



## Volume 4, Issue 2

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## **Table of Contents**

### **Articles**

- A Day Late and a Dollar Short: Examining Perceptions of Which Exonerees Deserve Compensation  
Alexandra Olson, Kelsey S. Henderson, Mark G. Harmon, & Christopher Carey 98 - 128
- Convicting the Innocent: An Analysis of the Effects of Wrongful Convictions and Available Remedies in Canada 129 - 164  
Casandra Pacholski, Gail S. Anderson

### **Student Paper**

- Queer in Fear: The Role of Homophobia and Transphobia in Wrongful Convictions 165 - 184  
Ryley Alp

### **Book Reviews**

- The Plea of Innocence: Restoring the Truth to the American Justice System (Tim Bakken)  
Christopher Sherrin 185 - 190

## **A Day Late and a Dollar Short: Examining Perceptions of Which Exonerees Deserve Compensation**

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*Many exonerees do not receive compensation from the state after they are released (43%) because most states have exclusionary laws that bar exonerees from receiving compensation (n = 16 states) (Compensation Primer, 2022). This study examined public perceptions of exoneree compensation, exclusionary laws and addressed the broader question of who deserves compensation (according to community members). Online participants (n = 225) read an article about a fictional exoneree who either pleaded guilty or was convicted by a jury trial and who either did or did not have a subsequent conviction. An exoneree with a subsequent conviction was perceived as less deserving of financial compensation (roughly \$8,000 less annually) and less deserving of support services. It was rated less positively than an exoneree who did not have a subsequent conviction. No differences were found between an exoneree who pleaded guilty and an exoneree who was convicted by a jury trial, demonstrating little impact of this common exclusionary rule on community members' perceptions and decisions. Overall, participants overwhelmingly supported exoneree compensation (only 6.7% disagreed). However, there are caveats. Community members are less supportive of compensating exonerees who have subsequent involvement with the justice system. These results illustrate possible biases the public has against an already marginalized population that has experienced a miscarriage of justice. Because public opinion can affect policy change, these results significantly affect state exclusionary rules and exoneree compensation policies.*

- I. Background
- II. Review of Literature
  - A. Exonerations, Compensation, and Exclusionary Rules
  - B. Exclusionary Criteria: Guilty Pleas and False Confessions
  - C. Exclusionary Criteria: Subsequent Convictions
  - D. Perceptions of Exonerees and Compensation
  - E. Documented Experiences of Exonerees and Compensation
- III. Current Study
  - A. Design
  - B. Participants
  - C. Stimuli
  - D. Dependent Variables
    - 1. Attitudes Towards and Perceptions of Exoneree
    - 2. Perceptions of Appropriate Compensation and Benefits
    - 3. General Perceptions of Wrongful Conviction Compensation
    - 4. Attention Check and Manipulation Check Questions

- E. Procedure
- IV. Results
  - A. Attitudes Towards and Perceptions of Exoneree
    - 1. Attitude Thermometer (0 – 100)
    - 2. Average Character Measure Scale (attitude)
  - B. Perceptions of Appropriate Compensation and Benefits
    - 1. Deservingness of Compensation
    - 2. Amount of Compensation
    - 3. Deservingness of Benefits
  - C. General Perceptions of Wrongful Conviction Compensation
    - 1. Perceptions of Exclusionary Rules
  - D. Exploratory Analyses
- V. Discussion
  - A. No Effect of Initial Conviction Method
  - B. Strong Impact of Subsequent Conviction
  - C. Overwhelming Public Support for Exoneree Services and Compensation
  - D. Exclusionary Rules
  - E. Importance of These Findings for Policy
- VI. Limitations and Future Directions
- VII. Conclusion
- VIII. References

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### I Introduction

According to the National Registry of Exonerations, exonerations of wrongfully convicted and imprisoned individuals have been on the rise in recent years. Since 1989, there have been 2,810 exonerations in the United States. However, there were documented wrongful convictions and exonerations before this date, even dating back to 1820.<sup>1</sup> The Innocence Project is the most well-known agency that aids in exonerating the wrongfully convicted and has documented 375 DNA exonerations since 1992.<sup>2</sup> When individuals are incarcerated for extended periods (the average length of imprisonment before exoneration is 14 years)<sup>3</sup>, they often lose their homes,

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<sup>1</sup> “Exonerations by year: DNA and non-DNA.”, *The University of Michigan Law School* (27 May 2021), online <<https://www.law.umich.edu/special/exoneration/Pages/about.aspx>>.

<sup>2</sup> “DNA exonerations in the United States”, *The Innocence Project* (27 May 2021), online <<https://innocenceproject.org/dna-exonerations-in-the-united-states/>>.

<sup>3</sup> *Supra* note 1.

employment, and social ties.<sup>4</sup> When released, they may have no money or job to support themselves, forcing them to rely on their family or friends. If the individual does not have a strong safety net and support system, they may struggle with re-entry, ultimately leading to recidivism.<sup>5</sup> Fair compensation for exonerees has implications for the individual, society, and the legitimacy of the criminal justice system.

Before discussing exoneree compensation and exclusionary rules, it is essential to identify the different types of wrongful convictions, as well as distinguish between exoneration and overturning a conviction. Importantly, factual innocence could mean that *another person* is the actual perpetrator, it could also be that *no crime* ever took place (e.g., a suicide mislabeled a homicide), as is the case with roughly one-third of wrongful convictions.<sup>6</sup> No-crime wrongful convictions can differ in many ways from actual-crime (i.e., wrong-person) wrongful convictions; for example, no-crime wrongful convictions are more likely to be associated with drug possession or sale than murder or sexual assault, which are more common in actual-crime wrongful convictions. Of relevance to this article, the nuances of some exclusionary rules are more likely to be relevant to wrong-person exonerations than no-crimes exonerations.<sup>7</sup> For example, consider the exclusionary criterion – “assisted or attempted to assist in the original crime” – in a no-crime conviction, an individual might have been “involved”, but no crime occurred (e.g., trespassing). On the other hand, in a wrong-person exoneration, assisting in the original crime would normally not lead to an exoneration. Consider that exonerees in Missouri are only eligible for compensation if they were exonerated by DNA evidence,<sup>8</sup> which is a rare occurrence in no-crime wrongful convictions (considering the types of crimes). As will be discussed more in this article, these exclusionary rules, and the nuances of exoneration (e.g., needing a “full pardon”) can make it difficult for individuals to re-enter society after wrongful conviction.

Exoneration and overturning a conviction are both outcomes associated with innocence; though they seem similar, they have different connotations and outcomes that must be addressed. Being exonerated means that an individual was convicted of a crime, but after reviewing the evidence in the case, they are determined to be *factually* innocent – meaning they did not commit the crime, or no crime was committed – or a government official relieves them of all consequences of their criminal conviction.<sup>9</sup> On the other hand, overturning a conviction is not exclusive to factual

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<sup>4</sup> “Compensating the wrongly convicted” *The Innocence Project*, (18 August 2021), online: <https://innocenceproject.org/compensating-wrongly-convicted/>.

<sup>5</sup> Mandery, Evan J et al, “Compensation Statutes and Post-exoneration Offending” (2013) 103:2 J. Crim. L. & Criminology 553-583, online: <https://www.jstor.org/stable/43895627>.

<sup>6</sup> Henry, Jessica, “Smoke But No Fire: When Innocent People Are Wrongly Convicted Of Crimes That Never Happened” (2018) 55 American Criminal Law Review, online: <https://digitalcommons.montclair.edu/justice-studies-facpubs/13>, 13.

<sup>7</sup> See Gutman, 2021 for a discussion of the importance of terminology such as “act” versus “crime” in drafting statutes as it relates to no-crime wrongful convictions.

<sup>8</sup> Gutman, Jeffrey S, “An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted” (2017) 82:2 Missouri Law Review 369–440, online: <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4268&context=mlr>.

<sup>9</sup> “Glossary”, *University of Michigan law School*, (18 July 2022), online: <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>.

innocence. For example, convictions can be overturned if there are errors at trial, official misconduct, or an illegal police search.<sup>10</sup> In a situation where the defendant's rights were violated, resulting in an unfair or biased trial, then the conviction can be overturned. As a result, the charges can be dropped, or there can be a retrial. In some circumstances, innocent individuals have had their convictions overturned rather than complete exoneration, which can have implications for compensation and benefits.

Compensation for exonerees is a responsibility of the jurisdiction that contributed to the miscarriage of justice and typically falls on the shoulders of the state. When states compensate exonerees, it ensures that the individual can recoup the money lost while wrongfully incarcerated and more easily re-enter society (e.g., find a home, attend college, and financially support themselves). Wrongful convictions are not limited to one geographical jurisdiction, and the federal government, the District of Columbia, and 36 states have compensation statutes. Still, they all differ.<sup>11</sup> Although allowing for compensation, 16 states allowing for compensation have some exclusionary rules, which hinder an exoneree's ability to receive compensation (See Table 1). 30 of the states have statutes stating specific compensation amounts that an exoneree could be awarded (e.g., based on their years incarcerated, or caps on the total amount). The remaining six of 36 states have no statutes dictating specific compensation amounts (e.g., Maine, Maryland, Massachusetts, Montana, New York, and West Virginia). The remaining 14 states do not have laws specifying the compensation process.<sup>12</sup> Exclusionary criteria can potentially exclude a high proportion of exonerees from compensation. As more legislation is drafted to address the issue of exoneree compensation (and many of these states include exclusionary criteria), examining this topic further is an important area for research to explore.

This study focused on community members' perceptions of two of the most common exclusionary criteria: a subsequent conviction (i.e., if, after exonerated, the individual is convicted of another crime) and pleading guilty (i.e., if the exoneree "aided" in their own conviction by accepting a guilty plea). We used a fully factorial experimental design to manipulate subsequent conviction (present v. absent) and initial conviction method (pleaded guilty v. trial). Community members gave their perceptions of the exoneree, their opinion of how much compensation and support the individual deserves, and their perceptions of exoneree compensation and exclusion laws generally. Measuring community members' perceptions is important because public support/endorsement has the potential to impact legislative policy. That is, community members' willingness to provide compensation to the exonerated and their perceptions of exclusionary criteria could impact the way that legislative bills are drafted and introduced and ultimately shed light on the overall endorsement of such laws and rules (important in those states where these laws are passed through ballot measures).

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<sup>10</sup> "How can a conviction be overturned?" *The Aslett Law Firm* (18 July 2022), online <<https://aslettlaw.com/criminal-defense/how-can-a-conviction-be-overturned/>>.

<sup>11</sup> *Supra* note 4.

<sup>12</sup> These states are Alaska, Arizona, Arkansas, Delaware, Georgia, Kentucky, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming. As an update, in March 2022, Oregon Senate approved Senate Bill 1584, which allows exonerees to receive \$65,000 per year of wrongful imprisonment and \$25,000 per year wrongfully spent on parole, post-prison, or on the sex offender registry. It will also provide access to counseling, housing assistance, and personal financial literacy assistance.

## II Literature Review

### A. Exonerations, Compensation, and Exclusionary Rules

There are multiple ways in which exonerees may receive compensation, including private bills, civil litigation, and the compensation statutes stated above. Private bills involve the exoneree convincing a state legislator to file a bill on their behalf.<sup>13</sup> Civil litigation involves filing a federal civil rights violation claim, arguing that county or state legal actors engaged in misconduct resulting in the wrongful conviction.<sup>14</sup> The other form of compensation, and the one this article focuses more closely on, is compensation through state statutes. Although there are multiple methods of compensation, many exonerees still have not received any repayment for their incarcerated time.<sup>15</sup> Of the Innocence Project's first 250 exonerations, approximately 40% had not received compensation, and only 33% had received compensation specifically through statutes.<sup>16</sup> It is difficult to tell exactly how many exonerees have been compensated because most exonerations are published on the National Registry of Exonerations either immediately or within the next few months, but compensation could take years to receive.<sup>17</sup> The registry does not monitor the exonerees once the initial information is published, which is another obstacle in obtaining data on the number that receives compensation.<sup>18</sup> In 2016, the registry studied 351 exonerations between 2005 and 2009. Of those exonerations, 173 (49.3%) received some form of compensation; 66 exonerees received compensation by state statute, 55 by lawsuits, and 13 by private bills.<sup>19</sup>

Some states tie the amount of compensation to years spent incarcerated and include a “cap” in terms of the maximum amount of compensation. According to the Innocence Project, in Iowa, exonerees are entitled to \$18,250 per year they spend in prison, but in the District of Columbia, exonerees are eligible for \$200,000 per year. Regarding exclusionary laws, in Connecticut, the exoneree's right to pursue litigation is relinquished if they intend to receive compensation from the state (i.e., exonerees cannot sue and receive compensation through statutes). Due to this variation, the Innocence Project has proposed a model that would be uniform across all states. Their recommendations include at least \$50,000 per year incarcerated with increased amounts for time spent on death row, on parole, or as a registered sex offender.<sup>20</sup> They also suggest providing reintegrative services, educational credits, and job-skill training for exonerees.<sup>21</sup> As Gutman and

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<sup>13</sup> “Making up for lost time: What the wrongfully convicted endure and how to provide fair compensation”, *The Innocence Project*, (2009), online:

[http://www.innocenceproject.org/docs/Innocence\\_Project\\_Compensation\\_Report.pdf](http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf).

<sup>14</sup> Gutman, Jeffrey S & Lingxiao Sun, “Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted” (2019) 11:2 *Northeastern University Law Review* 694–789, online: <https://papers.ssrn.com/abstract=3422474>.

<sup>15</sup> Norris, Robert J, “Assessing compensation statutes for the wrongfully convicted” (2012) 23(3) *Crim Justice Policy Rev* 352-374, online: <https://doi/10.1177/0887403411409916>.

<sup>16</sup> *Supra* note 13.

<sup>17</sup> Cole, Simon, “Compensation for exonerees primer”, *University of Michigan Law School* (7 July 2021), online <https://www.law.umich.edu/special/exoneration/Documents/Compensation%20for%20Exonerees%20Primer.pdf>.

<sup>18</sup> *Supra* note 17.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Supra* note 15.

<sup>21</sup> *Ibid.*



Sun have identified,<sup>22</sup> a model state in this regard would be one in which a high percentage of exonerees file for compensation, a high percentage are awarded, and a high percentage of lost years are compensated for (i.e., years lost because of miscarriage of justice). Given that roughly 50% of exonerees in states with statutes filed for compensation, we can assume that for some, the process and exclusion criteria might not make it worth the effort.<sup>23</sup>

At the heart of many of these statutes, their rules, and requirements, is the conceptualization of who is “deserving” and who is “undeserving” of compensation.<sup>24</sup> But as Gutman argues, these rules and the drafting of language place the burden on the exoneree, an unduly high burden at that (despite there being little evidence of compensating “undeserving” individuals).<sup>25</sup> Yet, many state statutes include prohibitions on compensation, and ban exonerees from receiving compensation under certain circumstances. Prior studies have shown that exclusionary laws have barred between 40% and 50% of exonerees from receiving compensation.<sup>26</sup> The three most common exclusionary rules are (in order of frequency): 1) if the exoneree pleaded guilty to the crime they were wrongfully convicted of, 2) if the exoneree was serving a concurrent sentence for another crime, and 3) if the exoneree had a subsequent felony. Some states have criteria stating that the exoneree must not have aided in their own conviction, with no specific language about pleading guilty or falsely confessing. Because “aided” is typically interpreted as having pleaded guilty or confessed, we have counted these states as exclusionary criteria, including pleading guilty. There are other, less common, exclusionary rules in place as well. Table 1 lists the common exclusionary rules across the United States, although the list is not exhaustive.

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<sup>22</sup> *Supra* note 14.

<sup>23</sup> *Ibid.*

<sup>24</sup> Gutman, Jeffrey, “Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes” (2021) 69:2 *Cleveland State Law Review* 219, online: <https://engagedscholarship.csuohio.edu/clevstlrev/vol69/iss2/5>.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Supra* note 13. See also *supra* note 17.

**Table 1.** Exclusionary Rules Across the 36 States and Washington D.C. that Allow for Exonerated Compensation

No exclusionary law/Not specified	Currently imprisoned or served a concurrent sentence for other crime	Subsequent felony conviction	Cannot be eligible solely based on witness recantation	Prior felony during incarceration (1+ nonviolent or 1 violent)	Could not have assisted or attempted to assist in the crime	Did not fabricate evidence or induce a person to commit perjury	Did not bring conviction upon themselves (guilty pleas & confessions)	Must not bring up civil litigation, have applied/received restitution or damages	Needs the governor's pardon
Illinois Kansas Louisiana Maine Maryland Massachusetts Michigan Minnesota Mississippi Missouri Nebraska Nevada New Hampshire New Jersey New York North Carolina Utah Vermont West Virginia Wisconsin	Alabama D.C. Hawaii Indiana Texas	Alabama Colorado Texas	Colorado	Florida	Hawaii	Hawaii Washington	California Colorado D.C. Iowa Ohio Oklahoma Virginia	Connecticut Indiana	Tennessee
21	5	3	1	1	1	2	7	2	1

**Note.** Exclusionary rules are not mutually exclusive (i.e., some states have multiple laws). There are variations in the specific wording of exclusionary laws across the states. Categories have been collapsed and combined for ease of interpretation. Information is from the most current (2021) compensation landscape provided by the Innocence Project.

## B. Exclusionary Criteria: Guilty Pleas and False Confessions

“Aiding” in one’s own conviction (falsely confessing and/or pleading guilty) bars exonerees from compensation in six states and D.C. However, guilty pleas are not uncommon; approximately 95% of felony convictions in the United States are obtained by guilty pleas.<sup>27</sup> Plea-bargaining is incentivized for everyone involved (the defendant, the state, and the court). From the state and court’s perspective, plea bargains help avoid spending resources on trials and streamline and expedite the court process. For defendants, they avoid the uncertainty of conviction at trial in exchange for a lesser sentence. But these trial penalties/plea discounts (i.e., the difference between the likely sentence if convicted at trial and the plea offer) can coerce innocent defendants to plead guilty.<sup>28</sup> Importantly, false guilty pleas and false confessions are conceptually often coupled together. A false confession often precipitates a false guilty plea, and both are often present for the same crime.<sup>29</sup>

In a 2015 report on guilty pleas by the National Registry of Exonerations, 261 out of their first 1,700 exonerees (15%) pleaded guilty. Similarly, 11% of the Innocence Project’s exonerees pleaded guilty, and 25% falsely confessed.<sup>30</sup> Plea discounts are likely higher and more incentivizing for more serious crimes. In an analysis of DNA exonerations by the Innocence Project, 21 out of 24 exonerees who had confessed and pleaded guilty had been charged with homicide (this also shows how frequently confessions and guilty pleas occur in the same case, 2019).

## C. Exclusionary Criteria: Subsequent Convictions

Receiving a subsequent conviction after release can bar exonerees from receiving compensation in three states. This is problematic given that one study found that 64% of adults in custody were rearrested after being released (over eight years).<sup>31</sup> Similarly, in May 2018, the United States Department of Justice examined recidivism by following 412,731 inmates released by 30 states in 2005. They found that 45% were rearrested within the year and 83% within nine years.<sup>32</sup>

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<sup>27</sup> “Innocents who plead guilty”, *University of Michigan law School*, (12 March 2022), online <<https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf>>.

<sup>28</sup> Zimmerman, David M & Samantha Hunter “Factors affecting false guilty pleas in a mock plea bargaining scenario” (2018) 23 *Legal Criminol Psychol*, 53-67, online <<https://doi.org/10.1111/lcrp.12117>>.

<sup>29</sup> Redlich, Allison D, “False confessions, false guilty pleas: Similarities and differences” in *Police interrogations and false confessions: Current research, practice, and policy recommendations Decade of behavior/Science conference grant* (Washington, DC, US: American Psychological Association, 2010) 49. online: <<https://doi.org/10.1037/12085-003>>.

<sup>30</sup> “Why do innocent people plead guilty to crimes they didn’t commit?”, *Guilty Plea Problem* (12 March 2022), online <<https://guiltypleaproblem.org/#about>>.

<sup>31</sup> Clarke, Matt, “Long-Term Recidivism Studies Show High Arrest Rates” *Prison Legal News*(3 May 2019) 60, online: <<https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/>>.

<sup>32</sup> *Ibid.*

It is difficult to know how many exonerees have received a subsequent conviction (if any) because they are not followed by organizations such as the National Registry of Exonerations once released. Importantly, compensation can affect post-exoneration offending. One study found that when exonerees were compensated \$500,000 or more, they committed subsequent crimes at a much lower rate than those who received no compensation or less than \$500,000.<sup>33</sup> This study examined offending patterns in 73 exonerees who had not committed an offense after exoneration and 43 who had. Of the 33 exonerees who received more than \$500,000 in compensation, 81.8% did not offend post-exoneration. Of the 34 exonerees who received less than \$500,000 in compensation, 50% did not offend post-exoneration. Barring exonerees from compensation because of a subsequent conviction only reinforces a cycle of injustice, further complicating re-entry efforts.

#### D. Perceptions of Exonerees and Compensation

Despite factual innocence, exonerees are often perceived negatively. Wrongfully convicted individuals are stereotyped more negatively and viewed as less good-natured, warm, intelligent, and confident than individuals with no prior conviction.<sup>34</sup> Furthermore, people feel more apprehension about being in the same room with exonerees due to uneasiness regarding their innocence.<sup>35</sup> These views are not limited to just community members. Employers and landlords hold more negative views of exonerees than non-exonerees. Employers offered the exonerees a lower wage, and landlords were significantly less likely to respond to rental inquiries and indicate housing availability for exonerees compared to the general public.<sup>36</sup>

Though most research examining opinions of exonerees shows negative feelings, evidence suggests there is more support for compensation. In 1995, nine out of 10 Canadians surveyed believed exonerees should receive compensation for their wrongful conviction. Furthermore, 65% of respondents agreed that the government needed to expand its efforts to stop wrongful

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<sup>33</sup> *Supra* note 5.

<sup>34</sup> Blandisi, Isabella, Kimberley Clow & Rosemary Ricciardelli, “Public Perceptions of the Stigmatization of Wrongly Convicted Individuals: Findings from Semi-Structured Interviews” (2015) TQR, online: <<https://nsuworks.nova.edu/tqr/vol20/iss11/13/>>; Clow, Kimberley A & Amy-May Leach, “After innocence: Perceptions of individuals who have been wrongfully convicted” (2015) 20:1 Legal Criminol Psychol 147–164, online: <https://bpspsychub.onlinelibrary.wiley.com/doi/10.1111/lcrp.12018>; Scherr, Kyle C, Christopher J Normile & Heidi Putney, “Perpetually stigmatized: False confessions prompt underlying mechanisms that motivate negative perceptions of exonerees” (2018) 24(3) Psychol Public Policy Law 341-352, online: <<https://doi.org/10.1037/law0000163>>; Thompson, Adina M., Molina, Oscar R., & Levett, Lora M. (2012). After exoneration: An investigation of stigma and wrongfully convicted persons. Albany Law Review, 75(3), 1373-1413.

<sup>35</sup> Blandisi et al, *supra* note 34.

<sup>36</sup> Kukucka, Jeff, Heather K Applegarth & Abby L Mello, “Do exonerees face employment discrimination similar to actual offenders?” (2019) 25:1 Legal Criminol Psychol 17-32, online: <<https://doi.org/10.1111/lcrp.12159>>; Zanella, Lesley et al, “The effects of race and criminal history on landlords (un)willingness to rent to exonerees” (2020) 44:4 Law Hum Behav 300-310, online: <<http://dx.doi.org/10.1037/lhb0000419>>.

convictions from occurring.<sup>37</sup> This research suggests community members generally favor compensation for exonerees, although these data are over 20 years old and not in the United States. More recent research suggests this support comes with caveats.

Much of the research on perceptions of exonerees and compensation has examined the impact of contributing causes and characteristics of the exoneree. When looking specifically at contributing causes of wrongful conviction (e.g., false confession, mistaken eyewitness, or jailhouse informant), community members are less confident in the actual innocence of an exoneree and are more negative towards them if they falsely confessed compared to other types of evidence.<sup>38</sup> Furthermore, exonerees who falsely confessed (compared to eyewitness misidentification and police misconduct) deserve the least compensation.<sup>39</sup> The belief that the exoneree contributed to their own wrongful conviction by doing “something to be convicted” or putting themselves in that situation impacts decisions about deservingness.<sup>40</sup> The type of evidence is not the only factor that impacts compensation decisions. Some research shows prior conviction history has a negative relationship with the deservingness of financial compensation ratings.<sup>41</sup> In contrast, other research found that the public generally has equally favorable attitudes toward exonerees, parolees, and individuals with no criminal history.<sup>42</sup>

Monetary compensation is not the only benefit examined for exonerees; recent work has examined public perceptions of other types of support, such as psychological counseling. In Scherr et al.’s research, they analyzed how an exoneree’s race (Black v. White) and stereotypical crimes of that race (embezzlement v. assault) impacted the culpability and deservingness of psychological counseling ratings.<sup>43</sup> Being wrongfully convicted of a crime that “fits” the stereotype of race diminished the public’s trust in exonerees’ innocence, resulting in decreased support for services for these individuals. Overall, more research is needed to understand the relationship between

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<sup>37</sup> Angus Reid. (1995). *Public perspectives on wrongful convictions: Justice and public safety issues*.

<sup>38</sup> Clow & Leach, 2014 *supra* note 34; Savage, Meaghan E et al, “After Exoneration: Attributions of Responsibility Impact Perceptions” (2018) 33(1) *Can J Law Soc*85-103, online: <https://doi.org/10.1017/cls.2018.6>.

<sup>39</sup> Kukucka, Jeff & Andrew J Evelo “Stigma against false confessors impacts post-exoneration financial compensation” (2019) 37:4 *Behav Sci Law* 372-387, online: <https://doi.org/10.1002/bsl.2403>.

<sup>40</sup> Clow & Leach, 2014 *supra* note 34.

<sup>41</sup> Karaffa, Kerry M, Jaimie Page & Julie M Koch, “Compensating the Innocent: Perceptions of Exonerees’ Deservingness to Receive Financial Compensation for Wrongful Convictions” (2017) 28:7 *Crim Justice Policy Rev* 710-732, online: <https://doi.org/10.1177/0887403415607049>.

<sup>42</sup> Thompson, Adina, “The aftermath: Two comparisons of the social consequences of DNA and non-DNA exoneration” (2014) (Accession No. 10173588) [Doctoral dissertation, University of Florida]. ProQuest Dissertations Publishing. online: <https://www.proquest.com/openview/24f3ac1c1815d160d9c256eed3d23381/1?pq-origsite=gscholar&cbl=18750>.

<sup>43</sup> Scherr, Kyle C, Christopher J Normile & Marian C Sarmiento, “Reluctant to embrace innocence: An experimental test of preserving culpability judgements on people’s willingness to support reintegration services for exonerees” (2018) 14(4) *J Exp Criminol* 529-538, online: <https://doi.org/10.1007/s11292-018-9336-4>.

community members' perception of exonerees and support for compensation (specifically, the role of exclusionary rules).

### E. Documented Experiences of Exonerees and Compensation

Compensation is important because – as mentioned previously – exonerees often face numerous barriers upon release (for a more thorough discussion see Clow, Leach, & Ricciardelli, 2012). In some cases, the exoneree's criminal record is not cleared, which can act as a barrier to accessing services, housing, and employment as well.<sup>44</sup> Consider first the financial costs: lost wages, garnished wages because of back child support, and attorney/court costs.<sup>45</sup> Only five states have explicit provisions for lost wages, and although many states recognize the social services needed for exonerees upon re-entry, actual provision of this support is less clear.<sup>46</sup> Consider the case of Calvin Willis who was convicted in 1982 at the age of 22 and exonerated in 2003 (innocenceproject.com). He enters a very different workforce than he left, without the education/training, experience, and years of work that he would have had if not for this miscarriage of justice. Ironically, exonerees are often released with fewer resources such as job placement than actual offenders.<sup>47</sup>

Next consider the psychological and physical impacts of wrongful conviction on exonerees. Individuals who have spent time in prison suffer effects of “institutionalization,” the adaptations needed to survive in a hostile, violent environment. Those effects can be amplified for individuals who are factually innocent (e.g., rejection of the label, “criminal”).<sup>48</sup> Many exonerees have clinical anxiety, depression, post-traumatic stress disorder (PTSD), or a combination of all three.<sup>49</sup> Consider the emotional toll that Ronald Cotton must have endured knowing that he was innocent of the crime in which he was convicted and the true perpetrator, housed in the same prison, bragged to other inmates that Cotton was doing time for the rape he committed.<sup>50</sup> Compensation is a requisite of funding treatment for these symptoms of incarceration; services from the state, such as psychological counseling, would also be beneficial.

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<sup>44</sup> *Supra* note 4.

<sup>45</sup> *Supra* note 13.

<sup>46</sup> *Supra* note 8.

<sup>47</sup> Clow, Kimberley A, Amy-May Leach & Rosemary Ricciardelli, “Life after wrongful conviction.” in Brian L Cutler, ed, *Conviction of the innocent: Lessons from psychological research* (Washington: American Psychological Association, 2012) 327. <https://doi.org/10.1037/13085-015>.

<sup>48</sup> Campbell, Kathryn & Myriam Denov, “The Burden of Innocence: Coping with a Wrongful Imprisonment” (2004) 46:2 *Canadian Journal of Criminology and Criminal Justice* 139–164, online: <https://utpjournals.press/doi/10.3138/cjccj.46.2.139>.

