Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes

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ARE FEDERAL EXONEREES PAID?:

LESSONS FOR THE DRAFTING AND INTERPRETATION OF WRONGFUL CONVICTION COMPENSATION STATUTES

By Jeffrey S. Gutman[1]

Introduction

The 2019 decision by the Justice Department to reinstate the federal death penalty[2] and subsequent executions[3] have refocused attention on federal exonerees – those people who have been exonerated of federal crimes for which they were wrongly convicted. In contrast to those exonerated of state crimes, which have received far more press coverage, exposure on podcasts, TV shows, movies and academic attention,[4] both for their exonerations and efforts to obtain compensation, federal exonerees remain a largely invisible group.

The National Registry of Exonerations[5] lists 118 exonerees who were wrongfully convicted of federal crimes and exonerated since 1989.[6] Apart from former CIA agent Edwin Wilson who was wrongfully convicted of exporting explosives to Libya,[7] and former Senator

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[2] Press Release, Dep't Of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse. *See In re Fed. Bureau of Prisons & Execution Protocol Cases*, 935 F.3d 106 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois v. Barr*, 2020 U.S. LEXIS 3406 (U.S. 2020).

[3] Mark Berman, *Justice Dept. carries out third federal execution in four days*, WASH. POST (July 17, 2020, 7:48 PM), https://www.washingtonpost.com/national/justice-dept-carries-out-third-federal-execution-in-four-days/2020/07/17/5afba3fa-c86f-11ea-8ffe-372be8d82298_story.html; Ryan J. Foley, *Iowa drug kingpin who killed 5 people in 1993 to be executed*, AP NEWS (July 16, 2020), https://apnews.com/a8ee04007265bdaa742add8a3b1e3362.

[4] Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369 (2017); Jeffrey S. Gutman & Lingxiao Sun, *Why Is Mississippi the Best State in Which to Be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 NE. U.L. REV. 694 (2019); Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 711 (2004); Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403 (2009).

[5] THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx.

[6] Six were convicted in a military tribunal and are excluded from this analysis. This number compares to 2,528 exonerees wrongfully convicted in state court as of the time of this writing.

[7] Maurice Possley, *Edwin Wilson*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3452.

Ted Stevens of Alaska, whose convictions for failing to report gifts were set aside,[8] this group is little known, because, on the whole, stories are less compelling. They average 2.5 years of imprisonment, compared to 9.2 years for state exonerees. 45 never served time at all; many were wrongly convicted of white-collar crimes. Only six were convicted of murder or sexual assault. Only one was exonerated as a result of DNA analysis.

Yet, analysis of federal exonerees teaches important lessons about the drafting and interpretation of the statute intended to compensate them. The history of the federal wrongful conviction compensation statute dates back to 1912 and stands as the first effort, state or federal, to pass such a statute in the United States. That initial effort was unsuccessful, but a statute authorizing $5,000 in compensation for wrongful conviction and subsequent incarceration was passed in 1938. Since then, the statute has served as a model for some parallel state statutes that award compensation for the wrongly convicted in state court.

The crafting of wrongful conviction compensation statutes begins with a conception of those who are "deserving." The drafting challenge is to create a process and a set of standards to ensure that those deemed deserving are always compensated while precluding compensation for those regarded as undeserving. The first champion of wrongful conviction compensation, Edwin Borchard, offered a modest notion of the "deserving"[9] and, even so, his 1912 draft of the statute failed that challenge. His poorly worded statute was virtually impossible to satisfy.

In Section I of this Article, I trace the lengthy history of the federal wrongful conviction compensation statute, which owes its passage to Borchard, and the bizarre wrongful murder conviction of a Hungarian immigrant who received post-exoneration financial support from an unusual source. While Borchard receives appropriate credit as the father of the statute, it was actually FDR's Attorney General, Homer Cummings, who had a more clear-eyed understanding of how it might work in practice. Congress' failure to adopt his suggestions on how to improve the statute continues to plague it.

In Section II, I show that, perhaps not coincidentally, only two federal exonerees listed in the National Registry has received compensation under the statute. In Section III, I return to Borchard's original concept and highlight the flaws in the drafting of the statute. While the statute took over two decades to pass, the key explanations of its language and purpose are set forth in brief and, in part, illogical passages of the legislative history. Ill-conceived language combined with this tangled legislative history have led to two distinct and conflicting approaches to the interpretation of the statute.

The first adheres closely to the text of the statute and yields results unfavorable to plaintiffs, outcomes unmoored from even Borchard's modest conception of the statute's appropriate scope. The second bristles against restrictive text and results in outcomes better as a matter of policy, but dubious as a matter of statutory interpretation. Changes to the language of

[8] Maurice Possley, *Ted Stevens*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3663.

[9] Borchard himself used the terms "deserving" and "undeserving." Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, S. DOC. NO. 62-974 at 14 (3d Sess. 1912) [hereinafter "S. DOC. NO. 62-974"].

the statute can resolve some of these issues, but I argue that there is a deeper problem in play that is not as susceptible to solution through redrafting.

I contend that an overreading of the statute's legislative history has led to interpretations that rest on the statute's presumed narrowness rather than its humanitarian purpose. The clearest manifestation of this approach lies in courts' assessments of the most important statutory requirement -- whether a plaintiff has demonstrated their innocence. Several courts have implicitly departed from a standard that requires the plaintiff to show their innocence by a preponderance of the evidence. Instead, they have adopted what I call "room thinking," in which they seize on pieces of inculpatory evidence and the plaintiff's failure to refute all evidence of guilt. With "room" to conclude that they may be guilty, these courts deny the requests for a certificate of innocence that is required for compensation.

In Section IV, I highlight these statutory and interpretive issues by discussing the obscure case of Mhummad Abu-Shawish, the director of a non-profit, who had hoped to redevelop a stretch of Milwaukee's Muskego Avenue and ended up serving three years in prison. Abu-Shawish has remarkably overcome both statutory and interpretive barriers in his quest for a certificate of innocence. In Section V, I offer thoughts on how cases like that of Abu-Shawish suggest changes in the language of the statute and approaches to its interpretation and implementation in a manner that redeems Professor Borchard's and Attorney General Cummings' vision of the federal wrongful conviction compensation statute and its state counterparts.

Section 1
The History of the Federal Wrongful Conviction Compensation Statute

A. 1912

In 1911, a wrongful conviction splashed across the newspaper headlines of the day. Andrew Toth, a Hungarian immigrant and steelworker in one of Andrew Carnegie's mills, was exonerated of a murder that occurred in the mill during labor unrest.[10] Another man, coincidentally also named Toth, belatedly admitted to the crime. The whole Toth saga would likely never have come to light were it not for Carnegie's well-publicized decision to provide Toth, who returned to Hungary after his exoneration, a $40 per month pension when the Pennsylvania legislature refused to compensate him.[11]

[10] Carnegie Pensions *Toth, Man Who Served Twenty Years for Crime He Did Not Commit*, N.Y. TIMES, Aug. 2, 1911, at 1.

[11] Andrew Carnegie's apparent generosity should be viewed in historic context. Toth, like many Hungarians, worked at Carnegie's J. Edgar Thomson Steelworks in Pittsburgh. Conditions were poor and wages were low. And, the steelworkers were required to work on Christmas Day, 1890. When the Hungarians staged a walk out on New Year's Day, their places were taken by Irish workers. A riot ensued when the Hungarian workers marched on the factory. An Irish supervisor, Michael Quinn, was killed. A witness was led down a line of Hungarian workers, picked out two claimed to have assaulted Quinn, and when he came to Toth, Toth laughed at him. The witness then accused Toth of involvement in the assault. Following a trial conducted in English, a language that the Hungarian workers did not understand, the three were convicted and sentenced to death. Carnegie persuaded the Governor to

The legislative history of the federal wrongful conviction compensation statute quickly followed in 1912 when the British-born Senator George Sutherland of Utah, who later served for nearly sixteen years as an Associate Justice of the United States Supreme Court, introduced a bill for "Relief of Persons Erroneously Convicted."[12] The bill and accompanying report was drafted by Edwin Borchard, then the Law Librarian of the Library of Congress, and the leading early advocate for wrongful conviction compensation.[13]

Borchard's 1912 report was called "State Indemnity for Errors of Criminal Justice,"[14] and was, as we will see, excerpted in subsequent legislative reports through the 1930s. In the first sentence of the report he noted, "[i]n an age when social justice is the watchword of legislative reform, it is strange that society, at least in this country, utterly disregards the plight of the innocent victim of unjust conviction or detention in criminal cases."[15]

The Report is principally a survey of how European countries have "solved the problem of indemnifying those innocent individuals who, in the exercise of a sovereign right beneficial to society and to the State in its function as the preserver to the public peace, have been unjustly arrested, detained, *or* convicted and punished." [16] Borchard's review of those statutes indicated that compensation in Europe was strictly limited to those who "deserve it."[17] But, there was no clear agreement on what that meant.

Borchard found that some countries compensated persons who were arrested, detained and released without having been convicted of a crime. Others compensated those who were acquitted after trial. Still others required an acquittal after appeal of a conviction. Some, but by no means all, additionally required a showing of innocence of the crimes for which they were charged.[18] Borchard mentioned the approaches of Sweden and Hungary in particular:

> In Hungary and in Sweden in case of unjust detention pending trial, he must show any one of three things: First, in both countries, the act for which he is held has not been committed. Second, in Hungary that the accused had not committed it; in Sweden, that its author was another than the accused. Third, in Sweden, that from all the

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commute the sentences to life imprisonment. In 1910, a dying man in Hungary named Stephen Toth, who fled the United States immediately after the riot, admitted that he participated in the murder. Based on that confession, the Governor freed Andrew Toth. *See* David J. Krajicek, *Andrew Carnegie's Iron Grip of Greed – the Saga of "Praying Andy" Toth*, N.Y. DAILY NEWS, Sept. 5, 2010. For more on the Toth/Carnegie case, *see* Rob Warden, *Andrew Toth*, THE NAT'L REGISTRY OF EXONERATION, https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=334.

[12] S. Res. 7675, 62d Cong. (1912), *as reprinted* in ---- Cong. Rec. 356 (Dec. 10, 1912).

[13] *United States v. Keegan*, 71 F. Supp. 623, 626 (S.D.N.Y. 1947); *see also* Lawrence Bluestone, *Unjust Imprisonment Claims Before the Court of Federal Claims: The Presentation of a Certificate of Innocence Should Not Be Considered "Jurisdictional*", 21 FED. CIR. B. J. 221, 23-24 (2011-12).

[14] S. DOC. NO. 62-974.

[15] *Id*. at 5.

[16] *Id*. at 6.

[17] *Id*. at 14.

