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Texas, Step Up to the Plate and Compensate: Face to Face with Joyce Ann Brown, Wrongfully Convicted Never to Receive Compensation

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COMMENTS

TEXAS, STEP UP TO THE PLATE AND COMPENSATE: FACE TO FACE WITH JOYCE ANN BROWN, WRONGFULLY CONVICTED NEVER TO RECEIVE COMPENSATION

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† Candidate for J.D., St. Mary's University School of Law, May 2002; B.A., Political Science, Baylor University, May 1999. First and foremost, I would like to thank God for giving me the strength and determination to draft this comment. I would also like to thank both the members of the Editorial Board and the writers for their help with this comment. In addition, I would like to thank my individual editors, Norma Ortiz and Scott P. Craig, for their hard work and dedication in developing this comment. Furthermore, I would like to thank Art Hall for his guidance with this comment. Words could not express how much I thank my parents, Wanda and Juluis Brooks, for their continued love and support. If it were not for my parents instilling in me good morals and values, it would be almost impossible to make it in a world filled with trials and tribulations. However, it is through my parents that I have learned that nothing or no one who comes against me shall prosper. This comment is dedicated to Joyce Ann Brown, and all the other innocent people that are wrongfully convicted never to receive compensation.

I. INTRODUCTION

> But I saw something else and what I saw sent a cold shiver of fear through my body. They wanted to find me guilty. I could see it in their eyes. I saw hatred for me on their faces. One of "them" had been murdered and one of "us" was accused. A Holocaust survivor had been shot in the head and a black nigger woman was on the stand. At that moment, I knew I had been had.[1]

Face to face with Joyce Ann Brown, I found that she is not a woman who allows herself to be filled with anger and hostility.[2] Nor is she a

1. JOYCE ANN BROWN, JOYCE ANN BROWN: JUSTICE DENIED 22 (1990) (stating Joyce Ann Brown's story of her wrongful conviction). Joyce's heart stopped, her hands were shaking as she read in the headline of the Dallas Morning News that the police were looking for her in connection with a robbery and murder. *See id.* at 12-13. Knowing that there was some misunderstanding, Joyce decided to go down to the police station to straighten out the mistake. *See id.* at 13. Before she took her final step out the door, Joyce called an attorney. *See id.* She explained the situation, and to her dismay, he advised her not to go by herself. *See id.* "Why," she thought, "attorneys are for guilty people." *Id.* Joyce and her attorney arrived at the police station and repeatedly stated that she was at work at the time of the robbery. *See id.* The police accused her of lying: "We know you left work, went and robbed that store, and returned to work. We have an eyewitness who has identified you." *Id.* Her attorney requested a lineup; however, the officer said that one was not needed because the witness had already identified Joyce from a photograph lineup. *See id.* Joyce then realized her past had caught up with her. *See id.* From her life of past sin, she remembered the voice of the police officer who told her that her picture was on file even after the charges were dropped. *Id.* Joyce's nightmare began. *See id.* at 14. What she did in the dark surfaced to the light. *See id.* Nevertheless, her past could never equal the injustices she would face for a crime she did not commit. *See id.*

2. *See* Interview with Joyce Ann Brown, Author of JOYCE ANN BROWN: JUSTICE DENIED, in Dallas, Tex. (Sept. 16, 2000). At one point in the interview, Joyce Ann Brown

woman who feels sorry for herself.[3] She is a strong Black woman, whose relentless determination allows her to remain formidable beyond all definition.[4] Determined to fight for her freedom, Joyce Ann Brown went to prison maintaining the mindset that she was coming home.[5] She refused to let the prison system dehumanize or demoralize her.[6]

Sentenced to life in prison, Joyce Ann Brown served over nine years before the district attorney dropped the charges that lead to her wrongful conviction.[7] Joyce is not alone, as many people wrongfully incarcerated in the United States prison system struggle daily to prove their innocence.[8] Although the Constitution clearly states that no state shall deprive one of their liberty without due process of law,[9] in reality, wrongful convictions still occur and the innocent go without compensation for the injustices they have faced.

Joyce Ann Brown is not alone in her wrongful conviction.[10] In a study reviewing four hundred cases of wrongful convictions, a devastating

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speaks about life in prison and how she was able to create some positive out of the negative. *See id.* She accomplished this by acquiring cooking utensils, pans, and food so that she could make home cooked meals for her and her cellmates. *See id.*

3. *See id.*

4. *See id.* Joyce believes that it was not luck, which she considers the devil's word, but being blessed that allowed her to be freed from her wrongful conviction. *See id.*

5. "With thanks to the Lord, who never left me, forsook me or deceived me, and by whose Grace so many came into my life to help free me from bondage." BROWN, *supra* note 1, preface v; Interview with Joyce Ann Brown, *supra* note 2. "[W]hen I went to prison, I went into prison with a mindset that I was coming home and that I wasn't going to do a life sentence. I did not get institutionalized when I was in prison because I wouldn't allow myself to get institutionalized." Interview with Joyce Ann Brown, *supra* note 2.

6. *See* Interview with Joyce Ann Brown, *supra* note 2. Joyce even became a sports fanatic in prison and watched an enormous amount of sports on television when she could. *See id.* She figured that as long as she kept herself occupied she avoided the stigma and trauma that jail often brands on one's soul. *See id.*

7. *See* BROWN, *supra* note 1, at 177. "[A]t last after nine years, five months and twenty-four days, my nightmare was over." *Id.*

8. *See* James Cleary, *When the Prisoner Is Innocent: Wrongful Convictions Are a Legal Fact of Life. How Do Compensation Boards Work - and Do They Work?*, 14 HUM. RTS. 42, 43 (1987) (demonstrating that there are incarcerated prisoners who are wrongfully convicted).

9. *See* U.S. Const. amend. XIV, § 1. The Due Process Clause reads as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

10. *See generally, e.g.*, Cleary, *supra* note 8, at 43 (giving the details of a wrongful conviction); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1317-21 (1997) (describing the increased media attention on the releases of innocent prisoners who were wrongfully

twenty-three lives ended in executions.[11] Furthermore, the National Institute of Justice found twenty-eight instances of wrongful convictions for sexual assault and murder in which the innocent individual had served an average of seven years in prison.[12] These innocent victims of the justice system, who have been wrongfully convicted, must be compensated for the injustices they suffered.

Texas claims to provide relief via a statute that allows compensation for those deprived of due process.[13] However, examination of the compensation statute reflects how difficult it is for a person to actually obtain relief for wrongful imprisonment. In order to be compensated, one must show that he or she: (1) has either completed or has partially served the sentence in a state institution; (2) plead "not guilty" to the charge that led to the wrongful conviction; (3) is actually innocent of the crime for which they were convicted; and (4) received a full pardon for the convicted crime.[14]

Thus, a person could meet all the requirements of the compensation statute, as in Joyce's case, and find that there are still shortcomings even if all of the elements are met. One of the shortcomings of the statute is

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convicted of crimes); James McCloskey, *Convicting the Innocent*, CRIM. JUST. ETHICS 2 (1989); Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1091 (1970) (citing a wrongfully convicted person as speculating that there are thousands wrongfully convicted).

11. *See* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 78 (1999) (examining a study conducted by Michael L. Radelet, Hugo Adam Bedau, and Constance E. Putnam which offered instances of wrongful conviction). *See generally, e.g.*, RUTH BRANDON & CHRISTIE DAVIES, WRONGFUL IMPRISONMENT: MISTAKEN CONVICTIONS AND THEIR CONSEQUENCES (1973) (highlighting the impact of wrongful convictions in society); EDWARD RADIN, THE INNOCENTS (1964) (discussing the subject of wrongful convictions); MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED (1991) (illustrating the factors and occurrences of wrongful convictions).

12. *See* EDWARD CONNERS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1986); Bernhard, *supra* note 11, at 75 (evaluating a report of the National Institute of Justice about wrongful convictions for those accused of sexual assault and murder).

13. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (Vernon 1997).

14. *See id.* The Claimants Entitled to Compensation code reads as follows:

> A person is entitled to compensation if the person:
> (1) has served in whole or in part a sentence in prison under the laws of this state;
> (2) pleaded "not guilty" to the charge for which he was convicted and that led to the imprisonment;
> (3) is not guilty of the crime for which he was sentenced; and
> (4) has received a full pardon for the crime and punishment for which he was sentenced.

Id.

the requirement that the individual obtain a pardon.[15] Obtaining a pardon does not eliminate a guilty record or show a finding of innocence, but merely serves as an act of grace from the governor.[16] Consequently, individuals who want to maintain their innocence may feel that in order to receive a pardon they must admit guilt for a crime they did not commit.[17] Additionally, the seemingly simple task of removing the wrongful conviction from a person's criminal record becomes complex in the face of the requirements of the expunction statute, which allows a person who is wrongfully convicted to clear his or her record.[18]

While some may view compensation of the wrongfully convicted as unnecessary and unsuitable, compensation is necessary to fight the injustices which wrongful convictions impose. Compensation helps to ensure that individuals receive an equitable end to an unfortunate situation. It is one thing society can do to work towards healing the harm caused by being wrongfully convicted.

This comment examines the problems the wrongfully convicted face in regard to not receiving compensation. Part I offers an introduction to Joyce Ann Brown's story. It also details the problems she and others who are wrongfully convicted face, especially regarding due process and compensation. Part II explores some of the factors that lead to most cases of wrongful convictions, including incorrect eyewitness testimony, cross-racial identification, and biased jury composition.[19] Part III assesses the existing law on wrongful convictions and demonstrates the inadequacies found in the law for those who are wrongfully convicted. Part IV offers a proposal, which incorporates a revised statute, allowing the innocent to receive compensation for wrongful convictions. Other alternatives will also be offered to help promote compensation for individuals who are

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15. A pardon is an "act or an instance of officially nullifying or other legal consequences of a crime . . . usually granted by the chief executive of a government." BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). *See generally* TEX. CONST. art. IV, § 11 (explaining that the pardoning power in Texas rests ultimately with the governor).

16. *See generally* TEX. CONST. art. IV, § 11 (giving the governor the power to grant reprieves and commutations of punishment and pardons); *Ex parte* Nelson, 209 S.W. 148 (Tex. Crim. 1919) (describing the power of clemency granted to the governor, which is subject to no limitations by the legislature, but only to constitutional limitations).

17. *See* Interview with Joyce Ann Brown, *supra* note 2. Joyce knew that she did not want to pursue a pardon. *See id.* For her, a pardon was like telling her that she committed the crime and the state was just going to dismiss it. *See id.* An expunction was the only acceptable remedy for Joyce. *See id.*

18. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01 (Vernon Supp. 1999).

19. *See* Bernhard, *supra* note 11, at 76. *See generally* EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (Leonard W. Levy ed., 1970); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

wrongfully convicted. Finally, Part V concludes by reiterating the fact that wrongfully convicted individuals must be compensated in order to establish legitimacy in the justice system and right the wrongs of the past.

II. Background on Wrongful Convictions

A. *Factors That Lead to Wrongful Convictions*

There are several common factors that lead to wrongful convictions.[20] They often include: incorrect eyewitness testimony, cross-racial identification, and all-White jury pools.[21] Each factor listed above must be addressed in order to demonstrate how wrongful convictions can occur.