<sup>49</sup> Wildeman, Jennifer, Michael Costelloe & Robert Schehr, “Experiencing wrongful and unlawful conviction” (2011) 50(7) *J Offender Rehabil* 411-432, online: <https://doi.org/10.1080/10509674.2011.603033>.

<sup>50</sup> O'Neill Helen, “The Perfect Witness”, *The Washington Post* (4 March 2001), online: <https://www.washingtonpost.com/archive/lifestyle/2001/03/04/the-perfect-witness/a7fa0461-c15c-4237-86db-52ab5069fbea/>.

Often overlooked in the discussion of exoneree re-entry is compensation delay, the length of time that passes between exoneration and compensation.<sup>51</sup> One such cause for delay is the discussion of whether the exoneree meets the components and considerations of the state's compensation statute (e.g., proving that you did not "aid in your own conviction"). Further delaying this process is that there is often no timeline for determination of compensation, the state legislature might need to approve the amount, or a civil lawsuit might be required.<sup>52</sup> Gutman calls attention to two exoneree's compensation timeline – Odom's took 3 years from the date of file to receive compensation, and Tribble's took longer.<sup>53</sup> The Innocence Project estimates the average time exonerees wait to receive funds is three years, during that time they may lack income, transportation, housing, and health coverage.<sup>54</sup> The lived experiences of exonerees shed light on where compensation is woefully undeserving. The current study seeks to better understand public perceptions of who is perceived as "deserving" of support and why. These findings can inform policy discussions about state statutes and exclusionary rules, and ultimately, contribute to greater support for individuals post-exoneration.

### III Current Study

Past research illustrated that the public tends to have overall negative perceptions of individuals exonerated of crimes. Negative attitudes seem more prevalent when the exoneree's conduct is seen as leading to their conviction. These perceptions align with compensation exclusionary laws limiting compensation for exonerees who pleaded guilty or "brought their conviction upon themselves." No studies have examined subsequent felony convictions and support for financial compensation, even though it is the second most common exclusionary criteria. Prior research has examined general perceptions and attitudes towards exonerees, but there has been limited research on perceptions on who deserves compensation and why. As such, our research questions are as follows:

1. Does a subsequent conviction influence support for financial compensation?
2. Does the initial conviction method – pleading guilty or a jury trial – influence support for financial compensation?

Regarding the main effects, we hypothesized that a subsequent conviction would decrease support for financial compensation and that pleading guilty would also decrease support for financial compensation. We also expected an interaction effect between subsequent conviction and initial conviction method in that support for compensation would be lowest for those exonerees who pleaded guilty and had a subsequent conviction. Last, we hypothesized that if the exoneree pleaded guilty or had a subsequent conviction, it would lead to lower favorability ratings compared to those conditions in which the exoneree was convicted by a jury trial or did not have a subsequent conviction. We expected these main effects to be qualified by an interaction. We predict the lowest favorability rating to occur when the exoneree pleaded guilty and had a subsequent conviction.

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<sup>51</sup> *Supra* note 8.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* at page 412.

<sup>54</sup> *Supra* note 13.

## A. Design

We tested these research questions using a 2 (subsequent conviction: present v. absent) by 2 (initial conviction method: pleaded guilty v. trial) between-subjects factorial design. Participants were randomly assigned to one of the four experimental conditions. We chose not to manipulate other variables such as demographics because prior research has examined factors such as exoneree race and gender on perceptions of compensation, attitudes, and assistance.<sup>55</sup> Further, the Innocence Project has expressed interest in research on compensation and exclusionary laws, so we focused exclusively on these topics.

## B. Participants

We used the online platform Prolific to collect a community sample. The sample was restricted to people over 18 living in the United States. Users come from various backgrounds, making Prolific a useful tool for collecting data from a representative sample of participants.

The appropriate sample size was determined by conducting a power analysis using G\*Power 3.1.<sup>56</sup> We used a small effect size for analysis of variance (ANOVA) analyses ( $f = .20$ ), with  $\alpha = .05$  and power = .80. Using these criteria, we needed at least 199 participants. Past research using Prolific has found a roughly 19% rate of unusable data due to failed attention and/or manipulation checks.<sup>57</sup> As such, we planned to recruit at least 237 participants.

In total, 245 participants clicked on the link to participate in the survey. Despite clicking the survey link, two participants did not consent to continue and were removed from the sample. Seven participants did not complete the survey and were excluded. Of the remaining 236 participants, six participants failed the attention check question. Lastly, five participants failed both manipulation check questions and were excluded from the sample (more below). Participants who correctly answered one of the two manipulation check questions were kept in the analysis per the pre-registration (<https://osf.io/zy3m6>). The final analytical sample consisted of 225 participants.

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<sup>55</sup> Bettens, Talley et al, How do race and gender impact perceptions of the wrongfully convicted? (2021) Research Dialogue Conference Proceedings, online:

<<https://scholar.utc.edu/cgi/viewcontent.cgi?article=1402&context=research-dialogues>>; Howard, Simon, “Exonerees in Black and White: the influence of race on perceptions of those who falsely confessed to a crime” (2019) 25:9 Psychology, Crime & Law 911–924, online: <<https://www.tandfonline.com/doi/full/10.1080/1068316X.2019.1597091>>; *Supra* note 41; Zanella et al *supra* note 36.

<sup>56</sup> Faul, Franz et al, “G\*Power 3: A flexible statistical power analysis program for the social, behavioral, and biomedical sciences” (2007) 39:2 Behavior Research Methods 175–191, online: <<https://doi.org/10.3758/BF03193146>>.

<sup>57</sup> Henderson, Kelsey S, Kelly T Sutherland & Miko M Wilford, “‘Reject the Offer’: The Asymmetric Impact of Defense Attorneys’ Plea Recommendations” (2023) 50:9 Criminal Justice and Behavior 1321–1340, online: <<http://journals.sagepub.com/doi/10.1177/00938548231172515>>.



Of the final sample, 28% lived in the Southeast, 22.7% in the Midwest, 20% in the Northeast, 19.6% in the West, and 9.8% in the Southwest. Furthermore, the majority of the sample, 72.9%, described where they live as urban, while 25.8% responded with rural.

The sample was 69.8% White, 10.2% Asian or Pacific Islander, 9.8% Hispanic or Latino, 7.1% Black or African American, and 3.1% did not specify (preferred not to answer), identified as more than one race, or did not answer the question. The majority of the sample was female (68.9%). 26.2% of participants were male, 1.8% were transgender, and 3.1% ( $n = 7$ ) preferred not to respond. The average age of participants was 33.64 years ( $min = 18$  years and  $max = 72$  years).

36.4% of participants had earned a bachelor's degree, 28.4% of participants completed some college but earned no degree, 15.1% completed a Master's degree or above, 12% completed a high school diploma or GED, and 8% earned their associate's degree. Of the final sample, 89.8% had no prior involvement with the criminal justice system, and 9.8% self-reported involvement. One participant preferred not to respond.

### C. Stimuli

We created a hypothetical newspaper article based on the true story of an exoneree, Robert Dubois. Using hypothetical newspaper articles to examine community support is common in this type of research.<sup>58</sup> Dubois was exonerated of rape and murder through DNA evidence and was represented by the Innocence Project. The Dubois case was modified in pertinent areas to create four unique experimental conditions, and we changed the name to David Quinn. The name David Quinn came from a random name generator online: <http://random-name-generator.info/>. We chose a male name because the majority of exonerees are male. Specifically, only about 9% of exonerees from The Innocence Project are female.<sup>59</sup> The experimental manipulations were fully crossed to examine the independent effect of subsequent conviction and initial conviction method and the interaction between the two variables. For example, the article described Quinn as having been convicted by a jury [guilty plea] for the initial crime and, after exoneration, committed a subsequent crime [this information was omitted in no subsequent conviction conditions].

### D. Dependent Variables

We asked a series of questions to gauge participants' attitudes towards the exoneree (David Quinn), their level of support for financial compensation for the exoneree (including appropriate compensation and caps on award amounts), and general perceptions of support for exoneree compensation and exclusionary laws.

#### 1. Attitudes Towards and Perceptions of Exoneree

To determine participants' attitudes towards the exoneree, they were presented with a graphic of a thermometer with a response range from 0°, indicating an extremely unfavorable

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<sup>58</sup> Thompson *supra* note 42; Clow & Leach *supra* note 34.

<sup>59</sup> Selby, Daniele "8 facts about incarcerated and wrongfully convicted women you should know" (2022), online: The Innocence Project <<https://innocenceproject.org/women-wrongful-conviction-incarceration-facts-iwd2020/>>.

attitude, to 100°, indicating an extremely favorable attitude.<sup>60</sup> Participants were asked to provide a number between 0° and 100° to indicate their attitude toward David Quinn.

To examine participants' perceptions of the exoneree, we used the personal characteristics scale adapted from prior research.<sup>61</sup> Participants responded to the following items using a 6-point Likert-type scale (1 = "strongly disagree," 6 = "strongly agree"): (a) David Quinn is a good person; (b) David Quinn is deviant (R); (c) David Quinn is not credible (R); (d) David Quinn is dishonest (R); (e) David Quinn is likable; (f) David Quinn is trustworthy; (g) David Quinn has good character; (h) David Quinn is violent (R). (R) denotes reverse-coded items. Higher scores indicated more positive perceptions of the exoneree. We averaged these items and created one scale labeled "Average Character Measure" ( $\alpha = .94$ ).

## 2. Perceptions of Appropriate Compensation and Benefits

In addition to attitudes, we assessed participants' perception of the deservingness of government assistance.<sup>62</sup> Participants were asked whether they think David Quinn is entitled to the following different forms of assistance: a) career counseling; b) job training; c) psychological counseling; d) monthly living expenses; and e) subsidized housing. Participants responded "yes" or "no."

Next, we asked participants how deserving David Quinn is of compensation using a 4-point Likert-type scale (1 = "not deserving," 2 = "somewhat deserving," 3 = "deserving," 4 = "very deserving"). Followed by a question that stated, "Please explain your decision to the above question." Next, we asked how much compensation David Quinn deserves each year.<sup>63</sup> Response options were: a) \$4,999 or less per year; b) \$5,000–\$14,999 per year; c) \$15,000–\$29,999 per year; d) \$30,000–\$59,999 per year e) \$60,000–\$99,999 per year and f) more than \$100,000 per year.

Due to recent legislation on exoneree compensation (SB 1114<sup>64</sup>), we asked participants if Quinn's compensation should be contingent on whether or not he was convicted of a separate offense prior to his wrongful conviction. Participants responded "yes" or "no."

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<sup>60</sup> Adopted from Thompson *supra* note 42; Tolson, Danielle, Adina M Thompson, Adina M., Lora M Levett, & Kimberley A Clow, The role of context in perceptions of exonerees and ex-convicts. Paper presented at the 2013 American Psychology-Law Society Conference, Portland, Oregon.

<sup>61</sup> Thompson *supra* note 42; Thompson, Adina M, Oscar R Molina & Lora M Levett, "After exoneration: An investigation of stigma and wrongfully convicted persons" (2012) 75(3) Albany Law Rev, 1373-1413, online:

<https://www.albanylawreview.org/article/69632-after-exoneration-an-investigation-of-stigma-and-wrongfully-convicted-persons>; Tolson et al *supra* note 60.

<sup>62</sup> Adapted from Clow and Leach *supra* note 34.

<sup>63</sup> Adopting from Susan Fiske et al, "A model of (often mixed) stereotype content: Competence and warmth respectively follow from perceived status and competition" (2002) Journal of Personality and Social Psychology.

<sup>64</sup> Until 2021, Florida had the exclusionary rule that if an exoneree had a prior conviction then they were barred from receiving compensation. In 2021, SB 1114 passed which changed this criterion. Now, if an

### 3. General Perceptions of Wrongful Conviction Compensation

Next, we assessed general perceptions of wrongful conviction compensation and exclusionary rules. Participants were asked about each exclusionary law individually and indicated their agreement with the question, “Should [exclusionary rule] affect the exoneree’s compensation amount for their wrongful conviction?” The exclusionary rules listed were: a) currently imprisoned or served a concurrent sentence for another crime; b) after exoneration, they were convicted of a crime; c) the witness in the original crime recanted (took back) their statement which led to the exoneree being exonerated; d) prior felony or felony during incarceration; e) assisted or attempted to assist in original crime; f) fabricated evidence or induced a person to lie under oath; g) pleaded guilty or falsely confessed; h) brought up civil litigation or have applied/received restitution or damages. This was measured on a scale where 1 = “exoneree deserves no compensation,” and 5 = “exoneree absolutely deserves compensation.”

We also asked participants the general question of if they believed exonerees were entitled to compensation from the state. They responded on a six-point Likert scale ranging from 1= “strongly disagree” to 6 = “strongly agree.”

### 4. Attention Check and Manipulation Check Questions

As a general check on data quality and reliability, all participants were asked one attention check question (e.g., “indicate- “strongly agree” for this question to demonstrate your attention to the questionnaire”). Six participants failed this question and thus were excluded from analyses.

Participants were also asked two questions to test their sensitivity to the experimental manipulations. To gauge sensitivity to the initial conviction method manipulation, participants were asked if a jury convicted David Quinn at trial or if he pleaded guilty to the crime (the correct answer varied depending on the condition). Similarly, participants were asked if David Quinn was convicted of another crime after he was exonerated (the correct answer varied depending on the condition). 5 participants were excluded from analyses because they answered both questions incorrectly (per pre-registration).

### E. Procedure

The Portland State University Institutional Review Board approved all materials and procedures before collecting these data. On Prolific, participants read a short description of the study. If they chose to participate, they were redirected to the Qualtrics site to first read the Informed Consent document. After giving consent, participants read a newspaper article (assigned based on condition) and then completed a questionnaire, which included our dependent measures, attention check, manipulation check questions, and demographic questions. The average time to complete the survey was 7:07 (*min* = 2:26, *max* = 30:18). Participants were thanked for their participation after completing the questionnaire. Participants were compensated through Prolific at \$1.39 for their time. Prolific calculated this amount based on the time the study was estimated

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exoneree has an *unrelated* prior conviction they are still able to receive compensation and the deadline to establish one’s status as eligible for compensation is now 2 years as opposed to 90 days.

to take to ensure fair pay for participation. This project was awarded an American Psychology-Law grant to pay for the compensation of participants.

#### IV Results

For all Likert-style items, we ran an ANOVA to examine the effect of subsequent conviction, initial conviction method, and their interaction (IVs) on the corresponding DV. For analyses related to the exoneree (David Quinn), we predicted an interaction effect between subsequent conviction and initial conviction method on participants' attitudes. We have included a table with an overview of our findings (see Table 2).

**Table 2.** Overview of Results

Dependent Variable	Key Findings	Discussion
	Specific to Exoneree (Quinn)	
Attitude Thermometer	Effect of subsequent conviction, $p < .001$ ; No other effects	Subsequent conviction = lower attitude ratings (unfavorable) than <i>no</i> subsequent conviction
Average Character Measure Scale (attitude)	Effect of subsequent conviction, $p < .001$ ; No other effects	Subsequent conviction = lower character ratings (e.g., untrustworthy) than <i>no</i> subsequent conviction
Deservingness of Compensation	Effect of subsequent conviction, $p < .001$ ; No other effects	Subsequent conviction = lower deservingness for compensation ratings than <i>no</i> subsequent conviction
Prior Offense	72% said Quinn's compensation should not be contingent on not having a prior offense	The majority perceive compensation should not be tied to "clean hands"
Amount of Compensation	Effect of subsequent conviction, $p = .006$ ; No other effects	Subsequent conviction = lower amount of compensation than <i>no</i> subsequent conviction
Deservingness of Benefits	Effect of subsequent conviction on deservingness of monthly living expenses, $p < .001$	Subsequent conviction = lower deservingness of monthly living expenses than <i>no</i> subsequent conviction
	Effect of subsequent conviction on deservingness of subsidized housing, $p = .004$ ; No other effects	Subsequent conviction = lower deservingness of subsidized housing than <i>no</i> subsequent conviction
General Exoneree Compensation		

Perceptions of Compensation	93.3% agree (ranging from somewhat agree to strongly agree) that exonerees deserve compensation from the state	The majority believe that exonerees, in general, deserve compensation from the state
Perceptions of Exclusionary Rules	Most support (54.7%) = If the exoneree fabricated evidence or induced a person to lie under oath, they deserve no compensation	If an exoneree lied about the crime, they deserve no compensation
	Least support (8%) = If the witness in the original crime recanted their statement, which led to the exoneration, they deserve no compensation	If an exoneree was incarcerated due to someone else's false accusations, they deserve compensation
	28.9% believed that if the exoneree pleaded guilty or falsely confessed, they absolutely deserve compensation	Inconsistent with prior research on exonerees not deserving compensation if they "aided in their own conviction."
Prior Involvement in Criminal Justice System	No significant effect	
Gender	No significant effect	
Age	No significant effect	

## A. Attitudes Towards and Perceptions of Exoneree

### 1. Attitude Thermometer (0 – 100)

The attitude thermometer ranged from 0 – 100, with 0 being a less favorable attitude towards David Quinn and 100 being a more favorable attitude. The average rating was 67.80 ( $SD = 24.40$ ,  $min = 0$ , and  $max = 100$ ). A significant main effect of subsequent conviction on attitude thermometer ratings,  $F(1, 225) = 85.58$ ,  $p < .001$ ,  $\eta^2 = .279$ . Participants in subsequent conviction conditions had lower attitude ratings (unfavorable) of Quinn ( $M = 54.76$ ,  $SD = 22.12$ ) compared to those participants in no subsequent conviction conditions ( $M = 80.51$ ,  $SD = 19.33$ ),  $d = -1.24$ , 95%  $CI [-1.53, -0.95]$ . The effect of the initial conviction method ( $F(1, 225) = 0.23$ ,  $p = .632$ ,  $\eta^2 = .00$ ) and the interaction effect ( $F(1, 225) = .01$ ,  $p = .935$ ,  $\eta^2 = .00$ ) were not significant.

### 2. Average Character Measure Scale (attitude)

The average character measure ranged from 1 – 6, with 1 being a less favorable attitude towards David Quinn and 6 being a more favorable attitude. The average rating was 4.78 ( $SD = 0.90$ ,  $min = 1$ , and  $max = 6$ ). A significant main effect of subsequent conviction was on participants'

perceptions of Quinn's character,  $F(1, 225) = 99.92, p < .001, \eta^2 = .311$ . Participants in subsequent conviction conditions had lower character ratings (unfavorable) of Quinn ( $M = 3.77, SD = 0.79$ ) compared to those participants in no subsequent conviction conditions ( $M = 4.77, SD = 0.70$ ),  $d = -1.34, 95\% CI [-1.63, -1.05]$ . The effect of the initial conviction method ( $F(1, 225) = 0.05, p = .823, \eta^2 = .00$ ) and the interaction effect ( $F(1, 225) = .43, p = .514, \eta^2 = .00$ ) were not significant.

## B. Perceptions of Appropriate Compensation and Benefits

### 1. Deservingness of Compensation

The deservingness of compensation measures ranged from 1 – 4, with 1 being not deserving of compensation and 4 being very deserving. The average rating was 3.32, which falls within the “deserving” category ( $SD = 0.91, min = 1, and max = 4$ ).

There was a significant main effect of subsequent conviction on participants' perceptions of Quinn's deservingness of compensation,  $F(1, 225) = 33.85, p < .001, \eta^2 = .13$ . Participants in subsequent conviction conditions had lower deservingness ratings of Quinn ( $M = 2.99, SD = .97$ ) compared to those participants in no subsequent conviction conditions ( $M = 3.65, SD = .70$ ),  $d = -0.78, 95\% CI [-1.05, -0.51]$ . The effect of the initial conviction method ( $F(1, 225) = 0.02, p = .889, \eta^2 = .00$ ) and the interaction effect ( $F(1, 225) = .001, p = .976, \eta^2 = .000$ ) were not significant.

The majority of participants responded “no,” Quinn's compensation *should not be* contingent on not having a prior offense (72%,  $n = 162$ ), and 28% ( $n = 63$ ) responded “yes” Quinn's compensation *should be* contingent on a prior offense.

### 2. Amount of Compensation

The perception of appropriate yearly compensation for David Quinn ranged from \$4,999 or less per year (lower bound) to more than \$100,000 (upper bound). The most common response was \$30,000 - \$59,999; 27.6% ( $n = 62$ ) of respondents believed this was the appropriate amount of compensation per year for David Quinn. 22.7% ( $n = 51$ ) believed Quinn deserved \$15,000 - \$29,999 annually. 15.1% ( $n = 34$ ) believed he should receive more than \$100,000 annually. 14.7% ( $n = 33$ ) said he deserved \$5,000 - \$14,999 annually. 12.4% ( $n = 28$ ) thought he should receive \$60,000 - \$99,999 annually. And lastly, 7.6% ( $n = 17$ ) believed he should receive \$4,999 or less yearly.

A significant main effect of subsequent conviction was on participants' opinions of appropriate compensation amount ( $F(1, 225) = 7.76, p = .006, \eta^2 = .034$ ). Participants in subsequent conviction conditions believed David Quinn deserved less compensation ( $M = 3.41, SD = 1.40$ ) compared to those participants in no subsequent conviction conditions ( $M = 3.95, SD = 1.47$ ),  $d = -0.38, 95\% CI [-0.64, -0.11]$ . There were no significant main effects of the initial conviction method ( $F(1, 225) = .210, p = .647, \eta^2 = .001$ ) or interaction effect ( $F(1, 225) = 1.433, p = .233, \eta^2 = .006$ ).

Because this item was a Likert scale with discrete responses, we tried to quantify the differences between these means (3.41 for subsequent conviction conditions and 3.95 for no

subsequent conviction conditions). \$15,000 - \$29,999 was coded as 3, and amounts ranging from \$30,000 to \$59,999 were coded as 4. The difference between the lower bound (\$15,000) and the upper bound (\$29,999) is \$14,999. We multiplied this value (\$14,999) by the difference between the lower and upper bound (e.g., 41% for subsequent conviction conditions). The difference is \$8,099.46. The corresponding average amount for subsequent conviction conditions was \$21,148.59 and \$29,248.05 for no subsequent conviction conditions.

### 3. Deservingness of Benefits

The perception of appropriate benefits was determined by asking if David Quinn deserved a specific benefit, and the respondent answered either “yes” or “no.” Because 0 was coded as “no” and 1 was coded as “yes,” this means that the closer to 1 the mean is for each benefit, the more support for that benefit. For career counseling, the mean was 0.96 ( $SD = 0.21$ ). For job training, the mean was 0.95 ( $SD = 0.22$ ). For psychological counseling, the mean was 0.98 ( $SD = 0.15$ ). For monthly living expenses, the mean was 0.81 ( $SD = 0.39$ ), and for subsidized housing, the mean was 0.87 ( $SD = 0.34$ ). All benefits had high means above 0.80, which shows overall support for all services for David Quinn.

**Table 3.** Perceptions of Quinn’s Deserving of Benefits

	Yes (Deserves benefit)	No (Does not deserve benefit)
David Quinn is entitled to the following benefit...		
Career counseling	95.6% ( $n = 215$ )	4.4% ( $n = 10$ )
Job training	95.1% ( $n = 214$ )	4.9% ( $n = 11$ )
Psychological counseling	97.8% ( $n = 220$ )	2.2% ( $n = 5$ )
Monthly living expenses	80.9% ( $n = 182$ )	18.7% ( $n = 42$ )
Subsidized housing	86.2% ( $n = 194$ )	13.3% ( $n = 30$ )

Given that the overall means of support for services were high (“ceiling effect”), we only examined the influence of subsequent conviction on support because of its strong main effect on the above-mentioned variables. We conducted multiple Chi-Square tests to examine the influence of subsequent conviction on the deservingness of benefits.

These analyses revealed two statistically significant findings: monthly living expenses and subsidized housing,  $\chi^2(1, 224) = 10.31, p < 0.001$ , and  $\chi^2(1, 224) = 8.14, p = .004$ , respectively. Within the subsequent conviction manipulation, 72.7% of participants said “yes” David Quinn deserves *monthly living expenses*, compared to 89.5% in no subsequent conviction conditions. Within the subsequent conviction manipulation, 80.0% of participants said “yes” David Quinn deserves *subsidized housing*, compared to 93.0% in no subsequent conviction conditions.

Although there were significant differences between the subsequent conviction and no subsequent conviction conditions for monthly living expenses and subsidized housing, there were no significant differences for career counseling, psychological counseling, or job training.

### C. General Perceptions of Wrongful Conviction Compensation

We also asked participants general questions about compensation for exonerees and their perceptions of exclusionary rules. These questions are general to *all exonerees* and not the hypothetical scenario of David Quinn. For general perceptions of deservingness of compensation for exonerees, the measure ranged from 1 – 6, with 1 being strongly disagree and 6 being strongly agree. The average rating was 5.15 ( $SD = 1.10$ ,  $min = 1$ , and  $max = 6$ ), meaning that most participants agree that exonerees deserve compensation from the state. Almost half of the participants (48.4%;  $n = 109$ ) strongly agreed that exonerees are entitled to compensation from the state. 31.1% ( $n = 70$ ) agreed exonerees deserve compensation, 13.8% ( $n = 31$ ) somewhat agreed, 2.2% ( $n = 5$ ) somewhat disagreed, 2.7% ( $n = 6$ ) disagreed, and 1.8% ( $n = 4$ ) strongly disagreed.

#### 1. Perceptions of Exclusionary Rules

To determine the public's perceptions about specific exclusionary rules, we asked, "Should the following factors affect an exoneree's compensation amount for their wrongful conviction?" The exclusionary rule with the most support (i.e., the highest percentage of participants believed that exonerees in this criterion "deserve no compensation") was if the exoneree fabricated evidence or induced a person to lie under oath (54.7%). In contrast, the exclusionary rule with the least support (i.e., the highest percentage of participants believed that exonerees in this criterion "absolutely deserve compensation") was if the witness in the original crime recanted their statement, which led to the exoneration (36%). Interestingly, the second lowest supported exclusionary criterion was if the exoneree had pleaded guilty or falsely confessed; 28.9% of the sample believed that if this occurred, the exoneree "absolutely deserves compensation." This aligns with our previous results that illustrated that pleading guilty or being convicted by a jury does not decrease support for nor affect the deservingness of compensation for exonerees.

**Table 4.** Perceptions of Deservingness of Compensation Based on Exclusionary Rules

	Mean	Deserves No Compensation		Neutral		Absolutely Deserves Compensation
Should the following factors affect an exoneree's compensation amount for their wrongful conviction?						
Witness in original crime recanted their statement	3.72	8% ( $n = 18$ )	12 % ( $n = 27$ )	15.6% ( $n = 35$ )	28% ( $n = 63$ )	<b>36%</b> ( $n = 81$ )
Pleaded guilty or falsely confessed	3.41	15.6% ( $n = 35$ )	10.2% ( $n = 23$ )	20% ( $n = 45$ )	24% ( $n = 54$ )	<b>28.9%</b> ( $n = 65$ )
Brought up civil litigation or has applied/received damages	3.20	12.9% ( $n = 29$ )	16.4% ( $n = 37$ )	<b>27.1%</b> ( $n = 61$ )	22.2% ( $n = 50$ )	20% ( $n = 45$ )



After exoneration, they were convicted of another crime	2.82	22.2% (n = 50)	20% (n = 45)	<b>25.3%</b> (n = 57)	17.8% (n = 40)	14.2% (n = 32)
Prior felony or felony during incarceration	2.79	20% (n = 45)	22.7% (n = 51)	<b>26.7%</b> (n = 60)	17.3% (n = 39)	12.4% (n = 28)
Currently imprisoned for another crime or served a concurrent sentence	2.58	24.9% (n = 56)	<b>27.1%</b> (n = 61)	23.1% (n = 52)	12.4% (n = 28)	11.6% (n = 26)
Fabricated evidence or induced person to lie under oath	2.05	<b>54.7%</b> (n = 123)	15.6% (n = 35)	8.9% (n = 20)	5.8% (n = 13)	12.9% (n = 29)
Assisted or attempted to assist in the original crime	1.85	<b>52.4%</b> (n = 118)	21.3% (n = 48)	13.8% (n = 31)	6.7% (n = 15)	3.6% (n = 8)

**Note.** On this question, participants responded on a 1 – 5 bi-polar scale with 1 = “Deserves No Compensation” and 5 = “Absolutely Deserves Compensation.” 3 = Neutral. Bold = most common response.

## 2. Exploratory Analyses

We ran four post hoc exploratory analyses to examine the effect of participants’ prior involvement in the criminal justice system, race, gender, and age, on their perceptions of if exonerees deserve compensation. The Likert item ranges from 1 = strongly disagree to 6 = strongly agree and asks if exonerees are entitled to compensation from the state. We chose this question because it examines compensation for exonerees generally, not just David Quinn. As such, we can ensure no specific elements of Quinn’s story affected their responses. Rather, it is more applicable to the field of wrongful conviction and exoneree research.

To guide these analyses, we searched for past literature on the effect of participant characteristics (such as those noted above) on exoneree support. Here we include a short overview of this research. We did not find any previous literature on if/how an individual’s prior involvement in the criminal justice system affects their perceptions of exonerees or support. A comprehensive dissertation on this topic<sup>65</sup> noted that it is possible that an individual’s experience in the criminal justice system could influence their opinions of exonerees and encouraged future research to examine this relationship more closely. As such, we conducted an analysis examining this effect. We found only one study that examined the impact of participant race; they found that non-white participants were more likely to believe that wrongful convictions happen “frequently”.<sup>66</sup> And finally, research has shown that participant does not impact perceptions of how often wrongful convictions happen.<sup>67</sup> However, one question asked, “do wrongful convictions frequently occur enough to justify system reform,” and females were more likely to agree and believed more strongly that reform should occur. Lastly, we did not find any previous literature on if/how an individual’s age affects opinions of wrongful convictions, exonerees, or compensation.

