

**Barriers Beyond the Cell Door: Why the Federal
Indemnification Statute Stands in the Way of Just
Compensation for Exonerees**

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“I was put out the door with nothing.”¹

I. INTRODUCTION

The Constitution provides that private property will not be taken for public use without just compensation.² Although personal liberty is an equal if not greater right than the right to hold property, the Constitution provides no protection against liberty that is wrongly taken by the government. However, Congress has provided a statutory right to indemnification and has given the Court of Federal Claims jurisdiction to hear exoneree compensation claims.³ Unlike takings of property, though, the federal indemnification statute does not require that compensation for wrongful incarceration be just. Instead, the statute, as implemented, creates a heavy and unjust burden on exonerees seeking redress for unjust takings of liberty.

The federal indemnification statute creates two primary burdens for exonerees. First, the statute creates onerous procedural barriers for exonerees seeking compensation. In particular, exonerees must overcome prosecutorial opposition and high burdens of proof to win compensation. Second, the statute often provides inadequate compensation for exonerees. Inadequate compensation results from the fact that the statute provides little compensation after

¹ One anonymous exoneree described his treatment upon being released from prison. Jeffrey Chann & Ashley Ratliff, *“I Was Put Out the Door With Nothing”—Addressing the Needs of the Exonerated Under a Refugee Model*, 45 CAL. W. L. REV. 405, 411 (2009).

² U.S. CONST., amend. V (“No person . . . shall private property be taken for public use, without just compensation.”).

³ 28 U.S.C. § 1495 (2012).

taxes and attorney fees are factored in. The inadequate compensation further burdens exonerees because exonerees often have a tremendous needs for financial support upon leaving prison.

This Article explores the burdens that federal exonerees encounter in seeking indemnification. Part II begins by outlining the historical background of indemnification in the United States and the policy justifications behind the current scheme. It then outlines the process that exonerees must follow in order to win compensation. Part III illustrates how the federal indemnification scheme places unfair and unnecessary burdens of exonerees, which creates enormous hurdles for exonerees to overcome and places heavy financial burdens on exonerees, even after receiving compensation. Finally, Part IV proposes reforming the federal indemnification statute by providing a rebuttable presumption of innocence for exonerees. Moreover, it advocates for a compensation system modeled after § 1983 awards, where the Court of Federal Claims would be given broader discretion over awarding compensation to exonerees and may consider the damages and hardships that exonerees face as part of their unjust imprisonment in crafting an appropriate award.

II. HISTORY AND PURPOSES OF THE FEDERAL INDEMNIFICATION SCHEME

The modern exoneree indemnification scheme resulted from scholarly recognition of the errors present in the American criminal justice system and the deleterious effects that wrongful incarcerations have on the individuals that experience them. The American criminal justice system has not always recognized its inherent errors, though, especially in terms of capital convictions. In 1912, Professor Robert H. Gault announced in a paper published in the Journal of the American Institute for Criminal Law and Criminology that, after thorough study, he had found no evidence

of wrongful executions in the American criminal justice system.⁴ Professor Gault reached his conclusion by surveying American prison wardens.⁵ Gault's survey asked each of America's prison wardens whether they could recall any instance of a wrongful execution in their collective tenures as prison wardens.⁶ No prison warden reported a false execution and Gault's survey produced only a handful of false convictions, lending further credit to the proposition that the American criminal justice system in 1912 was relatively error-proof.⁷ Accordingly, despite Professor Gault's erroneous methodology, early-Twentieth century America saw little need for indemnification statutes providing an express statutory indemnification scheme for individuals wrongly imprisoned for crimes that they did not commit.

Although Professor Gault's methodology and subsequent conclusion led many Americans to maintain a false perception about the false conviction rate in the United States, much of the Western world and a growing number of American scholars began recognizing errors in their criminal justice systems. Jeremy Bentham was one of indemnification's earliest champions.⁸ Bentham tried to persuade Parliament of the need for indemnification, but was ultimately unsuccessful in persuading England to provide any compensation for those wrongly convicted and incarcerated.⁹

⁴ See Robert H. Gault, *Find No Unjust Hangings*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 131 (1912).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* 383 (1932) ("In England, Jeremy Bentham was the first champion of the doctrine of State indemnification for errors of criminal justice.").

⁹ *Id.*

In continental Europe, indemnification began gaining ground in scholarly circles in the early 1800's.¹⁰ Voltaire, like Bentham was one of the earliest champions of indemnification, after seeing the false conviction rate in the French criminal justice system.¹¹ Voltaire pushed the French government to adopt an indemnification scheme for its own criminal justice system, but was ultimately unsuccessful in persuading the legislature to do so.¹² With his influence, though, he was able to persuade Frederick the Great of Prussia, a close friend and confidant, to adopt indemnification for victims of false convictions in the Prussian criminal justice system.¹³ Prussia's indemnification scheme did not last long, though; only fifty years after adoption, there was no sign of an indemnification scheme in Prussia's criminal code.¹⁴

Prussia's indemnification scheme had lasting effects elsewhere, though. By 1930, much of continental Europe had adopted some form of statutory indemnification for victims of wrongful incarceration.¹⁵ The United States and England held out, though, for a number of reasons. First, many Americans felt that the criminal justice system adequately provided reparation for individuals who were falsely convicted.¹⁶ Although the United States had no indemnification statute until 1938, those who were found innocent of their crimes prior to 1938 could sue the government in tort for false imprisonment.¹⁷ Beyond tort, exonerees could also seek individual

¹⁰ *Id.* at 381. The first Prussian indemnification statute was enacted in 1766. *See id.*; *see also* Neue Verordnung um die Proesse zu kürzen, sec. 9.

¹¹ *See* BORCHARD, *supra* note 8 at 380–81 (“One of [indemnification’s] most earnest champions was Voltaire.”).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 381.

¹⁵ *Id.* at 392–98.

¹⁶ *Id.* at 376.

¹⁷ The tort of false imprisonment created several large hurdles for those seeking compensation, though, due to the high burden of proof and challenge in proving each element of the tort. *Id.*

legislative action to receive reparation for their false convictions.¹⁸ Thus, some critics of statutory indemnification believed that the United States adequately provided for reparation of individuals wrongly convicted of crimes.

Others opposed indemnification on the grounds that the government, as sovereign could not be held liable for the false conviction of its citizens.¹⁹ In other words, as long as the government had not acted in a malicious manner in bringing about the false conviction of an individual, it could not be held liable, as the risk of false accusation and conviction was simply a risk of being a citizen.²⁰ Thus, many legal leaders and scholars resisted indemnification on both sovereign immunity and adequate remedy grounds.

In many instances, the turn of tides in public policy is due to the collective action of many individuals advocating for change. The federal indemnification scheme is one of the select instances in American history where the work of one individual is largely responsible for bringing about recognition of the problem and the resulting change. Professor Edwin M. Borchard served

¹⁸ Individual legislative action was often costly and burdensome, though. *See* Borchard, *supra* note 8 at xxiv. Moreover, many exonerees lacked the political connections necessary to win compensation from state or federal legislatures. *Id.* (“But such action is spasmodic only, and not all persons have the necessary influence to bring about legislation in their behalf.”).

