

**THE TORT OF NEGLIGENT INVESTIGATION:
CANADA’S RECOGNITION OF THE TORT AS A MODEL
FOR IMPROVING COMPENSATION FOR THE
WRONGFULLY CONVICTED**

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INTRODUCTION

In recent decades, the legal profession and the general public have become more aware of wrongful convictions and their devastating consequences. This public awareness has grown in large part because of the emergence of DNA evidence in addition to well-publicized exonerations that have shocked the public conscience. In response, some law enforcement agencies have updated their investigative techniques to decrease the chance of wrongful conviction. These reforms include changing the way lineups and interrogations are conducted, how evidence is handled, and which forensic techniques are relied upon. Still, many law enforcement agencies rely on techniques that have proven to be faulty, biased, or misleading, and have led to wrongful convictions; when investigators continue to rely on these techniques, their behavior arguably breaches a standard of care and constitutes negligent investigation.

Wrongful convictions carry disastrous consequences. A wrongfully convicted person may spend decades in prison, during which they are deprived of their freedom, ability to develop educational and professional skills, and time with family and friends. Even when a wrongfully convicted person is exonerated, they must cope with lost years of freedom, social, economic, and educational development, and family and friends who often refuse to believe that someone who spent so much

time in prison could be innocent.¹ Consequently, the wrongfully convicted individual continues to carry a powerful stigma.

The compensation for these years of lost freedom and economic, social, and family development are woefully inadequate. Some states provide restitution for wrongfully convicted persons, but these statutory schemes tend to pay meager amounts and contain limits and conditions that frustrate the purpose of restitution.² Some exonerated persons can sue for damages, but the substance of these rights- or tort-based claims tend only to reach behavior that is flagrant or intentional, but not negligent.³ This leaves exonerees who have been wrongfully convicted because of negligent investigation—techniques that have proven faulty, biased, or misleading—with even less means of compensation for all their loss.

The Supreme Court of Canada has come closer to filling the compensation gap for negligent investigations conducted in Canada. In 2007, the Supreme Court of Canada recognized the tort of negligent investigation by police investigators in *Hill v. Hamilton-Wentworth Regional Police Services Board*.⁴ The Supreme Court of Canada concluded in *Hill* that law enforcement officers owe a duty of care to particularized suspects and that imposing a duty of care on investigators would serve, and not detract from, public policy goals.⁵ Meanwhile, other common law jurisdictions have rejected the tort, concluding that public policy required imposing no duty of care on investigators.⁶

This note describes Canada's tort of negligent investigation, argues that exonerees in the United States would benefit from access to such tort liability, and explains where the tort could and could not fit into American law. In Part I, this note discusses the Supreme Court of Canada's *Hill v. Hamilton-Wentworth Regional Police Services Board* decision and briefly explains other international jurisdictions' rejections of the tort. Part II.A argues that jurisdictions in the United States would benefit from recognizing the tort for the same reasons cited in *Hill*, namely in improving

¹ See INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCH. OF LAW, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 7–9 (2009); Sandra D. Westervelt & Kimberly J. Cook, *Coping with Innocence After Death Row*, 7 CONTEXTS 32, 35 (2008).

² See *infra* Part II.A.2.

³ See *infra* Part II.B.

⁴ *Hill v. Hamilton-Wentworth Reg'l Police Servs. Board*, [2007] 3 S.C.R. 129, ¶ 3 (Can.).

⁵ *Id.* ¶¶ 48–62.

⁶ See, e.g., *infra* Part II.A.3; *Hill v. Chief Constable of West Yorkshire* [1987] UKHL 12, [1983] AC 53 (appeal taken from Eng.); *Sullivan v Moody* [2001] HCA 59, ¶¶ 62–65 (Austl.); *Gregory v. Gollan* [2006] NZHC 426 at ¶ 17 (N.Z.).

compensation for the wrongfully convicted and incentivizing investigators to improve their practices. Parts II.B and II.C then explains that although claims of negligent investigation would fail in federal courts, plaintiffs may be able to achieve recognition of the tort in state courts, even if state courts have generally been hostile to such claims in the past. Finally, Part III briefly concludes that state courts should recognize the tort in United States jurisdictions.

I. BACKGROUND

A. THE TORT OF NEGLIGENT INVESTIGATION IN CANADA

When the Supreme Court of Canada decided *Hill*, recognizing the tort of negligent investigation of a criminal suspect, most common law jurisdictions around the world had rejected similar claims. Some of Canada's lower courts had already recognized such a duty. For instance, the Ontario Court of Justice held in *Beckstead v. Ottawa (City)* that an officer "owed a duty to [the plaintiff-suspect] to perform a careful investigation . . . was negligent in the performance of that duty, and therefore [plaintiff-suspect's] claim must succeed for such negligence."⁷ In Quebec as well, courts had recognized a similar duty of care.⁸ The Supreme Court of Canada finally considered and recognized the tort for the entire country in the case of *Hill v. Hamilton-Wentworth Regional Police Services Board*.⁹

1. *The Supreme Court of Canada Recognizes the Tort of Negligent Investigation*

In *Hill v. Hamilton-Wentworth Regional Police Services Board*, the Supreme Court of Canada considered the claims of negligence of a man who spent twenty months in jail for a crime he did not commit. In 1994 and 1995, police suspected that Jason Hill had committed a series of

⁷ *Beckstead v. Ottawa Chief of Police*, [1995] O.J. No. 781 (Can. Ont. Gen. Div.) (QL).

⁸ *See, e.g., Dumont v. Québec (Attorney General)*, 2009 QCCS 3213 (Can. Que.). Under its civil law system, Quebec imposes liability between private actors according to the law of obligations, similar to tort law in common law systems. For a more detailed explanation, *see* Myles Frederick McLellan, *Innocence Compensation: The Success Rate of Actions for Negligent Investigation*, 40–42 (June 10, 2019), <https://ssrn.com/abstract=3402066> [<https://perma.cc/KK2E-V8RG>].

⁹ *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 (Can.).

ten different robberies based on an anonymous tip, eyewitness identifications, a potential sighting of Mr. Hill near the site of one robbery, and witness statements that the perpetrator was Aboriginal.¹⁰ After Mr. Hill was arrested for the robberies, two similar robberies occurred.¹¹ Nevertheless, prosecutors charged Mr. Hill with eight counts of robbery.¹² Ultimately, prosecutors withdrew nine of the original ten counts but proceeded on the remaining count because of certain eyewitnesses' persistence.¹³ Mr. Hill was convicted of this remaining count, but he appealed and was granted a new trial in which he was acquitted.¹⁴ Mr. Hill brought a civil action against the police, seeking damages for the twenty months he spent in jail as the result of what he alleged was negligent investigation.¹⁵ He specifically alleged that investigators were negligent in: (1) contaminating witnesses by publicly publishing his photo; (2) failing to properly record events and interviews with witnesses;¹⁶ (3) interviewing two witnesses together while a news clipping with his face was on the interviewer's desk and visible to the witnesses;¹⁷ (4) administering "structural[ly] bias[ed]" photo lineups by including a photo of him, an Aboriginal man, and eleven Caucasian foils;¹⁸ and (5) failing to adequately reinvestigate the robberies once investigators had new evidence.¹⁹

The trial court ruled against Mr. Hill for his claim of negligence by police investigators. The court held that the police met the standard of care of a reasonable officer at the time because their conduct was competent, according to contemporary standards, and that imposing liability would be "facile hindsight."²⁰ Mr. Hill appealed and the court of appeals affirmed that police investigators could be liable for negligent investigation, but affirmed that in Mr. Hill's case, the police investigators

¹⁰ *Id.* ¶ 6.

¹¹ *Id.* ¶ 7.

¹² *Id.* ¶ 8.

¹³ *Id.* ¶ 9.

¹⁴ *Id.* ¶ 10.

¹⁵ *See id.* ¶ 12.

¹⁶ *Id.* ¶ 76.

¹⁷ *Id.* ¶¶ 13, 76.

¹⁸ *Id.* ¶¶ 13, 16–17.

¹⁹ *Id.* ¶ 13, 76.