1. Eyewitness Testimony

Although eyewitness testimony is the most important evidence in criminal cases, incorrect eyewitness testimony presents the premier cause of wrongful convictions.[22] One study found that half of all wrongful convictions are the result of incorrect eyewitness testimony.[23] Furthermore, it is estimated that more than 4,250 innocent Americans are wrongfully convicted each year due to inaccurate eyewitness identification.[24] In addition, the National Institute of Justice reported that in approximately eighty-two percent of cases, the accused were incorrectly identified.[25]

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20. *See* Bernhard, *supra* note 11, at 76 (introducing a study which shows the common factors of wrongful conviction). These common factors include: incorrect eyewitness testimony, witness perjury, and poverty. *Id.* For the purpose of a limited discussion, the analysis will only include eyewitness testimony, cross-racial identification, and jury composition. *See also* Interview with Joyce Ann Brown, *supra* note 2 (commenting on some of the factors which played a great role in Joyce's wrongful conviction).

21. *See* Bernhard, *supra* note 11, at 76 (utilizing a publication by Edwin M. Borchard to emphasize a variety of errors that lead fact finders to erroneous conclusions).

22. *See id.* at 75; Psychological Issues in Eyewitness Identification 3 (Siegfried L. Sporer et al. eds., 1996) (showing that, although eyewitness testimony is heavily relied upon, errors occur in some percentage of the testimony); David M. Shofi, Comment, *The New York Courts' Lack of Direction and Discretion Regarding the Admissibility of Expert Identification Testimony*, 13 Pace L. Rev. 1101, 1141 (1994).

23. The number of wrongful convictions is estimated at 8,500 per year in the United States alone. *See* Elizabeth F. Loftus, *Ten Years in the Life of an Expert Witness*, 10 Law & Hum. Behav. 241, 242-43 (1986) (citing a 1983 Ohio State University Doctoral Dissertation). "If faulty eyewitness testimony is a major cause of wrongful conviction (or erroneous verdicts more generally), perhaps the study of witnesses, with an aim towards eventually improving that testimony, could lead to a reduction in errors." *Id.*

24. Andre A. Moenssens et al., Scientific Evidence in Civil and Criminal Cases § 19.15, 1171-1172 (4th ed. 1995). *See generally* United States v. Wade, 388 U.S. 218 (1967) (illustrating the potential for improper influences on eyewitnesses regarding the lineup procedure).

25. *See* Conners et al., *supra* note 12. The National Institute of Justice claims that twenty-three out of twenty-eight cases involve accused persons who were wrongfully iden-

These figures serve as a wake-up call for those who underestimate and ignore the influence of incorrect eyewitness testimony.

While eyewitness testimony is important to the jury in its function as fact finder, this testimony can lead them into a valley of great deception.[26] It has been reasoned that a principal cause of wrongful convictions is "the fact that, in general, juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers."[27] Juries tend to believe the testimony offered by an eyewitness even when the evidence is extremely doubtful.[28] Many jurors admit that presenting positive eyewitness identification is the most devastating and persuasive evidence presented in criminal trials.[29] Jurors often feel "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[30] Thus, innocent victims are easily convicted because jurors are often unaware that

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tified. *Id. See also* Bernhard, *supra* note 11, at 75 (exploring specific instances when the accused were incorrectly identified).

26. *See* William D. Gross, Comment, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307 (1999) (clarifying that while eyewitness testimony is important, it can also be unreliable).

27. PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 19 (1965). Scientists believe court testimony is unknowingly distorted and invented. *See id.* Dr. Daniel Wright is among the scientists who believe this to be true. *See id.* He works for the Eyewitness Research Unit and feels that mistaken identity and conviction are more prevalent than we think. *See id.* This is largely because juries trust eyewitness evidence when there is no forensic evidence on which to rely. *See id. See* Anjana Ahuja, *Can You Believe What You See?*, TIMES (London), Sept. 10, 2001, *available at* 2001 WL 4928641. *See also* Hector Becerra, *Yet Another Reversal with a Witness Issue*, L.A. TIMES, Aug. 22, 2000, at 18 (quoting Dr. Elizabeth F. Loftus, an expert on eyewitness testimony, as saying, "all the other factors that [lead] to a person's wrongful conviction . . . don't add up to the damage caused by bad [eyewitness] testimony").

28. *See* WALL, *supra* note 27, at 21; Gross, *supra* note 26, at 313; *see also* Roger B. Hanberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1022 (1995) (finding that juries usually overestimate the accuracy of eyewitness testimony).

29. *See* Watkins v. Sowders, 449 U.S. 341, 352-53 (1981); Manson v. Brathwaite, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) (dealing with the notion of juries being too ready to believe eyewitness evidence). There are psychological studies that highlight the weakness of eyewitness testimony. *Brathwaite*, 432 U.S. at 120. Moreover, police officers and those who have witnessed traumatic events are likely to be erroneously believed based on a false belief that they have the best memories. *See* Becerra, *supra* note 27.

30. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 237-47 (1979), *quoted in* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting). This same incident occurred in Joyce's case: "'Is the woman who robbed you in the store when your husband was shot in this courtroom?' Mrs. Danziger looked straight at Joyce and answered, 'It's that woman sitting right there.'" *See* BROWN, *supra* note 1, at 18.

eyewitness testimony can be unreliable,[31] and jurors are granted immunity once they reach a verdict, unless it can be shown that they acted with malice.[32] Furthermore, juries are not liable for wrongful verdicts rendered due to mistaken identity.[33]

William Jackson was convicted due to incorrect eyewitness identification.[34] He spent five hard years in the Ohio state penitentiary for the rapes of two women.[35] After five years, the authorities finally discovered their error.[36] They realized the wrong man was serving time for a crime he did not commit.[37] Besides the fact that both Jackson and the actual perpetrator had similar physiques, a face-to-face comparison showed only a rough resemblance.[38] However, two White women positively identified William Jackson as the man who committed the crime.[39] Although William provided several alibi witnesses, a White jury still convicted him.[40]

A similar instance of incorrect eyewitness testimony led to Joyce Ann Brown's wrongful conviction. A major factor in Joyce Ann Brown's wrongful conviction was incorrect eyewitness testimony. Even though Joyce had thirteen alibis who said she was at work, none of them were taken into account.[41] Moreover, not only did the eyewitness wrongfully

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31. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 946 (1984) (recognizing a tendency of jurors to believe eyewitness testimony even under doubtful circumstances); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 994-95 (1979).

32. *See* Bernhard, *supra* note 11, at 87 (considering that when jurors convict someone through unreliable eyewitness testimony they are free from blame); *see, e.g.*, Anthony v. Baker, 955 F.2d 1395 (10th Cir. 1992); White v. Frank, 855 F.2d 956 (2d Cir. 1988); Nardelli v. Stanberg, 377 N.E.2d 975 (N.Y. 1978); Martine v. City of Albany, 364 N.E.2d 1304 (N.Y. Ct. App. 1977).

33. Witnesses are protected under the doctrine of immunity as the courts wish that evidence not be withheld because of a fear of reprisal for a mistaken testimony. *See* Bernhard, *supra* note 11, at 87; *see also* United States v. Brien, 59 F.3d 274, 277 (1st Cir. 1995) (explaining that expert testimony involves cost and risk, and trial judges are typically afforded discretion as to its exclusion).

34. *See* James Feron, *Identification Procedure in Brink's Case Attacked*, N.Y. TIMES, Sept. 24, 1982, at B2; *60 Minutes*: *Open-and-Shut Case* (CBS television broadcast, Feb. 27, 1983); *see also* Johnson, *supra* note 31, at 935 (discussing the problem of cross-racial identification and addressing possible solutions).

35. *See 60 Minutes*, *supra* note 34; *see also* Johnson, *supra* note 31, at 935.

36. *See 60 Minutes*, *supra* note 34; *see also* Johnson, *supra* note 31, at 935.

37. *See 60 Minutes*, *supra* note 34; *see also* Johnson, *supra* note 31, at 935.

38. *See 60 Minutes*, *supra* note 34; *see also* Johnson, *supra* note 31, at 935.

39. *See 60 Minutes*, *supra* note 34; *see also* Johnson, *supra* note 31, at 935.

40. *See* Johnson, *supra* note 31, at 935.

41. *See* Interview with Joyce Ann Brown, *supra* note 2. Despite thirteen White persons testifying to Joyce Ann Brown being at work, having time cards filled out, and other paperwork, an all White jury still found her guilty. *See id.*

identify Joyce, she also misidentified David Shafer, the alleged driver of the getaway car.[42] However, the authorities believed Shafer was telling the truth.[43] They released him twenty-four hours after he was arrested and noted how Mrs. Danziger, the same lady that misidentified Joyce, misidentified Mr. Shafer.[44]

The possibility that misidentification played a role in Joyce's case was never considered. Joyce adamantly believes race played a factor in the release of Shafer as well as in her imprisonment.[45] It should have been unreasonable to believe that the same witness who had misidentified Mr. Shafer could be trusted to properly identify Joyce.[46]

2. Cross–Racial Identification

In addition to the thirteen people who could place Joyce at work during the time of the robbery, she had a time card and other paperwork.[47] Yet, an all-White jury still found her guilty and sentenced Joyce to life in prison.[48]

Further exacerbating the dilemma of inaccurate eyewitness testimony is that of cross-racial identification. The phenomenon of cross-racial identification, also referred to as the "own race effect," occurs when one identifies a member of a different race.[49] Scientific proof illustrates that

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42. *See* BROWN, *supra* note 1, at 14-16. At the time the police booked Joyce Ann, they asked her about David Shafer. *See id.* She repeatedly told the officers that she did not know anybody by that name. *See id.* Even when he was pointed out to her she did not know who he was or why he was there. *See id.*

43. *See id.* at 16. The police finally believed Shafer, but it was not until they had pointed a gun at him, accused him of stealing furs, called him a "nigger lover," and arrested him for aggravated robbery and capital murder. *See id.*

44. *See id.* Despite being wrong in their assessment of Shafer's guilt, the police released him without an apology or an explanation. *See id.* Shafer even had to pay $500 to have his record cleared. *See id.*

45. *See* Interview with Joyce Ann Brown, *supra* note 2.

46. *See id.* When asked the question, "Why do you believe the white man was released after they investigated his story, and they never considered misidentification on your behalf?" Joyce responded, "Ooh, I don't even know why you asked me that question. Because you already answered it just saying 'he was white.'" *Id.*

47. *See* BROWN, *supra* note 1, at 18-19. The prosecution made the claim that there was a thirty-minute gap in Brown's day that was unaccounted for, and that was all that was necessary. *See id.* at 19. This would have included leaving her desk, changing, driving three miles to the fur store, robbing it, shooting the owner, changing again, and heading back to work during noon traffic in Dallas. *See id.* at 19.; Interview with Joyce Ann Brown, *supra* note 2.

48. *See* Interview with Joyce Ann Brown, *supra* note 2.

49. *See* Johnson, *supra* note 31, at 937 (showing that cross-racial identification is also referred to as the "own-race effect").

people of one race have difficulties in identifying people of other races.[50] Cross-racial identification occurs disproportionately in cases wherein a person is deemed to have been wrongfully convicted.[51] In fact, within the last fifteen years, psychologists have found empirical evidence linking cross-racial identification and incorrect eyewitness identification.[52]

When a person identifies a member of another race, the identification is four times more likely to be incorrect than when the person identifies a member of his own race.[53] For instance, a study conducted on convenience store clerks concluded that White clerks incorrectly identified Black customers at a rate of 54.8 percent, while only misidentifying White customers 34.9 percent of the time.[54] This disparity has also been recognized by a federal court of appeals.[55] Who noted that "[t]he available data . . . unanimously supports the widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race."[56]

Furthermore, when it comes to instances of interracial crimes, rates of misidentification increase.[57] In fact, when identification involves a minority group suspect and a majority group identifier, error is more likely to occur.[58] For example, in *People v. McDonald*,[59] the crux of the case

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50. *See* Gross, *supra* note 26, at 315 (referring to *United States v. Telfaire*, which demonstrates the difficulty of one race identifying another).

