Presumed Guilty until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims under State Compensation Statutes

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Despite significant efforts to uncover and prevent wrongful convictions, little attention has been paid to the compensation of wrongfully convicted individuals once they are released from prison. State compensation statutes offer the best path to redress because they do not require the claimant to prove that the state was at fault for the wrongful conviction and because they are not susceptible to the same political influences as other methods of compensation. However, even under compensation statutes, too many meritorious claims are dismissed, settled for far too little, or never brought in the first place. After examining the current statutory framework, this Article analyzes the arguments for and against one potential solution to this problem that so far has not been considered—shifting the burden of proof to the state on the issue of innocence. Currently, the jurisdictions that have enacted statutes require that the claimant prove his or her innocence in order to recover compensation. Shifting the burden to the state to prove that the claimant is guilty would be more efficient because the state has better access to the relevant evidence, it could rely exclusively on the criminal trial transcript, and it is in a better position to bear the costs of litigation and to determine when to settle. Although this solution implicates several concerns, these concerns can be addressed through checks already built into the criminal justice system and by adjustments that can be made to the compensation statutes.

**INTRODUCTION**

There is no longer a question of whether our justice system produces convictions of innocent persons. Over the past thirty years, DNA evidence has revealed a much deeper problem than had ever been thought to exist, uncovering hundreds of cases in which individuals have spent years in prison, and in some instances executed, for crimes they did not commit. The problem, however, has not gone unattended. Individuals and organizations across segments of the legal world—including advocacy groups, defense attorneys,
academics, judges, police, and prosecutors—have enlisted to confront the issue and are making headway.

Most of the efforts in this area, and indeed most of the scholarly articles, have concentrated on the causes and possible prevention of wrongful convictions, while relatively little attention has been paid to compensating wrongfully convicted persons once they are finally freed. Yet it is now quite clear, if it was not before, that wrongfully convicted persons require compensation, not just for lost wages and the pain and suffering endured while incarcerated, but also for the substantial obstacles they face when they attempt to reenter and regain their life after prison. Until recently, in order to recover compensation, wrongfully convicted persons have had three remedial options at their disposal: a §1983 civil rights claim, a common law tort claim, and a private legislative bill. Each of these avenues presents its own roadblocks. Civil rights and common law tort claims require a showing of culpability on the part of the government, which often is either not present or extremely difficult for claimants to establish. Private bills are rarely passed, and reflect more the political connections of the wrongfully convicted person and the publicity surrounding the exoneration rather than the merits of the claim for compensation.

Over the past several decades, however, a number of jurisdictions have enacted statutes that hold states strictly liable for wrongful convictions and provide compensation to any wrongfully convicted person who can meet certain eligibility requirements.

1. For example, the New York Justice Task Force, whose mission it is to investigate and prevent wrongful convictions, was created by New York’s Chief Judge, Jonathan Lippman, is co-chaired by Court of Appeals Judge Theodore Jones and Westchester District Attorney Janet DiFiore, and is constituted by a number of judges, prosecutors, defense attorneys, victims rights advocates, members of the New York legislature, New York Police Department Commissioner Ray Kelly, and New York Attorney General Andrew Cuomo, among others. Nicholas Confessore, Top Judge Plans a Task Force on Wrongful Convictions, N.Y. Times, May 1, 2009, at A19.

2. See, e.g., N.C. GEN. STAT. ANN. §15A-284.51 (West 2009) ("The purpose of this Article is to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects."); W. VA. CODE ANN. §§ 62-1E-1 to -3 (LexisNexis 2009); N.J. ATTORNEY GENERAL, ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001).


4. See, e.g., Shawn Armbrust, Note, When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted, 41 AM. CRIM. L. REV. 157, 159 (2004) ("Scholars and commentators have focused quite often on the problem of convicting the innocent and the causes of wrongful convictions, while very few scholars have focused on the aftereffects of wrongful conviction." (footnote omitted)).
Although these statutes appear to present the best opportunity for recovery for wrongfully convicted persons, they present their own problems. Due to the heavy burden placed on the claimant and the protracted nature of the litigation that often is involved in recovering an award, a large number of meritorious claims are dismissed, settled for an insignificant amount, or never even brought. While some have advocated reforming the compensation statutes by loosening eligibility requirements and lifting caps on damages, neither of these suggestions addresses the difficulty and duration of obtaining much-needed compensation.

One aspect of the compensation statutes that could offer a solution to this problem—and an aspect that has received little scrutiny by the legal and academic community—is the burden of proof. This Article examines the arguments for and against shifting the burden of proof to the state on the issue of guilt as a possible solution to the problems raised by the current framework. Part II of this Article provides a brief background of wrongful convictions and the various methods by which a wrongfully convicted person can pursue compensation. Part III details the current statutory frameworks in the jurisdictions that have passed compensation statutes, including the eligibility requirements, disqualifications, and caps on damages. Part IV analyzes the justifications and risks implicated by shifting the burden of proof to the state and the possible solutions to those risks if a state is so inclined to adopt such a framework.

Currently, most of the jurisdictions that have enacted statutes—which include twenty-seven states, the District of Columbia, and the federal government—flip the criminal presumption of innocence by presuming that claimants are guilty until they can prove their innocence by a preponderance of the evidence or by clear and convincing evidence. This approach places a heavy burden on persons who often do not possess the resources to carry that burden; it demands that the wrongfully convicted person come forward with evidence related to the crime when it is often the state that possesses such evidence, and it delays for years the time it takes for a wrongfully convicted person to recover much-needed compensation.

See John Martinez, Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property,” 59 Hastings L.J. 515, 524 (2008) ("Definition of the appropriate standard of proof, including the myriad complexities of presumptions, and allocation and shifting of the burdens of production and persuasion requires further study, but is beyond the scope of this Article.").
Yet while shifting the burden to the state addresses these concerns, it too implicates its own problems. Placing the burden on the state increases the risk of compensating a guilty individual who was released from prison, not on the grounds of innocence, but on a procedural or legal failure. Moreover, shifting the burden of proof to the state would shift the costs of litigation along with it, and likely would lead to additional recoveries and settlements paid by states that are already over-budgeted and over-extended. Yet these problems can be addressed through safeguards in the current judicial system and careful drafting of compensation statutes. So long as eligibility requirements are drafted stringently and as long as there is a reasonable cap on damages, shifting the burden to the state could more quickly compensate a broader range of innocent individuals who were wrongfully convicted and, at the same time, avoid compensating guilty individuals and increasing costs for states to an unsustainable level.

I. Wrongful Convictions and Compensation

A. Uncovering and Preventing Wrongful Convictions

The rising awareness of wrongful convictions can be traced directly to the advancement of DNA testing and technology. Indeed, "[u]ntil [the first DNA exoneration in 1989], exonervations of falsely convicted defendants were seen as aberrational. Since 1989, these once-rare events have become disturbingly commonplace." One recent study documented 340 exonerations of wrongfully convicted individuals between 1989 and 2003 alone. However, DNA evidence cannot serve as a panacea for detecting wrongful convictions. Evidence that is susceptible to DNA testing is not available in most cases. Moreover, even when this evidence is avail-

6. Gross et al., supra note 3, at 523; see also Stanley Z. Fisher, Convictions of Innocent Persons in Massachusetts: An Overview, 12 B.U. Pub. Int. L.J. 1, 1–3 (2002) ("A rising tide of prisoner exonerations, a significant number of which have relied upon DNA testing, has revealed how miscarriages of justice can result from deficient practices of police interrogation and eyewitness identification, inadequate disclosure of exculpatory evidence, acceptance of unreliable 'junk science' and 'snitch' testimony, and ineffective assistance of counsel." (footnote omitted)).


8. See, e.g., Garrett, supra note 3, at 116 ("DNA evidence is not available or probative in the vast majority of criminal cases. DNA testing can only be used to show identity when biological evidence from the perpetrator has been left at the scene of the crime; the vast
able, there are a number of obstacles facing wrongfully imprisoned persons who wish to challenge their conviction, including a lack of resources required by the state to preserve such evidence and limitations that a number of states place on DNA testing after an individual has been convicted. So while DNA exonerations have demonstrated the ability of our government to correct its mistakes, they also have served as a "miner's canary" by shining a spotlight on the most serious and troubling flaw in the justice system—the unknown number of innocent individuals who remain imprisoned for crimes they did not commit.

Unable to rely exclusively on DNA testing to purge the system of wrongful convictions, individuals and groups from across the legal community have taken up the cause. Just as proof of wrongful convictions has increased exponentially over the past two decades, so too have the efforts to uncover and prevent them. In this last decade alone, at least nine states have created commissions to examine and remedy wrongful convictions, including California, Connecticut, Illinois, New York, North Carolina, Pennsylvania, Texas, Virginia, and Wisconsin. A number of legal organizations—including the American Bar Association and the New York Bar Association—also

majority of criminal cases lack such biological evidence."); Daniel S. Medwed, Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions, 51 VILL. L. REV. 337, 356 (2006) ("[T]he bulk of wrongful convictions . . . lack any biological evidence that could be subject to DNA testing.").

9. See Brandon L. Garrett, Innocence, Harmless Error, and Federal Wrongful Conviction Law, 2005 WIS. L. REV. 35, 51 ("DNA testing can be used only in a limited number of cases: when biological evidence may have been left by the perpetrator at the scene of the crime, that evidence was collected by law enforcement, that evidence was preserved, and the state permits access to such testing."); see also ALA. CODE § 15-18-200 (LexisNexis 1995) (limiting post-conviction DNA testing to individuals convicted of committing a capital offense); MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2008) (limiting post-conviction DNA testing to individuals convicted of murder, manslaughter, rape, or sexual assault); Commonwealth v. Wright, 935 A.2d 542, 547 (Pa. Super. Ct. 2007) (denying request for DNA testing because appellant confessed to the crime and the confession was "finally litigated, found not to be coerced, and was knowingly and voluntarily given").

have directed their attention and resources to wrongful convictions, undertaking studies and analyses of the issue.\textsuperscript{11} Moreover, the establishment of units within district attorneys offices “to examine [wrongful] convictions is an emerging trend.”\textsuperscript{12}

These efforts have uncovered what are now thought to be the main causes of wrongful convictions: namely, eyewitness misidentifications, unreliability of testimony by jailhouse informants, false confessions, inadequate representation by defense attorneys, and improper practices by prosecuting attorneys.\textsuperscript{13} In response to these findings, the Department of Justice, state innocence commissions, legal organizations, and academics already have made recommendations aimed at decreasing the incidence of wrongful convictions,\textsuperscript{14} and several states already have acted on those recommendations.\textsuperscript{15} For example, New Jersey became “the first state in the Nation to officially adopt the recommendations issued by the United States Department of Justice in its Eyewitness Evidence Guidelines” when the New Jersey Attorney General in 2001 implemented the Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures.\textsuperscript{16} According to the Attorney General, the guidelines “incorporate more than 20 years of scientific research on memory and interview techniques” and “will improve the eyewitness identification process in New Jersey to ensure that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence.”\textsuperscript{17}

These continued and significant efforts hopefully will curb the rate of wrongful convictions. However, as the list of exonerations


\textsuperscript{12} John Eligon, Prosecutor in Manhattan Will Monitor Convictions, N.Y. TIMES, Mar. 5, 2010, at A20 (discussing Manhattan District Attorney Cyrus Vance, Jr.’s creation of a Conviction Integrity Program to examine and prevent wrongful convictions).