²⁰ *Id.* ¶ 14 (quoting *Hill v. Hamilton-Wentworth Reg'l Police Servs. Board* (2003), 66 O.R. (3d) 746, ¶ 75 (Can. Ont. Sup. Ct. J.)).

did meet the standard of care.²¹ Two judges dissented, arguing that a photo lineup with eleven Caucasian foils for one Aboriginal suspect was obviously structurally biased and that failure to pursue leads based on new evidence constituted negligent investigation.²²

Following the intermediate appeal, Mr. Hill appealed the finding that investigators were not negligent to the Supreme Court of Canada and the police investigators cross-appealed on the question of whether Canada recognizes the tort of negligent investigation at all.²³ The Canadian Supreme Court granted review. First the Court addressed whether police investigators owe a duty of care to criminal suspects, applying the two-step *Anns* test.²⁴ The *Anns* test determines whether there is a duty of care between two types of people. A plaintiff alleging a novel duty of care must first establish a prima facie duty of care based on the foreseeability and proximity of the relationship.²⁵ A relationship has sufficient foreseeability if it is “reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim.”²⁶ A relationship has sufficient proximity when the relationship is “close and direct”²⁷ and where “imposition of legal liability for the wrongdoer’s actions is appropriate.”²⁸ In describing proximity, the Court acknowledged that proximity depends on various factors, that the weight of the factors will vary depending on the circumstances, and that the standard is flexible.²⁹ Once a plaintiff establishes a prima facie duty of care, the court considers whether residual policy considerations “ought to negate or limit that duty of care[.]”³⁰ If

²¹ *Id.* ¶¶ 15–16.

²² *Id.* ¶ 17.

²³ *Id.* ¶ 18.

²⁴ *Id.* ¶ 20. The *Anns* test comes from *Anns v. Merton London Borough Council*, [1978] AC 728 (HL). The Supreme Court of Canada adopted the *Anns* test in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, 8, 11–12 (Can.).

²⁵ *Hill*, 3 S.C.R. ¶ 23.

²⁶ *Id.* ¶ 22.

²⁷ *Id.* ¶ 23 (citing *Cooper v. Hobart*, [2001] 3 S.C.R. 537, ¶ 22 (Can.)).

²⁸ *Id.* ¶ 23.

²⁹ *Id.* ¶ 24.

³⁰ *Id.* ¶ 20. The policy concerns addressed by the Court included the “quasi-judicial” nature of police work; the conflict between a duty of care for investigations and other duties; the substantial amount of discretion inherent to investigations; the need to maintain other standards for arrest, search, and seizure; the potential of a chilling effect on investigators; inviting a flood of litigation; and the risk that factually guilty persons might unjustly recover because of police missteps. *Id.* ¶¶ 48–62.

policy considerations do not negate the duty, then a court recognizes a duty of care that can give rise to liability under tort law.³¹

In *Hill*, the Canadian Supreme Court held that an investigator does have a prima facie duty of care to a criminal suspect. The Court concluded, with little discussion, that negligent police investigation clearly could cause harm to a suspect,³² and then turned to proximity. Proximity depends on whether the relationship between tortfeasor and victim is “close and direct,” that is, whether “the wrongdoer ought to have had the victim in mind as a person potentially harmed.”³³ The Court limited its analysis to “particularized suspects” or people who have been singled out in an investigation, instead of the “universe of all potential suspects.”³⁴ A particularized suspect, like Mr. Hill, has a critical personal interest in the conduct of the investigation since the suspect’s liberty and reputation are at stake, unlike the general public.³⁵ Proximity was therefore established since police “create[] a close and direct relationship” by singling out a suspect, raising the stakes for a particularized suspect.³⁶ Having found a prima facie duty of care, the Court concluded that “suspects may reasonably be expected to rely on the police to conduct their investigation in a competent, non-negligent manner.”³⁷

The Canadian Supreme Court was careful to define the exact terms of its analysis of a prima facie duty of care. The Court explicitly limited its analysis of the tort of negligent investigation to claims by particularized suspects, and not claims by the general public, crime victims, or the families of crime victims.³⁸ Separately, the Court recognized that proximity is not a rigid rule. Rather, the element of proximity must be flexible to “meet new circumstances and evolving conceptions of justice” when new relationships that have not been contemplated by the law do arise.³⁹

³¹ *Id.* ¶ 20.

³² *Id.* ¶ 32 (“[W]e are concerned with the relationship between an investigating police officer and a suspect. The requirement of reasonable foreseeability is clearly made out and poses no barrier to finding a duty of care; clearly negligent police investigation of a suspect may cause harm to the suspect.”).

³³ *Id.* ¶ 29.

³⁴ *Id.* ¶ 33.

³⁵ *Id.* ¶ 34.

³⁶ *Id.* ¶ 33.

³⁷ *Id.* ¶ 39.

³⁸ *Id.* ¶ 27.

³⁹ *Id.* ¶ 25.

The Canadian Supreme Court was also remarkably transparent in its desire to help individuals who were wrongly convicted. The Court noted that the torts then available against law enforcement—false arrest, false imprisonment, and malicious prosecution—did not provide compensation for negligence.⁴⁰ The limits of tort law and the meager statutory remedies meant that the Court's failure to fill the gap for negligent harms would mean "quite literally, to deny justice."⁴¹

The Court then turned from the prima facie duty of care to the second part of the *Anns* test—whether public policy considerations negate the duty of care. The Court dismissed most policy concerns because in its view, the standard of care—that of a reasonable officer at the time of the investigation—mitigated or resolved any such policy concerns.⁴² First, the Court considered whether investigators' jobs were quasi-judicial in nature, and therefore could not be subjected to a duty of care.⁴³ The Court concluded that investigators' work is factual in nature and distinct from the quasi-judicial functions of prosecutors.⁴⁴ The reasonable officer standard would not subject investigators to the standards of a prosecutor or a judge, but would depend solely on the standard of reasonable police investigations.⁴⁵ Furthermore, any unreasonable decisions by prosecutors or judges would not impute liability to police investigators.⁴⁶ Second, the Court considered whether the discretion inherent in investigations negates a duty of care.⁴⁷ The Court answered that discretion is not relevant to whether there is a standard of care, but is relevant to defining the standard of care.⁴⁸ A reasonable officer standard allows for leeway in terms of discretion, so long as such exercise of discretion is reasonable.⁴⁹

Third, the Court considered whether recognizing a duty of care would unreasonably raise the standard required for arrest.⁵⁰ The Court concluded that a duty of care does not raise or modify those standards, but

⁴⁰ *Id.* ¶ 35.

⁴¹ *Id.*

⁴² *See id.* ¶¶ 65, 67.

⁴³ *Id.* ¶¶ 48–49.

⁴⁴ *Id.* ¶ 49.

⁴⁵ *Id.* ¶ 50.

⁴⁶ *Id.*

⁴⁷ *Id.* ¶¶ 51–54.

⁴⁸ *Id.* ¶ 51.

⁴⁹ *Id.* ¶ 52.

⁵⁰ *Id.* ¶ 55.

is informed by those preexisting standards for searches and arrests.⁵¹ Fourth, the Court considered whether recognizing a duty of care would have a chilling effect on police, making them unduly cautious.⁵² The Court found insufficient evidence that police behavior would change for the worse and indeed cited empirical evidence that tort liability does not have any adverse effect on investigations.⁵³ Rather, the evidence suggests that a standard of care might cause investigators to act more prudently.⁵⁴ The Court further elaborated that a chilling effect is unlikely because most police investigators are indemnified for official acts and that any reasonableness standard allows for broad discretion.⁵⁵ Fifth, the Court addressed whether recognizing a duty of care would invite a flood of litigation, and concluded that it would not. The class of potential plaintiffs was small—only particularized suspects—and any plaintiff would have to prove actual compensable harm.⁵⁶ These requirements and the experience in Quebec and Ontario all suggested that fear of litigation should not negate the tort.⁵⁷ Lastly, the Court addressed whether factually guilty defendants would benefit from the tort.⁵⁸ For instance, a defendant may commit a crime and then get an acquittal because of the investigators' negligence. This negligence could in turn give rise to tort liability.⁵⁹ The Court concluded, however, that a plaintiff's burden of proof sufficiently mitigated concerns over unjust enrichment.⁶⁰

⁵¹ *Id.* The standard of “reasonable and probable grounds” governs arrest and prosecution, search and seizure, and the stopping of a motor vehicle in Canada. It is analogous to probable cause in the United States, for the purposes of the article. *See* *Hunter v. Southam*, [1984] 2 S.C.R. 145 (Can.).

⁵² *Hill*, 3 S.C.R. ¶¶ 56–59.

⁵³ *Id.* ¶ 57 (citing Daniel E. Hall et al., *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 *POLICING: INT'L J. POLICE STRATEGIES & MGMT.* 529, 544–45 (2003); Michael S. Vaughn et al., *Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views*, 47 *CRIME & DELINQUENCY* 3 (2001); Tom Hughes, *Police Officers and Civil Liability: The Ties That Bind*, 24 *POLICING: INT'L J. POLICE STRATEGIES & MGMT.* 240 (2001); Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal, and State Police Officers*, 18 *POLICE STUD.* 19 (1995)).

⁵⁴ *Id.* ¶ 57 (“In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other.”).

⁵⁵ *Id.* ¶¶ 58–59.

⁵⁶ *Id.* ¶ 60.