51. *See* BORCHARD, *supra* note 19, at 74-79, 277-80 (discussing several cases involving cross-racial identification when the identification is incorrectly made); WALL, *supra* note 27, at 75; Johnson, *supra* note 31, at 935-36 (stating that a number of wrongful convictions can be attributed to cross-racial identification).

52. *See* Johnson, *supra* note 31, at 936 (reporting the greater number of errors of mistaken identity in cases involving cross-racial identification, and despite evidence pointing to errors committed by witnesses in cross-racial identification, most judges still do not allow defense counsel to warn the jurors of this potentially fatal form of evidence).

53. *See id.* at 942-43.

54. *See id.* at 939-46 (offering a study to support the claim that Whites incorrectly identify Blacks more than Whites).

55. *See* United States v. Telfaire, 469 F.2d 552, 559 (D.C. Cir. 1972) (Bazelon, C.J., concurring) (holding that the trial court harmlessly failed to give a *sua sponte* identification instruction). *See generally* Macklin v. United States, 409 F.2d 174 (D.C. Cir. 1969) (establishing the requirement necessary to offer a *sua sponte* identification instruction).

56. *Telfaire*, 469 F.2d at 559 (Bazelon, C.J., concurring) (showing the most readily available non-exhaustive data states the difficulty in cross-racial identification); *see also* United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985) (discussing the existence of studies which illustrate that cross-racial identifications are unreliable).

57. *See* Johnson, *supra* note 31, at 949 (concluding from data that error occurs more often in interracial crimes than from intra-racial crime). The risk for misidentification is highest when there is a White victim coupled with a Black defendant. *Id.* This type of own-race identification is strongest when White persons seek to identify Black persons. *Id.*

58. *See id.* (looking at the likelihood of error when identification is made by a person of another race).

rested on cross-racial identification; the case was overturned due to the fact that an expert witness was not allowed to rebut eyewitness testimony.[60]

Differences regarding cross-racial identification are not representative of a particular group's conscious control.[61] Furthermore, in order not to be perceived as racist, jurors may deny the effects of cross-racial identity because it is perceived as discriminatory if the accused "all look alike" to the jurors.[62] While eyewitness testimony is admissible in most cases, the law does not require an expert witness to point out possible inaccuracies that can occur due to cross-racial identification testimony.[63] In addition, most judges do not allow the defense counsel to inform the jury of possible cross-racial identification errors.[64] With this in mind, cross-racial identification is an important factor in the wrongful conviction of innocent people and needs to be addressed by the legal community.

3. Jury Composition

Jury composition is also a major factor leading to wrongful convictions.[65] Most juries in the United States are generally all White.[66] Thus, with all White juries, issues such as incorrect eyewitness testimony and cross-racial identification places a minority defendant at a disadvantage. Furthermore, in failing to explore racial bias regarding jury composition,

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59. 690 P.2d 709 (Cal. 1984).

60. *See id. See also* Gross, *supra* note 26, at 315 (establishing the fact that cross-racial identification issues arise in cases, and the courts need to recognize these inconsistencies).

61. *See* Johnson, *supra* note 31, at 941. Even in a study offering monetary awards, people still incorrectly identified people of another race. *Id.* This points to the idea that such faulty identification is not within the conscious control of people. *See id.*

62. Gross, *supra* note 26, at 315. "[S]ome jurors may deny the existence of the own-race effect in the misguided belief that it is merely a racist myth exemplified by the derogatory remark, 'they all look alike to me,' while others may believe in the reality of this effect but be reluctant to discuss it in jury deliberations for fear of being perceived as bigots." *Id.*

63. *See* United States v. Brien, 59 F.3d 574 (1st Cir. 1995); Gross, *supra* note 26, at 315.

64. *See* Johnson, *supra* note 31, at 936; *see also* McFarland v. Smith, 611 F.2d 414, 416-17 (2d Cir. 1979); United States v. Skillman, 442 F.2d 542 (8th Cir. 1971), *cert. denied*, 404 U.S. 833 (1971); State v. Reynolds, 639 P.2d 461, 464 (Kan. 1982); People v. Flinnon, 260 N.W.2d 106 (Mich. Ct. App. 1977); People v. Hearns, 18 N.E.2d 922, 923 (N.Y. 1963).

65. *See* Sheri Lynn Johnson, *Black Innocence and the White* Jury, 83 MICH. L. REV. 1611, 1613 (pointing out that racial prejudice still occurs in all White juries). The Supreme Court has yet to consider the matter of the effect of race in wrongful convictions. *See id.*

66. *See generally* JON M. VAN DYKE, JURY SELECTION PROCEDURES 28-32, app. G (1977) (showing that non-Whites are underrepresented in juries, thereby making juries mostly White); Hayward R. Alker, Jr., et al., *Jury Selection as a Biased Social Process*, 11 LAW & SOC'Y REV. 9, 33 (1976) (stating that African and Asian Americans are underrepresented in juries); Johnson, *supra* note 65, at 1616.

the Supreme Court has been lenient in applying standards of proof regarding racial discrimination in the jury venires.[67] For example, the case of *Castaneda v. Partida*[68] demonstrates that standards are more stringent in cases that require proof of purposeful discrimination rather than in challenges of racial prejudice due to a jury.[69] The Supreme Court held in the case of *Batson v. Kentucky*[70] that a prosecutor could exclude a juror solely on account of his race; if the prosecutor sets forth any race-neutral reason, the defense still must prove purposeful racial discrimination.[71]

Moreover, in four criminal trials, in which the defendants were Black, it was found that racial prejudice had an influence on the jury in all four cases.[72] In addition, some jurors felt that Blacks should be convicted simply because of their race.[73] Other jurors admitted to having negative and derogatory views of Blacks that influenced their rulings.[74] Also, there are significant differences in the rates of convictions of Black and White defendants.[75] For instance, seventy-seven percent of Black defendants were

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67. *See* Johnson, *supra* note at 65, at 1614. The Supreme Court has cut back on the use of preemptory challenges and has been unsympathetic to arguments that racial prejudice has infected jury deliberations. *See id.* In addition, the Supreme Court has been unsympathetic to arguments claiming that racial prejudice impacted a jury's deliberation process, especially as it relates to death penalty cases. *See id.* at 1615. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (illuminating where the Court has been unwilling to take into account racial disparities).

68. 430 U.S. 482 (1977).

69. *See id.* The case essentially revolves around whether the state of Texas (in the person of Castenda, the sheriff) was able to rebut Partida's claim of discrimination against Mexican Americans during grand jury selection. *See generally id.*

70. 476 U.S. 79 (1986) (holding that the prosecution must exercise preemptory challenges to remove from the venire members of the defendant's race).

71. *See generally id.* at 96-98 (explaining the factors which lead to an inference of purposeful discrimination).

72. *See* Hagan & Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. SOC. 329 (1982); *see also* Johnson, *supra* note 65, at 1619 (explaining the results of twenty-three trials between January 1954 and June 1955 that demonstrated racial prejudice).

73. *See* Dale W. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 23 (reporting that one juror voiced there was nothing wrong with convicting an individual based on race); *see also* Johnson, *supra* note 65, at 1619 (looking at situations when White defendants are acquitted and Black defendants are convicted).

74. *See* Hagan & Albonetti, *supra* note 72, at 329; *see also* Johnson, *supra* note 65, at 1619 (noting jurors expressed wanting to convict defendants solely because they were Black).

75. *See* Jules B. Gerard & T. Rankin Terry, Jr., *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 WASH. U. L.Q. 415, 436-37 (1970) (studying differences in conviction rates of Black from White defendants); *see also* Johnson, *supra* note 65, at 1620 (reporting the findings of three studies that demonstrated substantial differences in the conviction rates for Black versus White defendants).

convicted of crimes, whereas all-White juries convicted only thirty-three percent of White defendants.[76]

The race of the defendant has an impact on guilty verdicts. White individuals are more likely to find a Black defendant guilty than a White defendant in a similar situation or circumstance.[77] The victim's race also plays a part in the sentencing of Blacks when jurors are White and the victim is White.[78] In that particular case scenario, the Black defendant is convicted sixty-five percent of the time.[79] However, when the victim is Black, only thirty-two percent voted for conviction of the Black defendant.[80] Thus, more weight is attributed to the defendant's guilt if the victim is White rather than Black. Jury verdicts, therefore, are affected by racial bias.

III. THE LAW ON WRONGFUL CONVICTIONS

A. *The Constitution of the United States*

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[81]

The Supreme Court has identified two basic principles required by the Fourteenth Amendment's Due Process Clause: fundamental fairness and rationality.[82] Furthermore, the Supreme Court has held that states do

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76. *See* Gerard & Terry, *supra* note 75, at 430 (noting differences in the conviction rates of Black and White defendants); *see also* Johnson, *supra* note 65, at 1621 (demonstrating a significant disparity in the conviction rates of Black and White defendants).

77. *See* Johnson, *supra* note 65, at 1625 (detailing findings based on external validity, where problems might arise due to the fact that subjects know they are being studied).

78. *See id.* at 1634 (utilizing a study that looked to see if race played a factor in the decisions of White jurors when faced with a Black defendant).

79. *See id.* (highlighting a study which indicates that a Black defendant faces a challenge in proving his innocence to a White jury).

80. *See id.* (revealing that Black victims must struggle in the face of an all White jury to win the justice they seek).

81. U.S. CONST. amend. XIV, § 1.

82. *See* Schad v. Arizona, 501 U.S. 624, 637 (1991). There cannot be one single criterion for which courts must look to meet with due process; however, it is urged that courts follow a sense of appropriate specificity when dealing with the due process concepts of fundamental fairness and rationality. *See id. See also* Kelli Hinson, Comment, *Post-Conviction Determination of Innocence for Death Row Inmates*, 48 SMU L. REV. 231, 235 (1994).

not violate the Due Process Clause unless they offend either a fundamental principle of justice or a principle that would shock the conscience.[83] The Supreme Court, however, usually does not use the Due Process Clause to regulate criminal procedures in the states.[84] Thus, the State of Texas has enumerated many constitutional safeguards through its Bill of Rights.[85] Therefore, if one is convicted for a crime in Texas which he did not commit, the conviction would violate fundamental fairness and shock the conscience, thereby violating one's constitutional rights. To redress this violation, an individual is entitled to receive compensation.

Violating one's constitutional rights by sentencing him to a lifetime in prison at least calls for some type of compensation. No amount of money could adequately compensate Joyce for the life she lost or the life of her son Lee Jr.[86] According to Joyce, prison authorities reminded her that she was less than human when they refused to grant her permission to attend her son's funeral, despite Joyce not having one single rule infraction in four years.[87] The last words spoken by her son were, "Mama, when are they going to let you out? We don't have a family anymore."[88] The state's actions violated both the lives and liberty of Joyce and her family. Granting Joyce compensation is the least the state of Texas could do.

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83. *See* Speiser v. Randall, 357 U.S. 513, 523 (1958) (citing Snyder v. Massachusetts, 291 U.S. 97 (1934), which finds that the state may not burden the law so as to violate the traditional understanding of justice that is deemed to be fundamental within society); *see also* Rochin v. California, 342 U.S. 165, 169 (1952) (holding that due process requirements "inescapably impose upon this Court an exercise of judgment in order to ascertain whether they offend those canons of decency and fairness . . . of English-speaking peoples").