\textsuperscript{13} See, e.g., CAL. COMM’N, Final Report, supra note 10, at 10–21; N.Y. STATE BAR Ass’N TASK FORCE ON WRONGFUL CONVICTIONS, supra note 11, at 6; Understand the Causes, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (last visited Oct. 10, 2010).


\textsuperscript{15} See supra note 2.

\textsuperscript{16} Letter from John J. Farmer, Jr., N.J. Attorney General, to All County Prosecutors, Col. Carson J. Dunbar, Jr., Superintendent, New Jersey State Police, All Police Chiefs and All Law Enforcement Chief Executives 1 (Apr. 18, 2001) (on file with the University of Michigan Journal of Law Reform).

\textsuperscript{17} Id.
continues to grow, and since the eradication of wrongful convictions altogether seems quixotic, the justice system also must address the treatment of wrongfully convicted persons once they are released from prison.

B. Compensating the Wrongfully Convicted

After finally obtaining their freedom, wrongfully convicted persons face a number of significant obstacles to regaining their life. Many spend tens, if not hundreds, of thousands of dollars funding their appeal, leaving them in substantial debt. Hiring the best attorney they can find will give them the best chance of a reversal, but it also is likely to cost them the most money, making the climb out of debt that much more difficult. To make matters worse, after being deprived of the job experience and wages they would have earned had they not been in prison, these individuals face unique impediments to securing new employ.

For example, many job applications contain a question about the criminal history of the applicant. The wrongly convicted person must at least admit to being arrested and may have to reveal that he was convicted . . . . Even if an explanation is articulated and accepted by a potential employer, the wrongly convicted person faces a competitive workplace with no employment history, no recent references, and a lack of technical skills frequently required to perform many jobs in our computerized society.

This makes it exceedingly difficult for recently freed individuals to get back on their feet.

Yet the consequences of wrongful conviction are not only financial in nature. While in prison, the wrongfully convicted suffer considerable emotional, psychological, and physical harm. For example, in Baba-Ali v. State, a father was wrongfully convicted of molesting his daughter. The court noted that "[i]n prison, convicted child molesters were raped or murdered or both . . . . [Mr.

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18. Lopez, supra note 7, at 720 ("Not only will a wrongly convicted person forever face questions about his true innocence of the crime, but he will also encounter everyday hardships while trying to resume his life outside of prison.").
19. See, e.g., Armbrust, supra note 4, at 158–59 (noting that "[one] family invested about $200,000 to help fund his appeals").
20. Lopez, supra note 7, at 720.
Baba-Ali] was 'afraid for his life' from the day he arrived in prison until the day he left.\textsuperscript{22} Similarly, in Jones v. State, Mr. Jones was wrongly convicted of murdering a kingpin in the Bloods street gang.\textsuperscript{23} The court stated:

While incarcerated, he received threats on a daily basis as the purported killer of a Bloods gang member. At some point, he learned that a contract had been taken out against him. When housed in Elmira Correctional Facility, he was attacked by another inmate with a razor blade, which resulted in his segregation from the general population.\textsuperscript{24}

Nor is the emotional nightmare endured in prison vanquished by a legal finding of innocence. Many continue to suffer the consequences of their wrongful incarceration long after they are freed. After being exonerated, Mr. Baba-Ali was diagnosed with chronic Post Traumatic Stress Disorder and "clinically significant depression."\textsuperscript{25}

As if the physical and psychological impact were not enough, the social stigma associated with being imprisoned—even if wrongfully—makes it difficult for wrongfully convicted persons to regain their reputation.\textsuperscript{26} This can wreak havoc on their daily lives after prison, from tasks as basic as retrieving their driver's license from the state after being released, to dealing with child support payments that accumulated while incarcerated, to being unwelcomed into the new neighborhood into which they move.\textsuperscript{27}

In all, the social, economic, and emotional suffering that stems from a wrongful conviction requires some form of remediation.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{22} Id. at 561.
\item \textsuperscript{23} No. 2009-014-051 (N.Y. Ct. Cl. Aug. 19, 2009).
\item \textsuperscript{24} Id. at 5.
\item \textsuperscript{25} Baba-Ali, 878 N.Y.S.2d at 563.
\item \textsuperscript{26} See Lopez, supra note 7, at 720-21 ("[T]he most damaging injury inflicted upon the wrongly convicted is not necessarily the time lost behind bars, but the stigma that follows them for the rest of their lives."); see also Baba-Ali, 878 N.Y.S.2d at 561 ("The court also recognizes the toll the heinous nature of these crimes of moral turpitude has taken on claimant's reputation.").
\item \textsuperscript{27} See, e.g., Baba-Ali, 878 N.Y.S.2d at 562 ("[T]he stigma and lingering doubt the conviction had engendered adversely affected how the New York City Department of Social Services and the court-appointed law guardian both reacted to claimant's efforts to remove the Family Court's order of protection.").
\item \textsuperscript{28} See Martinez, supra note 5, at 537 ("[F]reedom alone is not enough for the person who has been chewed up by the criminal justice system and then spit out as wrongfully convicted, lacking compensation for the harm suffered."); Teressa E. Ravenell, \textit{Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims}, 81 TEMP. L. REV. 689, 691 (2008) ("Although wrongful convictions may be an inevitable consequence of our crim-
Exactly what form that compensation should take and the method by which it should be provided have yet to gain consensus. Currently, there are serious failings in the way that wrongfully convicted individuals are compensated. The California Commission on the Fair Administration of Justice, for example, noted in its final report:

[E]ven the limited resources made available to convicted felons who have served their sentences and are released from prison are not available to those whose convictions have been set aside. Parolees are released to the community in which they were arrested or convicted; services such as counseling and assistance in locating housing or jobs are limited to those who remain under parole supervision. But those who are being released because their conviction is set aside, including those who have been found innocent, receive none of these services.  

In many states, the recompense provided to the wrongfully convicted person upon his or her release is simply inadequate, forcing the individual to pursue legal or legislative alternatives.

C. Possible Legal Remedies for Wrongfully Convicted Persons

There are several legal channels through which a wrongfully convicted individual can attain compensation. They include constitutional and common law tort remedies, private legislative bills, and, in roughly half of the states, actions under state compensation statutes.

II. CONSTITUTIONAL AND COMMON LAW TORT REMEDIES

One option at the disposal of a wrongfully convicted person is to sue the government under 42 U.S.C. §1983 for the “deprivation of any rights, privileges, or immunities secured by the
Constitution and laws." Yet many wrongfully convicted persons cannot satisfy the requirements for succeeding on such a claim. For example, "[§] 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. The first step in any such claim is to identify the specific constitutional right allegedly infringed." However, not all wrongfully convicted individuals have been deprived of a right covered by § 1983. Perhaps even more fatal to most claims, § 1983 requires culpable conduct on the part of the government; constitutional violations "are just not triggered by lack of due care." Many wrongful convictions do not arise from any misconduct on the part of the government, but are instead a product of unintentional misidentifications by eyewitnesses or false testimony by jailhouse informants. Even where a government official has acted negligently or intentionally, it is difficult to prove, and "the need to protect . . . the vigorous exercise of official authority"
and to avoid harassment lawsuits\textsuperscript{38} has led the courts to grant complete or qualified immunity to police and prosecutors.\textsuperscript{39}

Common law tort claims, such as malicious prosecution and false imprisonment, suffer from similar inadequacies. A malicious prosecution claim is presented when a plaintiff can show "the initiation of an action or proceeding that terminated in favor of the plaintiff, lack of probable cause for the prior action or proceeding, malice and special injury."\textsuperscript{40} Similarly, "a plaintiff claiming false arrest must show, \textit{inter alia}, that the defendant intentionally confined him without his consent and without justification."\textsuperscript{41} Because actions for malicious prosecution and false imprisonment both require a showing of intent on the part of the government, as well as an absence of probable cause for the arrest, and are limited by the same immunity protections as § 1983 claims, they are exceedingly difficult to maintain.\textsuperscript{42}

\textsuperscript{38} Imbler v. Pachtman, 424 U.S. 409, 422–25 ("The common-law immunity of a prosecutor is based [partially] upon the . . . concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties . . . . The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.").

\textsuperscript{39} The Supreme Court has held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," \textit{Harlow}, 457 U.S. at 818, and that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983," \textit{Imbler}, 424 U.S. at 431.

\textsuperscript{40} Fink v. Shawangunk Conservancy, Inc., 790 N.Y.S.2d 249, 250 (App. Div. 2005) (internal quotation marks omitted); \textit{see also} Bernhard, \textit{supra} note 34, at 86 ("In order to establish a malicious prosecution, claimants must prove not simply that they were arrested and prosecuted and that the proceeding was eventually terminated in their favor, but also that there was no probable cause for their arrest in the first place and that they were prosecuted with actual malice.").

\textsuperscript{41} Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). While malicious prosecution and false arrest claims share common elements, the main difference lies in the scope of the remedy available under each. \textit{See} Heck v. Humphrey, 512 U.S. 477, 484 (1994) (noting that while recovery for false arrest covers only "the time of detention up until issuance of process or arraignment, . . . a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society" (internal quotation marks omitted)).

\textsuperscript{42} \textit{See} Garrett, \textit{supra} note 9, at 51 ("So long as police can credibly show that they had probable cause, any violation of a suspect's rights are [sic] rendered nonactionable."); Martinez, \textit{supra} note 5, at 531 ("Such claims are therefore typically unsuccessful because police can usually credibly testify that they had probable cause."); \textit{see also} Daniel J. Meltzer, \textit{Harmless Error and Constitutional Remedies}, 61 U. Chi. L. Rev. 1, 50–31 (1994) ("[W]hatever its hypothetical merits or demerits, a vigorous system of tort remedies does not exist. The scope of governmental liability is quite limited, and judges and prosecutors enjoy absolute immunity from damages liability." (footnotes omitted)).
Even if a wrongfully convicted claimant were able to succeed on a claim under § 1983 or a common law tort remedy, a favorable judgment takes years to recover, leaving the wrongfully convicted individual to front the costs of yet additional litigation while struggling to survive on whatever income he or she is fortunate enough to obtain.\(^4\)

A. Private Legislation

An alternative course of compensation for a wrongfully convicted individual is to seek a private bill from the state legislature, which can allocate money to the individual. This method presents its own unique obstacles. As an initial matter, a number of states interpret their constitutions as precluding this type of recovery.\(^4\) In addition, state legislatures simply are not equipped to handle the growing number of wrongfully convicted individuals that are seeking compensation—state legislatures do not have the time or resources to examine, debate, and vote on compensation for numerous individuals each year, which is likely one reason this remedy has been used so sparingly.\(^4\) Finally, a compensation bill is vulnerable to the same political infirmities as any piece of legislation, making a determination of which wrongfully convicted individual to compensate a function of the political climate of the day.\(^4\) Positive publicity surrounding the exoneration, the political connections of the exoneree, and budgetary concerns all are much more likely to determine the fate of the bill than the merits of the claim for compensation.\(^4\) This not only impairs the individual’s pursuit of redress, it also “can lead to charges of influence, political

\(^{43.}\) See Betty Ginsberg, Out with the New, in with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities, 36 FORDHAM URB. L.J. 713, 724 (2009).

\(^{44.}\) Bernhard, supra note 34, at 94.


\(^{46.}\) See Lopez, supra note 7, at 699–700.