⁵⁷ *Id.* ¶¶ 60–61.

⁵⁸ *Id.* ¶¶ 62–64.

⁵⁹ *Id.* ¶ 62.

⁶⁰ *See id.* ¶ 64.

Having decided that investigators owed a duty of care to particularized suspects, the Court then carefully defined the standard of care as that of a reasonable officer at the time of the investigation. The Court explained that like other reasonable person standards, the reasonable investigating officer standard does not demand perfection, but demands reasonableness based on prevailing standards in the field of work.⁶¹ Additionally, the Court explained that because the standard reflects reasonableness at the time of the investigation, more recent improvements in investigatory practices cannot be used in hindsight to judge an officer's conduct.⁶²

The Court finally turned to Mr. Hill's claims. The Court applied the reasonable officer standard to find that none of the officers' conduct breached a duty of care.⁶³ The Court held that the allegedly structurally biased photo lineup was not actually unfair because it was hard to distinguish racial differences between Mr. Hill and the Caucasian foils, even if reasonable officers are now more careful to use foils of the same race as a suspect.⁶⁴ As for the rest of the claims, the majority acknowledged that some of the practices may now be considered substandard, but that all of the officers involved in investigating and charging Mr. Hill acted reasonably within their discretion.⁶⁵ In the end, the Canadian Supreme Court affirmed Mr. Hill's right to claim negligent investigation, but held that the facts of his case did not show an actual breach of duty by investigators.

2. *Dissent from the Majority Opinion*

The dissenting justices in *Hill* would not have recognized a duty of care between a particularized suspect and an investigatory officer, largely for policy reasons. Specifically, the dissenting justices would have given greater weight to the interests of police officers in the first part of the *Anns* test to determine that there was not a prima facie duty of care in police investigations.⁶⁶ Primarily, police officers' interest in fulfilling other duties, such as apprehending criminals and generally protecting the

⁶¹ *Id.* ¶ 73.

⁶² *Id.* ¶ 77.

⁶³ *Id.* ¶ 74.

⁶⁴ *Id.* ¶¶ 79–81.

⁶⁵ *Id.* ¶¶ 82–88.

⁶⁶ *See id.* ¶¶ 137–48 (Charron, J., dissenting).

public, militates against a duty of care.⁶⁷ The dissent emphasized that the public is served by rigorous investigations, and that it is contrary to the public interest to consider a private citizen's interests in police investigations because that "pulls the police away from targeting that individual as a suspect."⁶⁸ Imposing a duty of care on investigators would impermissibly create conflict between their duty to investigate and apprehend criminals, and their duty under a negligence standard to "leave people alone."⁶⁹

The major disagreement between the majority and dissent seemed to be how much deference should be given to police investigators. The majority believed that imposing a duty of care on police investigators would provide increased compensation for victims of negligent investigation and have the salutary effect of incentivizing better investigations. The majority's emphasis that the standard of care is not perfection and does not allow for hindsight to unfairly subject investigators to liability leaves vast leeway for investigators. The reasonable officer standard and its prohibition against using hindsight unfairly puts investigators on notice that they must keep up with best practices, and also allows investigators to change their techniques without fear that doing so will tacitly admit negligence. These guardrails were not enough for the dissent, which believed that imposing liability would inhibit rigorous investigation as investigators would constantly second-guess whether they were acting reasonably, contrary to the majority's empirical evidence.⁷⁰

B. OTHER COMMON LAW JURISDICTIONS REJECT THE TORT OF NEGLIGENT INVESTIGATION

Each of the common law jurisdictions outside of Canada and the United States that have examined the tort of negligent investigation have rejected any duty of care between investigators and the public, largely for the same reasons raised by the dissent in *Hill*.⁷¹ Although some of the cases

⁶⁷ *Id.* ¶ 148.

⁶⁸ *Id.* ¶ 140.

⁶⁹ *Id.*

⁷⁰ See the list of studies cited *supra* note 53.

⁷¹ See, e.g., *Hill v. Chief Constable of West Yorkshire* [1989] AC 53 (HL) 6 (appeal taken from Eng.); *Sullivan v. Moody* [2001] HCA 59, ¶¶ 7, 65 (Austl.); *Gregory v. Gollan* [2006] NZHC 426 at [17] (N.Z.).

examined the relationship between investigators and victims of crime, and not criminal suspects, these courts' more general rules would bar claims of negligent investigation of a criminal suspect. In a landmark case, the United Kingdom rejected the tort as early as 1989 in *Hill v. Chief Constable of West Yorkshire*.⁷² There, the House of Lords⁷³ declined to impose liability against a police commissioner when a woman was murdered after the police failed to investigate or protect the murder victim.⁷⁴ The House of Lords concluded that police could not be liable to a class of potential victims for negligent investigation since such a large class lacks sufficient foreseeability of harm.⁷⁵ The House of Lords proceeded to cite public policy reasons for rejecting the tort, namely: (1) even though imposing liability tends to improve standards of care, liability would not do so in the policing context;⁷⁶ (2) imposing liability may cause police to have a "detrimentally defensive frame of mind";⁷⁷ and (3) the discretion and complexity inherent to investigations would demand intensive factual inquiries, impermissibly diverting judicial and law enforcement resources.⁷⁸ One member of the Court, Lord Templeton, suggested that terminating incompetent officers and democratic feedback through elected representatives would be sufficient to regulate police behavior.⁷⁹

Australia and New Zealand adopted much of the reasoning from *Hill v. Chief Constable of West Yorkshire* to reject the tort of negligent investigation. In 2005, the Supreme Court of Australia rejected the tort in *Sullivan v. Moody*, where it cited *Hill v. Chief Constable of West Yorkshire* for the proposition that imposing a duty of care on investigators would negatively affect their performance and put too much of a burden on judicial and police resources.⁸⁰ Likewise, the New Zealand High Court

⁷² *Hill*, [1989] AC 53 (HL) 6.

⁷³ The House of Lords acted as the highest court for civil cases in the entire United Kingdom and the highest court in criminal cases in England, Wales, and Northern Ireland. In 2009, the Supreme Court became the highest court in the United Kingdom as a result of the Constitutional Reform Act of 2005. HOUSE OF LORDS, JUDICIAL WORK, <https://www.parliament.uk/globalassets/documents/lords-information-office/hoflbpjudicial.pdf> [https://perma.cc/Q6HW-92M4] (last visited Jan. 27, 2021).

⁷⁴ *Hill*, [1989] AC 53 (HL) 1, 6.

⁷⁵ *Id.* at 5.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 8.

⁸⁰ See *Sullivan v. Moody* [2001] HCA 59 ¶ 80 (Austl.).

rejected the tort in *Gregory v. Gollan*.⁸¹ There, the plaintiff sued police for negligence, alleging that police entered the plaintiff's home without a warrant, sprayed him with pepper spray, detained him, and ultimately wrongly charged him for burglary, eventually withdrawing the charges and charging another suspect.⁸² The High Court affirmed the dismissal of his case, declaring "suspects in a negligent investigation are owed no duty of care."⁸³

II. ANALYSIS

The Canadian Supreme Court recognized that the tort of negligent investigation would provide greater compensation for the wrongfully convicted and would incentivize keeping police investigatory practices up to date. The United States federal government and state governments would benefit from recognizing the tort in the same ways described in *Hill*. First, at the time of *Hill*, exonerees had more remedies available in Canada than in jurisdictions in the United States. The fact that Canada's remedies were not sufficient suggests even greater urgency to recognize the tort in the United States, where remedies are fewer, but the same problems of wrongful conviction persist. Second, the Canadian Supreme Court concluded that the tort would improve, not detract from, police investigatory practice. As with Canada, the United States would benefit from increased incentives for keeping investigative techniques up to date.

Although recognizing the tort would improve compensation and the criminal justice system, implementing the tort is not easy under current law in the United States, absent legislative action. Recognition of the tort is most likely foreclosed in federal courts, whether a claim is made against the federal government or a state government. Although it is unlikely that many state courts will recognize the tort, there is a greater likelihood of convincing state courts to recognize the tort, and that is the path that advocates should take.

⁸¹ *Gregory v. Gollan* [2006] NZHC 426 at [16–23] (N.Z.).

⁸² *Id.* ¶ 4.

⁸³ *Id.* ¶ 18.

A. UNITED STATES JURISDICTIONS SHARE REASONS FOR
RECOGNIZING THE TORT OF NEGLIGENT INVESTIGATION AS
DESCRIBED IN *HILL*

The Supreme Court of Canada recognized in *Hill* that one reason to recognize the tort of negligent investigation was to fill a gap in compensation available to the wrongfully convicted. The Court also acknowledged that tort liability for negligent investigation could incentivize law enforcement agencies to adopt better investigative practices. As in Canada, wrongfully convicted individuals in the United States generally receive inadequate compensation for their time spent incarcerated. Similarly, jurisdictions in the United States have an interest in improving police practices, both for general efficiency and fairness, as well as to specifically avoid wrongful convictions. Jurisdictions in the United States face the same problems that the Supreme Court of Canada sought to mitigate with the tort of negligent investigation; therefore, jurisdictions in the United States should adopt the tort to mitigate the problems of inadequate remedies for the wrongfully convicted and investigative techniques that have been proven faulty or unreliable.