¹⁹ *See id.* at 388–92.

²⁰ In countering this argument, Professor Borchard noted :

[I]n the operation of any great undertaking, such as the management of a large industry or the administration of the criminal law, there are bound to be a number of accidents 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 loss when it occurs should be borne by the community as a whole and not by the injured individual alone.

Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV 201, 208 (1941).

as the law librarian of Congress and was singularly instrumental in formulating the federal indemnification scheme as it exists today.²¹ Professor Borchard completed an extensive study of the American criminal justice system and identified sixty-two notable and possible false convictions in the American criminal justice system, as well as two potential cases from England.²² Following his study, Professor Borchard noted that exonerees in America desperately needed an indemnification right provided under statute and put forward several policy proposals to ensure that exonerees were justly compensated while protecting against potential abuses to the system.²³

In proposing such a compensation scheme, Professor Borchard noted that while the Constitution provides compensation for unjust takings of property,²⁴ it provides no such protection for takings of liberty.²⁵ Liberty, Professor Borchard argued, is an equal, if not more profound,

²¹ *Guide to the Edwin Montefiore Borchard Papers*, YALE U. LIBRS., <http://drs.library.yale.edu:8083/HLTransformer/HLTransServlet?style=yul.ead2002.xhtml.xsl&pid=mssa.ms.0670&clear-stylesheet-cache=yes>. The number of reported false convictions has greatly expanded since the time that Professor Borchard was writing, too. In 1987, Michael Radelet and Hugo Bedau identified as many as 350 instances of wrongful execution. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23 (1987) (finding that the “risk of executing the innocent [was] largely unknown”). The University of Michigan and Northwestern University jointly maintain a registration database for exonerations. THE NATIONAL REGISTRY OF EXONERATIONS, UPDATE: 2012 THE NATIONAL REGISTRY OF EXONERATIONS 1 (2013). Estimates about the number of wrongful convictions in the United States are unreliable and approximate at best. Samuel R. Gross & Barbra O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 929, 929 (2008). Thus, the actual number of people who have been wrongly convicted is likely much larger.

²² See BORCHARD, *supra* note 8.

²³ *Id.* at 407 (“That there have been numerous cases of this kind there can no longer be any doubt. . . to the effect that there are but few cases of unjust execution of innocent persons. It may be hoped that within measureable time remedial legislation may recognize the social obligation to compensate the innocent victims of an unjust conviction.”).

²⁴ *Id.* at 391.

²⁵ *Id.*

right than the right to hold property.²⁶ Given that takings in liberty are at least as injurious as takings of property, Borchard concluded that the imperative for a federal indemnification scheme for wrongful convictions was all the more just and necessary.²⁷

Professor Borchard, in proposing a federal indemnification scheme, did hold several reservations about limitless indemnification, though. These reservations generally followed the reservations of European legislatures that had already adopted indemnification statutes. Most important, Borchard thought it was imperative that any statute prevent individuals who were not innocent of the crimes that they were convicted of, but instead were released for other reasons, from receiving compensation under statute.²⁸ Although European countries took various perspectives on burdens of proof and what constituted actual innocence, many European statutes in the early twentieth century required that a claimant be actually innocent of their crime in order to receive compensation.²⁹ Given that those not guilty of their crimes, but not innocent as well, were undeserving of compensation, many European countries restricted indemnification under statute.³⁰

²⁶ *Id.*

²⁷ *See* BORCHARD, *supra* note 8 at 391.

²⁸ *See* Borchard, *supra* note 20, at 209. The adopting Congress held similar reservations:

The claimant must be innocent of the particular charge and of any other crime or offense that any of his acts might constitute. The claimant cannot be one whose innocence is based on technical or procedural grounds, such as lack of sufficient evidence, or a faulty indictment – such cases as where the indictment may fail on the original count but claimant may yet be guilty of another or minor offense.

H. REP. NO. 2299 (1937).

²⁹ *Id.* at 394–95.

³⁰ BORCHARD, *supra* note 8, at 393.

Borchard also sought to limit indemnification to those who did not bring about their own convictions, staying in line with the generally theory that only those who are deserving of compensation should receive compensation.³¹ Under the prevailing view of the time, if one brought about their own conviction through their own negligence, say by lying during interrogation or under oath, or by offering a false confession, the individual was not deserving of compensation.³² As with difference statutory perspectives on innocence, European legislatures also differed on what actions constituted negligence for purposes of barring compensation, though.³³ Borchard took the view that the presiding judge should determine the amount that claimants contribute to their convictions and adjust their award according to the determined proportion.³⁴ Nonetheless, Borchard argued that in instances where claimants contribute to their conviction, they should be barred from any compensation resulting from their negligence.

A. *The Federal Indemnification Scheme Reflects the Policies and Concerns of Borchard and Other Policymakers*

Although Professor Borchard initially commented on indemnification in 1912 and highlighted the errors inherent in the criminal justice system in 1932, Congress did not adopt an indemnification statute until 1938.³⁵ The statute, as adopted, reflected many of the concerns and policies justifying indemnification. Congress did not adopt all of Professor Borchard's

³¹ Borchard, *supra* note 20, at 209.

³² BORCHARD, *supra* note 8, at 398–99.

³³ *Id.* Borchard noted that Austria, Germany, Hungary, Norway, and Sweden explicitly limited indemnification for those individuals who contributed to their own convictions. *Id.* On the other hand, Denmark's statute provided for a more intensive survey of the circumstances that led to the conviction in determining the proper amount of compensation for a falsely convicted claimant. *Id.*

³⁴ S. DOC. NO. 62-974.

³⁵ *See* 18 U.S.C. § 729–32 (1940).

recommendations, though.³⁶ Nonetheless, the statute has remained unchanged since adoption, absent a few minor changes of wording.³⁷

In order to receive compensation under statute, the federal indemnification scheme requires individuals to secure a certificate of innocence from a federal district court.³⁸ This reflects the adopters' concerns about ensuring that only deserving individuals be compensated for their wrongful incarcerations.³⁹ Certificates of innocence must adequately outline that the individual was innocent of the alleged crime and that the claimant did not bring about their conviction by their own negligence.⁴⁰ In proving innocence to a court, a claimant must prove either that he did not commit the alleged acts or that his acts did not constitute a crime.⁴¹

It is notable that Congress diverged from Borchard's vision about negligence and its role in compensation, though. As mentioned, most European countries that had adopted indemnification statutes barred compensation if the claimant had by way of his own negligence caused his own conviction.⁴² Borchard pushed for a system in which the presiding judge could

³⁶ In particular, Congress, in a last minute revision, removed Professor Borchard's proposal that the Court of Claims determine innocence claims. Instead, Congress opted to have exonerees secure a certificate of innocence in order to receive compensation under statute. *See* 28 U.S.C. § 2513(a–b) (2012).

³⁷ *Compare* 28 U.S.C. § 2513 (1952) *with* 28 U.S.C. § 2513 (2012).

