of Appeals thus held that the lower court appropriately exercised its discretion and properly balanced the concerns by limiting the scope of cross-examination.[188] Therefore, the need for a defendant to testify in a "he-said she-said" case does not preclude the trial court from properly analyzing the totality of the potential material and making a decision in line with the jurisprudence set forth by *Sandoval*.

In sum, the Court of Appeals seems to have adopted a pattern of deferring to the discretion of the trial courts when it comes to *Sandoval* analysis, with the caveat that the trial court must have exercised some discretion in its analysis. If it did not, the Court of Appeals is quite comfortable stepping in, as they did in the *Weinstein* case, which will be examined shortly.[189]

V. NEW YORK COMMON LAW AND THE FEDERAL RULES OF EVIDENCE

Before returning to the *Weinstein* opinions, it will be helpful to briefly address the differences between New York evidence law and the Federal Rules of Evidence. As mentioned earlier, New York is one of a few states that does not have a statutory code of evidence. Rather, the laws are scattered throughout judicial decisions, statutory provisions, and court rules.[190] Specifically, New York trial court judges must turn to the *Molineux* and *Sandoval* jurisprudence discussed above, which some state legislators now argue is problematic in the aftermath of the *Weinstein* decision.[191]

New York adheres to much broader rules of admissibility of prior bad acts for impeachment purposes than the Federal Rules of Evidence.[192] For this reason, the Court of Appeals needed to take special care when reviewing the *Weinstein* decision. New York Code of Criminal Procedure § 60.40 addresses this issue by permitting the prosecution to inquire into and prove such evidence, however, the application is left to the interpretation from case law.[193] On the other hand, the Federal Rules of Evidence provide spe-

---

[186] *Id.* at 965.

[187] *Id.*

[188] *Id.* at 966.

[189] *See infra* Part VI.

[190] New York State Unified Court System, *supra* note 138.

[191] *See infra* Part VII.

[192] McKenna, *supra* note 134, at 277–78.

[193] CPL 60.40 permits the prosecution to ask the defendant about prior convictions or bad acts. If the defendant answers in the negative or in an equivocal manner, the prosecution may independently prove such conviction. N. Y. Code Crim. Proc. 2014 § 60.40.

cific guidance to assist in this analysis, which includes time limits,[194] types of crimes and offenses,[195] and other helpful measures.[196] Of course, the language is couched with the built-in protection about the balancing of the prejudicial effect and the probative value, but Federal Rule 609 provides clear guidance to trial court judges to aid in their analysis in a way that New York law does not in its pure ad hoc discretionary approach.[197] However, while the differences[198] are noteworthy, both approaches require the same inquiry by the trial courts, which is balancing the probative value against the potential prejudice to the defendant.[199]

Since Weinstein had no criminal history, Federal Rule 608,[200] which deals with prior bad acts that were not criminal convictions, is more pertinent to the analysis in his case. Arguably, this rule also offers clearer and more precise guidance than New York's common law. Federal Rule 608(b) requires that the prior bad act be probative of the truthfulness or untruthfulness of the witness in order to use it to impeach. The Federal Rules recognize the potential limited value and prejudice and, therefore, prohibit the prosecution from using extrinsic evidence to prove the prior bad act.[201] In this way, the Federal Rules adopt a much narrower approach to prior bad acts, whereas New York potentially allows any bad act that satisfies the *Sandoval* balancing test. On the federal side, a defendant knows exactly what to expect from the start, due to the categories and buckets set forth above, whereas in New York, he would have to wait for the eve of trial with a *Sandoval* hearing to determine what he might face on cross-examination.

---

[194] Federal Rule of Evidence 609 prohibits the admission of a prior conviction that is more than ten years old. Fed. R. Evid. 609.

[195] Federal Rule of Evidence 609 permits impeachment of a witness with a prior conviction only if that crime was punishable by death, was a felony, or involved dishonesty or a false statement. Fed. R. Evid. 609.

[196] *See also Rule 609: Impeachment by Evidence Conviction of Crime*, 12 Touro L. Rev. 495 (1996) [hereinafter Touro]. FRE 609 states, in relevant part: "For purposes of attacking the credibility of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment . . . evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction. . . ."

[197] *Id.* at 503.

[198] FRE 609 categorizes prior convictions as automatically admissible, automatically inadmissible, or only admissible if the probative value outweighs the prejudicial effect. *Id.* Also, per the Federal Rules, the trial judge has discretion regarding whether to make a pre-trial ruling regarding prior felony convictions. *Id.* On the other hand, in New York, *Sandoval* creates a procedural right for criminal defendants to have a pre-trial hearing. *Id.*

[199] *Id.*

[200] Fed. R. Evid. 608.

[201] FRE 608(b) provides, in relevant part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination. . . ." Fed. R. Evid. 608.

Even before *Sandoval* set forth the procedural protocol, New York had allowed this uncertainty to exist.[202] Much of the potential *Sandoval* material in *Weinstein*—which were not convictions but rather prior bad acts—would have been inadmissible under the Federal Rules of Evidence.[203] However, under the New York rule, they were subject to the *Sandoval* balancing test set forth above, which the Court of Appeals held was decided incorrectly by the trial judge.[204]

Returning to *Molineux*, that decision from 1901 was actually a predecessor to Federal Rule of Evidence 404(b), which was enacted in 1975[205] and permits the admission of a defendant's previous criminal acts if they fall under a limited series of exceptions.[206] As stated in Part III, the *Molineux* Rule has been consistently reaffirmed in New York since its inception in 1901.[207] This general rule against non-propensity is similarly followed by rules in nearly every state and laid the groundwork for what are now Federal Rules 403 and 404(b).[208] For more than a century, the New York Court of Appeals has developed a tradition of excluding prior criminal evidence that demonstrates a defendant's criminal propensity.[209] This rule generally states that evidence of other crimes by the defendant is not admissible, intending to prevent prejudice against the defendant.[210] Since *Molineux* is so firmly rooted in New York law, there is no need to change or codify the law in response to the *Weinstein* decision.[211]

---

[202] See People v. Sorge, 93 N.E.2d 637, 638 (N.Y. 1950), where the Court of Appeals stated that a defendant may be interrogated upon cross-examination regarding any vicious or criminal act of his life that has a bearing on his credibility as a witness.

[203] McKenna, *supra* note 134, at 268.

[204] Some argue that New York's rules on impeachment are often inconsistently applied and often amended through caselaw, so adopting something similar to the Federal Rules could ensure more consistent application. *Id.* at 287. However, this article concludes that the Court of Appeals decision in *Weinstein* actually clarified any conflicting caselaw and thus there is no need to adopt the Federal Rules or codify as many state legislators now propose.

[205] Fed. R. Evid. 404(b).

[206] Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 Temp. L. Rev. 201 (2005); *See also* Rauch Wise, *Roland B. Molineux and his Illegitimate Offspring: The History and Mystery of 404(b*), 38 Champion 28, 29. The federal rule, for example, has exceptions to the general rule similar to the *Molineux* exceptions, allowing prior bad acts to be admissible if "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

[207] Brooks Holland, *Section 60.41 of the New York Criminal Procedure Law: The Sexual Assault Reform Act of 1999 Challenges Molineux and Due Process,* 27 Fordham Urb. L.J. 435, 444 (1999).

[208] *Id.* The Supreme Court has long warned about the dangers of propensity evidence. See *Boyd v. United States*, 142 U.S. 450, 458 (1892), where the court stated, "[h]owever depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

[209] Holland, *supra* note 207, at 445, 447.

[210] Wise, *supra* note 206, at 30.

[211] *See infra* Part VII.

Finally, with respect to sexual assault cases, Congress passed Federal Rule of Evidence 413 in 1994 to ensure the admissibility of a defendant's prior bad acts or other sexual assaults in sexual assault criminal cases.[212] Congress found that "Rule 413 is based on the premise that evidence of other sexual assaults is highly relevant to prove propensity to commit like crimes, and often justifies the risk of unfair prejudice. Congress thus intended that rules excluding this relevant evidence be removed."[213] Federal Rule 413 recognizes the sensitive and unique nature of sexual assault cases and provides extra protection for the prosecution by permitting evidence of the defendant's commission of another offense of sexual assault, which may be considered for its bearing on any matter to which it is relevant.[214]

Technically, a narrow application of Federal Rule 404(b) would preclude the need for Federal Rule 413,[215] but Congress enacted FRE 413 to admit evidence of unrelated, uncharged misconduct in sexual offense cases, which previously under FRE 404(b) were not admissible.[216] The public demand for more convictions against sex offenders has led to the addition of more specific evidentiary rules in sex offense cases.[217] This is despite some commentators' belief that there was no need for this specific exception to Rule 404(b).[218] In 1999, there was an attempt to codify similar language of FRE 413 into the New York Criminal Procedure Law, but it did not pass.[219] This attempt would have upended the legal principles established under *Molineux*, which, as the past hundred years have demonstrated, New York has preferred to follow.[220] New York has consistently resisted attempts to fall in line with jurisdictions that adopted FRE 413.[221]

---

[212] *Id*. at 34.

[213] *Id.*

[214] Fed. R. Evid. 413.

[215] There have been questions about the constitutionality of FRE 413, but the 10th Circuit deemed it constitutional. The issues raised concerned (1) the propensity prohibition has existed for so long that it is settled usage; (2) propensity evidence undermines the burden of proof by creating a presumption of guilt; and (3) propensity evidence erodes the presumption of innocence. Holland, *supra* note 207, at 448.

[216] Reed, *supra* note 206, at 238.

[217] *Id.*

[218] *Id.*

[219] Holland, *supra* note 207, at 436. *See infra* Part VII, as state legislators have renewed this proposed bill in the weeks after the *Weinstein* decision.

[220] *Molineux*, 61 N.E. at 294. FRE 413 specifically allows this evidence for any purpose, including propensity.

[221] In upholding FRE 413's constitutionality, the 10th Circuit relied on its non-propensity justification, the safeguards existing in FRE 403, and the notice requirement in 413(b). United States v. Enjady, 134 F.3d 1427, 1432-33 (10th Cir. 1998). Various states use different approaches concerning admissibility of evidence of a defendant's propensity for sexual assault cases. *See* Holland, *supra* note 207, at 450 (recognizing Georgia's use of "lustful disposition" to determine motive) and Wise, *supra* note 206 (highlighting Nevada's focus on motive rationale to prove motive). Many states use a variation of a "lustful disposition" rule that permits the admission of uncharged sexual misconduct evidence to establish that a defendant has a lustful disposition. Holland, *supra* note 207, at 450. These rules typically allow the prosecution to admit propensity evidence for "adultery, seduction, statutory rape upon one

VI. THE *WEINSTEIN* APPELLATE DECISIONS

A. Appellate Division, First Department

As referenced in Part II, Weinstein made two arguments on appeal. First, he argued he was unfairly prejudiced by the trial court's decision to permit *Molineux* evidence of uncharged crimes. Second, he argued he was deprived of his constitutional right to testify in his own defense when the court granted in part the prosecution's *Sandoval* motion.[222]

In its opinion, the Appellate Division offered a brief history and explanation of *Molineux* and its permitted exceptions.[223] It summarized the Prosecution's arguments that the *Molineux* evidence was properly admitted under the recognized intent exception.[224] According to the prosecution, this evidence was essential to combat Weinstein's attempts to point to activity outside the charged encounters as providing that the sexual encounters were consensual.[225] The prosecution's rationale was that if Weinstein attempted to raise the issue of consent or that he did not have the intent to use forcible compulsion against the victims, then the evidence of other uncharged sexual misconduct was necessary to combat this argument.[226] This falls squarely within the *Molineux* intent exception. However, Weinstein argued on appeal that the testimony of the *Molineux* witnesses was unnecessary because, if he was guilty of the crimes charged, the intent behind his actions against the complainants would be evident on its face.[227] Weinstein referred directly to the elements of the charges and argued that "forcible compulsion" is an element of both rape and criminal sexual act, so in order to be guilty of those offenses, he would need the requisite intent for the actual crimes charged.[228] As a basis for this argument, Weinstein relied on *People v. Var-*

---

under the age of consent and incest, acts of sexual intercourse between the parties before the offense charged in the indictment. *Id.* at 457. In some states, the exception is applied broadly to show a defendant's general sexual disposition. *Id.* For example, Georgia will allow evidence of similar previous transactions to show a lustful disposition and to corroborate a victim's testimony. *Id.* at 458. In Georgia, there only needs to be evidence that a defendant was the perpetrator of both crimes and sufficient similarity or connection between the independent crime and the offenses charged. *Id.* Nevada focuses on the motive rationale and allows whatever might motivate one to commit a criminal act is legally admissible to prove motive. Wise, *supra* note 206. California codified a lustful disposition exception to their rules of evidence and found that introducing evidence of other offenses, which demonstrate a defendant's predisposition to commit similar sex crimes, is proper and not a violation of due process. Reed, *supra* note 206, at 239.

[222] *Weinstein*, 207 A.D. 3d at 57, 61.

[223] *Id.* at 58.

[224] *Id.* at 63.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.* at 63–64. A person is guilty of criminal sexual act in the first degree, under Penal Law 130.50, repealed in September 2024, when he or she engages in oral sexual conduct or anal sexual conduct with another person by forcible compulsion. A person is guilty of rape in the first degree, under Penal Law

gas, in which the Court of Appeals reversed a conviction because evidence of prior sexual assaults could only serve the improper purpose of showing the defendant's propensity to commit sexual offenses.[229] Still, the Appellate Division highlighted and distinguished the instant case as very different from *Vargas*, especially as it concerned the relationship between Weinstein and the complainants. It stressed that the *Weinstein* jury could have believed the testimony of the complainants as to how the events occurred and at the same time accepted that the defendant believed that they had consented due to their complex relationship with him.[230]

Next, the Court addressed Weinstein's *Sandoval* arguments and again did not find them convincing. The trial court permitted the prosecution to question Weinstein about the sex offenses against the three *Molineux* witnesses and the uncharged bad acts against one of the complainants, along with twenty-eight acts spanning nearly thirty years.[231] The court acknowledged the "unquestionably large" amount of material and noted the "sheer size" but nevertheless rationalized its decision based on the circumstances presented by the case.[232] The court relied on the justification that these bad acts reflected a willingness to place his self-interest above the interests of another person and that the *Sandoval* determination rested largely within the reviewable discretion of the trial court.[233] It also noted that the trial court made some specific determinations and excluded some potential *Sandoval* evidence, which demonstrates that it did exercise sufficient discretion in its analysis.[234]

The Appellate Division affirmed the judgment of the trial court, which convicted Weinstein of criminal sexual act in the first degree and rape in the third degree, along with a sentence of twenty-three years in prison.

130.35, when he or she engages in sexual intercourse with another person by forcible compulsion. A person is guilty of rape in the third degree under Penal Law 130.35 when he or she engages in sexual intercourse with another person without such person's consent. Weinstein argued that, if the jury believed the complaints, which included testimony about forcible compulsion, all elements of the crime would be established and a conviction would be warranted.

[229] *Id.* at 64.

[230] *Id.* at 65. The Appellate Division stated, "the People could have attempted to prove defendant's guilt merely by relying on the testimony of [the three complainants], but that is an insufficient reason to preclude *Molineux* evidence." The author finds this statement unconvincing. The fact that guilt could be established from the testimony of the complainants is precisely the reason to preclude *Molineux* evidence. *See supra* Part III. The author finds the caselaw cited by the Appellate Division unpersuasive and mere propensity evidence couched by non-propensity reasoning, such as to provide context, to paint a clearer picture, or to offer background information.

[231] *Weinstein*, 207 A.D. 3d at 68.

[232] *Id.* at 68–69.

[233] *Id.* at 69.

[234] *Id.* at 69–70. The trial court rejected aspects of the defendant's bullying behavior, which lacked specificity. *Id.* at 69.

B. Court of Appeals

On April 25, 2024, the Court of Appeals held that the Appellate Division's decision

ran afoul of the time-honored New York rules of evidence, reversed the convictions, and ordered a new trial.[235]

In its reversal on the *Molineux* issue, the Court of Appeals concluded that the trial court erroneously admitted testimony of uncharged, alleged prior sexual acts against persons other than the complainants of the underlying crimes because that testimony served no material non-propensity purpose.[236] The Court of Appeals rejected the prosecution's theory that the *Molineux* evidence was needed to show the Defendant's state of mind about intent and the complainants' consent and said that this analysis would eviscerate the time-tested rule against propensity evidence.[237] The Court goes into much detail about how the *Molineux* evidence does not fit into the exception for intent and discusses how the trial court erroneously held that this testimony was used for a non-propensity purpose.[238] The Court stressed how the complainants' testimony was not equivocal on the issue of consent. All three complainants testified in painful detail about violent, forcible sexual assaults.[239] The Court of Appeals found the Appellate Division's concern about the jury's potential confusion on the consent issue to be "inconceivable" as the complainants' descriptions of events "belie any such equivocation in the moment."[240]

The Court went on to stress that the intent required is the intent to perform the prohibited act, which here, was the intent to forcibly compel another to engage in the sexual act.[241] "[E]vidence of prior criminal acts to prove intent will often be unnecessary, and therefore should be precluded even though marginally relevant, where intent may be easily inferred from the commission of the act itself."[242] The Court of Appeals saw through this veiled attempt to hide behind a *Molineux* exception and acknowledged that

---

[235] *Weinstein*, 2024 WL 1773181 at *16.

[236] *Id*. at *1.

[237] *Id.* at *7.

[238] *Weinstein*, 2024 WL 1773181 at *9.

[239] "There is no equivocality regarding consent when a person says 'no' to a sexual encounter, tries to leave, and attempts to physically resist their attacker before succumbing to the attacker's brute physical force. No reasonable person would understand such behavior as having communicated anything other than their rejection of sexual activity. Indeed, a contrary proposition perversely turns the concept of consent on its head. Simply put, there is nothing consensual about the conduct complainants described." *Id.* at *10.

[240] *Id.* at *10. See also *Weinstein*, 207 A.D. 3d at 63, as forcible compulsion is an element of each of the charged offenses. For the prosecution to prove the crime beyond a reasonable doubt, they needed to prove each element beyond a reasonable doubt. The complainants' testimony about intent and lack of consent was clear, not equivocal, and should have been sufficient to convict.

[241] *Id.* at *10.

[242] *Id.* (quoting *Alvino*, 519 N.E.2d at 812).

the true purpose was to bolster the complainants' credibility, which is an improper propensity purpose under *Molineux*.[243] The Court is cognizant of the sensitive nature of this type of case, but stressed that "justice for sexual assault victims is not incompatible with well-established rules of evidence designed to ensure that criminal convictions result only from the illegal conduct charged."[244] The Court of Appeals stressed in a variety of ways that the testimony from the *Molineux* witnesses were superfluous and were "pure propensity" evidence that is clearly inadmissible against a criminal defendant under *Molineux* and its century-old progeny.[245]

In its reversal on the *Sandoval* issue, the Court of Appeals concluded that the trial court erred by ruling that the defendant, who had no criminal history, could be cross-examined about those allegations as well as numerous allegations of misconduct that portrayed him in a highly prejudicial light.[246] The Court held that this evidence served no purpose other than to display his loathsome character to the jury, it impacted his decision to take the stand, and undermined the fact-finding process in this case.[247]

The Court acknowledged that the twenty-eight prior bad acts that the trial court allowed were appalling, shameful, and repulsive, but considering the defendant's lack of any prior criminal history, these acts had little if any probative value as to his lack of in-court veracity and simply served to unfairly prejudice the jury against him.[248] The court stressed that *Sandoval* does not legitimize destroying a defendant's character under the guise of prosecutorial need.[249] The Court of Appeals, with its *Sandoval* ruling, adheres to precedent and applies it straightforwardly, rectifying a trial court ruling that undesirably deterred the defendant from taking the stand and denied the jury significant material evidence.[250] The proposed *Sandoval*

---

[243] *Id.*

[244] *Id.*

[245] *Id.* at *12. The court offers a different perspective on *Vargas*, 666 N.E.2d 1357, which the Appellate Division said supported the convictions and was entirely distinguishable. The Court of Appeals found striking similarities between the two cases, on which Weinstein based many of his arguments. As the Court set forth in *Vargas*, "[T]wo starkly contrasting scenarios were presented, with only credibility in issue. If the trier of fact believed defendant's version of events, complainant consented to a sexual encounter with him . . . If the trier of fact found complainant more credible, defendant used force and threats to rape her, with intent readily inferable from the acts alleged. As in [*People v. Hudy*, 535 N.E.2d 250, 259 (N.Y. 1988)], the prior misconduct evidence was relevant only to lend credibility to complainant by suggesting that because defendant had engaged in sexual misconduct with others, he was likely to have committed the acts charged. The evidence therefore was improperly admissible." *Weinstein*, 2024 WL 1773181 at *13.