\(^{47.}\) Id. For example, Wilton Dedge, who served 22 years in prison after being wrongfully convicted of battery and burglary, was eventually awarded $2 million by the Florida state legislature. However, the first time the bill was raised, the speaker blocked it from a vote. Only later did he allow a vote and vote for it himself. Carrie Johnson & Steve Bousquet, Man Gets $2M for 22 Years He Lost, ST. PETERSBURG TIMES, December 9, 2005, at 1B, available at http://www.sptimes.com/2005/12/09/State/Man_gets_2M_for_22_ye.shtml.
power, etc., that create an appearance of impropriety and undermine the integrity of the legislative process.\textsuperscript{48}

B. Compensation Statutes

Given the difficulties faced by a wrongfully convicted individual who attempts to recover compensation through civil rights, common law tort, or legislative remedies, a number of states have enacted compensation statutes to bridge the gap. These statutes have been enacted "amid heightened awareness of instances of erroneous conviction, and growing interest in providing new legal remedies for persons exonerated after serving time in prison,"\textsuperscript{49} and "set forth criteria for a recovery which would be easier to establish than negligence on behalf of the government."\textsuperscript{50}

Of the twenty-nine jurisdictions that have enacted compensation statutes—twenty-seven states, the District of Columbia, and the federal government—all permit recovery even in the absence of any government culpability (addressing the primary obstacle presented by civil rights and common law tort remedies) and all are available to anyone who meets certain eligibility requirements, regardless of political connections (dealing with the issues presented by private legislative bills).

The decision to dispense with the government culpability requirement has been explained through the theory that the entire community benefits from the criminal justice system, and therefore when a mistake occurs (i.e., a wrongful conviction) the cost should be borne by the community at large, not individually by the victim of the mistake. As Edwin Borchard stated almost seventy years ago:

We have recognized, in certain spheres of activity, that it is unfair to the individuals injured that they alone should bear the entire loss resulting from the accident, and therefore society distributes the loss among its members. Where the common interest is joined for a common end—maintaining the public peace by the prosecution of crime—each individual member being subject to the same danger (erroneous conviction), the

\footnotesize{48. N.Y. Law Revision Comm'n, supra note 45, at 18.}
\footnotesize{50. In re Estate of Hernandez, 715 N.Y.S.2d 627, 629 (Surr. Ct. 2000).}
\footnotesize{51. The states that have enacted a compensation statute are: Alabama, California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.}
Compensation statutes, however, also implicate several concerns. Although the number of states that have enacted such statutes continues to grow rapidly, almost half of the states still have yet to adopt one. Moreover, “[c]ompensation amounts vary, as do caps on total compensation available,” and the statutes “typically erect a network of obstacles to recovery that most litigants find virtually impenetrable.” One of the most significant problems raised by compensation statutes is that succeeding on such a claim is too difficult and takes too long for a wrongfully convicted individual deserving of compensation. Meritorious claims often are defeated due to the substantial burden facing litigants—including the costs of litigation and the difficulty of producing evidence related to a crime that took place years ago. Even where a claimant does succeed, the action takes years to litigate, leaving the wrongfully convicted individual without any money during that period. The suggested reforms to date—removing caps on damages and loosening eligibility restrictions—may open the door to a wider class of claimants and may increase the amount of damages attained by the small number of successful claimants, but these suggestions do nothing to address the contentious and protracted litigation that precedes, and often precludes, such an award.

III. COMPENSATION STATUTES: A CLOSER LOOK
AT THE CURRENT FRAMEWORK

This section more closely examines the current statutory framework for compensating the wrongfully convicted by breaking down the statutes in the jurisdictions that have enacted them. There are five components of these statutes that impact whether and how
much a wrongfully convicted person can recover: standing (i.e., eligibility requirements), disqualification provisions, caps on damages, statutes of limitations, and the burden of proof.

A. Eligibility Requirements

Almost all of the existing compensation statutes limit redress to a certain category of wrongfully convicted individuals. Unless the claimant meets these eligibility requirements, he or she does not have standing to sue and the claim will be dismissed.

One type of eligibility requirement in some statutes restricts access based on the nature of the underlying crime for which the claimant was convicted. Nearly half (thirteen) of the jurisdictions that have compensation statutes only allow a claimant to obtain redress if he or she was convicted of a felony. Three permit claimants to proceed based on convictions of a misdemeanor or a felony. The remaining thirteen jurisdictions permit actions for any conviction, regardless of the nature of the crime.

A second eligibility requirement relates to the duration and the nature of the incarceration. All jurisdictions require that the claimant have served time in prison, with Massachusetts requiring that the claimant have served no less than one year in prison. Most states also do not permit a claimant to sue under the compensation statute if the claimant was concurrently serving time in prison for another offense for which the claimant was guilty or if the claimant is serving time in prison for, or is later convicted of, another crime.

The most significant eligibility requirement restricts a claimant’s ability to pursue a compensation claim based on the circumstances by which the claimant was released from prison. Four states only permit a claimant to seek relief if the individual has been pardoned by the governor. Three states permit suit only if the

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claimant was exonerated by DNA evidence.\textsuperscript{62} Nine states allow actions by claimants who were released on grounds of innocence or grounds consistent with innocence.\textsuperscript{63} Nine states, the District of Columbia, and the federal government require only that the conviction has been reversed or vacated and the claimant was either not retried or was retried and acquitted.\textsuperscript{64} And two states do not have any restrictions on who can bring a claim.\textsuperscript{65}

There are advantages and disadvantages to the limits placed on claimants based on the grounds for their relief. Drawing the eligibility requirements too narrowly precludes recovery for innocent individuals who were wrongfully convicted. Drawing them too broadly opens up the state to nuisance lawsuits that will cost it precious time and resources. Thus, the pardon requirement makes it very likely that the individual being awarded compensation is, in fact, innocent of the crime for which he or she was convicted. At the same time, it is unlikely that a governor’s office—already overburdened with the rigors of running the state—has the time and resources to actively investigate all cases of wrongful conviction and make a determination purely based on merits as to who deserves to be pardoned. Instead, pardons are granted to a small subset of in-


\textsuperscript{64} These states are Delaware, Del. Code Ann. tit. 11, § 9206 (1995), Connecticut, Conn. Gen. Stat. Ann. § 54-102uu (West 2009), Florida, Fla. Stat. Ann. § 961.04 (West 2010), Indiana, Ind. Code Ann. § 34-13-3-4 (West 2001), Iowa, Iowa Code Ann. § 663A.1 (West 2010), Louisiana, La. Rev. Stat. Ann. § 15:372.8 (2010), Massachusetts, Mass. Gen. Laws ch. 258D, § 1 (B) (LexisNexis 2009), Mississippi, Miss. Code Ann. § 11-44-7 (2009), Nebraska, Neb. Rev. Stat. Ann. § 29-4603 (LexisNexis 2009), and Ohio, Ohio Rev. Code Ann. § 2743.48 (LexisNexis 2008), permit recovery if the individual’s conviction was vacated or dismissed, or was reversed, and no further proceedings can be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the conviction. Illinois, 735 Ill. Comp. Stat. Ann. 5/2-702 (West 2009), New York, N.Y. Jud. Ct. Acts Law § 8-b (McKinney 2010), and West Virginia, W. Va. Code Ann. § 14-2-13a (LexisNexis 2009), use essentially the same language but also provide relief if the statute, or application thereof, on which the indictment or information was based violated the Constitution of the United States or the constitution of their state. The District of Columbia, D.C. Code § 2-422 (2006), and the federal government, 28 U.S.C. § 2513 (a)(1) (2006), provide access to claimants who have their conviction reversed or set aside, but specify that it be on the ground that they are not guilty of the offense of which they were convicted, or on new trial or rehearing was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction.

\textsuperscript{65} These states are New Jersey, N.J. Stat. Ann. § 52:4C-2 (West 2001), and Wisconsin, Wis. Stat. Ann. § 775.05 (West 2009).
individuals who receive the most publicity and public support, making pardons vulnerable to the same infirmities as private legislative compensation bills.

Like the pardon requirement, requiring that the claimant have been exonerated by DNA evidence ensures that the claimant is actually innocent, but also limits redress to a subset of innocent individuals. While such a requirement is not subject to the same political influences as a pardon requirement, most cases do not even involve evidence that is DNA-testable, and therefore it precludes many innocent individuals from receiving compensation.

Permitting suits by those individuals who have received judicial relief on the basis of innocence or grounds consistent with innocence broadens relief to a larger class of individuals than those pardoned by the governor or exonerated by DNA evidence. However, such a requirement still is under-inclusive of all innocent individuals who are wrongfully convicted because it makes recovery contingent on whether a court declares the individual innocent—a finding that many courts prefer not to reach, and one they need not reach in order to overturn the conviction.

The requirement that the claimant’s conviction have been reversed or vacated and he or she was either released or retried and acquitted—which has been adopted by a plurality of the jurisdictions that have compensation statutes—is both under- and over-inclusive. On the one hand, an innocent individual could be released from prison on grounds other than a reversal and dismissal of the indictment or a new trial and acquittal, but under most of the statutes in this category such a claimant could not bring an action. On the other hand, a guilty individual could have a new trial ordered on a legal technicality, and at the new trial the jury does not convict. However, a finding that a defendant is not guilty beyond a reasonable doubt is quite different from a finding that the defendant is innocent.

Lastly, the two states that permit anyone to bring an action for compensation based on wrongful conviction, regardless of the grounds upon which they were released from prison, open the door to meritless lawsuits by individuals who were rightfully convicted and who are merely hoping to exact a nuisance settlement.

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66. See, e.g., Bernhard, supra note 34, at 102.
A number of compensation statutes also contain a disqualification provision that precludes recovery for certain claimants. While a number of statutes include these disqualifying factors in their eligibility requirements, others permit the action to proceed past the pleading stage but place the burden on the claimant to establish that he or she does not fall under the scope of the disqualifying factor. The most common disqualification provision—present in roughly half of the current compensation statutes—precludes recovery if the claimant in some way caused or contributed to his or her conviction.67

In a number of states, this disqualifying provision is narrowly tailored to preclude recovery only if the claimant pled guilty, committed or suborned perjury, fabricated evidence, or otherwise made a false statement that contributed to the conviction.68 Other statutes contain broader language that covers any conduct by a claimant who, by his or her own conduct, caused or brought about the conviction.69 This broader language encompasses the specific conduct covered in the more limited provisions—pleading guilty, suborning perjury, fabricating evidence, or making a false statement—but also captures additional conduct. For example, in New York, a jurisdiction that requires the claimant to prove that he or she did not “cause or bring about his [or her] conviction,”70 the claimant cannot prevail if he or she attempted to protect the guilty party by concealing evidence to protect that person. In Stevenson v.

67. As of yet, no jurisdiction has adopted a comparative fault scheme for recovery, which would limit, rather than bar altogether, compensation for a wrongfully convicted individual who contributed to his or her own conviction. For a discussion of the comparative fault system in the context of wrongful conviction compensation, see generally Adam I. Kaplan, Comment, The Case for Comparative Fault in Compensating the Wrongfully Convicted, 56 UCLA L. REV. 227 (2008).