³⁸ The statute also allows claimants to pursue compensation claims if they receive a presidential pardon. 28 U.S.C. § 2513(b). The pardon option is only available if the claimant exhausted all other remedies in court, though. 28 U.S.C. § 2513(c). The pardon must also sufficiently state the innocence of the claimant in order to receive compensation under statute. *Id.*

³⁹ *See* S. DOC. NO. 62-974 at 32. Innocence can be proven either by showing that the claimant did not commit the acts alleged or by showing that his acts, as alleged, did not constitute a criminal offense. *See* *Osborn v. United States*, 322 F.2d 835, 841 (5th Cir. 1963).

⁴⁰ 28 U.S.C. § 2513(a)(1–2).

⁴¹ *Id.*

⁴² *See* BORCHARD, *supra* note 8.

determine how much the claimant's negligence contributed to his ultimate false conviction and then adjust a final reward accordingly.⁴³ The adopting Congress ultimately chose not to adopt Borchard's system, though, opting instead to prohibit compensation in any instance where the claimant's negligence contributed to his own false conviction.⁴⁴ Courts have subsequently interpreted this provision strictly in spite of Professor Borchard's intent.⁴⁵ Thus, claimants may be barred in the case that their own negligence brought about their own conviction or if their certificate of innocence does not adequately state that they were not responsible for bringing about their own conviction.⁴⁶

Once a claimant receives a certificate of innocence, they may then petition the Court of Federal Claims for relief.⁴⁷ The statute, as adopted, places several limits on the power of the court and what evidence it can hear, though. In particular, Congress limited the evidence that the Court of Federal Claims could receive to just the certificate of innocence.⁴⁸ Thus, in order to receive relief, claimants must make sure that their certificate of innocence clearly outlines each of the requirements necessary to receive compensation.⁴⁹ Congress also limited the amount of relief that the Court of Federal Claims could grant.⁵⁰ This reflected the general hesitance by some oppositionists of indemnification that an unharnessed indemnification scheme could put further

⁴³ See S. Doc. No. 62-974, at 32.

⁴⁴ See 28 U.S.C. § 2513(a)(1-2).

⁴⁵ See *Betts v. United States*, 10 F.3d 1278, 1283 (7th Cir. 1993).

⁴⁶ See H. REP. NO. 2299, at 30. This can be especially burdensome for some claimants as the influence of false confessions on false convictions is profound. See Bedau & Radelet, *supra*, note 21. Of the 350 false conviction cases that Bedau and Radelet analyzed, at least fifty, or fourteen percent, involved a false confession. *Id.*

⁴⁷ See 28 U.S.C. §1495 (2012).

⁴⁸ *Id.* at § 2513(b).

⁴⁹ *Betts v. United States*, 10 F.3d 1278, 1282 (7th Cir. 1993).

⁵⁰ *Id.* at § 2513(e).

strain on already stressed Treasury resources.⁵¹ Originally, the statute provided only for a maximum of \$5,000 for claimants who successfully met the statute's other requirements.⁵² Congress amended the statute in 2004 and now allows the Court of Federal Claims to award successful claimant \$50,000 per year incarcerated and \$100,000 for every year wrongly spent on death row.⁵³

III. THE FEDERAL COMPENSATION SYSTEM IS PROCEDURALLY, MONETARILY, AND TEMPORALLY BURDENSOME FOR EXONEREES SEEKING INDEMNIFICATION

As it stands, the federal indemnification statute creates two categorical hurdles for exonerees seeking compensation. First, exonerees must overcome procedural hurdles in order to win compensation. In particular, prosecutorial opposition and high burdens of proof stand in the way of many indemnification claims. If exonerees are successful in clearing procedural hurdles, exonerees must then confront the financial hurdles that the statute creates. Any award that exonerees may win is subject to taxation and does not include attorney fees. Once taxes and attorney fees are subtracted out, exonerees are often left with few financial resources to get themselves back on their feet and to confront problems such as stigma and unemployment that stand as long-lingering effects of incarceration. Thus, when combined, the procedural and financial hurdles created by the federal indemnification statute create tremendous and unnecessary barriers for individuals seeking indemnification for their false convictions and wrongful incarcerations.

⁵¹ BORCHARD, *supra* note 8. Recall that at the time of enactment that the United States was in the throes of the Great Depression and thus, Treasury resources would have been particularly strained. *See, e.g.*, 18 U.S.C. § 729–32 (1940); Borchard, *supra* note 20.

⁵² 18 U.S.C. § 729–32 (1940).

⁵³ 28 U.S.C. § 2513(e) (2012).

A. *The Federal Indemnification Process is Procedurally Burdensome for Exonerees*

The indemnification process itself can be burdensome for exonerees. A certificate of innocence can be difficult for some exonerees to procure because of prosecutorial opposition. Additionally, the statutory scheme places the burden of proving innocence on the claimant, which can be difficult for many claimants to overcome due to the inadequacy of evidence and the peculiar role of the judge in such proceedings. Thus, all told, indemnification is procedurally burdensome for exonerees seeking compensation for their wrongful imprisonment.

1. *Prosecutors Often Oppose Indemnification, Which Burdens Indemnification Claimants*

Prosecutors sometimes stand in the way of indemnification claims. Prosecutors often oppose findings of innocence and thus oppose indemnification.⁵⁴ There are a number of professional reasons that underlie prosecutorial opposition to indemnification. Some prosecutors oppose findings of innocence, as opposed to mere release, under the argument that such findings may undermine the validity and reliability of other convictions in the jurisdiction.⁵⁵ Prosecutors also have an incentive to preserve the conviction rate of their office.⁵⁶ In prosecutor offices, convictions often translate into professional advancement.⁵⁷ If some convictions are proven false, then one's professional advancement could be challenged.⁵⁸ Accordingly, prosecutors have professional incentives to oppose findings of innocence and indemnification for wrongly convicted individuals.

⁵⁴ See Meghan J. Ryan, *Remedying Wrongful Execution*, 45 MICH. J. L. & REFORM 261, 263 (2011).

⁵⁵ *Id.* at 263.

⁵⁶ *Id.* at 274.

⁵⁷ *Id.*

⁵⁸ *Id.*

Beyond professional incentives, prosecutors also have emotional barriers to findings of innocence and indemnification. Prosecutors, by the nature of their work, are often aligned with crime victims.⁵⁹ Accordingly, as with victims, it may be difficult to come to terms with that the underlying crime remains unresolved.⁶⁰ Additionally, it may also be difficult for individual prosecutors to come to terms with the fact that they themselves prosecuted a wrongful conviction and to confront the mistakes in their own work.⁶¹ Thus, prosecutors may have an emotional block to acknowledging false convictions and indemnification.

Given professional and emotional incentives, prosecutors often oppose declarations of innocence.⁶² Prosecutorial opposition stands as an obstacle to compensation, though. This is so because exonerees must obtain a certificate of innocence in order to petition the Court of Federal Claims for relief, prosecutors stand as a substantial barrier to receiving compensation for their false convictions.⁶³ Accordingly, the statute should be reformed to remove prosecutors as a barrier to compensation.