<sup>65</sup> Thompson, *supra* note 42.

<sup>66</sup> Marvin Zalman, Matthew J. Larson, & Brad Smith, “Citizens’ attitudes towards wrongful convictions” (2012) *Criminal Justice Review*, 37(1).

<sup>67</sup> *Ibid.*

For each of our analyses on these variables, we ran t-tests for categorical variables (e.g., prior criminal justice involvement, race, and gender) and a linear regression for the continuous variables (i.e., age). None of the results were statistically significant. Specifically, the *p*-value for prior criminal justice involvement was .354, race was .365, gender was .825, and age was .334.

## V Discussion

Prior research on perceptions of exonerees has found that, generally, the public has negative emotions towards exonerees and sees them as less warm and intelligent, especially if they falsely confessed.<sup>68</sup> Furthermore, research has shown that the public believes exonerees who falsely confessed deserve less compensation than those who did not “aid in their own conviction”.<sup>69</sup> This project sought to explore public opinion on the deservingness of compensation if the individual pleaded guilty vs. if they were convicted by a jury trial to assess further feelings about exonerees who “aid in their own conviction.” Prior research has not examined how an exoneree receiving a subsequent conviction affects public support for compensation. This project also examined how an exoneree receiving a subsequent conviction affects perceptions of the deservingness of compensation for exonerees.

Below, we present the major key findings:

1. **No Effect of Initial Conviction:** Community members’ perceptions of the exoneree or their deservingness of support were not influenced by whether the exoneree pleaded guilty or was convicted by a jury trial.
2. **Strong Impact of Subsequent Conviction:** If the exoneree had a subsequent conviction after their exoneration, support for their compensation, the amount of compensation, and receiving services decreased.
3. **Overwhelming Public Support for Exoneree Services and Compensation:** Overall, community members supported providing exonerees with services post-exoneration (note, participants were less likely to support subsidized housing and monthly living expenses for exonerees with a subsequent conviction compared to those with no subsequent conviction). Also, community members agree that exonerees deserve compensation from the state.

### A. No Effect of Initial Conviction Method

We chose to examine the effect of the initial conviction method on perceptions of exonerees and support for compensation because of the high proportion of plea bargains in the United States (95%) and accounts of exonerees having accepted a guilty plea despite their factual innocence. Prior research on public perceptions suggests that exonerees who have pleaded guilty or falsely confessed are perceived as less competent, warm, intelligent, and deserve less compensation (Clow & Leach, 2014; *Innocents who plead guilty*, 2015; Kukucka & Evelo, 2019; *Why do innocent people plead guilty to crimes they didn’t commit?*, n.d.; Scherr, Normile, & Putney, 2018).

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<sup>68</sup> Clow & Leach, *supra* note 34; Scherr, Normile & Putney, *supra* note 34.

<sup>69</sup> Kukucka & Evelo, *supra* note 39.

Inconsistent with our hypotheses and past research,<sup>70</sup> the initial conviction method did not affect perceptions of the exoneree nor their deservingness of support or financial compensation. More specifically, there was no significant difference between an exoneree who pleaded guilty and an exoneree who was convicted by a jury trial regarding perceptions of the exoneree's favorability and deservingness of compensation or the amount of compensation. Though the results were not significant, multiple participants mentioned the exoneree's guilty plea on the open-ended question when asked why they believed David Quinn was or was not deserving of compensation (this plea was often noted as justification for no compensation). For example:

"I believe he should be compensated for all the time he lost, but this is a hard one. If he pleaded guilty, then whose fault is it really?"

"I don't know why he would've pleaded guilty if he didn't do it."

Importantly, this illustrates that some community members do not understand the frequency of guilty pleas or how defendants are incentivized to plead guilty (even the factually innocent). If this information were more readily available or known, then perhaps public sentiment towards exonerees (and in opposition to this exclusionary rule) would continue to change for the better.

### **B. Strong Impact of Subsequent Conviction**

It is estimated that 83% of released inmates are rearrested within nine years.<sup>71</sup> Importantly, exonerees represent a different population than other justice-involved individuals (due to their factual innocence), but nonetheless, they may be at a greater risk of rearrest than others. Although it had not been examined empirically prior, it is assumed that if a prior conviction decreases support for compensation, then a subsequent conviction may as well.<sup>72</sup> Consistent with our hypotheses, if the exoneree received a subsequent conviction after their exoneration, participants rated his deservingness of compensation, the amount of compensation, deservingness of subsidized housing, and deservingness of monthly living expenses lower than an exoneree without a subsequent conviction. Though there is no past research that these results can be compared to, these findings align with research that has shown that the public generally believe some exonerees deserve less assistance than others.<sup>73</sup> Interestingly, most participants (72%) believed the exoneree's compensation *should not* be conditional on a prior conviction, which is contrary to prior research (Karaffa et al., 2015).

A subsequent conviction after exoneration also significantly decreased the favorability and character ratings of the exoneree. This character scale was an average of eight separate ratings about if the exoneree is a good person, credible, deviant, dishonest, likable, trustworthy, violent, or has good character. These findings are important because they shed light on how the public thinks about offending and individuals convicted of committing a crime. Unfortunately, these findings suggest a bias against exonerees who have a subsequent conviction. Exonerees with a

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<sup>70</sup> Clow & Leach, *supra* note 34; Clow & Leach *supra* note 34, Scherr Normile & Putney, *supra* note 34.

<sup>71</sup> Clarke, *supra* note 31.

<sup>72</sup> Clow & Leach, *supra* note 34.

<sup>73</sup> *Ibid*; Clow & Leach 2014, *supra* note 34.

subsequent conviction are perceived as less deserving of compensation and support. This bias was evident in some participants' responses to the open-ended question when asked why they believed David Quinn was or was not deserving of compensation. For example:

He may not have raped the girl and spent 37 years in prison, but 6 months later, he got a felony and went right back to prison. This shows he didn't learn his lesson of not getting in trouble."

"The fact that he was wrongly incarcerated for one rape and for 37 years certainly entitles David Quinn to compensation and support. That is an ethical duty of the State. However, the fact that he was also convicted of a second rape does place his character in question."<sup>74</sup>

If exonerees were to receive compensation for their time incarcerated automatically, subsequent convictions would likely decrease. Prior research has shown that the likelihood of offending after being exonerated *increases* if the exoneree does not receive compensation.<sup>75</sup> When exonerees were compensated \$500,000 or more, they committed subsequent crimes at a much lower rate than those who received less than \$500,000.<sup>76</sup> This illustrates that disqualifying exonerees from compensation could lead to increased crime and subsequent convictions.

### C. Overwhelming Public Support for Exoneree Services and Compensation

Despite significant differences in perceptions of deservingness of subsidized housing and monthly living expenses (between subsequent vs. no subsequent conviction conditions), community members overall supported services for exonerees. Even the item with the lowest amount of support - monthly living expenses - had about 80% of participants agreeing that exonerees deserved that assistance. This is partially in line with past research using the same assistance questions, which shows that the average respondent was more willing than not to support assistance for the exoneree.<sup>77</sup> These results were inconsistent with Scherr and colleagues' findings that wrongful convictions resulting from a false confession led to higher uncertainty regarding the exoneree's innocence, resulting in lower support for services such as job training, career counseling, and psychological counseling.<sup>78</sup> In our study, pleading guilty (comparable to false confessions) did not affect support for post-exoneration services, and general support was high. Overall, there are mixed results between studies on the deservingness of services and exonerees, and future research would be beneficial.

Our results also demonstrate that not only does the public believe that exonerees deserve services, but about 93% of the sample believe that exonerees are entitled to compensation from the state. Participants' responses to the open-ended question when asked why they believed David Quinn was or was not deserving of compensation demonstrate this sentiment:

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<sup>74</sup> Importantly, the newspaper article did not specify the crime Quinn was convicted of post-exoneration.

<sup>75</sup> Mandery et al, *supra* note 5.

<sup>76</sup> *Ibid.*

<sup>77</sup> Clow & Leach, *supra* note 34.

<sup>78</sup> Scherr, Normile & Putney, *supra* note 34.

I believe that he should be entitled to these programs or compensation as he spent years of his life behind bars without the resources or experiences he could have gained outside as a civilian. He was wrongfully convicted, and it was an error made out of his hands. He lost half of his life being treated as a prisoner - wrongfully.

He was in prison for 37 years for a crime he didn't commit, he was still a teenager when he went in, he has no life skills, he hasn't finished school, and his reputation is tarnished. He should have been given some money to take care of himself with.

Our findings are consistent with much of the prior research on compensation deservingness. Specifically, Karaffa et al.'s<sup>79</sup> research found that 86.1% of their sample believed exonerees deserve compensation. This is also in line with the 1995 Angus Reid survey conducted in Canada that found 90% of Canadians believe that exonerees should receive compensation for being wrongfully convicted. Lastly, similar results from 2012 found that 12 out of 15 respondents agreed that exonerees should be compensated by the government.<sup>80</sup> Findings of general financial support for exonerees transcend over the last three decades, and our results are consistent with that prior research on general exoneree compensation opinions. Future research should consider how this general support for exoneree compensation holds if participants are forced to choose between increased financial support for differing populations or tax-funded programs (e.g., funds for exoneree compensation versus funding for parks and recreation).

#### **D. Exclusionary Rules**

One key component of this project was to examine general endorsement or disagreement with exclusionary rules. Our analyses showed that the exclusionary rules with the most support (i.e., the highest percentage of participants believed that exonerees in this criterion “deserve no compensation”) were if the exoneree fabricated evidence or induced a person to lie under oath and if the exoneree assisted or attempted to assist in the original crime. These both allude to a suspicion that the exoneree being involved in the original crime decreases support for compensation.

Two of the exclusionary rules that participants were overall “neutral” about (i.e., the average fell in the middle of the scale, with responses on both sides) are directly related to variables explored in this study: (1) If the exoneree had a subsequent conviction and (2) If the exoneree had a prior felony or a felony during incarceration. Overall, this variability somewhat aligns with our quantitative findings about the hypothetical David Quinn in our newspaper article. Unfortunately, a prior or subsequent conviction will likely draw out biases or suspicion about exonerees for some community members.

The exclusionary rules with the least support (i.e., the highest percentage of participants believed that exonerees in this criterion “absolutely deserve compensation”) were if the witness in the original crime recanted their statement that led to the exoneration. The second exclusionary law with the least support was if the exoneree pleaded or falsely confessed. Though 28.9% of

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<sup>79</sup> Karaffa et al, *supra* note 41.

<sup>80</sup> Blandisi et al, “Public perception of wrongful conviction: Support for compensation and apologies” (2012) Albany Law Review.

participants felt that if an exoneree pleaded guilty or falsely confessed, they still deserved compensation, there were still 15.6% who believed they did not deserve compensation (and a greater chunk of participants felt somewhat neutral).

### **E. Importance of These Findings for Policy**

Our findings regarding exoneree support and exclusionary rules contribute to policy discussions and help to demonstrate where proposed efforts align with community sentiment. We take up a discussion of those avenues for change here.

Public opinion substantially impacts policy change, even when political organizations and people of power are prevalent in a community.<sup>81</sup> In Burstein's review of the relationship between opinion and policy in 30 different studies, 75% of the studies had a statistically significant relationship between opinion and policy.<sup>82</sup> Further, in an article that investigated a multitude of studies on public opinion, all but one out of 20 found that public opinion influences public policy.<sup>83</sup> Overall, democratic governments often do what their citizens want, specifically when an issue is important to the public.<sup>84</sup> This effect is likely to be amplified as greater focus is given to certain topics and they become more mainstream media, as opposed to rare news articles. Consider the lessons learned from Baumgartner et al<sup>85</sup> – the rising attention in mainstream media in the early 2000s given to the “innocence frame” (i.e., that errors are possible and have resulted in the execution of innocent individuals) impacted public opinion about the death penalty, and ultimately, the number of executions carried out. Public opinion impacts jury decision-making, the sentence prosecutors seek, and policy.<sup>86</sup> Continuing to raise attention to wrongful convictions and the unnecessary challenges exclusionary rules create can only aid in the creation of policies to support exoneree re-entry and support.

Some studies have found that political party power and advocacy organizations can impact policy creation. For example, states with a higher presence of advocacy organizations, such as the Innocence Project, have an increased likelihood of legislation change.<sup>87</sup> Further, interest organizations may be more effective if their actions align with public opinion, and they can increase responsiveness by being an intermediary group between the public and the government.<sup>88</sup> The majority political party in a state affects the likelihood that a state will incorporate policies that can decrease the presence of wrongful convictions, though this depends on the salience of the

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<sup>81</sup> Paul Burstein, “The impact of public opinion on public policy: A review and an agenda” (2003) *Political Research Quarterly*.

<sup>82</sup> *Ibid.*

<sup>83</sup> Paul Burstein, “Bringing the public back in: Should sociologists consider the impact of public opinion on public policy?” (1998) *Social Forces*.

<sup>84</sup> *Ibid.*

<sup>85</sup> Baumgartner et al, 2008

<sup>86</sup> *Ibid.*

<sup>87</sup> Stephanie L. Kent & Jason T. Carmichael, “Legislative responses to wrongful conviction: Do partisan principals and advocacy efforts influence state-level criminal justice policy?” (2015) *Social Science Research*.

<sup>88</sup> Burstein, *supra* note 81.

issue at hand.<sup>89</sup> The more prominent an issue, the higher responsiveness by elected officials.<sup>90</sup> This is because citizens usually vote based on issues at the forefront of an official's agenda. Therefore, elected officials are more likely to act on those issues once elected.<sup>91</sup> Political affiliation, beliefs, and views impact policies due to voting power. Individuals who believe in specific issues (e.g., exoneree support, mandatory DNA testing laws, and evidence-based practices to prevent miscarriages of justice) can push for change in this area of the criminal justice system, and their attitudes and opinions change policy.

Specific to our findings, we found overwhelming support for policies that compensate exonerees and provide services post-exoneration (e.g., job training and psychological counseling). Considering re-entry struggles and the support for these services under varying conditions, policymakers should work to eliminate barriers to these crucial services for exonerees. Importantly, these actions align with the Innocence Project's proposed legislation for compensation minimums and access to immediate services for exonerees across the United States.<sup>92</sup>

Despite "aiding in one's own conviction" being the most common exoneree compensation exclusionary criteria, community members in our study did not perceive it to be an important criterion for compensation. Nor did they overwhelmingly believe that exoneree compensation should be conditional on the exoneree not having a prior offense (often called the "clean hands" provision). These data suggest that proposed efforts to bar exonerees from compensation based on these criteria are not necessarily in line with community sentiment.

Lastly, we did find that community members believed an exoneree with a subsequent conviction to be less deserving of compensation than an exoneree without such conviction. However, these findings must be couched within the overwhelming support for exoneree compensation.

Given that this is the first study to examine the role of subsequent conviction on exoneree support empirically, we caution against using these findings alone to inform policy changes, especially considering the role of incarceration and exoneree compensation on subsequent offending. Because public opinion can influence policy, this may be an area where education and increased understanding could be helpful to the public. Overall, more research is needed on this important topic.

## VI Limitations and Future Directions

It is important to highlight a few limitations that could have impacted these results. The first of these concerns our sample. In this study, we collected data online; online samples could affect the generalizability of the results due to a non-representative sample. For example, the sample was 68.9% female and 26.2% male. Interestingly, in 2021 there was a rise in young female users on Prolific due to a TikTok video that promoted Prolific. This resulted in about 30,000 new

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<sup>89</sup> Kent & Carmicahel, *supra* note 87; *ibid*.

<sup>90</sup> Burstein, *supra* note 81.

<sup>91</sup> *Ibid*.

<sup>92</sup> Innocence Project, *supra* note 13.

participant signups to Prolific, which skewed heavily toward young female participants.<sup>93</sup> This was prevalent in our sample and could have affected the outcome of our analysis because prior research has found that females are more likely to believe that wrongful conviction reform should occur.<sup>94</sup> Therefore, knowing that females believe more strongly that reform should occur, and our results show that the majority of our sample believed that exonerees should receive compensation and services, this could be due to the overwhelming number of female participants.

An additional concern from the oversample of female respondents is that this sample may also oversample individuals with liberal political leanings and more likely to support compensation and services. America's hyper-polarized politics of the last decade make most public discussions highly influenced by respondents' political valences. These valences could potentially have a significant impact.<sup>95</sup> For example, it could impact what a respondent feels we have the resources for or are justified in spending on. While possible, without knowledge of the respondent's political leanings, we cannot fully assess this concern in the current study. Future research should recognize these concerns and build questions to glean and control for political leaning.

Furthermore, for future research to examine the role of prior criminal justice involvement on exoneree support, researchers should attempt to sample that population better. Though we attempted to do this, our sample of previously justice-involved individuals was too small ( $n = 22$ , 9.8%) to produce meaningful results.

The second limitation concerns the materials and measures. First, although prior research used a hypothetical newspaper article,<sup>96</sup> it is possible that participants had questions about David Quinn's scenario that the article did not address. For example, multiple participants mentioned their curiosity regarding the subsequent conviction in the open-ended question (e.g., what was the charge?). It is possible that the information gap could have increased or decreased their support for compensation dependent on outside experiences or preconceived notions of exonerees or those with past justice-involved experience. Considering many participants had questions about this, future research could manipulate different types of subsequent convictions and how that impacts exoneree support.

Another limitation of the materials used in this study concerns the name we chose in the hypothetical newspaper article. The name David Quinn came from a random name generator website. By not giving information such as race, participants could have used schemas and past experiences to assume the race of David Quinn. This could have affected the results; past research demonstrates how names affect people's opinions. For example, research has shown that applicants with afro-centric names are evaluated more negatively when people read fictitious resumes; more negative pre-interview impressions are formed than applicants with white, Hispanic, and Asian-

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<sup>93</sup> Nick Charalambides, "We recently went viral on Tiktok - here's what we learned" (August 24, 2021), online: Prolific <<https://www.prolific.co/blog/we-recently-went-viral-on-tiktok-heres-what-we-learned>>.

<sup>94</sup> Zalman et al, *supra* note 66.

<sup>95</sup> Andrew J. Madrigal & Robert J. Norris, "The Good, the Bad and the Uncertain: State Harm, the Aftermath of Exoneration, and Compensation for the Wrongly Convicted" (2022) *Critical Criminology*.

<sup>96</sup> Thompson, *supra* note 42; Clow & Leach, *supra* note 34.



sounding names.<sup>97</sup> Other studies have shown landlords are less likely to respond to inquiries from an individual with a stereotypically African-American-sounding name.<sup>98</sup> Similarly, the name choice could have affected the results. Further research should look into comparing exonerees with White sounding names versus African-American-sounding names without explicitly stating race in order to examine this concept further.

“Aided in one’s own conviction” is typically considered either a false confession, false guilty plea, or both. As such, in this article, we coupled false confessions and false guilty pleas and defined it broadly as “aided in own conviction.” We also used false confession research to support our hypotheses. Considering past research found decreased support and more negative perceptions towards an exoneree who falsely confessed,<sup>99</sup> but this study found no effect of having pleaded guilty on support or opinions, coupling this together may not have been justified. Future research could use a similar method but look at the perceptions of exonerees who falsely confessed vs. pleaded guilty two separate, independent variables. This could have also affected perceptions of the exclusionary criteria that generally state, “aided in own conviction.”

Furthermore, in our pilot survey, individuals assigned the “pleaded guilty” condition were not sensitive to the manipulation. We believe this is because the public might not understand the difference between pleading guilty vs. being convicted by a jury, meaning they do not understand that if an individual pleads guilty, they do not go to trial. Because of this, we altered the newspaper article in the final survey to say the exoneree “pleaded guilty to the crime, therefore avoiding a jury trial” to ensure there was no confusion on behalf of the participant. Though we changed this, participants still could have been confused, which could have affected our results.

Lastly, future research should modify the monetary scale used here. To assess how much compensation the exoneree deserved, we gave participants multiple options encompassing amounts of compensation. For example, one ranged from deserved \$5,000 - \$14,999 and another \$15,000 - \$29,999. This made it difficult to tell exactly how much they believed the exoneree deserved (e.g., was it closer to \$15,000 or closer to \$29,000 because those are vastly different amounts). Future research could use a sliding scale so participants can choose the exact amount they felt the exoneree deserved. Future research could also investigate the deservingness of certain compensation amounts for different populations of exonerees (e.g., the type of crime the exoneree was accused of committing and the race of the exoneree). This way, we can better untangle nuances in general support for exonerees.

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<sup>97</sup> King et al, “What’s in a name? A multiracial investigation of the role of occupational; stereotypes in selection decisions” (2006) *Journal of Applied Social Psychology*; Stevie Watson, Osei Appiah & Corliss G. Thornton, “The effect of name on pre-interview impressions and occupational stereotypes: The case of black sales job applicants” (2011) *Journal of Applied Social Psychology*.

<sup>98</sup> Andrew Hanson & Zackary Hawley, “Do landlords discriminate in the rental housing market? Evidence from an internet field experiment in US cities” (2011) *Journal of Urban Economics*.

<sup>99</sup> Savage et al, *supra* note 38; Kukucka & Evelo, *supra* note 39, Clow & Leach, 2014

## VII Conclusion

Overall, the results suggest that the public believes that there are instances in which exonerees deserve less compensation than others, despite feeling overall positive towards support for exonerees and compensation. Exonerees who had a subsequent conviction after their exoneration were perceived as less deserving of subsidized housing and monthly living expenses, less deserving of compensation overall, deserving of a lower amount of compensation, and had lower favorability ratings. This perception of subsequent convictions aligns with the exclusionary criteria that bars exonerees from receiving compensation due to the state's miscarriage of justice. This support could create barriers to changing these exclusionary laws for exonerees. On the other hand, the public did not perceive an exoneree who pleaded guilty differently than an exoneree who was convicted by a jury. This opinion of exonerees contradicts the exclusionary criteria that exonerees who "aided in their own conviction" are not eligible for compensation (this also had little support in this sample relative to other exclusionary rules). These findings could be beneficial to eliminating exclusionary laws for exonerees, which would ensure that exonerees receive compensation for the miscarriage of justice that occurred to them.

## **Convicting the Innocent: An Analysis of the Effects of Wrongful Convictions and Available Remedies in Canada**

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Canada

*The past three decades have seen at least 3,200 exonerations across North America. While this number continues to grow, attention must be turned to facilitating successful re-entry amongst this group. By conducting a content analysis of 57 Canadian exonerees, I gathered demographics and common case characteristics to assess the re-entry success of exonerees. Successful re-entry was incredibly difficult for the majority of exonerees due to a lack of specialized re-entry services, counselling, compensation legislation, and healthcare. Exonerees are suffering in the same ways as legitimate offenders while incarcerated and afterward, all while being offered drastically less assistance from Canada's institutions and government.*

- I. Introduction
  - A. Research Question
- II. Literature Review
  - A. Recidivism
  - B. Drug Use
  - C. Mental Health Issues
  - D. Discrimination and Stigma
  - E. Compensation
  - F. Not Enough
- III. Methods
  - A. Participant Sampling
  - B. Ethical Considerations
  - C. Coding and Analysis
  - D. Limitations
  - E. Measures of Success
- IV. Results
  - A. Compensation
  - B. Support
  - C. Government Assistance
  - D. Discrimination
  - E. Declining Health
  - F. Traumatic Events
  - G. Marginalized Groups
  - H. Indigenous People

- I. Other Marginalized Groups in Wrongful Convictions
- J. Growing up Incarcerated
- K. Summarizing Success
- V. Discussion
  - A. Money Matters: The Need for Compensation Law
  - B. Financial Assistance Training
  - C. Re-Entry Services
  - D. Social Services
  - E. Medical and Dental Care
  - F. Mandated Counselling Services
  - G. Family Counselling and Support
  - H. Indigenous Exonerees
  - I. Age as a “Risk Factor”
  - J. Automatic Record Expungement
  - K. Public Education and Awareness
- VI. Conclusion

## I Introduction

During the last three decades in America, 3,400 people have been wrongfully convicted and subsequently exonerated of crimes they did not commit. Data on exonerations are tracked by the Innocence Project, the Death Penalty Information Center, and individual researchers (Gross, p. 175). Given these data, Gross (2008) has conservatively estimated that 2.3% of death sentences are wrongful. Since murder and rape investigations are, supposedly, dealt with thoroughly, it is expected that the rate of wrongful convictions is much higher for lesser crimes (Gross, 2008, p. 178). This issue is identified by Roach (2012) who states that the “unknown number of wrongful convictions may be much larger than appreciated” (p. 1467). Roach (2012) adds that in Canada, the rate of wrongful convictions “arises in homicide or sexual assault cases, even though these cases constitute only a small percentage of all criminal cases and convictions” (p. 1470). This means that even in Canada, the true rate of wrongful convictions is likely much higher than one can imagine, especially when considering everyone who has been wrongfully convicted of lesser crimes. The increasing threat of wrongful convictions means that any one of us could have our livelihoods stripped away from us, at any given moment (Grounds, 2004).

The literature has largely addressed how wrongful convictions occur (Campbell, 2017; Furman, 2003; Huff & Killias, 2013). The same cannot be said about research addressing exonerees themselves, their experiences of being wrongfully convicted, and how they coped with re-entry. Many academics (Kukucka, Applegarth, & Mello, 2020; Grounds, 2004; Campbell & Denov, 2004; Wildeman, Costelloe, Schehr, 2011), have pointed out this gap in the literature. Taking these thoughts into consideration, this research aims to evaluate the demographics of those who are wrongfully convicted and the assistance available to them to assess which of these characteristics contribute to successful re-entry back into society.

### **A. Research Question**

What assistance is provided to the wrongfully convicted who leave prison? Does the usefulness of re-entry assistance for the wrongfully convicted vary based on case and individual characteristics? How do these characteristics influence re-entry? Why might this be? Do certain characteristics increase the chance of success? Most importantly, what do exonerees themselves need to assist them?

## **II Literature Review**

The burden of waiting years for reentry services often compounds problems for the exoneree. The wrongfully convicted who win their freedom only to find that they are penniless, unemployable, and dependent on others, experience family friction, poverty, and depression. This combination is a recipe for disaster, resulting in homelessness, self-medicating with drugs and alcohol, and societal alienation. Many suffer from mental health symptoms that resemble those suffered by veterans of the war and torture survivors; these symptoms stem directly from wrongful conviction and incarceration (Weigand, 2009, p. 429).

The literature largely addresses the effects of incarceration on incarcerated individuals, releasees, their families, and the community (Cooper, Durose, & Snyder, 2014; Cid, 2009; Listwan et al., 2013). However, the literature has largely ignored the thousands of wrongfully convicted individuals who are subject to the same pains of imprisonment and their subsequent effects. Even more sparse is the literature on what re-entry and rehabilitative services are offered to this unique group of individuals. This literature review aims to assess the effects of incarceration in general and focus on how these effects may extend to exonerees and to what extent.

### **A. Recidivism**

Though they are innocent of the charges for which they were incarcerated, there is no reason to think that they are immune from the detrimental effect that prison has on prisoners. It is well established that prison can habituate criminal behavior (Mandery, Shlosberg, West, & Callaghan, 2013, p. 554).

In the US, Durose, Cooper, and Howard (2014) found that 70% of actual offenders recidivate within three years of their release (p. 1). Duke (2018) corroborates these findings, stating that 76% of individuals recidivated following their release (p. 45). Recidivism has been found to be further exacerbated by unemployment and low levels of social support (Listwan et al., 2011, p. 162). The literature consistently shows alarmingly high rates of recidivism for anyone who has been incarcerated; this finding applies to all types of offenders, whether they are low or high-risk. Cid (2009) has found support for this point, stating that the highest rates of recidivism belong to high-risk offenders (82%), second highest being medium-risk offenders (40%), and lastly, a 19% recidivism rate belonging to low-risk offenders (p. 471). It is growing increasingly obvious that even if individuals pose little risk prior to incarceration, their experiences in prison and the difficulties with re-entry can incite criminal behaviour.

Although a small amount of literature exists addressing exoneree recidivism, it does tend to support the aforementioned idea. The literature goes as far as to suggest that “exonerees are potentially at a high risk for offending following their release” (Mandery et al., 2013, p. 554). The risk of recidivism may further be exacerbated if exonerees do not receive compensation and resources to help with the overwhelmingly difficult process of re-entry (Mandery et al., 2013, p. 555). Mandery and colleagues (2013) found that recidivism rates dropped significantly if exonerees were awarded more than half a million dollars (p. 574). Despite being useful information, this is a troubling idea, considering that many exonerees do not receive compensation, or are often severely under-compensated (Weighand, 2009, p. 429; Innocence Project, 2021b). In the US, Mandery et al. (2013) found that 45 of 118 (or 38%) exonerees were “convicted of at least one crime following their exoneration” (p. 570). Violent offences and drug offences were committed by nearly half of those exonerees; a smaller number commit property crimes and “other crimes”, with the frequency of incidence being 29% and 36% respectively (Mandery et al., 2013, p. 570). In interviews conducted by the New York Times, it is revealed that “about one-sixth of [exonerees] ... found themselves back in prison or suffering from drug or alcohol addiction” (Roberts & Stanton, 2007, para. 9). The link between drug use and recidivism is apparent in the literature on recidivism for both exonerees and actual offenders.

