EXONERATION FINANCE

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The path to financial compensation for the wrongfully convicted can be complex and time-consuming. Exonerees often struggle to make ends meet and function in free society, let alone navigate serpentine processes while waiting years for the recovery they deserve. Securing the assistance of an attorney is often a critical step, but too few lawyers are willing to risk accepting these complicated cases on a contingency-fee basis—the only way that exoneree-clients can likely pay their lawyers without outside help.

Litigation finance—an important tool for increasing access to justice in tort cases—could help close this access to justice gap for exonerees. In a practice called client-directed financing, litigation funders have provided a relative handful of exonerees with cash advances, often leading to greater recoveries in the long run. After considering the benefits and burdens of client-directed financing, we argue that litigation funders ought to consider lawyer-directed financing as well. Through lawyer-directed financing, financiers provide funds directly to private lawyers (instead of to their clients), which mitigates the lawyers' contingency-fee risk and thereby encourages more lawyers to represent exonerees. If more lawyers were to handle more exoneration compensation matters, the secondary benefits could be significant: securing more money for more exonerees, enhancing public safety, developing a more experienced bar, and increasing the likelihood that some police and prosecutors will alter their behavior towards future suspects and defendants.

For lawyer-directed financing to emerge, many states would have to make two changes to their laws: First, state supreme courts would need to interpret their attorney-client privilege laws to allow for necessary information to be shared with the financier without constituting waiver. Second, laws prohibiting champerty and sharing fees with non-lawyers would need to be removed. Even with those changes, we believe that ethics rules should properly constrain the financier's ability to control the legal matter and that the risks presented by outside financing are outweighed by the gains in access to justice for the many exonerees who don't presently have lawyers. For these reasons, we believe the expansion of litigation finance for exonerees merits serious consideration.

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INTRODUCTION

Eric Smokes recently walked out of prison after 36 years, having been exonerated for a murder he didn't commit.[1] What comes next? In addition to facing the economic and practical hurdles of reentry, he might seek compensation from the state. But he'll soon discover that recovering money for wrongful conviction is challenging; civil rights litigation is lengthy and stymied by complex immunity doctrines, while state legislative schemes often impose low caps on the available recovery. Finding a lawyer willing to help him pursue his case might be tricky, given the financial risk. Even with a lawyer, Mr. Smokes will be forced to wait many months or years to see any money; settling early to make sure he isn't left empty-handed will be tempting. Getting help from a litigation finance firm might be the answer.

Through litigation finance, "the most important development in civil justice" in a half-century,[2] a nonparty funds a plaintiff or a plaintiff's lawyer in pursuit of a legal matter, and return payment depends on the outcome.[3] The $13.5 billion[4] litigation finance market includes money from hedge funds, private equity, specialist firms, foundations, and even wealthy individuals—all of whom look to make money by betting on the outcome of lawsuits.[5] Litigation finance firms do not direct lawsuits or hire attorneys to pursue them; they instead make it more financially feasible for people to file and sustain such lawsuits. They take on some of the risk (otherwise borne by lawyers working on contingency fee) because they predict returns on their investments.[6]

In some instances, the "return on investment" sought by the funder

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[1] *Eric Smokes*, NAT'L REGISTRY OF EXONERATIONS (July 16, 2024), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6752 [https://perma.cc/Q6UW-YJR5].

[2] Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1075 (2019) [hereinafter Steinitz, *Follow the Money*].

[3] Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FOREST L. REV. 777, 781–82 (2022) [hereinafter Sebok, *Rules of Professional Responsibility*].

[4] Emily R. Siegel & Justin Wise, *Capital Flows into Litigation Funds with Social Justice Impact*, BLOOMBERG L. (Feb. 2, 2024, 4:00 AM), https://news.bloomberglaw.com/business-and-practice/capital-flows-into-litigation-funds-with-social-justice-impact [https://perma.cc/BY9X-KST4].

[5] Steinitz, *Follow the Money*, *supra* note 2, at 1075.

[6] *See id.* (explaining that litigation finance is a "high-risk high-reward" investment); *see also* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 9 (2004) (describing the financial risks that contingency-fee lawyers incur).

includes social change as well as money.[7] For example, outside funders helped a group of professional football players sue the National Football League for concussion-related brain injuries.[8] Financiers have also funded climate-related litigation[9] and challenges to affirmative action and diversity programs.[10] Aristata Capital, funded partially by money from the Soros Economic Development Fund, occupies a prominent place in this landscape globally, investing "in a diversified portfolio of litigation cases across a range of impact sectors—including environment, climate change, human rights, justice reform, access to justice, foreign aid and equality—where law can be used as a potent tool for social and environmental change."[11]

In this piece, we expose the potential of litigation finance to achieve a different sort of social change—supporting exonerees, like Mr. Smokes, who may seek compensation for wrongful conviction. In a relative handful of instances, investment firms have provided cash advances to exonerees to help them withstand delays and obstacles to compensation as they face the practical challenges of reentry.[12] This Essay shines a light on that practice, exposing its benefits and shortcomings.

More broadly, we consider whether funding lawyers (not just clients) in exoneration compensation matters would improve access to justice. If financiers assumed the contingency-fee risk that is currently shouldered solely by lawyers, more private lawyers may be willing to accept exonerees as clients. Some other good things might then follow: More exonerees might receive compensation, either through litigation or statutory compensation schemes; more police and prosecutors might be deterred from improper or illegal behavior; and the pathologies of the criminal legal system might be brought to the attention of more Americans, thereby broadening awareness of a more robust narrative of the criminal legal system than the one police and prosecutors offer.[13] For these reasons, lawyer-directed financing in the exoneration space ought to be explored.

For lawyer-directed financing to emerge, many states would have to

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7 Siegel & Wise, *supra* note 4. This is comparable to corporations spending money on ESG initiatives.

8 Steinitz, *Follow the Money*, *supra* note 2, at 1089.

9 Siegel & Wise, *supra* note 4.

10 *Id.*

11 *About*, ARISTATA, https://www.aristata.co.uk/about-aristata-capital [https://perma.cc/MRF2-VNBR].

12 *See* Roy Strom, *Out of Prison and Broke, Wrongly Convicted Sell Their Cases*, BLOOMBERG L. (Feb. 2, 2022, 11:38 AM), https://news.bloomberglaw.com/business-and-practice/out-of-prison-and-broke-wrongly-convicted-turn-lawsuits-to-cash [https://perma.cc/Z465-66Q4] ("Money from outside funders often fills a financial gap between the time someone is released and when states pay up—which can take years").