69. E.g., Cal. Penal Code § 4903 (West 2010) (did not intentionally contribute to arrest or conviction); W. Va. Code Ann. § 14-2-13a (LexisNexis 2009) (did not by own conduct cause or bring about conviction). Although Tennessee’s compensation statute does not contain a disqualifying provision of this sort, it does state that “[t]he state of Tennessee shall have a right of subrogation as provided by law for any amount awarded pursuant to this subdivision (a)(7) against any person who willfully and intentionally committed an act or engaged in conduct that directly resulted in or contributed to the wrongful conviction and imprisonment of the claimant.” Tenn. Code. Ann. § 9-8-108(a)(7)(G) (2009). Presumably, if the claimant intentionally committed an act that contributed to his or her own conviction, the state would be able to avoid liability.

the claimant had been wrongfully convicted, but had deliberately shielded from prosecution his identical twin brother who had actually committed the crime.71 According to the trial court, the "[c]laimant's failure to come forward at any time and his complete failure to mitigate by silence [was] precisely the type of disqualifying circumstance contemplated" by the legislature when it enacted New York's compensation statute.72 Similarly, in Taylor v. State, the claimant did not satisfy his burden of proving he did not contribute to his own conviction when he withheld information implicating his wife in order to protect her.73

The record clearly demonstrates that claimant either possessed incriminating knowledge or at least suspected that his wife was involved in this crime, that the decision not to call her was made by claimant, not defense counsel, and not for the purpose of advancing his own cause but instead to aid and to protect his wife. In our view, these facts remove this case from the realm of mere trial strategy and place it more in the area of withholding potentially exculpatory information.74

Even the broadly styled disqualification provisions are unlikely to reach ineffective trial strategy or an unsuccessful defense at the criminal trial. In O'Donnell v. State, the New York appellate division held that the "cause or contribute" requirement did not bar a claimant from recovering simply because he had put on an alibi defense at his criminal trial that was not believed by the jury.75

If the mere proffer of a disbelieved but not disproven alibi is deemed to constitute conduct that causes or brings about a wrongful conviction, Court of Claims Act § 8-b would, in effect, be of very little benefit to innocent defendants who unsuccessfully offer at trial any kind of affirmative and truthful evidence of innocence.... A claimant may not be penalized for decisions that fall within the realm of reasonable and legitimate trial strategy.76

71. 529 N.Y.S.2d 492 (Ct. Cl. 1987).
72. Id. at 494.
74. Id. at 174.
76. Id. at 270–71 (internal citation omitted).
Instead, the court held that the disqualification provision is meant to apply to "claimant's knowing withholding of available, admissible, and material exculpatory evidence, or his or her knowing presentation of evidence that is provably false through evidence independent of proof of guilt." 77

Even though some jurisdictions expressly state that coerced confessions and involuntary or invalid guilty pleas do not stand as a barrier to recovery, 78 it is not clear that all other jurisdictions would take the same view if confronted with such a case.

C. Caps on the Recovery of Damages

The amount of damages available under compensation statutes generally is smaller than the amount available under § 1983 civil rights and common law tort claims, a logical tradeoff given that a claimant under a compensation statute need not prove culpability on the part of the government. Thus, a number of compensation statutes place a cap on the amount of damages that can be recovered by a claimant.

Many states place limits on the amount of damages that can be recovered per year in prison, ranging from $5,000 per year in Wisconsin 79 to $80,000 per year in Texas. 80 The majority of jurisdictions that place annual caps on damages—Alabama, Florida, Mississippi, North Carolina, and the federal government—limit the amount to $50,000 per year in prison. 81 Louisiana, New Jersey, and Ohio all contain a lower cap on damages, 82 Vermont contains a higher

77. *Id.* at 271. However, it is possible that other courts could interpret these disqualification provisions more broadly than the courts in the cases described *supra* notes 71–76, perhaps even barring recovery where the claimant testified unpersuasively at the criminal trial.


79. *Wis. Stat. Ann.* § 775.05 (West 2009). Wisconsin, however, does allow the claims board to recommend to the legislature an additional amount if it finds that "the amount it is able to award is not an adequate compensation." *Id.*


one, and Utah and Virginia both base the annual amount on the state's average income or payroll. A number of jurisdictions—including some that place annual caps on damages—contain caps on the total amount of compensation that an individual can recover. Most of these caps on total damages are in the six-figures, but New Hampshire and Wisconsin limit the maximum amount of damages to $20,000 and $25,000, respectively, while Tennessee and Florida permit damages up to $1 million and $2 million, respectively. A small minority of states—California, Iowa, and Missouri—compensate a successful claimant either $100 or $50 for each day spent in prison.

Only six jurisdictions place no cap on damages. New York and West Virginia simply provide that "if the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him." Connecticut offers more guidance, stating that the amount of damages shall be based upon evidence of "loss of liberty and enjoyment of life, loss of earnings, loss of earning capacity, loss of familial relationships, loss of reputation, physical pain and suffering, mental pain and suffering and attorney's fees and other expenses arising from or related to such person's arrest, prosecution, conviction and incarceration." Unlike the other compensation statutes, and contrary to the strict liability nature of these statutes, Connecticut also permits the court to consider "whether any negligence or misconduct by any officer, agent, ($40,330 per year). Ohio also awards damages for lost wages and any fines or penalties arising out of the wrongful conviction. Id.

83. VT. STAT. ANN. tit. 13, § 5574 (2009) (providing for no less than $30,000 and no more than $60,000 per year). Vermont also compensates for lost wages, health coverage, psychological treatment, and reasonable attorney's fees. Id.
84. UTAH CODE ANN. § 78B-9-405 (2008) (the monetary equivalent of the average annual nonagricultural payroll wage in Utah); VA. CODE. ANN. § 8.01-195.11 (2007) (an amount equal to 90% of the Virginia per capita personal income). Virginia also provides up to $10,000 for educational tuition. Id.
86. N.H. REV. STAT. ANN. § 541-B:14 (2007); WIS. STAT. ANN. § 775.05 (West 2009).
88. CAL. PENAL CODE § 4904 (West 2010) ($100); IOWA CODE ANN. § 663A.1 (West 2010) ($50); MO. REV. STAT. § 650.058 (2007) ($50). Iowa also provides lost wages, attorneys' fees, and any fines or penalties paid by the individual in connection with the wrongful conviction. IOWA CODE ANN. § 663A.1 (West 2010).
89. E.g., CONN. GEN. STAT. ANN. § 54-102uu(c) (West 2009); D.C. CODE § 2-423 (2006).
90. N.Y. JUD. CT. ACTS LAW § 8-b (McKinney 2010); W. VA. CODE ANN. § 14-2-13a (LexisNexis 2009).
91. CONN. GEN. STAT. ANN. § 54-102uu(c) (West 2009).
employee or official of the state or any political subdivision of the state contributed to [the claimant’s] arrest, prosecution, conviction or incarceration.\textsuperscript{92}

In addition to the compensatory damages awarded for emotional and economic harm, six jurisdictions also cover expenses for employment training, educational tuition, and/or medical coverage.\textsuperscript{93}

While a small number of state compensation statutes restrict damages to an extremely low amount—New Hampshire and Wisconsin limit total damages to an amount lower than many states provide for each year in prison\textsuperscript{94}—the caps on damages in most jurisdictions are reasonable and provide those jurisdictions assurance that they will not be forced unexpectedly to pay an exorbitant sum of money from the state’s annual budget.

\section*{D. Statutes of Limitations}

The competing interests raised by the statute of limitations period are, on the one hand, to protect the state from unduly delayed claims,\textsuperscript{95}—which both undermine the state’s ability to budget for its expected liabilities and increase the likelihood that relevant evidence is lost or discarded—and, on the other hand, the wrongfully convicted claimant’s need for sufficient time to file suit. Like damage caps, statutes of limitations are utilized by a number of states to balance other components of the wrongful conviction statutes. Generally, the more restrictive the eligibility requirements, the longer the claimant has to bring the action.

A majority of the compensation statutes require the wrongfully convicted individual to file his or her claim within two years.\textsuperscript{96} Five jurisdictions offer less time—the District of Columbia, Oklahoma,

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\textsuperscript{92} \textit{Id. § 54-102uu(d)}.
\textsuperscript{94} Until recently, the federal government provided only $5,000 for each year in prison. In 2003, however, Congress enacted the Innocence Protection Act, which increased the limit to $50,000 for each year in prison for non-death row inmates and $100,000 for each year a prisoner spent on death row. 28 U.S.C. § 2513 (2006). This may be a harbinger for other states as well. For example, in its final report, the California Commission on the Fair Administration of Justice recommended “that the level of statutory compensation be increased, at least to the level of comparable federal compensation ($50,000 per year maximum).” \textit{Cal. Comm’n, Final Report, supra} note 10, at 105.
\textsuperscript{95} \textit{E.g., John R. Sand & Gravel Co. v. United States}, 552 U.S. 130, 133 (2008); \textit{United States v. Dalm}, 494 U.S. 596, 608 (1990) (noting that a statute of limitations is part of a bargain for the government to agree to waive sovereign immunity).
\textsuperscript{96} \textit{E.g., 2001 Ala. Acts 659; Cal. Penal Code § 4901 (West 2010)}.
\end{flushright}
and Tennessee provide for only one year, and Wisconsin requires a claimant to file notice with the state within 120 days. Four state statutes—Mississippi, New Hampshire, Texas, and Vermont—contain a three-year statute of limitations period.

Two or three years strikes that balance so long as the wrongfully convicted individual is aware that he or she is permitted to seek compensation from the state.

**E. The Burden of Proof**

The aim of the compensation statutes is to compensate innocent individuals who were wrongfully convicted. Consequently, in order to recover, these statutes demand some proof of innocence. Most jurisdictions require that claimants prove their innocence either by a preponderance of the evidence or by clear and convincing evidence. Although the statutes in the remaining jurisdictions do not specify the standard by which the claimant must carry his or her burden, they contain eligibility requirements that confer standing only if the claimant has been pardoned by the governor, exonerated by DNA evidence, or found innocent by a court, or make clear that it is the claimant's burden to prove his or her innocence.

**IV. The Implications of Shifting the Burden of Proof to the State to Prove Claimant's Guilt**

The current statutory framework, although a major step towards adequate compensation of the wrongfully convicted, still leaves the majority of wrongfully convicted individuals without redress and

100. Currently, most jurisdictions rely on the wrongfully convicted individuals to acquaint themselves with the available remedies or on attorneys, willing to take the case on a contingency fee basis, to inform the individuals of their options. If states deem these methods insufficient—i.e., that wrongfully convicted individuals being released from prison are not learning of their potential remedies—the states could provide notice to these individuals upon their release.
103. See supra notes 61–63 and accompanying text.
forces these individuals to front the cost of litigation, present evidence that they do not possess, and prove a negative—that they did not commit a crime—regarding an event that took place years earlier. As a result, many meritorious claims are dismissed, settled for too little, or never brought in the first place. This section examines the implications of shifting the burden of proof on the issue of innocence to the state as a possible solution to this problem. There are several justifications for shifting the burden and several compelling concerns associated with doing so. However, these concerns could be addressed effectively through checks already built into the justice system, careful drafting of statutory eligibility requirements, and resort to a reasonable cap on damages.

A. Inability of the Current Statutory Framework to Adequately Compensate the Wrongfully Convicted

Despite the introduction of compensation statutes by twenty-seven states, the District of Columbia, and the federal government, the majority of wrongfully convicted individuals have been unable to collect any compensation.\(^\text{105}\) For the successful minority, the compensation still takes years to recover and at high expense—an expense that most wrongfully convicted individuals are unable to pay.