[246] *Weinstein*, 2024 WL 1773181 at *1.

[247] *Id.* at *13.

[248] *Id.* at *14.

[249] *Id.* at *14.

[250] *Id.*

evidence was not the type of conduct that would assist the jury in measuring his credibility on the stand.[251]

VII. WHAT COMES NEXT?[252]

In the aftermath of this decision by the Court of Appeals, and as Weinstein's re-trial looms into the not-so-distant future, the New York Legislature has responded to the public outcry of what many see as defects in the state's criminal and evidentiary rules. It is reasonable that so many New Yorkers, and people across the country, were left wondering how someone so guilty in the court of public opinion could secure such an advantageous decision from New York's highest court.[253] Indeed, the Court of Appeals decision was issued on April 25, 2024, and there was movement in Albany just a few weeks later.

On May 15, 2024, New York State Senator Anthony Palumbo introduced Proposed Bill S-9445 in the New York State Senate.[254] This bill aimed to codify *Molineux* and permit relevant evidence to help prove a defendant's motive and intent.[255] While motive and intent are already two of the enumerated *Molineux* exceptions, the rationale behind the bill is that having these exceptions codified in the laws of New York might eliminate some of the uncertainty judges must navigate in interpreting these rules

---

[251] *Id.*

[252] On September 18, 2024, Harvey Weinstein pleaded not guilty to a new sexual assault charge: one count of criminal sexual act in the first degree. The Associated Press, *Harvey Weinstein pleads not guilty to new sex crime charge in New York*, NPR (Sept. 18, 2024), https://www.npr.org/2024/09/18/nx-s1-5118402/harvey-weinstein-sex-crime-charge-new-york. The new charge accuses Weinstein of forcing oral sex on a woman some time between April 29 and May 6, 2006. *Id.* Prosecutors said that a grand jury heard evidence of up to three alleged sexual assaults that took place in New York from the mid-2000s to 2016. *Id.* On October 23, 2024, the trial court granted the prosecution's request to consolidate both cases and said it would decide on a new trial date by January 29, 2025. Associated Press, *supra* note 8.

[253] *See* Susan Chira, *Can #MeToo Coexist With Protections for Defendants?,* The Marshall Project (2024), https://www.themarshallproject.org/2024/05/04/sex-crimes-weinstein-me-too (last visited Dec. 23, 2024). After Weinstein's reversal, there have been cries of despair that the legal system lags behind the "#MeToo reckoning." The power behind the #MeToo movement is the propensity argument of "because it happened to me, too, and you, too, it's more likely to be true that it happened at all." *See also* Chris Francescani, Josh Margolin & Aaron Katersky*, Timeline: Harvey Weinstein's path to his NYC sex crimes conviction and reversal,* ABC News (Apr. 26, 2024), https://abcnews.go.com/US/timeline-harvey-weinsteins-path-york-city-rape-sexual/story?id=67708458 (last visited Dec. 23, 2024) (timeline of allegations of sexual assault against Harvey Weinstein that were momentous for the "#MeToo" movement, which sparked in 2017).

[254] S. Res. 9445, 2023-2024 Leg., Reg. Sess. (N.Y. 2023), https://www.nysenate.gov/legislation/bills/2023/S9445. Co-sponsors of the bill include Senators Borrello, Canzoneri-Fitzpatrick, Lanza, Martins, Murray, Rhoads, and O'Mara.

[255] Steven D. Rhoads, *Senate Republicans Introduce Bills to Close Loopholes That Allowed Conviction of Dangerous Sexual Predator Harvey Weinstein to be Overturned,* N.Y. State Senate (May 23, 2024), https://www.nysenate.gov/newsroom/press-releases/2024/steven-d-rhoads/senate-republicans-introduce-bills-close-loopholes (last visited Dec. 26, 2024).

from post-*Molineux* case law.[256] At the end of the 2024 legislative session, and as of the date of this article submission, this bill remains in the New York State Senate Codes Committee.[257]

On May 9, 2024, Senate Deputy Leader Michael Gianaris introduced Proposed Bill S-9276 in the New York State Senate, which passed by a vote of 55-4 in the Senate on May 22, 2024.[258] This bill would allow evidence that the defendant committed prior sexual offenses to be introduced in a proceeding where the defendant is accused of sexual assault.[259] This bill is a renewed attempt to codify Federal Rule of Evidence 413 after the failed attempt from 1999.[260] The evidence may be considered to prove that the defendant had a propensity to engage in similar wrongful acts, but the court retains the discretion to exclude such evidence if the probative value is outweighed by the probability of undue prejudice to the defendant.[261] The bill's justification is that the *Molineux* rule sets a high threshold for admissibility, and codifying FRE 413 ensures that evidence of prior offenses would be admissible in sexual offense proceedings.[262]

The Bill's supporters feel the strong need to act quickly to prevent a Weinstein-like result from happening again.[263] However, the bill's language about "any matter to which it is relevant" includes propensity as a legitimate purpose and goes against a century of jurisprudence to the contrary. In theory, the language is saved by the judge's ability to perform a probative/prejudicial balancing test, but the bill still permits prior bad acts to establish a propensity to commit the instant act. For this reason, members of the New York State Assembly have expressed concern that this might lead to undue prejudice against defendants relative to the probative value of the evidence.[264] As of the date of this writing and submission of this article, this

---

[256] *Id.* "The legislature must act to close pro-criminal loopholes to protect victims and the rule of law in New York State. Codifying the *Molineux* rule and preventing the cherry-picking of judicial replacements are important safeguards against a radical court intent on legislating from the bench." According to Senator Robert Ortt, "They weaponized the courts in order to preserve their own political self-interests, and this is the result – serial sexual assaulters are allowed to walk free."

[257] N.Y. S. Res. 9445.

[258] S. Res. 9276, 2023-2024 Leg., Reg. Sess. (N.Y. 2024), https://www.nysenate.gov/legislation/bills/2023/S9276.

[259] *Id.*

[260] Co-sponsors of the current bill include Senators Hoylman-Sigal, Scarcella-Spanton, and Sepulveda.

[261] N.Y. S. Res. 9276.

[262] *Id.*

[263] *Assemblywoman Paulin & Senator Gianaris Introduce Legislation to Make Evidence of Prior Sexual Offenses Admissible at Trial*, Assemblywoman Amy Paulin, Assembly District 88 (November 6, 2024, 5:51PM), https://assembly.state.ny.us/mem/Amy-Paulin/story/110385. (Assemblywoman Paulin stated "sex offense trials often rest on the testimony of the survivor, whose credibility is then attacked. That's why patterns of behavior must be allowed as evidence." Assemblyman Dinowitz stated "the absence of a statutory code of evidence in New York has left us relying on antiquated rules, like the *Molineux* Rule, which often provides inadequate in the face of heinous crimes like sexual assault.").

[264] Brian Lee, *Bill, Spurred by Weinstein Case, Opening Door to "Molineux" Evidence, Needs Gubernatorial Boost, Lawmaker Says*, New York Law Journal (May 29, 2024), https://www.law.com/

bill has passed in the Senate but remains pending in the Assembly Codes Committee.[265]

Weinstein's re-trial has a tentative date set for sometime in 2025.[266] In keeping with the guidance set forth by the Court of Appeals decision, Judge Curtis Farber, the new trial judge, has ample guidance to avoid some of the mistakes made during the first trial. As for *Molineux*, he might be inclined to prohibit evidence from the three separate witnesses, but if he does permit any part of it, he must ensure that their testimony contributes a specific non-propensity argument, separate and aside from intent and consent. If he permits any of the three *Molineux* witnesses to testify, he will undoubtedly have the prosecution make a very clear record of the justification for what *Molineux* exception they rely on. When it comes time for the *Sandoval* hearing, he will need to be more selective and admit less than twenty-eight of the prior bad acts and focus solely on the ones that speak directly to Weinstein's in-court credibility. All twenty-eight prior acts demonstrate Weinstein's willingness to put his self-interest above the needs of society, so the court must limit the evidence to the ones that are most relevant to the charges and his credibility. The Court of Appeals stressed many times that Weinstein was improperly dissuaded from taking the stand, which denied the jury significant material evidence, so the court must take care to give him an opportunity to testify without fear of facing the "kitchen sink" during cross-examination.

While the public was justifiably outraged at the decision, New York legislators were a bit too hasty to take action in the immediate aftermath of this decision. It was rushed and imprudent to attempt to disregard one hundred years of common law doctrine in the aftermath of a single unpopular decision. If New York decides to codify the rules of evidence and/or closely

---

newyorklawjournal/2024/05/29/bill-spurred-by-weinstein-case-opening-door-to-molineux-evidence-needs-gubernatorial-boost-lawmaker-says/ (last visited Dec. 23, 2024). Opponents of the bill stress that any adjustment to the *Molineux* standard deserves more study and deliberation to prevent prejudice against defendants, and the legislature should not provide an impulsive reaction to media moments but rather must think about the rights of all people accused in New York State, aside from just Mr. Weinstein. In fact, Weinstein's attorneys commented that "it would be inadvisable to rush through legislation based on a single court decision-especially after this state has followed the *Molineux* decision for the last 125 years. Assemblymember Lunsford stated, "you can't say once a rapist, always a rapist, that is a pretty fundamental tenet of our justice system and it's far beyond what the federal law does that this is designed to emulate." Jefferson, Austin C. *Assembly has reservations about the Harvey Weinstein bill*, City & State New York (November 6, 2024, 5:59PM), https://www.cityandstateny.com/policy/2024/05/assembly-has-reservations-about-harvey-weinstein-bill/396892/.

[265] Rebecca C. Lewis & Austin C. Jefferson, *The Bills that passed and failed to pass in the last week of session*, City & State N.Y. (2024), https://www.cityandstateny.com/policy/2024/06/bills-passed-and-failed-pass-last-week-session/397243/ (last visited Dec. 23, 2024).

[266] *See* Associated Press, *supra* note 8. *See also* Rich McHugh, *Jessica Mann Speaks: Weinstein accuser "99% certain" she's ready for a retrial,* NewsNation (May 1, 2024), https://www.newsnationnow.com/crime/weinstein-accuser-ready-retrial/ (last visited Dec. 26, 2024). Jessica Mann is ready to return to court to testify at Weinstein's retrial.

mimic the Federal Rules, it should be after a slow and methodical process of study, input from practitioners and academics, and a thorough review of the jurisprudence from these two cases. It should not be an impulsive reaction to appease constituents who were unhappy with one decision. Overall, it is this author's opinion that *Molineux* and *Sandoval* have worked for 125 and 50 years, respectively, and while they may lead to some inconsistencies, the Court of Appeals in *Weinstein* has set forth clear guidance for lower courts to follow. If trial courts read the opinion carefully and follow its guidance, as Judge Farber will certainly do, this will eliminate any inconsistencies and ensure that justice is served for both crime victims and criminal defendants in accordance with established New York jurisprudence.

VIII. CONCLUSION

While the evidence against Harvey Weinstein was strong, and he may indeed be guilty of the crimes for which he was charged, if one can remove oneself from the strong emotions that this case elicited and focus on New York law as it existed for the past century, the Court of Appeals got it right. The Court used the correct analysis of *Molineux* and *Sandoval* to make an unpopular but legally sound decision. For various reasons, New York has resisted attempts to codify its rules of evidence and create rules to mimic the Federal Rules of Evidence and has preferred to follow the common law set forth by these two cases. Perhaps that will change in the future, and New York will adopt one of the bills referenced in Part VII. But as of April 2024, when the Court of Appeals made its decision, none of that has happened. The Court had over one hundred years of doctrine establishing propensity prohibitions and prophylactic rules against the dangers of unfair character evidence, and it provided clear guidance for the lower courts to follow. Absent similar legislative effort to deliberate on these vital concerns, any legislation in favor of loosening these protections would be overly hasty.

The Court ruled that the *Molineux* witnesses did not provide any non-propensity evidence, and the prosecution's attempt to use the intent exception was not persuasive, as the charged crimes were more than sufficient to establish Weinstein's intent. Moreover, the potential admission of twenty-eight random prior bad acts, which in effect served to preclude Weinstein from testifying, was an abuse of discretion by the trial court. The Court's decision, while it made a splash in the headlines, was correct as a matter of New York law with the background of a firm understanding of New York criminal procedure and evidence as it relates to *Molineux* and *Sandoval*. The world will be watching the re-trial for what happens next, but at least for now, New York law remains as it was, and the *Weinstein* decision helped to clarify and explain these two central tenets of New York state criminal laws.

Article

IT'S PAYBACK TIME: IMPROVING TEXAS'S STANDARD FOR COMPENSATING THE WRONGFULLY IMPRISONED

Cameron Hekkert[1*]

For almost seventy years, Texas has recognized the importance of righting the state's wrongs and compensating people whom the state has wrongfully imprisoned. As Texas's legislation has changed throughout those seventy years, the amount of compensation has increased to account for the accurate value of a person's financial losses due to wrongful imprisonment. However, in those seventy years, one problem has persisted: Texas excludes a broad amount of wrongfully imprisoned people from receiving compensation due to the imposition of an innocence classification and a statute of limitations.

As scientific methods improve and social movements condemn government misconduct, the number of exonerees and wrongfully imprisoned people rises throughout the country. Many states, as well as the federal government, have statutes that dictate who can recover compensation for the time they spent in prison and how much. Texas is at the forefront of these jurisdictions in terms of the amount of compensation awarded to the wrongfully imprisoned. Where Texas's legislation is fatally flawed is in the requirement of a finding of innocence to be eligible and the imposition of a statute of limitations to apply for this compensation.

This Article examines the innocence requirement and statute of limitations and provides a solution for those who are excluded by proposing that the Texas legislature amend the statute to eliminate both the innocence requirement and the statute of limitations to provide compensation to more wrongfully imprisoned people. Texas should eliminate the innocence requirement from its compensation statute because it prejudices those who

[1] * J.D. Texas Tech University School of Law, 2024; B.S. Sport Management, Texas Tech University 2021. The Author would like to thank her family for their constant support and encouragement through law school as well as the members of Texas Tech Law Review for their friendship and mentorship through the process of writing this Article.

receive relief through other avenues, such as prosecutorial misconduct or constitutional violations, that do not necessarily prove the innocence of the exoneree. Additionally, the statute of limitations should be eliminated because it places filing limits on exonerees who face struggles to reintegrate after their release from prison and may be unaware of their ability to file for compensation, thus allowing the statute of limitations to pass without a filing. This Article advocates for the removal of these two problematic elements of Texas's compensation statute to improve the lives of all exonerees who are granted relief from being wrongfully imprisoned.

I. Introduction 39
II. Current Statutes for Compensating the Wrongfully Imprisoned .. 41
A. The History of Compensation for the Wrongfully Imprisoned 41
B. The Tim Cole Act 43
C. Texas's Exoneration Process 45
III. The Necessity of a Compensation Statute 46
A. Section 1983 Claims are not Reliable Avenues of Compensation 47
B. Obstacles Associated with Section 1983 Claims 47
IV. Proposed Amendments to Texas's Compensation Statute 49
A. Eliminate the Requirement of Relief on the Basis of Innocence 50
B. Remove the Statute of Limitations 57
C. Require a Public Statement Regarding Compensation 61
D. Apply the Statute Retroactively to Compensate Any Person Who Meets the New Criteria 62
E. Return to the "Gold Standard" of Exoneree Compensation ... 64
V. Conclusion 70

I. INTRODUCTION

Learned Hand's infamous words—that "our procedure has been always haunted by the ghost of the innocent man convicted"—serve as a distinct reminder that the American criminal legal system is not flawless.[2] There will always be a risk of imprisoning those who have not committed a crime. When these great travesties occur, American principles of freedom and liberty require that the victims of the criminal justice system are recompensed for their loss of liberty. Unfortunately, this does not always occur.

On May 23, 1989, three people were shot and one killed in the course of a robbery of a Fajita Junction restaurant in Houston, Texas.[3] Robert Gandy, a 24-year-old, was implicated in the crime by one of the suspects as the man who supplied the weapons and drove the robbers to and from the restaurant to complete the crime.[4] In reality, Gandy drove the robbers to the restaurant because he believed they were visiting with former co-workers.[5] Nevertheless, in 1990, Gandy was tried for aggravated robbery, convicted, and sentenced to life in prison.[6] After fourteen years in prison, Gandy was released on parole on May 15, 2004.[7]

Gandy's conviction largely relied on testimony from an FBI agent who testified that bullets retrieved from the victims were linked to ammunition found in a box in Gandy's home, using a process called comparative bullet lead analysis (CBLA).[8] CBLA was premised on the belief that bullets in the same ammunition box would be made at the same time in the same factory, thus having identical chemical composition.[9] This analysis, however, was flawed.[10] In 2004, an independent review of CBLA by the National Research Council determined that there was no scientific basis for the FBI to determine if bullets were from the same ammunition box.[11] Therefore, there was no scientific evidence to connect Gandy with the robbery.[12]

---

[2] Arnold H. Loewy, Given That We Know We Sometimes Convict Innocent People, What, If Anything, Does That Say About the Death Penalty?:*The Death Penalty In A World Where the Innocent Are Sometimes Convicted*, 41 TEX. TECH L. REV. 187, 187 (2008); *see also* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (criticizing procedural formalism and excessive sentimentality for hindering effective prosecution).

[3] Maurice Possley, Other Harris County, Texas Exonerations, in THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5754. (June 26, 2020).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Innocence Center, *Lead Bullet Analysis*, https://theinnocencecenter.org/resource/lead-bullet-analysis/ (last visited Nov. 17, 2024).

[10] Possley, *supra* note 3.

[11] *Id.*

[12] *Id.*

In 2017, after learning of the independent review that identified CBLA as a "junk science," Gandy filed a writ of habeas corpus requesting his conviction be vacated due to the reliance on faulty science.[13] In 2019, a Harris County Criminal District Judge recommended the writ be granted, and later that same year, the Texas Court of Criminal Appeals granted the writ and vacated Gandy's conviction.[14] Gandy's case was remanded to Harris County and in 2020, the prosecution dismissed the charge.[15] Gandy was finally free from the shackles of the criminal justice system.[16] Or so he believed.[17]

Gandy was granted relief through a writ of habeas corpus but was not given the classification of actual innocence.[18] Although Gandy spent close to fourteen years wrongfully imprisoned after being convicted on the basis of faulty science, he has not received compensation for the time he spent incarcerated.[19] Gandy has been exonerated for over four years, yet he has still not received compensation for the time he spent in prison.[20] This is because he does not qualify for compensation under the current legislation in Texas, which requires that a person be granted relief on the basis of innocence.[21] Because Gandy's relief did not come with the stipulation that he was innocent, he is not entitled to compensation for the *fourteen* years that he spent in prison.[22]

This Article discusses necessary amendments to Texas's current statute to prevent injustices like the one described above. Part II provides background information on the avenues of compensation for the wrongfully imprisoned after they have gained relief from the state.[23] Part III details the avenues of compensation for exonerees and describes why compensation statutes are necessary for exonerees to recover for their time spent wrongfully imprisoned.[24] Part IV proposes amendments to the legislation which will

---

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See generally id.* (Gandy was released from prison but has not yet recovered compensation for the time he spent wrongfully imprisoned).