## **B. Drug Use**

The use of drugs has the potential to lead offenders and exonerees to crime. According to Houser, Saum, and Hiller (2019), about half of state prisoners “have a drug abuse or dependence disorder” (p. 1238). Bahr and colleagues (2010) found that many of these individuals who failed parole cited drug use as the reason why. Additionally, drug use led to incarceration for 82% of the parolees (p. 680). Houser and colleagues (2019) support this, finding that people who used drugs (PWUD) were 2.8-3.8 times more likely to offend compared to people who do not use drugs (p. 1239). This article also found that PWUD who had antisocial attitudes, were unemployed, and had poor relationships with others were more likely to recidivate (Houser et al., 2019, p. 1239). These findings are significant as the wrongfully convicted experience the same pains of imprisonment and re-entry with additional challenges due to their unique circumstances.

In an interview, one exoneree told Chunias and Aufgang (2008) that he began engaging in petty crime to “support his drug addiction” and that it “provided him with the occasional reprieve from the unstructured world he had grown to distrust and fear” (p. 116). Roberts and Stanton (2007) found similar sentiments, with one exoneree developing a drug addiction following his exoneration and eventually going back to prison for “cocaine possession and battery” (para. 3).

The literature shows that a lack of social bonds can increase drug use. The social bond theory posits that individuals conform if they have strong social bonds which create attachment, commitment, involvement, and belief (Hirschi, 1969 as cited in Ford, 2009, p. 339). Specifically, attachments to people and one’s relationship to them functions to prohibit “deviant” behaviour, such as drug use. While commitment refers to one’s “investment in conventional activities and goals”, which can refer to a good career or education that may prevent someone from using drugs, the literature supports the idea of trauma causing some exonerees to become withdrawn (Hirschi, 1969 as cited in Ford, 2009, p. 339; Grounds, 2004, p. 168; DeShay, 2016, p. 210; Campbell & Denov, 2004, p. 148). Withdrawal can therefore impact one’s relationship with strong social bonds

such as partners, friends, and family, leading to a dependence on drugs. Similarly, exonerees are at risk of a weak bond to commitment, as some have lost their careers or a chance at their career due to their wrongful conviction (Robert & Stanton, 2007, para. 2; Westervelt & Cook, 2021, pp. 65-66). This lack of commitment to strong social bonds such as work, therefore, may not apply to some exonerees, putting them at a risk of drug use.

The literature on substance abuse also identifies a link between people who suffer from traumatic incidents and the use of drugs to cope (Delker & Freyd, 2014, p. 576; Ullman, Relyea, Peter-Hagene, & Vasquez, 2013, p. 2219). The use of drugs facilitates reducing symptoms of post-traumatic stress disorder (PTSD), such as flashbacks and anxiety over the traumatic incident (Ullman, 2013, p. 2219; Grounds, 2004, p. 169). This use can range from “binge drinking” to the use of drugs that is so chronic that it could be classified as a substance use disorder (Delker & Freyd, 2014, p. 576). The literature has “long noted” that mere exposure to a traumatic incident may lead some to use drugs (Delker & Freyd, 2014, p. 576). One exoneree states that he “developed a serious drug habit while in prison”, possibly due to the traumatic experience of being incarcerated (Chunias & Aufgang, 2008, p. 116). Many exonerees develop illnesses such as PTSD from the traumatic experience of being wrongfully convicted and dealing with traumatic incidents in prison (Grounds, 2004, p. 169).

### **C. Mental Health Issues**

In the average prison population, mental illnesses are incredibly prevalent. Namely, 64% of individuals that comprise the prison population experience symptoms of mental illness or getting treated for mental illness, and 25% of prisoners have severe mental illnesses “such as psychotic symptoms, mania, and severe depression” (Mulvey & Schubert, 2017, p. 232). Saum, and Hiller (2019) found that “14% [meeting] the threshold for serious psychological distress” (p. 1238).

I called my brother one night and told him I was going to kill myself ... I was sick of it ... I was going to take the razor blades and I was going to slash my wrists open ... I was tired, you know? I was really burnt out at that point (Sean as quoted in Campbell & Denov, 2004, p. 149).

To date, there exist very few studies that assess the effects that wrongful conviction and imprisonment have on mental health (see Grounds, 2004; Campbell & Denov, 2004; Simon, 1993, Wildeman et al., 2011). Campbell and Denov (2004) interviewed five men who were wrongfully convicted who spent anywhere from three to eight years in prison (pp. 141-142). All five men in this study had admitted to contemplating suicide, with one man attempting suicide after being denied bail.

Similarly, Grounds (2004) assessed 18 men who were wrongfully convicted, many of which did not have any psychiatric disorders prior to being wrongfully convicted. A number of these psychiatric disorders were found, including personality changes, PTSD, depressive disorders, panic disorders, paranoia, and addiction (Grounds, 2004, pp. 168-169). Most respondents suffered from “personality change” which occurs after “catastrophic experiences” (Grounds, 2004, p.168). Those closest to the exonerees nearly all expressed the same concern,

stating that the exonerees “were not the same person” as they used to be (Grounds, 2004, p.168). In addition to these illnesses, 89% of the exonerees had experienced additional psychiatric disorders, which led to “pervasive and disabling symptoms” (Grounds, 2004, p. 169). One exoneree, David Shepard, lived with the anxiety and fear of being wrongfully accused again, leading him to collect “physical evidence” wherever he goes to “corroborate his activities” (Clow, Leach, & Ricciardelli, 2012, p. 330).

Wildeman and colleagues (2011) found support for the study conducted by Grounds (2004). Full-time employment, stable housing, and strong social bonds are known to assist in re-entry (Wildeman et al., 2011, p. 425). However, despite many of the exonerees possessing these features, 22% had some sort of psychiatric disorder; namely, anxiety, depression, PTSD, or a combination of these illnesses (Wildeman et al., 2011, p. 425).

Simon (1993) found that symptoms of mental illness may arise even in circumstances of false arrest and short-term imprisonment. Unfortunately, half of suicides while incarcerated occur within the first 24 hours, meaning that even short-term wrongful incarceration may lead to disastrous consequences for the wrongfully accused and their families (p. 523). Even though the wrongful accusation and incarceration is short lived, it carries with it a range of consequences that can last indefinitely. For one man, a wrongful accusation led those in the community to treat him and his family differently, and this became so unbearable that they needed to move away (Simon, 1993, pp. 524-525). It is becoming increasingly obvious that wrongful imprisonment, despite its length, carries with it common consequences. Even the psychiatric disorders that arise from these situations are similar. Simon (1993) found that “[PTSD], adjustment disorders, generalized anxiety disorders”, and chronic depression can all be found in those who have been wrongfully arrested or incarcerated for shorter amounts of time (p. 525).

#### **D. Discrimination and Stigma**

When I was going around looking for jobs, I had to explain that twenty-six-year gap. I had to tell them everything... And they just didn't want to deal with it... they thought, well, you was in there and something might come back (Gary James as cited in Westervelt & Cook, 2021, p. 67).

In the US and Canada, there are millions of individuals re-entering the community after being incarcerated. In other words, there are millions of people looking for work (Ricciardelli, Evans, & Peters, 2017, p. 1). Unfortunately, despite its well-known use in facilitating re-entry and in preventing recidivism, employers hesitate to hire those with a criminal record (See Ricciardelli, Evans, Peters, 2017; Solomon, 2012; Kukucka, Applegarth, & Mello, 2020; Giguere & Dundes, 2002). Studies have found that exonerees face the same difficulties as actual offenders in obtaining work. Even if one's record is expunged, the decades of absence will need to be explained to employers. This phenomenon has been clearly noted in the available literature (Westervelt & Cook, 2017; Holzer, Raphael, & Stoll, 2004; Kukucka, Applegarth, & Mello, 2020).

Kukucka et al. (2020) found that employers were more likely to offer a lower wage and contact more references of exonerees and hold overall “less favorable impressions” about them (p. 25). As previously mentioned, literature has found that not only is employment shown to reduce



the risks of recidivism, but it has a range of effects that decrease other characteristics that may also result in recidivism. In particular, “full-time employment led to lower levels of mental illnesses such as anxiety, depression, and PTSD, for exonerees” (Kulkucka et al., 2020, p. 18).

Similarly, housing has been cited as one of the most important “components for successful reintegration”, however, it is also the “biggest challenge” individuals leaving prison face (Zanella, Clow, Rempel, Hamovitch, & Hall, 2020, p. 302). Wrongful convictions are not automatically expunged from one’s criminal record, so a simple back-ground check would reveal charges against exonerees to prospective landlords (Zanella et al., 2020, p. 303). Currently, there is only one study that has addressed whether exonerees are discriminated against like actual offenders are. In their study, Zanella et al. (2020) discovered that exonerees were less likely to receive a response (31.6%) from landlords than both an individual without a criminal record (73%) and one with a criminal record (46%) (p. 304).

### **E. Compensation**

Does ten million give me my children back any faster than four [million]? Or does it give any of those 1,047 days back? The birthdays, the Christmasses? The money doesn’t. What the money will give me is security, comfort, peace of mind [...] The rest I have to get back myself. Nobody can compensate me for that [...] that’s the only thing they can give me. There’ll never be enough, but I have to accept a number that lets me move on (Campbell & Denov, 2004, p. 155).

In Canada, there is no law that mandates compensation at a federal, provincial, or territorial level (Campbell, 2019, p. 268). There are established guidelines in Canada that outline who is deserving of compensation, however, they drastically limit how one can be entitled to compensation. If charges were withdrawn or if the individual was acquitted for example, then they would not receive compensation under these guidelines (Mason, 2020, s. 4.3).

Civil litigation is the only option available to Canadian exonerees, however, civil suits are described as “surprisingly difficult for exonerees to win”, as it is difficult to prove “intentional misconduct” of various actors in the criminal justice system due to the absolute and qualified immunity they are entitled to (Bernhard, 2009, 403; Westervelt & Cook, 2012, p. 197). Oftentimes, there is just no one to sue due to genuine mistake (Bernhard, 2009, p. 407). This is incredibly problematic as the Innocence Project (2020), has found that “69% of DNA exonerations [in the US] have involved eyewitness misidentification”, and in addition to this, there are “450 non-DNA-based exonerations involving eyewitness misidentification” (paras. 1-2). This excludes the possibility of obtaining compensation through civil litigation for hundreds of exonerees. Although the Innocence Project revealed 28% of their clients have won civil suits, for most, it is not only difficult to prove misconduct, but the legal fees make this option unrealistic for many exonerees (Norris, 2012, p. 355).

To date, the largest compensation in Canada was to David Milgaard, who spent 23 years in prison for a crime he did not commit. Milgaard then waited another seven years before receiving 10 million dollars and a formal apology from the government of Ontario (Campbell, 2019, p. 262). However, many exonerees are not fortunate enough to acquire compensation, which is an

incredible failure of the North American justice system. Likewise, 57% of exonerees never regain the income level they had prior to being incarcerated, leading to a third of exonerees becoming “financially dependent on others” (Weighand, 2009, p. 428).

### **F. Not Enough**

The most common response to our inquiry about what they [the wrongfully convicted] got from the state upon release was ... “nothing”. Alan Gell says, “No state help. No federal help. No nothing.” ... Sabrina Butler echoes this: “No money. No nothing. They didn’t even give me jack! They just took the handcuffs off me and sent me out the door” (Westervelt & Cook, 2012, p. 201).

Wrongful convictions continue to impact each aspect of one’s life—structurally, emotionally, and interpersonally. The reality is that once exonerated, many exonerees are not granted access to programs meant for actual offenders, as they did not commit an offence. However, they experienced the same traumas, and much worse, than actual offenders, and they still require the same amount of assistance at the least. David Shepard was one of a handful of exonerees who have been “denied assistance because he had not actually committed a crime” (Clow, Leach, & Ricciardelli, 2012, p. 329). However, exonerees are a unique group with unique circumstances which means that they require specialized support. The literature has upheld this need for specialized programming to address the specific needs of exonerees (Wildeman et al., 2011; Chunias & Aufgang, 2008).

## **III Methods**

The purpose of this study is to assess the resources available to exonerees and whether those resources are helpful in exoneree re-entry. The research questions are as follows:

- a) What assistance is provided to the wrongfully convicted who leave prison?
- b) Does the usefulness of re-entry assistance for the wrongfully convicted vary based on case and individual characteristics?
- c) What do exonerees need to adequately assist their re-entry?

### **A. Participant Sampling**

All cases analyzed in this study were Canadian adults who have been wrongfully convicted of a serious offence and spent anywhere from a few months to decades in prison. Due to the nature of this study and the population and phenomenon being studied, purposeful non-random sampling was employed. The aim of the study was to assess the needs of exonerees and the barriers they face in re-entry, therefore, this type of sampling was taken to examine the cases of all known exonerees that were wrongfully accused of serious crimes such as murder, manslaughter, and sexual assault. Criteria of inclusion were that the case occurred in Canada, that the individual was charged with a crime they did not commit, and that they were adults. A few cases were omitted from certain analyses if they did not contain significant information needed for analysis. Participants were also excluded if they were under the age of 18 and/or were charged with a lesser

crime. These exclusion criteria were used as cases pertaining to minors or those who were charged with lesser crimes are not well publicized.

The current study employs a qualitative content analysis of Canadian newspaper articles, websites, and blogs to gather data on Canadian exonerations. Since many exonerations are not highly publicized, the search was expanded to include websites and blogs in addition to news articles. Content analysis was used to gather data on the majority of known Canadian exonerees accused of serious offences.

Initially, all cases of exoneration in Canada were gathered using databases such as *forejustice.org* and *Innocence Canada*. Content analysis was conducted using 81 media sources. Searches were made on the Google search engine using terms “(name) wrongful conviction”, “(name) compensation”, and “(name) life after exoneration.” In total, 37 different newspapers and blogs were used to gather data. In total, characteristics of 57 cases of Canadian wrongful convictions accused of serious crimes were examined. Nineteen cases were omitted due to the involvement of a minor or an overall lack of information about the case. A lack of information refers to a lack of publications which make little to no mention of individual characteristics. Where available, the following information was gathered: gender; age at time of conviction; race; time served; charge; education level; family; relationships; forms of stability; stability remaining after prison; legal issues arising before or after exoneration; whether individuals experienced abuse before, during, or after their conviction; the quality of life in prison; compensation; health issues arising before, during, or after sentence; and whether the individual was granted parole or received assistance from a non-profit organization.

## **B. Ethical Considerations**

Due to the nature of this study and the intended involvement of human participants, approval from Simon Fraser University’s Research Ethics Board (REB) was obtained. The following study was deemed to be of ‘minimal risk’ to participants and the community at large.

## **C. Coding and Analysis**

All websites, blog posts, and articles were uploaded into NVivo using Ncapture. Content analysis data were coded and analyzed in NVivo. Prior to analysis, all articles were read to assess whether they contained enough information pertaining to case characteristics, experiences, and demographics. Deductive coding was used to provide prior familiarity with the topic and a knowledge of what kind of data were needed. Nodes, or “interests” were created based on the literature concerning offenders released from prison and what issues they had in re-entry. This process resulted in the following codes: at risk groups, compensation, coping mechanisms, employment prior to wrongful conviction, employment following wrongful conviction, difficulty finding employment, family bonds remaining after wrongful conviction, family suffering due to wrongful conviction, illnesses arising after wrongful conviction, issues prior to wrongful conviction, issues in prison, re-entry stigma, level of education, lack of resources, legal issues following release, losing family/relationships while incarcerated/following wrongful conviction, mental illness due to wrongful conviction, missing life events, and parole. Demographics were also recorded in an excel spreadsheet containing the following data: gender, race, age at wrongful

conviction, length of incarceration, and time served in prison.

### D. Limitations

The following study relies on a limited population of known Canadian exonerees who have been wrongfully convicted of serious crimes (n=57). Therefore, some sub-populations of this group have smaller sample sizes, such as exonerees of colour and female exonerees. Additionally, this study relies on digital newspaper articles, webpages, and blogposts, which may not contain all the information of interest. When determining the rate of exonerees who struggle with certain barriers, this could be interpreted as the minimum number of this population who struggles, as much of the information surrounding these topics is unknown or undisclosed. Consequently, statistics may seem inflated due to smaller sample sizes. To prevent any misleading assumptions from being made, the sample size of each group is listed throughout the results section. As discussed in the introduction, the true number of individuals suffering from wrongful convictions is unknown or not yet exonerated, so this study can only rely on those known to be exonerated.

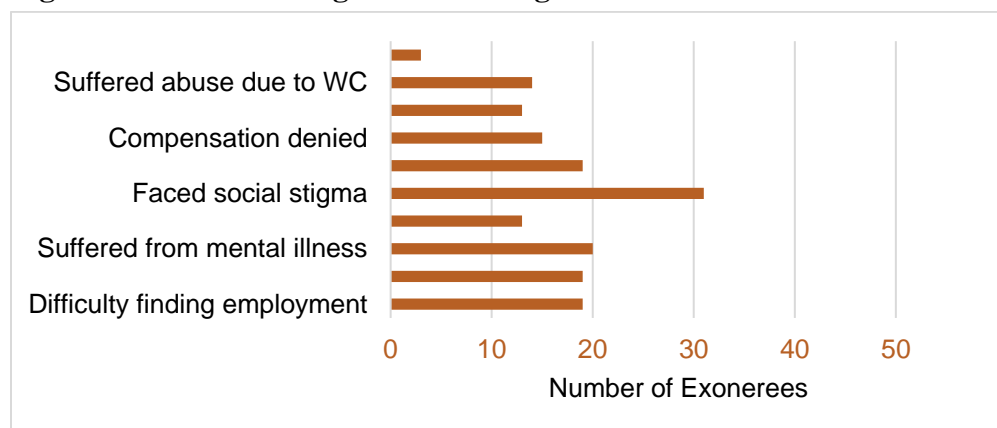
### E. Measures of Success

In this study, success refers to whether exonerees can “recover” their lives following wrongful conviction. For these reasons, success was measured with the following factors: obtaining compensation, having/starting a family, regaining employment, and maintaining a healthy and happy lifestyle. In contrast, un-successful re-entry included things such as: difficulty obtaining a job or housing, difficulty having relationships, family issues, recidivism, and mental or physical instability. Of main concern in this study is whether exonerees can and have the support they need to regain the lives wrongfully taken from them.

## IV Results

This chapter analyzes the results of a content analysis on 57 Canadian exonerees. Several themes were analyzed due to their perceived effect on exonerees ability to successfully re-enter into society, including lack of compensation, familial support, government assistance, employment insecurity, declining health, marginalized groups, and growing up incarcerated.

**Figure 4.1 Issues Arising Due to Wrongful Conviction**



### A. Compensation

Compensation is not guaranteed, with many exonerees being left with nothing following their exoneration. It was found that 28 exonerees in Canada have been awarded compensation. Eleven exonerees were denied compensation, with two being ordered to *pay legal fees to law enforcement agents* after losing their civil suit. The status of compensation for the remaining 18 exonerees is unknown. In other words, a *minimum* of 19% of Canadian exonerees did not obtain compensation. If we account for the remaining unknown cases of compensation (32%), the number of uncompensated Canadian exonerees could increase up to 51%.

Only five exonerees were known to have legal issues following release. One violated parole, and four committed crimes of a violent or financial nature. Three of the four exonerees who violated the law were not compensated at the time. While this is a small number, it is significant that almost all who committed crime did not receive compensation. One of these exonerees spoke out about the lack of resources available to exonerees and how they were forced to resort back to “old ways of surviving”. All but one exoneree who committed a crime were also at a high risk for issues re-integrating.

**Table 4.1** Compensation in Canada

Compensation Received	28
Compensation Denied	11
Unknown	18

While recidivism is certainly an issue, there are other indicators of unsuccessful re-entry. The presence of compensation alone does not dictate success. Table 4.2 shows the known outcomes of success and compensation of 30 exonerees:

**Table 4.2** Successful Re-Entry with Compensation

	Compensation Received	Compensation Not Received
Successful Re-Entry	7	1
Un-Successful Re-Entry	14	8

Much of this sample was not successful in their re-entry, even when receiving compensation (45%). However, successful re-entry was much greater for those who did receive compensation than for those who did not. These findings demonstrate that while compensation is certainly necessary, it is not a definitive cure to facing issues in re-entry.

In an analysis of 25 exonerees who obtained compensation, 32% of those who had compensation and familial bonds were successful in their re-entry. Twenty-four percent of those who had an absence of social bonds even with compensation were not successful. However, the majority (44%) of exonerees who had both compensation and familial bonds were still unsuccessful in some capacity. Of those who were unsuccessful, five received very little compensation, from as low as the tens of thousands up to nearly \$800,000. When analyzing the

cases of those who were unsuccessful despite receiving compensation and having familial bonds, it becomes apparent that those bonds alone are not enough to help. The 44% of exonerees in this category all had alternative risk factors or issues to deal with such as mental/physical illness (73%), severe stigmatization, abuse, and losing their careers. A few were also of a minority group, adding additional systemic barriers in achieving success. One exoneree, who dedicated his life to his career and assisting people, will now never be able to step foot back into his workplace due to the accusations made against him. In the words of his lawyer, “[he] lost the livelihood he loved” and now “lives on the edge of poverty” (Harland-Logan, n.d.c, para. 22).

It appears that the amount of compensation is unrelated to success. It could be expected that those with the lowest amounts of compensation (n=6) were more likely to be unsuccessful in their re-entry (67%), however this phenomenon was not exclusive to those who were poorly compensated. An analysis of the 10 highest cases of compensation shows that 1 in 2 exonerees are still less than successful in their re-entry. To further assess why exonerees are struggling in their re-entry, we must assess social bonds' influence on success.

## B. Support

In this sample many exonerees had some familial support in varying capacities. However, since wrongful conviction can take decades of someone’s life, a handful of exonerees have had to deal with the death of a loved one, divorce, having their children taken away, and other difficulties. This resulted in a sub-theme of “secondary victims” being created.

In accordance with the principles of social bond, familial support was seen in all exonerees who successfully re-entered society; however, it was not absolute, and just as many exonerees *did not* have a successful re-entry even *with* family support.

**Table 4.3** Family Support and Success

	Familial Support	Absence of Familial Support	Some Family Support
Successful Re-Entry	12	0	0
Un-Successful Re-Entry	11	8	3
Somewhat Successful	5	0	0

Two exonerees who had some familial support with an unsuccessful re-entry both made similar remarks about the conviction “tearing the family apart”. Another exoneree was unable to see their child due to bail conditions, which caused a spiral into mental illness, preventing a successful re-entry. This is significant as it indicates some governmental “assistance” is ineffective in that it blocks access to other supports such as family.

Of the twelve exonerees who had successfully reintegrated, eight were married and had their own children. The remaining four had strong familial support throughout their conviction and after release. This is demonstrated by the sentiment of one exoneree, who said “what has kept me alive is my faith, the support of my family and the hope that the day would come when I would wake up and this nightmare was finally over” (As quoted in Makin, 2008).

Even for those who have had a less than successful re-entry, familial bonds are incredibly important—as one exoneree put it, “I would be nowhere without [my family]”. Of those who were not as successful (71% of the entire sample), 16 out of 32 (42%) did not have as much family or stronger relationships such as marriage. Six exonerees were known to suffer from the death of a family member while incarcerated, four were divorced due to their wrongful conviction, and eight had their children taken away from them and adopted. To make matters worse, multiple exonerees were barred from attending their families’ funerals, making it increasingly difficult to cope with their loss:

"A lot has been taken from her ... she was unable to attend her son's funeral which to me was just heartless, spending all that time in jail there for something that she didn't do" (Grant, 2016, para. 25).

“He believed that speaking up in this way was the reason he was denied temporary passes and refused permission to attend his grandmother’s funeral” (Butts, 2009, para. 9).

Of the 14 exonerees known to have dealt with loss (i.e., divorce, adoption, death) due to their wrongful conviction, only one is known to be successful. There is insufficient evidence for three exonerees in this group, but the remainder of this sample was less than successful (79%).

Perhaps the most significant finding is that everyone with the absence of family support was not able to achieve “success”. Three of eight exonerees in this group experienced divorce directly caused by their wrongful conviction. The remaining five had lost their family, or “supports”, due to death or said they now have issues maintaining long-term relationships with others. Among this group, there was also more stigma reported for the family themselves. Of the eight exonerees who reported familial suffering due to wrongful conviction, 100% were less than successful. In total, the impact of wrongful conviction led to 16 children suffering from stigma, which included being denied housing, employment, abusing drugs, being abused in custody, and/or being put in physical danger. Several family members have detailed the effects of wrongful conviction on their life. In particular, the daughter of one exoneree details her and her families experience with wrongful conviction:

“From the moment we learned that he was arrested, our world kind of crashed down on us ... [My sister] really was tortured with his loss on a daily basis, she couldn't get over the fact that she missed out on him for nearly 28 years... [My] sister battled substance abuse and was sent into a tailspin with each new court proceeding” (As quoted in Proctor, 2015, paras. 23-25).

Another child of an exoneree talks about the intergenerational effects of wrongful conviction, stating:

“Forty-five years is a long time,” offered his son, his voice breaking. “It doesn’t only affect him. It affects his kids, his grandkids, his great-grandkids. We never probably got the love we deserved after this happened” (As quoted in Mendleson, 2015, para. 5).

These passages demonstrate how incarceration not only affects exonerees, but also all those waiting for them to be released. It also shows how wrongful conviction can cause mental illness and harmful coping mechanisms in family members of exonerees. While an unexpected finding, it appears that secondary, and possibly even tertiary, victims suffer in many of the same ways as primary victims of wrongful conviction, which gives rise to the idea that wrongful conviction has intergenerational effects.

### **C. Government Assistance**

“As inadequate as the system might be, the parole system is designed as a tool of reintegration. But when two men are acquitted at the end of a decade of being held by Her Majesty, they’re thrown out into the street and not afforded any of those. There’s nothing in place to deal with the mistakes of the criminal justice system” (Drake, 2008, para. 10).

An exoneree’s inability to plead guilty is seen as defiance and used to punish them despite their good behaviour in prison meaning that the vast majority of exonerees are afforded no governmental assistance in their reintegration. However, a few exonerees in the sample were able to obtain parole, halfway housing, or help from non-profit organizations. Exonerees are often unable to obtain these services for various reasons. Either they are not exonerated until after their release or they refuse to complete special programs related to the offense they were charged with, and there seems to be a “dislike” or stigma for incarcerated people who protest their innocence. Of this group, three of the exonerees, who have been successful with their re-entry, were granted parole and/or received help from non-profit organizations, with two also receiving compensation. Both exonerees had strong familial support. Despite being very young at the time of the wrongful conviction, two had started families since release and have received good employment. Parole shows mixed support for success rates, among the few exonerees who received it.

As mentioned, governmental assistance may be hard to determine due to how infrequently it is afforded to exonerees. One pregnant exoneree was fortunate to receive help from the EFS which conducted a risk-assessment proving she was a low risk “offender”. The woman completed programs, had good behaviour, and was recommended for early parole by a trial judge. However, the young mother accused of killing her stepdaughter was denied parole due to being “overly emotional”. With additional help from the EFS, she was able to finally obtain parole and access to a halfway house to give birth to her child. Another exoneree also obtained help from a non-profit organization and while she was not successful in her re-entry, she would have been much worse off without the support of this organization. These sentiments show that non-profit organizations seem to be invaluable and demonstrate the incompetence of government assistance.

Other than parole or halfway housing, one exoneree in this sample has experiences with government funded healthcare treatments, or rather, their lack. As mentioned, exonerees receive even less assistance than their rightfully convicted counterparts. This concept is best exemplified through the story of one exoneree wrongfully convicted of murder, when after his exoneration, Corrections Canada stopped funding his homeopathic cancer treatments (MacDonald, 2008, p. 6).



Perhaps due to the small sample size, the results on parole assisting the re-entry process are mixed. It is quite significant that two of the most successful exonerees in this sample were given parole. From what little assistance has been provided to exonerees, it has proven to be useful, affording exonerees the opportunity to slowly re-enter society with assistance. However, some still faced noticeable issues. To determine whether parole is a promising re-entry service for exonerees, we need to assess why some are still not successful.

When examining the cases in further detail, it becomes clear why parole itself is not enough to facilitate one's re-entry. For example, due to his professions of innocence, one exoneree was heavily abused while in prison and did not receive proper medical assistance on multiple occasions. The exoneree had family, however his bail restrictions prevented him from seeing them after his release. The accumulation of suffering eventually manifested into mental illness. Mere compensation and parole are not enough to facilitate re-entry when incarceration consistently victimizes the individual and when bail prevents exonerees from accessing important resources such as family. The other exoneree who was unsuccessful was awarded compensation and parole, however he lived his final days in semi-poverty and his health deteriorated before he was eventually diagnosed with and died from colon cancer. Again, parole cannot do much when exonerees are suffering from financial and/or health-related issues. It becomes clear that in cases where parole "does not work", there are multiple factors leading to unsuccessful re-entry that we currently do not address nor provide services for.

#### **D. Discrimination**

I would be better off in prison because [I am] almost broke and [don't] want to be a drain on my family (As quoted in Owen, 2010, para. 4).

In this sample, it was found that 20 (35%) of the exonerees expressed difficulties with finding employment after being wrongfully convicted. By listening to exonerees recount their experiences, it becomes clear that the lack of employment is linked to discrimination, which some exonerees have shared:

[I] couldn't land a job because [my] name was connected to the murder (As quoted in Barrera, 2018, para. 27).

Although [my] name has been cleared, [I] can never go back to [my] dream job ... [and now] live on the edge of poverty (As quoted in Harland-Logan, n.d., para. 25).

Quite frankly you're just too recognizable for us to have you. We'd love to have you. You've got the experience and stuff, the financial background ... Given the exposure you've had in public we don't think it's going to be a good fit (One exoneree recounts his experience, as quoted in Aylward, 2016, para. 12).