84. *See* Medina v. California, 505 U.S. 437, 442-43 (1992) (stating that "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure") (quoted in Spencer v. Texas, 385 U.S. 554, 564 (1967)).

85. TEX. CONST. art. I, § 19. The Texas Due Process Clause states, "no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land." *Id.*

86. *See* BROWN, *supra* note 1, at 107. "Your son Lee shot himself in the head." *Id.* This is what Joyce read in a letter to her about her son. *See id.* Unable at times to call, Joyce had to wait for letters of her son's condition as she continued to serve a sentence for a crime she did not commit. *See id.* at 108.

87. *See* BROWN, *supra* note 1, at 108-09. "The next morning, April 5, I was awakened around mid-morning. I assumed I had a visitor, but when I walked up to the officer in the pipe chase, she said, 'Joyce, you need to report to the chaplain's office immediately.' I couldn't move. Without being told, I knew." *Id.* One thing Joyce did not know was that the prison officials were about to deny her a chance to say goodbye to her son. *See id.* at 109. Since she was serving a life sentence, she was ineligible for a furlough; Joyce would have to settle for a private service with the prison chaplain. *See id.*

88. *Id.* at 109-10.

B. *The Texas Constitution*

The Texas Constitution provides that the Legislature may aid and compensate any person who has either paid a fine or served a sentence in prison under the laws of Texas for an offense the person did not commit.[89] In Texas, an individual wrongfully convicted is entitled to $25,000 dollars due to emotional pain, trauma, or suffering.[90]

C. *Compensation Statute*

The Texas Legislature, through a state statute, sets forth the requirements for a wrongfully convicted person to receive compensation.[91] Pursuant to Section 103.001 of the Texas Civil Practice and Remedies Code, a person is eligible for compensation if he or she:

(1) has either completed or has partially served the sentence in a state institution;
(2) had to plead "not guilty" to the charge that led to the wrongful conviction;
(3) is not guilty for the crime convicted; and
(4) the wrongfully convicted must have received a full pardon for the crime in which he or she was wrongfully convicted.[92]

Although the Texas statute is in place, there are still instances like that of Joyce, in which those who are wrongfully convicted and served tremendous amounts of their lives in prison are not compensated. One reason Joyce was not compensated was because she did not wish to receive a pardon.[93] She wanted to be exonerated, not forgiven for something she did not do.

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89. TEX. CONST. art. III, § 51(c). The statute reads as follows:

The Legislature may grant aid and compensation to any person who has heretofore paid a fine or served a sentence in prison, or who may hereafter pay a fine or serve a sentence in prison, under the laws of this State for an offense for which he or she is not guilty, under such regulations and limitations as the Legislature may deem expedient. *Id.*

90. TEX. CIV. PRAC. & REM. CODE ANN. § 103.006(b) (Vernon 1997). Damages assessed for physical and mental pain and suffering may not exceed $25,000. *Id. See* Cleary, *supra* note 8, at 45 (noting that despite the scarcity of compensation funds, the funds do not really compensate one who had to endure the dangerous, inhospitable prison lifestyle). One who files suit in federal court will be limited to damages in the amount of $5,000. Cleary, *supra* note 8, at 45. Only two states, New York and Tennessee, allow for no maximum for damages of wrongful convictions. *Id.*

91. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001.

92. *Id.*

93. *See* Interview with Joyce Ann Brown, *supra* note 2. Determined not to receive a pardon, Joyce once told the Commissioner that she was not after a pardon but an expunction. *Id.* She did not want her record to be sealed away for fear that it may come back in

D. *Pardon Statute*

> If I had gotten out and they had given me a pardon, they would have given me $25,000. And, it would have been the Joyce Ann Brown Bill. I wasn't interested in the Joyce Ann Bill, and I wasn't interested in a pardon because a pardon is something that says, "Okay we've sealed your record, you've been a good little girl, run on." But, it was still on your record.[94]

1. Pardons in Texas

Texas is one of the states that have set forth constitutional and statutory laws that allow for different types of clemency for the wrongfully convicted.[95] One of the requirements to receive compensation for a wrongful conviction is that a full pardon must be granted.[96]

2. Definition of Full Pardon

A full pardon absolves an individual freely and unconditionally of the crime for which he or she has been convicted.[97]

> A 'pardon' is a remission of guilt or an act of grace proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed, and that power, under our Constitution, may be exercised by the President of the United States and the Governors of the several states.[98]

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some shape or form. *Id.* She understood that an expunction would solve the problem by wiping the slate clean. *Id.* Also, she felt as though a pardon meant the government acknowledged that you committed the crime, but is letting you go anyway. *Id.*

94. *Id.* Joyce never tried to get a pardon. *Id.* For her, an expunction was the only way to adequately ensure that she would not have to be haunted by her past. *Id.*

95. *See* James C. Harrington, *Does Real Innocence Count in Review of Capital Convictions?*, 1 TEX. F. ON C.L. & C.R. 38, 38 (1994). Available forms of clemency include, but are not limited to the following: temporary reprieves, commuted sentences, and unconditional pardons. *Id.* The same statutes and constitutional provisions that allow for these types of clemency also limit their availability through various requirements. *See id.*

96. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(4) (requiring a full pardon in order for someone imprisoned to receive compensation).

97. Carr v. State, 19 Tex. Ct. App. 635, 657-58 (1885) (discussing an example of a full pardon). A full or absolute pardon unconditionally grants a prisoner his/her freedom. *See id.* On the other hand, a conditional pardon does as its name implies and grants a pardon that is conditioned on certain requirements being fulfilled. *See id.*

98. *Ex parte* Rice, 162 S.W. 891, 899 (Tex. Crim. App. 1913) (asserting that absolute pardon absolves the party from all the legal consequences of his crime). The power of pardon granting can be seen as far back as the Saxon kings of England. *Id.* This power now follows us into our modern history and rests with the executive branch. *Id.* It is a

Examples demonstrating the granting of pardons are provided in the cases of *Ex parte Lefors*[99] and *Ex parte Rice*.[100] In *Lefors*, the relator was sentenced to ten years due to a conviction for theft, but he was granted a conditional pardon from the governor.[101] This case illustrates that a pardon is considered an act of grace granted by the Governor upon the recommendation from the Board of Pardons.[102]

An individual convicted can seek a pardon subsequent to his or her conviction.[103] For instance, in *Hankamer v. Templin*,[104] an individual was paroled and received a full pardon after serving partial time on a felony conviction.[105] This pardon entitles the individual to restoration of citizenship rights, "including competency to testify in any and all courts, together with full rights of suffrage and benefits and obligations attendant therewith."[106]

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power that is even recognized by our Constitution in addition to those of the several states. *Id.*

99. 303 S.W.2d 394 (Tex. Crim. App. 1957). In this matter, relator seeks a writ of habeas corpus due to the belief that the sheriff of Dallas County, Texas deprived him of his liberties. *See id.*

100. 162 S.W. 891 (Tex. Crim. App. 1913). Appellant served five years of his term and received a conditional pardon from the governor. *See id.* Upon violation of the pardon, it was revoked and appellant now seeks to overturn the decision by way of appeal. *See id.*

101. *See Ex parte Lefors*, 303 S.W.2d at 395-96. The conditional pardon required that relator conduct himself in an exemplary manner. *See id.* If he failed to do so, then pardon was revocable at the governor's discretion. *See id.* In addition, he has to report to a parole supervisor and promise not to leave the county. *See id.*

102. *See generally id.* (illustrating that the power of pardon revocation lies in the hands of the governor, and the power to keep the pardon valid rests with the pardoned through compliance with its terms).

103. *See generally* Camron v. State, 22 S.W. 682, 682 (Tex. Crim. App. 1893) (explaining the pardon process, which is available only after conviction).

104. 187 S.W.2d 549 (Tex. 1945).

105. *See Hankamer*, 187 S.W.2d at 549-50. The most pertinent part of the pardon reads thusly:

> I . . . by virtue of the authority vested in me under the constitution and laws of this state, upon the recommendations hereinabove cited and for the reasons herein set out. . ., do hereby grant unto the said HAROLD M. HANKAMER, A FULL PARDON AND RESTORATION OF CITIZENSHIP including competency to testify in any and all courts, together with full rights of suffrage and benefits and obligations attendant therewith.

Id.

106. *Id.* at 550. The retention of citizenship rights is one of the perks of getting a pardon. *See id.* One is restored to his original standing in society as far as rights are concerned with the power to vote and to testify. *See id.*

3. Procedure for Obtaining Pardons

The Governor has the authority to grant pardons based on the recommendations of the Board of Pardons and Paroles, which was established by Article IV of the Texas Constitution and codified in Section 48.01 of the Texas Criminal Procedure Code.[107] The Board researches and collects information in order to provide their recommendations to the Governor so that he may make decisions regarding granting pardons.[108] They are also responsible for keeping records and explanations for their actions.[109]

In *Ex parte Ferdin*,[110] the defendant was sentenced to two years in the penitentiary for a charge of burglary; he was granted a conditional pardon from the Governor based on the recommendations of the Board of Pardons and Paroles.[111] In this process, the Board of Pardons and Paroles makes the recommendations, which are then sent to the Governor, and once he receives the recommendation, the Governor can accept or reject the Board's recommendation for pardons, as well as grant something less.[112] The Governor, in reviewing the cases after one is convicted, has the authority to grant pardons if the conviction rests on a criminal

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107. *See* TEX. CONST. art. IV, § 11(b). It reads as follows:

> In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishments and pardons; and under such rules as the legislature may proscribe, and upon the written recommendation and advice of a majority of the Board of Pardons and Paroles, he shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke conditional pardons. With the advice and consent of the Legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason.

Id. See also TEX. CODE CRIM. PROC. ANN. art. 48.01 (Vernon 1979).

108. *See* TEX. CONST. art. IV, § 11(b); TEX. CODE CRIM. PROC. ANN. art. 48.01; Ex parte Ferdin, 183 S.W.2d 466, 466 (Tex. Crim. App. 1944); Harrington, *supra* note 93, at 38.

109. *See* TEX. CODE CRIM. PROC. ANN. art. 48.01; Ex parte Ferdin, 183 S.W.2d at 466; Harrington, *supra* note 93, at 38.

110. 183 S.W.2d 466 (Tex. Crim. App. 1944).

111. *See id.* The pardon is conditioned on Ferdin's proper behavior and is revocable at the Governor's discretion. *See id.* It also calls for his return to the penitentiary to serve out his term. *See id. See generally* Jones v. State, 147 S.W.2d 508 (Tex. Crim. App. 1941) (noting that the power of enforcement and penalty collecting lie with the governor).