13 *See* Russell M. Gold & Kay L. Levine, *The Public Voice of the Defender*, 75 ALA. L. REV. 157 (2023) (arguing that defenders can use social media to counter the dominant state narrative and build community).

make two changes to their laws: First, state supreme courts would need to interpret their attorney-client privilege doctrine to allow necessary information to be shared with the financier without constituting waiver. Second, laws prohibiting champerty (taking a financial interest in another's lawsuit) would need to be repealed, and ethics rules that prohibit sharing fees with non-lawyers would have to be eliminated or read not to encompass financiers. Even with those changes, we believe that ethics rules should properly constrain the financier's ability to control the legal matter, and that the risks presented by outside financing are outweighed by the gains in access to justice for the many exonerees who don't presently have lawyers.

This Essay unfolds in four parts. Part I discusses the profound devastation wrought by wrongful conviction and the legal channels available to exonerees who want to pursue compensation. Part II explains the role that litigation financing has played thus far in helping exonerees' recovery efforts. Part III critically assesses the benefits and pitfalls of client-directed financing. Part IV sketches how a system of lawyer-directed financing might supplement client-directed financing to shrink the access-to-justice gap that exonerees presently face and discusses the legal changes that would be necessary for outsider funders to become involved.

I
WRONGFUL CONVICTION AND EXONERATION COMPENSATION SCHEMES

Over the past few decades, more than 3,500 people have been exonerated in the United States for crimes they did not commit.[14] They are overwhelmingly male and mostly Black, consistent with the prison population more generally, and hail from all fifty states.[15] Persons on the exoneration registry served, on average, nine years in prison before being set free.[16]

Wrongful conviction devastates a person's life in countless ways.[17] In addition to the sheer misery of being locked in a cage for years on end

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14 NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/6KWT-NDN6].

15 Jeffrey S. Gutman & Lingxiao Sun, *Why Is Mississippi the Best State in Which to Be Exonerated?: An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 NE. U. L. REV. 694, 701 (2019) (documenting and analyzing patterns from the National Registry of Exonerations); *id.* at 786. This source interchangeably uses "Black" and "African-American."

16 *Id.* at 740. The range of prison time extends from zero to multiple decades. *Id.* at 787. Fewer than six percent had been sentenced to death. *Id.* at 739.

17 Myles Frederick McLellan, *Compensation for Wrongful Convictions and the Innocence Continuum*, 50 CRIM. L. BULL. 346, 349 n.13 (2016) (citing two government studies from Canada); Jacqueline Kamel, Note, *A Model State Compensation Law for the Wrongfully Convicted*, 50 J. LEGIS. 179, 186–94 (2024).

(especially when wrongfully convicted),[18] incarceration inflicts significant financial harm on the accused and their families.[19] "[E]xonerees struggle with mental, physical, and financial health and wellbeing, have difficulties finding work and housing and building and maintaining relationships, and endure still other difficulties beyond their control."[20]

While many of these harms can never be fully redressed, two formal legal channels offer compensation to those who can navigate them successfully: civil rights lawsuits and legislative compensation schemes. First, an exoneree can file a civil rights action, under 42 U.S.C. § 1983 or *Bivens*,[21] against the persons or entities responsible for violating their constitutional rights leading to their wrongful conviction. The city or county that employs the officer is also subject to suit.[22]

But these lawsuits can take years to resolve, and various doctrines make this litigation quite complex to launch and difficult to win. Immunity is the first barrier, and it takes many forms. Police are protected by qualified immunity,[23] while prosecutors enjoy absolute immunity for conduct tied to the judicial phase of the adjudication process.[24] To establish municipal liability, cities or counties (which typically employ police, prosecutors, and criminalists at crime labs) are subject to suit only if the plaintiff can show unconstitutional behavior that amounted to a policy or custom, perhaps through deliberate indifference to constitutional rights.[25] As to proving the

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18 *See* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2510–30 (2020) (explaining that even though convictions represent a formal conclusion about the quantity of evidence possessed and produced by the prosecution, they are not always reliable indicators of factual guilt).

19 Audrey D. Koehler, *Exonerated, Free, and Forgotten: How States Continue to Punish the Wrongfully Convicted Through Procedural Hoops and Inadequate Compensation*, 58 WASHBURN L.J. 493, 498–99 (2019).

20 Jeremy Shifton, *Opinion Versus Reality: How Should Wrongfully Convicted Individuals Be Compensated Versus How They Are Actually Compensated*, 2 WRONGFUL CONVICTION L. REV. 89, 90 (2021); *see also* David Cloud, *On Life Support: Public Health in the Age of Mass Incarceration*, VERA INST. OF JUST. (Nov. 2014), https://www.vera.org/publications/on-life-support-public-health-in-the-age-of-mass-incarceration [https://perma.cc/76KE-SLWZ] (identifying mass incarceration as a driver of public health issues); Koehler, *supra* note 19, at 498 (explaining the difficulties exonerees face in seeking employment).

21 Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

22 Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 694–95 (1978).

23 White v. Pauly, 580 U.S. 73, 81 (2017) (per curiam); Mullenix v. Luna, 577 U.S. 7, 11 (2015); Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam). For scholarly critiques of qualified immunity, see, for example, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (arguing that legal justifications for the doctrine are unpersuasive); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 11, 18–19 (2017) (asserting that qualified immunity lacks empirical backing and fails on policy grounds).

24 Imbler v. Pachtman, 424 U.S. 409, 410 (1976); Kalina v. Fletcher, 522 U.S. 118, 129 (1997); Buckley v. Fitzsimmons, 509 U.S. 259, 277 (1993).

25 *Monell*, 436 U.S. at 694; City of Canton v. Harris, 489 U.S. 378, 388–89, 392 (1989). *See generally* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 430–38 (2016).

liability of the agents where sovereign immunity bars suits against the government, the Supreme Court has shrunk *Bivens* to fit into a bathtub.[26]

Because of this doctrinal morass, plaintiffs have a very difficult time prevailing without a talented lawyer.[27] This is especially true when plaintiffs are faced with government defendants who are repeat players and have greater ability to absorb the risk of loss. All the while, potential exoneree-plaintiffs face extremely challenging economic circumstances, leaving them cash-strapped and risk-averse. Plaintiffs who get as far as hiring lawyers and pursuing compensation are likely to feel pressure to accept an early settlement offer, which means the case may settle for far less than it is worth. Attorneys working for plaintiffs on a contingency-fee basis front the cost of litigation, so they might feel pressure to settle early in order to receive a certain payout and move on to their next case.[28] All told, underenforcement and undercompensation of civil rights claims diminish their potential deterrent effect.