[18] *Id*. at 10-12.

circumstances, it could not have been committed by him; in Hungary, that while committed by him it was not in a legal sense a punishable act.[19]

Borchard's proposal, set forth at the end of his Report,[20] was essentially identical to the bill introduced in the Senate. It was clearly more limited than most of the European models he studied, requiring both a wrongful conviction and a showing of innocence. He adopted language similar to his description of the statutes in Sweden and Hungary.[21]

The 1912 Senate bill first focused on the standard for showing wrongful conviction and framed it in terms of crimes. It permitted those who were convicted of a federal crime but who, after appeal or retrial, were found "innocent," of the charged crime "*and* not guilty of any other offense against the United States," to apply for "indemnification for the pecuniary injury he has sustained through his erroneous conviction and imprisonment."[22] The cap on damages was $5,000.[23]

Then, the bill turned to the standard of showing innocence and focused on an "act." When proceeding in the Court of Claims, claimants had the burden of proving their innocence by "show[ing] that the act with which he was charged was not committed at all *or*, if committed, was not committed by the accused."[24] Last, "the claimant must show that he has not, by his acts or failure to act, either intentionally or by willful misconduct or negligence, contributed to bring about his arrest or conviction."[25]

A parallel House bill was also introduced in 1912 and was virtually identical to the Senate version except for one curious difference, substituting an "or" for the italicized "and" above.[26] The House bill allowed those who were convicted of a charged federal crime to seek compensation if they were, after appeal, retrial or rehearing, "found innocent of the crime for which he was charged *or* of any other offense against the United States."[27] Both bills died in

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[19] *Id*. at 15-16. Borchard found Hungary's approach interesting; it required compensation for those found not guilty after wrongful conviction and permitted compensation for those unjustly detained prior to trial who could prove innocence. *Id*. at 16.

[20] S. DOC. NO. 62-974 at 31-33.

[21] *Id*. at 32.

[22] Emphasis added. In full, the Section read: "That any person who, having been convicted of any crime or offense against the United States shall hereafter, on appeal from the judgment of conviction or on the retrial or rehearing of his case, be found to have been innocent of the crime with which he was charged and not guilty of any other offense against the United States…may, under the conditions hereinafter mentioned, apply by petition for indemnification for the pecuniary injury he has sustained through his erroneous conviction and imprisonment." S. Res. 7675, *supra* note 12 § 1. This "not guilty of any other offense" requirement is written broadly enough to require claimants to identify a finding that that they had never committed *any* federal crime, whether or not related to the crime for which they were wrongly convicted. The impossible breadth of this requirement was fixed in the bill ultimately passed in 1938.

[23] *Id*. § 9.

[24] *Id*. § 4. (emphasis added).

[25] *Id*. § 5.

[26] H.R. 26748, 62d Cong. (3d Sess. 1912).

[27] *Id*. § 1 (emphasis added).

committee and no further effort to pass a federal wrongful conviction compensation statute was made for over twenty years.[28]

B. 1935-1938

The predecessor to today's federal wrongful conviction compensation statute was introduced in the Senate in 1935 by Senator Francis Maloney of Connecticut.[29] S. 2155 was nearly identical to the Borchard-drafted 1912 Senate bill. It required, in Section 1, that the clamant show that after appeal, retrial or rehearing, he had been "found innocent of the crime with which he was charged *and* not guilty of any other offense against the United States."[30] Borchard's 1912 Report explained that the latter requirement is "used to cover cases where the indictment may fail on the original count, but claimant may yet be guilty of another or a minor offense. Therefore, if the accused has committed *any* offense against the United States, his right to relief is barred."[31]

The bill contemplated that the claimant would offer testimony and evidence to the Court of Claims.[32] Like the 1912 bills, the burden was placed in Section 4 on the claimant to also prove his innocence, requiring him to "show that the act with which he was charged was not committed at all, or, if committed, was not committed by the accused."[33] Borchard did not intend this to be easy: "only a most flagrant case of injustice could be brought within the terms of this section."[34] The claimant would also have to show that "he has not, either intentionally or by willful misconduct or negligence, contributed to bring about his arrest or conviction."[35]

Unlike the 1912 bills, incarceration was not required to obtain indemnification,[36] but the maximum amount the claimant could obtain was still only $5,000.[37] The only apparent rationale for that figure lies in Borchard's 1912 Report: "[t]his provision is to limit any exorbitant claims which may be brought."[38] The bill thus combined both rigor and parsimony.

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[28] *See Abu-Shawish v. United States*, 898 F.3d 726, 734 n.4 (7th Cir. 2018); *Keegan*, 71 F. Supp. at 627. That 1912 effort closely coincided with the passage of state compensation statutes in Wisconsin, *see* 1913 Wis. Sess. Laws 196, and California, *see* 1913 Cal. Stat. 245. *See* Shelley Fite, *Compensation for the Unjustly Imprisoned: A Model for Reform in Wisconsin*, 2005 WIS. L. REV. 1181, 1182 nn. 1-4.

[29] S. 2155, 74th Cong. (1935).

[30] *Id*. § 1 (emphasis added). In relevant part, Section 1 read, "That any person, who, having been convicted of any crime or offense against the United States, shall hereafter, on appeal from the judgment of conviction or on the trial or rehearing of his case, be found to have been innocent of the crime with which he was charged and not guilty of any other offense against the United States…may, under the conditions hereinafter mentioned, apply by petition for indemnification…"

[31] S. DOC. NO. 62-974 at 31.

[32] S. 2155, *supra* note 29, §§ 2, 6. "The United States could examine witnesses, have access to all testimony taken and "resist all claims presented under this Act by all proper legal defenses." *Id*. § 8.

[33] *Id.* § 4 (emphasis added).

[34] S. DOC. NO. 62-974 at 32.

[35] S. 2155, *supra* note 29, § 5.

[36] *Id*. § 1 (indemnification was for "pecuniary injury he has sustained through his erroneous conviction and/or imprisonment").

[37] *Id.* § 10.

[38] S. DOC. NO. 62-974 at 33.

For reasons not made clear from the legislative history, twenty-three years after the 1912 bill died, the Senate seemed to do little more than to dust off the 1912 bill, report, and rationale. No particular cases of wrongful conviction subsequent to those of Toth and Adolf Beck, wrongly convicted of a theft in England in 1896 also mentioned in the 1912 study were cited in the legislative reports to prompt renewed calls for the legislation. The only thing which appeared to put wrongful conviction compensation again on the legislative docket was the 1932 publication of Professor Borchard's "Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice."[39] Essentially the National Registry of Exonerations of its time, the book was noted, but only in passing, at the conclusion of the 1938 House Report,[40] reflecting Professor Borchard's episodic, but persistent, advocacy for his vision of justice.

In 1936, the Senate Judiciary Committee favorably reported S. 2155 to the Senate with two important amendments recommended by Attorney General Homer Cummings.[41] The first, in Section 1, would require the claimant to have been found "not guilty," rather than innocent, of the crime for which he was convicted following appeal, retrial, or rehearing.[42] The Attorney General stated that the amendment was required because there is no such verdict as "innocent."[43] He took comfort that this proposed amendment would not open compensation to those not "entirely innocent" because Section 4 of the bill still imposed on the claimant the burden of showing innocence.[44]

The second amendment was that the word "act" in Section 4 be changed to "crime."[45] One is charged with crimes, not acts. The Attorney General agreed that compensation was due "in the rare and unusual instances" in which a person was found "entirely innocent" in contrast to situations in which convictions were reversed "on the ground of insufficiency of proof or… whether the facts charged and proven constituted a [criminal] offense…"[46] He, like Borchard, believed it necessary to "separate from the group of persons whose convictions have been reversed those few who are in fact innocent of any offense whatever."[47]

The rationale offered for the bill in the resulting Senate Report is thin, but rests principally on two grounds, neither of which would be terribly persuasive today. First, it noted that most European countries compensated the unjustly convicted.[48] Second, it quoted two law professors, one being Dean John H. Wigmore of Northwestern Law School who supported the bill and analogized the state's duty of compensation to eminent domain:

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[39] Edwin M. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (1932). At this point in his career, Borchard was a professor at Yale Law School.
[40] H.R. REP. NO. 75-2299, at 4 (1938).
[41] S. Rep. No. 74-2339, at 3 (1936).
[42] S. REP. NO. 74-2339, at 1 (1936); S. 2155, § 1.
[43] S. REP. NO. 74-2338, at 3. The Attorney General also expressed "doubt" that wrongly convicted persons who served no time in prison should be compensated. *Id.*
[44] *Id.*
[45] S. 2155, § 4.
[46] S. REP. NO. 74-2339, at 3.
[47] *Id.*
[48] *Id.* at 1.

> To deprive a man of liberty, put him to heavy expense in defending himself, and to cut off his power to earn a living, perhaps also to exact a money fine – these are sacrifices which the state imposes on him for the public purpose of punishing crime.[49]

To the question of why no federal compensation statute had previously been passed, Dean Wignore pulled no punches: "[b]ecause we have persisted in the self-deceiving assumption that only guilty persons are convicted. We have been ashamed to put into our code of justice any law which per se admits that justice may err. But let us be realists."[50]

The 1936 Report also excerpted a statement from Professor Borchard's 1912 Senate Report featuring the then old case of Andrew Toth.[51] Borchard noted that Pennsylvania had no compensation statute (it still doesn't) and the Pennsylvania legislature refused to compensate him through a private bill.[52] Borchard also cited the 1896 case of Adolf Beck,[53] who was wrongly convicted of a crime in England as a result of mistaken identity. He was incarcerated for seven years prior to his exoneration and received no compensation.[54] Nowhere is mentioned the irony that the federal compensation statute advocated by Borchard would not have helped Toth, who was convicted in a state court of a state crime.

Senator Maloney reintroduced the bill, now S. 750, in January of 1937,[55] with exactly the same language as the 1935 bill but strangely without the sensible amendments suggested by Attorney General Cummings. The bill was reported out of the Senate Judiciary Committee in March of 1937 without amendment and with a Judiciary Committee Report nearly identical to that of 1936.[56]

The Senate bill, then, had two essential prongs. The first prong was procedural – a requirement that there be a two-fold finding: that the claimant be innocent after appeal, retrial, or rehearing and that the claimant be not guilty of any other federal offense. The second prong was substantive, requiring a showing of innocence in one of two ways: that the act with which the claimant was charged was not committed at all or, if committed, was not committed by the claimant.

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[49] *Id.* at 2.
[50] *Id.*
[51] *Id*. *See also Abu-Shawish*, 898 F.3d at 734 n.4 (summarizing Toth case and Borchard's scholarship).
[52] S. REP. NO. 74-2339, *supra* note 42, at 2.
[53] For more on the Beck case, which involved not violence, but theft, see Brian Cathcart, *The Strange Case of Adolf Beck*, THE INDEPENDENT (Oct. 17, 2004), https://www.independent.co.uk/news/uk/crime/the-strange-case-of-adolf-beck-535209.html.
[54] S. REP. NO. 74-2339, *supra* note 42, at 2. The cases of Toth and Beck are mentioned in a 1916 Yale Law Journal article, James W. Garner, *Criminal Procedure in France*, 25 YALE L.J. 255, 282 (1916). Garner recommends that a French 1895 wrongful conviction compensation statute be replicated in the United States and England. Oddly, citing Borchard's own work, Garner notes that Beck in fact received $25,000 from the Parliament. *Id*. at 282, n.96.
[55] S. 750, 75th Cong. (1st Sess. 1937). The bill was referred to the House Judiciary Committee on March 22, 1937.
[56] S. REP. NO. 75-202 (1937). That Report reprinted the suggestions made by Attorney General Cummings in 1936, but they were not reflected in the 1937 bill.