1. *Avenues of Relief for Wrongful Conviction in Canada at the
Time of Hill*

In *Hill v. Hamilton-Wentworth Regional Police Services Board*, the Supreme Court of Canada explicitly acknowledged that recognizing the tort of negligent investigation would fill an existing gap in available relief for plaintiffs who were wrongfully convicted.⁸⁴ In Canada, the wrongfully convicted and other similarly harmed plaintiffs could seek compensation for false arrest, false imprisonment, and malicious prosecution, each of which is an intentional tort.⁸⁵ Plaintiffs had no remedy for negligent acts. Still, a plaintiff who suffers an intentional tort faces

⁸⁴ *Hill v. Hamilton-Wentworth Reg'l Police Servs. Board*, [2007] 3 S.C.R. 129, ¶ 35 (Can.). (“As the Court of Appeal pointed out, an important category of police conduct with potential to seriously affect the lives of suspects will go unremedied if a duty of care is not recognized To deny a remedy in tort is, quite literally, to deny justice. This supports recognition of the tort of negligent police investigation, in order to complete the arsenal of already existing common law and statutory remedies.”)

⁸⁵ *See id.*

substantial obstacles, such as the burden of funding a lawsuit and the burden of proof in proving their case.⁸⁶

Plaintiffs in Canada had additional non-tort remedies available, each with its own limits.⁸⁷ In addition to tort law, individuals who were wrongfully convicted could seek compensation by applying for an *ex gratia* payment, by a petition for relief under the International Covenant on Civil and Political Rights (ICCPR), or by seeking compensation as provided by statute.⁸⁸

Ex gratia payments refer to compensation administered by federal or provincial executives after a finding that the wrongfully convicted individual meets a number of conditions.⁸⁹ Although the Canadian government was prescient in establishing these guidelines as early as 1988, before DNA evidence galvanized the innocence movement, the program has met ample criticism. It has been criticized as arbitrary, ad hoc, inadequate in value, and shrouded in secrecy.⁹⁰

In 1976, Canada acceded to the ICCPR, creating another theoretical avenue of relief through the United Nations Human Rights Committee. Two of the ICCPR's articles are relevant to claims of negligent investigation. First, Article 9 declares that individuals have a right to liberty and security without arbitrary arrest or detention.⁹¹ Second, Article 14(6) states that an exoneree "shall be compensated according to law."⁹² An aggrieved individual can petition the United Nations Human Rights Committee.⁹³ The Covenant's promise, however, proves elusive.

⁸⁶ See Myles Frederick McLellan, *Innocence Compensation: the Private, Public and Prerogative Remedies*, 45 OTTAWA L. REV. 59, 62 (2013-2014) (discussing practical obstacles for the wrongfully convicted who seek to recover in tort).

⁸⁷ See generally *id.*

⁸⁸ See *id.* at 62. *Ex gratia* payments are discussed in conjunction with the royal/crown prerogative of mercy, which is analogous to a pardon. This paper is concerned with comparing avenues for compensation and only concerns means of proving innocence/wrongful conviction insofar as that method impinges on available compensation. Because the prerogative of mercy does not affect compensation, distinct from other means of proving wrongful conviction, this paper will not discuss the prerogative of mercy.

⁸⁹ *Id.* at 87-89.

⁹⁰ *Id.* at 88-89.

⁹¹ International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171.

⁹² *Id.* art. 14(6) ("When a person has [been exonerated or pardoned] on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure or the unknown fact in time is wholly or partly attributable to him.").

⁹³ For a more detailed description of the process of petitioning for relief, see McLellan, *supra* note 86, at 78.

The Supreme Court of Canada has ruled that the Covenant is consistent with Canadian law, and more specifically the Canadian Charter of Rights and Freedoms, but the Court has also held that the Covenant is only persuasive as to how the Charter should be interpreted.⁹⁴ The Covenant does not change Canadian domestic law, but only requires compensation for wrongful conviction if domestic law expressly adopts the Covenant's terms.⁹⁵ As a result, the Covenant's real effect is only to compel the Canadian government to compensate the wrongfully convicted if the government is adequately shamed on the world stage by such a petition.⁹⁶ Nevertheless, a plaintiff has this as an avenue of relief, if not in practice, then in theory.

2. *United States Jurisdictions Offer Fewer Remedies than Canadian Jurisdictions and Existing Remedies Are Inadequate*

Individuals who have been exonerated of a wrongful conviction have few avenues of relief in the United States, and the relief that is available tends to be inadequate.⁹⁷ Many jurisdictions provide for compensation after an exoneration according to statutory schemes that provide woefully adequate payments or present their own practical difficulties for exonerees.⁹⁸ Specifically, the federal government, District of Columbia, and thirty-five states have some form of statutory compensation, while fifteen states have none.⁹⁹ Federal statutes allow for no more than \$50,000 per year of incarceration, or up to \$100,000 if the exoneree was on death row.¹⁰⁰ However, this scheme is available to only a small proportion of exonerees since most criminal convictions are at the

⁹⁴ See Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, ¶ 59 (Can.).

⁹⁵ Dumont v. Québec (Procureur Général), 2009 QCCS 3213, ¶ 128. See McLellan, *supra* note 86, at 70–73 for a more in-depth analysis.

⁹⁶ *Id.* at 78.

⁹⁷ See *Compensating the Wrongfully Convicted*, INNOCENCE PROJECT, <https://www.innocenceproject.org/compensating-wrongly-convicted/> [https://perma.cc/ND5E-JGVT] (last visited November 20, 2019).

⁹⁸ See generally Donna McKneelen, “*Oh Lord Won’t You Buy Me a Mercedes Benz?*”: A Comparison of State Wrongful Conviction Compensation Statutes, 15 SCHOLAR 185 (2013); Michael Leo Owens & Elizabeth Griffins, *Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislations*, 75 ALB. L. REV. 1283 (2012).

⁹⁹ See INNOCENCE PROJECT, *supra* note 97 (states without statutory compensation are Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Kentucky, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming).

¹⁰⁰ 28 U.S.C. §§ 2513, 1495 (2018).

state level. State statutory schemes are far from uniform and put numerous limits on the availability and amount of compensation available. Statutes vary from the most generous sum of \$80,000 per year imprisoned in Texas, to a maximum of \$20,000 in New Hampshire regardless of time spent in prison, to no compensation except tuition reimbursement in Montana, if the exonerated individual attends one of Montana's state community colleges or universities.¹⁰¹ Not only do these schemes generally provide too little compensation, but they also contain other obstacles that often preclude any compensation. For instance, some statutes only allow for compensation by "private compensation bills." These bills require action from the state legislature for each individual that seeks compensation, thereby subjecting compensation to politicians' whims and sometimes requiring an exoneree to mount an onerous political campaign.¹⁰² Other statutes may deny compensation if the exoneree "contributed" to the conviction, even if such contribution was a coerced confession or coerced guilty plea.¹⁰³ For instance, New York only provides compensation if the exoneree "did not by his own conduct cause or bring about his conviction."¹⁰⁴ One exoneree, Douglas Warney, was denied compensation because he had signed a confession that played a pivotal role in his prosecution.¹⁰⁵ Even though he was mentally challenged and suffered from AIDS-related dementia, this confession was found sufficient to preclude compensation.¹⁰⁶ Similarly, some states deny compensation to exonerees who have separate, unrelated felony convictions.¹⁰⁷ Three states even

¹⁰¹ For a description of statutory schemes, see generally McKneelen, *supra* note 98; TEX. CIV. PRACT. & REM. CODE ANN. § 103.052(a)(1) (West 2019) N.H. REV. STAT. ANN. § 541-B:14(II) (LexisNexis 2020); MONT. CODE ANN. § 53-1-214 (2011) (providing only educational aid to exonerees).

¹⁰² See, e.g., Hans Sherrer, *Wilton Dedge Awarded \$2 Million for 22 Years Wrongful Conviction*, 30 JUSTICE DENIED: THE MAGAZINE FOR THE WRONGLY CONVICTED 21 (2005) (describing one Florida exoneree's Kafkaesque experience seeking compensation through courts and Florida's state legislature).

¹⁰³ See, e.g., Gregory P. Scholand, *Re-Punishing the Innocent: False Confession as an Unjust Obstacle to Compensation for the Wrongfully Convicted*, 63 CASE W. RES. L. REV. 1393, 1398 (2013).