Beyond this uncertain and unwieldy litigation channel, many jurisdictions have legislatively created mechanisms for the wrongfully convicted to secure compensation without litigation.[29] Where they exist, these legislative schemes typically move faster than litigation.[30] They usually do not require exonerees to demonstrate what led to their wrongful conviction[31] but sometimes impose other substantial hurdles to compensation, such as requiring the exoneree to provide proof of actual innocence (a high standard) or disqualifying exonerees with prior felony convictions.[32] Some states refuse to provide compensation to anyone

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26 *See, e.g.*, Egbert v. Boule, 596 U.S. 482, 492 (2022) (explaining that whether to imply a *Bivens* action in a particular context comes down to whether Congress or the courts should decide this question and that "the answer is 'Congress' . . . in most every case"); Ziglar v. Abassi, 582 U.S. 120, 122, 139–40 (2017) (holding that if a case "is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court," including if it involves an official of a different rank, then it is a "new *Bivens* context" and requires "special factors analysis" before it can proceed).

27 *See* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1559 (2020) ("[P]laintiffs' attorneys will tell you that civil rights litigation is an exceedingly complicated area of practice. It would make sense, then, that lawyers with experience bringing civil rights cases—and success in those cases—would be more likely to succeed in the cases they bring").

28 *See, e.g.*, Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536, 543–46 (1978); Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479 (1997).

29 Strom, *supra* note 12; *see also* Kamel, *supra* note 17, at 197–200 (criticizing existing legislative compensation schemes).

30 Meghan J. Ryan, *Compensation for Wrongful Convictions in the United States*, *in* COMPENSATION FOR WRONGFUL CONVICTIONS: A COMPARATIVE PERSPECTIVE 161, 175 (Wojciech Jasiński & Karonlina Kremens eds., 2023).

31 Myles Frederick McLellan, *Innocence Compensation: A Comparative Look at the American and Canadian Approaches*, 49 CRIM. L. BULL. 218, 234 (2013).

32 *Id.* at 234; McLellan, *supra* note 17, at 368–70; Koehler, *supra* note 19, at 509, 513–15, 516; Strom, *supra* note 12.

convicted by guilty plea instead of at trial,[33] which means the vast majority of defendants will receive nothing.[34] Others set tight time limits governing when an exoneree must file.[35] Many legislative schemes cap recovery well under $100,000 per year of incarceration or post-incarceration surveillance.[36] Wisconsin, at the extreme, limits recovery to $5,000 per year, with a total cap of $25,000 no matter how many years the person was incarcerated.[37]

In contrast to the low recovery amounts received through legislative schemes, successful civil rights actions for wrongful conviction have generated $2.4 billion in verdicts and settlements over the past twenty-two years; this equates to an average recovery of approximately $320,000 per year of wrongful incarceration across successful cases.[38] But only about 55% of the 808 exonerees who filed civil lawsuits from 2000–2019 won.[39] In some states, an exoneree can pursue both litigation and the legislative mechanism, but in others, a claimant who seeks compensation through the legislatively created scheme must waive their right to sue.[40]

Recovery through either channel can be extremely time-consuming and arduous.[41] Even an exoneree who secures a judgment might not see any money, as states tend to drag their feet when it's time to pay up.[42] For an exoneree in Alabama who spent thirty years on death row for a crime he did not commit, for instance, the state legislature simply "ran out of time" during

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33 Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 396 (2017); Kamel, *supra* note 17, at 199.

34 *See, e.g.*, Jeffrey Bellin & Jenia I. Turner, *Sentencing in an Era of Plea Bargains*, 102 N.C. L. REV. 179, 192 (2023) ("[M]ost convictions result from guilty pleas"); Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

35 *See, e.g.*, Koehler, *supra* note 19, at 516–17 (noting that in Florida an exoneree must "petition for a certification from the sentencing court that they were wrongfully incarcerated" within ninety days of having their conviction vacated); *id.* at 517 (observing that Tennessee provides one year to begin the process).

36 *See* Gutman, *supra* note 33, at 401–02 & nn.180–82 (listing the statutory maximums of different states).

37 Gutman & Sun, *supra* note 15, at 749 n.183 (citing WIS. STAT. § 775.05(4) (2018)).

38 Strom, *supra* note 12.

39 Gutman & Sun, *supra* note 15, at 699–700. This percentage should be viewed cautiously because their data collection ended in 2019, and more than 140 cases were still pending as of that date.

40 The following states require the litigation waiver: Colorado, Connecticut, Florida, Iowa, Louisiana, Michigan, Mississippi, Nebraska, Texas, Virginia, and Washington. Koehler, *supra* note 19, at 517 n.173, 528. A particular exoneree might try ad hoc recovery by legislative "private bill," but this process is considerably more onerous and subject to "the vagaries of politics and influence." McLellan, *supra* note 31, at 232.

41 *See* McLellan, *supra* note 31, at 218 ("Inevitably a person upon release will face the daunting task of issuing some action for relief which engages yet another battle requiring resources that the recently exonerated very likely do not have").

42 Koehler, *supra* note 19, at 519–21 (profiling certain exonerees who had to wait years to receive their funds even after awards were finalized).

the session, failing to award him funds that had been unanimously approved.[43] It is thus no surprise that "[e]xonerees have not been compensated for nearly half of the years they wrongly spent in prison."[44] Increasing compensation for the wrongfully convicted is where litigation finance can make a difference.

II
LITIGATION FINANCE FOR EXONEREE RECOVERY EFFORTS

Many attorneys handling wrongful conviction lawsuits accept them on a contingency-fee basis.[45] They cover filing fees, court costs, and administrative overhead. In return, the lawyers receive a percentage of the eventual recovery. Although the lawyers front the litigation costs, they do not (and cannot) distribute cash to their clients to help with living expenses while their case crawls through the system.[46]

Litigation finance firms provide such cash. Firms such as Legal-Bay, Validity Finance, and Baker Street advance funds to help clients "meet . . . immediate financial needs" while they await the uncertain and delayed prospect of a recovery.[47] This is known as client-directed financing.[48] For instance, litigation financing helped Anthony Ross obtain a settlement of nearly four million dollars after he spent thirteen years in prison for a murder

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43 *Id.* at 521 (describing the experience of exoneree Anthony Hinton and quoting state senator Paul Bussman).

44 Strom, *supra* note 12 (citing Gutman & Sun, *supra* note 15, at 699).

45 *Wrongful Conviction Settlement Funding*, USCLAIMS, https://usclaims.com/pre-settlement-funding/wrongful-conviction [https://perma.cc/2YDP-CDJ6] [hereinafter *Wrongful Conviction Settlement Funding*].

46 MODEL RULES OF PRO. CONDUCT r. 1.8(e) (AM. BAR ASS'N 2020) (noting that "a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation," subject to exceptions not relevant here).