So understood, satisfying these requirements was impossible in practice. A finding of innocence is rarely the outcome of post-conviction relief.[57] A vacatur or reversal of conviction or a reversal and grant of a new trial would instead be the typical remedies in successful post-conviction litigation.[58] Nor, as Attorney General Cummings understood, would the successful result of a retrial be a verdict of "innocent." It would be not guilty.

Moreover, how is the prospective plaintiff to obtain a finding that he or she is not guilty of other offenses against the United States? There was no obvious mechanism by which the post-conviction court would have occasion to decide the absence of guilt of crimes not charged in the indictment. In 1938, the flawed Senate bill was extensively redrafted in the House Judiciary Committee[59] and Congress passed the House bill.[60] The result, however, was not much of an improvement.

The principal revision was to replace the opportunity to present testimony and evidence to the Court of Claims with the ministerial requirement that the claimant simply present the Court with either a certificate of innocence from the court in which he or she were convicted.[61] The intent, perhaps, was to streamline the process in the Court of Claims. But, doing so led to two difficulties.

First, while the statute prescribed what a certificate of innocence needed to recite, it established no burden of proof by which the claimant needed to prove each element in the convicting court. Nor did it establish any procedures by which the convicting court should adjudicate petitions for the required certificate of innocence. Those were left entirely in the hands of the convicting court.

Second, by assigning the certificate of innocence the central role in the Court of Claims' compensation process, the drafters felt the need to deal with two additional matters – how to define the scope of people entitled to file a petition for compensation with the Court of Claims, and how to prescribe the recitals of the certificate of innocence that would be sufficient to authorize compensation. The result was a complicated mess. Section 1, later codified as 18 U.S.C. § 729, was a dreadfully long sentence:

> [That] Any person who, having been convicted of any crime or offense against the United States and having been sentenced to imprisonment and having served all or any of part of his sentence, shall hereafter, on appeal or on a new trial or rehearing, be found not guilty of the crime of which he was convicted or shall hereafter receive a pardon on the ground

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[57] *See* Keith Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1190 (2010/2011) ("Courts almost never rule on the question of actual innocence. The simple story of clear innocence is not a story the criminal justice system is designed to accommodate.").

[58] *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to A Constitutional Right of Actual Innocence: Is There A Need for A State Constitutional Right in New York in the Aftermath of Cpl S 440.10(1)(G-1)?*, 76 ALB. L. REV. 1453, 1473 (2013) (collecting cases).

[59] S. 750, *supra* note 55. *See also* Bluestone, *supra* note 13 at 224-25.

[60] Pub. L. No. 75-539 (1938).

[61] This was said to be in keeping with the then-present practice and procedure of the Court of Claims. *See* H.R. REP. NO. 75-2299. Unlike the Senate bill, the enacted statute required, as a condition for compensation, that the claimant serve time in prison. *Id*.

> of innocence, if it shall appear that such person did not commit any of the acts with which he was charged or that his conduct in connection with such charge did not constitute a crime or offense against the United States or any State, Territory, or possession of the United States or the District of Columbia, in which the offense or acts are alleged to have been committed, and that he has not, either intentionally, or by willful misconduct, or negligence, contributed to bring about this arrest or conviction, may…maintain suit against the United States in the Court of Claims for damages…[62]

The statute did adopt Attorney General Cummings' recommended change from "innocent" to not guilty. That resolved one of the difficulties in the Senate version. But it did not accept his recommendation that "act" be changed to "crime." In fact, it made matters more difficult for plaintiffs in three ways.

First, believing that the Senate Bill's two-part requirement that persons be innocent "of the crime with which he was charged and not guilty of any other offense against the United States" was "not definite and specific enough,"[63] it added a requirement that it "appear" that the claimant did not commit the "acts" with which he was charged without indicating where such a negative finding should appear. Second, the unexplained use of the plural word "acts," found in no prior legislative proposal, would seem to require plaintiffs to disprove that they committed *each* act charged in the indictment. This would include cases in which the charged crime required proof of multiple acts, some of which might, alone, be entirely innocent behavior. Third, in addition to showing that the conduct did not constitute a federal crime, the statute expanded the provision to include crimes of any state, territory, or the District of Columbia.

Although tightening the requirements, the statute was recast in an odd, unexplained, and apparently liberalizing way. The statute used the disjunctive "or" in describing the requirements, stating that the plaintiff be found not guilty of the crime of which he was convicted *or* that the conduct in connection with such charge not constitute another crime. In every proposal except the House Bill of 1912, the conjunctive "and" was used.

The statute thus raised the theoretical possibility that someone whose relevant conduct did constitute another crime, but who could show he did not commit any of the charged acts, or vice-versa, could be eligible for compensation. The Report, using the conjunctive, insisted that it did not do what it plainly did. It said, "[i]n other words, the claimant must be innocent of the particular charge *and* of any other crime or offense that any of his acts might constitute."[64]

In Section 2, later codified as 18 U.S.C. § 730, the only admissible evidence that the claimant was permitted to present to demonstrate eligibility for compensation was a certificate of innocence issued by the court in which the claimant was convicted or a certified copy of the pardon containing the recitals or findings that:

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[62] Pub. L. No. 75-539, *supra* note 60, § 1. Note that the narrowing of the "other offense" provision to those in connection with the charges for which there was a wrongful conviction eliminates the overbreadth problem identified in footnote 22.

[63] H.R. REP. NO. 75-2299, at 2 (1938).

[64] *Id.* (emphasis added).

(a) Claimant did not commit any of the acts with which he was charged; *or*
(b) That his conduct in connection with such charge did not constitute a crime or offense against the United States or any State, Territory, or possession of the United States or the District of Columbia in which the offense or acts are alleged to have been committed; *and*
(c) That he has not either intentionally, or by willful misconduct, or negligence, contributed to bring about his arrest or conviction.[65]

These three recital requirements, notably (a), overlap what was required in Section 1. But, the placement of "or" at the end of section (a) and "and" at the end of section (b) led to confusion. Did the certificate have to recite either (a) or (b), plus (c), or did it only have to recite (a) or, alternatively, (b) plus (c)? The court in *Keegan v. United States*[66] puzzled over this question, concluding that the former was correct.[67]

In sum, the House started with a Senate bill which was flawed, but fixable. By changing the locus of litigation from the Court of Claims to the court of conviction, the House wound up narrowing and confusing the statute's requirements in ways that it either did not explain, did not intend, or misstated in the legislative history. The result was a statute plagued by fuzzy thinking and language from which it has never fully recovered.

C. 1948

The reorganization and recodification of Title 28 of the U.S. Code in 1948 resolved some ambiguities[68] and changed the structure of the compensation statute.[69] 28 U.S.C. § 1495 vested the Court of Claims with jurisdiction to render judgment on claims by those "unjustly convicted of an offense against the United States and imprisoned."[70] 28 U.S.C. § 2513 reorganized the eligibility requirements for compensation by combining Sections 729 and 730. No longer are there separate statutes which identify the requirements a petitioner must meet to qualify to seek federal compensation and, if satisfied, set forth the required recitals for a certificate of innocence. The purpose of the reorganization was that the statute was "completely rewritten in order to clarify ambiguities which made the statute unworkable as enacted originally."[71]

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[65] *Id.*
[66] *Keegan*, 71 F. Supp. at 638-39.
[67] Similarly, the *Keegan* court parsed through the language of Section 729 and found, contrary to *Hadley v. United States*, 101 Ct. Cl. 112 (Ct.Cl. 1944), that the claimant needed to prove that he did not commit the acts for which he was convicted or that those acts did not constitute a crime against the United State or other state or territory. *Id.* at 637.
[68] For example, Section 2513(a)(1) clarifies the "appears" problem described above by referring to the "record or certificate." The very brief legislative history of the recodification has that the statute was "completely rewritten in order to clarify ambiguities which made the statute unworkable as enacted originally". Legis. Hist. of the Codification of 28 U.S.C. § 2513, P.L. 80-773, Ch. 646, 2d Sess. (1948).
[69] 18 U.S.C. §§ 729 and 730 were repealed and recodified. *See Abu-Shawish*, 898 F.3d at 735.
[70] Pub. L. No. 97-164, § 133(c)(1), 62 Stat. 941 (1948).
[71] Legis. Hist. of the Codification of 28 U.S.C. § 2513, *supra* note 68.

Instead, Section 2513(a) and (b) together state what the petitioner must plead and prove to obtain compensation, the proof taking the form of a certificate of innocence issued by the convicting court:

(a) Any person suing under section 1495 of this title must allege and prove that:
  (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction, and
  (2) He did not commit any of the acts charged or his acts, deeds, or omission in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

The statute retained the $5,000 cap on damages.[72] So things remained almost entirely unchanged for over fifty years.

D. 2000-2003

In 2000, Senator Patrick Leahy of Vermont introduced The Innocence Protection Act of 2000.[73] Section 301 would have amended the $5,000 cap on damages in 28 U.S.C. § 2513(e). The bill sought to increase the amount of damages that could be awarded to a maximum of $50,000 per year of incarceration and a maximum of $100,000 per year for those sentenced to death. The bill would further have directed the court to consider "the circumstances surrounding the unjust conviction…including any misconduct by officers or employees of the Federal Government," the "length and conditions of the unjust incarceration of the plaintiff" and "the family circumstances, loss of wages, and paid and suffering of the plaintiff" in determining the appropriate amount of damages.[74]

The compensation piece of the subsequent 2001 Innocence Protection Act bill introduced in both the House and Senate was revised. It called for a flat award of $50,000 per year of wrongful incarceration and not more than $100,000 per year of incarceration on death row.[75] The bill eliminated any standards for the court to consider in deciding whether to award less than the cap in such cases. S. 486 was reintroduced in the Senate in 2002 and offered yet a different compensatory metric. It proposed $10,000 per year of incarceration without distinguishing whether the case involved the death penalty.[76]

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[72] *Id.* at 943. Between 1948 and 2004, Congress passed three technical amendments to the statute. *See* Bluestone, *supra* note 13, at 225.
[73] S. 2073, 106th Cong (2d Sess. 2000). *See also* S. 2690, 106th Cong. (2d Sess. 2000) (same).
[74] A bill proposed in the House included identical language. *See* H.R. 4167, 106th Cong. (2d Sess. 2000).
[75] H.R. 912, 107th Cong. (1st Sess. 2001) at § 301; S. 486, 107th Cong. (1st Sess. 2001).
[76] S. 486, *supra* note 75.