112. *See* Harrington, *supra* note 95, at 38. It is impermissible for the Governor to grant greater clemency than the Board recommends. *See id.* The only other authority granted the governor in the matter of clemency is the ability to give a one-time, thirty-day stay of execution. *Id.*

charge.[113] The Governor makes his decisions based upon the recommendations of the Board of Pardons and Paroles.[114]

However, the recommendations made by the Board are not binding on the Governor.[115] The Governor has the authority to exercise executive clemency without any limitation from the legislature unless a specific constitutional provision is mentioned.[116] For example, the Governor of Texas has used his sole power in granting clemency for a person who was convicted of a misdemeanor theft in district court.[117] The Governor of Texas has also granted clemency in the form of parole to an individual serving a twenty-five year prison sentence for the crime of murder.[118] Although the Board of Pardons and Paroles made the recommendation, it was the exclusive authority vested in the Governor that allowed for the order granting clemency.[119] The Governor also has the authority to grant an order of something less than the Board suggests; however, the Governor does not have the right to grant something greater than the Board's recommendation.[120]

4. Pardons and the Courts

The Texas Court of Criminal Appeals, which is the highest court for criminal justice in Texas, also has an impact on the Texas clemency procedure. The Texas Court of Criminal Appeals has a history of handing

113. TEX. CONST. art. IV, § 11. However, the governor cannot grant pardons in cases where treason and impeachment are involved. *See id.*

114. *Id.*

115. *See Ex parte Ferdin*, 183 S.W.2d at 467. There is no power to bind the governor to any recommendation made by the Board of Pardons and Paroles; the decisions are made to assist him to make the best informed decision possible. *See id.* As long as the governor acts within the law pertaining to pardons, there is nothing the courts can do to remedy any decision that he may make within his enumerated powers. *See id.*

116. *See Ex parte* Nelson, 209 S.W. 148, 149 (Tex. Crim. App. 1919) (describing the Governor's authority to exercise executive clemency). The Legislature does not have the power to enlarge or restrict a pardon, nor to alter conditions established on the pardon. *See id.*

117. *See generally Ex parte* Green, 295 S.W. 910 (Tex. 1927) (showing that the governor granted a pardon which was revoked upon the relator's failure to comply with its terms); *Ex parte* Black, 59 S.W.2d 828, 828 (Tex. Crim. App. 1933) (discussing the governor's grant of clemency due to the health of the prisoner).

118. *See generally Ex parte Nelson*, 209 S.W. at 149 (discussing the clemency order issued by the Governor of Texas). Robert Nelson was sentenced to a five to twenty-five year term for a murder conviction. *See id.* After serving a little over a year of his sentence, he was paroled by then Governor Hobby. *See id.*

119. *See* TEX. CONST. art. IV, § 11; *Ex parte Nelson*, 209 S.W. at 149 (explaining through section 11, article 4 of the Texas Constitution and through various cases the governor's power of clemency); Harrington, *supra* note 95, at 38.

120. *See* TEX. CONST. art. IV, § 11; Harrington, *supra* note 95, at 38-39.

down harsh procedural decisions that make it difficult for the innocent to receive clemency.[121] Until very recently, their decisions over claims based on newly discovered evidence that shows actual innocence have not been given any judicial consideration.[122] The court finds that these claims have to be made within the proscribed procedural time frame of thirty-days after the judgment is signed, during which a motion for new trial can be made.[123] Thus, in order for a wrongfully convicted person to gain release more than thirty days after a judgment, that person must rely on the pardon procedure. This reliance results in a nearly impossible threshold to cross.

In *Gilbert v. State*,[124] the plaintiff was denied compensation in a suit against the state based on a wrongful imprisonment claim.[125] Gilbert did not meet the last requirement of the compensation statute because he did not receive a full pardon from his conviction.[126] In this case, no pardon was available because the plaintiff was granted a new trial and his charges were dismissed.[127] The court held that because Gilbert sought relief by way of habeas corpus through federal court, instead of by way of a pardon under state law, he was not entitled to compensation.[128]

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121. *See* Harrington, *supra* note 95, at 39; *see also Ex parte* Graham, 853 S.W.2d 564 (Tex. Crim. App. 1993) (en banc); *Ex parte* Binder, 660 S.W.2d 103, 106 (Tex. Crim. App. 1983) (en banc).

122. *See* Harrington, *supra* note 95, at 39; *see also Ex parte Graham*, 853 S.W.2d at 564; *Ex parte Binder*, 660 S.W.2d at 106.

123. *See* Harrington, *supra* note 95, at 39. Texas politicians reflect the state's vast popular support of the death penalty. *See id.* This creates an atmosphere in which a person must overcome an almost impossible threshold to receive a pardon. *See id. See also Ex parte Graham*, 853 S.W.2d at 564; *Ex parte Binder*, 660 S.W.2d at 106.

124. 437 S.W.2d 444 (Tex. Civ. App. – Houston [14th Dist.] 1969, writ denied)

125. *Gilbert*, 437 S.W.2d 444 (introducing the civil appellate courts' interpretation of pardon statutes), *see also* Bohm v. Alaska, 320 F.2d 851, 852 (9th Cir. 1963); *See generally* United States *ex rel.* Elliott v. Hendricks, 213 F.2d 922, 926 (3rd Cir. 1954); Jones v. Biddle, 131 F.2d 853, 854 (8th Cir. 1942).

126. *See Gilbert*, 437 S.W.2d at 445. This highlights the difficulty in receiving compensation when wrongfully convicted. *See id.* It is an unreasonable hurdle, and one that society ought not require one to achieve. *See id.* The state is basically saying that compensation is only available when the governor feels like giving it. *See id.* Something so tied to due process and liberty ought not be left up to the whims of a state governor. *See id. See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(4) (Vernon 1997).

127. *See Gilbert*, 437 S.W.2d at 445. Gilbert was simply not convicted of anything for which he could be pardoned. *See id.* This does not take away from the fact that he served a prison term under a wrongful conviction. *See id.* The government is saying that because his conviction was of a certain type it should not merit compensation; however, Willie Gilbert still had to face all the harsh realities prison life had to offer. *See id.* His conviction may not have been deemed deserving of compensation, but certainly his time away from his home, his job, and freedom ought to entitle him to monetary recognition of his false incarceration. *See id.*

128. *See id.* at 445-46 (pointing to the fact that there is no compensation for Gilbert).

In the case of *Ashford v. State*,[129] the plaintiff met the elements required by the statute, but was denied relief because he was granted a new trial once his conviction was reversed and remanded.[130] The court affirmed the trial court's findings that the full pardon granted by the Governor of Texas was not valid because at the time the pardon was granted, no convictions remained and there was nothing to pardon.[131] Without the pardon, Ashford did not meet the statutory elements required for compensation.

In Joyce Ann Brown's case, she did not want to receive a pardon.[132] After living a nightmare in prison for nine years, five months, and twenty-four days for a crime she did not commit, she could not bring herself to seek a pardon.[133] Although obtaining a full pardon was the only way that compensation could have been obtained, Joyce's pride was worth more than money. In order to receive a pardon, Joyce would have to settle for "an act of grace" from the Governor for a crime she did not commit. Joyce stated that she "wasn't interested in a pardon because a pardon is something that says, 'okay, we've sealed your record, you've been a good little girl, run on,' but it was still on your record."[134] After the pain Joyce Ann Brown had endured, she could never say "I did it, please forgive me," for a crime that she was innocent of committing.[135] Joyce felt that receiving a pardon would be equivalent to saying that she committed the crime and the state of Texas was dismissing it.[136] Joyce has emphasized that "[t]he state could take [her] freedom, but that was all they were going to get from [her]."[137]

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129. 515 S.W.2d 758 (Tex. Civ. App. – Waco 1974, no writ).

130. *See id.* Arnold Ashford was convicted of the felony offense of theft. *See id.* The jury found him guilty and sentenced him to eight years in the state penitentiary. *See id.* After some two years of serving time, he was granted a pardon from the governor. *See id.* He sought compensation for his time in prison. *See id.* (holding that Gilbert failed to establish two elements of his cause of action).

131. *See id.* at 759-60 (affirming the trial court's authority to find the pardon void); *see also* Englander Co. v. Kennedy, 428 S.W.2d 806 (Tex. 1968) (outlining the presumption necessary to find that evidence introduced supports the findings of the trial court); Hassell v. New England Mutual Life Ins. Co., 506 S.W.2d 727 (Tex. Civ. App. – Waco 1974, writ ref'd); Alexander v. Bank of Am. Nat'l Trust & Sav. Ass'n, 401 S.W.2d 688 (Tex. Civ. App. – Waco 1966, writ ref'd).

132. *See* Interview with Joyce Ann Brown, *supra* note 2.

133. *See* BROWN, *supra* note 1, at 177.

134. Interview with Joyce Ann Brown, *supra* note 2.

135. *See id.*

136. *See id.* "I don't need a pardon because that's like telling me that I committed that crime and they just dismissed it." *Id.*; *see* BROWN, *supra* note 1, at 7.

137. BROWN, *supra* note 1, at 7.

E. *Expunctions*

Expunction is a process by which an individual's criminal conviction is erased or removed from his record.[138] Once an expunction is granted, officials and agencies with access to any arrest records or files must produce all records and files, and then deposit them with the court.[139] However, if removal of the records and files is impractical, then the records and files should be destroyed.[140] Once those procedures take place, the records and files are deleted from the individual's public record.[141] The expunction order proceeding is then only available for inspection by the person who is the subject of the expunction.[142] As a result, the deletion of all records and files in an expunction allows a person's name to be cleared of any arrest or conviction, and he receives all of the applicable records.[143]

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138. BLACK'S LAW DICTIONARY 603 (7th ed. 1999). The expungement of record is the removal of a conviction from a person's criminal record. *Id.*

139. *See* TEX. CODE CRIM. PROC. ANN. art. 55.02 § 5(a)(1) (Vernon Supp. 1999). The applicable portion is found in the procedure for expunction portion of § 5:

> Section 5. (a) On receipt of the order, each official or agency or other entity named in the order shall:
>
> 1. return all records and files that are subject to the expunction order of the court or, if removal is impracticable, obliterate all portions of the record or file that identify the petitioner and notify the court of its action.

Id.

140. *See id.*

141. *See id.* § 5(a)(2). In addition to the requirements of § 5(a)(1), the following is required:

> Section 5. (a) On receipt of the order, each official or agency or other entity named in the order shall:
>
> (2) delete from its public records all index references to the records and files that are subject to the expunction order.

Id.

142. *See id.* § 5(c). The code also calls for the following:

> (c) If an order of expunction is issued under this article, the court records concerning the expunction proceeding are not open for inspection by anyone except the petitioner unless the order permits retention of a record under Section 4 of this article and the petitioner is again arrested for or charged with an offense arising out of the transaction for which he was arrested.

Id.

143. *Id.* § 5(b). This section reads thusly:

> (b) The court may give the petitioner all records and files returned to it pursuant to its order.

Id.

The expunction process has a positive effect because the individual gains certain safeguards.[144] For example, the release of the expunged record is prohibited.[145] Also, if no exceptions apply, the person subject to the expunction order is entitled to deny the existence of the arrest and expunction order.[146] If asked about the arrest in a criminal proceeding, petitioner or another person may only state that it has been expunged.[147]

The expunction provision is only intended for people who are not guilty of a crime.[148] Thus, expunctions are not granted to those who are arrested, plead guilty to the crime, and receive probation as a result of the offense.[149] Because expunctions are civil in nature, the party who applies for an expunction must meet the burden of proof in order to have his record deleted.[150]

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144. *See* TEX. CODE CRIM. PROC. ANN. art. 55.03(1) (Vernon Supp. 1999). The release, dissemination, or use of the expunged record is prohibited after an expunction order is entered. *Id.*

145. *See* TEX. CODE CRIM. PROC. ANN. art. 55.03(2) (discussing the rights of the petitioner under an order for expunction).

146. TEX. CODE CRIM. PROC. ANN. art. 55.03(3). Exceptions apply in a criminal proceeding when the person is questioned under oath about the expunction proceeding; however, the person may state only that the issue in question has been expunged. *See id.*

147. *See id.*

148. *See generally* Harris County Dist. Attorney's Office v. J.T.S., 807 S.W.2d 572 (Tex. 1991) (noting that expunction law was not intended to allow a person who pleads guilty to expunge their arrest and court records); State v. Arellano, 801 S.W.2d 128 (Tex. App. – San Antonio 1990, no writ) (discussing legislative intent of the expunction statute and the fact that it applies retroactively); Tex. Dep't of Pub. Safety v. Failla, 619 S.W. 2d 215 (Tex. Civ. App. – Texarkana 1981, no writ) (presenting a petitioner for expunction who plead guilty to a misdemeanor theft); 27 TEX. JUR. 3D *Criminal Law* §§ 4404-08 (1983) (outlining the procedure, effect, and right to an expunction).