47 *Wrongful Conviction Settlement Funding*, *supra* note 45. One such firm mentions that these needs might include "[r]ent and mortgage payments, [u]tilities, [g]roceries, [t]uition, and [o]ther living expenses." *Id.* It might also be "used to prevent foreclosure or eviction, ensuring that people who were wrongfully convicted do not lose their homes or other important assets." *Id.*

48 *See* Sebok, *supra* note 3, at 790 (using the term "client-directed legal finance"). To the extent that financing is available to exonerees, it is typically client-directed financing. *See* Strom, *supra* note 12. One exception seems to be the firm RD Funding, whose website claims that they will provide funds "to attorneys who have fees tied to a wrongful conviction case, but their payment is delayed." *Wrongful Conviction Compensation Legal Funding*, RD LEGAL FUNDING, https://www.legalfunding.com/eligible-cases/wrongful-conviction-compensation-legal-funding [https://perma.cc/FS9H-4UJ4]. This phrasing suggests the firm will make post-settlement finance arrangements (as well as pre-settlement), to cover the time between judgment and collection. In other models, outside funders extend credit lines to attorneys handling cases on a contingency-fee basis or help them front costs to cover expert witnesses or case preparation. Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 711–12 (2007).

he did not commit.[49] Ross received a cash advance from Legal-Bay[50] to help make it feasible for him to pursue that wrongful conviction claim.[51] Had Ross lost his case, he would not have had to pay back the cash advance. This is the structure of the finance arrangement: Following recovery, the firm is paid off the top, after attorney's fees, costs of suit, and liens are paid.[52] If the exoneree recovers nothing, they owe nothing to the funder.[53]

Litigation financiers are not indiscriminate lenders; they often articulate qualifying terms up front for which kinds of cases they will support.[54] For example, Validity Finance provides the following short list of conditions for its exoneree funding program, all of which correlate with a high expected recovery: The exoneree was incarcerated for longer than five years, the exoneree's lawyer has a proven track record, a financial advisor has created an expense budget for the duration of the litigation, and the relevant city or county has an indemnity policy of at least five million dollars.[55]

The precise financing terms differ, but the successful exoneree will typically pay back the funder its investment plus a certain percentage of "interest" for each year between funding and eventual recovery. Many litigation funding firms cap the compounding interest. Legal-Bay, for instance, reports that their cap-out provisions "ensure our clients will pay a fixed amount after 30 months. This amount will never go higher, no matter

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49 LEGAL-BAY, LLC, *Legal-Bay Lawsuit Funding Focusing on Wrongful Convictions and Imprisonment Cases*, PR NEWSWIRE (Feb. 25, 2021), https://www.prnewswire.com/news-releases/legal-bay-lawsuit-funding-focusing-on-wrongful-convictions-and-imprisonment-cases-301235338.html [https://perma.cc/AP8E-H773] [hereinafter *Legal-Bay Lawsuit Funding*]; *Illinois City to Pay $11M in Wrongful Conviction Settlements*, AP NEWS (Mar. 3, 2020), https://apnews.com/article/c312a30c73529b846b3215646d415a19 [https://perma.cc/A37T-D99B] [hereinafter *Illinois City to Pay*].

50 *What We Do*, LEGAL-BAY LAWSUIT FUNDING, https://lawsuitssettlementfunding.com [https://perma.cc/74LJ-UD8G].

51 *Legal-Bay Lawsuit Funding*, *supra* note 49.

52 *See, e.g.*, *Litigation Questions Answered*, TOWN CTR. PARTNERS, LLC, https://yourtcp.com/litigationfinanceguide.html [https://perma.cc/G6QP-WDV8] (explaining how litigation financiers are repaid after settlement or verdict).

53 *Pre-Settlement Funding for Wrongful Imprisonment Due to Wrongful Conviction*, BAKER ST. FUNDING, https://bakerstreetfunding.com/civil-rights-lawsuit-loans/wrongful-imprisonment [https://perma.cc/T6WR-QBVW].

54 The firms insist that the money is not a loan. By casting this money as an investment rather than a loan, litigation finance firms aim to escape the reach of usury laws that protect borrowers against predatory lending practices, particularly exorbitant interest rates. *See* Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750, 761–72 (2012) (explaining the history of courts interpreting litigation finance first as champerty, then as usury, and then as investment).

55 *Validity Finance Launches Non-Profit Program to Assist Innocent Exonerees*, LITIG. FIN. INSIDER (Feb. 3, 2022), https://litigationfinanceinsider.com/validity-finance-launches-non-profit-program-to-assist-innocent-exonerees [https://perma.cc/K88H-P82P]; *Solutions*, VALIDITY FIN., https://www.validityfinance.com/our-approach/solutions [https://perma.cc/AY2Q-SPAA].

how long the case drags on through the courts or in appeals."[56] At Baker Street Funding,[57] "interest rates are capped after two years and [clients] receive monthly or semi-annual cash advances."[58] However, the high interest rate means that in some instances, a successful exoneree will pay the firm nearly double what the firm originally advanced.[59] Other funders, such as Validity Capital,[60] charge only simple interest that does not compound the exonerees' debt as proceedings drag on.[61]

III
ASSESSING CLIENT-DIRECTED FINANCING AS A TOOL TO HELP EXONEREES

Litigation financiers offer a range of benefits to wrongfully convicted people who want to pursue compensation. First, they make seeking compensation more feasible because they eliminate the upfront costs of filing suit or navigating the legislative channel. Second, they reduce the risk for exonerees trying to get back on their feet.[62] Third, they "bolster [the exoneree's] bargaining power" by diffusing the pressure to quickly settle created by mounting expenses and the passage of time.[63] By providing cash support to an exoneree, the litigation funder should increase the amount of money received from the state at the end of the process. This is true even if some of that additional money ultimately gets paid to the financier and even if the amount paid to the financier increases over the length of the recovery process until the cap is reached. Aside from the benefits that accrue to the formerly incarcerated person from the successful pursuit of compensation,

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56 *Legal Bay Lawsuit Funding*, *supra* note 50.

57 *About Us*, BAKER ST. FUNDING, https://bakerstreetfunding.com/about [https://perma.cc/X3KB-B954].

58 Strom, *supra* note 12.

59 *Id.* (sharing the story of Fernando Bermudez, who received $215,000 from a financier and had to pay back more than $400,000, after he recovered more than $11 million for a wrongful conviction in New York); Kamel, *supra* note 17, at 194 (criticizing the predatory terms for litigation finance in exoneration proceedings). One New York attorney explained that "two funders—U.S. Claims and Law Finance Group—offer the best rates in the industry, topping out at twice the principal amount after four years." Strom, *supra* note 12 (paraphrasing Nick Brustin).

60 "Validity Capital" appears to be the same entity as "Validity Finance." *Compare* Strom, *supra* note 12 (discussing "Validity Capital" financially backed by TowerBrook Capital Partners), *with* Ralph J. Sutton, *Introducing Validity Finance*, VALIDITY FIN., LLC (June 25, 2018), https://www.validityfinance.com/news/company/2018-06-25-introducing-validity-finance [https://perma.cc/PD7U-AN2M] (discussing "Validity Finance" with funding from TowerBrook Capital Partners).