2. *The Burden of Proof for Exonerees Seeking Indemnification Inhibits Compensation*

⁵⁹ Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted From the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 51–53 (2009).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771, 778–79 (2010); see also Paul C. Giannelli & Myrna S. Raeder, *Achieving Justice: Freeing the Innocent, Convicting the Guilty Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, 37 SW. L. REV. 763, 786 (2008). Prosecutors are most likely to object when the crime is highly aggravated or publicized. THE NATIONAL REGISTRY OF EXONERATIONS, UPDATE: 2012 THE NATIONAL REGISTRY OF EXONERATIONS 1 (2013).

⁶³ Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 136 (2004).

The federal indemnification scheme creates a high burden for individuals seeking compensation. First, given that indemnification suits are civil in nature and that the exonerees are plaintiffs in indemnification claims, exonerees have the burden of proving that they meet the requirements under statute to receive a certificate of innocence from a United States District Court.⁶⁴ Second, the procedure of the innocence determination process runs contrary to the traditional acquittal scheme in the American justice system, which creates further challenges for exonerees seeking compensation for wrongful incarceration.⁶⁵ Combined, the increased burden adds further hurdles to exonerees seeking compensation, who must also overcome prosecutorial opposition before even petitioning the Court of Federal Claims for indemnification.

The federal indemnification statute has been an especially difficult subject for courts to grapple with as it requires courts to weigh criminal guilt in a civil setting. Although the suit is civil in nature,⁶⁶ the court must consider whether the claimant's actions constituted a criminal offense against the United States or a relevant state statute.⁶⁷ If the actions indeed did constitute the necessary elements of a criminal offense, the court need not grant a certificate of innocence and thus, the claimant is effectively barred from compensation.⁶⁸ Moreover, although the District

⁶⁴ *Rigsbee v. United States*, 204 F.2d 70, n. 2 (D.C. Cir. 1953) (“both the legislative history of the law and the language of Sections 729 and 730 lead me to the conclusion that in the present law discretion in the matter of granting a certificate of innocence is vested in the court; and in the sense that the court should not grant such certificate unless it is satisfied of petitioner’s innocence, the burden is on the petitioner.”). This requirement follows the prevailing stance by foreign countries at the time. At the time the Act was enacted, France, Germany, Italy, Belgium, Norway, Hungary, Sweden, Mexico, Spain, Monaco, Brazil, and Neuchâtel all placed the burden of proving innocence on the claimant. *See BORCHARD, supra* note 8 at 394–95.

⁶⁵ *See* S. DOC. NO. 62-974, at 33.

⁶⁶ *See U.S. v. Lyons*, 726 F.Supp.2d 1359 (M.D. Fla. 2010) (“A proceeding under Section 2513 is civil in nature, and issuance of the certificate is committed to the sound discretion of the court.”).

⁶⁷ 28 U.S.C. § 2513 (2012).

⁶⁸ *Id.*

court must consider whether or not a defendant's actions amount to a criminal offense, the court is not bound to make its determination beyond a reasonable doubt, as is required in criminal trials.⁶⁹ Thus, courts may determine that the claimant committed a crime and thus is effectively barred from pursuing compensation by a mere preponderance of the evidence. This difference in burdens of proof creates greater hurdles for exonerees seeking compensation. Rather than proving their innocence against reasonable doubt, claimants seeking indemnification must instead prove their innocence by a higher bar of a preponderance of evidence.⁷⁰ Given this loftier standard, many exonerees are paradoxically precluded from compensation, despite having wrongly spent time incarcerated.

The burden of proof situation creates equitable concerns for exonerees as well. The federal indemnification statute is unique in that it places the determination of innocence on the shoulders of the exonerating judge. Professor Borchard, in proposing a system of indemnification, raised worries about the conflicts that such a scheme creates. Professor Borchard noted that such a system allows courts to create degrees of acquittal, where a judge may acquit the defendant, but may

⁶⁹ The presumption of innocence has traditionally placed the burden of proof on the prosecutor. *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). Considering that exonerees were convicted of crimes that they did not commit, the presumption of innocence and corresponding burden of proof should be placed on the government.

⁷⁰ Former Attorney General Robert Cummings identified this danger very early on. In testimony to the 75th Congress, Attorney General Cummings noted:

[R]eversals in criminal cases are more frequently had on the ground of insufficiency of proof or on the question as to whether the facts charged and proven constituted an offense under some statute. Consequently, it would be necessary to separate from the group of persons whose convictions have been reversed, those few who are in fact innocent of any offense whatever.

S. REP. NO. 202 (1937).

assign a degree of innocence to the acquittal.⁷¹ This runs immediately counter to the tradition of the American justice system, where acquittals, whether determined by judge or jury,⁷² are absolute in nature. Professor Borchard explained:

If the . . . trial court were given the right to pronounce on the propriety of an award in a case of acquittal (as is the case in some of the European countries), it would bring into our law a new kind of acquittal, in which the jury or judge could acquit *with degrees of approval or sympathy*. The distinction would be an odious one to make. While it would be desirable to have the benefit of the special knowledge of the case secured by the trial court . . . , still it is better to forego this advantage for the sake of conformity with legal custom and leave the establishment of the damage to a new court conforming in its jurisdiction in this case to is jurisdiction in similar cases of claims against the United States.⁷³

Exonerees should be entitled to absolute declarations of innocence and then be granted the opportunity to prove their actual degree of innocence in front of a separate tribunal where no conflict of interest resides. Such a scheme is not provided for presently and thus exonerees must overcome an additional procedural barrier in order to win indemnification.

B. *The Federal Indemnification Scheme is Monetarily Burdensome for Exonerees*

Beyond overly-burdensome procedure, the current exoneree indemnification process creates an overly-burdensome financial toll for exonerees seeking indemnification. First, awards

⁷¹ S. DOC. NO. 62-974, at 31.

⁷² In the case of the federal exoneration statute, only the presiding judge makes determinations about the certificate of innocence. *Rigsbee v. United States*, 204 F.2d 70, 72 (D.C. Cir. 1953) Even if a jury acquits, the jury has no role in determinations of innocence for purposes of certificates of innocence. *Id.* (“Had the Congress intended to authorize suit for damages in the Court of Claims by one who had been convicted and imprisoned simply because, after reversal, he was found not guilty at a second trial, it could easily have done so by providing that the only condition precedent to recovery in the Court of Claims should be a certificate from the trial court showing conviction, imprisonment, reversal, and acquittal.”).

⁷³ S. Doc. No. 62-974, at 31 (emphasis added).

are subject to income taxes and not subject to federal attorney fee provisions. Thus, if an exoneree wins compensation, much of their award is dedicated to paying taxes and attorneys, leaving little left over. Sufficient financial awards are necessary for exonerees, though. Exonerees suffer from financial instability after leaving prison because they often cannot overcome insufficient job skills and the social stigma that results from their incarcerations. Thus, when combined, taxes, attorney fees, and insufficient resulting awards lead to precarious financial stability for exonerees, thereby necessitating greater awards for exonerees.