The Report issued by the Senate Judiciary Committee on S. 486 touched on the proposal to increase the $5,000 cap. Describing it as "miserly," the Report observed that many state statutes provided for more compensation while conceding that most states, at that time, had no compensation statutes for those wrongfully convicted in state court.[77] It offered brief summaries of the cases of four state exonerees who were not compensated for their wrongful convictions.[78] It then concluded with a description of the legislation's humanitarian purpose, language never cited in subsequent cases:

> Putting one's life back together after such an experience is difficult enough, even with financial support. Without such support, a wrongly convicted person might never be able to establish roots that would allow him to contribute to society. To help repair the lives that are shattered by wrongful convictions, the bill raises the Federal cap on compensation, and urges States to follow suit—at least in cases where the wrongly convicted person was sentenced to death. The new Federal cap proposed by the bill as reported is significantly lower than the cap proposed by the bill as introduced, and significantly lower than many Members of the Committee think appropriate. It is very least that the Congress should do.[79]

The House bill introduced in 2003 returned to caps of $50,000 per year of incarceration and $100,000 in death penalty cases.[80] The subsequent House Judiciary Committee Report does not explain the preference for higher caps, but includes the Congressional Budget Office's estimate that it "does not expect the number of such cases or any increase in payments for this purpose to be significant."[81] As ultimately passed in 2004 as part of the Justice For All Act, 28 U.S.C. 2513(e), was amended to read:

> The amount of damages awarded shall not exceed $100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and $50,000 for each 12-month period of incarceration for any other plaintiff.

Section II
The Data

The National Registry of Exonerations contains the country's most accurate and important listing of exonerations in the United States.[82] Widely cited,[83] the National Registry

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[77] S. REP. NO. 107-315, at 35 (2002).

[78] *Id.* at 35-37. None of these men would have been eligible for federal statutory compensation because they were not wrongfully convicted in federal court.

[79] *Id*. at 37. The Senate bill also encouraged states to provide compensation to exonerees wrongfully convicted and sentenced to death in state capital cases. The minority report supported increasing compensation only for those wrongfully convicted in federal capital cases. *Id*. at 50.

[80] H.R. 3214, 108th Cong. (1st Sess. 2013), at § 331. The parallel Senate bill contained the same language as the House bill. *See* S. 1700, 108th Cong. (1st Sess. 2013), at § 331.

[81] H.R. Rep. No. 108-321, at 25 (2003).

[82] THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 5; Gutman & Sun, *supra* note 4.

[83] *See* Radley Balko, *Report: Wrongful convictions have stolen over 20,000 years from innocent defendants,* WASH. POST (Sept. 10, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/; Emily Barone, *The Wrongly Convicted,*

documents each exoneration since 1989 and identifies the reasons for each wrongful conviction. Among many other data points, the National Registry records the race and gender of the exoneree, the court in which they were wrongly convicted and calculates the amount of time the exoneree was wrongly incarcerated.

The National Registry's definition of "exoneration" is narrow and exacting. It is not enough for someone's criminal conviction to be reversed or set aside on appeal or through a writ of habeas corpus. Instead, the National Registry defines an exoneration as follows:

> A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was either:
>
> (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or
>
> (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action.
>
> The official action may be:
>
> > (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence;
> >
> > (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or
> >
> > (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal.
>
> The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either
>
> > (i) was not presented at the trial at which the person was convicted; or
> >
> > (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered.
>
> The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person's guilt.[84]

In short, one qualifies for entry into the National Registry only if one is declared factually innocent by an official or agency to make that designation, or if one's pardon, acquittal (following conviction) or dismissal of charges was the result, at least in part, of newly discovered

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TIME (March 16, 2017), https://time.com/wrongly-convicted/. The Registry was cited in Justice Breyer's dissent from the denial of certiorari in *Jordan v. Mississippi*, 138 S. Ct. 2567, 2571 (2018) (Breyer, J., dissenting), and in his dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2757 (2015) (Breyer, J., dissenting).

[84] THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 5.

evidence of innocence. A reversal of a conviction on grounds of insufficiency of evidence is, alone, not enough to be listed in the Registry.

I have used the National Registry's data pertaining to exonerations of individuals previously convicted in a state court in prior articles.[85] In those articles, I have explained how I determine whether an exoneree has sought state statutory compensation or compensation through a civil rights or state tort suit.[86] I have also described how I code this compensatory activity and how I define the codes applied.[87] I have done much the same for those convicted in federal court and subsequently exonerated since 1989.

As of this writing, the National Registry of Exonerations lists 118 persons exonerated following conviction in a federal tribunal, six of which were convicted in a military court. Of those remaining 112 exonerees, 67 were incarcerated and 45 were not. Those who were not incarcerated are not entitled to wrongful conviction compensation. 60% of these federal exonerees were incarcerated, compared to XX% of persons convicted in state court and later exonerated.[88] The reason for this difference lies largely in the nature of the federal crime at issue and the exoneree. Of the 112 exonerees, 48 were wrongly convicted of what might loosely be defined as a white-collar crime – tax, securities, mail and wire fraud and government program frauds of one sort or another. Most were freed before and after trial on bond.

The 112 exonerees collectively were incarcerated for 287.2 years, or an average of 2.6 years per person.[89] That compares to an average of XX years for state exonerees.[90] Again, that difference can be explained by the high number of federal exonerees who are not incarcerated. 60 federal exonerees spent less than one year in prison.

The federal wrongful conviction compensation statute makes it clear that, in order to obtain compensation, one requires a certificate of innocence issued by the convicting court. A review of the federal docket in PACER, LEXIS CourtLink, Bloomberg Law and other databases can reveal whether the exoneree sought a certificate of innocence from the federal court in which they were convicted.

Table 1 provides the compensation statistics for the 67 federal exonerees who were incarcerated:

Not filing for federal statutory compensation	46
Premature cases	15

[85] Gutman, *supra* note 4; Gutman & Sun, *supra* note 4.
[86] Gutman & Sun, *supra* note 4 at 709; Gutman, *supra* note 4 at 434.
[87] Gutman & Son, *supra* note 4 at 711.
[88] THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 5. Note to editor: I will update these figures so that they are accurate near to the date of publication.
[89] Excluding those who serve no time, the average is XX years.
[90] THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 5.

Filed for federal statutory compensation	7
Denied	5
Pending	0
Granted	2

Table 1

Claimants under the federal wrongful conviction compensation statute have six years from the date of the conviction is vacated to file a complaint with the Court of Federal Claims.[91] Of the 67 incarcerated federal exonerees, the applicable statute of limitations has yet to run with respect to fifteen. Thus, they are coded as premature.[92] Of those fifteen, three have been exonerated since 2017, indicating that it is very unlikely that the remaining 12 will file.

Of the remaining 52 exonerees, only seven filed for compensation and just two of those were granted. Stephen Jones, who was wrongfully incarcerated for 12.4 years on federal drug charges received $551,985.65[93] and Antonino Jones, who was incarcerated for 2.5 years for drug trafficking and carjacking, received $137,397.26.[94] Just over 3% of incarcerated federal exonerees have received federal statutory compensation, accounting for just 6.5% [95]of the years lost.[96] Of the five denied, two claims were dismissed on technical procedural grounds,[97] and one was dismissed on statute of limitations grounds[98] Two denied on the merits were Michael Holmes and Maria Hernandez, whose cases are discussed below.[99]

Section III
The Statute as Applied

A. Borchard's Proposal and Its Flaws

[91] 28 U.S.C. § 2501 (6-year statute of limitations); *see Bolduc v. United States*, 248 Fed. Appx. 162, 164-65 (Fed. Cir. 2007) (unpublished and nonprecedential) (holding that the six-year statute of limitations accrues on the date the conviction is vacated, rather than the date of issuance of the certificate of innocence).

[92] Table 1 lists them as "premature" and that number is not included in the total of not filing.

[93] Settlement agreement on file with author.

[94] *Lyons*, 99 Fed. Cl. 552.

[95] [Compare with updated information of state exonerees]

[96] Federal exonerees may, in addition to statutory compensation, seek compensation under the Federal Torts Claims Act, federal civil rights theories, including Bivens claims, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 388 (1971), and/or for attorney's fees under the Hyde Act, 18 U.S.C.A. § 3006A note. My research has revealed that 25 federal exonerees have sought compensation under one or more of these theories. Seventeen were unsuccessful; 2 cases remain pending and 6 received compensation. Of the six, one was Stephen Jones.

[97] Carl and Christopher Veltmann's complaints in the Court of Federal Claims were dismissed because they failed to produce certificates of innocence from the court of conviction. *Veltmann v. United States*, 39 Fed. Cl. 426 (Ct. Cl. 1997), *aff'd*, 168 F.3d 1319 (Fed. Cir. 1998).

[98] *See Bolduc*, 248 Fed. Appx. 162, *supra* note 91.

[99] Except for them, none of the individuals whose cases are discussed below are listed in the National Registry.

Before examining how the statute has been applied in practice, it is worth reimagining Borchard's conception of the "deserving." With that understanding, we can better assess the extent to which the statute he drafted and interpretations of it diverge from those original principles.

One imagines that Borchard approached his effort with a sense of both modernism and moderation. He viewed the United States as far behind Europe; neither the federal government nor any state had enacted a wrongful conviction compensation statute by 1912. While many European countries had far more progressive laws on the books, Borchard started small, planting a seed to gain support and, perhaps, a long-term vision that with a legislative foot in the door more progressive reform could follow.

Borchard then had to argue that his aim was not to pay a lot of people who were arrested and not convicted of charged crimes, or who were convicted but whose convictions were overturned as some European countries did. The American "deserving" instead were a much smaller group of people who suffered a much more significant injustice. The Borchard "deserving" had three characteristics: 1) they were wrongly convicted, 2) they were innocent, and 3) they were blameless victims of a system that produced a bad outcome.

We thus see the origins of the timidity of Borchard's vision in the face of what he likely expected to be opposition by protectors of the public fisc. He believed fervently in his humanitarian cause and worked tirelessly to document cases of wrongful conviction to underscore the moral case for wrongful conviction compensation. But, he understood that there would be doubters – those skeptical of even plausible claims of wrongful conviction, those concerned about paying people whose convictions were set aside on technicalities, and those worried about scammers manipulating the scheme to get money.

Thus, his task, Congress' task, and the task of all state legislatures considering state wrongful conviction compensation statutes was to strike a delicate balance – to narrow the rules of eligibility to appease the doubters, but not so far as to disentitle those who truly merited compensation. To accomplish that goal, Borchard made one serious mistake that plagues us still.

How does a plaintiff[100] in a case seeking compensation show that they were wrongly convicted? For Borchard, it was when an appellate court on appeal or a trial jury on retrial said they were innocent.[101] This responded to the doubters' concerns about paying people whose convictions were set aside on a procedural technicality. Don't worry, responded Borchard, Unlike those whose convictions were reversed on procedural grounds who might nevertheless be guilty, these are clearly deserving people whose convictions were reversed on grounds of innocence or who were found innocent on retrial.[102] .

[100]I use the term plaintiff to describe criminal defendants who seek a certificate of innocence in the court of conviction even though that request is technically a part of the criminal docket. The courts have regarded such requests as civil in nature. *Betts v. United States*, 10 F.3d 1278, 1284 (7th Cir. 1993).

[101] Of course, as discussed, Attorney General Cummings pointed out that Borchard erroneously used the word "innocent" instead of "not guilty."

[102] This conception makes the separate requirement of a showing of innocence essentially duplicative.