61 Strom, *supra* note 12.

62 *Id.* (quoting Locke Bowman, the director of a wrongful convictions advocacy group at Northwestern Pritzker School of Law, who asserts that litigation funding for exonerees reduces "delay, stress, challenges, and uncertainty").

63 Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 92 (2010). *See generally* Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85 (2002) (noting that wealthy defendants sometimes intentionally extend litigation to force plaintiffs to concede).

there are also wider benefits to society. For instance, research has shown that exonerees who receive at least $500,000 in compensation are less likely to commit future crimes.[64]

Client-directed financing has downsides, however, which caution against uncritical acceptance of outside money in the exoneree compensation process. First, some critics argue that interest rates are too high for the risk that funders incur[65] and that exonerees are forced to accept these high interest rates because they lack other funding options.[66] Financiers are thus positioned to exploit vulnerabilities in the subject population if regulations or market forces fail to intervene. Exonerees are even more likely to need regulatory protection than are sophisticated corporations that obtain litigation financing.[67] We believe that regulation can address some of these concerns about predatory practices, and the market can tame funders' worst impulses. Caps on interest appear to have emerged from market pressure; there may be other ways to protect clients in litigation finance arrangements, but those questions go beyond the scope of this Essay.[68]

Others criticize third-party funding because it reduces settlement pressure on plaintiffs, thereby aggravating already overcrowded dockets in ways that are detrimental to more meritorious lawsuits.[69] These commentators decry litigation finance for making litigation more cumbersome, costly, and slow.[70] These are the same dynamics that repeat-player defendants have employed for years to wear down one-shot plaintiffs[71]—so it is ironic that, when used by plaintiffs, those goals suddenly appear systemically inappropriate.

More troubling than the effect on litigation rates is a concern about

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64 Evan J. Mandery, Amy Shlosberg, Valerie West & Bennett Callaghan, *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 556 (2013).

65 Strom, *supra* note 12 (quoting Jon Loevy); Hashway, *supra* note 54, at 758; Barksdale, *supra* note 48, at 727 (observing that firms "only take cases with the most potential to yield a successful outcome; [t]herefore, in reality the risk of non-recovery seems to be very little in comparison to the interest rate").

66 Barksdale, *supra* note 48, at 730; Molot, *supra* note 63, at 102 (arguing in the context of tort litigation generally that high interest rates for litigation financing can leave "plaintiffs . . . not all that much better off").

67 Maya Steinitz, *Written Testimony on Oversight of Third-Party Litigation Funding Before the Committee on Oversight and Accountability United State House of Representatives* 9–10 (B.U. Sch. of L., Research Paper No. 4578171, 2023) [hereinafter Steinitz Testimony].

68 *Id.* at 10. For more on whether funding agreements ought to be mandatorily disclosed to the court or opposing parties, see Steinitz, *Follow the Money*, *supra* note 2.

69 Barksdale, *supra* note 48, at 732; Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L., ECON. & POL'Y 613, 625 (2012).

70 *See, e.g.*, Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1087–88, 1100 (2012) (describing the propositions advanced by critics of the current regime of litigation).

71 Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

inequity: The litigation finance industry might be perpetuating inequality and structural disadvantage in the exoneree population. Litigation financiers, even if well-intentioned, may compound disadvantage in the name of making good business decisions—investing in those cases already earmarked by advantage and refusing to invest in cases that historical and statistical data suggest will yield small recoveries.[72]

We worried first about the impact of exonerees' race on their access to litigation financing. Given the racialized patterns observed in other corners of the legal system,[73] does race impact the compensatory outcome of a case and thus its attractiveness as an investment? To our surprise, the only study we can find documents no statistical association between race and outcome. Jeffrey Gutman and Lingxiao Sun's regression analysis found that while "Hispanics were associated with over $182,000 per year more compensation compared to African-Americans. . . . There [was] no correlation between being white or [B]lack and compensatory outcome."[74] Other variables—most notably, the involvement of an Innocence Project[75] and the existence of DNA—were far more salient to the likelihood of filing a lawsuit, the likelihood of pursuing statutory compensation, and the compensation amount.[76]

That said, race might be lurking behind other seemingly objective proxies, which means we ought to remain alert for it as a driver of investment decisions. For example, whether the exoneree has been convicted of other crimes since his release from prison surely factors into a financier's calculation. Renewed incarceration can make finding counsel more difficult, reduce the person's chances of prevailing, and reduce the monetary value of his claim.[77] Because of policing practices and other exercises of discretion by law enforcement actors, the likelihood of being convicted of a subsequent

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72 *Cf., e.g.*, J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1380 (2022) ("[I]ndividuals with meritorious but low-value claims have so little access to justice (to say nothing about access to systems capable of ensuring adequate recovery) . . . .").

73 *See, e.g.*, Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018) (finding that white defendants with no prior convictions are more likely to face reduced charges for felonies and misdemeanors than Black defendants with no prior convictions); Michael R. Menefee, *The Role of Bail and Pretrial Detention in the Reproduction of Racial Inequalities*, 12 SOCIO. COMPASS (2018) (finding racial and ethnic minorities are disproportionately detained pretrial, leading to increased rates of conviction). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (arguing that criminal law and mass incarceration reimpose discrimination against Black people of the sort that Jim Crow laws perpetrated).

74 Gutman & Sun, *supra* note 15, at 782–83. Black exonerees were the baseline against which white and Hispanic exonerees were measured.

75 *See* INNOCENCE PROJECT, https://innocenceproject.org [https://perma.cc/NMH9-CEE3] (explaining that the Innocence Project is an organization dedicated to freeing individuals who have been wrongfully convicted).

76 Gutman & Sun, *supra* note 15, at 759, 769, 775.

77 *Id.* at 723 n.90.

crime sometimes correlates with race.[78] Hence, if the funding model prioritizes investing in cases with the greatest chance of substantial recovery,[79] cases with Black exonerees may be less likely to make the cut.

Geography impacts equity too. Because jurisdictions differ dramatically in how much an exoneree will likely recover if he or she prevails, some exonerees will have a natural advantage in securing outside financing based simply on where they were convicted. On the generous end of the spectrum, consider New York State and the District of Columbia. New York's legislative scheme is uncapped—the average amount paid in New York is $148,000 per year of incarceration.[80] In D.C., which "had and partially still has an uncapped statute,"[81] the average annual legislative award is more than $375,000 per year.[82] By contrast, consider Wisconsin and Georgia. Wisconsin imposes a $5,000 per year cap on legislative compensation with a cap of $25,000 overall,[83] and the average award received after litigation in Wisconsin is just over $3,000 per year of incarceration.[84] The average annual award in Georgia, which has no fixed legislative channel, is only $15,000 per year of incarceration.[85] If we factor in litigation outcomes, "[o]ver 53% of all civil compensation was awarded to formerly incarcerated exonerees in just two states—Illinois and New York—which together accounted for only 22% of the 1,802 exonerees in the database. . . . [But they] both compensate at higher than the national average."[86] Because the exoneree must file in the state of conviction, litigation funding is more likely to be available to those exonerees who live in generous states than to those who live in stingy ones.