There has not been an abundance of wrongful conviction compensation lawsuits in the states that have enacted statutes, and even fewer that have made it to trial, but of the claims that have, there have been only a handful of occasions where the claimant was unable to carry his or her burden.\(^\text{106}\) However, it is difficult to draw

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\(^{105}\) BARRY SCHHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 290 (2000) ("(O)nly 37% of the wrongfully convicted received compensation."); Garrett, supra note 3, at 120 ("To date most exonerees have not obtained civil compensation for injuries suffered. Eighty-two (41%) have thus far received some kind of compensation for their years of imprisonment for crimes they did not commit, according to news reports located for most of the 200 exonerees."); Martínez, supra note 5, at 515 ("Exonerees, however, typically recover nothing for the harm caused by their wrongful conviction and incarceration. Instead, they are set free to be poor: their common law claims are defeated by sovereign immunity doctrine, statutes providing for relief typically erect a network of obstacles to recovery that most litigants find virtually impenetrable, and their constitutional civil rights claims shatter against the barriers of governmental immunity and causation doctrines.").

\(^{106}\) See Tennison v. Cal. Victim Comp. & Gov't Claims Bd., 62 Cal. Rptr. 3d 88, 110 (Ct. App. 2007) ("As discussed above, substantial evidence supports the Board's determination Tennison failed to carry his burden of proof."); Vasquez v. State, 693 N.Y.S.2d 220, 221 (App. Div. 1999) ("Contrary to the claimant's contentions, her conclusory and self-serving testimony failed to carry her 'heavy burden' of demonstrating, by clear and convincing evidence, that she did not commit the crimes charged in the accusatory instrument." (internal
any inferences from this fact. On the one hand, if only a handful of claimants fail to prove their innocence once they get to that stage of the litigation, one could argue that most individuals suing under the compensation statute are, in fact, innocent and should not be forced to front the costs of litigation and wait years before being compensated for their wrongful conviction. This overlooks the fact that many individuals are filtered out prior to getting to the stage of proving their innocence and that shifting the burden to the state may cause additional claimants—claimants who are, in fact, guilty—to bring suit as well.

On the other hand, one could argue that if only a handful of claimants are unable to prove their innocence, then the burden does not need to be shifted. This, however, overlooks the primary flaw in the current system—that recovery still takes years, and there are many other innocent individuals who do not bring suit, settle early on for too little, or otherwise get filtered out at early stages of the litigation due to the high costs and heavy burdens of litigating their claims. For example, the New York Times recently researched the compensation claims of 206 individuals who had been exonerated by DNA evidence. According to the article,

\[\text{at least 79—nearly 40 percent—got no money for their years in prison. . . . More than half of those who did receive compensation waited two years or longer after exoneration for the first payment. . . . Indeed, despite being imprisoned for an average of 12 years, they typically left prison with less help—prerelease counseling, job training, substance-abuse}

\[\text{(citation omitted)}\]; Rivers v. State, 609 N.Y.S.2d 253, 254 (App. Div. 1994) ("The trial court's conclusion that the claimant failed to present sufficient evidence to establish that he had not criminally possessed a weapon on the date of the shooting is neither against the weight of the evidence nor contrary to law."); Ellis, 596 N.E.2d at 431 (affirming the finding that claimant did not satisfy his burden of proving innocence by a preponderance of the evidence); Seiber v. State, No. 81314, 2002 WL 31771250, at *4 (Ohio Ct. App. Dec. 12, 2002) ("[W]e find competent, credible evidence to support the court's judgment [that claimant did not meet his burden by a preponderance of the evidence]."); Chandler v. State, 641 N.E.2d 1382, 1386 (Ohio Ct. App. 1994) (affirming trial court's conclusion that "appellant failed to demonstrate by a preponderance of the evidence that the crime was never committed by anyone or that he did not commit the crime of which he was convicted"); see also Mike v. State, 11 Misc. 3d 384, 391 (N.Y. Ct. Cl. 2005) (granting summary judgment to state because "claimant is not likely to succeed at trial in establishing that he did not commit any of the acts charged in the accusatory instrument").

treatment, housing assistance and other services—than some states offer to paroled prisoners.  

The New York Times article only details the struggles of those individuals who were exonerated by DNA evidence. The road to redress for someone without scientific proof of their innocence is often much more difficult.

B. Justifications for Shifting the Burden of Proof to the State

There are several justifications for shifting the burden of proof to the state on the issue of innocence. First, the state, not the claimant, most often possesses the evidence related to the crime in question, and therefore shifting the burden to the state would create the incentive to produce that evidence. Second, and relatedly, due to cost concerns and the difficulty of proving a negative, the state is in a better position to prove that the claimant did commit the crime than the claimant is in to prove that he or she did not commit the crime. Third, shifting the burden to the state removes the state’s incentive and ability to hold the claimant to his or her burden—and thereby preclude recovery for years—even where there is overwhelming evidence of innocence and no evidence of guilt. There also are two less-persuasive arguments for shifting the burden; namely, shifting the burden to the state would be consistent with the presumption of innocence afforded to defendants in criminal trials, and shifting the burden to the state might have a deterrent effect on wrongful convictions.

1. Access to Evidence

It is often the case that one party has “easier access to evidence than his opponent, meaning he can assemble the appropriate evidence at lower cost than his opponent.” Where this is the case, and all else being equal, the burden should be shifted to the party with the better access to evidence (i.e., the party with the lowest relative costs of production). Not surprisingly, then, “[b]urden-

108. Id.
110. See id.
shifting where one party has superior access to evidence on a particular issue is a common feature of our law."

For wrongful conviction civil claims—where the litigated issue is the commission of a past crime that was investigated and tried by the state—it is the state that most often has the best access to the evidence. The convicted individual does not take to prison the ballistics and forensic evidence, the victim’s and witnesses’ statements and whereabouts, or the case file; this material remains with the state. If the burden is placed on the claimant, the claimant must seek discovery of that evidence or seek to obtain the information independently—both of which may be expensive ventures. However, placing the burden on the state “relieves [the claimant] to some extent of that task—thereby saving expenditures that might otherwise be incurred by the [claimant].”

Moreover, if the state misplaces or loses the evidence—not an unlikely occurrence given that convictions often are overturned years after the criminal trial, and in the case of newly testable DNA evidence, sometimes decades later—the claimant may not be able to gather comparable evidence to present at trial. In that case, placing the burden on the claimant would result in a victory for the state, effectively penalizing the claimant for something outside his or her control. Shifting the burden to the state has the effect of penalizing the party that loses the evidence.

2. Ease of Carrying the Burden

Shifting the burden of proof to the state would align the showing of proof required at the criminal trial with the one required at the later civil trial, and also would relieve the claimant of proving a negative—that he or she did not commit the crime. Thus, in

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111. United States v. One Parcel of Prop. Located at 194 Quaker Farms Rd., Oxford, Conn., 85 F.3d 985, 990 (2d Cir. 1996); see also Medina v. California, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring) (“In determining whether the placement of the burden of proof is fundamentally unfair, relevant considerations include: whether the government has superior access to evidence.”); Nat'l Commc'ns Ass'n v. AT&T Corp., 238 F.3d 124, 130 (2d Cir. 2001) (“[A]ll else being equal, the burden is better placed on the party with easier access to relevant information.”).

112. See, e.g., Hay & Spier, supra note 109, at 419 (“Giving the plaintiff the burden of proof may lead her to demand, and sift through, piles of information that may or may not contain useful evidence—generating costs that might be avoided if the defendant were given the burden of proof.”).

113. Id. at 413 (emphasis removed).

114. Cf. Dixon v. Shalala, 54 F.3d 1019, 1037 (2d Cir. 1995) (holding that defendant state, and not the class members, should be penalized for the destruction of evidence).
general, it would be easier for the state to prove guilt than it would be for the claimant to prove innocence.

At a criminal trial, it is the state's burden to prove beyond a reasonable doubt that the defendant is guilty. If that defendant later brings a civil action against the state for wrongful conviction, requiring the state to prove that that individual is guilty by a preponderance of the evidence would involve essentially the same proof that was proffered at the criminal trial—only under a lesser standard. The state already would be in possession of the evidence needed to establish the claimant's guilt because the state already presented that evidence at the criminal trial—as noted supra, the state has in its control the physical evidence and the names (and, assuming still current, the whereabouts) of relevant witnesses.\footnote{115. In fact, the Massachusetts compensation statute instructs the state to notify the victim of the crime at issue. Mass. Gen. Laws ch. 258D, § 4 (LexisNexis 2009). The victim "shall be allowed, but may not be compelled, to testify or furnish other evidence." Id.}

Moreover, even where the state is unable to locate witnesses or those witnesses are unable to testify at the civil trial, the state could rely solely on the criminal trial transcript and still be able to satisfy its burden.\footnote{116. See, e.g., Guzman v. Commonwealth, 907 N.E.2d 1140, 1141–42 (Mass. App. Ct. 2009) ("To be sure, all the evidence relied upon by the parties on the issue of actual innocence, including any inculpatory evidence from the criminal trial that the Commonwealth may choose to introduce, eventually must be weighed and evaluated to determine whether the claimant has met his burden of proof and is entitled to recover.").}

The claimant, on the other hand, rarely would be able to satisfy the burden of proof by relying on the criminal trial transcript. Even where the claimant has been acquitted at a retrial, that only establishes that the claimant is not guilty beyond a reasonable doubt, not that he or she is innocent of the crime. Criminal defendants often do not put on a case of innocence, and therefore the trial transcript would not be as pertinent to a burden that requires a showing of innocence.\footnote{117. There could be situations where the claimant, at the criminal trial, presented an alibi defense or eyewitnesses who testified to the claimant's innocence. It is possible that the criminal trial transcript in that case would be sufficient for the claimant to prove his or her innocence. For example, in State v. Moore, 847 N.E.2d 452, 456 (Ohio Ct. App. 2006), the claimant presented only the trial transcript and exhibits from the trial in which a jury found him not guilty. While the trial transcript supporting a not-guilty verdict may not be sufficient to support a wrongful imprisonment finding in every case, we hold that it constituted competent, credible evidence to support such a finding in this case.}

Instead, the claimant likely would have to find witnesses and evidence from a crime that occurred years earlier and then present those witnesses and evidence at trial. Several states have recognized this difficulty and have stated ex-
Pressly in their compensation statutes that the court may, "in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf." However, in practice it is difficult to carry out this ethereal guidance. Shifting the burden of proof to the state would reduce the need for live witnesses at trial (and the associated costs) and would obviate reliance on witnesses that may no longer remember the crime and evidence that may no longer exist.

Shifting the burden to the state also would relieve the claimant of the awkward chore of proving a negative—that he or she did not commit the crime. In other contexts, courts have shifted the burden to the defendant where the failure to do so would require the plaintiff to prove a negative. Indeed, "all else... being equal, courts should avoid requiring a party to shoulder the more difficult task of proving a negative." While proving that the claimant committed the crime at issue is a feat that the state already has accomplished before and one that involves linking evidence to a known individual, proving innocence forces a claimant to reexamine and investigate the crime to determine who actually committed it.

Commentators and courts alike note that wrongful conviction compensation suits "are notoriously difficult to litigate given the

118. N.J. STAT. ANN. § 52:4C-1 (West 2001); N.Y. JUD. CT. ACTS LAW § 8-b(1) (McKinney 2010); W. VA. CODE ANN. § 14-2-13a (LexisNexis 2009).