¹⁰⁴ N.Y. CT. CL. ACT § 8-b(5)(d).

¹⁰⁵ See Scholand, *supra* note 103, at 1394.

¹⁰⁶ See *id.* Warney's denial of compensation was eventually reversed on procedural grounds, *Warney v. State*, 947 N.E.2d 639 (N.Y. 2011), and he settled with the City of Rochester, Emily Lurie, *Douglas Warney Awarded \$3.75 Million*, FALSE CONFESSIONS BLOG (Dec. 7, 2011), https://falseconfessions.org/fc_blogs/douglas-warney-awarded-3-75-million/ [<https://perma.cc/H9BW-HZ9F>].

¹⁰⁷ See INNOCENCE PROJECT, *supra* note 97. For a discussion of how negligence does not meet scienter requirements for rights violations under federal law, see *infra* Part II.B.

require that the governor pardon the wrongfully convicted individual before the state can provide any compensation.¹⁰⁸

Non-statutory remedies are limited in the United States. First, the United States does not allow for *ex gratia* payments, nor does it have any analog. Second, the United States has not integrated the ICCPR into its domestic law,¹⁰⁹ which prevents exonerees from demanding compensation from the federal government or from state governments under international law. Finally, when a plaintiff alleges that a state or federal official violates some constitutional right, the plaintiff generally must allege more than mere negligence and is thereby foreclosed from claiming that negligent investigation violated some right.¹¹⁰ The numerous limitations on compensation for the wrongfully convicted in the United States, especially as the result of negligence, seem to leave more compensation gaps than in Canada prior to *Hill*. This suggests that the United States should recognize the tort, as Canada did, to fill these gaps in compensation.

3. *United States Jurisdictions Would Benefit from the Tort's Incentives for Better Investigative Techniques, as Explained in Hill*

Another reason to recognize a duty of care for police investigators is that such a duty incentivizes better investigative practices, which should generally improve investigations, and specifically reduce the likelihood of wrongful convictions. The Supreme Court of Canada recognized that imposing a duty of care on police officers during investigations might incentivize better behavior.¹¹¹ The standard of care that the Supreme Court of Canada established—a reasonable police investigator, judged by standards at the time of the investigation—incentivizes investigators to assess their forensic and investigatory practices and to replace or abandon techniques that have proven unreliable. This standard of care incentivizes

¹⁰⁸ ME. STAT. tit. 14, § 8241 (2018); MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (LexisNexis 2021); N.C. GEN. STAT. § 148-82(a) (2021).

¹⁰⁹ See *infra* Part II.B.3.

¹¹⁰ For a discussion of how rights-violations claims fail to meet claims of negligent investigation by the federal government and by the states, see *infra* Part II.B.1.

¹¹¹ *Hill v. Hamilton-Wentworth Reg'l Police Servs. Board*, [2007] 3 S.C.R. 129, ¶ 56 (Can.) (“In theory it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized.”).

police departments to adopt new practices that are scientifically sound,¹¹² but would not impose overly onerous standards on police investigators based on hindsight.

The specific allegations of negligence in *Hill* show how the reasonable investigator standard balances the interests of improving techniques and avoiding unfairly imposing liability on investigators. Mr. Hill alleged that the investigators' photo lineup procedure was negligent because lineup was structurally biased—it consisted of him, who was Aboriginal, and eleven foils, all Caucasian.¹¹³ He also alleged that police were negligent in interviewing two witnesses together while a news clipping with Mr. Hill's photo was on the interviewer's desk.¹¹⁴ The Court indeed explained that "[a] reasonable officer today might be expected to avoid lineups using foils of a different race than the suspect, to avoid both the perception of injustice and the real possibility of unfairness to suspects who are members of minority groups."¹¹⁵ Nevertheless, the Court affirmed that the lineup in Mr. Hill's case was not negligent since such a lineup was acceptable by 1995 standards, and that at any rate, the racial makeup of the lineup was harmless since the Caucasian foils did not actually appear racially distinct from Mr. Hill.¹¹⁶ The Court also explained that interviewing two witnesses together, with a news clipping of the suspect visible to the witnesses do not make "good police practices, judged by today's standards," but that a reasonable officer in 1995 would follow those practices.¹¹⁷ This standard therefore does not hold police investigators liable if they performed a photo lineup or interview in a way that was not known to be faulty at the time. Instead, the standard of care of a reasonable police officer, judged at the time of the investigation, has a salutary effect—investigators will abandon poor past practices and "might become more careful in conducting investigations . . . strik[ing] a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other."¹¹⁸

¹¹² See generally NATIONAL ACADEMY OF SCIENCES, STRENGTHENING THE USE OF FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 53 (2009) for analysis of several investigative techniques that are much less reliable than conventionally believed.

¹¹³ *Hill*, 3 S.C.R. 129 ¶ 13.

¹¹⁴ *Id.*

¹¹⁵ *Id.* ¶ 80.

¹¹⁶ *Id.* ¶ 81.

¹¹⁷ *Id.* ¶ 78.

¹¹⁸ *Id.* ¶ 56.

Wrongful convictions are often secured using techniques and practices that later prove to be unreliable or misleading. Bitemark evidence and eyewitness identification are such examples. Bitemark evidence, which ostensibly matches bites on a victim's skin to a suspect, has led to at least twenty-six wrongful convictions.¹¹⁹ Once the National Academy of Sciences and American Board of Forensic Odontology demonstrated the bitemark evidence was unreliable, some law enforcement agencies abandoned the technique.¹²⁰ Unfortunately, many law enforcement agencies and prosecutors have continued to use bitemark evidence, despite being widely discredited.¹²¹ Similarly, eyewitness identification has been used in numerous investigations, but often results in wrongful conviction, such as when investigators bias an eyewitness with certain procedures.¹²² Researchers have found numerous techniques that investigators can use with eyewitnesses to reduce the risk of false identifications.¹²³ These are just two examples of faulty techniques that have led to wrongful convictions and there are many others, such as microscopic hair analysis, arson analysis, and comparative bullet lead analysis.¹²⁴

One of the purposes of imposing a duty of care in any area of tort law is to encourage actors to behave more mindfully of their consequences. Potential liability causes individuals to adjust their behavior according to the standard of care. Even though the United States Supreme Court has suggested that negligent behavior cannot or should not be deterred,¹²⁵ imposing a duty of care on investigators would logically cause investigators to review whether their investigative conduct was reasonable or not. Imposing a duty of care on investigators would incentivize them to dispose of faulty practices, thereby improving the

¹¹⁹ *Why Bitemark Evidence Should Never Be Used in Criminal Trials*, INNOCENCE PROJECT, <https://innocenceproject.org/what-is-bite-mark-evidence-forensic-science/> [<https://perma.cc/WEW8-V8FW>] (last visited Jan. 18, 2021).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 616 (2006).

¹²³ See Keith Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 382 (2016).

¹²⁴ *Overturing Wrongful Convictions Involving Misapplied Forensics*, INNOCENCE PROJECT, <https://innocenceproject.org/overturing-wrongful-convictions-involving-flawed-forensics> [<https://perma.cc/5C4J-2XX9>] (last visited Jan. 19, 2021) [hereinafter *Innocence Project Misapplied Forensics*]; NATIONAL ACADEMY OF SCIENCES, *supra* note 112.

¹²⁵ *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (explaining that the Fourth Amendment's exclusionary rule need not apply to negligent behavior because the rule's purpose is deterrence, and only purposeful or flagrant behavior need be deterred).

criminal justice system.¹²⁶ Investigators would be on notice that they must keep their investigative techniques up-to-date with empirical assessments of their reliability. Law enforcement agencies would be encouraged to abandon debunked techniques or to improve existing techniques once those techniques have been discredited. The reasonable officer standard of the tort of negligent investigation would achieve this while not disciplining agencies that abide by contemporary standards. For example, a law enforcement agency that relied on biased eyewitness interviews before they were discredited or relied on bite-mark evidence before it was debunked would not be punished for doing so, but if they continued to use the techniques after they were discredited, then they would be subject to potential liability.

Finally, the concern that imposing a duty of care on investigators will have a chilling effect on proper police conduct should not outweigh the benefits of greater compensation and improved investigative standards. The dissent in *Hill* summarized this concern: an officer who is afraid of civil liability may decline to take some investigative action to avoid civil liability and this runs contrary to the public interest in rigorous law enforcement. The dissent's position was speculative, unlike the majority's position, which was based on legal and sociological studies on police behavior.¹²⁷ These studies surveyed police departments in the United States and suggested that there would similarly be no chilling effect in the United States.¹²⁸ Because liability for negligent investigation would increase compensation for the wrongfully convicted, would incentivize adoption of updated investigative techniques, and is unlikely to inhibit proper police behavior, jurisdictions in the United States would benefit by adopting the tort.