Having addressed the benefits and burdens of client-directed financing for exonerees seeking compensation, we suggest that lawyer-directed

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78 *See, e.g.*, Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015) (explaining that, in the context of risk-assessment algorithms, prior criminal history is a proxy for race).

79 Kidd, *supra* note 69, at 633 (noting that firms are likely to limit the number of low-value claims "in order to focus more on high-value claims").

80 Gutman & Sun, *supra* note 15, at 746.

81 *Id.* at 763. Both the District of Columbia and New York State receive a grade of 'A' for "state statute generosity" in Gutman and Sun's rubric. *Id.* at 748. The other jurisdictions which received an 'A' grade are Maryland, Minnesota, and West Virginia. Montana, New Hampshire, and Wisconsin received the lowest scores. *Id.*

82 Gutman & Sun, *supra* note 15, at 763.

83 WIS. STAT. § 775.05(4) (2018); *see also* Gutman & Sun, *supra* note 15, at 749 n.183 (lamenting that recent attempts to augment payments to exonerees and to provide social services for them appear "to lack support in the Wisconsin state senate").

84 Gutman & Sun, *supra* note 15, at 763.

85 *Id.* at 773. Georgia has "the unhappy distinction of being one of the states in which exonerees would least likely be compensated." *Id.*

86 *Id.* at 772–73. Gutman and Sun speculate that this pattern may be due to more experienced civil rights attorneys, a history of prior settlements affecting negotiations, and the nature of the jury pools in these two states. *Id.* at 773.

financing could add value in this arena and mitigate the inequities described above.

IV
ALLOWING LAWYER-DIRECTED FINANCING TO IMPROVE ACCESS TO JUSTICE

In this final part of this Essay, we briefly sketch the contours of a lawyer-directed financing arrangement to supplement client-directed financing for exonerees seeking compensation. If outside money relieved lawyers of the contingency risk they bear, would more private lawyers be willing to help exonerees pursue compensation? What would this mean for our system of justice? We offer some preliminary thoughts about what lawyer-directed financing could look like and how it might impact the wrongful-conviction landscape.

In a lawyer-directed finance system, the financier would pay the lawyer on an hourly or flat-fee basis for legal services provided to an exoneree who seeks compensation. In return for this investment, any eventual recovery would be shared with the financier. This approach would shift financial risk from the contingency-based lawyer to the better-diversified financier.[87] Shifting that risk in turn should help close the access to justice gap that arises when lawyers determine that a potential case payout is not worth the risk of time expended. Spreading risk from law firms to better-diversified hedge funds, for example, would allow smaller law firms to take cases that would otherwise pose too much opportunity cost relative to their expected payout.[88] Allowing lawyer-directed financing can thus increase the odds that more exonerees will receive representation, thereby increasing their likelihood of success.[89] To borrow from one author's call to increase the use of litigation finance in the tort sector, "[m]ore access to capital results in more access to counsel, which results in more access to justice."[90]

For financiers interested in hedging their risk while supporting social

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87 This is a common structure for litigation finance in Australia. Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561, 575 (2014).

88 Steinitz, *Follow the Money*, *supra* note 2, at 1075, 1086 (observing that the litigation finance market has attracted hedge funds, among other entities, and that litigation finance allows start-up, boutique, and other small firms to compete with larger and more established firms for "high-end work, including work that may require investment by the firm").

89 *See id.* at 1096 (arguing that since the "extremely high cost of litigation" often inhibits access to justice, litigation finance "has the potential to add significant diversity to the pool of those able to afford to litigate and therefore to increase the diversity of issues before the courts"); *see also* Gutman & Sun, *supra* note 15, at 759, 769, 775 (documenting the statistical association between Innocence Project involvement and successful claims in both the litigation track and the statutory compensation track).

90 Bob Koneck, *New Ideas for Using Litigation Finance to Close Justice Gap*, LAW360 (May 5, 2023), https://www.law360.com/articles/1604591/new-ideas-for-using-litigation-finance-to-close-justice-gap [https://perma.cc/48ZQ-DUFE].

justice efforts, building a larger portfolio of cases would be important. Financiers would need to invest in many cases to be sure that at least some will yield a financial return.[91] In so doing, they would provide support to many more exonerees than they currently do, both in litigation and in the statutory compensation track. As it currently stands, we suspect many exonerees who cannot find counsel could benefit from a lawyer's advice about which route to pursue, especially in jurisdictions where exonerees cannot pursue both a lawsuit and statutory compensation. Without advice, exonerees may choose the statutory procedure because it offers a quicker and more certain payout than litigation,[92] perhaps without realizing that they are forfeiting a potential (and potentially large) litigation recovery. Lawyers can help exonerees better evaluate whether to sacrifice size for speed and certainty.[93] Innocence Projects are already doing some of this work, but we need deeper engagement by the private bar to serve a larger population.[94] In sum, if outside funders offered support to private attorneys to do exoneration compensation work, we believe more exonerees in more places would initiate compensation proceedings (in court or via statutory process), supported by counsel who could provide much-needed advice from the earliest stages.

The secondary impacts of this shift could be significant. First, and most fundamentally, if the availability of more lawyers encourages more exonerees to pursue compensation and increases their chances of success, more exonerees will be compensated.[95] In this population the risk of frivolous lawsuits, oft-cited by opponents of client-directed financing, is extremely low, as they have already been exonerated; liability is not an open question. Second, society would share in this benefit because, as noted above, exonerees who receive at least $500,000 in compensation are less

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91 *Id.* Some litigation finance could even be offered on a no-cost basis to attorneys doing work pro bono.

92 Gutman & Sun, *supra* note 15, at 701.

93 Shifting the financial risk away from the lawyer may also affect lawyers' financial incentives in ways that align differently with clients' interests when compared to how those interests align under the current contingency-fee structure. When lawyers do not bear the risk of a contingency fee, they have less incentive to push for the quick but certain settlement. *See* Clermont & Currivan, *supra* note 28, at 536. If the financing arrangement pays the lawyer on an hourly basis the lawyer might be inclined to steer the client toward litigation, whereas a financing arrangement that pays the lawyer on a flat-fee basis may lead the lawyer to steer the client toward quick but certain recovery in the legislative scheme. *See id.* at 535–36. Nonetheless, ethical lawyers should and will prioritize the client's interests, and we think that making representation financially viable for more exonerees outweighs any potential downsides of these incentive structures.

94 *See* Steinitz Testimony, *supra* note 67, at 3 (explaining that litigation finance can serve as venture capital for new law firms).