Overall, there proves to be resistance to hiring exonerees due to them being recognizable and the stigma of being tied to a serious crime. This stigmatization proves to be a large barrier to reintegration. Of those who have expressed issues finding employment (n=20), 80% were less than successful in reintegrating and overcoming their wrongful conviction. One exoneree details his

experience with both unemployment and how the accumulation of barriers has impacted both him and his family:

I carry the shame of a crime I did not commit ... every day. It has limited my work and career advancement opportunities, caused ... rejection from financial institutions, resulted in hardships for members of my family (Harland-Logan, n.d.a., para. 28).

Of those who spoke about their struggles in finding employment, only 35% were compensated. However, four of those seven (57%) were not compensated enough to sustain themselves and their family, in some circumstances. This means that the vast majority of exonerees who are struggling to find employment are also not compensated, adding an additional barrier in their reintegration. This leads to nine out of the thirteen (69%) exonerees being less than successful in their re-entry. The prevalence and accounts of job insecurity and unemployment are notable; suggesting that employment, even for the factually innocent, is incredibly hard to achieve and that unemployment causes marked difficulties on successful reintegration.

### **E. Declining Health**

Out of the 57 exonerees examined, 23 were reported to have issues with mental and/or physical health. Of the 23, nearly 20% were found to be suffering from PTSD . Similarly, 22% were found to have suicidal ideations, with some attempting to commit suicide while incarcerated.

[He] also attempted suicide several times in prison, once lowering a line with fishhooks down his throat and yanking it back up (Makin, 2016, para. 14).

[He] contemplated suicide on many occasions during his adult life and says he never thought he would live to see the day his name would be cleared of this heinous crime (“Unravelling the Official Story, n.d., p. 16).

A few exonerees also mentioned suffering from mental illness, such as depression, and insomnia and using drugs or alcohol to cope. In women, mental illness seemed to be higher for those dealing with the loss of their children and with being wrongfully convicted of hurting their children. These women, termed “baby killer[s]” by some of their fellow inmates, seemed to be more exposed to verbal abuse and some instances of physical abuse. In men, mental illness could be related to experiences of sexual and physical assault, however this was only known to be present in a handful of cases. For one exoneree, his experiences were marked by cases of sexual and physical assault, which led to multiple suicide attempts (Innocence Canada, n.d., para. 10). However, this link remains unclear in most cases, and is likely impacted by many other difficulties and barriers to reintegration. Due to mental illness, three exonerees have been sent to psychiatric institutions. For one exoneree, who was mentally incapacitated and endured horrific instances of sexual and physical abuse in prison, the psychiatric institution he was sent to will most likely be his home for the rest of his life.

Researchers have yet to assess all the impacts of wrongful conviction on exoneree physical health. To best contextualize this issue, we can look to one exoneree, who suffered from multiple

heart attacks after years in prison beginning in his late 40s:

They took away the real food and they replaced it with processed food. So everything they're eating in prison is processed, it's full of salt and trans fat and everything else. Inmates are having heart attacks" (As quoted in Bousquet, 2019, para. 44).

The exoneree eventually left prison with stents in his heart. It took multiple heart attacks and a 15 hour wait to finally receive medical attention, and at that point one artery was already 90% blocked and the other artery was 99% blocked.

This story is not uncommon with 11 of 57 exonerees in this sample experiencing health issues due to their wrongful conviction (19%). Out of the 18 exonerees who were incarcerated at 30 years or older, seven dealt with serious health issues following release or while incarcerated (39%). Three others were under the age of 30 when admitted and released when they were 40; two of those three men died at 55 and 62 years old, while the other was left on disability and survived several heart attacks while incarcerated. Others reported stress-related medical issues, high blood pressure (3), migraines (2), arthritis, and nerve pain after being physically assaulted in prison. In this sample, six exonerees have died due to known health complications, at ages 55, 56, 62, 67, 69, and 76. This is incredibly alarming as the average age of death in Canada is 82 years old (World Bank, 2020), meaning that exonerees seem to be dying at a much younger age following incarceration. The table below displays the circumstances of all eleven exonerees who have suffered physical illness during or shortly after their incarceration.

**Table 4.4** Age and Illnesses

Age at Incarceration (Length of Incarceration)	Age of Issues	Health Issues After Prison	Health Issues in Prison
43 years old (Incarcerated for 17 years)	40's-50s	n/a	Four heart attacks and broken bones after being physically assaulted by prison staff
56 years old (Incarcerated for 5 years)	71 years old	Died of unspecified illness	n/a
38 years (Incarcerated for 23 years)	n/a	Arthritis and difficulties falling asleep	n/a
33 years (Incarcerated for 31 years)	76 years old	Died of emphysema	Attempted suicide
36 years old (Incarcerated for 27 years)	63 years old	High blood pressure, described as in "pitiful health" and "grey and bloated"	n/a

Age at Incarceration (Length of Incarceration)	Age of Issues	Health Issues After Prison	Health Issues in Prison
17 years old (Incarcerated for 12 years)	n/a	Chronic respiratory disease requiring double lung transplant – died at 55 years old	n/a
29 years old (Incarcerated for 10 years)	50s	4-year battle with colon cancer – died at 62 years old	n/a
33 years (Incarcerated for 4 years)	30s	Suffering intense and frequent migraines following incarceration	n/a
24 (Incarcerated for 7 years)	Late 20s	Now dependent on heart medication and on disability pay	Developed serious heart condition – had a heart attack and required surgery in prison

### F. Traumatic Events

The wrongful conviction itself is not the only thing that puts an exoneree at risk of developing physical and mental health complications. Exonerees live through many traumatic events such as sexual assault, physical assault, and near-death situations while in prison. One exoneree who is developmentally disabled suffered extreme physical and sexual abuse from rape to having boiling water poured onto him, leaving him with mental and physical scars that have landed him in a psychiatric institution. One lawyer described it as “among the most serious, if not the most serious” violations of fundamental rights ever reported (As quoted in Seguin, 2006, para. 12).

Even the sheer exposure to life in prison is traumatic in itself, one exoneree recounts his daily life:

You’d never know if you’d make it to the night ... I’ve seen the most horrendous things in the world — inmates getting stabbed, raped, slashing their own throats. The pain will never go away (As quoted in Silverberg, 2004, para. 3).

This is not merely a consequence of being incarcerated. For some exonerees, physical abuse was a direct repercussion of protesting their innocence, as one exoneree shares:

It was stainless steel, this thing, and he was beating me on the head with it... It was the worst beating I’ve ever taken in my whole lif ... [the interviewer] interrupts to ask if the guards gave him a reason for the beating. Well, it was for standing up for my innocence, because I was protesting my innocence all the time (As quoted in Bousquet, 2019, paras. 12-17).

Again, this is not a “one off” experience, and other exonerees share this reality—being

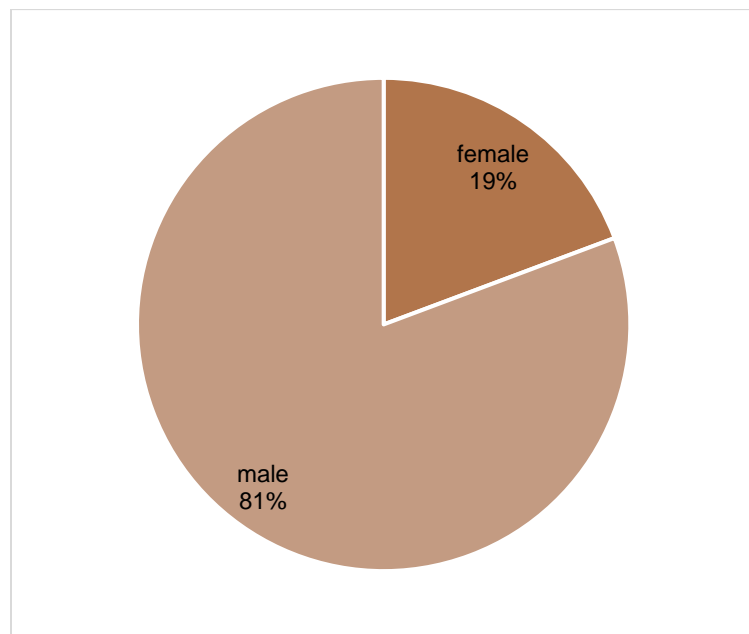
abused, either by prisoners or guards, due to their protests of innocence. Even when exonerated, exonerees are not truly free, which was the case for one female exoneree who was physically assaulted in public after her release. This was also the case for two exonerees who had their houses “firebombed”, this not only hospitalized one of the exonerees, but put both exonerees, their families, and livelihoods in danger. Above are only a few examples of the vast amount of trauma exonerees have endured. In this sample, there are fourteen individuals impacted by abuse due to their wrongful conviction, severely impacting their ability to successfully re-integrate.

### G. Marginalized Groups

Two groups stood out in this study due to their over-representation in Canadian wrongful convictions. Those two groups were women and Indigenous people, who also seem to have unique needs and barriers in their re-entry.

Out of the 57 exonerees in this study, nine identified as female, which is approximately 16% of the sample. While this is a relatively low number, women only represent 6% of the Canadian federal prison population. In 2018, only 676 women were in a Canadian federal institution, with 133 serving life or indeterminate sentences and the majority serving sentences of less than five years (Correctional Services Canada, 2019, p. 1). In other words, female offenders, especially serious or violent offenders, are generally uncommon. On the other hand, men represent 93% of the Canadian federal prison population and 84% of my sample (Malekieh, 2020, p. 5).

**Figure 4.2** Gender of Canadian Exonerees



Many women in the sample were young mothers and one was in a position wherein she worked with young children. The fact that they were wrongfully convicted of crimes against children greatly influenced the stigma they faced. One woman’s husband said:

This is one of the most terrible charges you can face. It's even worse than murder...How do you get over something like this? I know [we] didn't do anything wrong. Our lives are gone. Our reputation is gone (CBC News, 2003, para. 4).

He went on to claim they will never be able to escape the stigma of wrongful conviction. Even after being acquitted of any crime, some women experienced intense stigmatization and were blamed for the death of their children:

[Y]ou are guilty and you'll rot in hell ... you left [your child] to die, no matter what (Ableby, 2001, para. 7).

Of the women who were not wrongfully convicted of crimes against children, one was still heavily stigmatized as she was “connected” to a murder, saying that she “hit rock bottom after being released” (Barrera, 2018). Five out of nine women (56%) in this sample were known to have suffered stigma; there is no information concerning the remaining four women and their experiences with stigma. The majority of female exonerees were young mothers (56%), four were women of colour, and one other was developmentally disabled. Three women are known to be struggling incredibly due to their wrongful conviction, stigmatization, inability to find work, and/or turning to criminal behaviour or drug use. As mentioned previously, mental illnesses such as PTSD were apparent in female exonerees, perhaps the chance of PTSD is exacerbated in young mothers who have lost their children and have their lives taken from them shortly afterward. Some female exonerees were also pregnant while incarcerated, with one having her and her unborn child's life threatened by another inmate, adding to the level of stress incarcerated women must deal with. Due to most of these women's experiences of being a mother or caregiver, it seems women have unique and additional barriers in their re-entry than their male counterparts.

## **H. Indigenous People**

This study included eleven Indigenous exonerees out of 57, or 19%. However, Indigenous people only represent 4.5% of the Canadian population. This means that not only are Indigenous people over-represented in Canada's legal system, but also in our sample of Canadian exonerees (Malakieh, 2020, p. 5). Of the 11 exonerees who identified as Indigenous, there was insufficient information about two to classify them as unsuccessful/successful, and another two had no information at all. The remaining seven experienced noticeable issues and barriers with their re-entry. Among this group, multiple sentiments are made to represent their difficulties coping and dealing with re-entry:

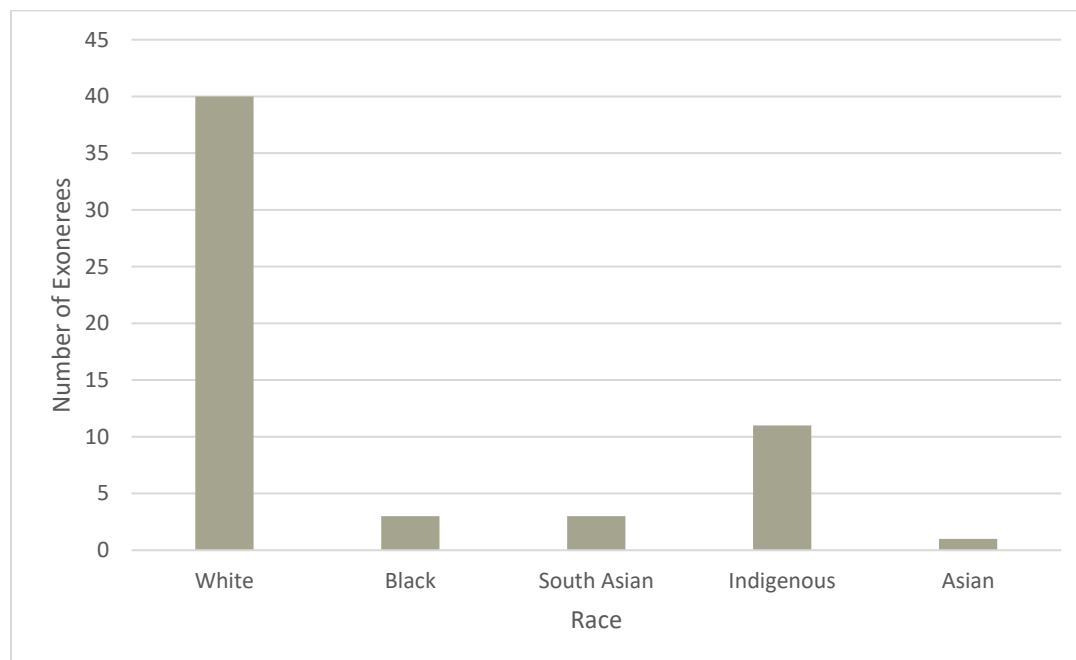
[The wrongful conviction] destroyed my life ... it has been nothing but hell for me and my family (As quoted in Harland-Logan, n.d.b, para. 22).

There are just no supports out there for reintegration for prisoners ... There are just no support systems whatsoever (As quoted in Barrera, 2018, para. 30).

Five of these individuals were also all from the age of 17-22 years old when convicted, which may have had significant impacts on their re-entry as well.

Below is a graph highlighting the races of Canadian exonerees. Indigenous exonerees seem to be over-represented when compared to other races. As of 2016, those of European origin made up 73% of the Canadian population, which is proportionate to their presence in this sample (70%) (Statistics Canada, 2016). However, for every four White exonerees there is one Indigenous exoneree despite making up less than 5% of the population.

**Figure 4.3** Race of Canadian Exonerees



### I. Other Marginalized Groups in Wrongful Convictions

This sample also indicated that 5% of exonerees were Black and another 5% were East Indian. Black Canadians make up 3.5% of Canada's population (Owusu-Bempah, Jung, Sbaï, Wilton, & Kouyoumdjian, 2021, p. 4). This suggests that Black Canadians may be over-represented in Canadian wrongful convictions as well.

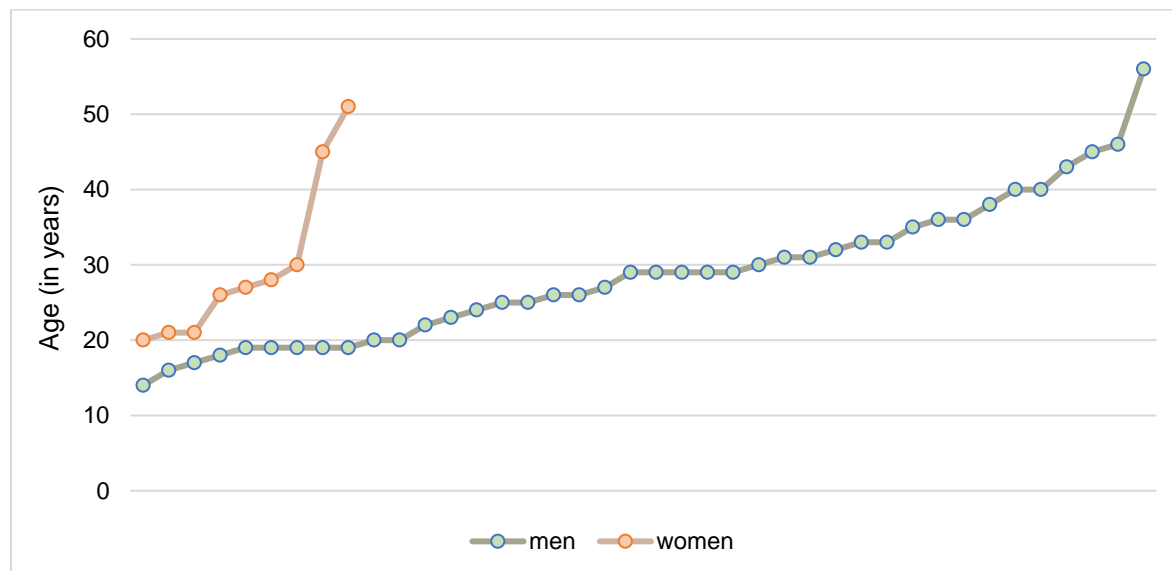
Due to the incredibly small sample size, it is difficult to draw any conclusions or results from their experiences. However, as Canadian Immigrants and Black Canadians belong to marginalized groups, I wanted to share their experiences with wrongful convictions as well. It is important to acknowledge these experiences as the miscarriage of justice commission has found that the number of Black inmates has increased by 75%, and "raise[s] important concerns about the over-representation of ... Black people .... among the wrongfully convicted" (LaForme & Westmoreland-Traoré, 2022, p.26). While this study has only a few Black exonerees represented, this commission indicates there may be many more not yet exonerated in Canada.

### J. Growing up Incarcerated

I was interested in determining whether age influenced successful reintegration. The average age of incarceration was found to be 29 years old ( $n = 49$ ) with a low of 14 and a high of

56. For women, the average age of incarceration was 29-30 years old ( $n = 9$ ), while for men this average was 28-29 years of age ( $n = 40$ ). The age of wrongful conviction for men began much earlier (14 years old) than for women (20 years old). Eleven men were convicted at 20 years old or younger, while only one woman was convicted at the age of 20.

**Figure 4.3** Average Age of Incarceration for Exonerees



Since brain development is complete at approximately twenty-five years of age, I examined the success rates of exonerees who were convicted under the age of twenty-five. This sample contained 17 individuals; one was omitted due to lack of information. Of the remaining 16, three identified as women and thirteen identified as men. All three women were able to re-integrate quite well despite some mental health concerns and were all 20-21 years old when convicted. Of the men, seven did not have successful re-entries, and two more had semi-successful re-entries. Of the seven who were not successful, four had various “risk” factors, three of the men were Indigenous and the other had severe mental disabilities. The other three had no additional risk factors other than incarceration at a young age.

To contrast these findings on young age and successful re-integration, I also examined those who were incarcerated past the age of 35-years-old to see whether our older population of exonerees would be more successful than their younger counterparts. The sample in this group consisted of 19, 63% were found to be un-successful, 26% were semi-successful, and 11% were successful. Although this group had much lower success rates, they had strong familial support (86%) and most of the group did not have risk factors despite some of older age. Fifty percent of the sample dealt with illnesses due to their wrongful conviction, which impacted their quality of life and therefore their success rates.

It seems that older exonerees are at a higher risk of un-successful re-entry than younger exonerees. This may be due to the impact that incarceration had on their physical health in prison and shortly afterward. However, older exonerees are also more likely to have established careers and families prior to their wrongful conviction, meaning they could have lost more due to their



wrongful conviction than their younger counterparts.

The stress created by the accusation and the prospect of standing trial destroyed his marriage (Innocence Canada, n.d.a, para. 3).

She had, in her words, "lost everything" -- contact with her four other children, her reputation, all her possessions and close to four years of freedom (Appleby, 2001, para. 7).

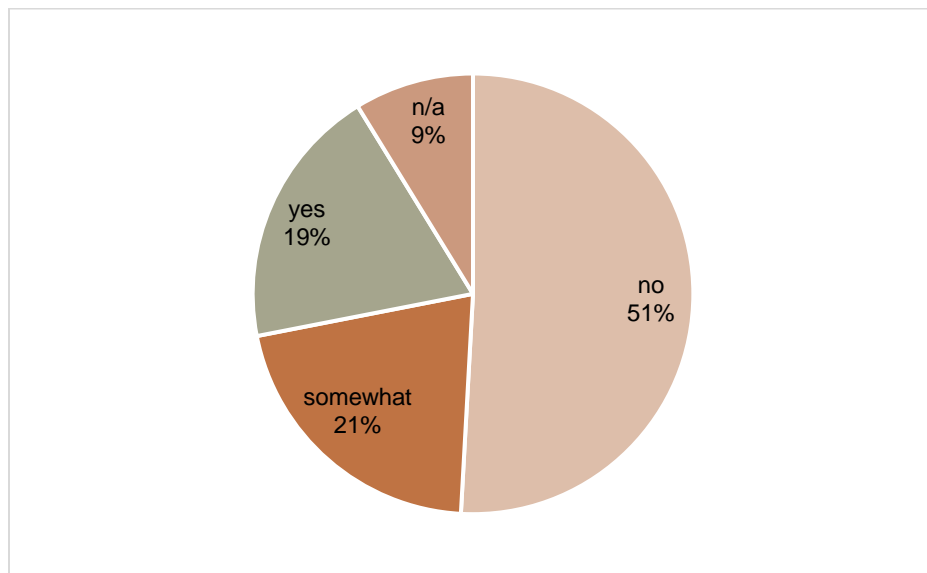
Unfortunately, these sentiments of loss and "destruction" were more common among those who have already established a livelihood, relationships, and family. Indicating that those who are more established may face additional challenges in re-entry. Establishment is not exclusive to age; however, it was more common in older exonerees than their younger counterparts.

### K. Summarizing Success

It was my hope to conclude my results section with an "equation" that would lead exonerees to success. Of course, it is much more complicated than that due to the diversity of the exoneree population, coming from all walks of life, and the poor state of Canada's re-entry assistance. Perhaps if our state of assistance was of higher quality and widely available, these results would be more definitive. Nonetheless, we can now identify common exoneree experiences in Canada, as well as what assistance we need to implement and improve to remove barriers.

The graph below summarizes the rates of successful re-entry among the exonerees in this study:

**Figure 4.5** Success rates among Canadian Exonerees



Although the data on some supports such as parole, compensation, and social bonds show mixed results, one thing is certain—Canadian exonerees are given inadequate support leading to large barriers in obtaining a successful re-entry. Compensation, parole, and halfway housing are

all sparingly awarded to exonerees erecting additional barriers to re-entry. Without these services, exonerees may be pushed into poverty, their stigma preventing them from gaining employment, and the lack of funds creates difficulties obtaining housing or counselling. These can, and have, led to unhealthy coping mechanisms such as substance dependency and recidivism to assist in an exonerees survival. Due to the lack of government assistance, the onus is placed on the exoneree to take back the life that was wrongfully taken from them. Exonerees often have no one besides their family, and possibly legal team, to rely on for assistance. For some, issues are exacerbated if they suffered familial loss during or due to wrongful conviction. One may seek help from non-profit organizations, although it seems that many are unaware of these services, as only a couple have received assistance from organizations such as the EFS. Canadian non-profit organizations, however, do not currently have any specialized programs for exonerees—which are completely necessary to deal with the unique traumas and experiences this group faces. All in all, the criminal legal system has completely failed to address their failures and to mitigate these errors, leaving exonerees and their families with the burden of overcoming these traumatic experiences on their own.

## V Discussion

Since these barriers have been identified, what we need now is the services to address them. The Innocence Project (2021a) has worked to outline a list of necessities that should be provided to exonerees, this list includes: a set compensation per each year incarcerated, financial support for necessities, affordable housing, medical/dental care, counselling services, education or skills training, and legal services to have one's criminal record expunged, help regain child custody, and obtain other benefits to which the exoneree may be entitled. The following discussion of policy implications applies these suggestions to the research findings.

### A. Money Matters: The Need for Compensation Law

Only half of exonerees were able to obtain compensation from civil litigation, and this is only after they exerted what resources they may have left, and risk being denied compensation. This presents a myriad of implications, from not having the funds to obtain housing, to support family, and/or to seek out counselling. This phenomenon has already been noted in the literature by a study which found that American exonerees who do not obtain compensation have a higher likelihood of committing crime due to their difficulties with re-entry (Mandery et al., 2013, p. 555).

As the results show, many exonerees who obtain compensation may still be less than successful in re-entry, this can occur for several reasons. First, some exonerees do not receive a sustainable amount of compensation. These amounts are not able to support the exoneree, and their family, for an extended amount of time. This amount is unable to help exonerees receive all the help they need—medical attention, both physically and mentally, family counselling, housing, business endeavours, transportation, and whatever else they and their family need. In addition, compensation can take years to obtain, so by the time the exoneree is compensated, they have already been left struggling for years. As the literature has noted the “most pressing need faced by exonerees upon release is immediate transitional assistance”, meaning exonerees cannot afford to

await compensation (Simms, 2016, p. 156). Lastly, exonerees may be given money and sent on their way without assistance. One exoneree has previously discussed the topic of individuals taking advantage of exonerees who receive large sums of compensation (Westervelt & Cook, 2012, p. 204). Another exoneree shared similar sentiments, stating he received hundreds of “friend requests” on social media after his compensation award was published in the news (Page, 2013, p. 104). While this was not explicitly found in this study, it is a dangerous possibility that cannot be overlooked, and further promotes the idea that compensation should be accompanied by professional help from a financial manager. In this sense, compensation alone can result in adverse effects for the exoneree.

The establishment of mandated compensation at a fixed rate would ensure all exonerees are compensated fairly and equally. This would prevent the disparities we see in compensation being awarded currently. The enactment of legislation would also prevent the burden from being placed on exonerees and from the issue becoming politicized (Innocence Project, 2021a, para. 9). As said by the Innocence Project (2012), “by that time, the exoneree has already faced the biggest obstacles to readjustment on [their] own” (p. 18). Additionally, we cannot allow exoneree suffering to be prolonged or to expose exonerees to additional barriers in re-entry. Government mandated compensation would help combat these long civil trials from taking places and ensure compensation is awarded not only equal, but within a reasonable time.

### **B. Financial Assistance Training**

Financial training or management must also be provided to exonerees alongside compensation. A study from Texas has assessed the benefits of financial management for those awaiting compensation and found that the program has proven useful, teaching exonerees how to properly budget, increased confidence regarding money management, and knowledge relating to building credit and obtaining a credit card (Page, 2013, p.109). Overall, exonerees found that the program “addressed financial issues they face on a regular basis” (Page, 2013, p. 109). A few states in America have begun adding various social services and financial assistance to their “compensation packages” (Page, 2013, p. 99). However, Canada has yet to implement these services for exonerees, despite their recorded benefits.

### **C. Re-Entry Services**

As discussed, exonerees experience the same pains of imprisonment as actual offenders. These experiences are exacerbated for exonerees, who are wrongfully suffering and are not afforded the same help while incarcerated as discussed in the results section. Even after exoneration, exonerees are often no longer considered eligible for many re-entry services due to their exoneration (Nowotny et al., 2021, p. 2). Therefore, it is imperative to develop re-entry assistance available and relevant to the exoneree experience.

### **D. Social Services**

Few studies have noted the importance of social workers in assisting and re-integrating exonerees. In addition to mandated compensation and financial assistance, assigning social workers to exoneree cases would assist exonerees in addressing their “immediate transitional

needs”, such as finding shelter, food, clothing, etc. (Simms, 2013, p. 156). As noted by Kirshenbaum et al. (2020), “social support is necessary for successful re-integration”, mainly due to issues in finding housing, food, and clothing (p. 190). Once these needs are met and the exoneree can move past the immediate obstacles of re-entry, social workers would work on “case management services”, assisting exonerees in obtaining affordable and permanent housing, finding work, finding a trusted doctor and dentist, and obtaining proper identification and documentation (Simms, 2013, p. 156).

As pointed out by Simms in the US (2013), exonerees are still a small population in the grand scheme of releasees and the general population, therefore it is not always “practical” to establish and fund programs solely for exonerees. Due to the smaller size of this population, a more feasible solution would be to create “emergency or short-notice reintegration plans for potential exonerees” (Simms, 2013, p. 156). These plans could be available in pre-existing re-entry programs; however, they would be specialized to address the needs of exonerees, enabling us to provide specific and urgent re-entry assistance.

### **E. Medical and Dental Care**

Many exonerees in this sample suffered from physical illness, some have died from it and others will never live a normal life because of it. This begs the question of whether these deaths and illnesses were preventable if only the exonerees were given the proper standard of medical care following their exoneration.

Incarceration and prison food is known to be harmful to one’s health, creating “risk factors for cardiovascular diseases and other chronic conditions” (Reimer, Pearce, Marek, Heslin & Moreno, 2021, p. 1403). This corroborates my findings, as there were higher rates of cardiovascular issues than any other issue. Chronic health issues were found to be correlated to negative feelings (i.e., depression, anger, bitterness), meaning the presence of mental health issues can manifest into physical ones in the future (Kirshenbaum et al., 2020, p. 186). This is concerning, especially for exonerees who may be more likely to manifest negative feelings due to their wrongful conviction.

Not only does incarceration cause a decline in health, but the literature has noted that releasees also have reduced access to healthcare, as well as high rates of discrimination against those with a criminal record (Reimer et al., 2021, pp. 1403-1404). Discussion of exoneree physical health is sparse, however, it is incredibly clear that exonerees may face multiple barriers in healthcare and have their health compromised because of wrongful incarceration.