149. *See generally* Tex. Dep't of Pub. Safety v. Butler, 941 S.W.2d 318 (Tex. App. - Corpus Christi 1997, no writ) (reiterating that a plea of guilty resulting in probation renders expunction inapplicable); Moore v. Dallas County Dist. Attorney's Office, 670 S.W.2d 727 (Tex. App. – Dallas 1984, no writ) (holding that grant of probation prohibits right of expunction); Tex. Comm'n on Law Enforcement Officers Standards & Educ. v. Watlington, 656 S.W.2d 666 (Tex. App. – Tyler 1983, writ denied) (stating that expunction is available only when statutory conditions have been met); *Failla*, 619 S.W.2d at 215 (illustrating that one who pleads guilty and is put on probation cannot be granted an expunction).

150. *See* Harris County Dist. Attorney's Office v. Lacafta, 965 S.W.2d 568, 569 (Tex. App. - Houston [14th Dist.] 1997, no pet.) (quoting Tex. Dep't of Pub. Safety v. Wiggins, 688 S.W.2d 227, 229 (Tex. App. – El Paso 1985, no writ)); Thomas v. State, 916, 916 S.W.2d 540, 543 (Tex. App. – Waco 1995, pet. denied) (quoting Harris County Dist. Attorney's Office v. Burns, 825 S.W.2d 198, 202 (Tex. App. – Houston [14th Dist.] 1992, pet. denied)); *Ex parte* Scott, 818 S.W.2d 226, 226-27 (Tex. App. – Corpus Christi 1991, no writ); Tex. Dep't of Pub. Safety v. Wiggins, 688 S.W.2d 227, 229 (Tex. App. – El Paso 1985, no writ).

1. Entitlement to an Expunction

An individual is entitled to an expunction pursuant to the Texas Code of Criminal Procedure.[151] Article 55.01 not only sets out the requirements for an individual to receive an expunction, but also illustrates the factors that can prevent one from obtaining an expunction.[152] The two pertinent subsections of Article 55.01 of the Texas Code of Criminal Procedure dealing with expunctions will be discussed.

First, Article 55.01(a) of the Texas Code of Criminal Procedure allows an individual to expunge his or her record if they were arrested for either a felony or a misdemeanor and if certain other conditions are met.[153] Once an applicant proves that he is eligible under this part of the section, the court is not allowed discretion to refuse to expunge the records.[154] The primary purpose of subsection (a) is to allow expunctions for those who are wrongfully arrested.[155]

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151. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01; *see also* Harris County Dist. Attorney's Office v. Pennington, 882 S.W.2d 529, 530 (Tex. App. – Houston [1st Dist.] 1994, no writ) (quoting Wilkomirski v. Tex. Criminal Info. Ctr., 845 S.W.2d 424, 426 (Tex. App. – Houston [1st Dist.] 1994, no writ)). A person may only have their record expunged when all of the statutory conditions are met. *See id.*

152. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01 (Vernon Supp. 1999).

153. *Id.* § a (demonstrating the conditions which must be met in order for one to obtain an expunction). The conditions for expunction of criminal records are as follows:

> (a) A person who has been arrested for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if:
>
> (1) the person is tried for the offense for which the person was arrested and is:
>
> (A) acquitted by the trial court; or
>
> (B) convicted and subsequently pardoned; or
>
> (2) each of the following conditions exist:
>
> (A) an indictment or information charging him with commission of a felony has not been presented against him for an offense arising out of the transaction for which he was arrested or, if an indictment or information charging him with commission of a felony was presented, it has been dismissed and the court finds that it was dismissed because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense or because it was void;
>
> (B) he has been released and the charge, if any, has not resulted in a final conviction and is no longer pending and there was no court ordered probation under Article 42.12, Code of Criminal Procedure, nor a conditional discharge under Section 481.109, Health and Safety Code; and
>
> (C) he has not been convicted of a felony in the five years preceding the date of the arrest.

Id.

154. *See id.*; *Ex parte* Current, 877 S.W.2d 833, 836 (Tex. App. - Waco 1994, no writ).

155. *See J.T.S.*, 807 S.W.2d at 574; Harris County Dist. Attorney's Office v. R.R.R., 928 S.W.2d 260, 264 (Tex. App. - Houston [14th Dist.] 1996, no writ).

Second, Article 55.01(b) of the Texas Code of Criminal Procedure provides that unless subsection (c) applies, a district court has the discretionary power to expunge the records of one arrested due to a felony or a misdemeanor pursuant to Article 55.02, which identifies the procedure for an expunction if certain requirements are met.[156] Article 55.01(b) gives the court discretion to expunge an individual's records.[157] Even if one meets all the requirements under this subsection, the discretion to issue the expunction is still placed with the trial court.[158] Furthermore, under subsection (b), the court's decision is reviewed pursuant to the abuse of discretion standard, which means the previous court decision is unlikely to be overturned.[159]

2. Distinct Differences in the Statutes

The confusing requirements of subsections (a) and (b) of Article 55.01 are expressly illustrated in the case of *Ex parte Current*.[160] In that case, the petitioner Carl Current moved to expunge his record of a prior conviction for the burglary of a building.[161] However, the District Attorney's

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156. TEX. CODE CRIM. PROC. ANN. art. 55.01(b) (laying out the foundations for receiving an expunction under this subsection). To expunge one's record under Article 55.01(b), the following applies:

> (b) Except as provided by Subsection (c) of this section, a district court may expunge all records and files relating to the arrest of a person who has been arrested for commission of a felony or misdemeanor under the procedure established under Article 55.02 of this code if the person is:
>
> (1) tried for the offense for which the person was arrested;
>
> (2) convicted of the offense; and
>
> (3) acquitted by the court of criminal appeals.

Id.; *see also* TEX. CODE CRIM. PROC. ANN. art. 55.02.

157. *See Ex parte Current*, 877 S.W.2d at 836.

158. *See id. See also* Barlow v. Lane, 745 S.W.2d 451, 453-54 (Tex. App. - Waco 1988, writ denied).

159. *See Ex parte Current*, 877 S.W.2d at 836.

160. *See* TEX. CODE CRIM. PROC. ANN. arts. 55.01(a), 55.01(b). *See generally Ex parte Current*, 877 S.W.2d 833 (discussing whether Article 55.01 can be applied if not reversed by the court of criminal appeals). The case centers around the following:

> The two sections of this statute are distinctly different. Section (a) provides for an *entitlement* to the expunction of the criminal records. Once an applicant demonstrates his eligibility under the provisions of this section, the court does not have the discretion to refuse to order the records expunged. Section (b), however, states that the court "may" expunge records; thus, an applicant who meets the criteria of this section places the decision on the motion to expunge within the sound discretion of the trial court.

Current 877 S.W.2d at 834 (emphasis added).

161. *See id.* at 835. Carl Current was convicted by a jury for the crime of burglary, but the Court of Appeals determined the evidence to be insufficient and remanded the case to the trial court for an acquittal. *Id.*

Office argued that "Current was not eligible for an expunction because the indictment had not been dismissed."[162] The court reviewed this case by considering Current's entitlement to an expunction under the strictly applied Article 55.01.[163] The court went to extensive lengths to clarify the distinction between subsections (a) and (b) of the statute.[164]

First, the court evaluated subsection (a) of the statute.[165] The court concluded that Current did not meet any of the conditions that would afford him an expunction under subsection (a).[166] The court then considered Article 55.01(a)(1)(B). That subsection applied to a pardon and was not at issue in this case, so it is not applicable.[167] Next, the court reviewed Article 55.01(a)(1)(A) of the statute, in which there is a requirement that an individual prove that the trial court acquitted him.[168] This subsection also did not apply because a jury convicted Current, thus he was not entitled to an expunction under this subsection.[169] Furthermore, subsection (a)(2) of Article 55.01 is not applicable because Current did not complain as to a dismissal of an indictment.[170]

The court then applied subsection (b) to Current's case, which only "applies when a conviction is reversed by the court of criminal appeals."[171] Current believed that he was entitled to an expunction because he was acquitted.[172] However, the appellate court ordered the acquittal that instructed the trial court to sign the judgment; thus, in reality, the trial court did not acquit Current.[173] Since the Court of Appeals, and not

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162. *Id.* Because the indictment was dismissed, Current is not entitled to an expunction of his records under Article 55.01 (a)(2). *Id. See* Harris County Dist. Attorney's Office V. M.G.G., 866 S.W.2d 796, 798 (Tex. App. – Houston [14th Dist.] 1993, no writ) (explaining that in order to receive an expunction, a petitioner has the burden of proof to prove he has met the requirements); *see also* TEX. R. EVID. 201 (stating that the court has the right to take notice of an indictment not being dismissed); Holley v. Holley, 864 S.W.2d 703, 706 (Tex. App. – Houston [1st Dist.] 1993, writ denied).

163. *See Ex parte Current*, 877 S.W.2d at 835. The court looked at the various provisions within Article 55.01 to determine Current's ability to receive an expunction of his records for the crime of burglary. *See id.*

164. *See id.* at 836; TEX. CODE CRIM. PROC. ANN. arts. 55.01(a), 55.01(b).

165. *See Ex parte Current*, 877 S.W.2d at 835-37.

166. *See id.* at 837; *see also* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(1)(B).

167. *See Ex parte Current*, 877 S.W.2d at 836.

168. *See id* at 837; *see also* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(1)(A).

169. *See Ex parte Current*, 877 S.W.2d at 837.

170. *See id.* at 836.

171. TEX. CODE CRIM. PROC. ANN. art. 55.01(b); *see Ex parte Current*, 877 S.W.2d at 837.

172. *See Ex parte Current*, 877 S.W.2d at 836 (noting Current's reasoning for believing in his right to have his record expunged).

173. *Id.* "We do not believe that this subsection applies when an acquittal is ordered by an appellate court, even though the trial court may actually sign the judgment of acquittal." *Id.* at 837. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(b).

the trial court, ordered the acquittal, Current was not eligible to receive an expunction under a literal interpretation of 55.01(b).[174]

In order for the court to interpret the statute, the court must look to the plain language of the statute.[175] If the language is found to be clear and unambiguous, then the court does not make any changes to the law and goes forward with the legislative intent.[176] In Current's case, the court believed that a literal reading of the statute would lead to an absurd result.[177] The court rationalized that the "legislature's clear intent was to formulate a remedy that allows the innocent to clear their records of the offense, regardless of when they were found to be innocent."[178] Therefore, the court ordered that Current was eligible to have his case considered for expunction pursuant to subsection (b) of Article 55.01.[179] The court reiterated, that while they felt that Current was *eligible* to have his record expunged, the trial court still had the authority to exercise its discretionary power in determining whether Current's records were actually *entitled* to be expunged.[180]

However, the court does provide for changes when it feels that the statute's language will lead to absurd consequences that the legislature did not intend.[181] There can be nothing more absurd than a person's record being permanently ruined because the court refused to clear it due to a procedural hurdle that makes it more difficult for the innocent to clear their name and good standing in the community. A wrongfully convicted person ought not be denied the right to expunge his record because of a mere formality that is inconsistent with a sense of fairness and justice.