[18] *Ex parte* Gandy, No.WR-22,074-10, 2019 WL 2017291, at *1 (Tex. Crim. App. May 8, 2019) (per curiam).

[19] Possley, *supra* note 3.

[20] E-mail from Texas Comptroller of Public Accounts, Open Records Section to Cameron Hekkert (Oct. 18, 2022) (on file with author) (list of names from the Texas Comptroller of every person who has been paid under the compensation statute since 2011).

[21] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (outlining eligibility criteria for compensation and health benefits, requiring incarceration and proof of innocence through a pardon or habeas corpus relief).

[22] *See Gandy*, 2019 WL 2017291 at *1.

[23] *See infra* Part II (detailing the history of Texas's compensation for exonerees and the exoneration process).

[24] *See infra* Part III (describing compensation through statutes and section 1983 claims).

encompass a broader number of exonerees and provide compensation to more wrongfully imprisoned people who are entitled to it.[25]

II. CURRENT STATUTES FOR COMPENSATING THE WRONGFULLY IMPRISONED

Thirty-eight states, the District of Columbia, and the federal government all have legislation designed to compensate those who have been wrongfully imprisoned.[26] While each state has different standards for who qualifies for compensation as well as the amount each person should be compensated, it is generally accepted by scholars that society has a duty and obligation to provide assistance to those who have been wrongfully imprisoned.[27] This obligation manifests itself through monetary compensation, and the provision of support services such as food, transportation, housing, medical care, counseling services, education assistance, employment assistance and more.[28] As exonerations rise due to scientific advances, these services become increasingly important to assist a growing number of people who are found to have been wrongfully convicted and wrongfully imprisoned.[29]

This Part begins with an inquiry into exonerations in Texas and how it affects the state today.[30] Next, this Part outlines Texas's history of compensating the wrongfully imprisoned and then discusses the most recent amendment to Texas's compensation statute, the Tim Cole Act.[31]

A. The History of Compensation for the Wrongfully Imprisoned

The first time Texas recognized that people who have been wrongfully imprisoned are entitled to compensation was in 1956.[32] Texas recognized this right by adding a compensation amendment to Article III of the Texas Constitution.[33] Section 51-c of the Texas Constitution states:

The Legislature may grant aid and compensation to any person who has heretofore paid a fine or served a sentence in prison, or who may hereafter

---

[25] *See infra* Part IV (advocating for specific amendments to Texas's current legislation that compensates exonerees).

[26] National Registry of Exonerations, *Compensation for Exonerees*, Univ. of Mich. L. Sch., https://www.law.umich.edu/special/exoneration/Pages/Compensation.aspx (last visited Nov. 17, 2024).

[27] Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. Chi. L. Sch. Roundtable 73, 74 (1999).

[28] *Id.*

[29] *Id.* at 75 (post-conviction DNA testing is increasing the number of wrongfully convicted).

[30] *See infra* Section II.A (outlining the ways exonerees recover compensation for their time spent wrongfully imprisoned).

[31] *See infra* Section II.B–C (describing the Tim Cole Act and exoneration process in Texas).

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

[33] TEX. CONST. art. III § 51-c.

pay a fine or serve a sentence in prison, under the laws of this State for an offense for which he or she is not guilty, under such regulations and limitations as the Legislature may deem expedient.[34]

After this amendment was passed by the Texas Legislature, the Texas Constitution was determined not to be self-serving by the Texas Court of Civil of Appeals in Texarkana in 1958.[35] This determination meant that additional legislation was necessary to provide a statutory right to compensation for wrongful imprisonment.[36]

State v. Clements was the first case in which an exoneree attempted to recover compensation from the state through amendment 51-c.[37] Clements sued the state seeking "damages directly and proximately resulting from his wrongful arrest, indictment, conviction, sentence and imprisonment in the penitentiary aggregating $149,500."[38] While the court recognized that Clements was the type of person the amendment was specifically meant to apply to, the court ruled that the amendment to the Texas Constitution was not able by itself to award compensation to those who had been wrongfully imprisoned.[39] Because the amendment was not self-executing, the Texas legislature needed to first take action for a wrongfully imprisoned person to be able to recover compensation.[40]

In 1965, the Texas Legislature enacted House Bill No. 904, a statute in the Texas Penal Code.[41] The statute granted compensation to those who had been wrongfully imprisoned if they met the following criteria: (1) the person had served in whole or in part a prison sentence in Texas; (2) the person had pleaded "not guilty" to the charge which led to their imprisonment; (3) they were not guilty of the crime for which they were sentenced; and (4) they had received a full pardon from the Governor of Texas for the crime and punishment.[42] This legislation required that after receiving a pardon, the wrongfully imprisoned person must initiate a judicial proceeding to receive compensation.[43] Compensation for physical and mental pain and suffering was capped at $25,000. When coupled with compensation for medical expenses, the total

---

[34] *Id.*

[35] *See* State v. Clements, 319 S.W.2d 450, 453 (Tex. Civ. App.–Texarkana 1958, writ ref'd) ("It has been held that a provision which merely authorizes action by the Legislature is not self-executing.").

[36] *Id.*

[37] *Id.* at 452.

[38] *Id.* at 451.

[39] *Id.* at 452–53.

[40] *Id.* at 453.

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

[42] *Id.* § 2.

[43] *Id.*

could not exceed $50,000.[44] Adjusted for inflation, this amount of compensation in 1965 would be equivalent to $504,480.77 in 2024.[45]

From 1965 to 2001, this legislation had no substantive changes regarding who was entitled to compensation, but the statute did move from the Penal Code to the Texas Civil Practice and Remedies Code.[46] In 2001, the legislature changed the requirements for compensation by adding additional procedural avenues to acquire compensation and increasing the amount of compensation that could be awarded.[47] Those who were entitled to compensation under the statute could now apply for compensation through the Texas Comptroller.[48] Additionally, those who had been wrongfully imprisoned were now entitled to $25,000 for each year they served in prison, or $500,000 total if they were incarcerated for over twenty years.[49] In 2007, the statute was again amended, increasing the compensation award to $50,000 per year of incarceration or $100,000 per year if the incarcerated person was sentenced to death.[50]

B. The Tim Cole Act

In 2011, the Tim Cole Act was passed, implementing the most recent amendment to Texas's compensation statute.[51] The story of Tim Cole is a tragic one, and one that hits close to home for Lubbock, Texas. Tim Cole, a 26-year-old Texas Tech student and military veteran, was convicted of sexually assaulting a woman in 1986 and sentenced to twenty-five years in prison.[52] In 1995, after the statute of limitations for rape had passed, another man wrote to Lubbock officials confessing that he had committed the assault.[53] Tragically, Cole passed away in prison in 1999, without knowing another man had attempted to confess to the crime.[54] Cole's story eventually

---

[44] *Id.* § 6(b).

[45] *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=25000&year1=196501&year2=202209 (last visited Oct. 12, 2024).

[46] Act of June 16, 1985, 69th Leg., R.S., ch. 959 § 1, sec. 103.001–103.007, 1985 Tex. Gen. Laws 3242, 3307–08 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 103.001).

[47] Act of June 15, 2001, 77th Leg., R.S. ch. 1488 § 1, 2001 Tex. Gen. Laws 5280 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 103.001).

[48] *Id.*

[49] *Id.*

[50] Act of June 15, 2007, 80th Leg., R.S., ch. 1190 § 2, 2007 Tex. Gen. Laws 4054, 4055 (current version at Act of June 15, 2001, 77th Leg., R.S. ch. 1488 § 1, 2001 Tex. Gen. Laws 5280, 5280) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 103.001).

[51] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.00 (defining eligibility criteria for compensation and health benefits for wrongfully convicted individuals, including proof of innocence through a pardon, habeas corpus relief, or dismissal based on a lack of credible evidence, while also addressing health coverage and limitations for concurrent sentences).

[52] FRED B. MCKINLEY, A PLEA FOR JUSTICE: THE TIMOTHY COLE STORY 134 (2010).

[53] *Id.* at 151.

[54] *Id.* at 153.

made it to the Innocence Project of Texas, and in 2007, Cole was posthumously exonerated.[55] In 2010, Governor Rick Perry posthumously granted Tim Cole a pardon for innocence.[56] However, the legislation at the time did not allow for Tim Cole's family to receive any compensation for the thirteen years he spent wrongfully imprisoned.[57]

In 2011, Texas passed the Timothy Cole Act, which amended Texas Civil Practice and Remedies Code Section 103.[58] Under the amendments, exonerees who qualify under the innocence standard are now entitled to $80,000 for each year of imprisonment with a prorated amount for partial years spent in prison.[59] This amount is paid in lump sum and additional annuity payments are based on "a present value sum equal to the amount to which the person is entitled."[60] The legislation now also states that the heirs and estate of any deceased person who would have been entitled to compensation had they survived and been granted innocence are entitled to the sum on the deceased's behalf.[61] Additionally, the Tim Cole Act awards non-monetary benefits to those who have been wrongfully incarcerated.[62] People who qualify under the innocence standard can also request tuition costs of a public university or career center of higher education for up to 120 hours.[63]

The statute also imposes limits as to how a wrongfully imprisoned person is able to recover compensation.[64] Section 103.153(b) states "[a] person who receives compensation under this chapter 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 of any governmental unit."[65] This section of the statute precludes the applicant from filing any kind of section 1983 claim or a tort law claim against any person who was involved in their conviction and subsequent

---

[55] *Id.* at 165.

[56] Sarah Rafique, *Timeline of Tim Cole's Wrongful Conviction, Exoneration*, LUBBOCK AVALANCHE-JOURNAL (Sept. 13, 2014), https://www.lubbockonline.com/story/news/local/2014/09/14/timeline-tim-coles-wrongful-conviction-exoneration/15021663007/.

[57] MCKINLEY, *supra* note 52, at 170–71.

[58] TEX. CIV. PRAC. & REM. CODE ANN. § 103.001.

[59] TEX. CIV. PRAC. & REM. § 103.052.

[60] TEX. CIV. PRAC. & REM. § 103.053.

[61] TEX. CIV. PRAC. & REM. § 103.001(c).

[62] *See* TEX. CIV. PRAC. & REM. § 103.054 (providing for the payment of up to 120 credit hours of tuition and mandatory fees at public institutions or career centers for wrongfully convicted individuals, if requested within seven years of the relevant date); TEX. HEALTH & SAFETY CODE § 614.021 (defining services for wrongfully imprisoned individuals, including access to medical and dental care, mental health treatment, and support services to aid reintegration into the community).

[63] TEX. CIV. PRAC. & REM. § 103.054.

[64] TEX. CIV. PRAC. & REM. CODE § 103.153.

[65] *Id.*

imprisonment.[66] This presents those who have been wrongfully convicted with a difficult decision—to either apply for compensation through the state and receive a guaranteed sum, or take a risk and file a lawsuit against the state for their misconduct in hopes of recovering a massive lump sum that dwarfs the amount granted under the statute.[67]

The Texas Health and Safety Code also includes a provision that dictates individuals, who qualify under the innocence standard, are assigned a case manager upon release from prison and receive assistance accessing medical and dental services, mental health treatment, and other services meant to assist a person "in making the transition from incarceration into the community."[68] An exoneree seeking to qualify for these services must fit the definition of a "wrongfully imprisoned person" under Section 501.101 of the Texas Government Code, which defines a wrongfully imprisoned person under the same standard as Chapter 103 of the Texas Civil Practice and Remedies Code.[69] Thus, to be eligible for integration services—which are often essential to a person's successful reintegration into society after release from prison—a person must meet the innocence standard that is imposed in Texas's compensation statute.[70] Texas's statutes, which are meant to assist the wrongfully imprisoned with their release from prison and the subsequent struggles they will face, block the wrongfully imprisoned from accessing essential services that they should be entitled to.

C. Texas's Exoneration Process

Wrongful convictions are a serious issue in Texas. The causes of wrongful convictions can be summarily grouped into five categories: eyewitness misidentification; improper or unvalidated scientific methods; false admissions; government misconduct; and unreliable informants.[71] Since the implementation of DNA evidence to combat wrongful convictions, the number of

---

[66] *See id.* (prohibiting individuals who receive compensation under this chapter from pursuing legal actions against governmental units or their employees related to the same subject matter, including arrest, conviction, or confinement).

[67] *See generally id.* (due to the preclusion of a lawsuit against the state, an exoneree must decide only one or the other, not both).

[68] TEX. HEALTH & SAFETY CODE § 614.021.

[69] TEX. CIV. PRAC. & REM. § 103.001; TEX. GOV'T CODE § 501.101.

[70] *See* TEX. CIV. PRAC. & REM. § 103.001 (noting that eligibility for reintegration services under Texas law requires meeting the innocence standard outlined in the state's compensation statute); *see also* TEX. GOV'T CODE § 501.101 (defining a "wrongfully imprisoned person" as one who served time and was later proven innocent, and ensuring access to programs and services equivalent to those provided to parolees or individuals on mandatory supervision upon discharge from the department).

[71] *Why Do Wrongful Convictions Happen?*, KOREY WISE INNOCENCE PROJECT, https://www.colrado.edu/outreach/korey-wise-innocence-project/our-work/why-do-wrongful-convictions-happen (last visited Nov. 16, 2024).

exonerees in the United States has skyrocketed.[72] Since 1989, when the first exoneration through the use of DNA science occurred,[73] Texas has exonerated a total of 480 people and is one of the states leading the country in the number of exonerations.[74]

However, not all who have been exonerated have been compensated for their time spent behind bars.[75] Since 2011, when the most recent amendment to Texas's compensation statute was made, Texas has paid 110 people under the compensation statute.[76] However, according to the National Registry of Exonerations, Texas has exonerated 294 people in that same amount of time.[77]

III. THE NECESSITY OF A COMPENSATION STATUTE

Those who have been wrongfully imprisoned can recover compensation from the state by filing a lawsuit under 42 U.S.C. § 1983[78] (section 1983 claim) or applying for compensation through Texas's current statute.[79] If an exoneree chooses to apply for compensation through Texas Civil Practice and Remedies Code Section 103.001, the statute dictates that they are forfeiting their right to later file a civil rights lawsuit through section 1983.[80] This presents a difficult decision for exonerees, who are often desperate for financial assistance but may also want the state to be forced to recognize their wrongdoings through a civil rights lawsuit.[81] Section A of this Part discusses why section 1983 claims are often an unsuccessful avenue of compensation for the wrongfully imprisoned and Section B details the obstacles associated with section 1983 claims and why compensation statutes must be written carefully to sufficiently advocate for exonerees.[82]

---

[72] *DNA Exonerations in the United States*, THE INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Nov. 16, 2024).

[73] *Id.*

[74] *See generally* THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Nov. 16, 2024) (filtering all exonerations since 1989 to Texas only).

[75] *See* Johnathan Silver & Lindsay Carbonell, *Wrongful Convictions Have Cost Texans More Than $93 Million*, THE TEXAS TRIBUNE, (June 24, 2024), https://www.texastribune.org/2016/06/24/wrongful-convictions-cost-texans-over-93-million/ (noting that the first DNA-based exoneration occurred in 1989, marking the beginning of modern forensic exonerations). "Several current and former Texas prisoners have fought to clear their names and could one day make the expensive and exclusive list of exonerees." *Id.*

[76] E-mail from Texas Comptroller of Public Accounts, Open Records Section to Cameron Hekkert, author (Sept. 26, 2022, 5:19 PM) (on file with author).

[77] *See generally* NATIONAL REGISTRY OF EXONERATIONS, *supra* note 74 (filtering all exonerations since 2011 to Texas only).

[78] 42 U.S.C.A. § 1983.

[79] Shaw, *supra* note 32, at 601.

[80] TEX. CIV. PRAC. & REM. § 103.001.

[81] *See supra* notes 61–64 (describing the limitations placed on exonerees if they apply for compensation).

[82] *See infra* Part III a (describing why section 1983 claims are not reliable for exonerees).

A. Section 1983 Claims are not Reliable Avenues of Compensation

Section 1983 claims may be filed against police or prosecutors by "wrongfully convicted individuals who have suffered an infringement on their Fourth and Fourteenth Amendment rights."[83] A Section 1983 claim allows the wrongfully convicted to seek damages against a state official for the deprivation of a constitutional right.[84] A common Section 1983 claim is brought against police alleging that evidence used in the exoneree's conviction was obtained in violation of Fourth Amendment search and seizure principles.[85] Another common Section 1983 claim occurs when the wrongfully convicted allege that they were deprived of the right to liberty protected under the Fourteenth Amendment against prosecutors.[86]

Section 1983 claims that are successful often result in large sums being paid to the wrongfully convicted.[87] The catch, however, is that Section 1983 claims are daunting tasks with a high burden to meet.[88] Exonerees face many challenges when bringing a lawsuit against the state in search of relief through Section 1983.[89] Wrongfully convicted people may bring a Section 1983 claim based upon malicious prosecution, retaliatory prosecution, fabrication of evidence, suppression of exculpatory evidence, eyewitness misidentification, coerced confessions, and ineffective assistance of counsel.[90]

B. Obstacles Associated with Section 1983 Claims

The preceding bases for a Section 1983 claim all have their own obstacles within them.[91] For example, to prevail on a malicious prosecution claim, "most courts have held that *something in addition* to the common law elements of malicious prosecution is required to establish a Fourth Amendment violation[.]"[92] The plaintiff must also establish that the defendant (1) initiated criminal prosecution; (2) without probable cause; (3) with malice; and (4)

---

[83] Alberto B. Lopez, *$10 Dollars and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 690 (2002).

[84] *Id.* at 691.

[85] *Id.*

[86] *Id.* at 693.

[87] *See* Pam Belluck, *U.S. Told to Pay $101 Million for Framing 4 Men*, THE N.Y. TIMES (July 26, 2007), https://www.nytimes.com/2007/07/26/us/26cnd-mob.html (wrongfully convicted plaintiffs were awarded over $100 million under a Section 1983 claim).

[88] *See* Lopez, *supra* note 83, at 691 (explaining that Section 1983 allows individuals to sue state officials for damages when their constitutional rights are violated, often used by the wrongfully convicted to challenge evidence obtained in violation of the Fourth or Fourteenth Amendments, though proving such violations can be difficult due to the low probable cause standard).

[89] Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B. U. PUB. INT. L. J. 439, 441–42 (2009).

[90] *Id*. at 439–40.