119. See, e.g., Reed v. State, 574 N.E.2d 433, 438 (N.Y. 1991) ("While the Legislature specified that courts should 'give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons,' it also allocated to claimants the heavy burden of proving their innocence by clear and convincing proof." (quoting N.Y. JUD. CT. ACTS LAW § 8-b(1) (McKinney 2010)).

120. See, e.g., United States v. Swiss Am. Bank, 191 F.3d 30, 40 (1st Cir. 1999) (shifting the burden of proof to the defendant on the issue of personal jurisdiction because otherwise the plaintiff would be required "to prove a negative fifty times over—an epistemological quandary which is compounded by the fact that the defendant typically controls much of the information needed to determine the existence and/or magnitude of its contacts with any given jurisdiction"); Fara Estates Homeowners Ass'n v. Fara Estates, Ltd., No. 96-17338, 1998 WL 10744, at *6 (9th Cir. Jan. 9, 1998) ("Thus, in those cases where the court has given some consideration to the burden of proof requirements, either implicitly or explicitly, the burden has been placed on the defendant to show that the plaintiff had the requisite knowledge of facts... Further supporting such an allocation is the fact that the alternative allocation would require the plaintiff to prove a negative, i.e., to prove that it lacked knowledge of certain facts.")

121. Nat'l Commc'ns Ass'n v. AT&T Corp., 238 F.3d 124, 131 (2d Cir. 2001); see also Vith v. Jubelirer, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring) ("[P]roving a negative is a challenge in any context."); Elkins v. United States, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative.")
absence of a method to prove innocence to a degree of scientific certainty. In Reed v. State, the trial court had awarded damages to the claimant despite her inability to produce sufficient evidence to demonstrate her innocence, and expressed concern that no "claimant could ever prove innocence by clear and convincing evidence except in the instance where another person confesses to the crime and such confession is accepted by the judicial authorities." New York's highest court reversed the judgment and stated that "such damages actions were not expected to succeed frequently. The [Law Revision] Commission anticipated that most claims asserted under section 8-b would be dismissed before trial.

Due to the difficulty of proving innocence, even where the claimant is factually innocent, he or she may fail to carry the burden, settle the case for a reduced amount, or even decide against filing a claim at all. Because it would be easier for the state to prove guilt than it would be for the claimant to prove innocence, these same risks are less likely to plague the state if it had the burden of proof.

3. Inducing Settlement Where Appropriate

Another benefit of shifting the burden of proof to the state would be to save judicial resources and prevent an innocent individual, already wronged by the system, from fronting the costs of litigation and enduring a protracted adversarial process. By placing the burden on the claimant, even where there is overwhelming proof of innocence, and even where the state does not have a single piece of evidence to rebut the claimant's case, the claimant must proceed through years of litigation—including discovery, motion practice, and trial—before obtaining an award that still may be the subject of appeal.

This is evidenced by several examples. In Vera v. State, no witnesses took the stand at the 8-b trial to testify that [the claimant] was part of the ... robbery; defendant rested with-
out putting on a case. Nor was any physical evidence presented linking claimant to the crime, such as fingerprints, fiber evidence or ownership of one of the guns that was brandished at the apartment.

Mr. Vera's conviction was vacated and the charges against him dismissed in February 2000, yet he did not receive a decision by the court until January 2008.

In *Jones v. State*, Mr. Jones had been convicted of a courtyard murder based solely on the eyewitness testimony of one woman who claimed she saw the shooting from her ninth floor balcony, overlooking the dimly lit courtyard at 10 PM. A new trial was ordered when the prosecutor failed to correct materially false testimony by this witness even though the prosecutor knew the testimony to be false at the time. At the new trial, three witnesses came forward to testify that they were at dinner with the alleged eyewitness at the time of the shooting and remembered coming home to the crime scene with her after the shooting took place.

The jury acquitted Mr. Jones of all charges. Mr. Jones then filed a civil lawsuit under New York’s compensation statute. The state did not put on a single piece of evidence or a single witness, while Mr. Jones proffered two alibi witnesses and two other witnesses who were at the scene of the crime, both of whom testified that the shooter was not Mr. Jones. Despite this fact, the state held Mr. Jones to his burden—as it had a right to do—which meant that Mr. Jones did not see a penny of compensation until three years after his release from prison.

There are several other examples where a trial court was faced with “the uncontradicted testimony of the claimant and little

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126. No. 102187, 2008 WL 220178, at *5 (N.Y. Cl. Ct. Jan. 7, 2008); see also Jackson v. State, No. 84611, slip op. at 11 (N.Y. Cl. Ct. Apr. 22, 1998) (“Upon the record before it, which includes no direct evidence of the claimant’s guilt, the Court finds that claimant . . . has, by clear and convincing evidence established that he did not commit any of the acts charged in the accusatory instrument and that his conduct did not cause or bring about his conviction.”).
129. *Id.*
131. *Jones*, No. 2009-014-051, slip op. at 3.
132. *Id.* As the court observed, “no evidence was adduced at trial which connects [Mr. Jones] to the commission of the crimes of which he was convicted.” *Id.* at 5.
133. *Id.* at 3.
In these cases, the state offered "no eyewitness testimony, admission [or] documentary evidence connecting claimant to the crime."\(^{35}\)

Placing the burden on the claimant means that, in cases like these, the claimant will not see any money for years after being released from prison unless she "settle[s] the case for less than her damages, even though the evidence indicates she is 'in the right.' The effect of such errors may be to frustrate such objectives as deterrence, compensation, or whatever other functions the substantive law may have."\(^{36}\) The main objective underlying state compensation statutes is, to state the obvious, compensation.\(^{37}\) As a result, the burden should be allocated to further this aim, not to frustrate it.\(^{38}\)

Placing the burden on the state would force it to evaluate the merits of the claims much earlier in the process and, where appropriate, seek a settlement because the state would not be able simply to hold the claimant to his or her burden. This would be particularly helpful in the context of wrongful conviction claims where the state has the resources and ability to endure a contentious and protracted litigation, while the claimant—who often is hard-pressed for money—does not. Shifting the burden to the state, therefore, would "ensure that plaintiffs with sound claims will not needlessly be forced to sue; the result will be to conserve judicial resources."\(^{39}\)

4. Consistency with the Presumption of Innocence

A less persuasive argument for shifting the burden to the state is that such a shift would align the burden of proof with that employed in the criminal case. A fundamental precept of the criminal justice system is that a defendant is presumed innocent until proven guilty. By placing the burden of proof on the claimant to establish his or her innocence in order to recover compensation for a wrongful conviction, compensation statutes flip the presump-
tion of innocence on its head—presuming the claimant guilty until proven innocent.

Legally, the presumption of innocence does not apply in civil cases. In fact, even in the criminal context, the burden of proof applies only to the trial. The Supreme Court in *Bell v. Wolfish* noted that the presumption of innocence “allocates the burden of proof in criminal trials” and “may serve as an admonishment to the jury to judge an accused’s guilt or innocence solely on the evidence adduced at trial.” But the Court held that this presumption “has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.” If the presumption of innocence has no bearing on the pretrial stage of a criminal case, then it certainly would not attach to an individual suing the government civilly for compensation.

Some, however, believe that the presumption of innocence emanates not from legal principle, but from “political morality and human dignity. The presumption of innocence is a normative principle, directing state authorities as to the proper way of treating a person who has not yet been convicted.” In a number of countries, “the presumption of innocence is enjoyed by every person, at all points in time, until her conviction by a court of competent jurisdiction.”

When viewed in this light, the presumption of innocence would apply regardless of the legal context, and therefore would attach to an individual yet to be convicted of a crime, as well as to an individual improperly convicted of one. However, while there is logical force behind the argument that an individual who was never properly convicted should be deemed innocent of the crime for which he was charged, this normative argument does not preempt the long-held legal principle that the presumption of innocence applies only to criminal trials. Therefore, this argument should not serve as the basis to shift the burden of proof—and the accompanying costs—to the state which, in many cases, itself did not act wrongly to cause the wrongful conviction.

140. See, e.g., Reed v. State, 574 N.E.2d 433, 436 (N.Y. 1991) (“We long ago held that the presumption of innocence is not indulged in a civil action because of the lesser burden of proof.”); see also Rabon v. Great Sw. Fire Ins., 818 F.2d 306, 310–11 (4th Cir. 1987) (reversing and remanding a finding of liability based on the fact that the trial court improperly instructed the jury that someone is presumed innocent of committing a crime both in the criminal and civil context).

141. 441 U.S. 520, 533 (1979).


143. *Id.* at 276.
5. Deterrence of Wrongful Convictions

The tort system has long been recognized as serving as an effective deterrent. For example, the Supreme Court has noted that "implied private actions provide a most effective weapon in the enforcement of the securities laws and are a necessary supplement to Commission action." Similarly, the Court recently held that a violation of the requirement that police officers knock-and-announce their presence before executing a search warrant need not require the suppression of all evidence found during that search in order to deter such conduct because, inter alia, "civil liability is an effective deterrent here, as we have assumed it is in other contexts."

It is arguable that wrongful conviction compensation lawsuits also have a deterrent effect. Exacting a large sum of money from states arguably could cause them to take more measures to prevent wrongful convictions in order to avoid paying damages in the future on such claims. By extension, one could argue that shifting the burden to the state would amplify this deterrent effect. Such an argument, however, is based on several presumptions, all of which are dubious.

144. See, e.g., Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 AM. U. L. REV. 1393, 1405 (1993) ("In tort and contract law, liability is determined and damages assessed with an eye toward affecting the behavior of the defendant and those similarly situated. Thus, even though damages are labeled as compensatory, the focus is not entirely on the victim's loss, but also on the conduct of potential wrongdoers.").


147. See Garrett, supra note 3, at 121 ("An important impact of post-conviction DNA testing may be that civil rights actions filed by a select group of exonerees disproportionately deter law enforcement and prosecutors from violating fair trial rights."); Garrett, supra note 9, at 100-02 ("Wrongful conviction actions finally provide a mechanism to return the deterrent power of the Constitution to our criminal justice system, but in a civil forum. ... Federal discovery alone may go a long way toward uncovering and providing the remedy for patterns of error in our criminal justice system.").

148. Lauren C. Boucher, Comment, Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated, 56 CATH. U. L. REV. 1069, 1102-03 (2007) ("The least cost avoider theory posits that in cases of accidental harm, the party that was best able to avoid the harm by taking preventive measures must be held liable. This creates an incentive to implement the cautionary measures in his control, thereby preventing, or at least decreasing, the likelihood of the accident in the future. ... [T]he most common causes of erroneous conviction—mistaken eyewitness identification, crime lab error, and ineffective defense counsel—can all be decreased through state preventive actions. ... [I]mplementing relatively simple lineup procedures can greatly reduce the likelihood of mistaken eyewitness identification. Likewise, changes in crime lab administration and regulation can decrease the incidence of crime lab error. In addition, reform of indigent defense systems will result in a lower probability of receiving ineffective counsel at trial.").
First, in order for burden-shifting to have any impact on wrongful convictions, that burden-shift must result in increased costs to the state (either by increasing the cost of litigation for the state or the overall amount of damages the state would pay). Although as a practical matter this may occur, if the shift in burden is coupled with caps on damages, as suggested *infra*, it would equalize or decrease the overall costs paid by the state.