The case of *Harris County District Attorney's Office v. Jimenez*[182] also illustrates the distinction between subsections (a) and (b) of Article

174. *See Ex parte Current*, 877 S.W.2d at 837; *see also* TEX. CODE CRIM. PROC. ANN. art. 55.01(b); *see also* Bigley v. State, 865 S.W.2d 26, 28 (Tex. Crim. App. 1993) (Baird, J., concurring) (holding that despite an appellate court ordering the lower court to acquit someone of an offense, it is ultimately the appellate court and not the trial court who renders the judgment).

175. *See Ex parte Current*, 877 S.W.2d at 837; Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

176. *See Ex parte Current*, 877 S.W.2d at 837; *Boykin*, 818 S.W.2d at 785.

177. *See Ex parte Current*, 877 S.W.2d at 837.

178. *Id.* at 839. *But see* Herron v. State, 821 S.W.2d 329 (Tex. App. – Dallas 1991, no writ) (holding that the court of appeals does not have the power to extend the meaning of the expunction statute).

179. *See Ex parte Current*, 877 S.W.2d at 840.

180. *Id.* (emphasis added).

181. *See id.* at 837. "There is of course, a legitimate exception to this plain meaning rule: where application of a statute's plain language would lead to absurd consequences that the Legislature could not possibly have intended, we should not apply the language literally." *Id.* at 837 (quoting *Boykin*, 818 S.W. 2d at 785).

182. 886 S.W.2d 521 (Tex. App. - Houston [1st Dist.] 1994, writ denied).

55.01.[183] Jim Jimenez was acquitted for sexual assault and then attempted to expunge his criminal record.[184] Although the *Jimenez* court agreed in part with the holding in *Current*, concerning subsection (a) of the statute, the court did not have the same opinion of the *Current* court's finding of subsection (b).[185] The district court in *Jimenez* granted an expunction, but the Court of Appeals reversed and ordered that the expunction be denied.[186] First, the Court of Appeals considered the mandatory expunction statute under Article 55.01(a)(1)(A).[187]

The Court of Appeals reviewed the matter to determine which court, the trial or appellate court, granted Jimenez's acquittal.[188] This distinction was imperative because an acquittal by the trial court would then make Jimenez eligible for an expunction; however, if the trial court did not grant the expunction, the right to an expunction would be regarded as discretionary.[189] The *Jimenez* court followed *Current's* first holding which stated that Article 55.01(a)(1)(A) is not applicable to acquittals made by the Court of Appeals.[190] Thus, Jimenez was not granted a mandatory expunction because he was acquitted by the appellate court rather than by the trial court.

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183. *See generally Jimenez*, 886 S.W.2d at 523 (holding that the judgment be reversed and rendering that the expunction be denied); *see also* TEX. CODE CRIM. PROC. ANN. arts. 55.01(a), 55.01(b) (Vernon Supp. 1999).

184. *See Jimenez*, 886 S.W.2d at 522. Jimenez was granted the expunction after he received an acquittal for sexual assault allegations brought against him by the Harris County District Attorney's Office. *See id.*

185. *See id.* at 522-23. This court agreed with the *Current* court, in that Article 55.01(a)(1)(A) does not apply to cases in which an acquittal is ordered by a court of appeals. *Id.* at 522. Therefore, neither Jimenez nor Current is entitled to an expunction under that provision. *See generally* TEX. CODE CRIM. PROC. ANN. art. 55.01(a); *Ex parte Current*, 877 S.W.2d at 840.

186. *See Jimenez*, 886 S.W.2d at 523.

187. *Id.* at 522 (citing *Ex parte Current* and aligning itself with that opinion and stating that it was the Court of Appeals that granted the expunction and not the trial court as necessitated under Article 55.01(a)(1)(A)); *see* TEX. CODE CRIM. PROC. ANN. art. 55.01 (a)(1)(A).

188. *See Jimenez*, 886 S.W.2d at 522.

189. *See id.* (stating the expunction right is discretionary because the statute states that when a court of criminal appeals acquits a person, the "district court *may* expunge all records") (emphasis in original). *But cf.* Herbert v. State, 827 S.W.2d 507, 508 (Tex. App. – Houston [1st Dist.] 1992, no writ) (demonstrating that it is possible to lose rights due to a trial judge's error); Winter v. State, 725 S.W.2d 728, 731-34 (Tex. App. – Houston [1st Dist.] 1980, no writ) (Cohen, J., concurring) (furthering the notion that rights may be lost because of error created by the trial judge).

190. *See Jimenez*, 886 S.W.2d at 522. The court takes into account the legislative intent and determines that an acquittal by an appellate court cannot be held in the same light as an acquittal granted by a trial court. *Id. See also Ex parte Current*, 877 S.W.2d at 836 (stating that the subsection does not apply when the appellate court orders a person's acquittal).

Next, the court reviewed article 55.01(b)(3) and concluded that an expunction granted under these terms would violate the plain meaning of the statute.[191] The Court of Appeals found that the intent of 55.01(b) was to have expunctions occurring after appellate acquittals to be discretionary rather than mandatory.[192] Furthermore, the court felt that the statute was clear in its intentions, and that the provision granting discretion to the trial court following an acquittal by the Court of Criminal Appeals could not be read as an acquittal by any appellate court.[193]

3. Liberal Application of the Statutes

The court in *Harris County District Attorney's Office v. R.R.R.*[194] explains why Article 55.01 of the Code of Criminal Procedure should be construed liberally.[195] When the grand jury did not indict appellee for the offense of aggravated sexual assault, he sought an expunction of his records; however, the state again presented the complaint that resulted in a second grand jury indictment.[196] The appellee filed a motion to quash the indictment entered by the second grand jury; the appellee argued that insufficient information was presented and critical information was not introduced to the second grand jury.[197] The second grand jury indictment was eventually quashed, and the appellee again filed for the expunction

191. *See Jimenez*, 886 S.W.2d at 523 (disagreeing with the holding in *Current* that the legislature's words should be defined more broadly to encompass more expunction possibilities); *see also* TEX. CODE CRIM. PROC. ANN. art. 55.01(b)(3) (requiring an acquittal by the *criminal* court of appeals) (emphasis added); Board of Ins. Comm'rs v. Guardian Life Ins. Co., 180 S.W.2d 906, 909 (Tex. 1944) (claiming that a second-guessing of the legislature's intent will bring about "disastrous or mischievous results").

192. *See Jimenez*, 886 S.W.2d at 523. "We do not agree with the statement in *Current* that the statute is nonsensical if it allows expunction after appellate acquittals only by the Court of Criminal Appeals." *Id. But see Ex parte Current*, 877 S.W.2d at 839 (holding that the language of 55.01(b)(3) could be applied to any appellate court which had criminal jurisdiction).

193. *See Jimenez*, 886 S.W.2d at 523.

194. 928 S.W.2d 260 (Tex. App. – Houston [14th Dist.] 1996, no writ).

195. *R.R.R.*, 928 S.W.2d at 263 (holding that the quashing of the indictment met the requirement that the indictment needed to have been dismissed). *See Jimenez*, 886 S.W.2d at 521.

196. *See R.R.R.*, 928 S.W.2d at 261.

197. *Id.* (asserting four points of error: first, he was not permitted to offer testimony to the second grand jury; second, information such as appellee passing a polygraph test was eliminated; next, information due to the complainant's mental illness which affected his credibility was withheld; finally, inconsistencies concerning the testimonies of the complainant and his mother were disregarded).

of his records.[198] The trial court granted the appellee an expunction pursuant to Article 55.01 of the expunction statute.[199]

Following a challenge by the district attorney, the Court of Appeals affirmed the trial court's ruling ordering an expunction of criminal records by looking at the legislative intent of Article 55.01 in reviewing the requirements of a dismissal.[200] The Court of Criminal Appeals concluded that the legislative intent would be thwarted if an individual's records were not expunged following a wrongful arrest.[201] The court held that the order from the trial court quashing the indictment was equivalent to a dismissal of that indictment.[202] Subsequently, the court concluded that when an "indictment was dismissed because 'its presentment was the result of mistake, false information, or other similar reasons indicating absence of probable cause' and was not 'so against the great weight and preponderance of the evidence as to be manifestly unjust'" that the individual was entitled to an expunction.[203]

Even though the court did not have the equitable power to extend the clear meaning of the statute, it nonetheless has construed the statute liberally on the grounds that it is remedial in nature.[204] Because the statute is remedial in nature, applying the statute strictly would defeat the purpose for which the statute was intended.[205] The intent of the legislature and the reason for Article 55.01 would be nullified if the appellee's record was not expunged.[206] Thus, the statute should be construed liberally so

198. *Id.* (alleging that the indictment was due to mistake, false information, or similar reasons because evidence was withheld from the grand jury).

199. *Id.* at 264-65 (finding that the indictment was a result of mistake, false information, or reasons which are similar).

200. *Id.*

201. *Id.* at 264.

202. *Id.* at 263.

203. *Id.* at 265; *see also* Harris County Dist. Attorney's Office v. Burns, 825 S.W.2d 198 (Tex. App. – Houston [14th Dist.] 1992, writ denied); Cyrus v. State, 601 S.W.2d 776 (Tex. Civ. App. – Dallas 1980, writ ref'd n.r.e.). *But see* Texas Dep't of Pub. Safety v. Katopodis, 886 S.W.2d 455 (Tex. App. – Houston [14th Dist.] 1994, no writ) (finding that when the dismissal of one's indictment was due to false information or mistake, there was a lack of probable cause that the defendant is entitled to an expunction).

204. *See R.R.R.*, 928 S.W.2d at 263; Harris County Dist. Attorney's Office v. Pennington, 882 S.W.2d 529, 530 (Tex. App. – Houston [1st Dist.] 1994, no writ) (reasoning that since the expunction statute is remedial, it should be construed liberally); *Ex parte* E.E.H., 869 S.W.2d 496, 497 (Tex. App. – Houston [1st Dist.] 1993, writ denied).

205. *See Pennington*, 882 S.W.2d at 530; *Arellano*, 801 S.W.2d 128 at 132 (Tex. App. – San Antonio 1990, no writ).

206. Harris County Dist. Attorney's Office v. J.T.S., 807 S.W.2d 572, 573 (Tex. 1991); *R.R.R.*, 928 S.W.2d at 263; *see also* Agbor v. St. Luke's Episcopal Hosp., 912 S.W.2d 354, 357 (Tex. App. – Houston [14th Dist.] 1995, writ granted) (illustrating the believe that the primary purpose of the court is to effectuate the intent of the legislature).

that its purpose, to rid those who were wrongfully arrested of the injustices they faced, can be achieved.[207]

4. Joyce and the Expunction Statutes

Joyce Ann Brown was only interested in receiving an expunction.[208] The district attorney signed an affidavit stating that Joyce did not receive a fair trial in 1980.[209] Furthermore, the district attorney admitted that the prosecutors did not disclose evidence that would have been vital to Joyce's defense.[210] Examining the information, the judge recommended the case to the Texas Court of Criminal Appeals, and Joyce was finally granted a new trial.[211] On the date set for an announcement of the trial, the district attorney dropped the charges.[212] As a result, Joyce became a free woman.

However, upon release, Joyce received neither a pardon nor an expunction for serving years of prison time for a crime she did not commit.[213] In Joyce's case, the expunction statute did not serve its intended purpose, which was to allow people's records to be expunged if they were wrongfully arrested for a crime they did not commit.[214] Joyce should have been immediately granted an expunction of her records because she

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207. *See J.T.S.*, 807 S.W.2d at 574 (stating that "the primary goal of statutory construction is to effectuate the intent of the legislature"); State v. Knight, 813 S.W.2d 210, 212 (Tex. App. – Houston [14th Dist.] 1991, no writ) (recognizing that "Article 55.01 was enacted to enable persons who are wrongfully arrested to expunge their arrest records"); Tex. Dep't of Pub. Safety v. Failla, 619 S.W.2d 215 (Tex. Civ. App. – Texarkana 1981, no writ) (reiterating the purpose of Article 55.01).