### **F. Mandated Counselling Services**

The results show that mental illness is prevalent among exonerees, these findings are further supported by the literature (See Grounds, 2004). According to the literature, “long-term functioning”, or success, is “correlated with the support provided during the initial stages of reintegration” (Kregg, 2016, para. 2). Kirshenbaum et al. (2020) corroborate these findings, stating that “exoneree mental health is one of the largest obstacles to successful re-integration” (p. 189). One major concern for exonerees re-entering is dealing with the trauma of wrongful conviction

and incarceration, as sexual trauma has been linked to depression, suicidal thoughts, and attempts. It is clear then, that sexual abuse produces noticeable difficulties with successfully re-integrating (Kirshenbaum et al., 2020, p. 185). Those who are developmentally disabled, or even those struggling with mental illness while incarcerated, are at a much greater risk of sexual abuse, approximately nine times higher (Kirshenbaum, 2020, p. 185). This finding was reflected in the results, with one of two exonerees who are developmentally disabled suffering from marked levels of violence.

Studies have found that physical harm far exceeds sexual abuse in terms of frequency, with physical harm being estimated to be five to ten times as prevalent as sexual abuse (Kirshenbaum, 2020, p. 185). Likewise, it seemed physical abuse was more apparent, or more likely to be reported, than sexual abuse—leading to pervasive mental health issues and less successful re-entries. It is, then, integral for exonerees to receive support upon being exonerated from federally funded re-entry service programs (Kregg, 2016, para. 3).

### **G. Family Counselling and Support**

Social bonds such as family or other relationships have been identified as an “important factor for predicting” successful re-integration, as “maintaining” these bonds assists with coping and eases re-entry (Kirshenbaum et al., 2020, p. 187; Nowotny, 2021, p.3). The literature has noted that family strain is common among exonerees due to their wrongful conviction and many families experience feelings of being “overwhelmed” (Kirshenbaum et al., 2020, pp. 190-191). These feelings can arise from having to physically provide for the exoneree, or from being affected by how much the individual has changed while incarcerated due to time and possibly mental illness (Kirshenbaum et al., 2020, p. 191; Grounds, 2004).

Families must deal with the loss of a loved one that could have been entirely prevented if it were not for legal errors. As a consequence of wrongful convictions, many children have also missed the opportunity to be raised by their parents, often being taken to foster homes and being put up for adoption which has led to some horrifying instances of abuse. However, this study has also found that families of those who are wrongfully convicted suffer in some of the same ways as exonerees themselves, from being abused in foster homes, being denied housing and employment, to suffering intense stigmatization in their social lives. Social bonds are incredibly important in achieving a successful re-entry; therefore, family counselling and services must be offered to ensure exonerees have these necessary social bonds and to provide justice to the families affected by wrongful conviction.

### **H. Indigenous Exonerees**

Indigenous people were also found to be over-represented in Canadian wrongful convictions of serious crimes (19% of the sample). Not only are Indigenous people at a risk of wrongful conviction, but they also seem to experience more barriers in successfully re-integrating. This may be further exacerbated due to many Indigenous exonerees’ young ages at the time of incarceration. It is assumed Indigenous exonerees may face additional barriers as some members of this group had familial support and compensation, yet still struggled immensely with re-entry. This finding was quite unexpected, as it was hypothesized that with compensation and/or strong

social bonds, one would have a much better chance at successful re-entry.

The literature has pointed out that in general, Indigenous releasees seem to struggle more than non-Indigenous releasees with re-entry. Willis (2008) found that Indigenous people were 1.4x more likely to recidivate than non-Indigenous people (p.2). Willis (2008) hypothesized that a likely contributing factors to unsuccessful re-entry among Indigenous groups is a lack of culturally relevant services (p.5). Indigenous people who have been incarcerated call attention to the “need for Indigenous specific programs”, as a lack of these programs was indicative of both reduced participation in programs and unsuccessful re-entry for actual offenders (Willis, 2008, p. 5). A study by Ellerby and MacPherson (2002) found increased rates of completion (83%) when programs incorporated traditional Indigenous healing approaches than those that did not (55%). Trevethan et al. (2005) corroborated these findings, adding that 91% of participants were pleased that Indigenous healers led their programming. Overall, studies in this subject area found that culturally relevant programs enable Indigenous people to strengthen their connection to the community, serving as a “protective factor” in re-integration (Gutierrez, Chadwick, & Wanamaker, 2018, p. 327). The literature on cultural relevant programming has been done in the general prison population, however, the outcomes seem promising for all formerly incarcerated Indigenous people, including exonerees, who struggle with their re-entry.

### **I. Age as a “Risk Factor”**

It is well documented that the brain matures until the age of about twenty-five-years-old; until then, our development is greatly impacted by our environment (Arain et al., 2013, p. 451). This includes our nutrition, sleep patterns, drug abuse, and any type of stress whether it is physical, emotional, economical, or mental (Arain et al., 2013, p. 450). Incarceration is known to cause stress, due to high rates of violence or exposure to violence and sleep deprivation, which could have negative effects on brain development (Umbach, Raine, & Leonard, 2017, p. 35). However, young age at conviction did not seem to result in as many issues as did older age at conviction (35 years or older). Although younger exonerees are thought to be impacted in many ways due to the environment under which their brain is developing, possible inability to start a family, receive an education, and start their lives, I saw much more difficulties for older exonerees. One study noted that the “prevalence of major depression was 50 times higher among incarcerated older men” than in the community (Williams & Abralde, 2007, p. 61). It would be naïve to assume this finding does not also impact exonerees.

Literature on the general prison population, has found that older individuals who have been released from prison had “nearly five times greater risk of a subsequent suicide attempt than those never incarcerated” (Barry et al., 2018, p. 1171). According to some scholars, prisons were designed for the young, meaning “age introduces additional challenges in safety, functional ability, and health” (Williams & Abralde, 2007, p.56). This continues in the prisoner’s re-entry, where they may experience more difficulties due to age such as “having multiple medical conditions with limited access to medical care”, leaving a “familiar” setting, and being “frail in an unsafe neighborhood” (Williams & Abralde, 2007, p. 57). These findings were prevalent in the following study, as some exonerees will never be the same again due to physical illness, one exoneree suffered physical abuse so horribly that it continues to cause him physical pain, another must remain on disability for the rest of his life, causing additional barriers to success.

These results are also consistent with the literature that has shown that those who are incarcerated are more likely to be diagnosed with chronic illness and have a 3.5x higher likelihood of death following incarceration than non-incarcerated individuals (Howell et al., 2016, p. 1496; Binswanger et al., 2007, p. 157).

### **J. Automatic Record Expungement**

One study found that approximately one-third of exonerees have not had their record expunged (Scholsberg et al., 2014). In Canada, one can only apply to have their record expunged for very few crimes, excluding anyone wrongfully convicted of murder, manslaughter, and sexual assault. Additionally, applying requires one to submit certain documentation. This process is not only lengthy but can also incur additional fees (Parole Board of Canada, 2022). In America, it was found that “petition-based record clearing” can cost nearly \$4,000 USD, compared to automatic processes which can range from \$3-128 USD per person/charge (Chien, 2020, p. 575). In Canada, we also function under this “petition based” expungement, meaning that many exonerees may not have the funds to get their record expunged, even if eligible. A criminal record for exonerees can have a criminogenic affect as well. A study on post-exoneration offending found that exonerees without their record expunged were significantly more likely to engage in post-exoneration offending (Scholsberg et al., 2014, p. 353). Automatic record expungement is not only cost-efficient, but would also help decrease crime in our communities, and assist exonerees in their re-entry—all which benefit the community and government, therefore should be a priority in public policy (Scholsberg, 2014, p. 355).

### **K. Public Education and Awareness**

A commonly overlooked solution in the literature is public education and awareness on wrongful convictions. The idea of social stigma on exonerations in the literature is noticeable (See Clow & Leach, 2015; Scherr, et al., 2020; Blandisi, Clow, & Ricciardelli, 2015). Clow & Leach (2015) have called on this need to examine whether awareness can “mitigate stigmatizing views of exonerees” (p. 183). While this study did not examine public attitudes, it did note extreme social stigma leading to the loss of opportunities such as employment and housing for exonerees and their family alike. Introducing the topic of wrongful convictions into our grade-school, university, and law school curriculum could not only help prevent wrongful convictions from occurring, but also help the public to understand why wrongful convictions occur to reduce any negative stereotypes made about exonerees. By reducing stigma about wrongful convictions and exonerees, we can increase the likelihood of exonerees finding housing, employment, and creating social bonds in the community—all which would assist in re-integration.

## **VI Conclusion**

At the end of this study, I hoped to be able to develop a formula that could predict success. However, throughout the study, it became increasingly clear that this formula does not exist--exonerees, who come from a range of backgrounds, levels of education, genders, age groups, races, and socio-economic status, all have complex needs and a variety of experiences. While the answer is not definitive it seems that social assistance, adequate compensation, strong family bonds, and

parole could all function to help increase success rates. Additionally, if exonerees had access to financial assistance, medical care, counselling, and social services, previous issues with compensation, parole, and other forms of assistance, existing issues would be mitigated. By mandating compensation, providing financial assistance, counselling, and a social worker to help exonerees obtain medical care, affordable housing, and any other unique services they may require, such as culturally relevant care, we would see much higher rates of success in exoneree re-entry as these services largely address every issue this study has seen with the current state of exoneree re-integration in Canada.

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**Queer in Fear:**  
The Role of Homophobia and Transphobia in Wrongful Convictions

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*This paper will explore how the criminal justice system's ingrained prejudice against LGBTQ2S+ people can lead to wrongful convictions. Primarily, this paper will focus on the negative stereotypes of and myths surrounding queer people, rooted in homophobia and transphobia, that lead to wrongful convictions. Examining the cases of Miguel Castillo, Bernard Baran, The San Antonio Four, and Monica Jones, this paper will prove that these pervasive and dangerous stereotypes impact queer people at every step of the criminal justice system. This paper will conclude by briefly discussing instances of queer wrongful convictions in the Canadian context.*

- I. Introduction
  - A. The Criminalization of LGBTQ2s+ People in the 20th Century
- II. The Over-Representation and Mistreatment of LGBTQ2S+ People in the Justice System
- III. Case Studies
  - A. Miguel Castillo and the “Queer Killer” Stereotype
  - B. Bernard Baran and the San Antonio Four: Satanic Panic and the Predator Stereotype
    - i. Bernie Baran: Homophobia Leading to Wrongful Conviction
    - ii. The San Antonio Four: Homophobia, Sexism and Racism in Wrongful Convictions
  - C. Monica Jones: Walking While Transgender Leading to Wrongful Conviction
- IV. Wrongful Convictions Today and the Deterioration of Queer Rights
- V. Conclusion

**Faculty Endorsement-** Stephen Bindman, Part-time Professor, Faculty of Law, University of Ottawa, Canada. I endorse this article for publication in the Wrongful Conviction Law Review.

## I Introduction

In most countries, homosexuality and acts associated with homosexuality were at one point criminalized and/or continue to be criminalized to this day.<sup>1</sup> Today, lesbian, gay, bisexual, transgender, queer or questioning, and two-spirit (LGBTQ2S+) people are severely over-

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<sup>1</sup> “Fact Sheet: Criminalization” (2014) at 1, online (pdf): *United Nations Free & Equal* <[www.unfe.org/system/unfe-43-UN\\_Fact\\_Sheets\\_-\\_FINAL\\_-\\_Criminalization\\_\(1\).pdf](http://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf)>.

represented in the justice system.<sup>2</sup> This disproportionate representation, often paired with discriminatory treatment based on stereotypes of LGBTQ2S+ people, has led to multiple wrongful convictions within the queer community. This paper will explore how the criminal justice system's ingrained prejudice against LGBTQ2S+ people and the stereotypes of one's sexual orientation or gender identity can lead to wrongful convictions. The case studies in this paper find that wrongful convictions involving individuals from the LGBTQ2S+ community also coincide with other related causes of wrongful convictions, such as forensic science errors, tunnel vision, and professional misconduct from prosecutors and police. Importantly, these cases also often overlap with systemic racism, classism, and sexism.

This paper will start with an overview of the history of criminalization of LGBTQ2S+ people and discuss the general mistreatment of LGBTQ2S+ people in the criminal justice system in North America. Next, this paper will briefly situate homophobia and transphobia within wrongful convictions before analyzing several wrongful conviction cases. First, Miguel Castillo, who was wrongfully convicted because of a fabricated confession by police that was based on a harmful stereotype about gay men. Next Bernard Baran, a gay man, who was wrongfully convicted during the "day-care sex-abuse hysteria" of the 1980s and 1990s. Following that, the San Antonio Four, four Latina lesbian women wrongfully convicted of sexual assault, in part due to the idea that lesbian women are predatory to young girls. Finally, Monica Jones, a transgender woman of colour, who was wrongfully convicted for "manifesting prostitution". Lastly this paper will briefly explore wrongful convictions of LGBTQ2S+ people in the Canadian context and the potential impact of the recent increase in anti-LGBTQ2S+ laws.

### **A. The Criminalization of LGBTQ2S+ People in the 20th Century**

Policing and punishment of "deviant" sexual and gender expression has existed since the beginning of colonization, especially the policing of racialized minorities, immigrants and lower-income people.<sup>3</sup> In Canada and many other countries, criminal law was used to regulate homosexual or queer conduct for decades. Laws against "buggery" (anal intercourse) and "gross indecency" (an intentionally vague term, with no definition, covering a range of "homosexual acts") could be found in s. 159 of the *Criminal Code* until 1969.<sup>4</sup> These laws essentially criminalized homosexuality. The *Criminal Code* was amended in 1969 to decriminalize these offences specifically between married persons of the opposite sex and between consenting adults

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<sup>2</sup> Ilan H Meyer et al, "Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011- 2012" (2017) 107:2 *American Journal of Public Health* 267 at 269; In my paper will be using the acronym LGBTQ2S+ which stands for lesbian, gay, bisexual, transgender, queer & questioning, and two-spirit, with the plus sign representing other sexual identities like pansexual and asexual. I will also use the term 'queer' as an umbrella term to refer to the LGBTQ2S+ community. Although historically used as a derogatory term, LGBTQ2S+ communities have reclaimed queer as a term of love, respect, and empowerment.

<sup>3</sup> Joey L Mogul, Andrea J Ritchie & Kay Whitlock, *Queer (In)justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011) at 1.

<sup>4</sup> "Questions and Answers - An Act related to the repeal of section 159 of the Criminal Code" (1 Sep 2021), online: *Department of Justice* <[www.justice.gc.ca/eng/csj-sjc/pl/s159/qa\\_s159-qr\\_s159.html](http://www.justice.gc.ca/eng/csj-sjc/pl/s159/qa_s159-qr_s159.html)>.



over 21 years old in private.<sup>5</sup> Therefore, for queer people, even kissing in public was still a crime. Eventually, attitudes began to shift, and in 1987 s.159 of the *Criminal Code* was amended again to remove the offence of gross indecency. Buggery was renamed anal intercourse, but remained banned unless occurring between two people who were married or between two consenting adults over 18 in private.<sup>6</sup> In the 1995 case *R v C.M.*, the Court of Appeal for Ontario found that s.159 was unconstitutional altogether, with two judges deciding it discriminated on the basis of age and Justice Abella deciding it discriminated primarily on the basis of sexual orientation.<sup>7</sup>

Beyond the judicial system, the Canadian government reinforced anti-LGBTQ2S+ rhetoric through a number of measures. Between 1952 and 1977, being gay was a reason prospective immigrants could be denied entry into Canada.<sup>8</sup> The federal government also paid a researcher at Carleton University in the 1960s to find a method to “detect” LGBTQ2S+ people so that they could be fired or identified so as not to be hired in the first place.<sup>9</sup> “The fruit machine” was created out of fear that queer people would be more susceptible to blackmail from Russian spies during the Cold War. The use of this “machine” led to a purge of LGBTQ2S+ people from the federal public service, as well as the Canadian Armed Forces and the RCMP. In 2016, survivors of this purge launched a class action that was settled for \$145 million in 2018.<sup>10</sup>

Although the 21<sup>st</sup> century has seen progress around the perception of LGBTQ2S+ people, this history of criminalization and oppression underlies the relationship that queer people have with the criminal justice system. The laws on buggery and gross indecency created a culture where Canadian police would target LGBTQ2S+ people, often in washrooms, bars, bathhouses and parks.<sup>11</sup> In the 1960s, over 8000 LGBTQ2S+ people were investigated by the RCMP.<sup>12</sup> Although many laws have since been overturned, this history influences the relationship between law enforcement and LGBTQ2S+ people today.

In the United States, where the majority of the wrongful convictions discussed in this paper occurred, sodomy laws were not officially declared unconstitutional by the Supreme Court until 2003 in *Lawrence v Texas*.<sup>13</sup> Dressing in drag was also a crime, and police used “masquerade”

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<sup>5</sup> *Ibid.*

<sup>6</sup> Miriam Smith, “Homophobia and Homonationalism: LGBTQ Law Reform in Canada” (2020) 29:1 *Social & Legal Studies* 64 at 70.

<sup>7</sup> *R v CM*, [1995] 23 OR (3d) 629, 41 CR (4th) 134.

<sup>8</sup> John Fisher, “Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality” (2004) 49 *McGill LJ* 1183 at 1185 (QL).

<sup>9</sup> Peter Knegt, “The Fruit Machine: Why every Canadian should learn about this country's 'gay purge'” *CBC News* (30 May 2018), online: <[www.cbc.ca/arts/the-fruit-machine-why-every-canadian-should-learn-about-this-country-s-gay-purge-1.4678718](http://www.cbc.ca/arts/the-fruit-machine-why-every-canadian-should-learn-about-this-country-s-gay-purge-1.4678718)>.

<sup>10</sup> *Todd Edward Ross, Martine Roy, and Alida Satalic v Her Majesty the Queen*, FC File No T-370-17 (Final Settlement Agreement), online (pdf): <[lgbtpurgefund.com/wp-content/uploads/2019/08/Final-Settlement-Agreement.pdf](http://lgbtpurgefund.com/wp-content/uploads/2019/08/Final-Settlement-Agreement.pdf)>.

<sup>11</sup> Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) at 166.

<sup>12</sup> Fisher, *supra* note 8 at 1186.

<sup>13</sup> *Lawrence v Texas*, 123 S Ct 2472 (2003).

laws to arrest people who were gender-nonconforming.<sup>14</sup> In the United States there has been a sharp increase in anti-LGBTQ2S+ laws in recent years. Laws like this have eroded cultural-acceptance of the queer community and increased fear of LGBTQ2S+ people.<sup>15</sup> The backsliding of queer rights and acceptance has the potential to create the types of wrongful convictions that are detailed later in this paper. The criminalization of LGBTQ2S+ people in the 20<sup>th</sup> century has set the tone for how queer folks are still perceived, associating them with concepts like “danger, degeneracy, disorder, deception, disease, contagion, sexual predation, depravity, subversion, encroachment, treachery and violence.”<sup>16</sup> These views lead to what Mogul et al. call “queer criminal archetypes” which make queer people targets for policing and punishment whether or not they actually committed a crime.<sup>17</sup> These stereotypes of LGBTQ2S+ people, along with the criminal law backdrop of the 20<sup>th</sup> century, demonstrate how the police and the justice system are prejudiced against queer folks, which, as will be shown later in this paper, have led to wrongful convictions.

## II The Over-Representation and Mistreatment of LGBTQ2S+ People in the Justice System

As noted, ingrained prejudice against the LGBTQ2S+ community has led to their criminal victimization throughout the past century. In turn, we see a disproportionate representation of the queer community in all parts of the justice system. Researchers have found that, starting from a young age, 20% of youth in the juvenile justice system are LGBTQ2S+, compared to 4-6% of the general population.<sup>18</sup> Of those LGBTQ2S+ youth in the system, 85% identify as people of colour. Further to this, 40% of youth who are assigned female at birth and in the juvenile justice system are gender nonconforming, LGBTQ2S+, or both.

LGBTQ2S+ youth are at increased risk of rejection by their family, forcing them into homelessness or the child welfare system.<sup>19</sup> According to a survey of social service providers who work with LGBTQ2S+ homeless youth, “46% of respondents became homeless because they ran away from home due to family rejection of their sexual orientation and/or gender identity, and 43% were forced out by parents because of their identity.”<sup>20</sup> Homelessness is often criminalized

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<sup>14</sup> Hugh Ryan, “How Dressing in Drag Was Labeled a Crime in the 20th Century” (last modified 28 Jun 2019), online: *History* <[www.history.com/news/stonewall-riots-lgbtq-drag-three-article-rule](http://www.history.com/news/stonewall-riots-lgbtq-drag-three-article-rule)>.

<sup>15</sup> “LGBTQ+ Americans Under Attack: A Report and Reflection on the 2023 State Legislative Session” (last modified 8 Jun 2023), online (pdf): *Human Rights Campaign* <[hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf](https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf)>.

<sup>16</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 23.

<sup>17</sup> *Ibid.*

<sup>18</sup> Angela Irvine & Aisha Canfield, “The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population” (2016) 24:2 *J Gender Soc Pol’y & L* 243 at 249.

<sup>19</sup> *Ibid* at 249-250.

<sup>20</sup> Jane Hereth, “Overrepresentation of People Who Identify as LGBTQ+ in the Criminal Justice System.” (May 2022) online (pdf): *Safety + Justice Challenge* <[safetyandjusticechallenge.org/wp-content/uploads/2022/05/LGBTQOverrepresentationReport-1.pdf](https://safetyandjusticechallenge.org/wp-content/uploads/2022/05/LGBTQOverrepresentationReport-1.pdf)> at 6.

itself, or can lead to committing crimes to survive, such as theft and sex work. Also, over 50% of youth in Canada's criminal justice system have also been in the child welfare system.<sup>21</sup> The overrepresentation of LGBTQ2S+ youth in the juvenile system translates directly to an overrepresentation in the imprisoned adult population. The 2011-2012 National Inmate Survey found that sexual minorities were disproportionately incarcerated at a rate of over three times more than the non-LGBTQ2S+ population.<sup>22</sup> In one survey of LGBTQ2S+ inmates, one fifth reported homelessness prior to incarceration, 39% said they have traded sex for survival, and half of respondents reported they had sold drugs for money.<sup>23</sup> 58% of these respondents' first arrest occurred when they were under the age of 18 and only 29% had completed high school outside of prison.<sup>24</sup> This demonstrates how impactful the lack of familial support in a child's formative years can be on queer youth.

Although marginalization and the resulting increased poverty levels are an important factor to consider in over-incarceration of queer people, there are also documented examples of how discrimination within the criminal justice system plays a role in the overrepresentation of LGBTQ2S+ people in prisons. Beyond the challenges faced by LGBTQ2S+ adolescents, members of the queer community may face systemic discrimination at each stage of the criminal justice system, which can lead to wrongful convictions. Often, due to the impacts of historical criminalization, queer people are subject to increased police surveillance because of "perceptions of deviance," and police have a history of profiling, entrapping, and harassing queer people.<sup>25</sup> One study found that 67% of queer people have "experienced or perceived the police to be anti-gay; 14% feared abuse from the police and 40% feared public disclosure of their sexual orientation."<sup>26</sup> In Canada, the RCMP had an anti-homosexual hiring policy until 1986, as the force considered being gay a character weakness.<sup>27</sup> The 2SLGBTQ Plus Justice project surveyed 30 participants who had been in the criminal justice system in the Halifax Regional Municipality from 2019 onwards. This study noted that the police demonstrated "blatant disrespect and discrimination" and used "belittling and offensive language" against respondents, which often included misgendering the individual.<sup>28</sup> In New Zealand in the late 1990s, a series of interviews with police officers demonstrated that many officers still equated homosexuality with deviance, promiscuity

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<sup>21</sup> Jeremy Greenberg, "When One Innocent Suffers: Phillip James Tallio and Wrongful Convictions of Indigenous Youth" (2020) 67:4 Crim LQ 477 at 492.

<sup>22</sup> Meyer et al, *supra* note 2.

<sup>23</sup> Jason Lydon et al, "Coming Out of Concrete Closets: A Report on Black & Pinks National LGBTQ Prisoner Survey" (Oct 2015) online (pdf): *Black & Pink* <[www.blackandpink.org/wp-content/uploads/2020/03/Coming-Out-of-Concrete-Closets-incorporated-Executive-summary102115.pdf](http://www.blackandpink.org/wp-content/uploads/2020/03/Coming-Out-of-Concrete-Closets-incorporated-Executive-summary102115.pdf)> at 3.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Supra* note 20 at 5; Christy Mallory, Amira Hasenbush & Brad Sears "Discrimination and Harassment by Law Enforcement Officers in the LGBT Community" (Mar 2015), online: *Williams Institute* <[williamsinstitute.law.ucla.edu/publications/lgbt-discrim-law-enforcement/](http://williamsinstitute.law.ucla.edu/publications/lgbt-discrim-law-enforcement/)>.

<sup>26</sup> Janoff, *supra* note 11 at 158.

<sup>27</sup> *Ibid* at 158-159.

<sup>28</sup> Feleshia Chandler, "Halifax study highlights experiences of LGBTQ people in criminal justice system" *CBC News* (25 Mar 2021), online: <[www.cbc.ca/news/canada/nova-scotia/jail-prison-lgbtq-lgbtquia-criminal-justice-system-1.5964222](http://www.cbc.ca/news/canada/nova-scotia/jail-prison-lgbtq-lgbtquia-criminal-justice-system-1.5964222)>.

and pedophilia.<sup>29</sup> As Mogul et. al. noted, “Police and other law enforcement agents do not merely objectively enforce the letter of the law...They are given considerable latitude in deciding which laws to enforce, how to enforce them and which people to target for enforcement.”<sup>30</sup> Prejudice and latitude combine to create a culture where stereotypes police officers have of LGBTQ2S+ people contribute to over-incarceration and wrongful convictions, as will be shown in the case studies later in this paper.

Moving further along in the judicial process, in the late 1990s, in Milton, Ontario, potential jurors were asked about their views on homosexuality prior to a trial and approximately 20% stated that they would not be able to view the case fairly.<sup>31</sup> In one study in the United States from 2003 to 2008, 45% of the jurors surveyed viewed homosexuality as an “unacceptable lifestyle.”<sup>32</sup> The enduring legacy of laws criminalizing sexual orientation and gender identities continues to inform how queer people are treated in court.<sup>33</sup> When juries are prejudiced it increases risk for wrongful conviction. In a 2014 case, an HIV-positive man living in Toronto was convicted of several sexual assault charges and received a six-year sentence.<sup>34</sup> However, it was discovered that one of the jury members, Derek Welsman, a radio-show performer, had talked about the trial on-air.<sup>35</sup> He had publicly mocked gay men who visit bathhouses and made a variety of homophobic comments, including statements implying that the accused would be eager for prison showers, and that the prison sentence would be “like a cruise” for the appellant.<sup>36</sup> The conviction was then vacated based on a reasonable apprehension of bias.<sup>37</sup> This example shows how homophobia can still be a pervasive influence in courtrooms and on juries. Many people who hold homophobic views, even after swearing to be unbiased, may still end up on a jury which can have profound impacts on sentencing - including wrongful convictions.

After conviction, when a queer person moves to a detention facility, the treatment in jail and prison can also be discriminatory. In one survey of LGBTQ2S+ prisoners, it was reported that members of this community were serving sentences almost 3 times longer than the national average.<sup>38</sup> Prisons often do not provide gender-affirming resources (like clothing), and LGBTQ2S+ people are often targeted for their sexuality, which can be distressing.<sup>39</sup> Respondents to the survey reported they were over 6 times more likely to be sexually assaulted than the general prison population, over a third were physically assaulted by prison staff, and most respondents

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<sup>29</sup>Janoff, *supra* note 11 at 163.

<sup>30</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 48.

<sup>31</sup> Janoff, *supra* note 11 at 163

<sup>32</sup> Christina Swarns, “LGBTQ+ People Are Vulnerable to Wrongful Conviction” Innocence Project (27 Jun 2022), online: <<https://innocenceproject.org/news/lgbtq-people-are-vulnerable-to-wrongful-conviction/>>.

<sup>33</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 73.

<sup>34</sup> Jesse McLean & David Bruser, “Shock-jock juror’s conduct prompts new trial” *The Toronto Star* (31 Oct 2016), online: <[www.thestar.com/news/canada/2016/11/01/shock-jock-jurors-conduct-prompts-new-trial.html](http://www.thestar.com/news/canada/2016/11/01/shock-jock-jurors-conduct-prompts-new-trial.html)>.

<sup>35</sup> *Ibid.*

<sup>36</sup> *R v Dowholis*, 2016 ONCA 801 at para 26.

<sup>37</sup> *Ibid.*

<sup>38</sup> Lydon et al, *supra* note 23 at 4.

<sup>39</sup> Chandler, *supra* note 28.

reported facing discrimination and verbal harassment.<sup>40</sup> This demonstrates how homophobia and transphobia permeate into every aspect of the criminal justice system.

Overall, LGBTQ2S+ people are severely discriminated against in the criminal justice system for their sexual orientation and gender expression. The over-incarceration of LGBTQ2S+ people, as well as systemic discrimination within the justice system and historical criminalization, are all factors that may increase the likelihood of wrongful convictions in the queer community.