¹²⁶ Some states have enacted statutes that allow for judicial review of a conviction based on discredited forensic evidence. While these statutes are helpful for the wrongfully convicted, they do not encourage prospective reform by investigators. For a list of five states that have recently enacted such statutes in the past decade, see Innocence Project Misapplied Forensics, *supra* note 124.

¹²⁷ *Hill v. Hamilton-Wentworth Reg'l Police Servs. Board*, [2007] 3 S.C.R. 129, ¶ 57 (Can.).

¹²⁸ See sources cited *supra* note 53.

B. EXISTING FEDERAL REMEDIES ARE INCOMPATIBLE WITH
CLAIMS OF NEGLIGENT INVESTIGATION

This note will now examine how the wrongfully convicted can and cannot bring claims of negligent investigation under federal law and in federal courts. Indeed, federal law and federal courts offer some limited avenues of relief for plaintiffs claiming injury by government actors. These avenues of relief include 42 U.S.C. § 1983,¹²⁹ *Bivens* actions,¹³⁰ the Federal Tort Claims Act,¹³¹ and the International Covenant on Civil and Political Rights.¹³² While some of these avenues of relief are appropriate for some cases of wrongful conviction, the legal doctrines that make up each avenue of relief preclude negligent acts, making each of these avenues of relief unavailable to plaintiffs for claims of negligent investigation.

1. *Negligent Investigation Is Not a Rights-Violation, as Required
for § 1983 Claims and Bivens Actions*

Individuals may sue under 42 U.S.C. § 1983 in federal court when someone acting under color of state law deprives the individual of a constitutional right.¹³³ Wrongfully convicted individuals have used § 1983 to recover from states that somehow violated their rights in securing a conviction, such as a *Brady* violation in violation of Fourteenth Amendment Due Process.¹³⁴ Some of these claims are similar to claims of negligent investigation, making § 1983 appear as a viable avenue of relief. However, because § 1983 generally requires a mental state that is more culpable than negligent, claims of negligent investigation would likely fail under § 1983. Because § 1983 appears superficially viable for claims of negligent investigation, it is worth explaining the doctrinal pitfalls for claims of negligence.

Section 1983 is a natural fit for many claims of wrongful conviction since most criminal prosecutions occur under state law and not

¹²⁹ 42 U.S.C. § 1983 (2021).

¹³⁰ See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

¹³¹ 28 U.S.C. §§ 1346(b), 2671-2680 (2021).

¹³² International Covenant on Civil and Political Rights, *supra* note 91, at art. 6.

¹³³ 42 U.S.C. § 1983.

¹³⁴ See *Brady v. Maryland*, 373 U.S. 83 (1963). See *Connick v. Thompson*, 563 U.S. 51 (2011) for an example of a *Brady* claim under § 1983.

federal law. Not all claims under § 1983 will succeed as § 1983 only allows for redress when an existing right has been violated. Furthermore, § 1983 does not allow recourse in tort, but only allows recourse for rights violations.¹³⁵ The constitutional rights that would appear to cover a claim of negligent investigation under § 1983 are the Fourth or Fourteenth Amendments.¹³⁶ An individual deprived of life, liberty, or property¹³⁷ as the result of negligent investigation might claim a violation of the Fourteenth Amendment right to due process.¹³⁸ Similarly, a plaintiff might claim that negligent investigation amounts to an unreasonable search or seizure, in violation of the Fourth Amendment, as incorporated against the states.¹³⁹ Despite this apparent match between § 1983 and claims of negligent investigation, any such claim would fail since the Fourth and Fourteenth Amendments require some mental state more culpable than negligence.

First, negligent acts by officials do not implicate Fourteenth Amendment Due Process rights.¹⁴⁰ The United States Supreme Court has explained that the guarantee of due process protects individuals against *deliberate* government action.¹⁴¹ The purpose of the due process guarantee is to protect against abuses of power, and a lack of due care, or negligence, is not a deliberate act of an abuse of power. Rather, holding that negligence

¹³⁵ *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (“Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. . . False imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.”).

¹³⁶ U.S. CONST. amends. IV, XIV. *See* 1 Silver, *Police Civil Liability* § 8.05 (Matthew Bender, Revised Edition) (noting that major constitutional provisions constituting § 1983 actions also include the First, Sixth, and Eighth Amendments).

¹³⁷ This note focuses on imprisonment as a harsh consequence for persons wrongfully convicted because of negligent investigation, but a plaintiff could certainly claim injury for less extreme harms, such as shorter pretrial detentions or civil asset forfeiture.

¹³⁸ U.S. CONST. amend. XIV (“[Nor] shall any State . . . deprive any person of life, liberty, or property, without due process of law.”).

¹³⁹ *See* U.S. CONST. amend. IV (“The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated.”); *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁴⁰ *Daniels v. Williams*, 474 U.S. 327, 336 (1986); *but see id.* at 341 (Stevens, J., concurring) (“‘Deprivation,’ it seems to me, identifies, not the actor’s state of mind, but the victim’s infringement or loss.”). This same analysis would apply to Fifth Amendment Due Process claims against the federal government, but § 1983 only allows suits against those acting under color of state law, not federal law.

¹⁴¹ *See id.*

violated due process would “trivialize the centuries-old principle of due process of law.”¹⁴²

Similarly, negligence generally does not implicate Fourth Amendment rights. A plaintiff may wish to claim that a search leading to a wrongful conviction and based on negligent investigation violates the Fourth Amendment guarantee against unreasonable searches. This type of claim would fail precisely because of the negligent mental state. Over time, the Supreme Court has narrowed its reading of the Fourth Amendment guarantee against unreasonable searches so that a remedy is available if such remedy deters illegal police conduct,¹⁴³ and has explained that negligent behavior is not deterred by remedies like the exclusionary rule.¹⁴⁴ Instead of automatically applying the exclusionary rule when there is an illegal search, whether the rule applies will vary with the degree of law enforcement culpability.¹⁴⁵ The good-faith exception and the emphasis on deterring only “deliberate, reckless, or grossly negligent” behavior have “swallow[ed] the exclusionary rule.”¹⁴⁶ Relatedly, the Fourth Amendment guarantee against unreasonable seizures does require probable cause for arrest, but the Court has not gone so far as to say that negligent investigations negate probable cause, even if intentionally fabricated evidence does.¹⁴⁷ Although the Supreme Court has not explicitly foreclosed that grossly negligent conduct could violate the Fourth Amendment,¹⁴⁸ its recent jurisprudence has continually diminished the exclusionary rule, which could suggest that even claims of gross negligence would be hard to prove.¹⁴⁹

Discussion of these potential constitutional claims points next to *Bivens* actions, which allow for very limited claims of money damages against the federal government.¹⁵⁰ Under *Bivens*, a plaintiff may have a private right of action for money damages when no other avenue of relief exists for the violation of a constitutional right. To make a claim under *Bivens*, a plaintiff must allege that a constitutional right has been violated,

¹⁴² *Id.* at 332.

¹⁴³ *Compare Mapp*, 367 U.S., with *United States v. Leon*, 468 U.S. 897 (1984).

¹⁴⁴ *Strieff*, 136 S. Ct. 2056, 2063.

¹⁴⁵ *Herring v. United States*, 555 U.S. 135 (2009).

¹⁴⁶ *Davis v. United States*, 564 U.S. 229, 257 (2011) (Breyer, J., dissenting).

¹⁴⁷ *See Manuel v. City of Joliet*, 137 S. Ct. 911 (2017).

¹⁴⁸ *Herring*, 555 U.S. at 147–48.

¹⁴⁹ *See Andrew Guthrie Ferguson, Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 639–40 (2015).

¹⁵⁰ *See Bivens*, 403 U.S. 338.

such as Fifth Amendment Due Process or Fourth Amendment guarantees against unreasonable search and seizure.¹⁵¹ As discussed in the previous paragraphs, negligent investigation does not amount to a due process or unreasonable search or seizure violation, making a *Bivens* claim unavailable for as long as negligence remains insufficient for rights violations. Moreover, in recent decades the Supreme Court has grown increasingly reluctant to extend *Bivens* to new contexts.¹⁵²

2. *The Federal Tort Claims Act Does Not Allow Claims of Negligent Investigation*

The Federal Tort Claims Act (FTCA) is similar to the aforementioned claims of constitutional rights violations in that it appears to be a potential avenue of relief but does not actually provide relief for claims of negligent conduct. The FTCA makes the United States liable for torts committed by persons acting on behalf of the United States, but only if the alleged misfeasance would make a government actor “liable to the claimant in accordance with the law of the place where the act or omission occurred.”¹⁵³ In short, the FTCA does not allow for claims of negligent investigation unless the state law where the act or omission occurred allows such a claim. Because no state recognizes the tort, the FTCA is not a viable vehicle for claiming negligent investigation. This, of course, may change if state courts eventually adopt the tort, as discussed *infra* Part II.C.2.