1. *Indemnification Awards are Subject to Taxation, Which Further Reduces the Amount of Actual Compensation Exonerees can Win Under Statute*

Indemnification awards are subject to federal and state income taxation, which further reduces the amount of compensation awarded to exonerees who successfully navigate the procedurally burdensome compensation process.⁷⁴ The issue with taxing indemnification awards is that the entire award is subject to taxation in the year that it was received, in spite of the fact that the award is based on the number of years that a claimant was incarcerated, in part as a substitute for income during that time.⁷⁵ Given that the entire award is taxed in the year it is received, the award is subject to a higher tax bracket than it would be if it were taxed as annual income over the course of the incarceration. Thus, a higher portion of the award is quickly eaten by federal and state income taxes.

As an example, assume that one exoneree receives an indemnification award of \$500,000 for ten years of wrongful incarceration for a non-capital crime. If the award were taxed

⁷⁴ See Elaine Ellis, *The Cost of Freedom: Tax Treatment of Post-Exoneration Compensation Awards*, 65 TAX LAW. 119, 119 (2012).

⁷⁵ See Borchard, *supra* note 20.

individually for each year spent in prison as a substitute for income, the exoneree would be subject to a total federal income tax bill of \$82,026.50.⁷⁶ If, however, the sum received is taxed as a lump sum, as is presently done, the exoneree's award would be subject to a tax of \$155,045.75.⁷⁷ State income taxes can take even more from an exoneree's award.⁷⁸ Thus, taxes subtract a substantial amount from indemnification awards.

2. *The Federal Indemnification Statute Does Not Allow for Attorney Fees and Thus, Exonerees Must Subtract Attorney Fees From Their Rewards*

Once exonerees pay the tax bill on their awards, they must often pay attorney fees next. The federal indemnification statute does not allow for attorney fees, which means that exonerees are left paying the bill.⁷⁹ Moreover, although the statute allows claimants to pursue their cases *in forma pauperis*, due to the complex nature of the statute, exonerees often require the assistance of counsel to win compensation. Finally, pro bono help is often unavailable due to limited resources and the greater attention paid to exoneration itself, rather than to compensation post-release. Thus, many exonerees must subtract substantial legal fees out of their awards, which after tax bills, can leave very little compensation left.

The federal indemnification statute does not provide for attorney fees and thus, claimants seeking compensation must bear their own legal costs.⁸⁰ The prohibition of attorney fees was best

⁷⁶ See, e.g., 26 U.S.C. § 1 (2012).

⁷⁷ *Id.* The difference in tax bills is created by the different marginal tax rates that the exoneree would be subject to.

⁷⁸ See Ellis, *supra* note 74, at 119.

⁷⁹ United States v. Marsh, 48 F.R.D. 315 (W.D. Va. 1969).

⁸⁰ See 28 U.S.C. § 2513 (2012).

laid out in *United States v. Marsh*, which is the leading case on the issue.⁸¹ The claimant in *Marsh* had previously been exonerated of his prior conviction and had reached a settlement for compensation in the amount of \$5,000 with the United States, which was the statutory maximum allowed during the time that Marsh brought his suit.⁸² In settlement, a dispute arose between Marsh and the United States as to whether attorney fees were included in his award. Marsh filed a motion for summary judgment with the court arguing that 28 U.S.C. § 2412 allowed for attorney fees in addition to his settlement.⁸³ The district court disagreed. The court held that the federal indemnification statute did not have an express provision providing for attorney fees and thus, the court had no authority for such a grant.⁸⁴ Thus, the Court denied Marsh's motion and held that his award of \$5,000 included attorney fees.

Although he was convicted of a state crime, Kevin Byrd's case exemplifies the effects that income taxes and attorney fees have on indemnification awards. Byrd was convicted in 1985 of aggravated rape.⁸⁵ In 1997, Byrd was freed after DNA proved his innocence.⁸⁶ Byrd received a \$50,000 lump sum payment for his wrongful conviction, averaging \$4,166 for each year spent in

⁸¹ *Marsh*, 48 F.R.D. at 318.

⁸² *Id.* at 317.

⁸³ *Id.*

⁸⁴ *Id.* at 318 (citing *Fleischmann Distilling Co. v. Maier Brewing Co.*, 386 U.S. 714, 721 (1967) ("When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied.)); *see also* *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (holding that there must be an express statutory grant in order for a court to have the authority to grant attorney fees).

⁸⁵ John Makeig, *Man Cleared By DNA Tests is Reunited With His Family After Court Hearing*, HOUS. CHRON., July 31, 1997, at A29.

⁸⁶ *Id.*

prison.⁸⁷ After taxes and attorney's fees, though, Byrd ended up with only \$8,000, or \$666 for each year spent in prison.⁸⁸ Thus, Byrd's case is indicative of compensation statutes: he received a nominal sum despite a wrongful conviction, due to the effects of taxes and attorney fees. Moreover, Byrd has had a difficult time keeping on his feet after release.⁸⁹ He is self-employed and struggles to make ends meet.⁹⁰

3. *Exonerees Face a Number of Financial Difficulties Which Makes Adequate Compensation Necessary*

The need for adequate compensation extends beyond the need to pay tax bills and attorney fees. Exonerees often face substantial financial stability challenges once they are released. Financial instability results from several factors, but all relate to the difficulty that exonerees face in finding stable employment and income. Moreover, many difficulties that exonerees face result directly from their wrongful incarcerations. First, exonerees must confront the stigma of their convictions and incarceration, despite being cleared by a court. Second, convictions often destroy personal and familial relationships, which means that exonerees have few financial and social support systems once they leave prison. Finally, because exonerees on average spend ten years in prison before winning release, they often lack the job skills necessary for securing stable

⁸⁷*Kevin Byrd, LIFE AFTER EXONERATION PROGRAM*, http://www.exonerated.org/index.php?option=com_content&view=article&id=142, (last visited July 26, 2013).

⁸⁸ *Id.*

⁸⁹ After attorney's fees and taxes, Byrd used \$4,500 on a used truck and spent the rest on an apartment. DENNIS J. STEVENS, *MEDIA AND CRIMINAL JUSTICE: THE CSI EFFECT* 261 (2011).

⁹⁰ *See Kevin Byrd, supra* note 87.

employment. Combined these factors place tremendous, immediate financial burdens on exonerees, which means that compensation should be both adequate and expedient.

Stigma most profoundly aggravates exonerees' financial burdens. Exonerees confront intense stigma from their wrongful convictions after leaving prison, which greatly decreases their employment prospects.⁹¹ Much of the problem with stigma stems from the fact that exonerees' convictions are discoverable, without context, years after release. For instance, false convictions can take upwards of ten years to expunge.⁹² Thus, false convictions show up on criminal background checks years after exoneration and release.⁹³ Internet search engines have added further stigma that exonerees must overcome during a job search. Because exonerees are often falsely convicted of heinous crimes, meaning their false convictions are easily discoverable by employers screening potential candidates via a Google search.⁹⁴ Finally, even if employers learn about an exoneree's wrongful conviction, the mere fact that an exoneree spent time behind bars has an associated stigma of hardened and crime-prone individuals in and of itself.⁹⁵ Accordingly,

⁹¹ Stephanie Armour, *Wrongfully Convicted Walk Away With Scars*, USA TODAY, October 13, 2004, at 1A.