95 *See* Steinitz, *Follow the Money*, *supra* note 2, at 1086 (explaining how litigation financing allows smaller firms to now compete with bigger firms and has inspired modes of litigation funding for criminal and civil cases).

likely to commit future crimes.[96] Third, as success stories accumulate, an experienced bar is likely to emerge and take root outside of the major cities,[97] which in turn should lead to a greater likelihood of success for exoneree-plaintiffs in a wider range of locales—thus mitigating the geographic disparity.[98]

Widening the lens still further, with more exonerees prevailing on their claims, more police and prosecutors might pay attention to the constitutional and statutory guardrails that are in place to prevent wrongful convictions in the first place. To be sure, the chain that connects payouts in wrongful conviction suits to deterring wrongdoing by police and prosecutors is attenuated. The time lag and likely personnel differences between the current police/prosecutor staff and those involved in the challenged convictions weaken the deterrent effect. So too does the fact that police officers and departments rarely personally pay the damage awards won by exonerees.[99] But even with those concessions, injecting more outside money into the exoneration compensation landscape might make at least some members of the law enforcement team take notice.

The rules about attorney-client relationships lead to some questions about the legality and wisdom of lawyer-directed financing that client-directed financing avoids, because lawyer-directed financing (1) injects a third party into the relationship who might try to control the case and (2) involves fee-sharing between lawyers and non-lawyers. We believe these questions merit consideration but ultimately should not defeat a proposal for lawyer-directed financing.

To begin, an outside funder who is financially invested in the outcome of the case might want to control the litigation to better the chances of getting a return on its investment (or to maximize the size of that return). This risk has been discussed extensively in the context of outside funding for mass tort litigation, where funders have sometimes required recipients to sign agreements (sometimes called "capital provision agreements") giving away

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96 Mandery, Shlosberg, West & Callaghan, *supra* note 64, at 533, 556.

97 The success of exonerees in New York, D.C., and Illinois appears to be at least partly attributable to the talented and experienced civil rights attorneys in those locations. *See* Gutman & Sun, *supra* note 15, at 773; *see also* Steinitz Testimony, *supra* note 67, at 2 (explaining that litigation finance generally can increase plaintiffs' access to more experienced and specialized counsel).

98 *See* Gutman & Sun, *supra* note 15, at 747–54 (identifying a geographic disparity in compensation for exonerees through statutory processes).

99 *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (documenting that governments indemnify officers for misbehavior, including for punitive damage awards, even when prohibited by statute); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1542 (2017) (observing that municipalities purchase insurance to indemnify against actions by police officers). Perhaps increased insurance premiums might get the attention of high ranking (typically elected) officials, who could exert some influence on the state actors who work for them.

their rights to make important decisions on the case.[100] We believe this is not a significant risk in the exoneree context, for a few reasons. First, outsiders already help pay for lawyers in some litigation, such as a car insurance company that pays for a lawyer to represent an insured driver involved in a car accident. To be sure, the financier's sophistication, financial motive, and arms-length dealing might lead to a request for more information in an exoneree's case than an insurance company asks for in the driver's case (for example, asking to examine case materials before deciding to invest or seeking ongoing information about the case), but this kind of information exchange already exists.[101] More importantly, already-existing ethics rules insist that these interactions do (and should) proceed only with the client's informed consent.[102] We encourage state supreme courts to remove another potential hurdle to this interaction by interpreting attorney-client privilege law in their jurisdictions[103] to clarify that sharing information with the financier does not amount to waiver (presumably by deeming the financier an entity necessary to the representation).[104] If such a rule were in place, the financier could and should be treated as a fiduciary, with duties akin to fiduciaries in other settings.[105]

To be clear: we would not condone any financing structure that removes or even dilutes the exoneree's ultimate decision-making authority,[106] as we

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100 For a thorough discussion of these issues, see Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J. F. 32 (Oct. 31, 2023). Parikh notes that these agreements sometimes give the funder the right to veto settlement offers. *Id.* at 44.

101 *See* N.Y.C. BAR ASS'N, COMM. ON PRO. ETHICS, FORMAL OPINION 2011—12: THIRD PARTY LITIGATION FINANCING 2 [hereinafter NYC Bar], https://www2.nycbar.org/pdf/report/uploads/20072132-FormalOpinion2011-2Third-partyLitigationFinancing.pdf. [https://perma.cc/6ZW5-BY5L]; *see also* AM. BAR ASS'N, COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 4 (Feb. 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf [https://perma.cc/JFX7-YYKH].

102 NYC Bar, *supra* note 101, at 6.

103 Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1326–28 (2012). *See also* Hashway, *supra* note 54, at 755 (explaining that such disclosure waives privilege under existing law); Barksdale, *supra* note 48, at 714 (same).

104 *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 70 at 539 (AM. L. INST. 2000) (discussing when presence of third parties does not waive attorney-client privilege). The state supreme court's role in enlarging the boundaries of the privilege might vary slightly depending on whether privilege law is embodied in a statute, contained in a rule, or remains a common law doctrine in each state. *See id.* § 68 cmt. d ("In most of the states, the privilege is defined by statute or rule, typically in an evidence code; in a few states, the privilege is common law").

105 Exploring the details of that arrangement is beyond the scope of this Essay.

106 *See* Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 677, 691 (2010) (criticizing the idea that litigation financing must be prohibited because financiers will pressure lawyers to pressure clients to settle cases); Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 508 (2012) (explaining how financiers can wield practical control even when funding agreements disavow funder control).

believe strongly that exonerees ought to be protected from financial exploitation. Fortunately, even a straightforward reading of legal ethics rules suggests they don't permit arrangements that dilute client control either.[107] In fact, a Working Group of the ABA reviewed numerous such agreements in the tort setting to look for signs of excessive control by the funder, in response to concerns about how these arrangements might restrict clients' decision-making autonomy; they mostly found agreements that "describe a benign relationship where the financier is a passive investor, attorneys have absolute autonomy, and the plaintiff has unquestioned decision-making authority."[108]

Second, we are less likely to see "unethical and potentially illegal tactics" to build large portfolios of plaintiffs[109] or to drive unwise settlements,[110] as the potential financing amounts and payouts in exoneration matters are nowhere close to the dollars involved in mass torts.[111] In the exoneration space, the liability issue—wrongful conviction—has already been decided, and even the most generous juries award to the individual exoneree only a fraction of what mass actions in the tort space yield. For these reasons, the pressure on the defendant to settle a wrongful conviction lawsuit should be much less than that experienced by mass tort defendants.[112] With protections in place for client control and transparency, we believe that ethics rules should permit lawyer-directed financing.