3. *The United States’ Implementation of the International Convention on Civil and Political Rights Does Not Compel Compensation for the Wrongfully Convicted*

Despite being a member of ICCPR, the United States has interpreted the ICCPR to provide no guarantee of relief to the wrongfully convicted in the United States. Other countries have adopted the ICCPR more fully, such as the United Kingdom, which has incorporated the ICCPR into domestic law. In doing so, the United Kingdom has removed discretion as to whether to grant relief once a conviction has been reversed

¹⁵¹ See U.S. CONST. amends. IV, V.

¹⁵² See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–58 (2017).

¹⁵³ 28 U.S.C. § 1346(b)(1) (2020).

or a pardon has been granted on the grounds of newly discovered exculpatory evidence.¹⁵⁴ Once a person has been exonerated “the Secretary of State *shall* pay compensation”¹⁵⁵ Other countries have retained some discretion over enforcement of the ICCPR by creating administrative or judicial bodies to grant awards to exonerees.¹⁵⁶ Even though this approach might have more administrative difficulties for governments and exonerees than the United Kingdom’s approach, this approach has proven to be effective in countries such as Canada.¹⁵⁷

The United States’ approach differs from most countries’ because it interprets the ICCPR not as creating a right to compensation, but a right to “an effective and enforceable mechanism to provide compensation.”¹⁵⁸ This interpretation makes the ICCPR ineffective for exonerees in a number of ways. First, the United States has pointed to the federal compensation statute¹⁵⁹ and judicial mechanisms, such as a *Bivens* action,¹⁶⁰ as sufficient mechanisms of compensation.¹⁶¹ The federal compensation statute provides no more than \$50,000 USD and only applies to individuals wrongfully convicted under federal law. *Bivens* actions are incredibly rare and only apply to federal action. Neither of these mechanisms reaches the majority of wrongful convictions since most convictions are under state law. This reality points to other limits, such as the limitations of § 1983, discussed *supra* Part II.B.i, and the inconsistency of state compensation statutes. The United States also reserves that the application of the ICCPR is subject to “reasonable requirements by domestic law.”¹⁶² This reservation limits compensation by preserving sovereign immunity defenses for states and excluding violations made in good faith.¹⁶³ The

¹⁵⁴ Jason Costa, Comment, *Alone in the World: the United States’ Failure to Observe the International Human Right to Compensation for Wrongful Conviction*, 19 Emory Int’l L. Rev. 1615, 1622 (2005).

¹⁵⁵ Criminal Justice Act 1988, c. 133 (UK) <https://www.legislation.gov.uk/ukpga/1988/33/section/133> [<https://perma.cc/T5M5-EWAB>].

¹⁵⁶ Costa, *supra* note 154, at 1624.

¹⁵⁷ *Id.* at 1624–26.

¹⁵⁸ U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

¹⁵⁹ 28 U.S.C. §§ 1495, 2513 (2021).

¹⁶⁰ *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁶¹ Costa, *supra* note 154, at 1632–34.

¹⁶² U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992).

¹⁶³ Costa, *supra* note 154, at 1634–37.

United States' domestic law reservation seems to contradict the ICCPR's intent to improve state accountability.¹⁶⁴

In light of the United States' interpretation of the ICCPR, it is no surprise that the federal government has done little to guarantee compensation for wrongful convictions, nor has it taken steps to harmonize compensation by states. Exonerees of federal crimes may be granted relief by the Court of Federal Claims; however, this is only for exonerees convicted of an offense against the United States, not any given state, where most criminal convictions occur.¹⁶⁵ Exonerees of state crimes are still left to whatever remedies are available by state statutes, which are inconsistent and largely insufficient.¹⁶⁶ In failing to require that states comply with the ICCPR, the United States has failed in its obligation to the ICCPR and has turned what could be a promising avenue of relief into one that is a hollow mirage.

C. CURRENT STATE REMEDIES ARE INCOMPATIBLE WITH CLAIMS OF NEGLIGENT INVESTIGATION BUT COULD DEVELOP TO ALLOW FOR NEGLIGENT INVESTIGATION CLAIMS

A plaintiff alleging negligent investigation by investigators is foreclosed from seeking relief under federal law, and the federal courts are virtually foreclosed from recognizing the tort as a novel tort at common law.¹⁶⁷ State schemes for compensation to such victims are largely inadequate and often place onerous requirements on victims of negligent investigation. Because of these obstacles, a plaintiff alleging harm as the result of negligent investigation by police should turn to the final remaining avenue to seek relief: state courts. State courts generally have inherent power to recognize novel torts at common law¹⁶⁸ and have the final say in interpreting their state constitutions.¹⁶⁹ This Part explains the current state of negligent investigation in state courts then concludes that exonerees and their advocates should seek recognition of the tort of negligent investigation in state courts to improve compensation and incentivize best practices by investigators.

¹⁶⁴ *Id.*

¹⁶⁵ 28 U.S.C. §§ 1495, 2513.

¹⁶⁶ *See supra* Part II.A.1.

¹⁶⁷ *See supra* Part II.

¹⁶⁸ James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1740–43 (2003).

¹⁶⁹ *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

1. *Negligent Investigation Liability Exceeds at Most to Victims of Crime But Not to Suspects*

In several states, police owe a duty of care while conducting investigations, but this duty is owed to the victims of crimes, not to suspects. Some such states impose a statutory duty for police or other state actors specifically to investigate claims of child abuse or domestic violence.¹⁷⁰ Similarly, some state courts recognize claims of negligence when a victim or third-party reports child abuse or domestic violence and the police agency fails to investigate the claim, resulting in harm to the child or domestic partner.¹⁷¹ Even when police are negligent, immunity statutes often limit their liability.¹⁷²

With regard to negligent investigation of a suspect, no state has recognized such a duty of care. Several state supreme or appellate courts typically addressed this type of negligence claim but have held that state immunity statutes or public policy in tort law precludes claims against investigators. For example, a California statute interpreted its prosecutorial immunity statute broadly to protect investigators against tort claims.¹⁷³ Although one state statute waived sovereign immunity when a public official became liable in tort,¹⁷⁴ the state did not waive liability when such employee did so “by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment.”¹⁷⁵ The California court interpreted the exemption for judicial proceedings broadly, concluding that

the section’s immunity provision is not limited to actions for malicious prosecution . . . nor to acts to commence or to maintain . . . a judicial or administrative proceeding, but extends to any of a variety of intentional or negligent acts of public employees in any of various connections with such proceedings.¹⁷⁶

¹⁷⁰ *E.g.*, Wash. Rev. Code Ann. § 26.44.050 (West 2020) (law enforcement agencies must investigate claims of child abuse or neglect).

¹⁷¹ *E.g.*, OR. REV. STAT. §§ 124.060-.070 (West 2020) (mandatory reporting of abuse of those 65 years of age and older).

¹⁷² *E.g.* Thompson v. City of Capitola, 284 Cal.Rptr. 548 (Cal. Ct. App. 1991) (analyzing exceptions to waivers of immunity).

¹⁷³ *Id.*

¹⁷⁴ Cal. Gov’t Code §§ 815.2, 820 (West 2021).

¹⁷⁵ *Id.* § 821.6.

¹⁷⁶ Thompson, 284 Cal.Rptr. at 550.

An Idaho court reached the same conclusion on different grounds.¹⁷⁷ In *Wimer v. State*, Idaho's immunity statutes did not prevent a tort claim against a public official since "a private person or entity would be liable for money damages under the laws of the state of Idaho."¹⁷⁸ Rather, the court concluded that the tort of negligent investigation did not exist at all under Idaho common law and agreed that public policy supported this common law determination because "hold[ing] investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect on law enforcement."¹⁷⁹ The cases in California and Idaho are illustrative of many states that have rejected the tort for statutory or public policy reasons and many states have not addressed the tort at all.¹⁸⁰ Those courts that reject the tort for public policy reasons share the same essential concerns as the commonwealth jurisdictions examined in Part I.A.iii,¹⁸¹ and the dissent in *Hill v. Hamilton-Wentworth*.¹⁸²

2. *Using Hill v. Hamilton-Wentworth's Model to Gain Recognition of the Tort of Negligent Investigation in State Courts*

The aforementioned avenues of relief, each of which would not allow for claims of negligent investigation, have all been against states or the federal government in federal courts. This leaves state-level solutions left to be examined. As discussed in Part II.A.ii, state statutes are largely inadequate for compensating the wrongfully convicted and for incentivizing best investigatory practices. State legislatures certainly should improve their compensation statutes. But legislative reform is not the only option; state courts, with their power to review state common law and constitutional law, could provide possible relief with novel claims of negligent investigation.