⁹² Jack Healy, *Wrongfully Convicted Often Find Their Record, Unexpunged, Haunts Them*, N.Y. TIMES, May 6, 2013, at A10 (illustrating how one exoneree, Audrey Edmunds, encountered trouble securing employment after being exonerated for the shaking death of an infant because employers found stories of the crime after Googling her name).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Adina M. Thompson, Oscar R. Molina, & Lora M. Levett, *After Exoneration: An Investigation of Stigma and Wrongfully Convicted Persons*, 75 ALB. L. REV. 1373, 1377 (2012) (noting that “[i]n the case of exonerated individuals, observers may commit correspondence bias by attributing the initial conviction to the exoneree's perceived inherent criminality rather than to a flaw in the criminal justice system”).

exonerees can face extraordinary stigma after release and that stigma can negatively impact their employment prospects, thereby negatively affecting their financial stability.

Exonerees often lack adequate financial support upon release from prison as well. During incarceration, most exonerees have no income, which means that exonerees have no financial resources upon release.⁹⁶ Additionally, many familial and other relationships are destroyed by convictions and incarceration.⁹⁷ Finally, programs offered to parolees, including job training and housing placement, are not made available to exonerees.⁹⁸ Accordingly, exonerees lack a social support system to get them back on their feet after release. This lack of support and financial resources further necessitates adequate and expedient compensation under the federal indemnification statute, which is not presently provided for.

Finally, exonerees often lack sufficient job skills to secure employment after release.⁹⁹ During their incarceration, many exonerees lose essential job skills and do not keep pace with the technological advances of society and the modern workforce.¹⁰⁰ For instance, many times,

⁹⁶ Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 429 (2009).

⁹⁷ See Neil Miller, *Reflections of the Wrongly Convicted*, 35 NEW ENG. L. REV. 615, 619–20 (2001). Neil Miller was convicted of raping a 19-year old college student in 1989. *Frontline, Profiles- Neil Miller*, <http://www.pbs.org/wgbh/pages/frontline/shows/burden/profiles/miller.html> (last visited June 2, 2013). He subsequently spent 10 years in prison before DNA evidence exonerated him. *Id.* Neil Miller's relationship with his daughter and the rest of his immediate family was destroyed during his time in prison. *Id.*

⁹⁸ See BRANDON L. GARRETT, CONVICTING THE INNOCENT 234 (2011).

⁹⁹ See Leslie Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, 5 AM. U. CRIM. L. BRIEF 10, 10–11 (2010).

¹⁰⁰ See, e.g. Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, at 138.

released exonerees are unfamiliar with advances in computer and cell phone technology.¹⁰¹ This further restricts exonerees' ability to secure stable employment.¹⁰² This causes further financial distress for exonerees, necessitating adequate and efficient compensation.

Professor Borchard noted the deleterious effects of wrongful incarceration as far back as 1932. The federal indemnification statute was purposed in part to rectify these deleterious effects. As it operates today, the statute falls short of such a goal. Although awards under the statute may be substantial, especially after Congress raised the statutory award ceiling in 2004, attorney fees and income taxes eat up much of these awards. Thus, exonerees are often left with the deleterious effects of wrongful incarceration and little left in financial support to rectify these wrongs.

IV. THE COMPENSATION SYSTEM SHOULD PROVIDE JUST COMPENSATION FOR EXONEREES

As with takings of property, the federal government should accommodate unjust takings of liberty with just compensation. As illustrated, though, the present federal exoneree indemnification scheme falls short of this goal. To make the indemnification scheme more just, Congress should reform both the procedural and compensatory restrictions inherent in its indemnification scheme. To make indemnification more procedurally just, Congress should provide exonerees with a rebuttable presumption of innocence, so that those who are truly innocent of their crimes may directly petition the Court of Federal Claims for compensation. Additionally, to provide more just compensation, Congress should increase the amount of discretion available to the Court of Federal Claims to grant awards under statute, using section 1983 claims as a guide for compensable damages. This way, exonerees will see a more streamlined process for

¹⁰¹ Ann Zimmerman, *A Convict Freed By DNA Evidence Tries to Find a Life*, WALL ST. J., Oct. 30, 2007, at A1.

¹⁰² *Id.*

indemnification and just compensation that reflects the damages that years of wrongful incarceration creates.

A. *Exonerees Should Receive a Rebuttable Presumption of Innocence in Order to Directly Petition the Court of Federal Claims for Indemnification*

In order to streamline the federal indemnification scheme, Congress should create a rebuttable presumption of innocence for exonerees pursuing indemnification claims. This presumption of innocence would remove the requirement that exonerees secure a certificate of innocence and would instead allow exonerees to directly petition the Court of Federal Claims for indemnification in the case that they are innocent of the crimes for which they were convicted.

The federal indemnification statute is structured to prevent compensating those who are undeserving of compensation.¹⁰³ In proposing the first federal exoneree compensation statute, Professor Borchard was deeply concerned by the possibility that individuals who are exonerated on obscure procedural grounds could receive compensation under the statute.¹⁰⁴ Congress was equally concerned by such a possibility in debating the statute.¹⁰⁵ Thus, the adopting Congress required, as many European legislatures did at the time, that the claimant prove his innocence in order to receive compensation.¹⁰⁶

As previously noted, however, innocence is not easily proven.¹⁰⁷ To protect against the worry of compensating undeserving individuals and to provide a more streamlined process of

¹⁰³ See Borchard, *supra* note 20.

¹⁰⁴ See BORCHARD, *supra* note 8.

¹⁰⁵ See Borchard, *supra* note 20.

¹⁰⁶ See BORCHARD, *supra* note 8, at 393–97.

¹⁰⁷ See *supra*, Part III.A.

indemnification for the truly innocent, the Department of Justice should be granted thirty days to review and challenge a claimant's presumption of innocence in a United States District Court. Following such a process, claimants under 28 U.S.C. § 1495 would file their claims with the Court of Federal Claims. At this point, the Department of Justice would have the opportunity to review the case and determine whether it wished to challenge the innocence of the claimant. If it is concluded that the innocence of the claimant should indeed be challenged, the Department of Justice should then be required to challenge the innocence in an appropriate United States District Court. It would then be the duty of the presiding judge to determine whether the claimant is truly innocent of the crimes for which he was convicted, per the requirements of the statute. This would allow the government to protect against the possibility of compensating those who are undeserving of compensation, but more importantly would also streamline the indemnification process for those who are truly innocent and deserving of compensation.¹⁰⁸

1. *A Rebuttable Presumption Would Remove the Burden of Proof Barriers That Currently Confronts Exoneree Claimants*

A Justice Department challenge of innocence would have several unique characteristics that would distinguish it from the current compensation process. These differences would have the effect of taking the burden of proving innocence off of exonerees and placing it on the government. Thus, the burden of proof barriers would be removed from claimants seeking indemnification. The first major distinguishing feature between a rebuttable presumption of

¹⁰⁸ The Department of Justice would theoretically only challenge only those claims where the claimant is not innocent of the crimes for which he was convicted. *See infra* Part IV.A. Thus, those who are truly innocent can proceed directly to the Court of Federal Claims and circumvent the proof and prosecutorial opposition barriers that currently complicate the indemnification process.

innocence and the present indemnification scheme is that since the Justice Department would be the party bringing the challenge in federal court, it would take on the burden of proof.¹⁰⁹ This would mean that the government would have the burden of proving that the claimant is not innocent of the crimes for which he was committed, rather than placing the burden on the exoneree claimant to prove their own innocence.