208. *See* Interview with Joyce Ann Brown, *supra* note 2 (choosing this alternative over a pardon, Joyce Ann Brown wanted her record cleared).

209. *See* BROWN, *supra* note at 1, at 163. "Armed with that affidavit, Kerry was going to present my writ to the court right then instead of waiting for the October 23rd hearing. Ironically, the date was September 29th – the same date I had begun my trial nine years earlier." *Id.*

210. *See id.* Only fifteen minutes was necessary for the hearing, but Joyce knew a recommendation for appeal meant a stronger chance for a favorable review. *See id.*

211. *See id.* at 163, 167. "'Yes.' I answered, my heart pounding. He took a deep breath and then, in that beautiful golden voice of his said, 'Joyce Ann, the Texas Court of Criminal Appeals handed down their decision this morning. You're going to get a new trial.'" *Id.* at 167.

212. *See id.* at 177. Although Joyce was able to walk away from her incarceration, she was not able to receive the necessary compensation that would help to mend the rift that has been created in her life by the faulty conviction. *See id.*

213. *See id.* For Joyce and others like her, it has been difficult to be released from a wrongful conviction without any real compensation for their loss of liberty. *See id.*

214. *See* 27 TEX. JUR. 3D *Criminal Law* §§ 4404-08 (1983).

was arrested, did not plead guilty to the crime, and did not receive probation as a result of the offense.[215]

In order to allow those individuals who were wrongfully convicted of a crime a means to expunge their records, the legislature established Article 55.01 of the Code of Criminal Procedure.[216] Joyce was wrongfully convicted, serving almost ten years in prison for a crime in which she did not commit. This Article was created specifically for people like Joyce, people who find themselves wrongfully convicted. Furthermore, since the statute is supposedly remedial in nature, it should be read liberally in order for an innocent individual to receive an expunction of their record.[217] While Joyce's case was only dismissed, the expunction statute should be read for the purpose it was intended, to allow those who were wrongfully arrested to clear their records. Nevertheless, Joyce Ann Brown served several years in prison for a crime she did not commit and had to fight to clear her criminal record.

IV. PROPOSAL

Receiving neither compensation nor a pardon for her wrongful conviction, Joyce Ann Brown was eventually released from her shackles of bondage without even a simple apology. This comment offers four proposals that would allow the state of Texas to finally grant those who were wrongfully convicted their due process of law.

First, the compensation statute should be revised. It should include additions that, if in place, would set forth methods to ensure innocent persons wrongfully convicted receive compensation for their time lost while incarcerated. The revisions of the statute would balance the playing field and allow the innocent and wrongfully convicted to receive adequate compensation, thus making the statute less harsh and more just.

Secondly, the expunction statute requirements should stand for the purpose for which they were written, to provide remedial measures in order to rid the innocent of unjust criminal records. The expunction stat-

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215. *But see* Tex. Dep't of Pub. Safety v. Butler, 941 S.W.2d 318 (Tex. App. – Corpus Christi 1997, no writ) (demonstrating circumstances in which one cannot be granted an expunction despite convictions that are wrongful).

216. *See* Harris County Dist. Attorney's Office v. J.T.S., 807 S.W.2d 572, 573 (Tex. 1991); State v. Knight, 813 S.W. 2d 210, 211 (Tex. App. – Houston [14th Dist.] 1991, no writ); Tex. Dep't of Pub. Safety v. Failla, 619 S.W.2d 215, 217 (Tex. Civ. App. – Texarkana 1981, no writ).

217. Harris County Dist. Attorney's Office v. R.R.R., 928 S.W.2d 260, 263 (Tex. App. – Houston [14th Dist.] 1996, no writ); Harris County Dist. Attorney's Office v. Pennington, 882 S.W.2d 529, 530 (Tex. App. – Houston [1st Dist.] 1994, no writ); *Ex parte* E.E.H., 869 S.W.2d 496, 497 (Tex. App. – Houston [1st Dist.] 1993, writ denied).

ute should be interpreted liberally in order to erase the wrongful convictions of the innocent.

Third, the government has not ordered a comprehensive study that identifies the major errors leading to innocent persons being wrongfully convicted. Conducting this study allows the government to take effective measures on the factors that contribute to wrongful convictions.

Lastly, the Governor should publicly apologize to the wrongfully convicted. The state ought to acknowledge the wrong it has caused and the pain it has inflicted. It would be unconscionable to expect those newly freed from their wrongful convictions to enter into society without an express declaration of their innocence.

A. *Revision of the Compensation Statute*

Instead of imposing harsh requirements on the innocent, the state should advocate that the statute be read in a manner that offers the most favorable results for those who have been wrongfully convicted. The statute should be read liberally to include everyone who was wrongfully convicted by the criminal justice system of Texas, no matter the form of release. Therefore, the compensation statute should be revised and rewritten to read as follows:

A person is entitled to compensation if the person meets *three* of the four requirements:

1. has served in whole or in part a sentence in prison under the laws of this state;
2. plead "not guilty" to the charge for which he was convicted and that lead to the imprisonment;
3. is not guilty of the crime for which he or she was sentenced; and
4. has received a full pardon for the crime and punishment for which he was sentenced, noting that the pardon recognizes the person as not guilty of the crime for which he or she was wrongfully convicted.

If revised, in instances where the charges are simply dismissed after an individual has served several years in prison, the revised statute would still allow the innocent to be justly compensated. The revised statute would also allow for the automatic expunction of one's records pursuant to Article 55.01. By revising the statute to read as stated above, the state of Texas would provide its citizens due process of law as required by both the United States and Texas Constitutions.

B. *Less Restrictive Interpretation of the Expunction Statute*

Next, the expunction statute requirements should stand for the purpose for which they were written, to provide remedial measures in order to rid

the innocent of criminal records that they should have never received in the first place. The expunction statute should be interpreted liberally in order to erase the wrongful convictions of the innocent. The court hearing the request for expunction of record ought not bog itself down in inflexible and rigid interpretation. This approach only serves to harm those who suffered under a wrongful conviction; the court needs to avoid causing any further injury. Therefore, this harsh and difficult statute should include a provision to expunge the records of the wrongfully convicted that meet the requirement of the aforementioned newly revised compensation statute. With these new provisions in place, innocent victims like Joyce Ann Brown would receive some type of compensation for their wrongful conviction.

C. *Eliminating Factors Responsible for Wrongful Convictions*

Several factors identified help lead the innocent to the pronouncement of their wrongful convictions. In order to eliminate some of these factors, it is necessary to get to the root of the problem. The state of Texas should conduct a comprehensive study on the factors that lead to wrongful convictions. Once the study shows the contributions to errors in these instances, the state of Texas could come up with policies that would help eliminate the cause of these problems. For instance, since eyewitness testimony is an extreme problem when one crosses the racial line to identify another, juries could at least be properly instructed on this phenomenon to avoid inaccuracies in their decisions.

A study could shed light on a problem and bring about fairness and equity to the justice system. Any justice system that allows people to be wrongfully incarcerated is always in jeopardy of being questioned as to its legitimacy.

D. *Apology*

This part of the proposal is the easiest to undertake. Upon the release of one who is wrongfully convicted, the Governor of the State of Texas should arrange a press conference in order to recognize the wrongfully convicted person's release. During this press conference, which should be televised throughout the state of Texas on major networks, the Governor of Texas should apologize to the person. This apology would be on behalf of the state of Texas, allowing the innocent party to know that the state is sorry for having deprived that person of their liberty.

While an apology may not be deemed as much to some, it would be a necessary step in solving the problem, and would work towards repairing the lives ruined by wrongful convictions. A problem must first be recognized before it can be solved. With the apology, the state of Texas is no longer trying to bandage the wound, but working towards allowing the

wound to heal. While the wound is healing, the innocent will know that the state of Texas feels remorse for the time the innocent person has lost from their life while incarcerated.

V. CONCLUSION

Innocent people who have been wrongfully convicted for crimes and subsequently imprisoned should not be frustrated when trying to seek compensation. These innocent persons deserve a simple avenue made available to them to receive compensation for their wrongful convictions. The revised statutes and other alternatives offered in the proposal eliminate wrongful convictions and compensate the innocent, thereby providing redress for these innocent persons. It is the responsibility of the state of Texas to ensure that those who were unjustly convicted and subsequently imprisoned recover based upon their damages.

"It's over Joyce. You can go home. The district attorney has dropped the charges. You've won."[218] Those words cannot even begin to express the anticipation and anguish with which Joyce had in awaiting the court's decision. It goes without saying that winning came at a high price for Joyce. She spent nine long years, five hard months, and twenty-four sad and lonely days incarcerated for a crime that she did not commit.[219] One day, it was over for Joyce; she was free to go home, but without compensation. For nearly a decade, Joyce was imprisoned, and there was no real justice for her, and no compensation readily available to her.

Although there are several factors that lead to wrongful convictions, few remedies exist for the innocent to actually receive compensation. The statutes available in Texas have strict requirements for an individual to receive compensation. For instance, the Texas compensation statute requires that all four elements of the statute need to be met before one can truly receive compensation.[220] Furthermore, obtaining a pardon in Texas is difficult.[221] It also degrades the pride of the innocent who was wrongfully convicted, because the innocent victim does not need forgiveness, but compensation.

Moreover, when the expunction statute is interpreted strictly, it does not always serve its intended purpose. The statute was drafted in order to

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218. BROWN, *supra* note 1, at 177.

219. *See id.*

220. TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (Vernon 1997).

221. *See* Interview with Joyce Ann Brown, *supra* note 2 (noting that few Blacks receive pardons). Joyce Ann Brown stated, "You research how may Black folks have left prison and gotten a pardon. Because it is always sitting on the governor's desk, and they change 5 or 6 governors, and they are still on the governor's desk." *Id.*

allow expunctions for those who are wrongfully convicted.[222] Thus, the statute should be read liberally in order to serve the purpose for which it was intended. That is, to provide expunctions for those convicted of crimes they did not commit.

While Joyce considers herself extremely blessed, there are others not as fortunate as she was. Joyce believes that of the high percentage of those who are wrongfully imprisoned, those with DNA evidence stand a chance of being released.[223] Nevertheless, Joyce feels that others in her situation are not as fortunate. Wrongful convictions are still a problem in the state of Texas. Joyce Ann Brown, aware of the problem firsthand, has formed an organization (MASS) which she hopes will grow into an institution that will "be able to change and make things better for innocent people going into and coming out of prison and for those who actually commit a crime and are eventually going to be released back into society."[224]

Joyce has taken an active stance to help not only those in her situation, but others who are actually guilty of crimes. Now, it is up to the state of Texas to take an active stance. Though Joyce may not be as concerned with compensation as others, she and others should be entitled to some type of redress for the injustices they have faced. Measures need to be taken to grant these innocent victims compensation. The Texas statutes regarding compensation and expunctions are not adequate to compensate innocent victims for their wrongful convictions. The compensation and expunction statutes should be revised to truly provide justice for those who are wrongfully convicted. Texas, this is an appeal to your sense of fairness, justice, and decency to step up to the plate and compensate.

222. *See J.T.S.*, 807 S.W.2d at 574; R.R.R., 928 S.W.2d at 264.
223. *See* Interview with Joyce Ann Brown, *supra* note 2.
224. *Id.*