[91] *Id.*

[92] *Id.* at 441 (emphasis added).

that the prosecution later ended in the wrongfully imprisoned person's favor. These elements are already difficult standards to meet.[93] Combining these high standard common law elements with the uncertainty of what must be shown in addition to these elements to prevail on a malicious prosecution demonstrates how difficult it is for a wrongfully imprisoned person to prevail on a Section 1983 claim.[94]

Moreover, the government has continuously shown that they are able to wiggle out of liability for Section 1983 claims, even if there truly was bad conduct on behalf of the state.[95] As a defendant in a Section 1983 claim, the government has almost indispensable resources to use in their defense, while a plaintiff must hire an attorney to go to battle for them.[96] Occasionally, this leads wrongfully convicted persons to "sell" their cases to attorneys who desire a large financial award from a jury.[97] Litigation funding is a common practice for civil rights claims brought by those who have been wrongfully convicted.[98] Funders provide exonerees with an upfront payment to buy their case—in the hopes that it will lead to a massive payout by the end of the litigation.[99] If the exoneree subsequently wins their Section 1983 claim, they can be obligated to pay back almost twice as much as the amount of the upfront payment given to them.[100] Moreover, exonerees are blatantly taken advantage of at a time when they are at their most vulnerable, broke and recently out of prison.[101]

A Section 1983 claim may not be the worst route to compensation for an exoneree, especially if it is successful.[102] Data has shown that civil suits through section 1983 claims have generated $2.4 billion in awards in a two-decade period, and the average winning suit pays about $320,000 in

---

[93] *Id.* at 442.

[94] *See id*.

[95] *E.g.,* Arnone v. County of Dallas County, Tex., 29 F.4th 262, 264-273 (5th Cir. 2022). In this Section 1983 claim, Arnone challenged Dallas County for using evidence of a polygraph test at trial against evidentiary rules. *Id.* The Fifth Circuit Court of Appeals held that Arnone could not prevail on his 1983 claim because he was lacking the requirement of a county policymaker under *Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658. *Id.* The district attorney was acting as a *state* policymaker, not a county policymaker, when they acquiesced to the polygraph policy, and therefore Dallas County could not be held liable. *Id.*

[96] *See generally* Roy Strom, *Out of Prison and Broke, Wrongly Convicted Sell Their Cases*, BLOOMBERG LAW (Feb. 2, 2022, 11:38 AM), https://news.bloomberglaw.com/business-and-practice/out-of-prison-and-broke-wrongly-convicted-turn-lawsuits-to-cash (detailing the fight among law firms to acquire exonerees as plaintiffs).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *See id.* (Fernando Bermudez received an advance payment of $215,000 but later had to pay back $400,000).

[101] *Id.*

[102] *Id.*

compensation per year of imprisonment.[103] While section 1983 claims do have the potential for a massive payday, that is all they are—potential.[104] There is no guarantee that a wrongfully convicted person will prevail on their civil rights claim.[105] In fact, of 1,200 exonerees who filed civil lawsuits, only approximately 50% prevailed on their claims and saw any kind of compensation.[106] The plaintiff leaves their fate in the hands of a jury and only approximately half of those who take the risk reap the benefits.[107]

Exonerees recently released from prison are at their most vulnerable to be manipulated into unfavorable financial situations.[108] Many exonerees come out of prison with almost nothing to their name, into a world that has changed immensely from the last time they saw the outside.[109] Exonerees feel taken advantage of and exploited when presented with the option of selling their civil rights lawsuit to the highest bidder.[110] This leads the wrongfully convicted to turn to another avenue of compensation—state statutes that determine how much money a wrongfully convicted person is entitled to per year of imprisonment.[111] These statutes, however, come with their own hurdles lurking in the shadows of the legislation.[112]

IV. PROPOSED AMENDMENTS TO TEXAS'S COMPENSATION STATUTE

Section 103.001 of the Texas Civil Practice and Remedies Code compensates those who have been wrongfully imprisoned.[113] However, not all who have been wrongfully imprisoned are entitled to this compensation because of certain requirements that must be met to make a person eligible for compensation.[114] The current legislation requires that a wrongfully imprisoned person be granted relief on the basis of innocence and also implements a time limit to apply for compensation.[115] A wrongfully imprisoned person granted relief on the basis of innocence must apply for compensation no later than three years after they were granted such relief, as this type of relief

---

[103] *Id.*

[104] *See id.* (approximately half of exonerees succeed in their Section 1983 lawsuits).

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *See* Corey Kilgannon, *They Were Unjustly Imprisoned. Now, They're Profit Centers*, THE N.Y. TIMES (Nov. 27, 2022), https://www.nytimes.com/2022/11/27/nyregion/high-interest-loans-exonerated-prisoners.html ("Many former prisoners are broke until state settlements arrive. Tiding them over has become a niche market for finance firms.").

[109] *Id.*

[110] *See* Strom, *supra* note 96.

[111] *See* Shaw, *supra* note 32, at 603.

[112] *See supra* Part II b (describing the problems with Texas's current compensation statute).

[113] TEX. CIV. PRAC. & REM. CODE ANN. § 103.001.

[114] *See supra* Part II b (explaining that only those with an innocence designation are eligible for compensation).

[115] *See* CIV. PRAC. & REM. CODE ANN. §§ 103.001, 103.003.

makes them eligible for compensation.[116] Additionally, the statute awards tuition credit for four years' worth of undergraduate education but imposes a time limit of seven years to apply for the tuition credit.[117]

It is time for Texas to update its compensation statute. The requirement of relief on the basis of innocence and imposition of a statute of limitations unfairly prejudices wrongfully imprisoned persons because it substantially reduces the number of exonerees eligible to receive compensation for their time spent in prison.[118] Texas should amend its compensation statute to eliminate the innocence requirement and the statute of limitations. These amendments should apply these amendments retroactively to benefit those who were not previously eligible for compensation for their time spent wrongfully imprisoned.

This Part advocates for removal of additional requirements that impede an exoneree's ability to recover under the statute. More specifically, Section A examines the requirement of innocence and how the three statutory avenues do not adequately provide relief for all exonerees.[119] Section B further advocates for the removal of the statute of limitations given the nature of some proceedings.[120] Section C suggests the inclusion in the statute for mandatory release of a public statement at the time relief is granted to ease confusion about where the compensation funds come from.[121] Section D proposes that the amendments to be discussed apply retroactively, to allow for those who had been previously excluded from compensation to recover.[122] Finally, Section E compares Texas's statutes to other states that have passed similar statutes and advocates for an amendment to Texas's statutes to return to the gold standard of exoneree compensation.[123]

A. Eliminate the Requirement of Relief on the Basis of Innocence

Texas must eliminate its requirement of innocence to allow a broader group of exonerees to qualify for financial compensation and other benefits. Section 103.001 of the Texas Civil Practice and Remedies Code only allows compensation for time spent wrongfully imprisoned if the person: (1) "has received a full pardon on the basis of innocence[;]" (2) "has been granted relief [through] a writ of habeas corpus that is based on a court finding or

---

116 CIV. PRAC. & REM. CODE ANN. § 103.003.

117 CIV. PRAC. & REM. CODE ANN. § 103.054.

118 *See* Jeffrey Gutman, *Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 NORTHEASTERN UNIV. L. REV. 694, 785 (2019) (demonstrating that the filing breadth of coverage in Texas is lower than the national average).

119 *See infra* Part IV a (advocating for the removal of the innocence requirement).

120 *See infra* Part IV b (describing why the statute of limitations must be removed).

121 *See infra* Part IV c (recommending the inclusion of a public statement in compensation cases).

122 *See infra* Part IV d (proposing that amendments suggested apply retroactively).

123 *See infra* Part IV e (comparing Texas to other states for context).

determination that the person is actually innocent"; or (3) "has been granted relief in accordance with a writ of habeas corpus and[] the "state's attorney states that [they] believe[] the defendant is actually innocent of the crime."[124] While the statute includes three different avenues for compensation, it excludes many, including any person who is granted habeas corpus relief without a determination of innocence, such as those who have been granted relief based on prosecutorial misconduct, procedural error, or received a pardon that is not on the basis of innocence, as well as other avenues of relief.[125]

Relief based on innocence is granted through either a pardon for innocence or a writ of habeas corpus granted on the basis of innocence.[126] A pardon for innocence may only be granted by the Governor of Texas and is a complex process.[127] "A pardon based on innocence exonerates a person of the crime and erases the conviction when there is evidence of actual innocence, or a court has determined the person is innocent."[128] A defendant must apply for a pardon on the basis of innocence through the Texas Board of Paroles and Pardons.[129]

The application for a pardon of innocence requires that the certified court documentation be included with the application, including the indictment, judgment, and sentence.[130] A defendant must also include the arrest reports for each conviction.[131] The requirement to produce these documents alone prejudices defendants who are unfamiliar with the criminal justice system and almost certainly ensures that a defendant will be required to hire a lawyer to assist the defendant with the application process.[132] The application also requires a written recommendation of innocence from a majority of the current trial officials.[133] The requirement of a recommendation of innocence from trial officials renders the Board's recommendation obsolete, as the board cannot make recommendations to the governor of their own volition.[134] Additionally, the Board of Pardons and Paroles has the discretion to deny an

---

[124] TEX. CIV. PRAC. AND REMEDIES CODE § 103.001(a)(2)(A)-(C).

[125] *See generally* John C. Prezas, *The Basics of Post-Conviction Habeas Corpus*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=43961 (last visited Nov 9, 2024) (detailing the different bases that a writ of habeas corpus can be granted in Texas).

[126] TEX. CIVIL PRAC. AND REMEDIES CODE § 103.001(a)(2)(A)-(C).

[127] *What is Clemency?*, TEXAS BOARD OF PARDONS AND PAROLES (Jan. 2, 2019), https://www.tdcj.texas.gov/bpp/exec_clem/exec_clem.html.

[128] *What is a Pardon for Innocence?*, TEXAS BOARD OF PARDONS AND PAROLES (Jan. 2, 2019), https://www.tdcj.texas.gov/bpp/exec_clem/Pardon_for_Innocence.html.

[129] *Id.*

[130] TEXAS BOARD OF PARDONS AND PAROLES, PARDON FOR INNOCENCE APPLICATION (Jan. 2, 2019).

[131] *Id.*

[132] *See generally id.* (this application requires the production of multiple certified court documents as well as information that is difficult for a layman to comprehend, therefore almost guaranteeing that a lawyer will be necessary to file the application).

[133] *Id.*

[134] *See generally id.* (requiring the attachment of a recommendation of innocence from trial officials).

application for a pardon for innocence as they see fit.[135] The requirements of a recommendation from trial officials as well as a recommendation from the Board of Pardons and Paroles undermine the governor's ability to grant pardons for innocence of his own volition, and as he deems fit.[136]

Governors have great deference in determining when to grant a pardon, and which kind of pardon to grant. For example, Governor Rick Perry, who was in office from 2000 to 2015, granted at least 221 pardons while in office.[137] Of these 221 pardons, seventeen were pardons for innocence, which would render that exoneree eligible for compensation.[138] Comparatively, since Greg Abbott was sworn in as Governor of Texas in 2015, he has granted only forty-four pardons, none of which have been pardons for innocence as of 2022.[139]

Additionally, a recommendation for clemency from the Board of Pardons and Paroles does not always result in clemency being granted by the governor. Since 2014, the Board of Pardons and Paroles has made 191 recommendations for pardons.[140] These statistics demonstrate the governor's immense discretion in granting clemency to exonerees.[141] Further, of the forty-four pardons that Governor Abbott has made in the past eight years, not a single one of those pardons was a pardon for innocence.[142] Thus, of the 191 people who have been recommended to Governor Abbott to be granted clemency, only forty-four of those people have received the relief of being pardoned and released from prison, yet *none* of those people have been awarded any relief in the form of compensation or tuition credit, simply because they do not qualify under Texas's current compensation statute.[143]

These statistics perfectly demonstrate why the innocence requirement is too restrictive. A governor can decide not to grant as many pardons for innocence, or general pardons, as he likes, regardless of recommendations to pardon for innocence from the Board of Pardons and Paroles.[144] This fact

---

[135] *See generally Frequently Asked Questions (FAQ) Clemency Process*, TEXAS BOARD OF PARDONS AND PAROLES, https://www.tdcj.texas.gov/bpp/faq/ClemencyProcess.html (last visited Oct. 21, 2022) (applicants cannot appeal a board decision denying a recommendation for clemency but may reapply two years after the board decision).

[136] TEXAS BOARD OF PARDONS AND PAROLES, *supra* note 128.

[137] Jessica Hamel & Ryan Murphy, *Search: Pardons by Gov. Rick Perry*, THE TEXAS TRIBUNE (Aug. 6, 2014), https://www.texastribune.org/library/data/search-texas-governor-rick-perry-pardons/.

[138] *See id.* (filtering the database to only view the number of pardons for innocence).

[139] Letter from Andrea Hardy, Ombudsman, Tex. Bd. of Pardons & Paroles, to Cameron Hekkert, Author, (Oct. 17, 2022) (on file with author).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *See generally id.* (none of the pardons were pardons for innocence therefore they do not allow any of those granted pardons to qualify under the statute for tuition credit).

[144] *See generally* TEXAS BOARD OF PARDONS AND PAROLES, *supra* note 127 (the Governor has authority to grant clemency but is not required to grant clemency upon recommendation of the Texas Board of Pardons and Paroles).

enables the Governor to have substantial personal control over an exoneree's ability to be compensated.[145] If a Governor decides not to grant a pardon for innocence, a pardon recipient generally cannot take further action to gain a classification of innocence, and most Texas courts will not review such decisions, leaving the pardon recipient "stuck" in the middle ground of being free, yet not compensated.[146] Executive clemency is not a fail-safe in our criminal justice system,[147] but rather a subjective use of power that toys with exonerees' lives.

Relief may also be granted through a writ of habeas corpus, coupled with a determination of innocence by the court or a statement of innocence by the state's attorney.[148] Relief based on a writ of habeas corpus is "the essential and the only viable means of vindicating actual innocence claims."[149] Relief based on anything other than innocence, such as acquittal due to legal insufficiency of the evidence, does not make a defendant eligible for compensation.[150] "Claims of actual innocence are rare and the cases in which relief is granted are even more rare."[151] The Texas Court of Criminal Appeals "recognizes two types of 'innocence' claims," a *Herrera* claim and a *Schlup* claim.[152]

A *Herrera* claim is a "substantive claim in which the person asserts a 'bare claim of innocence' based solely on newly discovered evidence."[153] When making a determination of innocence based on a *Herrera* claim, the Texas Court of Criminal Appeals has held that "A conviction should not be overturned lightly and that the burden on the applicant who had had error-free proceedings is exceedingly heavy to take into account society's and the state's interest in finality."[154] To prevail on a *Herrera* claim in a writ of habeas corpus, "The applicant must show that the new evidence unquestionably establishes his innocence."[155] This standard is exceptionally high, and places a burden on the applicant that they "must prove by clear and convincing evidence that no reasonable juror would have convicted the applicant in light

---

[145] *See id.*

[146] *See Texas Capital Clemency Information Memorandum*, AMERICAN BAR ASS'N. 3 (Nov. 6, 2019), https://www.capitalclemency.org/file/tex_clemency_memo-11_19.pdf (noting that Texas courts have "no power to review the wisdom of an act of the Governor so long as he operates within the law in exercising his own discretion and judgment in the performance of his constitutional duties.").

[147] Herrera v. Collins, 506 U.S. 390, 391 (1993) (referring to executive clemency as the traditional fail-safe remedy).

[148] TEXAS CIVIL PRAC. AND REMEDIES CODE § 103.001(a)(2)(B)–(C).

[149] Gary A. Udashen & Tona Trollinger, *Freeing the Innocent: Actual Innocence and the Writ of Habeas Corpus*, 3-4 (unpublished, prepared for State Bar of Tex. Annual Advanced Crim. L. Course) (July 2010), http://www.udashenanton.com/wp-content/uploads/2017/06/Freeing-the-Innocent-July-26-29-2010.pdf.

[150] State *ex rel.* Abbott v. Young, 265 S.W.3d 697, 705 (Tex. App.–Austin 2009, pet. denied).

[151] *Ex parte* Tuley, 109 S.W.3d 388, 394 (Tex. Crim. App. 2002).

[152] *Ex parte* Brown, 205 S.W.3d 538, 544 (Tex. Crim. App. 2006).

[153] *Id.*

[154] *Ex parte* Tuley, 109 S.W.3d at 390.

[155] *Id.*

of the new evidence."[156] This burden of proof is analyzed by weighing the evidence of the applicant's guilt against the new evidence of their innocence.[157]

Essentially, the applicant must have some kind of new evidence, whether it was newly discovered or previously withheld, that establishes there is no way the applicant would have committed the crime.[158] The Texas Court of Criminal Appeals has made it clear that a *Herrera* claim is not simply an attack on the sufficiency of the evidence.[159] A *Herrera* applicant is showing, or attempting to show, that despite evidence of their guilt that supported the conviction, "no reasonable juror could have found the applicant guilty in light of the new evidence."[160]

A *Schlup* claim allows for relief if the conviction was so intertwined with constitutional error that a conviction is rendered invalid.[161] A *Schlup* claim requires that a person "show actual innocence by a preponderance of the evidence and that a constitutional error, which otherwise would have been procedurally barred, likely resulted in the conviction of an actually innocent person."[162] For example, Billy Frederick Allen pursued a *Schlup* claim and alleged that ineffective assistance of counsel led to his conviction.[163] Had his attorney acted properly during trial and interviewed a material witness, the attorney would have discovered exculpating evidence.[164] Billy Frederick Allen used a *Schlup* claim, that there was constitutional error of ineffective assistance of counsel, to gain a finding of innocence and the Texas Supreme Court held that an exoneree granted innocence through a *Schlup* claim is entitled to compensation under the statute.[165]

The majority of innocence claims made through writs of habeas corpus, however, are *Herrera* claims.[166] Obtaining a determination of innocence through a *Herrera* claim has been referred to as a "Herculean task" by the Texas Court of Criminal Appeals.[167] The applicant carries the burden of

---

[156] *Id.*

[157] *Id.*

[158] *See id.* (holding that to succeed on a bare innocence (Herrera-type) claim, the applicant must provide clear and convincing evidence that no reasonable juror would have convicted them in light of the new evidence).

[159] *Id.* at 392.

[160] *Id.*

[161] *Ex parte* Brown, 205 S.W.3d at 544–45.

[162] Matthew Clarke, *Texas Supreme Court Rules Compensation Required in Schlup-type Innocence Cases*, PRISON LEGAL NEWS (Feb. 15, 2013), https://www.prisonlegalnews.org/news/2013/feb/15/texas-supreme-court-rules-compensation-required-in-schlup-type-innocence-cases/.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *See Ex parte* Brown, 205 S.W.3d at 544 (emphasizing that habeas corpus relief is substantive in nature, requiring newly discovered evidence to affirmatively prove the applicant's actual innocence).

[167] *Id.* at 545.

showing "by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence."[168] Not only must the defendant initiate the action to be determined innocent, but they must also discover or obtain new evidence that was not available to them at the time of their trial.[169] Without the presentation of newly discovered or previously unobtained evidence, a court is not entitled to grant a *Herrera* innocence claim.[170]

The requirement of new evidence, in any form, creates a barrier to innocence that many cannot overcome.[171] If evidence is hidden from the defendant at the time of trial, as was the case for Michael Morton, there is a very small likelihood that the defendant will be made aware of this evidence and the chances become slimmer as time goes on.[172] Additionally, without a support system such as family members or criminal defense lawyers to continuously advocate for an innocent person, a defendant is unlikely to discover new evidence to prove their innocence while they are imprisoned.[173] With the presentation of new evidence being the most likely way to be granted innocence through a pardon or writ of habeas corpus, many exonerees will never be eligible for compensation if the statute continues to stand as currently written purely because the likelihood of discovering new evidence or getting their hands on suppressed evidence is so minute.[174]

The innocence requirement should be eliminated altogether. Texas Civil Practice and Remedies Code Section 103.001 should be amended to read:

> (a) A person is entitled to compensation if:
>
> (1) The person has served in whole or in part a sentence in prison under the laws of this state; and
>
> (2) The person:
>
> (A) Has received a full pardon ~~on the basis of innocence~~ for which the person was sentenced;

---

[168] *Ex parte* Tuley, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002) (citing *Ex parte* Elizondo, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996)).