The House Report poorly explained this distinction:

> 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.[103]

Attorney General Cummings' letter to the Senate Judiciary Committee echoes a similar concern about those benefitting from a technicality:

> Ideal justice would seem to require that in the rare and unusual instances in which a person who has served the whole or part of a term of imprisonment, is later found to be entirely innocent of the crime of which was convicted, should receive some redress. On the other hand, reversals 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.[104]

The sentence from the House Report and Cummings' letter are the only passages in the lengthy legislative history that explain the rationale for the language of the statute. In contrast to the Borchard and Wignore focus on the statute's humanitarian purpose, these passages are ones of exclusion. The caselaw almost uniformly cites the House Report, the Cummings letter and/or cases that do in support of limiting interpretations of the statute. [105] Rarely is the remedial purpose mentioned.

Cummings was not wrong. Borchard's modest conception of the statute does require a method for identifying those "few" who are factually innocent. Borchard's proposal, largely adopted by Congress in this respect, fails to do that properly. The problem lies in the nature of a wrongful conviction. As the National Institute of Justice explains, "[a] conviction may be classified as wrongful for two reasons: 1) The person convicted is factually innocent of the charges. 2) There were procedural errors that violated the convicted person's rights."[106] These categories are not always mutually exclusive; they can be overlapping.

However, Congress, worried about compensating all "procedural winners," overlooked the reality that some might also be factually innocent. After all, many Due Process violations arise from unconstitutional misconduct either intended to yield a wrongful conviction or willfully indifferent to the possibility.[107] Adopting language close to Borchard's, Congress required

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[103] H.R. REP. NO. 75-2299, at 2 (1938). What this passage probably meant was to evince concern that those whose convictions are reversed on procedural grounds could be still guilty of the *charged* crime, not a different offense.
[104] S. Rep. 75-202, *supra* note 56 at 3.
[105] *United States v. Racing Servs*., 580 F.3d 710, 712-13 (8th Cir. 2009); *United States v. Graham*, 608 F.3d 164, 171-72 (4th Cir. 2010); *Osborn*, 332 F.2d at 840.
[106] *Wrongful Conviction*, NAT'L INST. OF JUST., https://nij.ojp.gov/topics/justice-system-reform/wrongful-convictions; Brad Smith, Marvin Zalman & Angie Kiger, *How Justice System Officials View Wrongful Convictions*, 57(5) CRIME & DELINQ. 663, 664 (2011).
[107] Official misconduct was present in [blank] % of exonerations listed in the National Registry.

plaintiffs to show that they "were found not guilty of the offense of which he was convicted."[108] This language, in Section 2513(a)(1), seemingly precludes those whose convictions were overturned on Due Process-based fair trial grounds undeveloped in 1912, 1938, or 1948 from the opportunity to demonstrate their innocence because their convictions were not set aside on the ground that they were not guilty. Fearful of compensating all "procedural winners," Congress overcorrected and saw to it that none were. As it turned out, and explained below, Section 2513(a)(1) has proven to be a barrier to some claimants, but not as many as one might expect. A combination of generous interpretations of the provision in some cases and parties and courts ignoring it entirely others, has allowed some "procedural winners" to argue their innocence under Section 2513(a)(2). For almost of them, however, this luck is short-lived because the skepticism of "procedural winners" that underlies the drafting of Section 2513(a)(1) seeps into the consideration of their innocence under Section 2513(a)(2).

The House Report and Cummings letter make it clear that "procedural winners" are a disfavored class. Courts correctly observe that procedural reversal or acquittal on retrial are not tantamount to innocence. [109] From that accurate premise, some courts draw on the legislative history to support a misplaced suspicion that members of this disfavored class are not among those who are "truly" or "altogether" innocent and thus deserving of compensation. Thus is created a formidable burden on these plaintiffs to prove innocence – a high bar that is rarely met.

This burden manifests itself in what I call "room thinking." Courts say that they are applying a preponderance of the evidence standard to prove innocence, but in practice "room thinking" demands that plaintiffs refute all evidence of guilt – to clear the room of all doubt of innocence. I cannot prove the limited scope of the statute and narrow interpretations of it explain the extraordinary underutilization of it demonstrated in Section 2. Many other factors might explain it, but the potential correlation is striking, and one Edwin Borchard would surely regard as disappointing.

B. The Caselaw

Putting aside those pardoned,[110] the statute clearly requires the plaintiff to plead and prove three elements:

1. That the conviction was reversed or set aside on the ground that the plaintiff was not guilty of the offense *or* that they were found not guilty of such offense after retrial; *and*
2. That the plaintiff did commit any of the acts charged *or* that the acts or omissions charged did not constitute an offense against the United States, state or territory; *and*
3. That the plaintiff did not cause their prosecution by misconduct or neglect.[111]

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[108] 28 U.S.C. § 2513(a)(1).

[109] *Cf. Osborn v. United States*, 322 F.2d 835, 841-42 (5th Cir. 1963) (denying request for certificate of innocence resting solely on grounds that the conviction was reversed because the court-martial lacked jurisdiction); *United States v. Brunner*, 200 F.2d 276, 280 (6th Cir. 1952) ("[I]nnocence of the petitioner must be affirmatively established and neither a dismissal of a judgment of not guilty on technical grounds is enough.").

[110] I set this narrow category aside for the purpose of this analysis.

[111] *See United States v. Mills*, 773 F.3d 563, 566 (4th Cir. 2014); *Graham*, 608 F.3d 171 (emphasis added).

The statute limits the plaintiff to only one form of proof of these elements and no others: a certificate of innocence issued by the court in which he or she was wrongly convicted.[112] To obtain federal compensation, the exoneree must obtain a certificate of innocence from the convicting court properly setting forth the recitals required in Section 2513(a) and file it with the Court of Federal Claims.[113] If the Court finds the certificate to be in proper form, it simply has the ministerial task of entering judgment for the plaintiff.[114] The Court of Federal Claims has no power to vacate wrongful convictions, to issue certificates of innocence, or to review other courts' decisions not to issue one.[115]

There are two major areas of litigation in this area: whether the convicting court should issue the certificate and, whether, if it fails to do so or does not do so in accordance with the requirements of Section 2513, a case filed pursuant to Section 1495 in the Court of Federal Claims should be dismissed for lack of jurisdiction or for failure to state a claim for which relief can be granted.[116] My focus is on the first. I will examine each of these three prongs in detail and show that as to each there is a disconnect between the statutory language and either Borchard's vision or statutory intent, or both.

1. Prong 1

Section 2513(a) focuses on process after conviction and is straightforward to apply. In what I will call Prong 1(A), the reversal or vacatur of the conviction must be on grounds that the plaintiff is not guilty of the offense for which they were convicted. Alternatively, regardless of the reasons for the setting aside of the conviction, this Section can be satisfied by showing what Prong 1(B) requires – a finding of not guilty after retrial. If the plaintiff is not retried, Prong 1(B) is unavailable.

The difficulty is that reasonably common grounds for a vacatur, such as ineffective assistance of counsel, *Brady* violations, prosecutorial or police misconduct, witness perjury, or the reliance on unreliable forensic evidence, are typically not alone enough to satisfy Prong 1(A). If a conviction is set aside on any of these grounds, or other procedural infirmities,[117] it is often

[112] 28 U.S.C. § 2513(b); *Abu-Shawish*, 898 F.3d at 733.
[113] *See, e.g.*, *Burgess v. United States*, 20 Cl. Ct. 701, 704-05 (Cl. Ct. 1990).
[114] *See Roberson v. United States*, 124 F. Supp. 857, 863 (Ct.Cl. 1954). Of course, there may be disputes about the amount of compensation that should be awarded. *See, e.g.*, *Crooker v. United States*, 828 F.3d 1357 (Fed. Cir. 2016) (holding that the plaintiff is not entitled to compensation for time served that was credited to a subsequent sentence); *Lyons*, 99 Fed. Cl. 552 (awarding plaintiff $50,000 per year, the compensatory metric in place at the time of the filing of the complaint rather than $5,000 in compensation which was in place during the plaintiff's imprisonment).
[115] *See Johnson v. United States*, 411 Fed. Appx. 303, 305 (Fed. Cir. 2010) (per curiam); *Sykes v. United States*, 105 Fed. Cl. 231 (Ct. Cl. 2012).
[116] This second issue is discussed in detail in Bluestone, *supra* note 13. The author concludes that the failure to file a satisfactory certificate of innocence should not be regarded as a jurisdictional defect but, instead, as a failure of proof.
[117] *See Osborn*, 322 F.2d 835 (Prong 1(A) not satisfied in case in which a conviction of murder in court martial charging violation of provision in the Uniform Code of Military Justice was set aside because the provision does not apply in peace time); *Cratty v. United States*, 83 F.Supp. 897 (S.D. Ohio 1949) (denying request for certificate of innocence on Prong 1(A) grounds by plaintiff whose conviction was overturned on statute of limitations grounds).

because the court has found that the trial was unconstitutionally unfair, not because the defendant was not guilty.[118]

So understood, Prong 1(A) is a very substantial hurdle potentially affecting a large number of exonerees. Of the XXX wrongful convictions listed in the National Registry, one of these issues was present in XXx of them. It is also one that may not be in the minds of criminal defense attorneys pursuing post-conviction remedies. Their task is to try to get their clients' convictions set aside using arguments with the greatest likelihood of success. If that is a "technical or procedural" ground, so be it. Even if more difficult (at least in some cases) claims of innocence are also made, there is surely no guarantee that the appellate court would reach the innocence issue if it could reverse on the narrower ground.[119] And, if successful on this technical ground, the criminal defense attorney is certainly going to press the prosecutor to drop the charges. They would hardly welcome a retrial in the hope that, if successful, it could possibly lead to federal compensation. Fifty thousand dollars a year is not worth that sort of gamble. Prong 1 stands as a potentially powerful explanation for the paucity of attempts, much less successful ones, of exonerees to obtain federal compensation.

Hernandez v. United States,[120] a case featuring a defendant who is listed in the National Registry of Exonerations, is a good recent example of the problem. Maria Hernandez was convicted of a drug and money laundering conspiracy in which she was alleged to have been sent $125,000 by one of the conspirators that was actually sent to her sister-in-law, Maria Pena. As it happens, the address to which the money was sent had two houses – one that Hernandez left before the delivery and the other owned by Pena. Hernandez' attorney failed to investigate or present evidence on the obvious defenses. Without it, all that was left was a highly attenuated and circumstantial piece of evidence against her. She filed for a writ of habeas corpus.

The district judge found that Hernandez' attorney's ineffective assistance of counsel deprived her of a fair trial. Applying a standard that she would have to show "a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors,"[121] the district court concluded that absent counsel's errors, there was a probability of acquittal.[122] The prosecution then dropped the charges.

Hernandez petitioned the court for a certificate of innocence. The Fifth Circuit affirmed the denial of the petition. The court reasoned the relief awarded must be "on the ground that" or "because" she was not guilty.[123] Here, the relief was awarded on the grounds of ineffective

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[118] *See, e.g., People v. Trulove*, 2014 Cal. App. Unpub. LEXIS 26 (Cal. App. 2014) (prosecutorial misconduct and ineffective assistance of counsel); *Milke v. Ryan*, 711 F.3d 998 (9th Cr. 2013) (Brady violation); *Bunch v. State*, 964 N.E.2d 274 (Ind. App. 2012) (newly discovered evidence; Brady violation); *Tice v. Johnson*, 647 F.3d 87 (4th Cir. 2011) (ineffective assistance of counsel); *Gibson v. State*, 334 S.C. 515 (1999) (Brady violation); *McMillian v. State*, 616 So. 2d 933 (Ala. Crim. App. 1993) (suppression of exculpatory evidence).