This shift in burden would also relieve exonerees of the burden of proving their own innocence in front of their exonerating judge. Recall that the federal indemnification statute creates a very unusual duty on judges—it requires a presiding judge to first grant acquittal, which is granted in absolute terms, and then requires the same judge to determine the exoneree’s degree of innocence so that they may proceed in an indemnification claim.¹¹⁰ A presumption of innocence would remove this burden from presiding judges. Instead, an exoneree claimant, once freed by a court, could directly proceed to the Court of Federal Claims without the need of a certificate of innocence. Moreover, in the case that their innocence is challenged, the determination is made by a judge other than the one who freed the claimant. Thus, judges are relieved from the conundrum of granting freedom on absolute terms and then immediately turning around and in some cases, assigning varying degrees of innocence or guilt for the same freed claimant.

¹⁰⁹ If the government maintained the burden of proof, it would keep with the American tradition of the government proving criminal guilt, not the individual proving criminal innocence. *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

¹¹⁰ S. DOC. NO. 62-974, at 31.

2. *A Rebuttable Presumption of Innocence Would Remove the Prosecutorial Barriers
That Currently Confront Exoneree Claimants*

Giving exonerees a presumption of innocence and allowing the Justice Department the opportunity to rebut those presumptions would also cut down on prosecutorial opposition in indemnification proceedings.¹¹¹ As previously mentioned, prosecutors often oppose certificates of innocence for a variety of reasons. This common trend of opposition correspondingly places a substantial barrier in front of exonerees pursuing indemnification.

A rebuttable presumption removes prosecutorial opposition as a barrier because the Department of Justice would bear the burden of proof in challenging indemnification claims. Under the current indemnification scheme, prosecutors can oppose indemnification claims without the need to support the reasons behind their opposition.¹¹² If the Justice Department bore the burden of proof, it would not have such a luxury. The Justice Department has an interest in challenging only those cases where the exoneree is not actually innocent.¹¹³ First, the Justice Department has an interest in preserving its reputation and would thus likely choose case in which it is likely to prevail.¹¹⁴ Moreover, losses are a drain on agency resources and thus, the agency will only choose those cases where the claimant is not innocent of their alleged crimes.¹¹⁵ Given reputational and resource concerns, granting rebuttable presumptions of innocence would cut down on prosecutorial opposition and streamline the indemnification process for federal exonerees seeking redress for their wrongful incarceration.

¹¹¹ See Ginsburg & Hunt, *supra* note 62, at 778–79; Medwed, *supra* note 63, at 136.

¹¹² See Raeder, *supra* note 62, at 786.

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

B. *Congress Should Expand the Amount of Compensation That Exonerees Can Receive Under Statute by Expanding the Discretion of the Court of Federal Claims*

Even if the procedural barriers to indemnification are removed with a rebuttable presumption of innocence, exonerees are often financially burdened by the indemnification process as well.¹¹⁶ To mitigate the financial barriers that exonerees face after release, Congress should provide for greater compensation under the federal indemnification statute. Greater compensation should come in two forms. First, Congress should expand the actual amount of compensation that exonerees receive so that exonerees can gain better financial footing after release by eliminating the ceiling for compensation and by providing the Court of Federal Claims greater discretion over granting indemnification awards. Moreover, to guide compensable injuries, Congress should use Section 1983 claims as a guide as the damages allowed in Section 1983 claims are substantially similar to those incurred by exonerees. Second, and more important, Congress should create an express grant allowing for the collection of attorney fees for successful claimants. Such an expanded compensation scheme would accommodate many of the financial barriers that exonerees face post-release and would thus make compensation more just.

1. *Congress Should Grant the Court of Federal Claim Broader Discretion in Awarding Indemnification Claims, Using § 1983 Claims as a Guide for Discretion and Damages*

The first step towards more just compensation involves granting the Court of Federal Claims greater discretion over awards issued to successful indemnification claimants. This first involves removing the ceiling for claims that is currently in place.¹¹⁷ The enacting Congress

¹¹⁶ See *supra* Part III.B.

¹¹⁷ 28 U.S.C. § 2513(e) (2012).

imposed a limitation on claims over the concern that too much discretion could place undue burdens on the Treasury.¹¹⁸ Such a concern may have been valid for the enacting Congress because the country was in the throes of the Great Depression at the time of enacting. Such a strain on Treasury resources is much less a concern today. Given the lesser concern over straining Treasury resources, the ceiling presently in place should be removed.

In addition to removing the ceiling for exoneree indemnification claims, Congress should grant the Court of Federal Claims greater discretion in formulating awards for exonerees. Moreover, in providing for more just compensation for exonerees, Congress should take its cue from § 1983 claims. In § 1983 claims, Congress allows courts to consider a wide spectrum of damages in formulating a final award for a prevailing claimant.¹¹⁹ The Supreme Court has held that a court, in considering an award for damages in § 1983 claims, may consider, among other things, loss of past earnings, loss of future earnings, mental anguish, humiliation, loss of personal dignity, loss of reputation and status.¹²⁰ As exonerees suffer from many of the same damages allowed in § 1983 awards, Congress should use § 1983 and its corresponding jurisprudence as a guide for providing compensation for exonerees under statute and give the Court of Federal Claims greater discretion in considering the wide range of damages that exonerees bear as part of their false conviction in formulating a proper award.

¹¹⁸ Borchard, *supra* note 20, at 209.

¹¹⁹ *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“Compensatory damages may include not only out-of-pocket loss and other monetary harms, but also injuries as ‘impairment to reputation . . . , personal humiliation, and mental anguish and suffering.’” (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974))); *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985) (allowing for humiliation and emotional distress damages for claimant who was passed over for promotions because of race and gender).

¹²⁰ The Supreme Court has held that § 1983 claims are most analogous to state personal injury tort claims. *Wilson v. Garcia*, 471 U.S. 261, 277 (1985).

There is perhaps some worry, however, that § 1983 would be an improper guide, as it such a scheme could be absent of bounds for compensation, creating unnecessarily high awards for some successful claimants. Such a concern lacks merit, though. Although the Supreme Court allows for compensatory damages for lost wages, mental anguish, and lost earning capacity, the Supreme Court requires that compensated plaintiffs prove out-of-pocket costs as well as damages such as loss of reputation, provided that evidence is presented to establish the extent and duration of the injury.¹²¹ Such a standard could guide federal indemnification claims as well. The Court of Federal Claims should have discretion to consider all damages burdened by the plaintiff, past and present, and issue an award based on the actual damages that the plaintiff receives. Moreover, because loss of earning potential and the loss of wages have natural limits,¹²² such a scheme protects against over-compensating successful indemnification claimants.

a. *If the Court of Federal Claims Had More Discretion Over Indemnification Awards, It Would Cut Down on the Financial Burdens That Exonerees Face Post-Release*

With no ceiling and greater discretion over awards, the size of the award that exonerees receive under the federal indemnification scheme would better reflect the damages that wrongful incarcerations inflict on exonerees. Accordingly, more appropriate awards would counter the financial problems that exonerees face after the indemnification process is complete. First, appropriate compensation would allow exonerees to pay the large tax bills that follow

¹²¹ See *Horina v. City of Granite City*, 538 F.3d 624, 637 (7th Cir. 2008) (difficulty in proving abstract damages does not preclude their award, but plaintiff must show that he actually suffered such injuries). The testimony of the plaintiff alone can support the award of such damages. *Harper v. City of Los Angeles*, 533 F.3d 1010, 1029 (9th Cir. 2008).