[169] *Id.* at 390.

[170] *See id.*

[171] *See Ex parte* Brown, 205 S.W.3d at 545.

[172] *See generally* Johnathan Silver, *How Michael Morton's Wrongful Conviction Has Brought Others Justice*, THE TEXAS TRIBUNE (Aug. 13, 2016), https://www.texastribune.org/2016/08/13/michael-morton-murder-case-reverberates-across-tex/ (Michael Morton's family had to fight for several years to have access to evidence that was hidden from his counsel at trial).

[173] *See generally* Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POLICY INITIATIVE (Oct. 20, 2015), https://www.prisonpolicy.org/reports/prisonvisits.html ("less than one-third of people in state prisons receive a visit from a loved one in a typical month"). This article details the difficulties for prisoners in maintaining contact with family and a support system. *Id.*

[174] *See Ex parte* Tuley, 109 S.W.3d at 390 (discussing the burden on applicants to provide new or previously suppressed evidence to substantiate claims of actual innocence); *see also* .TEX. CIV. PRAC. & REM. CODE § 103.001 (tying compensation eligibility to the presentation of new evidence, which is required for a finding of actual innocence through a pardon or habeas corpus relief).

> (B) ~~Has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced; or~~
>
> (B) has been granted relief in accordance with a writ of habeas corpus and:
>
> (i) the state district court in which the charge against the person was pending has entered an order dismissing the charge; *or*
>
> (ii) the person was acquitted upon re-trial.~~; and~~
>
> ~~(iii) the district court's dismissal order is based on a motion to dismiss in which the state's attorney states that no credible evidence exists that inculpates the defendant and, either in the motion or in an affidavit, the state's attorney states that the state's attorney believes that the defendant is actually innocent of the crime for which the person was sentenced.~~

This new standard will allow any person who has been granted relief and has not been retried and re-convicted for the same crime, to be eligible for relief. Those who were granted relief and subsequently retried for the same crime, and convicted again, would not be eligible for compensation for the time they spent in prison under the first conviction.

The innocence standard creates an insurmountable barrier to compensation for a person's time spent wrongfully imprisoned. The standard disparages many exonerees and prevents a significant number from being able to recover for the time they spent behind bars.[175] Of the 295 people that have been exonerated since 2011, the Texas Comptroller has only paid 110 of those exonerees.[176] Less than forty percent of people who have been exonerated in the state in the past eleven years have seen any kind of compensation for the time they lost from their lives.[177]

This avoidance by the state of compensating and taking responsibility for its actions is abhorrent, and directly contradicts Article 3 Section 51-c of the Texas Constitution, which grants the right to compensation to those who have been wrongfully imprisoned.[178] Texas's constitution enables the legislature

---

[175] *See* E-mail from Texas Comptroller of Public Accounts, Open Records Section to Cameron Hekkert, *supra* note 76; *see generally* THE NATIONAL REGISTRY OF EXONERATIONS, *supra* note 74 (filtering all exonerations since 2011 to Texas only).

[176] *See* E-mail from Texas Comptroller of Public Accounts, Open Records Section to Cameron Hekkert, *supra* note 76; *see generally* THE NATIONAL REGISTRY OF EXONERATIONS, *supra* note 74 (filtering all exonerations since 2011 to Texas only).

[177] *See* E-mail from Texas Comptroller of Public Accounts, Open Records Section to Cameron Hekkert, *supra* note 76; *see generally* THE NATIONAL REGISTRY OF EXONERATIONS, *supra* note 74 (filtering all exonerations since 2011 to Texas only).

[178] TEX. CONST. art. III, § 51-c.

to compensate those who have been wrongfully imprisoned, and acknowledges that those who spent time wrongfully imprisoned have a right to compensation for the state's "taking" of their life and liberty.[179] The legislature, by imposing strict limits on who can apply for this compensation, is disparaging all who are entitled to compensation under the Texas Constitution. The constitution uses broad language to describe those who are entitled to compensation as those who wrongfully served time in prison and are not guilty of their crime.[180] Not guilty, however, is not the same standard as innocent. In American criminal jurisprudence, a finding of not guilty means there was a reasonable doubt of whether the defendant committed the crime.[181] The interpretation of innocence after a conviction, however, has required the existence of evidence that counteracts the convicting evidence so that no reasonable juror could have convicted the defendant.[182] The Texas legislature has enacted a statute that flips the standard. Rather than innocent until proven guilty, an exoneree—whose conviction may have already been vacated—is guilty until proven innocent.

B. Remove the Statute of Limitations

Transitioning from incarceration back into free society is extremely difficult.[183] This difficulty has been recognized through psychological studies[184] and also has been demonstrated in major motion pictures.[185] While not every incarcerated person faces long-term psychological or physical effects, "few people are completely unchanged or unscathed by the experience."[186] Those who have been wrongfully convicted also face the risk of more severe

---

[179] *Id.*

[180] *Id.*

[181] *See generally* TEX. PENAL CODE § 2.01 (Texas burden of proof for criminal cases is beyond a reasonable doubt).

[182] *Ex parte* Tuley, 109 S.W.3d 388, 391 (Tex. Crim. App. 2002) (citing *Ex parte* Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996)).

[183] *See Barriers to Successful Re-Entry of Formerly Incarcerated People*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (Mar. 27, 2017), https://civilrights.org/resource/barriers-to-successful-re-entry-of-formerly-incarcerated-people/ (highlighting the significant barriers faced by formerly incarcerated individuals, including restricted voting rights, limited access to education and employment, and ineligibility for public benefits, which hinder successful reintegration into society).

[184] *See generally* Craig Haney, THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION (Nov. 30, 2001), https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0 (noting that psychological consequences of incarceration may interfere with an ex-convict's transition from prison to home, impede an ex-convict's successful reintegration into a social network and employment setting, and compromise an ex-convict's ability to resume his or her role with family and children).

[185] *See generally* THE SHAWSHANK REDEMPTION (1994) (depicting the struggles of prison inmates and their reintegration into society after their release).

[186] Haney, *supra* note 184.

treatment in prison.[187] Their adherence to their innocence may lead them to receive harsher treatment and "precludes them from seeking certain prison services, visiting with their families, being placed in isolation, etc."[188]

Not only is living in prison a more than unpleasant experience, "but it almost surely reduces one's life expectancy upon leaving."[189] Inmates who have been released "often carry diseases contracted while incarcerated" and are at a higher risk of premature death than if they had never been incarcerated.[190] These long-lasting effects surely require that the state compensate individuals for the time they spent wrongly incarcerated.[191] Further, exonerees are often abruptly released from prison, which typically renders them without any pre-release planning or post-release support services.[192] It is no secret that the hardships of reintegration for those who have been recently released from prison manifest themselves in a multitude of ways.[193] While no amount of financial compensation can reverse the effects of incarceration, it is a step in the right direction.

A study conducted by the Department of Psychology at Towson University made three significant findings: (1) eighty percent of the exonerees surveyed experienced traumatic events while incarcerated; (2) 48–52% of exonerees surveyed "met a clinical cut-off score or reported a symptom pattern consistent with PTSD"; and (3) fifty-one percent of exonerees surveyed qualified as having major depressive disorder.[194] Of the fifty-five exonerees surveyed, they had been released from prison for an average of 11.5 years.[195] This study demonstrates that the consequences of incarceration stay with an exoneree for a significant amount of time—it is extremely common for an exoneree to struggle with the consequences of incarceration for the rest of their lives.

Texas's statute ignores these long-lasting consequences by imposing a time limit on applying both for financial compensation as well as tuition credit for an undergraduate university.[196] Section 103.003 of the Civil Practice and Remedies Code requires that a person seeking financial compensation apply through the Texas Comptroller within three years of receiving a pardon for innocence, being granted a writ of habeas corpus on the basis of

---

[187] Mark Cohen, *Pain, Suffering and Jury Awards: A Study of the Cost of Wrongful Convictions*, 20 CRIMINOLOGY & PUBLIC POL'Y 691, 694 (2021).

[188] *Id.*

[189] Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 74 (2008).

[190] *Id.*

[191] *Compensation for Exonerees*, *supra* note 26.

[192] Cohen, *supra* note 187, at 694–95.

[193] *Compensation for Exonerees*, *supra* note 26.

[194] Jeff Kukucka et al., *The Exoneree Health and Life Experiences (ExHaLE) Study: Trauma Exposure and Mental Health Among Wrongly Convicted Individuals*, 28 PSYCH., PUB. POL'Y, AND L. 387, 393 (2022).

[195] *Id.* at 390.

[196] TEX. CIV. PRAC. & REM. CODE ANN. § 103.003.

innocence, or the signing of an order of dismissal.[197] Thus, a wrongfully imprisoned person who is reintegrating into society must be aware of their right to compensation and have the knowledge and ability to submit the application to the Texas Comptroller within three years of being released.[198] Additionally, Section 103.054 limits the application for tuition credit to within seven years of the occurrence of one of the aforementioned events.[199] The state of Texas will not grant undergraduate credit to an exoneree if they apply over seven years after they have been granted relief.[200]

The costs of filing applications for both financial compensation and tuition credit are an immense financial burden.[201] Often after being released from prison, an exoneree faces a substantial amount of debt.[202] The average debt incurred from indictment to a person's release from prison is $13,607.[203]

These statutory limits to filing are detrimental to a person's reintegration into society.[204] Approximately half of exonerees are still facing serious mental health issues after over eleven years since they were released from prison.[205] Texas's limits of three and seven years for financial compensation and tuition credits, respectively, are extremely prejudicial to those trying to get their lives back on track.[206] It is absurd for the state to assume that after three years, if an exoneree has not applied for compensation, they are no longer in need.

Additionally, the limited seven-year window to apply for tuition funding may not align with the realities many exonerees face. Reintegration challenges often delay an exoneree's ability to pursue higher education. While some exonerees have successfully used these funds, the overall utilization remains low.[207] Exonerees face employment discrimination even after their record has been expunged and they have been fully cleared of the crime.[208] In a study comparing hiring patterns of exonerees and applicants without a

---

[197] *Id.*

[198] *Id.*

[199] CIV. PRAC. & REM. § 103.054.

[200] *Id.*

[201] *See supra* notes 133–36 (describing the difficulties of submitting applications for compensation and tuition credit).

[202] deVuono-Powell et al., *Who Pays? The True Cost of Incarceration on Families*, FORWARD TOGETHER (Sept. 2015), https://forwardtogether.org/tools/who-pays/.

[203] *Id.*

[204] *See generally* Kukucka et al., *supra* note 194, at 392–93 (time since release had no effect on mental health severity of exonerees. Therefore, filing requirements are detrimental because exonerees do not see substantial improvement in mental health struggles with the passage of time).

[205] *Id.* at 390.

[206] CIV. PRAC. & REM. § 103.003, 103.054.

[207] Eric Dexheimer, *Follow-Up: Few Exonerees Take Advantage of Free College*, AUSTIN AMERICAN-STATESMAN (Sept. 22, 2018), https://www.statesman.com/story/news/2017/02/12/follow-up-few-exonerees-take-advantage-of-free-college/10393640007/.

[208] Kukucka et. al., *Do Exonerees Face Employment Discrimination Similar to Actual Offenders?*, 25 LEGAL & CRIMINOLOGICAL PSY. 17, 25 (2019).

criminal history, researchers found that when examining exoneree applications, "hiring professionals formed less favorable impressions of exonerees and offender applicants, desired to contact more of the exoneree's references, and were more likely to offer the exoneree a low wage[.]"[209] Exonerees clearly struggle more than the average person in obtaining a job and thus face challenges in creating a long-term plan for their education and occupation.[210] It is of the utmost importance that exonerees have the ability and opportunity to pursue undergraduate education past the seven years after release that the statute currently restricts.

Exonerees deserve to obtain higher education in whichever field they decide to pursue. However, due to hiring prejudice, it may be difficult for exonerees to formulate a plan for their education and therefore struggle to determine when to pursue undergraduate education and in which field.[211] Preventing these people from accessing the tuition credit they are entitled to is an attempt by the state to avoid fulfilling its duty of righting its wrongs from wrongful incarceration.

The statute of limitations should be eliminated altogether. Texas Civil Practice and Remedies Code Section 103.003 should be amended to read:

> A person seeking compensation under this chapter ~~must~~ *may* file an application with the comptroller for compensation under Subchapter B ~~not later than the third anniversary of~~ *any time after* the date:
>
> (1) the person on whose imprisonment the claim is based received a pardon as provided by Section 103.001(a)(2)(A);
>
> (2) the person's application for a writ of habeas corpus was granted as provided by Section 103.001(a)(2)(B); or
>
> (3) an order of dismissal described by Section 103.001(a)(2)(C) was signed.

A statute of limitations should not be imposed on exonerees who have been granted any kind of relief. Exonerees struggle mentally, emotionally, physically, and financially when attempting to reintegrate into society after their release.[212] Preventing exonerees from recovering financially, or obtaining tuition credit, at any time throughout the rest of their lives is highly prejudicial and sends a clear message from the state. This message—that exonerees are not important enough to the state to be provided with

---

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *See* Kukucka et al., *supra* note 194, at 393 (noting that qualitative studies highlight the significant challenges exonerees face post-release, including health issues, poverty, unemployment, homelessness, and strained relationships); *see generally* Allen & Laudan, *supra* note 192 (detailing the difficulties that recently released prisoners face when reintegrating into society).

accommodations they deserve unless they are aware of their rights within a few years of their release—must be changed.

C. Require a Public Statement Regarding Compensation

Additionally, Texas judges and prosecutors are unlikely to grant innocence because there is a lack of education on what granting innocence means for an exoneree and subsequently allowing an exoneree to be compensated. Texas judges and district attorneys are elected officials and must be re-elected after their term to continue serving in their position.[213] Judges can be influenced by political and financial considerations in many decisions.[214] As they must gain re-election, judges and prosecutors can be hesitant to grant innocence because they do not want their constituents to fear losing money or an increase in taxes to be able to pay large amounts to those who have been wrongfully imprisoned.[215]

To combat this fear of losing an election due to voter misunderstanding, the statute must be amended to require the release of a public statement every time a person is exonerated and deemed eligible for compensation. This public statement should include clarification that each time a wrongfully imprisoned person is exonerated and compensated, they will be paid through a fund set aside by the *state,* not by the county.

Ideally, this public statement will educate constituents and quell the fears of judges and prosecutors that compensating a wrongfully imprisoned person will prevent them from being re-elected. When an exoneree is granted relief through a writ of habeas corpus, the writ itself should contain the following language:

The applicant is hereby granted relief upon the basis of a writ of habeas corpus. This relief entitles them to compensation, to be paid out by the State of Texas, for the time the applicant spent wrongfully imprisoned. This compensation will be paid from the State's budget, by the Texas Comptroller, and will not implement a financial responsibility upon the convicting county.

The inclusion of such a statement should also be included in a pardon granted by the Governor of Texas. This inclusion of a statement detailing where the compensation will be funded from will help to alleviate the concerns of judges and prosecutors who refuse to grant innocence based upon their belief that their constituents will not re-elect them because of costs to the county.

---

213 TEX. GOV'T CODE § 44.001.

214 Hans Sherrer, *The Complicity of Judges in Wrongful Convictions*, PRISON LEGAL NEWS (Aug. 15, 2004), https://www.prisonlegalnews.org/news/2004/aug/15/the-complicity-of-judges-in-wrongful-convictions/.

215 *Id.*

D. Apply the Statute Retroactively to Compensate Any Person Who Meets the New Criteria

The amended statute, which will eliminate both the innocence requirement and the statute of limitations, should apply retroactively to compensate those previously ineligible to receive compensation from the state. Exonerees who were granted relief on the basis of procedural error, prosecutorial misconduct, or any other basis of relief are still people who have been wrongfully imprisoned. Because they are granted relief on a basis other than innocence, they do not fall under the qualifications to receive compensation.[216] These people deserve, and are entitled to under the Texas Constitution, financial compensation for the time they spent in prison and the life-altering effects imprisonment can have on a person's life.[217] Thus, after the amendment to the legislation is enacted, any person who was previously excluded from compensation should be eligible and granted compensation upon application to the Texas Comptroller.

An amendment should be made to Texas Civil Practices and Remedies Code Section 103.001, which defines who is eligible to receive compensation, to include those who were granted relief and previously ineligible under the current writing of the statute. The statute should be amended to include this statement as 103.001(b):

This statute applies retroactively to any person who was previously ineligible to receive compensation due to the innocence requirement and is now eligible through one of the avenues of relief detailed above. Any person who has been granted relief, even if granted such relief before the amending of this statute, is now eligible for compensation so long as they meet the elements proscribed under Section 103.001(a).

A person who was wrongfully imprisoned and granted relief on a basis other than innocence faces the same challenges as an exoneree who was granted relief through innocence.[218] Additionally, compensation is also meant to recompense a person for the taking of imprisonment.[219] The money is meant to compensate for the time spent in prison, and while the majority

---

[216] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (excluding individuals whose convictions were overturned for reasons such as procedural errors or prosecutorial misconduct, rather than actual innocence, thereby disqualifying them from compensation under the current statutory framework).

[217] TEX. CONST. art. III § 51-c.

[218] *See generally* Haney, *supra* note 185 (Haney makes no distinction between exonerees who received relief on the basis of innocence and exonerees who did not when describing the challenges that face prisoners recently released from prison).

[219] *See Compensating the Wrongly Convicted*, THE INNOCENCE PROJECT, https://web.archive.org/web/20220307122735/https://innocenceproject.org/compensating-wrongly-convicted/ (last visited Nov. 23, 2024) ("when an innocent person has had his life stripped from him only to endure the horror of prison, justice demands that the individual be compensated for the harm suffered.). In this author's view, a person should receive this compensation even if they have successfully reintegrated into society and will not use the money to assist them in adjusting to life outside of prison.

of recipients who receive their money directly after their imprisonment use it to assist with reintegration, that is not the sole utilization of the money.[220] Therefore, any person who has been wrongfully imprisoned by the state, for any reason and for any amount of time, should be eligible for compensation.

Applying the amended statute retroactively can be analogized to backpay that a wrongfully terminated employee receives.[221] That employee is being compensated for wages they lost because of their wrongful termination.[222] Wrongfully terminated individuals must prove they were wrongfully terminated to succeed in a claim, but receiving compensation also requires meeting additional considerations, such as mitigating back pay damages by seeking comparable employment, as well as mitigating damages by seeking comparable employment.[223] Similarly, an exoneree should be compensated for money lost while they were wrongfully incarcerated and only have to prove they were in fact wrongfully incarcerated to receive compensation, rather than have to prove innocence as the statute currently requires.[224]

Moreover, allowing the legislation to apply retroactively will act as a deterrence for prosecutors and judges to reduce the number of individuals who are wrongfully convicted and wrongfully imprisoned. If prosecutors and judges are aware that their actions of wrongful convictions will allow more people to recover from the state, there may be an element of deterrence to wrongfully convict. A significant increase in the number of exonerees compensated could impact Texas taxpayers, and judges and prosecutors who must be elected would be motivated to prevent wrongful incarcerations in the first place to protect their constituents' votes. Texas has a rampant problem of wrongful convictions within the state, as evidenced by the multitude of exonerations the state has awarded since 1989.[225] If this legislation can serve as an additional deterrent to prosecutors and judges to avoid wrongful convictions, along with the potential damage to their reputation in the legal field, this is just one more reason to amend legislation to compensate more exonerees.