### III Case Studies

There are many reasons a wrongful conviction may occur. The commonly held causes of wrongful convictions are eyewitness misidentification, false confessions, perjury or false accusations, official misconduct, inadequate legal defence, and unvalidated forensic science.<sup>41</sup> Stereotypes can impact all these canonical causes. The “drive to confirm a preconceived belief in guilt adversely impacts ... witness interviews, eyewitness procedures, interrogation of suspects, and the management of informers” and this occurs in almost all known cases of wrongful conviction.<sup>42</sup> Systemic homophobia and transphobia in the justice system can cause errors that lead to wrongful convictions. When police label the LGBTQ2S+ community as perverse and dangerous, they may resort to improper means of gathering evidence in order to convict someone who fits their preconceived notions. Prosecutors perpetuate negative stereotypes and juries often believe these misconceptions.

It is well documented that “when the accused is a marginalized or racialized outsider, the risk for conviction increases.”<sup>43</sup> Therefore, the queer community is generally at a higher risk for conviction. Often, the marginalization of accused individuals can lead to improper conduct during cases.<sup>44</sup> “Stereotypes...work to both wrongly exclude and wrongly include suspects in an investigation, not only because the police share the biases of the community but also because they tend to strenuously resist their eradication.”<sup>45</sup> Stereotyping and demonization of the queer community increases “public fear and loathing [which] is a necessary element of most cases of wrongful conviction.”<sup>46</sup> There is comfort in using stereotypes as it affirms preconceived beliefs and it is difficult to unlearn existing biases and challenge the status quo. The following case studies will explore how stereotypes of the queer community have been a factor in wrongful convictions. These stereotypes help perpetuate systemic homophobia and transphobia in the justice system. The

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<sup>40</sup> Lydon et al, *supra* note 23 at 4.

<sup>41</sup> Berube et al, “Identifying Patterns Across the Six Canonical Factors Underlying Wrongful Convictions” (2022) 3:3 *Wrongful Convictions L Rev* 166 at 167.

<sup>42</sup> Dianne L Martin, “Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence” (2002) 70:4 *UMKC L Rev* 847 at 848.

<sup>43</sup> *Ibid*.

<sup>44</sup> Dianne L Martin, “The Police Role in Wrongful Convictions: An International and Comparative Study” in Sandra D Westervelt & John A Humphrey, *Wrongly Convicted: Perspectives on Failed Justice* (New Brunswick: Rutgers University Press, 2001) 77 at 84.

<sup>45</sup> *Ibid* at 89.

<sup>46</sup> *Ibid* at 85.

case studies also demonstrate how stereotypes of queer people work in conjunction with other systemic and procedural errors that lead to wrongful convictions.

### A. Miguel Castillo and the “Queer Killer” Stereotype

The stereotype of LGBTQ2S+ people as violent killers is pervasive and ongoing. Mogul et al. refer to it as the “queer killer” archetype.<sup>47</sup> This archetype can be traced back to Leopold and Loeb, two wealthy students at the University of Chicago who were engaged in a sexual relationship and convicted of the murder of fourteen-year-old Bobby Franks in 1924.<sup>48</sup> Franks’ body was found nude with acid marks on his mouth and genitals, and the police believed it was a crime prompted by a perverted homosexual desire.<sup>49</sup> The story was popularized in various of media outlets, including the movie *Rope*, which was based on the murder and perpetuated the stereotype of gay men who can “only feel sexually alive through senseless killing.”<sup>50</sup> In Hollywood, queer characters and queer-coded characters in films are often villains and frequently depicted as violent or dangerous. This can be seen in movies such as *Psycho*, *The Silence of the Lambs*, *Cruising*, *Dressed to Kill*, and *Basic Instinct*.<sup>51</sup> These characters are often obsessive, deranged, and murder in a grisly and perverse manner. The “queer killer” archetype suggests that queer people commit murder for no reason other than being queer.<sup>52</sup> This representation of queer people impacts how the public perceives the LGBTQ2S+ community, and the stereotype of the violent “queer killer” has made its way into multiple wrongful conviction cases. As previously noted, the police themselves often perceive queer people to be deviant, and presenting as queer often leads to being perceived as risky or dangerous.<sup>53</sup> The following example shows how this stereotype of the “queer killer” has influenced a wrongful conviction.

In May 1988, Rene Chinae, a 50-year-old gay man and Cuban immigrant, was murdered in Chicago, Illinois. He was found dismembered, with his throat slashed, genitals and hands cut off, and legs partially severed.<sup>54</sup> Upon investigation by the Chicago police, it was determined that Chinae was the victim of a “homosexual murder,” meaning that another gay person had committed the crime.<sup>55</sup> The Chicago police made this connection based on the stereotype that “gay men who are lovers or roommates are ‘particularly violent’ when they fight, often engaging in ‘gruesome-type, serious cuttings.’”<sup>56</sup> In 1989, Miguel Castillo, a thirty-seven-year-old Cuban man, was

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<sup>47</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 27.

<sup>48</sup> *Ibid* at 20.

<sup>49</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 21

<sup>50</sup> *Ibid* at 22; Wess Haubrich, “‘Based Upon A True Story’: Leopold & Loeb & Hitchcock’s ROPE (‘48)’ (9 Jul 2017) online: *Medium* <medium.com/the-nu-romantics/based-upon-a-true-story-leopold-loeb-hitchcocks-ropes-48-ef689bc1cc6b>.

<sup>51</sup> John Weir, “FILM; Gay-Bashing, Villainy and the Oscars” *The New York Times* (29 Mar 1992), online: <[www.nytimes.com/1992/03/29/movies/film-gay-bashing-villainy-and-the-oscars.html](http://www.nytimes.com/1992/03/29/movies/film-gay-bashing-villainy-and-the-oscars.html)>

<sup>52</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 27.

<sup>53</sup> Rachel Girardi, “‘It’s easy to mistrust police when they keep on killing us’: A queer exploration of police violence and LGBTQ+ Victimization” (2021) 31:7 *J Gender Studies* 852 at 859.

<sup>54</sup> *Ibid* at 69.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid*.

arrested for the murder. The Chicago police department claimed he had confessed to the murder, but Castillo denied this claim. In court, the officers depicted him as a disturbed queer killer who had bragged about murdering Chinae. Testimony from medical examiners demonstrated that Chinae had been killed between May 7th and 9th, at which time Castillo was in jail.<sup>57</sup> However, the compelling “confession” from Castillo was enough for him to be sentenced to 48 years in prison on October 24<sup>th</sup>, 1991. In 2000, Castillo’s attorneys presented new evidence to prove he was in jail at the time of the murder, leading to his exoneration in 2001.<sup>58</sup>

Castillo’s wrongful conviction demonstrates how police can perpetuate negative stereotypes of LGBTQ2S+ people to secure a conviction. From the beginning, the police assumed that the person who killed Chinae was gay due to the gruesome nature of the murder, which maintains the stereotype that gay men are particularly violent. The police attributed the killer’s motive primarily to sexual orientation. When the police’s tunnel vision closed in on Castillo, it did not matter that Castillo identified as heterosexual and that there was no evidence of his alleged homosexuality or romantic relationship with Chinae. The Chicago police department alleged that in Castillo’s confession, he admitted to being Chinae’s lover and killing and dismembering him after finding out about an affair with a younger lover.<sup>59</sup> The confession also detailed that cutting off Chinae’s hands and penis was symbolic in Cuban culture to indicate he was an unfaithful lover.<sup>60</sup> Further to this, the police testified in court that he was not remorseful, but in fact boastful during his confession. Importantly, Castillo never signed a written statement, the confession was never recorded, and there were no handwritten notes from the interrogation.<sup>61</sup> To this day, Castillo alleges that he was beaten to try to extract a confession and when he failed to give one the police fabricated one for him.<sup>62</sup> All of the attributes of this manufactured confession play into the “queer killer” narrative to show that Castillo was violent and perverse. Additionally, the racist implication that dismembering someone is part of Cuban culture also shows the high degree of prejudice demonstrated by police in this case. Based on limited evidence, the police fabricated a storyline using stereotypes of gay men. They created a confession that confirmed their own narrative to convict Castillo, and it worked despite having a plethora of exculpatory evidence. There was evidence that proved it was almost impossible for Castillo to have been the murderer, including a letter left for Chinae’s landlords and a call placed to his employers to explain his absence, two tasks that would have been almost impossible from jail.<sup>63</sup> Also, after Chinae’s disappearance, three men were heard playing the stereo and vacuuming in his home.<sup>64</sup> All the evidence, however, was still not enough to counteract the compelling and evocative “confession” built on homophobia.

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<sup>57</sup> Rob Warden, “Miguel Castillo” (last updated 21 Oct 2016), online: *The National Registry of Exonerations*: <[www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3094](http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3094)>.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Castillo v Zuniga*, [2002] No.01 C 616 (ND Ill) at 3.

<sup>60</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 70.

<sup>61</sup> *Ibid* at 70-71.

<sup>62</sup> Warden, *supra* note 57.

<sup>63</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 70.

<sup>64</sup> *Ibid.*

## B. Bernard Baran and The San Antonio Four: Satanic Panic and the Predator Stereotype

The myth of LGBTQ2S+ people as predators and child molesters has been an inescapable falsehood since the period of historic criminalization of gay sexual expression. Homosexuality was equated with pedophilia and many media messages during the 1950's and 1960's focused on gay men as predators.<sup>65</sup> "Throughout the twentieth century, the specter of the pathological, predatory, sexually violent deviant played a significant role in shaping discourse about homosexuality."<sup>66</sup> In the 1970's, prominent entertainer Anita Bryant began an anti-gay rights organization called "Save Our Children" which was created in protest of an anti-discrimination law being considered in Dade County, Florida.<sup>67</sup> Save Our Children used a mix of biblical morality arguments and claims that children should be protected from harm. The campaign was built on four arguments, "gay men recruit children because they cannot have children of their own, they want to teach children that homosexuality is acceptable, they cause physical harm to others, and they seduce and molest children."<sup>68</sup> Save Our Children published homophobic newspaper advertisements claiming that passing gay rights laws would give gay men a green light to "recruit and molest their children in schools."<sup>69</sup> Eventually, Save Our Children used this campaign to repeal the anti-discrimination ordinance. At the time, many people did not know much about the queer community, so in the eyes of the public, the homophobic statements made by Save Our Children, veiled by arguments for protecting family and upholding morality, seemed true.<sup>70</sup> The narrative that LGBTQ2S+ people are harmful to children continued to prevail for the rest of the 20<sup>th</sup> century. Further compounding this fear, a new moral panic erupted in the 1980s. Claims against daycare providers began to surface, asserting that satanic rituals were being performed on the children.<sup>71</sup> This struck fear into the hearts of parents and in turn over one-hundred-day care centers were investigated.<sup>72</sup> Satanic ritual abuse was linked closely to the "sexual deviance" of the LGBTQ2S+ community, especially with conservative and religious media connecting homosexuality and pedophilia.<sup>73</sup> This is the cultural context which led to the wrongful conviction of Bernard Baran and the San Antonio Four.

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<sup>65</sup> Anthony Niedwiecki, "Save Our Children: Overcoming the Narrative That Gays and Lesbians Are Harmful to Children" (2013) 21:125 *Duke J Gender L & Pol'y* 125 at 143.

<sup>66</sup> Michael A Smith, "Queers and Provocateurs: Hegemony, Ideology, and the 'Homosexual Advance' Defense" (2006) 40:4 *Law & Soc'y Rev* 903 at 904.

<sup>67</sup> Niedwiecki, *supra* note 65 at 143-144.

<sup>68</sup> *Ibid* at 145.

<sup>69</sup> Niedwiecki, *supra* note 65 at 146.

<sup>70</sup> *Ibid* at 147.

<sup>71</sup> Mary deYoung, "Another look at moral panics: the case of satanic day care centers" (1997) 19:3 *Deviant Behaviour* 257.

<sup>72</sup> *Ibid* at 258.

<sup>73</sup> Sarah A Hughes, "American Monsters: Tabloid Media and the Satanic Panic 1970-2000" (Doctor of Philosophy, Temple University, 2015) [unpublished] at 73.



### i. Bernie Baran: Homophobia Leading to Wrongful Conviction

Bernard Baran was a 19-year-old working as a teacher's assistant at a school day care center, the Early Childhood Development Center (ECDC), in Pittsfield, Massachusetts.<sup>74</sup> In mid-September 1984, the parents of a 3-year-old boy at ECDC filed a complaint about Baran, an openly gay man, being allowed to care for young children. One month later on October 5<sup>th</sup>, 1984, those same parents filed a report to the police that Baran had touched their child's penis, claiming they found blood in their child's bathwater one evening.<sup>75</sup> They took the child in for a medical examination the next day and a throat culture tested positive for gonorrhea. Another woman who was informed of the allegations, a survivor of sexual abuse herself, questioned her daughter about Baran and contacted the police to inform them her daughter had been molested as well. Following these two reports, Baran was arrested on October 7<sup>th</sup> for indecent assault and battery.<sup>76</sup> On October 10<sup>th</sup> Baran was tested for gonorrhea using rectal, throat, and penile samples, all of which all came back negative. However, the news of the arrest spread, and so ECDC performed a puppet show for the children about inappropriate touching. They also sent out letters to the parents informing them of the charges, noting that their own children may have been abused, which resulted in anxiety and more complainants. On November 7<sup>th</sup> 1984 a Grand Jury, after being shown edited videotapes of the children's interviews, indicted Baran on three counts of rape and five counts of indecent assault and battery.<sup>77</sup> Baran's defense counsel proved to be extremely ineffective, even allowing a sixth allegation to be added on the day of the trial without objection, despite there being no indictment. At trial, the first boy refused to testify. The counts relating to him were dropped, but the jury had already heard opening statements about the boy and the positive test for gonorrhea. Defense counsel did not try to strike this evidence or move for a mistrial and the trial judge simply informed the jury to no longer consider the indictments. Bernie Baran was sentenced to three concurrent life sentences in January of 1985.<sup>78</sup>

In 2004, through the post-conviction discovery process, Baran's new counsel found documents and materials that had not been used at trial, including long unedited versions of the videotapes of the interviews with the children conducted by the district attorney's office. The tapes that Baran's counsel had been searching for were 'discovered' just weeks after a new district attorney had taken over.<sup>79</sup> Baran's counsel also found materials containing information on accusations from two of the children about being molested by their respective mother's boyfriends, which was likely the reason behind the first child having physical evidence of sexual assault. The jury in the original trial had been shown extremely edited versions of the interviews, which omitted portions where the children denied that anything had been done to them, and had even accused other ECDC employees of abuse. The children were also distracted and non-responsive and only accused Baran of molestation after investigators used improper questioning techniques, like

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<sup>74</sup> *Commonwealth v Bernard F Baran Jr*, [2009] No 07-P-1096, (MA App Ct) [Baran].

<sup>75</sup> *Ibid.*

<sup>76</sup> Baran, *supra* note 74.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> Daniel Alexander & Tom Opferman, "Freeing Bernie Baran" (11 Sep 2010) online (video): [www.youtube.com/watch?v=msobBlk\\_ZJ0&ab\\_channel=Bee%27sVictorySociety](http://www.youtube.com/watch?v=msobBlk_ZJ0&ab_channel=Bee%27sVictorySociety).

leading questions.<sup>80</sup> Techniques such as the misuse of props, like the dolls used by the district attorney's office in this case, have also been proven to lead to false accusations.<sup>81</sup> There were also inconsistencies between the videos and the statements made by the children at trial. One child told their therapist later that year that "mommy told me what to say otherwise we wouldn't get candy and money."<sup>82</sup> Another witness saw the prosecutor saying to one child "when I ask you questions just say yes."<sup>83</sup> One child did not even attend school at the ECDC location Baran worked at, but the files to prove this were allegedly burned in a fire.<sup>84</sup> In 2006, Bernard Baran was freed pending a new trial, after a motion judge ruled that his counsel had been deficient. This judgment was appealed by the district attorney's office. In 2009, the Appeals Court of Massachusetts affirmed the 2006 ruling. Baran received a \$400,000 settlement but tragically died in September 2014 at 49 years old.<sup>85</sup>

This wrongful conviction stemmed from the homophobia of two parents. These parents had a history of drug abuse, drug distribution and of cooperating as government informants.<sup>86</sup> In the deposition of Julie Heath, the mother who had made the initial complaint about Baran working at ECDC, she stated that she had a "very bad attitude about the gay community, they shouldn't be with kids, they shouldn't get married, they shouldn't have children, they shouldn't be allowed out in public."<sup>87</sup> Heath eventually admitted that she had lied about blood coming from her son's penis in the original allegation. In the documentary *Freeing Bernie Baran*, Baran states that when the staff found out he was gay they told him to change because they did not believe it was appropriate he worked there. The assumption that gay men are predators was prevalent throughout the trial, with the district attorney even referring to Baran as a "chocoholic in a chocolate factory."<sup>88</sup>

Baran, although testing negative for gonorrhea, was still charged with the first assault. The prosecution stated he could have easily taken penicillin, even though medical records showed that Baran was allergic to penicillin.<sup>89</sup> The shock of a young child with gonorrhea in their throat would have been very persuasive to a jury. The HIV/AIDS crisis was also occurring at the time, and was closely linked with prejudice towards gay men.<sup>90</sup> "The attitudes toward the HIV/AIDS epidemic coalesced around centuries-old beliefs in queer sexuality as deviant and dangerous."<sup>91</sup> The prosecution leveraged the fear created by the HIV/AIDS epidemic and reinforced the stereotype

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<sup>80</sup> Dori Berman et al, "The trials of Bernard Baran" *The Boston Phoenix* (18 Jun 2004) online: <bostonphoenix.com/boston/news\_features/top/features/documents/03917095.asp>.

<sup>81</sup> *Ibid.*

<sup>82</sup> Alexander & Opferman, *supra* note 79 at 00h:37m:36s.

<sup>83</sup> *Ibid* at 00h:41m:48s.

<sup>84</sup> *Ibid* at 00h:40m:47s.

<sup>85</sup> Maurice Possley, "Bernard Baran" (last updated 24 Sep 2014), online: *The National Registry of Exonerations* <[www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3011](http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3011)>.

<sup>86</sup> Alexander & Opferman, *supra* note 79 at 00h:13m:29s.

<sup>87</sup> *Ibid* at 00h:06m:38s.

<sup>88</sup> *Ibid* at 00h:42m:55s.

<sup>89</sup> Alexander & Opferman, *supra* note 79 at 00h:26m:43s.

<sup>90</sup> Laura Ramos Grappo, "'Four Lives Lost': Criminalization and innocence in the case of the San Antonio Four" (2020) 18:1 *Latino Studies* 3 at 9.

<sup>91</sup> *Ibid.*

that gay people carry sexually transmitted infections to implicate Baran. They implied that Baran went to ‘underground gay clubs’ and was an immoral person as a gay man, therefore would have gonorrhea, despite having physical evidence proving the contrary.<sup>92</sup> The prosecution also used expert evidence stating that gonorrhea is more common among prostitutes and homosexuals, despite having no statistical proof to back this statement.<sup>93</sup> In the end, gonorrhea should not have even been a live issue, as the first child refused to implicate Bernie and the charges were dropped. However, due to incompetent defence counsel, lack of strong jury instruction to disregard the first child’s charges, and the stigmatization of gay men during the AIDS crisis, it still impacted the verdict.

Another “victim” from the case, a young girl, claimed that Baran had scooped blood out of her with scissors and then stabbed her in the foot in the bathroom of the daycare, but she never told anyone. This is especially shocking as the bathroom had very little privacy. It had a large window that faced the playground, had no door, was directly attached to a classroom, and there were no witnesses to the incident despite the girl claiming two teachers were in the bathroom with Baran.<sup>94</sup> The only physical evidence of this was three small notches on the child’s hymen, which were later proven to be normal and not an indicator of sexual assault.<sup>95</sup> Hearing that a cult of Satanists was on the rise, and that this was allegedly happening in daycares across the country as portrayed by the media (a notion that was later widely debunked), this imagery would have likely struck fear into the jurors hearts. The hysteria surrounding gay people as created by the Save Our Children movement would have also had a strong cultural influence at the time.

Gay and gender-nonconforming people are often denied professional, effective and competent legal service.<sup>96</sup> Counsel for Baran was completely ineffective. Not only did the defence counsel fail to prepare for trial, but he also failed to properly vouch for his client throughout the trial, failed to object to improper evidence and statements from the prosecution, and failed to insist on indictment for the sixth charge added the day of trial. Justice Lenk of the Appeals Court of Massachusetts stated that “defense counsel’s apparent failure to engage in any meaningful preparation for what was indisputably a complex, high-stakes trial represented a more or less complete abandonment of his professional obligations to the defendant.”<sup>97</sup>

Aside from homophobia and hysteria driving Baran’s wrongful conviction, there was also clear prosecutorial misconduct: bad interviewing techniques through the use of anatomically correct dolls and suggestive questioning (and even potentially coercion); junk science surrounding one child’s hymen; and the DA’s office disregarding two other reports of sexual assaults committed on two children. Bernie, however, cited only two reasons for what happened: that he was gay and that he did not have an education.<sup>98</sup>

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<sup>92</sup> Alexander & Opferman, *supra* note 79 at 00h:31m:22s.

<sup>93</sup> *Ibid* at 00h:31m:49s.

<sup>94</sup> Alexander & Opferman, *supra* note 79 at 00h:34m:40s.

<sup>95</sup> Sabra Thomas, “Addressing Wrongful Convictions: An Examination of Texas’s New Junk Science Writ and Other Measures for Protecting the Innocent” (2015) 52:3 Hous L Rev 1038 at 1053.

<sup>96</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 75.

<sup>97</sup> Baran, *supra* note 74.

<sup>98</sup> Alexander & Opferman, *supra* note 79 at 01h:20m:59s.

## ii. The San Antonio Four: Homophobia, Sexism and Racism in Wrongful Convictions

The day care sex abuse hysteria continued well into the 1990s. Elizabeth Ramirez, Anna Vasquez, Kristie Mayhugh, and Cassandra Rivera were four queer, young Latina women from San Antonio, Texas.<sup>99</sup> In 1994, Ramirez's young nieces, aged 7 and 9, stayed with her for a few days in the summer while their mother was in Colorado. All three of the other women had been at Ramirez's apartment frequently throughout the children's stay.<sup>100</sup> After their visit, the girls alleged that they had been sexually assaulted by the four women on multiple occasions, stating that they had been held down, fondled, and that objects had been forced into their vaginas.<sup>101</sup> Throughout the process, the accounts of the sexual assaults were inconsistent, with multiple versions of each event told by both nieces.<sup>102</sup> All four women maintained their innocence. The young girls were brought to a clinic for a sexual-assault exam, and Dr. Kellogg, who was an expert in physical findings for child sex abuse cases, found that the girls' examinations were not normal and one had a scar on the hymen that indicated "painful penetration."<sup>103</sup> Dr. Kellogg linked the signs of physical abuse to lesbianism and satanic rituals.<sup>104</sup> In 1997, Ramirez was sentenced to 37.5 years for sexually aggravated assault and indecency with a child by contact. A year later the other three women were sentenced to 15 years in prison each.<sup>105</sup>

In 2013, a team from the Innocence Project of Texas filed for post-conviction relief based on the fact that one of the victims and Dr. Kellogg recanted their statements. Stephanie, the youngest niece, stated that her father had forced her and her sister to accuse her aunt of sexual assault, and had threatened her when she indicated she wanted to tell the truth.<sup>106</sup> Dr. Kellogg also recanted her testimony about the physical evidence of sexual abuse based on more recent scientific studies. She acknowledged that her original testimony was based on scientifically invalid evidence, and recognized that "if the medical science in this area...had been available to her in 1997 or in 1998... she 'would not have testified that the finding was indicative of trauma to the hymen.'"<sup>107</sup> The San Antonio Four brought a new application using the new forensic science statute in Texas that allowed for post-conviction relief on the basis of new science and actual innocence.<sup>108</sup> Anna Vasquez had already made parole at that time but in the summer of 2013 the three other women were released. In 2016 they were exonerated by the Texas Court of Criminal appeals.<sup>109</sup>

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<sup>99</sup> Grappo, *supra* note 90 at 4.

<sup>100</sup> *Kristie Mayhugh et al v. The State of Texas*, [2016] Nos. WR-84, 700-01; WR-84, 700-02 (Tx App Ct), at 6 [Mayhugh].

<sup>101</sup> *Ibid* at 7.

<sup>102</sup> Mayhugh, *supra* note 100 at 9.

<sup>103</sup> *Ibid* at 10.

<sup>104</sup> Grappo, *supra* note 90 at 6.

<sup>105</sup> Mayhugh, *supra* note 100 at 10.

<sup>106</sup> Elvia Mendoza, "State Violence and the Un/making of Queer Subjectivities" (Doctor of Philosophy, The University of Texas at Austin, 2016) [unpublished] at 31; Mayhugh, *supra* note 89 at 31.

<sup>107</sup> Mayhugh, *supra* note 100 at 13.

<sup>108</sup> Innocence Staff, "Justice at Last: San Antonio Four Are Declared Innocent" (30 Nov 2016), online: *Innocence Project* <[innocenceproject.org/san-antonio-four-declared-innocent/](http://innocenceproject.org/san-antonio-four-declared-innocent/)>.

<sup>109</sup> *Ibid*.

Homophobia was a consistent theme throughout the trial and prosecution of the San Antonio Four. Javier Limon, the father of Elizabeth Ramirez's nieces, had made advances towards Ramirez on numerous occasions.<sup>110</sup> He had sent her unrequited love letters and had offered to marry her, and the four women speculate that he made up the allegations to punish her rejection of his advances.<sup>111</sup> In the documentary *Southwest of Salem*, Ramirez notes that Javier knew that she dated women and "that's one thing he didn't like."<sup>112</sup> The San Antonio Four would have not been convicted were it not for these original false allegations from Javier, based partially in his homophobia towards the group.

During jury selection, Cassandra Rivera stated "the attorneys talked about us being gay as if it were a disease, or something to be frightened of—that we were not human."<sup>113</sup> Throughout the jury selection process, it was difficult to find jurors that were not homophobic, with one prospective juror commenting that the women being lesbians made them "uncomfortable".<sup>114</sup> Another prospective juror for Elizabeth Ramirez's trial stated that "if someone is willing or can justify to themselves the act of homosexuality, that perhaps they can also justify to themselves the act of sexual assault of a child."<sup>115</sup> Importantly, the motion to have this juror excused was denied. Even a reverend, who had told the court he believed homosexuality was wrong because of the Bible, was chosen to be the head juror.<sup>116</sup> It is quite clear that homophobic sentiments were present amongst the jurors. The homophobia the women faced from this Texas-based jury is not surprising considering at the time Texas' anti-sodomy law was still in place. Even today, attempts to remove certain homophobic provisions from the *Penal Code* in Texas have failed. For example, "homosexual conduct," defined as when a person "engages in deviate sexual intercourse with another individual of the same sex", can still be found in the *Penal Code* despite being declared unconstitutional in *Lawrence v. Texas* in 2003 and therefore not enforceable.<sup>117</sup>

The district attorney also leaned into the women's "alternative lifestyle" and lesbian identities. In one line of questioning between the prosecutor and Ramirez he asked about the activities the two young girls had claimed happened in relation to sexual orientation. "When she describes either you or one of the other girls kissing her vagina, that is consistent with a gay lesbian sexual relationship, isn't it?" and "insertion of objects into the vagina is consistent with a gay sexual lesbian relationship – sexual relationship isn't it?"<sup>118</sup> This line of questioning directly associated the alleged acts to the defendant's sexual orientation, implying that the alleged sexual

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<sup>110</sup> Grappo, *supra* note 90 at 4.

<sup>111</sup> *Ibid* at 5.

<sup>112</sup> Investigation Discovery, "Southwest of Salem: The Story of the San Antonio Four" (2016) at 00h:16m:52s, online (video):<tubitv.com>.

<sup>113</sup> Mendoza, *supra* note 106 at 70.

<sup>114</sup> *Southwest of Salem*, *supra* note 112 at 00h:18m:05s.

<sup>115</sup> Mendoza, *supra* note 106 at 80.

<sup>116</sup> *Ibid* at 82.

<sup>117</sup> Tom Dart, "Texas clings to unconstitutional, homophobic laws – and it's not alone" *The Guardian* (1 Jun 2019), online:

<[www.theguardian.com/world/2019/jun/01/texas-homophobic-laws-lgbt-unconstitutional](http://www.theguardian.com/world/2019/jun/01/texas-homophobic-laws-lgbt-unconstitutional)>.

<sup>118</sup> Mendoza, *supra* note 106 at 74-75.

assault occurred because she is a lesbian. The prosecutor continuously tied the women's sexual orientation into notions of Satanism and pedophilia:

Records of police and prosecutor questions reveal an intentional confusion over lesbianism itself (wherein the women were continually challenged about their friendships and whether they were in fact all sexually involved with one another) and over the distinction between queer sexuality and pedophilia.<sup>119</sup>

Additionally, Dr. Kellogg's medical reports connecting the (debunked) physical evidence to satanic ritual, which would have been informed by the day-care sex abuse hysteria, were used in the prosecution's arguments.<sup>120</sup> Notably, the prosecution used words to describe what had happened as a "sacrificial offering on the altar of lust."<sup>121</sup> This type of imagery from the prosecution, and the focus on the four as lesbians, falsely equated the women's sexual orientation with sexual deviance and Satanism. "The court's willingness to overlook the peculiarities present in the alleged victims' statements and to accept the dubious testimony surrounding Satanism was clearly tied to the identities of the accused."<sup>122</sup>

Lesbian women often defy the norms of how some believe women 'should' look, dress, and act. This was likely the case for the San Antonio Four, whose gender presentation was unfavourable towards them. During the trial, Anna and Kristie did not conform to heteronormative expectations in the way they presented their gender. Anna sported a mullet, and Kristie had short hair that was buzzed along the side. At trial, they wore clothing that appeared to be oversized men's clothing.<sup>123</sup> This clear defiance of femininity may have worked against them when it came to sentencing:

Studies show that women who are perceived as gender inappropriate in court receive harsher sentences than women who appear more feminine in court. This could be because prosecutors often emphasize a woman's masculine characteristics, or lesbianism if applicable, to turn jurors against female defendants, instead of relying solely on evidence that the woman committed a crime.<sup>124</sup>

Some legal feminist scholars claim that jurors are more reluctant to convict women than they are for the same crimes committed by men.<sup>125</sup> However, with two of the four women clearly defying gender norms and expectations, visual proof of their "queerness" may have implicated them as more deserving of punishment to the jury.