[119] Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 139 (2010).

[120] *Hernandez*, 888 F.3d 219 (5th Cir. 2018).

[121] *United States v. Hernandez*, Civ. No. 02-cr-00692 (W.D. Tx. Mar. 31, 2014) at 10 [Dkt 339].

[122] *Id*. at 41.

[123] *Hernandez*, 888 F.3d at 223.

assistance of counsel - "procedural grounds." True, that procedural ground had a substantive component – whether there was a reasonable probability that without errors, the jury would have had reasonable doubt of guilt.[124] But that standard was lower than "not guilty" and thus the certificate of innocence was denied.[125]

The *Hernandez* case is one in which there is pretty compelling evidence of factual innocence. Yet, she was barred from trying to make that case because she failed Prong 1(A) and was not retried. Earlier, I explained the source of this language and how it overcorrected the problem it was trying to solve – the worry about compensating those whose reversals were based on "technical" or "procedural" grounds.[126] Certainly, Congress did not want to pay people who based *solely* on a "technical" reversal (or acquittal after retrial); that is not innocence.[127] But, Cummings' letter at least hints at the correct view that those whose convictions have been reversed on any grounds should at least be permitted to try to be among those few able to prove that they are "truly innocent."[128] After all, while reversal on technical or procedural grounds does not prove innocence, it does not preclude it either. [129]

United States v. Lyons, in contrast, involving one of the two federal exonerees to be compensated under the statute, skirts the language of the statute and arrives at the right result.[130] In Lyons, the court dismissed Lyons' convictions on *Brady* and *Giglio* grounds after evidence of egregious prosecutorial misconduct came to light.[131] Yet, the court found that Section 2513(a)(1) was satisfied because he was "exonerated as to all of the charges against him."[132] The statute says nothing about exoneration; it requires the conviction to be set aside on the grounds that Lyons was "not guilty of the offense of which he was convicted." Such was not the case for Lyons. His conviction was set aside on "procedural" grounds. Lyons was the beneficiary of a generous interpretation of the statute while Hernandez was not.

2. Prong 2

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[124] *Hernandez*, 888 F.3d at 223 (citations omitted).
[125] *Id.*
[126] H.R. REP. NO. 75-2299, at 2 (1938) ("The claimant cannot be one whose innocence is based on technical or procedural grounds…").
[127] H.R. REP. NO. 75-2299, at 2 (1938). *See Rigsbee*, 204 F.2d at 72; *Cratty*, 83 F. Supp. at 900.
[128] Indeed, one of the examples of "technical" reversal cited in the legislative history was insufficiency of the evidence. Yet, the courts have either held that such grounds satisfy Prong 1, *United States v. Grubbs*, 773 F.3d 726, 732 (6th Cir. 2014); *Pulungan v. United States*, 722 F.3d 983 (7th Cir. 2013); *see United States v. Gaskins*, 2019 U.S. Dist. LEXIS 226175 *5 (D.D.C. Dec. 13, 2019), or pass by it without mention. *See, e.g., Keegan*, 71 F. Supp. at 638.
[129] As noted earlier, there are, however, cases in which the petition could have been denied on Prong 1 grounds but was not. *United States v. Brunner*, 200 F.2d 276 (6th Cir. 1952), is an example. In *Brunner*, a man's conviction for theft of postal property was in large part the result of his wife's incriminating testimony. The conviction was reversed on the ground that her testimony was erroneously admitted. Brunner lost his petition for a certificate of innocence because the court used the erroneously admitted evidence against him to conclude that he was not factually innocent. *Id*. at 280. He could have been denied on Prong 1 grounds because the reversal of his conviction was not on the ground that he was not guilty of theft. *Cf. Mills*, 773 F.3d at 566 (reversal of conviction on a narrowed interpretation of federal criminal statute).
[130] *United States v. Lyons*, 726 F. Supp. 2d 1359 (M.D. Fl. 2010).
[131] *Id*. at 1364.
[132] *Id*. at 1366 (other charges were dropped by the prosecution).

Before addressing the substance of the innocence of Prong 2, let's first examine how courts have approached the process of applying Prong 2 to requests for a certificate of innocence. A very influential early decision under the 1938 version of the statute, *United States v. Keegan*,[133] laid the groundwork. The court correctly observed that Section 730 (like its successor statute) "is entirely silent as to what procedure a court should follow in determining whether or not a petitioner is entitled to a certificate."[134]

In the absence of statutory direction, the court made two initial and sensible decisions. First, the petition for a certificate of innocence was reassigned to the judge who tried the underlying criminal case. Who would know the evidence better than the trial judge?[135] Second, the court decided not to rest solely on the criminal trial record, but instead permitted the parties to present additional facts by affidavit.[136]

The absence of legislative guidance leaves the convicting court with substantial discretion to craft the procedures for deciding petitions for a certificate of innocence.[137] That discretion, however, has its limits at least in the Seventh Circuit. There, the trial judge should not simply conclude, without consideration of the trial record, that a reversal of a conviction or acquittal after retrial is, alone, insufficient to demonstrate factual innocence.[138] At a minimum, the parties must be permitted to offer new evidence and the court must take a "fresh look" at such evidence and relevant portions of the trial record to determine whether the petitioner is factually innocent.[139]

Keegan went on to observe that because the statutes effect a waiver of sovereign immunity, their terms are to be strictly construed.[140] The court did not mention another canon: that humanitarian statutes are to be interpreted liberally in accordance with their remedial

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[133] 71 F. Supp 623.
[134] *Id.* at 637
[135] Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 448 (2004). This can be a mixed blessing as Keegan found out. It is readily apparent in Judge Barksdale's opinion that he was not happy that the convictions in his court of these German sympathizers were overturned. *Keegan* is well known for its extensive examination of the legislative history of the statute. But, it is never criticized for very dubious grounds on which it denied Keegan's petition. *Keegan*, 71 F. Supp. at 638-40 (regarding as dicta to be ignored the Supreme Court's holding that the defendants were not guilty of counseling evasions because the Court directed the acquittal on conspiracy to counsel evasion charges even though the acquittal was not based on the law or facts of conspiracy); *see also Weiss v. United States*, 95 F. Supp. 176, 180 (S.D.N.Y. 1951) (Barksdale, J). (same and adding that the defendant in the same German Bund matter had not shown innocence because he and co-defendants were "disposed to counsel evasion"). In contrast, the district judge who presided over Abu-Shawish's first criminal trial in 2006 granted his petition for a certificate of innocence in 2020. *See United States v. Abu-Shawish*, Cr. No. 03-CR-211-1-JPS, 2020 U.S. Dist. LEXIS 132322 (E.D. Wis. Jul. 27, 2020).
[136] *Keegan*, 71 F. Supp. at 637-38. Although the judge thought it would rarely be necessary, he had no objection to hearing live witnesses if appropriate.
[137] *United States v. Mills*, 773 F.3d 563, 566 (4th Cir. 2014) (quoting *Graham*, 608 F.3d at 166); *Rigsbee v. United States*, 204 F.2d 70, 72 (D.C. Cir. 1953).
[138] *Abu-Shawish*, 898 F.3d at 736-37; *but see Rigsbee*, 204 F.2d at 72 (rejecting argument that acquittal after retrial requires issuance of certificate of innocence but engaging in no further record review or fact finding).
[139] *Abu-Shawish*, 898 F.3d at 733 (quoting *Betts* 10 F.3d 1278). The Magistrate Judge in *Abu-Shawish* subsequently had an evidentiary hearing on the petition for a certificate of innocence. Transcript of Evidentiary Hearing, United States v. Abu-Shawish, No. 03-cr-00211-JPS (E.D. Wis. Jan.12, 2017), ECF No. 339.
[140] *Keegan*, 71 F. Supp at 636.

purposes.[141] *Keegan* instead imposed a substantial burden of proof on the plaintiff: "[I]t would seem to me obvious that the burden is on the petitioner at least to the extent that the court should not grant the certificate unless it is satisfied from the record before it that the petitioner is altogether innocent."[142]

Neither *Keegan* nor the early cases specify the petitioner's burden of proof. More recent cases have held, without analysis, that the petitioner's burden of showing an entitlement to a certificate of innocence is by a preponderance of the evidence, consistent with the ordinary burden of proof in civil cases.[143] Nonetheless, that burden has generally been very difficult to shoulder.[144] A court of appeals has only once reversed a district court's denial of a certificate of innocence,[145] and two trial court awards of certificates of innocence have been reversed on appeal.[146]

This is the empirical support for the courts' reading of the statute as creating a "high bar"[147] to compensation. There are two sources for this high bar, one imposed by the language of the statute, and one self-imposed. As we have seen in Prong 1 and will see again in Prongs 2 and 3, there is unnecessary and/or unintended language in the statute which has the effect of potentially precluding some of the "deserving" from compensation. Those can be fixed by amendment.

In Prong 2 there are also discretionary approaches, based in part on an overreading of the legislative history, that require a showing beyond that contemplated in the preponderance standard, which raise the bar to compensation. These judicially imposed limitations can be corrected by reconceiving the manner in which district courts use their wide discretion to develop decision and fact-finding procedures.[148]

There are three aspects of Prong 2 worthy of closer examination, two of which are discussed below and one of which is discussed in Section IV in the context of the *Abu-Shawish* case. Recall, as discussed further below, that to satisfy Prong 2, plaintiffs must show that they "did not commit any of the acts charged" [Prong 2(A)] or that his "act, deeds, or omissions in connection with such charge constituted no offense" against the United States, state, territory or the District of Columbia.[149] [Prong 2(B)].

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[141] *See Burch v. Sec'y of Health & Human Servs.*, No. 99-946V, 2010 WL 1676767, at *6 (Fed. Cl. Apr. 9, 2010) (collecting cases); *McLean v. United States*, 73 F. Supp. 775, 778 (D.S.C. 1947) (interpreting federal wrongful conviction compensation statute liberally in accordance with its "beneficent purpose" to include convictions by court martial); *Osborn*, 322 F.2d at 839-40 (same); *United States v. Lyons*, 726 F. Supp. 2d 1359, 1365 (M.D. Fla. 2010).
[142] *Keegan*, 71 F. Supp at 636.
[143] *Abu-Shawish*, 898 F.3d at 739; *Holmes v. United States*, 898 F.3d 785, 789 (8th Cir. 2018); *Grubbs*, 773 F.3d at 733; *Lyons*, 726 F. Supp. 2d at 1366.
[144] *Graham*, 608 F.3d at 172.
[145] *Abu-Shawish*, 898 F.3d at 733 n.1.
[146] *Pulungan*, 722 F.3d at 986; *Brunner*, 200 F.2d 276.
[147] *Abu-Shawish*, 898 F.3d at 735 (citing *Pulungan*, 722 F.3d at 985).
[148] *Id*. at 736; *Betts*, 10 F.3d at 1286; *Keegan*, 71 F.Supp. at 636.
[149] 28 U.S.C. § 2513(a)(2).