---

[220] *See id.* (noting that the wrongly convicted should receive money for each year served in prison and assistance with obtaining affordable housing, psychological services and education assistance).

[221] *What Kind of Damages Can You Get in a Wrongful Termination Case?*, PLBH BLOG, https://www.plblaw.com/what-kind-of-damages-can-you-get-in-a-wrongful-termination-case/ (last visited Dec. 4, 2024).

[222] *Id.*

[223] *Id.*

[224] *Cf.* TEX. CIV. PRAC. & REM. CODE § 103.001 (explicitly requiring exonerees to prove actual innocence, either through a full pardon, habeas corpus relief with a finding of innocence, or a prosecutorial motion to dismiss based on actual innocence).

[225] *See generally* NATIONAL REGISTRY OF EXONERATIONS, *supra* note 74 (filtering the database to determine how many exonerations have been granted in Texas since 1989).

E. Return to the "Gold Standard" of Exoneree Compensation

Since the passing of the Tim Cole Act, legal scholars have argued that Texas is paving the way for other states for legislation regarding compensation of the wrongfully incarcerated.[226] In 2011, the Tim Cole Act set Texas at a higher standard than the rest of the nation in compensating wrongfully imprisoned individuals, largely because of the increase in the compensation amount from $50,000 to $80,000 and because the statute now allowed family members of posthumous exonerees who died in prison to recover on their behalf.[227] However, as more states have passed legislation, this is no longer the case.[228] Eight states and the federal government have enacted legislation that applies to a broader group of exonerees than Texas's statute.[229] While Texas still pays one of the most generous amounts per year, the impact of that payment is diluted when the amount of people entitled to it is significantly limited by the innocence requirement and statute of limitations.[230]

Mississippi, due to the generous amount of compensation offered per year of imprisonment and their breadth of coverage of types of exonerees and number of years compensated, is arguably the best state to be exonerated in for an exoneree seeking compensation.[231] Mississippi compensates exonerees whose conviction was vacated or reversed, and the charges were dismissed or a conviction was not obtained at retrial, which allows a broad category of exonerees to receive compensation.[232] Mississippi compensates at a rate of $50,000 per year of incarceration, as well as attorney's fees.[233] While Mississippi is not the most generous state in terms of the amount of compensation, they are one of the top states in regard to the large number and broad groups of exonerees who can apply and qualify for compensation, as they do not impose an innocence limitation.[234]

Mississippi is one of several states that do not require exonerees to prove their innocence to qualify for compensation.[235] Iowa's compensation statute

---

[226] *See* Shaw, *supra* note 32, at 613 (noting that the Tim Cole Act is considered a model for other states due to its comprehensive approach to compensating the wrongfully incarcerated, including both monetary compensation and support services).

[227] TEX. CIV. PRAC. & REM. CODE ANN. § 103.001.

[228] *Contra* Shaw, *supra* note 32, at 613 (Texas is not the gold standard because other states allow a broader group of exonerees to recover compensation).

[229] *See* THE INNOCENCE PROJECT, COMPENSATION STATUTES: A NATIONAL OVERVIEW (May 21, 2018), https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf.

[230] *Id.*

[231] Gutman, *supra* note 118, at 784–85.

[232] MISS. CODE ANN. § 11-44-3.

[233] MISS. CODE ANN. § 11-44-7(2).

[234] Gutman, *supra* note 118, at 784–85.

[235] *See* THE INNOCENCE PROJECT, COMPENSATION STATUTES: A NATIONAL OVERVIEW, *supra* note 229 (states that do not explicitly require exonerees to prove actual innocence to qualify for compensation

requires that a person's conviction is vacated or reversed *or* that the charges are dismissed.[236] Maryland's qualification requirements are only that a person receives a "pardon stating that the individual's conviction has been shown conclusively to be in error," or if a judge determines: (1) the conviction was reversed or vacated; (2) the charges were dismissed or the claimant was found not guilty on retrial; and (3) the claimant did not commit the crime.[237] Michigan compensates people whose "conviction was reversed or vacated and either the charges were dismissed" or the person was found not guilty at retrial.[238] Nebraska compensates those who receive a pardon, whose conviction has been vacated, or whose conviction has been reversed and remanded and has not been reconvicted.[239] New Jersey requires that a claimant establish only that they "did not commit the crime for which he was convicted; and . . . did not by his own conduct cause or bring about his conviction."[240] Ohio compensates those whose conviction has been vacated, dismissed, or reversed on appeal.[241] West Virginia compensates a claimant if their conviction was reversed or vacated, the charges were dismissed, or the claimant was found not guilty at retrial.[242] Finally, the federal government compensates exonerees if they have been pardoned on the ground of innocence *or* the conviction was reversed or set aside, or the exoneree was found not guilty of the offense upon new trial or rehearing.[243]

Allowing compensation to exonerees without imposing an innocence requirement is not a novel theory.[244] As evidenced by eight states, as well as the federal government, doing away with an innocence requirement,[245] Texas's statute is now outdated and no longer the model legislation for compensation for those who have been wrongfully imprisoned. Texas must fall in line with the example set by other jurisdictions and amend its legislation to broaden the number of people eligible for compensation.

It is time for Texas to reevaluate its legislation for compensating exonerees. Of the thirty-eight jurisdictions that have legislation for compensating the wrongfully imprisoned, including the District of Columbia and the federal government, twenty-four of those statutes have been enacted or amended more recently than Texas's last amendment in 2011.[246] Texas is

include Alabama, Connecticut, Maryland, New Hampshire, New Jersey, and Ohio, allowing broader criteria such as overturned convictions or dismissals consistent with innocence).

[236] IOWA CODE § 663A.1.

[237] MD. CODE ANN., STATE FIN. & PROC. § 10-501.

[238] MICH. COMP. LAWS § 691.1754.

[239] NEB. REV. STAT. ANN. § 29-4603.

[240] N.J. REV. STAT. § 52:4C-3.

[241] OHIO REV. CODE ANN. 2743.48.

[242] W. VA. CODE § 14-2-13A.

[243] 28 U.S.C. § 2513.

[244] *See* THE INNOCENCE PROJECT, COMPENSATION STATUTES: A NATIONAL OVERVIEW, *supra* note 229.

[245] *Id.*

[246] *Id.*

behind the curve in regard to keeping its compensation statute up to date in a world that changes as quickly as it does. While many amendments that have been made to other states' statutes increase the amount of compensation to be paid to the wrongfully imprisoned, Texas is one of the leaders in the amount of financial compensation.[247] Texas fails its citizens with the implementation of limitations placed on exonerees through the innocence standard and statute of limitations. Texas must make compensation available to more than just those who can prove their innocence and apply for compensation within three years of release.

Not every wrongfully imprisoned person even applies for compensation, for a variety of reasons.[248] The national average for exonerees who were exonerated in states with compensation statutes and have filed compensation claims is fifty-three percent.[249] Texas, when compared to the national average, has a below-average filing rate of forty-three percent.[250] Of the forty-three percent of exonerees in Texas who do file compensation claims, eighty-eight percent are actually awarded compensation from the Texas Comptroller.[251] Exonerees in Texas are likely discouraged from filing because they either know they do not qualify under the statute's relief requirements, or simply cannot complete the application.[252] Additionally, attorney's fees, when coupled with leftover court fees from the original prosecution, can prove to be an insurmountable barrier to compensation for an exoneree.[253]

Additionally, not only are there other states that have more lenient standards for compensation, but the federal standard is also more generous than Texas's current statute.[254] The federal government compensates exonerees if they have been pardoned on the ground of innocence *or* the conviction was reversed or set aside, or the exoneree was found not guilty of the offense

---

[247] *See generally id.* (showing that Texas's award of $80,000 per year of wrongful imprisonment is more generous than most states).

[248] Gutman, *supra* note 230, at 745.

[249] *Id.*

[250] *Id.* at 747.

[251] *Id.*

[252] *See generally State of Texas Comptroller's Office, Request for Wrongful Imprisonment Compensation*, TEX. COMPTROLLER'S OFFICE, https://comptroller.texas.gov/programs/support/judiciary/docs/wrongful-imprisonment-claim-2016.pdf (last visited Nov. 3, 2024) (form that must be submitted to apply for compensation has multiple requirements for attachments that must be verified by various departments of the state).

[253] *See generally* deVuono-Powell et al., *supra* note 202 (describing the significant debt exonerees face when released from prison). In this author's view, there may be many reasons a person is unable to complete the application. For example, a person may be entirely unaware of the compensation statute or lack the ability to submit the application without a lawyer's expertise, which can create a hefty bill that a person may be unable to afford when they have been recently released from prison.

[254] 28 U.S.C. § 2513; *see also* THE INNOCENCE PROJECT, COMPENSATION STATUTES: A NATIONAL, *supra* note 229 (federal government permits compensation if prisoner granted pardon because conviction reversed or set aside, while Texas does not).

upon new trial or rehearing.[255] While the federal standard does impose an innocent requirement, this is only *one* of the ways an exoneree can qualify for compensation, and there are other avenues to receive a financial award.[256] The federal legislation directly conflicts with Texas's standard of requiring innocence in every avenue of relief,[257] and the burden falls upon Texas to amend its statute to be more reflective of other statutes.

Texas must remove the requirement of an innocence standard. Some may argue that the innocence requirement is necessary, and simply advocating for a lower standard of innocence will be sufficient to allow more exonerees to qualify for compensation. This argument, however, falls flat due to the long history of interpretation of the innocence standard.[258] The two types of innocence claims, *Schlup* and *Herrera* claims, have both been interpreted by the Texas Court of Criminal Appeals.[259] These claims, however, are given their foundations from the United States Supreme Court cases that discussed them.[260] To reduce the innocence standard, a case would have to be first granted certiorari by the United States Supreme Court which would overrule or change the holdings of either *Schlup* or *Herrera*. Texas has the authority to remove the innocence standard from its legislation.[261] Texas does not have the authority to unilaterally re-interpret the innocence standard that has been federally mandated through the United States Supreme Court.[262] Therefore, rather than reducing the innocence standard and granting the wrongfully convicted a lower bar to qualify for innocence, Texas must eliminate the innocence standard altogether.

Texas can no longer be considered the legislative model for compensating individuals.[263] Additionally, of the thirty-eight states that have legislation to compensate the wrongfully imprisoned, only eight of them have statutes that apply broadly to most exonerees and serve the intended purpose of helping imprisoned persons reintegrate into society.[264] The remaining thirty states

---

[255] 28 U.S.C § 2513 (a)(1); THE INNOCENCE PROJECT, COMPENSATION STATUTES: A NATIONAL, *supra* note 229.

[256] *Id.*

[257] *Id.*

[258] *See generally Ex parte* Tuley, 109 S.W.3d 388 (Tex. Crim. App. 2002) (interpreting the innocence standard in Texas).

[259] *See id.* at 390.

[260] Schlup v. Delo, 513 U.S. 298 (1996); Herrera v. Collins, 506 U.S. 390 (1993).

[261] *See* The Legislative Process in Texas, TEXAS LEGISLATIVE COUNCIL 1–2 (Nov. 2022) https://tlc.texas.gov/docs/legref/legislativeprocess.pdf (outlining the legislative process in Texas, indicating that legislators have the authority to introduce and amend laws, including changes to standards or criteria in existing statutes).

[262] The implication that Texas cannot unilaterally reinterpret the innocence standard federally mandated would come from the broader federalism principle that states cannot contravene constitutional protections established by the Supreme Court.

[263] *Contra* Shaw, *supra* note 32, at 613 (arguing that Texas's compensation scheme should be the model for other states).

[264] *See Compensation for Exonerees*, *supra* note 26.

should also amend their legislation to eliminate the requirement of proving actual innocence, and the fourteen states that have no legislation compensating the wrongfully imprisoned should adopt a substantially similar version of the legislation that is proposed in this Article.[265]

Some may argue that amending the legislation to allow a broader number of exonerees to qualify for compensation for their time spent in prison will inevitably bankrupt the state, as they will be forced to award larger compensation packages.[266] Since 2011, however, the state of Texas has paid only $150,334,444.90 to 110 exonerees under the compensation statute.[267] In comparison, in 2021 alone, Texas's total expenditures were $143.2 billion.[268] The amount of money dedicated to compensating those who have been wrongfully imprisoned is minuscule compared to the total amount of money spent by the state in one year.[269] Texas has only exonerated 294 people since 2011.[270] If each person were to be compensated $1 million total, the state would spend less than $300 million in an eleven-year period, or a little over $27 million per year.[271] Using the total expenditures of 2021, the $27 million the state would pay per year is .01 percent of the state's total expenditures.[272]

Those who are opposed to amending the legislation and argue that compensating the wrongfully imprisoned will surely bankrupt the state could not be further from the truth.[273] An argument that dedicating .01 percent of the state's total budget to compensating the wrongfully imprisoned would bankrupt the state is inadequate as a reason to continue to implement the innocence requirement.[274] The percentage is so small as to be a blip on the radar, and will not require a significant raise in taxes, if any, on the public. In comparison, Texas taxpayers spend upwards of $2 billion per year on Operation Lone Star, the initiative that funds border security at the Texas-Mexico border.[275] This border operation receives approximately 1.4% of the state's total

---

[265] The discussion of other states amending their legislation is beyond the scope of this Article.

[266] *See* Deborah M. Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 529 (2011).

[267] E-mail from Texas Comptroller of Public Accounts, Open Records Section to Cameron Hekkert, *supra* note 76.

[268] NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, 2021 STATE EXPENDITURE REPORT 8 (2021), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b7500fca152d64c2/UploadedImages/SER%20Archive/2021_State_Expenditure_Report_S.pdf (last visited Dec. 16, 2022).

[269] E-mail from Texas Comptroller of Public Accounts, Open Records Section to Cameron Hekkert, *supra* note 76.

[270] *See generally* NATIONAL REGISTRY OF EXONERATIONS, *supra* note 74 (filtering all exonerations since 2011 to Texas only).

[271] *Id.*

[272] NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, *supra* note 269, at 8.

[273] Mostaghel, *supra* note 266, at 529.

[274] *Id.*; NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, *supra* note 269, at 8.

[275] Jason Beeferman, *Gov. Greg Abbott Redirects $500 Million from Other Agencies to Fund Border Security Mission Through End of Fiscal Year*, THE TEXAS TRIBUNE (Apr. 29, 2022), https://www.texastribune.org/2022/04/29/greg-abbott-texas-border-mission-funding/.

budget, almost 140 times the amount that would be delegated to compensate the wrongfully imprisoned.[276]

The amount of money needed to compensate exonerees is also minimal compared to the amount counties across the state budget to their prosecutor's offices for one year.[277] In comparison, in 2021, Dallas County alone budgeted $58,298,663 for the county prosecutor's office.[278] Tarrant County budgeted $34,895,407 for the prosecutor's office, an increase of 13.3 percent since fiscal year 2011.[279] Travis County budgeted $37,468,201 for the prosecutor's office, an increase of 63.5 percent since fiscal year 2011.[280] El Paso County budgeted $18,677,156 to the prosecutor's office for the 2021 fiscal year, an increase of 39.3 percent since fiscal year 2011.[281] Bexar County budgeted $41,590,988 to the prosecutor's office in 2021, an increase of 51 percent since the fiscal year 2011.[282] Harris County budgeted $94,280,000 for the prosecutor's office in 2021, an increase of 40.2 percent since fiscal year 2011.[283] Throughout the state of Texas, large sums are budgeted to prosecutions by Texas counties.[284] If these budgets can be dedicated to imprisoning accused people, America's foundational principles of justice demand that relatively small amounts be allocated to address the wrongs committed by these counties and the state.

Additionally, compensating exonerees has only a positive effect on those who have been wrongfully imprisoned and does not negatively affect any other class of the population.[285] Amending the legislation to include a broader group of exonerees is unlikely to negatively affect many citizens of Texas, as similar changes in other states have been shown to have minimal impact.[286] Only those who have been wrongfully imprisoned and face the negative

---

[276] *Id.*

[277] *See generally* E-mail from Texas Comptroller of Public Accounts, Open Records Section to Cameron Hekkert, *supra* note 75 (compared to budgets of Texas counties dedicated to prosecution offices).

[278] *What Prosecution Costs, Dallas, TX*, VERA INSTITUTE, https://www.vera.org/publications/what-prosecution-costs/dallas-tx (last visited Dec. 16, 2022).

[279] *What Prosecution Costs, Arlington, TX*, VERA INSTITUTE, https://www.vera.org/publications/what-prosecution-costs/arlington-tx (last visited Dec. 16, 2022).

[280] *What Prosecution Costs, Austin, TX*, VERA INSTITUTE, https://www.vera.org/publications/what-prosecution-costs/austin-tx (last visited Dec. 16, 2022).

[281] *What Prosecution Costs, El Paso, TX*, VERA INSTITUTE, https://www.vera.org/publications/what-prosecution-costs/el-paso-tx (last visited Dec. 16, 2022).

[282] *What Prosecution Costs, San Antonio, TX*, VERA INSTITUTE, https://www.vera.org/publications/what-prosecution-costs/san-antonio-tx (last visited Dec. 16, 2022).

[283] *What Prosecution Costs, Houston, TX*, VERA INSTITUTE, https://www.vera.org/publications/what-prosecution-costs/houston-tx (last visited Dec. 16, 2022).

[284] *Supra* notes 279–284 (stating the prosecutor's budgets for several Texas counties).

[285] *See generally* Scott Rodd, *What Do States Owe People Who Are Wrongfully Convicted?*, STATELINE PEW TRUSTS (Mar. 14, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/14/what-do-states-owe-people-who-are-wrongfully-convicted ("The bill wouldn't affect many people in Tennessee[,]" referencing those who would be affected by the passing of a compensation statute for exonerees).

[286] *Id.*

consequences of that experience every day of their lives will be directly affected by the amendment to the legislation.[287] This amendment must eliminate the innocence requirement and the statute of limitations, which restricts the time at which an exoneree is able to apply for their financial compensation or undergraduate tuition credit, as well as apply retroactively to allow exonerees who were previously unqualified to receive compensation from the state for the time they spent wrongfully imprisoned.

V. CONCLUSION

Texas must amend its legislation. Exonerees' lives are being ruined, not only because they spent time facing traumatic events in prison, but also because they are not being looked after by the state and recompensed for the state's wrongs. Texas is harming every person who faced even one day in prison, was subsequently exonerated, and has not yet been compensated for the time they spent incarcerated.

It has been clearly established that those who spend time in prison wrongfully face hardships in almost every aspect.[288] Not only do they face difficulties in prison, but after release they experience a multitude of challenges as well. These exonerees and wrongfully imprisoned people have faced extreme hardship due to the actions of the state. When it is time for Texas to step up and take responsibility for its wrongs, they remain silent.

Texas must amend its legislation to remove the innocence requirement and the statute of limitations, include the release of a public statement that will educate Texas voters, judges, and prosecutors, and apply retroactively to benefit all exonerees. Texas's inaction speaks louder than words for the wrongfully imprisoned. Texas must use its voice to support the wrongfully imprisoned. Texas must amend its legislation to more broadly impact and benefit exonerees. This is the least the state can do for those people whose lives have been ruined by Texas's criminal justice system.

---

[287] *Id.*

[288] Haney, *supra* note 185.