Second, wrongful conviction lawsuits themselves may have no deterrent effect on states because state governments are not as obviously susceptible to economic incentives as private parties. "Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay." This is compounded by the large number of government players that have an impact on wrongful convictions—the state legislature, the governor, the police, and prosecutors—as well as defense attorneys and judges who are outside the control of the state. It is unclear what impact, if any, increased costs resulting from wrongful conviction lawsuits would have on any of these actors in the face of competing political and social influences.

Lastly, this deterrence argument presumes that the state needs additional incentives to curb wrongful convictions. As discussed *supra*, there is an increasingly widespread effort to stop wrongful convictions. And there is already a strong incentive for each segment of the criminal justice system to end this phenomenon—not only do wrongful convictions destroy the lives of the innocent individuals convicted, they also leave at large the actual perpetrator who is free to commit more crimes against additional innocent victims. In fact, compensation lawsuits may actually undermine the state’s attempts to reform the system, at least in the short term. Increasing the costs associated with compensation lawsuits will shrink the state’s budgetary capacity and, therefore, hinder its ability to spend money on steps to prevent wrongful conviction.


150. Each of these individuals is accountable to several, sometimes competing constituencies, including the voting public, crime victims, state laws, internal guidelines and rules, as well as each individual’s own notion of “justice.” See, e.g., Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 931 (1996).

151. *But see* Richard A. Posner, *Economic Analysis of Law* 57 (6th ed. 2003) (“Although government procurement decisions cannot be assumed to be made on the same profit-maximizing basis as private procurement decisions ... it would be reckless to assume that the government is immune to budgetary considerations and could therefore be relied on always to buy the socially least costly inputs, regardless of their price.”).
C. Arguments Against Shifting the Burden to the State

Despite the justifications enumerated above, there also are compelling arguments against shifting the burden to the state on the issue of guilt. First, by shifting the burden to the state, there is an increased risk that the state would be forced to compensate an individual who is, in fact, guilty of the crime and who was only released from prison on a technicality or other grounds not necessarily consistent with innocence. Second, shifting the burden to the state has the potential to increase the cost to the government and, by extension, the taxpaying public. There also is a less-persuasive argument against shifting the burden: namely, that burden-shifting schemes in general are difficult for courts to administer.

1. Compensating the Guilty

A finding that an individual was wrongfully convicted is not synonymous with innocence. There are a number of grounds on which an individual's conviction can be reversed other than actual innocence—in fact, appeals themselves rarely are grounded on claims of actual innocence. Shifting the burden to the state to prove guilt, then, could lead to an increased chance that a guilty individual, released on a legal technicality, gets compensated. In that situation, a guilty individual who deserves to be in prison would not only escape the justified punishment, but would actually be rewarded for the portion of the sentence that he or she rightfully served. This is repugnant to public policy and contrary to the stated intent of the wrongful conviction compensation statutes, which "were intended to compensate the innocent for wrongful imprisonment" and not "to compensate those who had merely avoided criminal liability."

There are, however, several ways to address this concern. First, there is already a check built into the criminal justice system to ensure that a conviction is not reversed based solely on a legal technicality. The "harmless error" rule permits courts to "block setting aside convictions for small errors or defects that have little, if
any, likelihood of having changed the result of the trial." The rule first found its place in the American justice system when the public at large became frustrated by automatic reversals on extremely technical grounds. Although the rule was initially limited to certain types of trial errors, and was not applicable to constitutional errors, in Chapman v. California, the Supreme Court decided that even some constitutional errors can be held harmless so long as the court can "declare a belief that [the error] was harmless beyond a reasonable doubt." Over the years, the Supreme Court has expanded the types of errors that can be held harmless. In Rose v. Clark, the Supreme Court made clear that "while there are some errors to which Chapman does not apply, they are the exception and not the rule." In Arizona v. Fulminante, the Supreme Court extended the scope of the harmless error rule to encompass coerced confessions.

Moreover, while a strict application of the "beyond a reasonable doubt" standard would seemingly lead to reversal unless the error is "technical, marginal, or insignificant," in practice, courts have employed the harmless error rule liberally to preclude reversals in an overwhelming number of cases. Indeed, "there is a widespread

156. See Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).
157. 386 U.S. at 24. There is debate about whether the Supreme Court has adopted divergent standards for determining whether such an error is harmless—one being the "beyond a reasonable doubt" established in Chapman, and the other being "overwhelming evidence of guilt." See Harrington v. California, 395 U.S. 250, 254 (1969) ("The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed."); Roger A. Fairfax, Jr., Harmless Constitutional Error and the Institutional Significance of the Jury, 26 Fordham L. Rev. 2027, 2036-37 (2008).
158. See Ogletree, supra note 155, at 159; see also Meltzer, supra note 42, at 3-4 ("Thus, commentators have discussed, often critically, the Supreme Court’s extension of the range of issues that can be subjected to harmless error analysis, ... [such as] the Court's decision last Term in Brecht v. Abrahamson that when federal courts determine, under their habeas corpus jurisdiction, whether a federal constitutional error infected a state criminal conviction, an error should be deemed harmless unless it 'had substantial and injurious effect or influence in determining the jury's verdict.' That formulation is less protective of criminal defendants than the 'harmless beyond a reasonable doubt' standard that, under Chapman, governs on direct review." (citing Brecht v. Abrahamson, 507 U.S. 619, 623 (2006)); Fairfax, supra note 157, at 2029 (2008) ("The Supreme Court has been sparing in its designation of errors as structural, thus far admitting only a handful of constitutional defects into the category of errors requiring automatic reversal.").
159. 478 U.S. 570, 578 (1986).
160. 499 U.S. 279 (1991); see also Ogletree, supra note 155, at 155-56.
161. Ogletree, supra note 155, at 159.
perception that in the Supreme Court, as well as in state and lower federal courts, errors of some substance are nonetheless found harmless so as to permit the affirmance of convictions.\footnote{Fulminante, 499 U.S. at 309–10 (noting that the following are not subject to harmless error review: deprivation of the right to counsel at trial, a judge who was not impartial, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the right to public trial). Moreover, Brady violations are not subject to harmless error review, but lead to a reversal "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).}

As a result, where an individual is believed by a court to be guilty, it is unlikely that a trial error would lead to a reversal, which means that the individual will not be released from prison and cannot file a wrongful conviction civil action under a compensation statute. Yet there are still trial errors that are exempt altogether from harmless error analysis\footnote{See, e.g., Boucher, supra note 148, at 1099 ("Legislatures can carefully draft a statute to prevent unwarranted claims from being considered.").} and, even for those that are not, it is inevitable that some errors will not be deemed harmless and that some guilty individuals will have their convictions reversed.

There is, however, a second method of addressing the concern that a burden-shifting scheme would lead to the compensation of guilty individuals. The compensation statutes themselves can be drafted to exclude those individuals who have been released on a technicality.\footnote{See supra Part III.A & note 65.} Rather than permitting anyone to bring an action under the compensation statute—as in New Jersey or Wisconsin—states can adopt eligibility requirements that require the individual to have been acquitted at a retrial or had their conviction reversed or vacated on an enumerated list of non-technical grounds. In New York, for example, although the compensation statute provides for eligibility if the claimant had the conviction vacated or reversed and either the accusatory instrument was dismissed or the claimant was acquitted at a retrial,\footnote{See, e.g., Long v. State, 852 N.E.2d 1150, 1155 (N.Y. 2006) ("A claimant may therefore seek redress where the court (1) vacates (or reverses) the judgment and dismisses the accusatory instrument; (2) vacates the judgment and orders a new trial, followed by a subsequent dismissal of the accusatory instrument before retrial; or (3) vacates the judgment and orders a new trial, resulting in a not guilty verdict.").} the statute only permits relief if the conviction was reversed on one of several speci-
fied grounds. Consequently, a claimant is not even eligible to bring suit under the statute if his or her conviction was reversed or vacated on a ground not enumerated in the statute.168

The statutes also can employ effective disqualification provisions to ensure that an individual who is guilty of a lesser-included offense or who was serving a concurrent or subsequent prison sentence for another crime cannot recover compensation. As the Ohio Supreme Court has noted, such a disqualification provision "is intended to filter out those claimants who have had their convictions reversed, but were committing a different offense at the time that they were engaging in the activity for which they were initially charged."169

Of course, any statutory construct will be both over- and under-inclusive. In New York, the preclusion of a right of action for those individuals whose convictions were reversed on a technicality precludes recovery for that subset of individuals who are, in fact, innocent. One court captured this concern:

In a matter which has garnered great public scrutiny, Betty Tyson has served some 25 years in State correctional facilities for a criminal conviction that is now vacated. However, the Legislature, in its wisdom, has placed a high threshold upon those seeking recompense under this statute, and unfortunately for Betty Tyson, her claim cannot surmount that limitation. And note that this is a threshold, not a roadblock, because the remedy for which recompense is sought here is a statutory creation, not a common-law right, and thus I am bound by the Legislature's draftsmanship. So, unfortunately for Betty Tyson, there can be no recovery here, and no opportunity for her to prove her innocence, perhaps her ultimate goal.170

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168. See, e.g., Leka v. State, 791 N.Y.S.2d 660, 661 (App. Div. 2005) ("Contrary to the claimant's contention, his claim does not state a cause of action under Court of Claims Act § 8-b(3)(b), as the vacatur of his May 1990 conviction due to the People's failure to disclose certain Brady material was not based on any of the grounds set forth in the statute or premised on any likelihood of innocence, but rather on the ground that the claimant was deprived of his due process rights as guaranteed by the United States Constitution."); Romero v. State, 742 N.Y.S.2d 701, 705 (App. Div. 2002) (finding that claimant failed to meet pleading requirements where "the reversal of his criminal convictions and dismissal of the indictment [was] on technical grounds"); Guce v. State, 637 N.Y.S.2d 483, 484 (App. Div. 1996) ("As the claimant failed to present documentary evidence to establish that his conviction was vacated and that the indictment was dismissed on one of the grounds enumerated in Court of Claims Act § 8-b, the State's motion [to dismiss] should have been granted.").


170. Tyson v. State, 698 N.Y.S.2d 410, 415 (Ct. Cl. 1999). In Tyson's case, there were two witnesses who allegedly claimed to have seen her commit the crime. One, however, told the
On the other hand, such eligibility requirements will be over-inclusive, granting access to a subset of individuals who are guilty. For example, an acquittal at a retrial is not synonymous with innocence. A guilty individual can be found innocent at a retrial because the state does not have sufficient evidence to convict, because the jury incorrectly concludes that the defendant is innocent, or because the jury believes the defendant is guilty but is not certain beyond a reasonable doubt. Under New York's compensation statute, this individual could sue the state for compensation.

However, "[a]lthough an acquittal is not, ipso facto, equivalent to a determination of innocence, generally or for purposes of this remedial statute, it is a useful and relevant indicator of innocence, just as the grounds enumerated in the proviso clause are." Therefore, an individual who was acquitted at a retrial, had the conviction vacated or the accusatory instrument dismissed has a higher probability of succeeding on a civil claim for wrongful conviction, which itself is a justification for shifting the burden of proof to the state on the issue of guilt.

Moreover, even where the harmless error rule and eligibility requirements do not prevent a guilty individual from bringing suit under a compensation statute, shifting the burden to the state does not mean that those individuals will be compensated. Indeed, under the current statutory framework, many states force claimants to prove their innocence by a preponderance of the evidence, so a claimant need only establish innocence by roughly a 51% certainty. If the state is able to rebut a claimant's case where the police at the scene that he did not see anything, but the police withheld this statement. The other later recanted. Manny Fernandez, Examining Human Error in Wrongful Convictions, N.Y. Times, Feb. 1, 2009, at A25; Jane Gross, A Conviction Ruled Unjust Leads to a Redemption, N.Y. Times, May 29, 1998, at B1.