State supreme courts have inherent power to interpret their own state constitutions and statutes, and to shape the common law of their state. State supreme courts can certainly interpret their own constitutions to be

¹⁷⁷ *Wimer v. State*, 841 P.2d 453 (Ct. App. 1992).

¹⁷⁸ *Id.* at 924 (citing Idaho Code § 6-903(1) (West 2021)).

¹⁷⁹ *Id.* at 925.

¹⁸⁰ *See, e.g. Wimer*, 841 P.2d.

¹⁸¹ *See supra* Part I.A.3.

¹⁸² *See* Part I.A.3, discussing *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, para. 149 (Can.) (Charron, J., dissenting).

more protective of individual rights, even when interpreting state constitutional protections that are analogous to federal constitutional protections.¹⁸³ As for tort liability, state courts have traditionally developed tort law to further the public good.¹⁸⁴ For instance, state courts developed the common law to include intentional infliction of emotional distress, false light, strict liability torts, and other theories of liability in the twentieth century.¹⁸⁵ State court authority, limited to the state yet broad in scope, allows state courts to be laboratories of democracy, “try[ing] novel social and economic experiments without risk to the rest of the country.”¹⁸⁶

State courts can expand compensation for individuals wrongfully convicted as the result of negligent investigation in three ways: (1) recognizing the tort of negligent investigation; (2) recognizing wrongful conviction as the result of negligent investigation as a compensable rights violation under a state constitution or statute; and (3) bolstering the right to compensation with the ICCPR as persuasive authority for interpreting state law.

First, state courts may choose to expand tort liability to negligent investigation. As discussed in this note, academic research suggests that imposing a duty of care on investigators would not have a chilling effect on rigorous investigation and public safety, but rather would reasonably encourage law enforcement agencies to adopt up-to-date practices and policies to meet a reasonable standard of care.¹⁸⁷ State courts have expanded tort liability in the past; the power to do so is only limited by state legislation, often directed to correct what a legislature considers as overly broad liability in specific areas of tort law.¹⁸⁸

Advocates are in a good position, historically, to plead negligent investigation, because of heightened scrutiny of law enforcement procedures and the criminal justice system generally. State courts with an appetite to address criminal justice reform may be eager to affirm that

¹⁸³ See *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”).

¹⁸⁴ See Gardner, *supra* note 168, at 1740–43.

¹⁸⁵ *Id.* at 1741–42.

¹⁸⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁸⁷ See Daniel E. Hall et al., *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 529, 530 (2003).

¹⁸⁸ See, e.g., George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5 J. ECON. PERSP. 31 (1991) (discusses expansion of tort liability and tort reform in the 20th century).

negligent investigation by police is, in fact, a cognizable tort claim. In addressing the question, these courts would consider whether the public policy arguments in favor of limiting liability still outweigh the public and individual interest in recovering based on negligent investigation. For example, in 1994, the Idaho judiciary rejected the tort out of fear of a chilling effect.¹⁸⁹ After twenty-seven years, the Idaho judiciary may be ready to revisit the tort of negligent investigation in light of the social science surrounding a potential chilling effect, cited in *Hill v. Hamilton-Wentworth*.¹⁹⁰ While advocates must be sure not to engage in frivolous or vexatious litigation, they can candidly ask courts to revisit the tort of negligent investigation after twenty-six years, and a plaintiff would be wise to at least try.

Advocates interested in this approach should observe the Washington Supreme Court's recent opinion in *Mancini v. City of Tacoma*.¹⁹¹ In *Mancini*, the plaintiff alleged negligence when police investigators identified her apartment for a raid and executed the raid.¹⁹² There, the Court recognized that police owe a duty of care in the exercise of their official duties, and that the duty of care even governs the execution of a search warrant.¹⁹³ The Court did not reach the question of whether to recognize the tort of negligent investigation of a suspect, and thereby overturn precedent, because it characterized the plaintiff's claim more specifically as a claim of negligent execution of a warrant.¹⁹⁴ The Court focused on evidence that police breached the plaintiff's door unreasonably quickly during a raid, that they took an unreasonable time to realize they had raided the wrong apartment, or that they left the plaintiff handcuffed for an unreasonable amount of time.¹⁹⁵ Despite this distinction, the Court did not draw clear lines between negligent investigation and negligent execution of a search warrant. As for public policy, the Court rejected arguments that the discretion inherent in investigations and that police investigators' other duties to the public should outweigh their interest to particularized suspects. Instead, the Court emphasized that "tort liability may be the only way of assuring a certain standard of performance from

¹⁸⁹ *Wimer*, 841 P.2d at 455.

¹⁹⁰ *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, ¶ 57 (Can.).

¹⁹¹ *Mancini v. City of Tacoma*, No. 97583-3, 2021, Wash. LEXIS 49* (Wash. Jan. 28, 2021).

¹⁹² *Id.* at ¶¶ 2–7.

¹⁹³ *Id.* at ¶¶ 32–35.

¹⁹⁴ *Id.* at ¶ 20.

¹⁹⁵ *Id.* at ¶¶ 32–41.

governmental entities”¹⁹⁶ and that official actions that personally harm a plaintiff may give rise to tort liability.¹⁹⁷ The Court’s opinion echoed the *Hill v. Hamilton-Wentworth Police Services Board* opinion in many respects, and the Court’s openness to imposing liability in tort should give hope for the development of the tort of negligent investigation.

Second, state courts can interpret their constitutions to give greater protection to individuals than the federal constitution.¹⁹⁸ State constitutions vary in similarity to the federal constitution—some have identical or virtually identical rights provisions while others vary quite significantly. State courts may interpret their state constitutional guarantees as more protective of individuals no matter how similar the text is to a federal constitutional guarantee. Advocates should plead wrongful convictions cases as a violation of various, plausibly applicable, state-level rights, such as due process or cruel and unusual punishment. Constitutional text may even lend itself to more novel arguments, such as that a wrongful conviction amounts to a taking that requires compensation, akin to a taking of property.¹⁹⁹ The likelihood of success with this approach depends both on the text of the state constitution, the degree of difference between federal constitutional text and state constitutional text, and the state courts’ traditional approach to interpreting their constitution compared to the federal constitution.

Finally, state courts may look to the ICCPR to interpret their own constitutional or statutory protections. As explained above, state courts are not bound to interpret their own state constitutions in ways that are analogous to federal courts’ interpretations of the federal constitution. State courts can therefore cite the international consensus, enshrined in the ICCPR to interpret their state constitutional guarantees of liberty and due process, or other pertinent guarantees, as requiring compensation for wrongful convicted individuals.²⁰⁰

¹⁹⁶ *Id.* at ¶ 45 (citing *Bender v. City of Seattle*, 664 P.2d 482 (1983)) (punctuation omitted).

¹⁹⁷ *Id.* at ¶ 48.

¹⁹⁸ See *Arizona v. Evans*, 514 U.S. 1, 8 (1995); see also Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) (state courts confronted with a question of constitutional rights should examine their state constitution before the federal constitution).

¹⁹⁹ See Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 97–98 (2004) (arguing that states should be required to compensate wrongfully convicted persons for the taking of their liberty just as states are required to compensate for takings of property).

²⁰⁰ See Costa, *supra* note 154, at 1643 (explaining how international conceptions of cruel and unusual punishment informed federal and state courts on the issue of the death penalty and proposing that courts look to the ICCPR as persuasive authority).

In summary, these three approaches to judicial relief for the wrongfully convicted provide uncertain but conceivable hope for greater compensation for the wrongfully convicted. Though each of these options faces high obstacles, particularly *stare decisis*, creative advocates pursue these paths towards ensuring just compensation for the victims of negligent police investigations. This is not to say that advocates should focus solely on this cause of action—legislative solutions are certainly possible and can achieve more systematic remedies than a court's decision. The personal pain wrought by negligent investigation is enough, though, to demand advocacy on all fronts. Unless and until legislatures fill compensation gaps and incentivize or demand up-to-date investigative techniques, advocates should seek recognition of the tort of negligent investigation.

III. CONCLUSION

The tort of negligent investigation is by no means a panacea to the harms of wrongful conviction. Even when a jurisdiction adopts the tort, plaintiffs face a high burden of proving negligence based on then-prevailing standards. Nevertheless, this tort could provide one more avenue of relief for wrongfully convicted individuals and prospectively help to improve investigative techniques. Unless and until legislatures make victims of negligent investigation whole, particularly wrongfully convicted individuals, state courts should follow the example of the Canadian Supreme Court in *Hill v. Hamilton-Wentworth Regional Police Services Board* and use their power to advance the public good.