Article

THE "CLASSIC PENALTY" CATCH-22: THE CURRENT CIRCUIT SPLIT AND WHY STATES SHOULD ADOPT THE FEDERAL APPROACH TO SUPERVISED RELEASE

Janelle Smith*

I. Introduction 72
II. Background 73
A. The Fifth Amendment 73
B. The "Class Penalty" Standard 74
C. The Circuit Split 76
1. The Majority View: Condition Created Penalty Situation 76
2. The Minority View: Condition Did Not Create Penalty Situation 80
III. Analyzing The Circuit "Split" 82
A. The Nature of the "Split" 82
IV. Adopting The Federal Approach 84
A. The Federal Approach 84
B. Impact of the Federal Approach 85
C. Benefits 86
1. Probationers 86
2. Community 87
V. Conclusion 88

* Third-year law student, The University of Texas School of Law. Northeastern University, B.A., 2016 and M.S., 2019. I would like to thank The Honorable Robert Pitman for his invaluable insights on this topic and in the classroom.

[*]I. INTRODUCTION

"'You mean there's a catch?' Yossarian asked.

'Sure there's a catch,' Doc replied. 'Catch-22.'"[1]

Yossarian is faced with a dilemma. He desperately wants to avoid flying combat missions in a war and believes he can do so by claiming he is insane.[2] But there's a catch. Should he ask to be grounded from missions, he will necessarily demonstrate his sanity, and therefore not be declared insane.[3] Alternatively, Yossarian can simply not ask. But either option would yield an undesirable result—continued participation in dangerous combat missions.[4] This paradox, also known as a "catch-22," describes a situation where a person is trapped by a set of contradictory conditions.[5] Just like Yossarian, this person is damned by either option.

A probationer may find himself confronted with a similar paradox. Namely, a probationer who is subject to a probation condition that requires truthful answers may face a situation in which he must choose between giving an incriminating response or invoking his Fifth Amendment right to remain silent and suffer government-threatened punishment.[6] In such a situation, the state, either explicitly or implicitly, asserts that if the probationer invokes the Fifth Amendment, his probation will be revoked.[7] The Supreme Court has coined this dilemma the "classic penalty situation."[8] Since a person on probation does not lose protection against self-incrimination, the Court has developed a solution to this situation.[9] Specifically, courts must excuse the probationer's failure to assert the privilege and the probationer's answers will be deemed compelled and inadmissible in a subsequent criminal prosecution.[10]

Since the Court's decision in *Murphy*, United States circuit courts have reached different results on whether a standard condition requiring a defendant to truthfully answer all questions asked by his probation officer presented

---

[*]

[1] JOSEPH HELLER, CATCH 22 57 (1996).

[2] *Id*. at 56.

[3] *Id*. at 57.

[4] *See id*. (noting that a person must ask first to be "grounded," and that if the person asks, he will have to fly more missions.).

[5] The Introvert Alert, *The Fascinating History and Meaning Behind the Saying "Catch-22,"* MEDIUM, (May 10, 2023), https://medium.com/@theintrovertalert/the-fascinating-history-and-meaning-behind-the-saying-catch-22-d895b342a1a.

[6] McKathan v. United States, 969 F.3d 1213, 1217 (11th Cir. 2020).

[7] Minnesota v. Murphy, 465 U.S. 420, 435 (1984).

[8] *Id.*

[9] *Id*. at 426.

[10] *Id*. at 435.

a classic penalty situation.[11] The Ninth and Eleventh Circuits decided in favor of the defendant-probationer, finding that the release conditions took the "impermissible step" of requiring a probationer to choose between jeopardizing his conditional liberty by remaining silent or making incriminating statements.[12] In contrast, the Fourth Circuit held that a defendant's supervised release condition did not require the defendant to choose between invoking his constitutional right to remain silent or giving an incriminating response.[13]

This paper examines the split among the circuits regarding the classic penalty situation. Part I discusses the purpose and intent of the Fifth Amendment and details the "classic penalty" standard the Court outlined in *Murphy*. It also discusses the current circuit split on the issue of whether a standard probation condition presented a penalty situation. Part II analyzes the circuit court split and compares the factors in each case that led to the court's determination. Part III explains why states should consider adopting the federal approach to supervised release to decrease the likelihood that a probationer will be faced with a classic penalty situation. This analysis includes a discussion on the impact of the current federal approach and the potential benefits for probationers and the community if states were to adopt a uniform approach to the "answer truthfully" condition of probation.

II. BACKGROUND

A. The Fifth Amendment

The Fifth Amendment of the U.S. Constitution prevents the government from abusing its prosecutorial powers.[14] It reads, in relevant part, that "no person . . . shall be compelled in any criminal case to be a witness against himself."[15] This clause originated in early English common law as a response to the unfettered ability of English judicial officers to place witnesses under oath and subject them to broad inquiries into their possible criminal activity.[16] The effort to protect individuals from such inquisitions developed into the

---

[11] *Compare* United States v. Saechao, 418 F.3d 1073, 1075 (9th Cir. 2005), *and McKathan*, 969 F.3d at 1230, *with* United States v. Linville, 60 F.4th 890, 897 (4th Cir. 2023).

[12] *Saechao*, 418 F.3d at 1075; *McKathan*, 969 F.3d at 1229.

[13] *Linville*, 60 F.4th at 893.

[14] CONGRESS, *Amdt5.1 Overview of Fifth Amendment, Rights of Persons*, https://constitution.congress.gov/browse/essay/amdt5-1/ALDE_00000056/ (last visited May 1, 2024).

[15] U.S. CONST. amend. V. The clause originates from the Latin maxim "*nemo tenetur seipsum accusare*," which translates to "no man is bound to accuse himself." *Self-Incrimination*, JUSTIA, https://law.justia.com/constitution/us/amendment-05/07-self-incrimination.html#fn-184 (last visited May 1, 2024).

[16] E. R. Harding, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 471 (1974), https://digitalcommons.law.villanova.edu/vlr/vol19/iss3/3.

self-incrimination privilege, which was adopted in the Fifth Amendment to the U.S. Constitution in 1791.[17]

The clause serves two interrelated interests.[18] First, is the preservation of an accusatorial system of criminal justice, which goes to the integrity of the American judicial system.[19] It must be such that "even the guilty are not to be convicted unless the prosecution shoulder[s] the entire load."[20] Second, is the preservation of personal privacy from unwarranted governmental intrusion.[21] This interest reflects the concern of our society for each person to have the right to "be let alone."[22]

Traditionally, a person called upon to give legally required testimony can claim the self-incrimination privilege in any proceeding when his answer may be used against him in that proceeding or in a future criminal proceeding.[23] The privilege can also be claimed when the answer may be exploited to uncover other evidence against the person.[24] This person must have a reasonable fear that his response will be incriminatory.[25] With limited exceptions, the person must claim the privilege to benefit from it.[26] Otherwise, his answers will not be considered "compelled" within the meaning of the Amendment.[27]

B. The "Class Penalty" Standard

The U.S. Supreme Court set the standard for how courts should determine whether a probationer is in a classic penalty situation.[28] In *Murphy*, the Court resolved the issue among state and federal courts of whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding.[29] In that case, a probationer was given a suspended prison sentence after pleading guilty to a sex-related charge in a Minnesota state court.[30] The terms of his probation required that he be truthful with his probation officer "in all matters."[31] He was

---

[17] *Id*.

[18] CONGRESS, *5.4.3 General Protections Against Self-Incrimination Doctrine and Practice*, https://constitution.congress.gov/browse/essay/amdt5-4-3/ALDE_00000865/ (last visited May 1, 2024).

[19] *Id.*

[20] *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 415 (1966).

[21] CONGRESS, *supra* note 18.

[22] *Tehan*, 382 U.S. at 416.

[23] JUSTIA, *supra* note 15.

[24] *Id*.

[25] *Id.*

[26] *Id.*

[27] United States v. Monia*,* 317 U.S. 424, 427 (1943) (footnote omitted).

[28] *Murphy*, 465 U.S. at 425.

[29] *Id.*

[30] *Id*. at 420.

[31] *Id.*

also informed that a failure to comply with his probation terms could result in his probation being revoked.[32]

During one meeting, the probation officer questioned the probationer about a prior rape and murder.[33] Upon questioning, the probationer admitted that he had committed the rape and murder and was subsequently indicted for first-degree murder.[34] The probationer then sought to have his confession suppressed on the ground that it violated his Fifth and Fourteenth Amendment rights.[35]

The Court noted that a defendant does not lose protection against compelled testimony in a subsequent criminal case merely because he was on probation at the time he made incriminating statements.[36] It held that a general obligation to appear and answer questions truthfully does not in itself convert voluntary statements into compelled ones.[37] The Court then considered whether the probationer was in a "classic penalty situation," such that the probationer's failure to assert the privilege would be excused.[38] To be excused, the probationer must have had a reasonably perceived threat of revocation of his probation.[39] A reasonably perceived threat would occur if the state either expressly or implicitly asserted that invoking the privilege would lead to revocation of probation.[40] If present, then the probationer's failure to invoke the privilege would be excused.[41]

Ultimately, the Court concluded that the probationer was not in a penalty situation.[42] First, the state did not expressly assert that the probationer's probation would be revoked if he asserted the privilege.[43] On its face, the probation condition did not say anything about the probationer's freedom to decline to answer certain questions or suggest that the probationer's probation was conditioned on waiving his privilege.[44] Second, the probationer was not expressly informed by his probation officer that asserting the privilege would result in a penalty.[45] Moreover, under Minnesota's revocation statute, revocation is not automatic and the probationer must be afforded a hearing.[46] Further, the Court was not aware of any Minnesota case where the state

---

[32] *Id.* at 422.
[33] *Id.* at 422–23.
[34] *Id.* at 420.
[35] *Id.* at 425.
[36] *Id.* at 426.
[37] *Id.* at 427.
[38] *Id.* at 435.
[39] *Id.* at 439.
[40] *Id.* at 435.
[41] *Id.*
[42] *Id.* at 439.
[43] *Id.* at 437.
[44] *Id.*
[45] *Id.* at 438.
[46] *Id*.

attempted to revoke probation simply because a probationer refused to give incriminating statements.[47] As an aside, the Court noted that the requirement that the probationer attend the meeting and answer his probationer's questions truthfully was insufficient to excuse the probationer's failure to exercise the privilege.[48] The Court concluded that the probationer was not deterred from claiming the privilege against self-incrimination.[49] Thus, the Court held that the probationer could not successfully invoke the privilege to prevent the information he "volunteered" to his probation officer from being used against him in his subsequent criminal prosecution.[50]

C. The Circuit Split

In applying the classic penalty standard, U.S. courts of appeals have disagreed on whether a condition of release requiring a defendant to truthfully answer all questions asked by his probation officer created a classic penalty situation. Two circuit courts held that the condition placed the defendant in a penalty situation. More recently, however, the Fourth Circuit held that the condition did not violate the defendant's Fifth Amendment right against self-incrimination.

1. The Majority View: Condition Created Penalty Situation

The Ninth Circuit held that the probationer was compelled to give incriminating admissions within the meaning of the Fifth Amendment.[51] In *Saechao*, the probationer was on state probation after pleading guilty to a state felony offense.[52] The day after his plea, the probationer was informed of his probation conditions.[53] The conditions required him to "promptly and truthfully answer all reasonable inquiries" by the Department of Correction and prohibited him from possessing weapons or firearms.[54] The terms also provided that a failure to comply with these conditions could result in a revocation of his probation.[55] In their first meeting, the officer repeatedly asked the probationer if he possessed a firearm.[56] The probationer eventually admitted that he had a rifle in his apartment.[57] After the admission, the officer

[47] *Id.* at 439.
[48] *Id.* at 437.
[49] *Id.* at 439.
[50] *Id.* at 440.
[51] *Saechao*, 418 F.3d at 1075.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

accompanied the probationer to his apartment and confiscated the rifle.[58] The officer then turned the evidence to federal authorities, who ultimately charged the probationer with being a felon in possession of a firearm.[59]

On appeal, the Ninth Circuit addressed whether the district court erred in granting the probationer's motion to suppress the evidence obtained as a result of the incriminating statements he gave in response to his probation officer's inquiries.[60] The court noted that Oregon's probation condition implicitly foreclosed a probationer's right to remain silent.[61] Namely, because the condition required the probationer to "promptly . . . *answer all* reasonable inquiries," the probationer did not have the luxury of remaining silent.[62] The court determined that this condition was unlike the condition in *Murphy*, which only required the probationer to "be truthful with his probation officer in all matters."[63] Under this condition, the probationer in *Murphy* was allowed to remain silent as long as he was truthful when he spoke.[64]

The court also relied on Oregon state court's interpretation of the probation condition to reach its decision.[65] In response to the state's argument that a probationer is subject to a threat of penalty only when the state *explicitly* announces that it will impose a penalty, the court noted that this interpretation is contrary to Oregon state court's interpretation of its own statute.[66] Specifically, the Oregon Court of Appeals held that statements elicited by a probation officer were compelled even though there was no express reference to the self-incrimination privilege in the probation conditions.[67]

In *Gaither*, a defendant was required to "promptly and truthfully answer all reasonable inquiries" posed by his probation officer and to provide a list of all of his prior victims.[68] After being asked by the officer if he had committed previous acts of abuse, the defendant admitted that he had.[69] The defendant was subsequently charged with sexual abuse in the first degree.[70] Even though the officer testified that he neither told the defendant nor led the defendant to believe that his probation could be revoked if he exercised his self-incrimination privilege, the Oregon Court of Appeals held that the probationer was in a penalty situation.[71] The Ninth Circuit stated that by making

---

[58] *Id.* at 1076.
[59] *Id.*
[60] *Id.* at 1075.
[61] *Id.* at 1079.
[62] *Id.* at 1078–79 (alteration in original).
[63] *Id.* at 1078.
[64] *Id*.
[65] *Id.* at 1079.
[66] *Id*. (emphasis added).
[67] State v. Gaither, 100 P.3d 768, 772 (2004).
[68] *Id*. at 770.
[69] *Id*.
[70] *Id*.
[71] *Id*. at 770–773.

this decision, the Oregon Court of Appeals implicitly held that an express declaration that a probationer may not invoke the Fifth Amendment is not required and that invoking the privilege does not constitute compliance with Oregon's probation conditions.[72] As such, the Ninth Circuit held that the probationer's conditions implicitly penalized the probationer's right to remain silent and affirmed the district court's decision to suppress the evidence obtained by the probationer's incriminating responses to his probation officer.[73]

Similarly, in *McKathan*, the U.S. court of appeals for the Eleventh Circuit concluded that a releasee faced a penalty situation when his probation officer asked him to answer questions that would reveal that he had committed new crimes.[74] *McKathan* involved a releasee who was sentenced to federal supervised release after pleading guilty to and serving a term of imprisonment for possession of child pornography.[75] Under his release terms, the releasee was required to "answer truthfully all inquiries by the probation officer" and the officer was permitted to conduct reasonable searches of the releasee's house, including electronic devices within the home since the releasee agreed to forgo using computers with internet access.[76] The releasee was informed that his supervised release could be revoked and that he could be sent back to prison if he violated these terms.[77]

In 2014, seven years after the releasee began living under the terms of his supervised release, the probation officer paid a surprise visit to the releasee's home and asked the releasee about his internet usage after noticing a cell phone on the releasee's bed.[78] The releasee admitted that he was the owner of the phone, that the phone could access the internet, and that he had been viewing child pornography.[79] The releasee even provided the officer with the phone's unlock code after the officer asked for it.[80] Upon inspecting the phone, the officer found downloaded images of child pornography.[81] The officer used the evidence in the releasee's revocation hearing and also provided the images to authorities.[82] The releasee was indicted and ultimately pled guilty to knowingly receiving child pornography.[83]

---

[72] *Saechao*, 418 F.3d at 1079.
[73] *Id.* at 1081.
[74] *McKathan*, 969 F.3d at 1217.
[75] *Id.* at 1218.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* at 1219.
[83] *Id.* at 1220.

In reviewing the releasee's motion to vacate the conviction, the court assessed whether the releasee was in a classic penalty situation.[84] The court determined that the terms of the releasee's supervised release conditions, on their face, only prohibited false statements and did not indicate that probation was conditional on waiving the privilege against self-incrimination.[85] However, the court determined that the releasee's belief that he was in a penalty situation was objectively reasonable.[86] The court made this determination based in part on a previous Eleventh Circuit case where the court affirmed a decision to revoke the probation of a convicted smuggler who refused to make non-immunized disclosures about his criminal acts.[87]

In *Robinson*, a releasee was required to "respond completely and truthfully to the questions asked by his probation officer."[88] When the probation officer asked the releasee about the source of income he had reported on his tax return, the releasee asserted his Fifth Amendment privilege to remain silent.[89] The court later revoked the releasee's probation based on his refusal to answer the officer's question.[90] On appeal, the Eleventh Circuit affirmed the revocation, determining that the releasee's refusal to "completely and truthfully" answer the officer's question was a violation of his probation and that a failure to report—regardless of why—can alone justify probation revocation.[91] Based on its decision in *Robinson*, the court in *McKathan* concluded that a reasonable person in the releasee's position would understand that *Robinson* authorized punishment if a person on supervised release refused to answer his probation officer's questions.[92]

The court then noted that the U.S. Sentencing Commission's 2016 Amendment to this condition effectively abrogated *Robinson*.[93] In 2016, the Commission added an Application Note to Section 5D1.3.[94] This note states that although the condition requests that the defendant "'answer truthfully,' . . . a defendant's legitimate invocation of the privilege against self-incrimination in response to a probation officer's questions shall not be considered

---

[84] *Id.* at 1222–26.

[85] *Id.* at 1226.

[86] *Id.* at 1231.

[87] *Id.* at 1228–31(citing United States v. Robinson, 893 F.2d 1244, 1244–45 (11th Cir. 1990)).

[88] *Robinson*, 893 F.2d at 1244–45.

[89] *Id.* at 1244.

[90] *See id.* at 1244–45 (analyzing whether district court abused its discretion for revoking probation after probationer pled fifth amendment after probation officer asked probationer about source of income on probationer's tax return).

[91] *See id.* (quoting United States v. Morin, 889 F.2d 328, 332 (1st Cir.1989) to reason that a failure to comply with reporting requirements is a probation violation that "alone can justify revocation of probation.").

[92] *McKathan*, 969 F.3d at 1228.

[93] *Id.* at 1230.