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<sup>119</sup> Grappo, *supra* note 90 at 4.

<sup>120</sup> Thomas, *supra* note 95 at 1052.

<sup>121</sup> Mendoza, *supra* note 106 at 61.

<sup>122</sup> Grappo, *supra* note 90 at 6.

<sup>123</sup> As observed in the footage of the trial from *Southwest of Salem*, *supra* note 112.

<sup>124</sup> Andrea L Lewis & Sara L Sommervold, "Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women" (2015) 78:3 Alb Law Rev 1035 at 1048.

<sup>125</sup> Mendoza, *supra* note 106 at 76.

The women also identify as Latina, which only created additional barriers considering in the United States in the 1990s there was “great national anxiety about Latinx immigration,” as well as “overlaps that existed between narratives of the Latino threat and the satanic panic ordeal.”<sup>126</sup> The pervasive stereotype of the “hypersexualized” Latina woman may have also impacted the jury’s perception of the women as the type of people who would sexually assault a child.<sup>127</sup> The combined effect of identifying as queer Latina women meant that systemic discrimination was working against them on all fronts, and the San Antonio Four paid the price, fighting their wrongful conviction for over 20 years.

### C. Monica Jones: Walking While Transgender Leading to Wrongful Conviction

Transgender people face high levels of discrimination in everyday life. Transgender and gender-nonconforming youth often experience discrimination and rejection from their families, leading many to face homelessness.<sup>128</sup> Often due to stigma and lack of other economic opportunities, “many transgender people participate in the sex trade in order to earn income or as an alternative to relying on homeless shelters and food banks.”<sup>129</sup> However, as sex workers, transgender people face many issues with policing and violence:

The criminalizing and stigmatizing of sex work in the United States can worsen the discrimination and marginalization that transgender people already face in society. Trans sex workers experience harassment and violence, often at the hands of police, and these experiences are heightened for transgender people of color, especially women.<sup>130</sup>

Additionally, the impact of masquerade laws and prohibitions on “cross-dressing” have persisted into the 21<sup>st</sup> Century, impacting how transgender people are policed. “Law enforcement officers have fairly consistently and explicitly policed the borders of the gender binary.”<sup>131</sup> Police prejudice against transgender people still exists in the forms of arbitrary arrests, arrests for using the incorrect washroom, and routine verbal harassment.<sup>132</sup> A study by the National Center for Transgender Equality and the National Gay and Lesbian Task force found that 1 in 5 trans people who have had police contact reported being harassed by police. For Black transgender people this increased to 38%.<sup>133</sup>

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<sup>126</sup> Grappo, *supra* note 100 at 14.

<sup>127</sup> Maria Jimenez Moya, “Our True Face: Latina women are exoticized and unfairly portrayed in the media” *The Daily Free Press* (9 October 2019), online: <[dailyfreepress.com/2019/10/09/our-true-face-latina-women-are-exoticized-and-unfairly-portrayed-in-the-media/](http://dailyfreepress.com/2019/10/09/our-true-face-latina-women-are-exoticized-and-unfairly-portrayed-in-the-media/)>.

<sup>128</sup> Tara Lyons et al, “Negotiating Violence in the Context of Transphobia and Criminalization: The Experiences of Trans Sex Workers in Vancouver, Canada” (2017) 27:2 *Qualitative Health Research* 182.

<sup>129</sup> Erin Fitzgerald et al, “Meaningful Work: Transgender Experiences in the Sex Trade” (December 2017) at 4, online (pdf): *Trans Equality* <[transequality.org/sites/default/files/Meaningful%20Work-Full%20Report\\_FINAL\\_3.pdf](http://transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf)>.

<sup>130</sup> *Ibid.*

<sup>131</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 64.

<sup>132</sup> *Ibid* at 64-67.

<sup>133</sup> *Supra* note 32.

Monica Jones is a Black transgender woman and an advocate for the decriminalization of sex work.<sup>134</sup> In 2013, she was arrested by an undercover police officer in Phoenix, Arizona for manifesting an intent to commit or solicit an act of prostitution, which criminalizes activities such as beckoning or stopping cars, engaging passerby in conversation, and inquiring whether someone is a police officer.<sup>135</sup> Her arrest occurred as a part of Project ROSE, which is a program in Phoenix that targets sex workers on the street and online.<sup>136</sup> Once arrested, she was brought to a church, with no access to a lawyer, and offered a diversion program or otherwise face jail time.<sup>137</sup> In April 2014 she was convicted. Her conviction was later vacated on appeal in 2015.<sup>138</sup>

Transphobia was a theme throughout Jones' case, starting with the law itself, which is a vague and explicitly ambiguous municipal law. The law gives police latitude to decide how to enforce it and which people to target, including targeting people based on how they look. To this effect, Monica Jones, a transgender woman of colour, was profiled for simply walking to the bar that night. Jones was approached by the undercover officer who asked if she needed a ride, and she accepted.<sup>139</sup> Jones states that once she got in the car he harassed her, asking about her prices and services. She denied any intention to prostitute herself and asked to be let out of the car, but was not let out until the police came.<sup>140</sup> The arresting officer testified at trial that the neighbourhood was known for prostitution, and that she had been wearing a "black, tight-fitting dress".<sup>141</sup> The officer also continuously misgendered Jones by referring to her as a man.<sup>142</sup> The blatant transphobia from the officer's statement, exhibited by his refusal to acknowledge her as a woman and the implication that a certain outfit would make her more likely to be a prostitute, is problematic and disrespectful. According to Amnesty International, the profiling of transgender women as sex workers is common amongst police officers, and transgender women often face increased scrutiny from police officers even when engaging in activities such as shopping or walking their dogs.<sup>143</sup> This systemic profiling of transgender women and police misconduct is what led to Monica Jones' wrongful conviction.

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<sup>134</sup> Kavish Harjai, "Monica Jones and the Problem of "Walking While Trans" (30 June 2016), online: *Innocence Project* <[innocenceproject.org/monica-jones-walking-while-trans/](http://innocenceproject.org/monica-jones-walking-while-trans/)>

<sup>135</sup> *Ibid*; *Phoenix Municipal Code*, Article 4 sec 23-52(3).

<sup>136</sup> Molly Crabapple, "Project ROSE is Arresting Sex Workers in Arizona to Save Them" *Vice* (26 February 2014), online:

<[www.vice.com/en/article/av4eyb/in-arizona-project-rose-is-arresting-sex-workers-to-save-them](http://www.vice.com/en/article/av4eyb/in-arizona-project-rose-is-arresting-sex-workers-to-save-them)>.

<sup>137</sup> Che Gossett & Eva Hayard, "Monica Jones: An Interview" (2020) 7:4 *Transgender Studies Quarterly* 611 at 614.

<sup>138</sup> Harjai, *supra* note 134.

<sup>139</sup> *Ibid*.

<sup>140</sup> *Ibid*.

<sup>141</sup> Jamie Ross "'Manifesting' Prostitution Law Challenged" *Courthouse News Services* (6 August 2014), online: <[www.courthousenews.com/manifesting-prostitution-law-challenged/](http://www.courthousenews.com/manifesting-prostitution-law-challenged/)>.

<sup>142</sup> *Ibid*.

<sup>143</sup> Amnesty International, "Stonewalled: Police abuse and misconduct against lesbian, gay, bisexual and transgender people in the U.S" (2005) at 21, online (pdf): *Amnesty* <[www.amnesty.org/en/wp-content/uploads/2021/08/amr511222005en.pdf](http://www.amnesty.org/en/wp-content/uploads/2021/08/amr511222005en.pdf)>.



Additionally, there is a “criminalizing archetype of transgender and gender non-conforming people as intrinsically dishonest and deceptive.”<sup>144</sup>

The archetypal narrative that casts queers as inherently deceptive undermines LGBT defendants’ ability to challenge sex-related charges based on arrests by undercover officers. In such cases, the word of a queer defendant – already marked as dishonest and perverted is pitted against the word of law enforcement officers, whose testimony is generally afforded more credibility than that of civilians.<sup>145</sup>

This archetype was clear at Jones’ trial. The prosecutor asked Jones about her previous arrest for sex work, which Jones admitted to, stating “my past is my past.”<sup>146</sup> However, in his closing statement, the Judge said that he found her not to be a credible witness as she had a prior conviction for sex work and a motive to avoid a 30-day sentence. Despite a lack of evidence to support the conviction, other than the testimony from a transphobic police officer, the Judge still found her guilty.<sup>147</sup> The stereotype of transgender people as untrustworthy had more weight than the real evidence in this case. Jones was simply “walking while trans” and yet she was still wrongly convicted. Her conviction was eventually overturned on appeal on the grounds that the trial judge had deprived her of a fair trial.<sup>148</sup> However, Jones’ case highlights the systemic discrimination transgender people face in the criminal justice system.

#### IV Wrongful Convictions Today and the Deterioration of Queer Rights

In Canada many queer people were convicted in the 20<sup>th</sup> century under the homophobic s.159 of the *Criminal Code*.<sup>149</sup> Although there are many definitions of wrongful convictions, most consider either factual or procedural innocence in their definitions.<sup>150</sup> Arguably, however the type of wrongful convictions under s.159 stem from the law itself being morally wrong. In 2018 the government introduced the *Expungement of Historically Unjust Convictions Act*. The purpose of the Act was to recognize that “the criminalization of certain activities constitutes a historical injustice” and would be inconsistent with the *Charter* today.<sup>151</sup> This Act allows people to clear their records of offences involving consensual same-sex activity convictions. However, in the 3 years since its implementation, only 9 expungements have been granted out of over 6000 charges in the RCMP databases.<sup>152</sup> Although there has been 70 applications thus far, 60 were refused as

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<sup>144</sup> Mogul, Ritchie & Whitlock, *supra* note 3 at 66.

<sup>145</sup> *Ibid* at 76.

<sup>146</sup> *The State of Arizona v Monica Renee Jones*, [2015] LC2014-000424-001 DT (AZ Sup Ct) at 2.

<sup>147</sup> Ross, *supra* note 141.

<sup>148</sup> Harjai, *supra* note 134.

<sup>149</sup> Smith, *supra* note 6.

<sup>150</sup> Kathryn M Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018).

<sup>151</sup> *Expungement of Historically Unjust Convictions Act*, SC 2018, c 11, preamble.

<sup>152</sup> Patrizia Gentile et al., “Sex Workers Are Left Out by Ottawa’s Unjust Conviction Changes” *The Tyee* (19 April 2023), online:

[<thetyee.ca/Analysis/2023/04/19/Sex-Workers-Left-Out-Ottawa-Unjust-Conviction-Changes/>](https://thetyee.ca/Analysis/2023/04/19/Sex-Workers-Left-Out-Ottawa-Unjust-Conviction-Changes/).

the convictions were not eligible offences for expungement<sup>153</sup> This is likely due to “serious problems that persist in the legislation, including onerous requirements for documentation, an unequal age of consent and an overly restrictive schedule of eligible offences.”<sup>154</sup> Queer people who were wrongfully convicted under s.159 deserved a more accessible method to have their records expunged. In doing so, the government would better acknowledge the gravity of queer wrongful convictions.

Unfortunately, anti-LGBTQ2S+ rhetoric has increased over the last few years. Queer rights are being eroded while more homophobic and transphobic bills are signed into law. In June 2023 the Human Rights Campaign, the largest LGBTQ+ organization in the United States, declared a state of emergency for LGBTQ+ people.<sup>155</sup> In the previous year alone over 75 anti LGBTQ2S+ laws were signed into law in the United States, mostly targeting transgender and non-binary individuals.<sup>156</sup> When the law discriminates based on queer identity, more queer people will end up in the criminal justice system. It also further increases the anti-LGBTQ2S+ sentiment that drives the stereotypes that impact wrongful convictions. Recent rhetoric accusing drag queens and other members of the LGBTQ2S+ community of child grooming or harming children is reminiscent of stereotypes seen in the era of Anita Bryant and “Save Our Children”. The ongoing rhetoric that queer identities are dangerous will lead to more queer people being prosecuted. The passing of these laws indicate backsliding with respect to queer rights and may result in further wrongful convictions within the community. Understanding the impact that homophobia and transphobia have on wrongful convictions is important, but ensuring the laws themselves are not discriminatory towards the queer community is even more critical.

## V Conclusion

LGBTQ2S+ people face systemic discrimination for their sexual orientation and gender identity in the criminal justice system. Through the cases of Miguel Castillo, Bernard Baran, the San Antonio Four, and Monica Jones we can see that this systemic discrimination has also repeatedly led to wrongful convictions. The way forward is to acknowledge and further explore the impact homophobia and transphobia have had, and still have, on the justice system in order to create a better future for all LGBTQ2S+ people.

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<sup>153</sup> Steven Maynard, “Pride and prejudice: With only 9 LGBTQ criminal record expungements, what’s to celebrate?” *The Conversation* (17 June 2021), online:

<[theconversation.com/pride-and-prejudice-with-only-9-lgbtq-criminal-record-expungements-whats-to-celebrate-161308](https://theconversation.com/pride-and-prejudice-with-only-9-lgbtq-criminal-record-expungements-whats-to-celebrate-161308)>.

<sup>154</sup> *Ibid*

<sup>155</sup> *Supra* note 15.

<sup>156</sup> *Supra* note 15.

**The Plea of Innocence:  
Restoring the Truth to the American Justice System**

By Tim Bakken  
(New York, NYU Press, 2022)  
Reviewed by Christopher Sherrin  
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In *The Plea of Innocence*, Tim Bakken argues that we need to introduce into our adversarial criminal justice system a better means by which the factually innocent can access exculpatory evidence. He proposes that an accused should be entitled to plead innocent, rather than just not guilty, and thereby enter an inquisitorial sort of process in which the accused would disclose what he knows to the investigating authorities in exchange for the authorities cooperatively searching for the truth rather than for evidence in support of conviction.

Bakken previously made this proposal in a journal article in 2008.<sup>1</sup> He does not develop the proposal much further in the book. This is unfortunate. The proposal is an interesting one, but it raises several questions and includes some curious elements, many of which are not adequately explored. The result is a provocative but ultimately unsatisfying book.

***The Book***

Bakken devotes most of the book to criticizing the American adversarial system. He says that it does not support the search for the truth. Instead, it “supports parties’ attempts to remain silent, suppress facts, and avoid revealing evidence for their advantage, regardless of the effects on society.”<sup>2</sup> Lawyers have control of the system and they emphasize procedure, which does not reduce factual error and may even increase it. The result is that the “adversarial system has come to accept, perhaps first from necessity but now as a matter of principled decision making, that due process is a replacement for seeking the truth.”<sup>3</sup>

This, according to Bakken, is a system that does not help the innocent. The guilty receive the lion’s share of the benefits of the rules and procedures. Investigators hunt in secret for evidence sufficient to arrest and convict, “as opposed to searching for the truth, which is a consideration but not a necessary part of their work.”<sup>4</sup> Suspects have no right or ability to participate in the state’s search for evidence. Defense counsel do not usually have the expertise, time or resources to search for facts. Neither do most accused. Trial procedures are not very good at uncovering the true facts. Appellate procedures are no better.

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<sup>1</sup> Tim Bakken, “Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System” (2008) 41 U Mich JL Reform 547.

<sup>2</sup> Page 53.

<sup>3</sup> Page 30.

<sup>4</sup> Page 94.

Not only does the adversarial system not support a search for truth, it is structured so as to hide it. Police can lie to suspects and witnesses and engage in investigatory practices that produce false confessions and false guilty pleas. Lawyers engage in combat rather than an independent cooperative collection of facts. Defense counsel deflect or suppress evidence suggesting guilt and urge triers to reach conclusions they know are false. They also silence their clients, even though the innocent (unlike the guilty) want to talk. Prosecutors resist post-conviction review that threatens the integrity of convictions.

To reform the system, Bakken argues for a new procedure in which an accused can plead innocent. “Prior to a judge’s acceptance of the plea, defense lawyers will have to affirm their clients’ innocence.”<sup>5</sup> The accused will consent to an interview with the prosecution. If an accused makes “a reasonable or plausible claim of innocence,”<sup>6</sup> prosecution offices will be required to conduct good-faith searches for exonerating facts, with the guidance and possibly direction of a neutral magistrate.<sup>7</sup> This will occur prior to trial when facts are fresh and more available. If unconvinced by the accused’s story and unable to find exonerating facts, the prosecutor could proceed to trial and introduce the accused’s pre-trial statements. In exchange, the prosecution would have to prove guilt to a standard higher than beyond a reasonable doubt and the accused would not be required to take an oath before testifying in his<sup>8</sup> own defense. If the jury found that the prosecution did not fully investigate the reasonable or plausible claims of innocence, it could infer that a full investigation would have found some facts or evidence indicating innocence. It could also infer conscience of innocence from the accused fully answering all of the prosecution’s pre-trial questions, his prompt claim of innocence following an accusation, or “his demeanour or actions.”<sup>9</sup> At trial, defense counsel would be prohibited from implying or arguing that witnesses they know to be truthful or accurate are lying or inaccurate.<sup>10</sup>

### *Review*

Bakken makes a number of strong claims but does not set out to rigorously prove many of them. He relies mainly on references to other scholars, court rulings, case examples, historical analyses, cross-jurisdictional comparisons, and some of the available social science literature. It can make for some interesting reading, but his reasoning is sometimes hard to follow and occasionally effectively absent. For example, he questions whether cross-examination at trial can uncover the truth, but while he amply demonstrates how it can undermine truthful incriminating

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<sup>5</sup> Page 162.

<sup>6</sup> Page 162.

<sup>7</sup> Defense counsel would have equal access to the magistrate.

<sup>8</sup> I use the masculine pronoun when referring to the accused simply because most criminal defendants and exonerees are male. Obviously, individuals who are not male are sometimes wrongly accused and convicted.

<sup>9</sup> Page 193.

<sup>10</sup> It is possible that Bakken is claiming this prohibition should apply even when the accused pleads not guilty rather than innocent.

evidence, he relies on a single oblique scholarly reference to suggest that it does a poor job of exposing false incriminating evidence,<sup>11</sup> the issue that seems most critical to his argument. His suggested reform is a bit surprising. Below, I comment on its specifics, but at a more general level one would think that if the adversarial system is so deficient reform should involve much more than a supplemental procedure tacked on to the current system, available in only a subset of cases, and even then only at the choice of the accused. Surely, we care about getting accurate verdicts in all cases, including in cases where the accused is guilty.<sup>12</sup>

Perhaps Bakken is starting with the most important reform: that which protects the innocent. This would be understandable. But there are still some curious elements of his analysis. For example, Bakken emphasizes how the adversarial system allows lawyers to conceal facts and hide the truth, yet his focus is explicitly on defense counsel, even though concealment of exculpatory evidence by the prosecution is a well recognized contributor to wrongful convictions.<sup>13</sup> Defence counsel do sometimes contribute to wrongful conviction by failing to adduce exculpatory evidence, but that it usually due to incompetence, laziness or inadequate resources rather than an attempt to take advantage of adversarial rules.<sup>14</sup> Indeed, one would think that in most cases defense counsel would not intentionally hide exculpatory evidence.<sup>15</sup>

Even more curious is the fact that Bakken makes almost no attempt to support the critical assertion that underlies his ultimate proposal: the inability to find and collect exonerating facts is

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<sup>11</sup> On p.129, he quotes Professor Park, who suggests that the greatest legal engine for the discovery of truth is probably not cross-examination but discovery and investigation: Roger Park, “Adversarial Influences on the Interrogation of Trial Witnesses” in Peter van Koppen and Steven Penrod, eds, *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (New York: Kluwer, 2003) at 131 and 166.

<sup>12</sup> Bakken himself says we must. For example, on p.33 he writes that “reforms have to be designed to prevent guilty people from escaping responsibility.”

<sup>13</sup> See, e.g., Samuel Gross et al, *Government Misconduct and Convicting the Innocent Bakken: The Role of Prosecutors, Police and Other Law Enforcement* (National Registry of Exonerations, September 1, 2020), online at:

[https://www.law.umich.edu/special/exoneration/Documents/Government\\_Misconduct\\_and\\_Convicting\\_the\\_Innocent.pdf](https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf), finding that concealing exculpatory evidence was the most common type of official misconduct, occurring in 44% of the first 2400 exonerations. Bakken recognizes that prosecutors withholding exculpatory evidence contributes to wrongful convictions (page 4).

<sup>14</sup> See, e.g., Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* (New York: Signet, 2001) at ch.9; Brandon Garret, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge, Mass.: Harvard University Press, 2011) at ch.6; Adele Bernhard, “Effective Assistance of Counsel” in Sandra Westervelt and John Humphrey, eds, *Wrongly Convicted: Perspectives on Failed Justice* (New Jersey: Rutgers University Press, 2001) at ch.11; Ellen Yaroshefsky, “Defense Lawyering and Wrongful Convictions” (2014), online at [https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1930&context=faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1930&context=faculty_scholarship)

<sup>15</sup> In some cases counsel could. The most obvious situation is where counsel might discourage an innocent accused from testifying in order to hide unfavourable aspects of his evidence, such as a criminal record. See Garrett, *ibid* at 162-163.

“the primary reason why innocent people are convicted.”<sup>16</sup> The assertion is not implausible, but neither is it self-evident. Bakken himself seems to acknowledge that the collection of facts will not help accused persons who committed the *actus reus* and whose innocence depends on a correct understanding of their mental state at the time (e.g., what they perceived or intended) or a correct application of a legal rule (e.g., an assessment of the reasonableness of actions taken in self-defense). Even when an accused did *not* commit the *actus reus*, when a wrongful conviction is a product of eyewitness misidentification, false confession, forensic error, perjured testimony, or racism, it will not always be true that further investigation could have uncovered the truth. A suspect who is incorrectly identified as the perpetrator, for example, will not always have an alibi or other proof that the witness is mistaken.<sup>17</sup>

Maybe this isn't critical. It is undeniable that in some cases further investigation could help establish innocence.<sup>18</sup> It does mean, however, that Bakken's reform will be of no use to some innocent accused and maybe even dangerous for them to pursue, given that they will be exposing themselves to potentially extensive pre-trial questioning.<sup>19</sup> Those accused will still have the chance to plead not guilty, but must rely on the hope that the jury will not make anything of the failure to plead innocent. This is another issue that, unfortunately, Bakken does not spend a lot of time considering: the effect of an innocence plea on the factually innocent who cannot benefit from it (a.k.a. the third verdict problem). He says that “they would retain all the rights they currently possess”<sup>20</sup> and refers briefly to jury selection procedures<sup>21</sup> and rather half-heartedly to an accused's ability to ask for a jury direction telling jurors not to draw an inference from the failure to plead innocent.<sup>22</sup> Additional analysis was needed.

Bakken's proposed procedure that would follow a plea of innocence is at times curious and at times incomplete. The requirement for defense counsel to affirm the accused's innocence is perplexing. This is partly because it not clear what defense counsel must actually assert. Bakken suggests it is their personal belief. Why it matters what a particular lawyer happens to believe is hard to fathom. It is even harder to understand why an innocent accused should be precluded from pleading innocent just because he has sceptical counsel. Surely what matters is whether the accused has admitted guilt to his representative.<sup>23</sup> This raises the question of whether, with a plea of

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<sup>16</sup> Page 129.

<sup>17</sup> Bakken himself refers to this example but does not follow it up.

<sup>18</sup> This is what contributes to many exonerations.

<sup>19</sup> Bakken recognizes this when discussing the example above of the misidentified suspect who has no proof of innocence: “By pleading innocent, he will have to tell prosecutors that he was home alone when the assault occurred. This kind of statement is virtually always a significant benefit for the prosecution” (p.172).

<sup>20</sup> Page 178.

<sup>21</sup> He quotes an article by Daniel Medwed arguing that a *voir dire* during jury selection could allow a lawyer to exclude from the panel prospective jurors who believe that factual innocence is a *sine qua non* for an acquittal: p.191, citing “Innocentrism” 2008 U Illinois L Rev 1549 at 1567-1568.

<sup>22</sup> He follows this up immediately by saying “Moreover, defendants might be in a better position by not requesting such an instruction,” since research suggests jurors might react negatively to it (p.191).

<sup>23</sup> An asserted belief in innocence does not necessarily imply that the accused has not admitted guilt. A lawyer could believe that the accused is mistaken, confused, mentally ill, or making a false confession to protect the real perpetrator.

innocence, the accused would be deemed to waive privilege over communications with his counsel. In his earlier article, Bakken indicated that the accused would,<sup>24</sup> but he leaves the matter unclear in the book.

Bakken offers almost no guidance regarding the prosecution's interview of the accused. He implies that it would be recorded and that defense counsel could be present, but does not explain where it would occur, how long it could last, whether breaks would be required, how many times it could occur (including whether it could follow an initial post-arrest interrogation), whether objections to specific questions could be adjudicated, whether there would be any limitations on topics or forms of questioning, whether certain tactics would be prohibited (like presentation of false evidence), whether procedures must be tailored to account for vulnerabilities of the accused (such as intellectual disability), and so forth. All we know is that the jury would be entitled to infer the accused was concealing information if he did not fully answer the prosecution's questions. An obvious risk is that an unregulated interview could generate a false confession or admission.<sup>25</sup> Another risk is that an accused, subjected to unfair questioning, would eventually stop answering, leading to the inference that he is hiding something. In either case, the innocent accused would be worse off than if he had not pled innocent; indeed, a false confession could be decisive at trial despite the higher burden of proof. None of this is to say that a fair and reasonable procedure for the interview could not be devised. It is simply to say that the details are critical.

Bakken makes the prosecution's obligation to conduct good-faith searches for exonerating facts – the primary benefit for the innocent accused – conditional on the accused making a “reasonable or plausible” claim of innocence. The jury would be the ultimate arbiter of when a claim is reasonable or plausible, but it seems that the prosecution would make the initial decision, presumably after the completion of the interview. This creates the risk that in some cases it could collect the statement (and maybe otherwise privileged communications between the accused and his counsel), conduct no searches, and argue at trial that the jury should not draw an adverse inference because the claim of innocence was plainly incredible. That could be a big risk for an innocent accused to assume, especially when the most he can hope for is an inference that a full investigation would have found some unknown facts or evidence indicating innocence to some unknowable extent. It is surprising that Bakken does not consider whether it would be wiser to call on the neutral magistrate, after the accused makes initial disclosure of his story and before follow-up questioning, to make a ruling binding on the prosecution as to whether the claim of innocence is reasonable or plausible.

Another protection given to the accused who pleads innocent is that the prosecution would have to prove guilt to a standard higher than beyond a reasonable doubt. Bakken suggests that the standard could be beyond any doubt (although not to a certainty). Whether a jury or judge would

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<sup>24</sup> *Supra* note 1 at 549, 567, 571.

<sup>25</sup> For an overview of how factors like lengthy questioning, specific interview tactics (like maximization-minimization and presentation of false evidence), and suspect-vulnerabilities can contribute to false confession, see Saul Kassin et al, “Police-Induced Confessions: Risk Factors and Recommendations” (2010) 34 *Law & Hum Behav* 3.

be able to appreciate and apply this subtle difference is far from clear.<sup>26</sup> Bakken is also inconsistent about precisely when the enhanced standard would be required. At one point, he states that it would be required in cases “where defendants plead innocent and consent to being interviewed by prosecutors.”<sup>27</sup> At another point, he states that the accused would be entitled to the higher standard only if the jury finds that he “fully answered the questions of the prosecution and made a reasonable or plausible claim of innocence.”<sup>28</sup> The latter would mean that an accused who pled innocent could never be confident of the standard that will be applied, or even if the different members of the jury all applied the same standard.

Bakken would grant an accused who pled innocent the right to testify at trial without taking an oath.<sup>29</sup> The goal would be to allow him to avoid a perjury charge if he was acquitted but the prosecutor disbelieved his story. But Bakken gives no consideration to how jurors and judges might react to unsworn testimony. They might be inclined to give it less or no credit, making the risk of a perjury charge the least of the innocent accused’s worries.

I do not mean to be harshly critical of Bakken’s book. He makes some valuable observations. The accused does need greater access to the resources of the state; investigators do need to seriously consider and explore the defense position; additional facts can help some innocents.<sup>30</sup> The seeds of a potentially important reform are present. Bakken just needed to let them germinate.

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<sup>26</sup> Indeed, Bakken himself criticizes current definitions of beyond a reasonable doubt and cites research indicating that jurors do not understand the instructions judges give them (p.176-177).

<sup>27</sup> Page 174.

<sup>28</sup> Page 193.

<sup>29</sup> Whether he would otherwise have to promise to tell the truth is not stated.

<sup>30</sup> An excellent example of all three can be found in the case of *State of Florida v. Gerald Wayne Lewis*, described in Chris Fabricant, *Junk Science and the American Criminal Justice System* (New York: Akashic Books, 2022) at 112-120.