173. See Hay, supra note 125, at 678 (noting that under the current legal framework the burden of proof is commonly placed on the defendant when, "given the facts available to the court, the probability is high that the plaintiff is correct").

174. See, e.g., M. Neil Browne & Ronda R. Harrison-Spoerl, Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us, 91 MARQ. L. REV. 1119, 1208 n.425 (2008) (quantifying different legal standards as follows, according to certainty level: beyond a reasonable doubt = 95%; clear and convincing evidence = 75%; and preponderance of the evidence = 51%). Therefore, even in the states that employ a clear and convincing evidence standard, theoretically there could be a 25% chance that the individual being compensated is guilty. In fact, even in cases in which someone is released based on DNA evidence, the individual still may be guilty of committing or aiding the crime. In
claimant bears the burden—providing sufficient evidence to demonstrate that the plaintiff is at least 50% likely to have committed the crime—then it is doubtful that the state would not also be able to establish guilt by 51%. The question, then, becomes one of cost, and who is in the best position to prove their case. If the state is in the better position to prove guilt—because it has better access to evidence and more resources than the claimant, as discussed supra—then placing the burden on the claimant is more likely to result in the failure to compensate an innocent individual than shifting the burden to the state would be to result in the compensation of a guilty person.175

2. Increased Costs to the State

A second concern implicated by shifting the burden to the state to prove the claimant’s guilt is the likelihood that such a shift would increase the state’s annual expenditures. If under the current framework a number of meritorious claims never make it to trial—either because the claimant settles for less than the claim is worth or does not bring a claim at all due to the cost of litigation—then a shift in burden will result in more meritorious claims litigated to a conclusion, and the state will be forced to pay additional damages on those claims. Along these lines, one Texas appellate court denied an expansive reading of the eligibility requirements under the Texas compensation statute because such a reading

*Broum v. State*, No. L-05-1050, 2006 WL 751364, at *2 (Ohio Ct. App. Mar. 24, 2006), the claimant was granted a new trial for murder when DNA evidence established that the semen found in the victim was not claimant’s. However, in affirming the grant of summary judgment to the state on the claimant’s wrongful conviction compensation suit, the Ohio Court of Appeals stated:

Appellant asserts that the DNA evidence is compelling evidence of his innocence and raises a genuine issue of material fact on that issue. The DNA evidence, however, only establishes that appellant did not rape Bobbie Russell. Moreover, it is noteworthy that appellant was never convicted of raping Russell. Rather, he was convicted of aggravated murder in the commission of an aggravated burglary.

*Id.* at *5.*

175. If there remains a concern about compensating the guilty, the state also could create disincentives for guilty individuals to sue the state. For example, the legislature could provide that the claimant be forced to pay the state’s costs if the state proves guilt by clear and convincing evidence. Cf. Mo. Rev. Stat. § 650.058 (2007) ("If the results of the DNA testing confirm the person’s guilt, then the person filing for DNA testing . . . shall: (1) Be liable for any reasonable costs incurred when conducting the DNA test, including but not limited to the cost of the test. Such costs shall be determined by the court and shall be included in the findings of fact and conclusions of law made by the court; and (2) Be sanctioned.").
has potentially significant fiscal consequences. . . . If, as [the claimant] urges, the legislature waived sovereign immunity to permit wrongful-imprisonment claims by claimants whose convictions were set aside on direct appeals and not solely through habeas corpus relief based on 'actual innocence,' the fiscal consequences for the State could be dramatically more significant.176

Thus, rather than being able to spend money on education, public safety, tax cuts, or even the prevention of wrongful convictions, states will be forced to allocate that money to damage awards for wrongful conviction claimants. Most states already are over-extended and do not have sufficient funds to pay for imperative government programs, so they may not be so willing to provide additional funds for this objective.

However, there is a simple solution to this concern: a reasonable cap on damages. As described supra, six jurisdictions place no limits on damage awards while the remainder cap damages on a daily, annual, or sum-total basis. States can limit each claimant's recovery by dividing the total amount that the states wish to allocate by the anticipated number of claimants. The states could add more claimants to the denominator in order to ensure that they do not end up over budget in the event that there are more claims than anticipated.

There is no doubt that placing such limits on recovery will under-compensate some individuals for their wrongful conviction. However, the current system already under-compensates a number of individuals by creating bars to recovery based on an unduly difficult burden and the high costs of protracted litigation. Under the current framework, many meritorious claims receive no award while a lucky few recover in full (after years of litigation). By shifting the burden to the state to prove the claimant's guilt, and by implementing reasonable caps on damages, a much larger number of claimants would be able to recover more quickly, even though the amount recovered would be lower. It would be preferable to award each wrongfully convicted individual $200,000 than to award a select few $600,000 each.

3. Difficulty in Administering a Burden-Shifting Scheme

There also is an argument that states should not shift the burden to the state in wrongful conviction civil cases because burden-shifting schemes, in general, are difficult for courts to administer. This argument, however, is not persuasive, because courts routinely handle cases in which the burden of proof on a particular issue is shifted to the defendant for reasons similar to the justifications described supra—namely, that the defendant has greater access to evidence or has an easier time satisfying the burden than does the plaintiff. For example, courts invoke the doctrine of res ipsa loquitur to shift the burden to the defendant on the issue of a defendant’s own negligence in cases that generally result from negligence and on the issue of product defects in product liability suits. "Res ipsa loquitur is grounded in the sound procedural policy of placing the duty of producing evidence on the party who has superior knowledge or opportunity to explain the causative circumstances." 

Courts also shift the burden in certain cases where the plaintiff is able to make a prima facie showing on a particular issue. For example, in Title VII employment discrimination cases, the plaintiff bears the initial burden of making out a prima facie case of discrimination. 

177. For example, in deciding that the ADEA is not subject to the same burden-shifting scheme as Title VII cases, the Supreme Court noted that some burden shifting schemes are difficult to apply. See Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2352 (2009). It should be noted that in Gross, the Court was referring to "cases tried to a jury," where "courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework." Id. Under most compensation statutes, the case is not tried to a jury.

178. See Hay & Spier, supra note 109, at 425.


180. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Courts also have administered burden-shifting schemes in cases involving discrimination where the state is the defendant. See Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence, 2003 U. ILL. L. REV. 615, 691 (2003) ("Because the burden-shifting standard governs many statutory antidiscrimination contexts, courts are competent to administer this test in equal protection litigation. Furthermore, the fact that statutorily imposed impact standards apply in cases where states are defendants, courts have already encountered institutional concerns in these settings."); see also Torres-Martinez v. P.R. Dep't of Corr., 485 F.3d 19, 23 (1st Cir. 2007) ("Once a plaintiff has made out a prima facie case of political discrimination, the burden then shifts to the state to show by a preponderance of the evidence that it would have reached the same decision as to plaintiff's employment even in the absence of the protected conduct." (internal quotes and brackets omitted)); Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mkrg. Bd., 462 F.3d 249, 261 (3d Cir. 2006) ("The party challenging the statute has the burden of proving the existence of such discrimination, and the burden then shifts to the state to prove that the statute serves a legitimate local purpose, and that this purpose could not be served
This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.181

Once the plaintiff has done that, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."182 The rationale for this burden shift is that the defendant, not the plaintiff, has access to direct evidence of intent to discriminate, making it difficult for the plaintiff to prove.183

Similarly, the court regularly shifts the burden to the defendant on the issue of personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2). Under Rule 4(k)(2),

[for a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.184

Forcing the plaintiff to prove that the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction "poses practical difficulties for district courts,"185 especially because "the defendant, and not the plaintiff, oftentimes possesses the necessary

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182. Id.; see also Hay & Spier, supra note 109, at 427 ("Roughly speaking, if the plaintiffs can show they were treated differently from a group of similarly situated male employees, the defendant must come forward with evidence that the plaintiff was not fired for discriminatory reasons.").
183. See, e.g., Hildebrandt v. Ill. Dep’t of Natural Res., 347 F.3d 1014, 1029 (7th Cir. 2003); Burgess v. Washington Dep’t of Corr., No. 98-35417, 1999 WL 974182, at *2 (9th Cir. Oct. 22, 1999) ("In most employment discrimination cases, direct evidence of discriminatory motive is unavailable or difficult to obtain. Therefore, the Supreme Court has set forth an indirect method of proof which relies on presumptions and shifting burdens of production.").
184. FED. R. CIV. P. 4(k)(2).
As a result, many of the circuits that have addressed this issue place the burden on the defendant. Failure to relieve the plaintiff of this burden, these courts have rationalized, would allow "some defendants to escape jurisdiction due to the excessive burden involved in making such a showing. It is difficult to prove a negative." Other circuits, such as the First and Fourth Circuit, have adopted a similar approach, but require that the plaintiff first certify that based on available information the defendant is not subject to suit in the courts of general jurisdiction of any state.

If the plaintiff makes out his prima facie case, the burden shifts to the defendant to produce evidence which, if credited, would show either that one or more specific states exist in which it would be subject to suit or that its contacts with the United States are constitutionally insufficient.

These formulas for shifting the burden of proof to the defendant in the above-referenced circumstances are apposite examples for wrongful conviction claims. In the wrongful conviction civil context, the claimant would bear the burden on the eligibility requirements and disqualification provisions—establishing that he or she is rightfully suing under the compensation statute. The burden then would shift to the state to prove that the claimant is guilty of the crime for which he or she was convicted. The burden would then shift back to the claimant to prove that he or she is entitled to damages, and the amount of those damages.

Conclusion

This Article has examined the current statutory framework for wrongful conviction compensation claims and has attempted to
outline the chief arguments for and against shifting the burden to the state to prove the claimant's guilt after the claimant has established that he or she is eligible to sue under the relevant statute. Although shifting the burden makes sense from an efficiency perspective (because the government has better access to the relevant evidence and could rely exclusively on the criminal trial transcript) and from a cost-spreading perspective (because the state is in a better position to bear the costs of litigation and to determine when to settle), there also are strong arguments against shifting the burden grounded in public policy. Shifting the burden to the state could increase the risk of compensating a guilty individual and may divert money away from important social goals. And while there are safeguards that can be implemented to minimize these concerns, there is no way to eliminate them altogether.

Regardless of whether or not states adopt a burden-shifting scheme, however, a debate must be had about how to compensate wrongfully convicted individuals in a timely fashion so that they are not released from prison to face employment, medical, emotional, and psychological obstacles without the means necessary to overcome them. As horrific as a wrongful conviction is—both because it sends an innocent person to jail and because it leaves the guilty person free to strike again—once discovered, the suffering should end.

Removing eligibility requirements and eliminating caps on damage, as some have advocated, would not solve this problem. In fact, New York’s compensation statute does not place any limits on damages and contains moderate eligibility requirements, yet judgments for compensation awards in New York still are few and far between. Shifting the burden to the state to prove the claimant's guilt would be a productive solution because states would be induced to settle meritorious claims early in order to avoid litigation costs and, even where the states proceed to trial, the claimant would be relieved of the substantial expenses associated with proving innocence. By implementing, rather than eliminating, caps on damages and eligibility requirements, shifting the burden may be the most effective way to improve the process by which compensation is awarded to those innocent individuals who have been the unintended collateral consequence of the criminal justice system.