[94] U.S. SENT'G GUIDELINES MANUAL § 5D1.3, cmt. note 1 (U.S. SENT'G COMM'N 2016).

a violation of this condition."[95] The court also added that since November 1, 2016, the date the Amendment became effective, no supervised-releasee has been able to demonstrate that he reasonably believed he was faced with the classic penalty situation.[96] But, because the probationer answered the questions in 2014—before the notes became effective, the court stated that the Amendment could not control its analysis and concluded that the releasee was in a class penalty situation.[97]

2. The Minority View: Condition Did Not Create Penalty Situation

Unlike the Ninth and Eleventh Circuits, the Fourth Circuit held that a supervised release condition did not place a releasee in a penalty situation.[98] In *Linville*, a releasee was on federal supervised release for receiving child porn.[99] These supervised release conditions, like those in *McKathan*, required the releasee to "answer truthfully all inquiries from his probation officer."[100] In *Linville*, the releasee had to submit to polygraph testing.[101] Releasee was also prohibited from possessing any sexually explicit materials.[102] After a polygraph test indicated that the releasee was being deceptive about whether he possessed or viewed pornography, the probation officer asked the releasee if he possessed pornography.[103] The releasee admitted that he possessed adult and child pornography and told the officer that the pornography was at his home.[104] The officer found CDs and DVDs at the releasee's home, which were later determined to contain files depicting children engaged in sexual acts.[105] The releasee was sentenced to prison for violating his supervised release terms and was also charged with knowingly possessing child pornography.[106] The releasee ultimately pled guilty after the district court denied a motion to suppress his statements and the evidence obtained from his home.[107]

On appeal, the Fourth Circuit determined that the release conditions did not place the releasee in a penalty situation.[108] First, the conditions did not require the releasee to choose between revocation and asserting the self-

---

[95] *Id.*
[96] *McKathan*, 969 F.3d at 1230.
[97] *Id*.
[98] *Linville*, 60 F.4th at 893.
[99] *Id.*
[100] *Id.* at 895.
[101] *Id.* at 893.
[102] *Id.* at 893–94.
[103] *Id.* at 894.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 894–95.
[107] *Id.* at 895.
[108] *Id.* at 893.

incrimination privilege.[109] Second, there was no reasonable basis for the probationer to believe that he risked revocation if he invoked the privilege.[110] Specifically, there was no evidence that the officer threatened the releasee with revocation if he asserted his rights.[111] The court also noted that the 2016 Amendment notes state that a legitimate invocation of the privilege against self-incrimination shall not be considered a violation of this condition.[112] The court added that as the Eleventh Circuit noted in *McKathan*, no supervised-releasee who chose to answer incriminating questions since the Amendment was promulgated could demonstrate a reasonable belief that he was faced with a classic penalty situation.[113]

The court then differentiated this case from *Saechao* and *McKathan*.[114] It stated that the applicable law in the instant case was vastly different from the law present in *Saechao*.[115] Namely, *Saechao* involved Oregon law under which invoking the privilege does not constitute compliance with Oregon's probation condition, which was unlike this case where clear federal law provides that invoking the privilege could not constitutionally be grounds for revoking supervised release.[116] Likewise, the court distinguished this case from *McKathan*.[117] There, the condition placed the releasee in a penalty situation and the releasee testified that his probation officer threatened him with revocation if he did not follow his probation conditions.[118] Here, however, the conditions did not create a penalty situation and there was no evidence that the releasee was threatened by his probation officer.[119] Moreover, the interaction with the releasee and officer in *McKathan* took place before the Sentencing Commission's 2016 Amendment.[120] Thus, the court concluded that the government did not assert that it would revoke the releasee's probation and noted that even if the government did, the releasee's belief would not have been reasonable.[121] As such, the court affirmed the district court's motion to suppress the evidence.[122]

---

[109] *Id.* at 897.
[110] *Id.*
[111] *Id.*
[112] *Id*. at 898.
[113] *Id.*
[114] *Id.* at 898–99.
[115] *Id.* at 898.
[116] *Id.*
[117] *Id.* at 899.
[118] *Id.*
[119] *Id.* at 897–99.
[120] *Id.* at 899.
[121] *Id.*
[122] *Id.*

III. ANALYZING THE CIRCUIT "SPLIT"

A. The Nature of the "Split"

There is no true split among the circuits because each court applied the classic penalty standard correctly. The standard, as outlined in *Murphy*, reasonably provides for a two-step inquiry to determine whether a probationer was faced with a penalty situation.[123] As part of this inquiry, courts assess (1) whether the conditions explicitly or by implication require the probationer to choose between waiving his Fifth Amendment right and probation revocation[124] and (2) whether this is a reasonable basis for the probationer to conclude that invoking the privilege will lead to his probation being revoked.[125] As to the first inquiry, the Court in *Murphy* considered whether the conditions only prohibit false statements.[126] In the second inquiry, the Court considered the following factors to assess reasonableness: (1) whether there was direct evidence that the probationer confessed because he feared his probation would be revoked if he remained silent; (2) whether under the revocation statute, revocation is automatic if a probationer violates his probation conditions; and (3) whether there are cases in the jurisdiction where the government revoked probation merely because a probationer refused to answer incriminating questions.[127]

Each court applied the two-step inquiry correctly to distinguishable facts. Namely, the probationer in *Saechao* was subjected to a penalty situation based primarily on the first step—whether the conditions explicitly or by implication required the probationer to choose between waiving his Fifth Amendment right and probation revocation.[128] The condition in *Saechao* expressly required the probationer to "promptly and truthfully *answer all* reasonable inquiries."[129] This language did not give the probationer the "freedom to decline to answer particular questions."[130] Instead, the probationer was expressly required not only to answer reasonable inquiries from his probation officer but to answer *all* of them.[131] Moreover, interpreting the

---

[123] *See Linville*, 60 F.4th at 897 ("Fairly read, *Murphy* provides a two-step inquiry for courts considering classic penalty situation arguments in the context of supervised release conditions.")

[124] *See id.* (noting that in the first step, the court must consider whether "the conditions actually require a choice between asserting the Fifth Amendment and revocation of supervised release?").

[125] *See id.* ("Second, even if [conditions do not require a choice between asserting the Fifth Amendment and revocation of supervised release], is there a reasonable basis for a defendant to believe they do?")

[126] *Id.*

[127] *Id.* at 437–39.

[128] *See Saechao*, 418 F.3d at 1078–80 (analyzing whether the condition required Saechao to truthfully answer all inquiries).

[129] *Id.* at 1075 (emphasis added).

[130] *Murphy*, 465 U.S. at 437.

[131] *Saechao*, 418 F.3d at 1075.

condition to mean that the probationer was in a penalty situation aligned with Oregon's interpretation of this condition.[132]

Likewise, the releasee in *McKathan* was also faced with a penalty situation.[133] Although the condition itself only required that the releasee "answer truthfully,"[134] and thus did not satisfy the first inquiry, the second inquiry—whether the probationer had a reasonable basis to conclude that invoking the privilege would lead to his probation being revoked—was satisfied.[135] A factor the Court considered in *Murphy* as part of this reasonableness inquiry was whether there were cases in the jurisdiction where a probationer refused to answer incriminating questions and the government sought revocation on this basis.[136] The *Robinson* case, where the releasee's probation was revoked for his refusal to "completely and truthfully" answer his probation officer's questions,[137] fit squarely within this criteria. Thus, the existence of *Robinson* required the Eleventh Circuit to conclude that the releasee's belief that he was subjected to a "classic penalty situation" was objectively reasonable.[138]

Linville was the only circuit court case where the court determined that a "classic penalty situation" did not exist as neither inquiry was satisfied.[139] Regarding the first inquiry, the release condition did not require the releasee to answer all inquiries but to "*truthfully answer* all questions."[140] This condition was unlike the one in *Saechao*, which foreclosed the probationer's right to remain silent.[141] Namely, the condition in *Linville* did not require the releasee to speak; it only required him to speak truthfully when he did speak.[142]

While the releasees in *Linville* and *McKathan* were subject to the same "answer truthfully" condition, the courts reached different outcomes based on the second inquiry. In *McKathan,* the releasee could rely on *Robinson* to support why he reasonably believed invoking the right or remaining silent could be grounds for probation revocation.[143] However, because of the 2016 Amendment, which essentially abrogated *Robinson*,[144] there were no cases that the releasee in *Linville* could rely on to demonstrate that he reasonably

---

[132] *Id.* at 1079–80.

[133] *McKathan*, 969 F.3d at 1231.

[134] *Id.* at 1218.

[135] *Id.* at 1230.

[136] *Murphy*, 465 U.S. at 439.

[137] *See Robinson*, 893 F.2d at 1244–45. (noting that releasee failed to report his activities "*completely and truthfully*" and quoting *Morin*, 889 F.2d at 332 to reason that a failure to comply with reporting requirements is a probation violation that "alone can justify revocation of probation.").

[138] *McKathan*, 969 F.3d at 1230–31.

[139] *See infra* Section II.C.2.

[140] *Linville*, 60 F.4th at 893 (emphasis added).

[141] *Saechao*, 418 F.3d at 1078.

[142] *See Linville*, 60 F.4th at 897 (noting that the condition did not expressly state that if the releasee exercised his Fifth Amendment right to remain silent, he risked incurring criminal penalties).

[143] *McKathan*, 969 F.3d at 1227.

[144] *Id.* at 1230.

believed he was in a penalty situation.[145] Additionally, the releasee in *McKathan* provided evidence that his probation officer threatened him with probation revocation, which is unlike the probationer in *Linville*, where there was no evidence that the releasee's probation officer threatened him.[146] Since none of the factors that the Court in *Murphy* listed as the basis for a probationer to reasonably believe he was in a penalty situation were met,[147] the Court in *Linville* applied the penalty standard correctly.

Notably, it is doubtful that the probationer in *Linville* would have satisfied the reasonable belief inquiry even if his probationer officer threatened him with revocation. In *McKathan*, the court stated that it was required to conclude the releasee's belief was objectively reasonable because of the existence of *Robinson*.[148] This indicates that if *Robinson* or a comparable case did not exist, the court may not have determined that the releasee's belief was objectively reasonable. This, combined with the fact that no releasee has been able to demonstrate that he reasonably believed he was in a penalty situation after the Amendment became effective, suggests that the language added to the Amendment—as opposed to other factors—effectively ends the reasonableness inquiry for probationers on federal supervised release.[149]

IV. ADOPTING THE FEDERAL APPROACH

States should consider adopting the federal approach to the "answer truthfully" condition of supervised release. Applying the condition uniformly and nationwide poses benefits for both probationers and society.[150]

A. The Federal Approach

The federal standard condition requiring a releasee to "answer truthfully" has two components. First, is the language itself. It instructs the releasee that he "must *answer truthfully* the questions asked by [his] probation officer."[151] Unlike Oregon's condition that requires a probationer to "*truthfully answer* all reasonable inquiries," and thus, expressly *requires a probationer to*

---

[145] *Linville*, 60 F.4th at 898.

[146] *Id.* at 897–99.

[147] *Id.* at 898.

[148] *McKathan*, 969 F.3d at 1228–29.

[149] *See id.* at 1230 (noting that no supervised-releasee who chose to answer questions after the amendment became effective could demonstrate that he reasonably believed he was faced with the "classic penalty situation.").

[150] Even the federal system recognizes that national uniformity in adopting standard conditions is necessary. Namely, standard conditions represent "core supervision practices required in every case to fulfill the statutory duties of probation officers" and "ensures efficient policy development and training at the national level," ADMIN. OFF. OF THE U.S. CTS., OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 13 (2016), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf.

[151] *Id.* at 21.

answer particular questions,[152] the plain language in the federal condition *does not require a probationer to speak* but to be truthful when he does speak.[153] Moreover, the federal condition does not expressly state that if the releasee exercises his self-incrimination privilege, he risks a criminal penalty.[154]

Second, the federal standard for this condition now includes the following application note: "Although the condition . . . requires the defendant to 'answer truthfully' the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition."[155] This note effectively puts the probationer on notice that he retains the right to assert his self-incrimination privilege and that should he assert it, it alone shall not be considered a probation violation.

Moreover, if a probationer refuses to answer a question he believes to be incriminating, federal probation officers are instructed not to compel the probationer to answer the question through the threat of revocation.[156] Instead, officers are advised to refer the matter to court as the court will determine whether the invocation of the privilege against self-incrimination is valid.[157] As such, revocation of supervised release if a releasee invokes his Fifth Amendment right is not automatic in the federal system.[158]

B. Impact of the Federal Approach

The federal condition has effectively reduced the number of "classic penalty situations" and the success rate of motions to suppress evidence where a probationer was in a penalty situation.[159] Adoption of the federal approach would likely yield comparable results across all states.[160]

---

[152] *Saechao*, 418 F.3d at 1075, 1079.

[153] *McKathan*, 969 F.3d at 1226.

[154] *Linville*, 60 F.4th at 897.

[155] U.S. SENT'G GUIDELINES MANUAL § 5D1.3, cmt. note 1 (U.S. SENT'G COMM'N 2016).

[156] ADMIN. OFF. OF THE U.S. CTS., *supra*. at 150.

[157] *Id.*

[158] *See id.*

[159] *Linville*, 60 F.4th at 897-98 (denying releasee's motion to suppress evidence in part because no supervised-releasee who chose to answer questions after the amendment became effective could demonstrate that he reasonably believed he was faced with the "classic penalty situation").

[160] *Compare United States v. Sanchez*, 334 F. Supp. 3d 1284, 1298 (N.D. Ga. 2018) (finding that parolee on state parole was in a classic penalty situation when federal officer warned parolee that he was required to "truthfully answer all questions" and follow all instructions from his parole officer or any other employee of the State Board of Pardons and Paroles), *with United States v. Ka*, 2018 WL 901723, at *3 (W.D.N.C. Feb. 15, 2018), *aff'd*, 982 F.3d 219 (4th Cir. 2020) (determining that condition requiring federal supervised releasee to "answer truthfully all inquiries by [his] probation officer" did not place releasee in penalty situation).

The federal approach effectively forecloses both classic penalty inquiries. First, the express language of the condition does not create a penalty situation because it does not require a choice between revocation and asserting the privilege.[161] The courts in both *Linville* and *McKathan* determined as such when they reviewed the precise terms of this condition.[162] Thus, state probationers would be unlikely to face a penalty situation based on the language in the condition itself—inquiry one in the classic penalty analysis—if they were to adopt the federal language for this condition.

Second, informing a probationer that the condition does not foreclose the valid assertion of his Fifth Amendment privilege against self-incrimination would likely reduce the likelihood that a probationer would reasonably believe that he faced a penalty situation—inquiry two in the penalty analysis. Namely, adding the language, informing probation officers to refrain from threatening to revoke probation if a probationer asserts the privilege, and having a court review whether the assertion was valid as opposed to automatically revoking probation should all but eliminate each factor in the reasonable belief inquiry.

Likewise, because probation officers are informed on what to do when a probationer does not answer a question, they may refrain from threatening probationers who do not answer a potentially incriminating question.[163] Finally, because cases would be referred to courts, probation revocation would not be automatic for a probationer who allegedly violated this condition.[164] As such, if states were to adopt this approach, there would be a lack of case law to satisfy the reasonable belief inquiry. Therefore, if states adopt the federal language in the "answer truthfully" condition, a probationer will be unlikely to find himself faced with a "classic penalty situation" since neither of the inquiries would likely be satisfied.

C. Benefits

State adoption of the federal approach would benefit both probationers and the community.

1. Probationers

Adopting the federal approach to the "answer truthfully" condition would inform probationers that they maintain their Fifth Amendment right

---

[161] *McKathan*, 969 F.3d at 1227; *Linville*, 60 F.4th at 897.

[162] *Id.*

[163] *See id.* (considering whether probationer was threatened with the imposition of penalty by his probation officer before he gave incriminating statements in reasonable belief analysis).

[164] *See id.* at 438. (considering whether state's revocation statute authorized automatic revocation under this provision).

against self-incrimination even while on probation.[165] Because probationers are informed of the terms of their probation when they are initially placed on it,[166] they may be less likely to answer incriminating questions in meetings with their probation officer that could result in new criminal charges.[167] The probationer may also be more likely to make an informed and voluntary decision on whether to answer such questions.[168]

Moreover, should the probationer assert the privilege, and his probation officer seek revocation, the revocation would not be automatic.[169] Instead, the probationer's assertion of the privilege would be reviewed by a court to determine if it was valid.[170] This would provide the probationer with the opportunity to explain to a court why he asserted the right.

Additionally, this approach would also help effectuate the purpose of the Fifth Amendment by decreasing the possibility of compelled testimony. Namely, it would ensure that the prosecution has the full burden of proving a defendant-probationer's guilt in a subsequent criminal prosecution.[171]

2. Community

Implementing the federal approach in all states would better protect the community. A desired outcome of supervised release is to protect the community by reducing the risk and recurrence rate of crimes.[172] This approach to release would protect the community because it would better ensure that criminal offenders are less likely to succeed on motions to suppress their incriminating statements. For example, the probationer in *Murphy* was on release for a sex-related charge and gave what the court determined to be voluntary statements to his probationer officer about a rape and murder he confessed to committing.[173] Because neither the terms of his probation nor

---

[165] *Id.* at 426. (noting that a defendant does not lose Fifth Amendment protection because he has been convicted of a crime notwithstanding that he is on probation when he makes the incriminating statements).

[166] ADMIN. OFF. OF THE U.S. CTS., *supra* note 150, at 18 (explaining that the probation officer instructs the defendant about the conditions of supervision and may provide the defendant with a written statement of the conditions at the beginning of the supervision process).

[167] *McKathan*, 969 F.3d at 1221 (releasee testified that he believed he had to comply with probation officer's questions because if he didn't his supervised release "would certainly have been revoked.").

[168] *Id.* (compared to the releasee in *McKathan* who spoke because he believed he had to comply with the probation officer's requests).

[169] U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 8 (2020) (Noting that once a probation officer notifies court that supervised releasee, the court must conduct a series of hearings to determine whether a violation occurred, which includes an initial appearance, a preliminary hearing, and a revocation hearing.), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf.

[170] *Id.*

[171] *Tehan*, 382 U.S. at 415.

[172] ADMIN. OFF. OF THE U.S. CTS., *supra* note 150, at 5.

[173] *Murphy*, 465 U.S. at 440.

any reasonableness factor was satisfied,[174] the voluntary statements were admitted in the probationer's trial.[175] The probationer was subsequently convicted of first-degree murder[176] and sentenced to life in prison.[177]

In contrast to the probationer *Murphy*, who the Court determined was not in a penalty situation, the Court concluded that the releasee in was faced with such a situation. In *McKathan*, the releasee previously pled guilty to possessing child pornography, was on supervised release because of that conviction, and likely continued to view child pornography despite his release conditions and previous conviction.[178] But because the court determined the releasee was faced with a classic penalty situation, it vacated the denial of the motion to suppress,[179] weakening the chance that the releasee would be convicted on the new charge. Decisions like this, which make it less likely for repeat offenders to be convicted for subsequent offenses, undoubtedly pose risks to community safety considering the impact that child pornography has on child victims.[180]

Adopting a uniform approach would ensure that offenders like the probationers in *Saechao* and *Murphy* are incarcerated and unable to harm people in the community. This approach strikes an appropriate balance between a probationer's constitutional right against self-incrimination and the community's right to be safe from offenders.

V. CONCLUSION

Although the circuit circuits have reached different decisions on whether a standard condition requiring a defendant to truthfully answer all questions asked by his probation officer presented a classic penalty situation, each court applied the classic penalty standard correctly. The Fourth Circuit deviated from the other circuits in part because of the Amendment to the "answer truthfully" condition of federal supervised release. This Amendment effectively forecloses a federal-releasee's ability to satisfy the reasonableness inquiry in the classic penalty analysis. If states adopt the Amendment and the

---

[174] *Id.* at 437.

[175] State v. Murphy, 380 N.W.2d 766, 770 (Minn. 1986).

[176] *Id.*

[177] *Information*, Minn. Dep't. of Corr., https://coms.doc.state.mn.us/publicviewer/OffenderDetails/Index/106517/Search (last visited May 2, 2024).

[178] *See McKathan*, 969 F.3d at 1218 (releasee admitted to the probation officer that he had viewed child pornography and when the officer inspected the probationer's phone, he found downloaded images of child pornography).

[179] *Id.* at 1232–33.

[180] The victimization in child pornography never ends because images placed on the internet can never be fully erased or recovered. The long-term effects on child victims include depression, anxiety, and other mental illnesses; feelings of worthlessness & low self-esteem; and a greater risk of getting entrapped in commercial sexual exploitation. *The Impact of Child Pornography on Victims*, FOOTHILLS CHILD ADVOC. CTR., http://www.foothillscac.org/uploads/9/9/2/1/9921414/the_impact_of_child_pornography_on_victims.pdf (last visited May 2, 2024).

precise terms of the federal "answer truthfully" condition, they too will reduce compelled testimony from probationers and limit the number of successful motions to suppress evidence on classic penalty grounds. The benefits to probationers and the community provide a strong basis for why states should adopt the federal approach to supervision. By adopting this approach, the Catch-22 that probationers have been faced with would be greatly diminished.