1. Acts or Crimes?

What do we want the "deserving" to the innocent of? Borchard used the term "act" to describe it: "he must show that the act with which he was charged was not committed at all, or, if committed, was not committed by the accused."[150] Attorney General Cummings understood what he meant and suggested that the word "crime" be used instead.[151] The notion is that one is charged with and conceivably innocent of a crime, not an act.[152] As explained, the Senate included in S.2155, but then without explanation dropped Cummings' suggestion in S.750.

The 1938 version introduced for no obvious reason the language that exists today: the plaintiff did not "commit any of the *acts* charged."[153] The use of the words "any" and "acts" make it reasonably clear that the plaintiff must demonstrate that he or she did not commit each of the acts that constitute the crime, even if some of the acts are inherently innocent ones.[154] This creates an unnecessary bar for plaintiffs seeking federal wrongful conviction compensation.

The influential *Keegan* case illustrates why this crime/acts distinction is important. The case involved a petition for a certificate of innocence by a counsel to the German-American Bund who was found guilty of conspiracy during World War II to violate Section 11 of the Selective Training and Service Act of 1940. The relevant provision of Section 11(3) made it a crime to counsel, aid, or abet another "to evade registration or service," or to conspire with others to do so.[155]

Section 8(i) of the Act expressed the policy of the United States that employment vacancies caused by the draft were not to be filled by members of the Communist Party or the German-American Bund.[156] Regarding that provision to be unconstitutionally discriminatory, the Bund issued Command 37 notifying members that they must register for the draft, but urging them to refuse military service until Section 8(i) was revoked. Its purpose was to produce a test case to challenge the statute's constitutionality.[157]

After a month-long trial largely featuring evidence regarding the nature of the Bund from which the jury was to infer the intent and purpose of the Command, 24 Bund members, including Keegan, were convicted. The Supreme Court ultimately overturned Keegan's conviction on grounds of insufficiency of evidence.[158]

The Court held that the Bund Command's exhortation to its members to register for the draft, but *refuse* to serve if drafted was not a crime; counseling to *evade* service was.[159] It

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[150] S. DOC. NO. 62-974 at 33.
[151] S. REP. NO. 74-2339, *supra* note 42.
[152] For the court in *Mills*, that is proof that "acts charged" is not equivalent to "crimes." *Mills*, 773 F.3d at 570. The result was a statute that was "not necessarily more generous to a petitioner." *Id*.
[153] Pub. L. No. 75-539, *supra* note 60 (emphasis added).
[154] *See Mills*, 773 F.3d. at 571.
[155] 50 U.S.C.A. § 311(3), (6) (1940).
[156] *Id.* § 308(i).
[157] *Keegan v. United States*, 525 U.S. 478, 485 (1945).
[158] *Keegan*, 325 U.S. 478.
[159] *Keegan*, 325 U.S. at 487-88

reasoned that "the surest way of rendering oneself incapable of evading military service, of slipping away or escaping it, is to register."[160] To overtly urge resistance is not to counsel "stealthily and by guile" to evade the law.[161]

Noting that the government did not argue that the Bund Command alone violated the Act, the Court examined the prosecution's remaining evidence. It parsed through various statements made by the defendants and found that they showed, at most, that they "were the kind of men who might be inclined to counsel evasion of military service," not that they actually did.[162] The Court therefore held that the district court erred in denying their motion for acquittal. Not surprisingly, Keegan sought a certificate of innocence from the U.S. District Court for the Southern District of New York, in which he was convicted.

The court quickly concluded that Keegan had committed the acts for which he was charged.[163] That conclusion is surely correct; there was no dispute about what Keegan did. Those acts, however, did not constitute a crime. Nonetheless, the statute's focus on acts, rather than crimes, required the denial of his petition.

United States v. Mills[164] further illustrates the point. Mills, who had been previously convicted of seven North Carolina state felonies, sold two stolen firearms to a pawn shop. He was charged and convicted of the federal crime of being a felon in the possession of a firearm.[165] Following an intervening Fourth Circuit case,[166] Mills sought a writ of habeas corpus on the ground that, as reinterpreted, he was not a felon for purposes of the applicable federal statute because he could not have been imprisoned for over a year for any of the seven state crimes. The writ was granted.[167]

Prong 2(B) was not available to Mills because his possession of the firearms was a violation of North Carolina law.[168] As explained below, for Borchard, that alone would be sufficient to deny his petition, but since Prong 2(A) and 2(B) are stated in the disjunctive, Mills tried to satisfy Prong 2(A). That was a tall order. The majority explained that, "when an indictment charges more than one act, if a petitioner commits any of the acts charged, he is not eligible for a certificate of innocence."[169]

The majority reasoned that the term "acts" was neither equivalent to "crime" nor to the elements of the crime.[170] A crime consists of elements. Some of those elements are acts and

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[160] *Id*. at 487.
[161] *Id.* at 494.
[162] *Id*. at 488.
[163] *Keegan*, 71 F. Supp. at 638. The court denied the petition for a certificate of innocence on this and other grounds. *See also Weiss v. United States*, 95 F. Supp. 176, 179 (S.D.N.Y. 1951) (in a case brought by another of the German Bund defendants before the same judge deciding *Keegan*, the court held that "the fact is that he did commit all of the acts with which he was charged, upon proof whereof, his conviction followed.").
[164] 773 F.3d 563 (4th Cir. 2014).
[165] 18 U.S.C. § 922(g)(1).
[166] *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011).
[167] Mills v. United States, No. 5:03-CR-249-1-BR, 2012 WL 3594627, at *2 (E.D.N.C. Aug. 20, 2012).
[168] *Mills*, 773 F.3d at 567.
[169] *Mills*, 773 F.3d at 567.
[170] *Id.* at n.5.

some are a matter of one's status. After the intervening Fourth Circuit's decision, the combination of Mills' acts (possession) and status (a state felon) which were once regarded as a violation of a federal criminal statute no longer were. Nonetheless, the majority held that he indisputably committed one of the acts charged – possession of the firearms.[171] It held that "[t]he only plausible reading of § 2513 is that possessing a firearm is an "act charged" against Mills."[172] Possession of firearms alone[173] is not unlawful, but commission of that lawful act resulted in Mills' failure to satisfy Prong 2(A).

Because of the unfortunate language of the statute, three groups of people will likely be unable to satisfy Prong 2(A) and receive compensation. The first are those convicted of crimes which did not actually occur as a matter of fact. There are numerous examples of "no crime" cases of this sort in the National Registry,[174] such as the alleged murder being a suicide, the allegedly shaken baby's death was really by natural cause, the alleged child sexual abuse was made up through improper suggestion, or the alleged arson was really bad electrical wiring. In such cases, acts by the defendant which had appeared suspicious, like carrying the baby, knowing and being alone with the victim, or having access to the home in which there was a fire, have in retrospect an innocent explanation. But, since the plaintiff did these charged but innocent acts, they cannot satisfy Prong 2(A).

Second are those like Mille convicted of a crime, which ultimately is determined not to be crime as a matter of law. In these cases, a proper interpretation of the criminal statute yields a conclusion that those acts do not actually constitute a violation of that statute. An example would arise from errors in jury instructions that too broadly interpret the criminal statute.[175] Another might be cases in which the acts are legally justified, like self-defense.[176] The acts were committed, but they do not amount to a crime as a matter of law.

Third are cases in which a conviction is reversed on the ground of insufficiency of evidence. An example would be a plaintiff like Keegan who did the acts charged but which no reasonable juror could conclude beyond a reasonable doubt constitute a violation of a criminal statute.[177] A plaintiff might do everything the government said he did, but those acts alone are not enough to prove a crime.

There is one court who has resisted this reading of the statute: the Seventh Circuit in *Betts v. United States*,[178] the only case reversing the denial of a certificate of innocence. In *Betts*, an attorney was convicted of criminal contempt for failing to attend a court hearing. Criminal

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[171] *Id*. at 567.
[172] *Mills*, 773 F.3d at 569.
[173] Possession of firearms as a state felon, however, is unlawful. N.C. GEN. STAT. § 14-415.1(a).
[174] At the time of this writing, xxx% of the xxx exonerations in the Registry are "no crime" cases.
[175] *See, e.g. United States v. McDonnell*, 136 S.Ct. 2355 (U.S. 2016) (reversing conviction based on overly broad jury instruction defining "official act"); *Skilling v. United States*, 561 U.S. 358 (U.S. 2010) (reversing conviction based on overly broad jury instruction defining "honest services")
[176] *Rigsbee*, 204 F.2d at 72-73. *See also Marie v. State*, 302 Neb. 217 (Neb. 2019) (claim of self-defense is insufficient to demonstrate actual innocence under Nebraska Claims for Wrongful Conviction and Compensation Act). *But see Mills*, 773 F.3d at 569 (noting that mens rea can be separated from "acts charged").
[177] *House v. Bell*, 547 U.S. 518, 555 (2006); *Speight v. United States*, 599 A.2d 794, 798 (D.C. 1991).
[178] 10 F.3d 1278 (7th Cir. 1993).

contempt requires "a willful failure to comply with a lawful order of reasonable specificity."[179] The Seventh Circuit reversed Betts' conviction on the ground that the order that he appear in court was not sufficiently clear.[180] Thus, it could not have been willfully violated. As the court explained, "Betts' conduct, quite simply, did not constitute a crime; he is as the district court put it, 'factually innocent.'"[181]

Betts, though, clearly committed the acts (or omissions) that were charged. Presumably, among the acts or omissions charged were that he received notice of the order to appear in court and failed to show up to the hearing. Betts cannot say that he did not commit any of the acts charged. Nor could Keegan or Mills. So, Betts should fail the *Keegan* test. However, the *Betts* court interpreted the statute the way Cummings had wished it were written – by imagining that the statute's use of the term "acts" really meant "crime." The court flatly said so by concluding that Betts' conduct did not constitute a crime.[182] The result in *Betts* is the right one, and consistent with Borchard's vision, and Cummings' preference, but not the one directed by the statute.

That is not to say that plaintiffs found to have committed no federal crime would always satisfy Prong 2(A) if it used the word "crime." Doing so would be substantially easier in category two cases, above, like those of *Mills* and *Betts* because a finding of innocence turns on a conclusion of law. As discussed below, for "no crime" or insufficiency of evidence cases, categories one and three, the task may be more difficult, but not impossible. The plaintiff would need to advance some evidence of innocence and persuade the judge that it is more likely than not that he or she did not commit it. To that issue we turn next.