¹²² The plaintiff is required to prove actual damages for loss of wages and loss of earning potential. See *Horina*, 538 F.3d at 637. Given this standard, there is a natural limit imposed for awards.

indemnification claims. Recall that compensation claims are subject to both federal and state income taxes.¹²³ Considering that the awards are taxed in the year received, rather than counted as income over the course of incarceration, the lump sum is subject to a higher tax bracket, meaning that a large percentage of an award is often eaten by higher federal and state income taxes.¹²⁴ By providing an award that takes into consideration lost income, mental anguish, and lost earning capacity, among other things, exonerees would receive a larger award that would help offset the large sums that tax burdens impose on exonerees. Thus, greater discretion would have the effect of mitigating the toll that income taxes place on exonerees after they receive compensation.

Beyond tax bills, exonerees often lack financial stability when they leave prison.¹²⁵ Exonerees lose social and familial support over the course of incarceration and thus have few safety nets upon release.¹²⁶ Additionally, due to the stigma and insufficient job skills that result from incarceration, many exonerees have trouble finding stable employment, which adds to further financial instability after release from prison.¹²⁷ Increased discretion in the Court of Federal Claims would reduce the challenges that exonerees face as the result of financial instability as well. The current indemnification scheme places ceilings on indemnification and thus prohibits the

¹²³ See Ellis, *supra* note 74, at 119.

¹²⁴ See *supra* Part III.B.1.a.; see also Ellis, *supra* note 74, at 119.

¹²⁵ See *supra* Part III.B.2; See Steve Mills, *Life after prison: Wrongfully convicted man has trouble moving on and clearing his name*, CHI. TRIB. (Jan. 30, 2013), http://articles.chicagotribune.com/2013-01-30/news/ct-met-life-after-prison-20130130_1_wrongful-murder-conviction-inmates-innocence; Weigand, *supra* note 96, at 429.

¹²⁶ See Weigand, *supra* note 96, at 429.

¹²⁷ Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongfully Convicted*, 18 B.U. PUB. INT. L.J. 391, 395 (2009) (“[E]ven if the exonerated were able to overcome those hurdles and obtain monetary compensation for the harm of wrongful imprisonment or accusation, they may never be able to recover fully from the criminal stigma that attaches to their association with criminal punishment, and the receipt of a damage award alone will not address this injury, at least not in full.”).

Court of Federal Claims from accommodating lost wages and lost earning potential in their awards.¹²⁸ Accommodating lost wages and lost earning potential would offset much of the financial instability that exonerees face, because the damages that exonerees face post-release could be accommodated for in a final award. Thus, increased discretion in the Court of Federal Claims would mitigate the issues surrounding heavy tax burdens and inadequate social support after leaving prison, thereby making compensation claims more just.

2. Congress Should Create an Express Attorney Fee Provision for Successful Claimants

The second step in creating a more just award for successful indemnification claimants is to provide for attorney fees as part of the award. Attorney fees, in addition to inadequate compensation and tax burdens, contribute greatly to exoneree financial instability.¹²⁹ Moreover, the present indemnification statute does not provide for attorney fees as part of the award. Under federal law, the statute must create an express allowance for attorney fees in order for a successful claimant to petition the court for an attorney fee award.¹³⁰ Given that the present indemnification statute contains no such provision, attorney fees are barred for successful exoneree claimants, at the detriment to exonerees.

Generally, attorney award provisions are incorporated into statutes to “equalize contests between private individual plaintiffs and corporate or government defendants.”¹³¹ In the case of

¹²⁸ 28 U.S.C. § 2513 (2012).

¹²⁹ *See supra* Part III.B.2.

¹³⁰ *United States v. Marsh*, 48 F.R.D. 315 (W.D. Va. 1969) (citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967)).

¹³¹ *See HENRY COHEN, CRS REPORT TO CONGRESS: AWARDS OF ATTORNEYS’ FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (2008), available at <http://www.fas.org/sgp/crs/misc/94-970.pdf>.*

civil rights cases, the federal government specifically provided attorney fees to attract adequate counsel for claimants.¹³² Accordingly, there are presently more than two hundred individual federal statutes that authorize attorney fees.¹³³

The federal indemnification statute should provide an express attorney fee provision along the same guidelines. First, exonerees are heavily disadvantaged in pursuing claims against the United States because of the heavy burden placed on them to prove their innocence and to comply with the confusing procedural requirements of the statute. Additionally, attorneys should be incentivized to provide adequate counsel to exonerees. Because of their limited financial resources, representation can be difficult to obtain and even if counsel can be obtained, the resulting fee can often significantly diminish the final award taken by the claimant.¹³⁴ Attorney fees would encourage more competent representation for exonerees and would do so absent the cost to final awards. Thus, attorney fees, in addition to increased discretion for the Court of Federal Claims would create more just indemnification awards for exonerees.

V. CONCLUSION

¹³² See S. REP. NO. 1011 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5903, 5913.

It is intended that the amount of fees awarded under [42 U.S.C. § 1983] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature [citing cases in which these standards have been appropriately applied]. . . . These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

Id.

¹³³ See COHEN, *supra* note 131.

¹³⁴ See Part III.B.2.

Although the Constitution guarantees just compensation for takings of property, takings of liberty require no such protection. The present federal indemnification statute grants compensation for exonerees, but the statute in its present form is neither procedurally nor financially just. Under the present procedural requirements of the indemnification statute, exonerees must overcome the challenges of securing a certificate of innocence, including prosecutorial opposition and difficult burdens of proof. Even if the procedural barriers can be overcome, exonerees often receive unjust awards which are quickly depleted by income taxes, attorney fees, and the financial effects that flow from wrongful incarceration.

To provide for more just compensation, Congress should implement a rebuttable presumption of innocence for exonerees and give greater discretion to the Court of Federal Claims to grant fair indemnification awards. A rebuttable presumption of innocence would mitigate the unjust procedural barriers in the present indemnification scheme by streamlining the indemnification process for innocent exonerees, shifting the burden of proof to the federal government, and reducing the opportunity for prosecutorial opposition. Moreover, greater discretion to the Court of Federal Claims over indemnification awards would result in more appropriate awards that reflect the actual damages that exonerees incur from wrongful incarceration. Accordingly, adjusting the current federal indemnification scheme would create a compensation scheme that is both more procedurally and financially just for exonerees whose liberty was unjustly taken.