Apart from privilege issues, a system of lawyer-directed funding might raise problems under the law of champerty (buying a contingent stake in

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107 *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (describing a lawyer's professional duty to abide by client decisions concerning the objectives of representation); *see also* W. Bradley Wendel, *Paying the Piper but Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 3 (2018) (asserting that lawyers must be careful when finding avenues to finance representation, in order to ensure that client representation is not ethically interfered with as a result).

108 Parikh, *supra* note 100, at 58 (citing *Informational Report to the House of Delegates*, AM. BAR ASS'N COMM'N ETHICS 20/20 6–7 (2012)). Parikh questions the utility of this report, asserting that funders chose which reports to submit for review. *Id.* at 58 n.126.

109 *Id.* at 47 (describing practices in the mass tort area that funders use to generate huge portfolios of plaintiffs: "Opaque capital relies on intermediaries to contact potential mass-tort claimants and attempt to create and enhance claims"). Those "lead generator" tactics, *id.* at 51, while troubling, could not be used in exoneration cases because each claim to wrongful conviction is individual.

110 *Id.* at 41. One of these tactics in the mass-tort space includes selectively releasing private information to the press to pressure the defendant to settle. *Id.* at 46.

111 One funder gave a plaintiff "approximately $140 million to finance . . . antitrust litigation . . . ." *Id.* at 61. In terms of payouts, the talc powder litigation resulted in a $9 billion settlement against Johnson & Johnson. Ronald V. Miller, Jr., *Most Active Class Action Mass Torts in 2024*, LAWSUIT INFORMATION CENTER (June 2, 2024), https://www.lawsuit-information-center.com/most-active-class-action-2023.html [https://perma.cc/9FZR-9PDM].

112 Parikh, *supra* note 100, at 50 (citing Nora F. Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 32 (2019) ("Defendants reportedly feel more 'pressure' to settle when up against a lawyer with a large 'volume of cases.'")).

another's lawsuit[113]) and fee-splitting in some jurisdictions. We believe those rules should be adapted to permit lawyer-directed finance because it can facilitate greater access to justice and increased government accountability.[114] Old English champerty doctrines have already been loosened in many U.S. jurisdictions[115] and abolished in England,[116] and all U.S. jurisdictions now allow at least some form of champerty—the lawyer's contingent fee.[117] States should take the final step and just eliminate this barrier for exoneration plaintiffs. Arizona and Utah have eliminated the rule against sharing fees with non-lawyers,[118] and even New York courts allow lawyer-directed finance in other contexts despite the New York City Bar Association's contrary view.[119] Scholars have questioned whether lawyer-directed finance (in other contexts) violates fee-splitting rules.[120] We suggest that fee-splitting and champerty rules should not be read to inhibit access to justice innovations, particularly for exonerees. Rather, these kinds of regulations should be understood as tools to ensure that the client, rather than

113 *See Champerty*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining champerty as "an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim").

114 *See* Burch, *supra* note 103, at 1328 & n.267 (arguing that if prohibitions on champerty and maintenance were eliminated, third-party funders could provide a more useful check on lawyers in aggregate litigation); Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87, 139 (2017) (same); *see also* Gillers, *supra* note 106, at 689 ("[T]he question is whether allowing companies to make non-recourse advances is a good thing, and surely it is").

115 Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98–99 & n.162 (2011) (observing that a majority of states allow champerty, though with varied limitations by jurisdiction) [hereinafter Sebok, *Inauthentic Claim*].

116 *See* Issacharoff, *supra* note 87, at 562 (noting that along with other former colonies, England has "let the venture capitalists, the investment banks, and the hedge funds into the litigation process").

117 *See* Sebok, *Inauthentic Claim*, *supra* note 115, at 99 (stating that all fifty-one U.S. jurisdictions allow champerty through the form of the contingency fee).

118 Sebok, *Rules of Professional Responsibility*, *supra* note 3, at 825; *see also* Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 WM. & MARY L. REV. 939, 982–83 (2022) (detailing reforms around fee-sharing in Arizona and Utah). The mere presence of a financier does not necessarily interfere with a lawyer's professional judgment. *See id.* at 988–89 (explaining that lawyers may act as enforcers, ensuring compliance for themselves as well as financiers); Gillers, *supra* note 106, at 691 (critiquing the argument that financing, which can be beneficial to a client, must be forbidden for fear of lawyers possibly violating ethical obligations).

119 *See* Sebok, *Rules of Professional Responsibility*, *supra* note 3, at 822–23 (finding that when it comes to lawyer-directed legal finance agreements, there is a gap between what the ABA concludes and how the law operates in action, both in New York and other jurisdictions); *see, e.g.*, RDLF Fin. Servs., LLC v. Esquire Cap. Corp., No. 13906/11, 2012 WL 695488, at *15 (N.Y. Sup. Ct. Feb. 27, 2012) (denying fraudulent funds transfer allegations as there was no confidential or fiduciary relationship); *In re* Cousins, No. 09 Civ. 1190, 2010 WL 5298172, at *3 (S.D.N.Y. Dec. 22, 2010) (rejecting appellant-lawyer's claim that financier's payments were loans and not purchases).

120 *See* Sebok, *Rules of Professional Responsibility*, *supra* note 3, at 821–27.

the funder, maintains control of the litigation, as ethics rules already do,[121] particularly where the funding arrangement is disclosed to the court.

CONCLUSION

An exoneree who wants compensation for wrongful conviction must be both patient and resourceful, navigating a complex web of procedures that seem in place mostly to discourage rather than to facilitate meritorious claims. Even those who successfully obtain counsel often suffer long waits, complicated doctrines, and foot-dragging from the states that wronged them. Assistance sometimes comes from outside funders, who advance cash in return for a share of the recovery, but thus far the pool of people helped by this money has been limited.

We argue that outside money could and should be used to encourage more private lawyers to join the wrongful conviction compensation fight, increasing exonerees' access to justice and the likelihood of social change on a grander scale. Financing for lawyers interested in taking exoneration compensation cases might lead to more experienced lawyers taking these matters, generating more filings and more successes, and possibly mitigating geographic disparities that presently exist. We might even see some police and prosecutors prospectively curbing their illegal behavior, thereby reducing the chances of wrongful conviction for future defendants.

For financiers to support attorneys who take exoneree compensation matters, two changes to the law will be necessary. First, state supreme courts should interpret the jurisdictional rules regarding attorney-client privilege to permit the attorney to share information about the exoneree's case with the financier, because the financier is necessary to the representation. Second, rules prohibiting champerty and fee-sharing with non-lawyers ought to be lifted in exoneree matters. Neither of these changes should permit the dilution of client decision-making autonomy, though, as protection and support for the exoneree is the primary goal. In sum, lawyer-directed financing offers significant benefits both to individual exonerees and to the system overall.

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121 *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 5.4(c) (instructing that lawyers must not allow a person who pays them to direct their professional judgment when providing legal services to another person or entity).