2. Preponderance or Room?

As noted, in the absence of statutory direction, the courts of conviction have broad discretion to determine how to make the Prong 2 judgment.[183] A key element of that procedure is the plaintiff's burden of proof. Recent cases have held that the plaintiff must prove innocence by a preponderance of the evidence, consistent with the burden in any standard civil suit.[184]

How have courts operationalized this standard? The easy cases are ones in which the plaintiff relies solely on a reversal or acquittal and offers no evidence of innocence.[185] Plaintiffs should lose those cases. For the harder cases in which the record contains some evidence of

[179] *Betts*, 927 F.2d at 986.
[180] *Betts*, 927 F.2d at 987.
[181] *Betts v. United States*, 10 F.3d at 1284. In this sense, *Betts* is a variation of the second category of cases described above where it is court order, rather than a statute, that is interpreted.
[182] *Id*. The court's failure to squarely address Prong 2(A) is illustrated in its holding in which it quotes Prong 1 and Prong 2(B), but not Prong 2(A). *Betts*, 10 F.3d at 1284. Perhaps the court implicitly decided the case on Prong 2(A) grounds, reading Prongs 2(A) and 2(B) as disjunctive requirements. The court, however, does not say that and uses language to suggest that it considered both prongs and found both satisfied. *Id*.
[183] *Abu-Shawish*, 898 F.3d at 736-37.
[184] *See supra* notes 143-146. Some state compensation statutes employ a clear and convicting evidence standard. *See, e.g.*, COLO. REV. STAT. ANN. § 13-65-101 (West); LA. STAT. ANN. § 15:572.8; OKLA. STAT. ANN. tit. 51, § 154 (West).
[185] *Rigsbee*, 204 F.2d at 72; *Osborn*, 322 F.2d at 842; *Abreu*, 2018 U.S. Dist. LEXIS 229911 at *16.

innocence, many courts have asked whether the facts in the record they review nevertheless "leave[] room for the possibility that the petitioner in fact committed the offense with which he was charged."[186]

Betts, the only case reversing the denial of a certificate of innocence, is responsible for this unfortunate "room" language. The Seventh Circuit tried to show why Betts' situation was different than the "technical" reversals of convictions unrelated to innocence. It listed many examples of reversals or vacaturs for reasons unrelated to innocence[187] – lack of jurisdiction (*Osborn*), expiration of the statute of limitations (*Cratty*), use of inadmissible evidence (*Brunner*), or failure of proof beyond a reasonable doubt (*Keegan*).[188]

In such cases, the ground of the reversal left "room" for the possibility that the plaintiff actually committed the crime. This was the point that the House Report inartfully tried to make.[189] And, this was the reason why Congress unwisely drafted Prong 1 that could bar the plaintiff from seeking to demonstrate innocence (as in practice they often did not) in Prong 2. In contrast, having misinterpreted the statute to require innocence of a crime, rather than acts as explained above, the *Betts* court held that there was no "room" because "[c]ontempt…was legally impossible."[190]

This logic helped *Betts* but left other cases out to dry. Prong 2(A) does not require that guilt be legally impossible. But, when the notion of "room" for guilt is combined with the passages of legislative history that require the plaintiff to be "truly innocent" or "altogether innocent," the burden placed on plaintiffs to demonstrate innocence often becomes unsurmountable.[191] In practice, it is far greater than the preponderance of evidence standard.

One good test for this idea is in insufficiency of evidence cases. Even though the legislative history regards these cases as examples of the kind of "technical" or "procedural" reversals that should fail Prong 1, these cases have been held to satisfy Prong 1.[192] Thus, insufficiency of evidence cases require a Prong 2(A) analysis and test how that prong is applied to situations in which there is some evidence or "room" for guilt, but not enough to convict.

United States v. Grubbs[193] offers an example. In *Grubbs*, police searched Mae Grubbs' house as part of investigation into stolen vehicles. Mae's son Paul lived with her in the house, but her son Ernest only visited on occasion, including the night before the search.[194] During the search, police found a nine-millimeter handgun in Paul's bed. Paul admitted that it was his gun

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[186] *Betts*, 927 F.2d at 1284; *Grubbs*, 773 F.3d at 733. *See also DeWitt v. D.C.*, 43 A.3d 291, 299 (D.C. 2012).

[187] Because these cases involved reversals on grounds other than a finding that the defendant was not guilty of the crime he was convicted, these cases should not have gotten past the Prong 1 stage.

[188] The parenthetical examples are mine, not the court's.

[189] H.R. REP. NO. 75-2299, at 2 (1938).

[190] *Pulungan*, 722 F.3d at 985.

[191] *See, e.g., Racing Servs*, 580 F.3d at 713.

[192] *Grubbs*, 773 F.3d at 732; *Osborn*, 322 F.2d at 840; *United States v. Valle*, 2020 U.S.Dist. LEXIS 107519 at *20 (S.D.N.Y. June 18, 2020). In other insufficiency cases, the analysis skips Prong 1. *United States v. Racing Servs*., 580 F.3d 710 (8th Cir. 2009); *Holmes v. United States*, 898 F.3d 785 (8th Cir. 2018).

[193] *Grubbs*, 773 F.3d 726.

[194] *United States v. Grubbs*. 506 F.3d 434, 436 (6th Cir. 2014).

bought at a flea market.[195] Mae testified that Ernest slept in a different room, and Ernest's fingerprints were not found on the weapon.[196] Ernest, though, was convicted of being a felon in possession of a handgun. The conviction was later overturned for lack of sufficient evidence.[197] Ernest then petitioned for a certificate of innocence. What tied the gun to Ernest?

A neighbor, Jones, testified that sometime previously Ernest encountered him at night as he was driving home. Apparently, Ernest accused Jones of having an affair with Ernest's sister. Jones and later Jones' wife saw that Ernest had a dark colored automatic handgun. However, neither of them could testify that it was the gun retrieved from Paul's bed.[198]

Is there "room" to conclude that the gun was Ernest's? Sure. Jones and his wife saw Ernest with a gun bearing some characteristics in common with the seized weapon. But, is it more likely than not that it was not Ernest's gun? In overturning his conviction, the Sixth Circuit explained, "[a]t best, this testimony suggests that Grubbs possessed a black, semiautomatic firearm at some point before the arrest. It is a tenuous leap…to infer from Grubbs' earlier possession that he constructively possessed the same black, semi-automatic gun recovered from his brother's bedroom at the time of the arrest. Although it is true that the recovered firearm matched Jones's generic description, these attributes are too common to support a conviction for constructive possession."[199] The court further observed that there was no temporal connection between Jones' glimpse of the gun and its seizure.[200]

Moreover, this is not a case in which the plaintiff relied solely on the lack of persuasive evidence of guilt. He also offered exculpatory evidence – the gun was in Paul's bed, Paul admitted owning it, and Paul testified that he was with Ernest during the conversation with Jones and had not seen a gun.[201] Perhaps Paul was covering for his brother, but there was apparently no evidence introduced to challenge his credibility.[202]

Nevertheless, the Sixth Circuit upheld the trial court's denial of the certificate of innocence. It found persuasive that Jones' wife saw Ernest with a gun and Jones saw a similar gun not long before the search.[203] The court said that it was applying the preponderance of the evidence standard, but when weighing the evidence for and against the gun being Ernest's, it is very hard to conclude that the balance weighs in favor of the government.

Because Ernest could not prove definitively a negative – that the gun was not his – there was "room" for the conclusion that it was. Thus, it is easy for "room thinking" courts to conclude that the plaintiff has failed to demonstrate they are "truly" or "altogether" innocent. But as Professor Keith Findlay explains, "to demand certainty is to demand the impossible."[204]

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[195] *Id*. at 437.
[196] *Id*. at 437.
[197] *Id*.
[198] *Grubbs*, 773 F.3d at 729-30; *Grubbs*, 506 F.3d at 437.
[199] *Grubbs*, 506 F.3d at 441.
[200] *Id*. at 442.
[201] *Grubbs*, 773 F.3d at 733.
[202] *Grubbs*, 506 F.3d at 437.
[203] *Grubbs*, 773 F.3d at 733-34.
[204] Keith A. Findley, *supra* note 57, at 1162.

Our modern conception of innocence, if anything, is more demanding now in a DNA world than it was in Borchard's a century ago.[205]

One wonders whether this heavy burden of showing innocence is really what Borchard had in mind. Recall that Borchard's model innocent man was Andrew Toth. How was he so sure that Toth was innocent? The evidence that led to his release was the death bed confession of the actual killer.[206] Isn't there "room" to think that the confession might be fabricated?[207]

Ultimately, weighing the evidence in these "room" cases and determining whether the plaintiff has shown innocence by a preponderance of the evidence is, in close cases, a sensitive and difficult judicial exercise. For example, in *United States v. Holmes*, the plaintiff and a police officer offered competing narratives and the officer's credibility had not been challenged, a district judge found to have the discretion to "credit either witness and to interpret the evidence either way."[208]

When a court must weigh credibility, that is a rational conclusion to draw, but not simply because there is some credible evidence of guilt. The preponderance standard does not require the plaintiff to rebut or clear the room of every inculpatory fact. It requires him to demonstrate that it is more likely than not that he did not commit the crime. That contemplates the possibility that there is evidence consistent with guilt, but that other facts outweigh them.

The problem with "room" thinking is that it trains the court's focus on evidence of guilt and essentially presumes it in a way that effectively imposes a burden more rigorous than that contemplated by the preponderance standard. There is no obvious way to amend the statute to solve this problem. A possible solution, however, resides in the recognition that courts have wide discretion to decide petitions for certificates of innocence. An appropriate way to exercise that discretion while still remaining true to the preponderance standard is to borrow the concept of burden shifting from Title VII cases.

In *McDonnell Douglas v. Green*[209] the Supreme Court developed a procedure to implement the plaintiff's burden of persuasion in Title VII employment discrimination cases.[210]

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[205] *Id*. at 1188-89 (arguing that DNA evidence can mislead courts into thinking that it now serves as the only conclusive evidence of innocence).

[206] THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 5.

[207] Dying declarations are admissible in court as an exception to the hearsay rule. FED. R. EVID. 804(b)(2). They are allowed because they are considered necessary and reliable. *See* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1374 (1985). However, dying declarations have been questioned as unreliable since as early as 1877. Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1425 (2010) (reviewing critique of dying declarations).

[208] *Holmes*, 898 F.3d at 790; *see Finley v. United States*, 2008 U.S. Dist. LEXIS 107006 (E.D. Cal. Jun. 26, 2008) (finding that petitioner had not shown by a preponderance of the evidence that he did not have a willful state of mind with respect to a fraud).

[209] 411 U.S. 792 (1973).

[210] This has been replicated in other contexts as well. *See Babb v. Wilkie*, 140 S. Ct. 1168, 1171 (2020) (discrimination under ADEA's federal sector provision); *Ohio v. Am. Express Co*., 138 S. Ct. 2274, 2284 (2018) (explaining burden shifting in antitrust case); *Morris v. Mathews*, 106 S. Ct. 1032, 1038 (1986) (explaining burden shifting in double jeopardy cases); *Metro. Stevedore Co. v. Rambo*, 117 S. Ct. 1953, 1964 (1997) (explaining burden shifting in workers' compensation act claim).

The plaintiff has the initial burden of showing by a preponderance of the evidence a *prima facie* case of discrimination. This burden is "not onerous,"[211] but serves to "eliminate any non-discriminatory reasons" for the action against the plaintiff.[212] Put another way, the plaintiff must show that the act was "more likely than not" due to discrimination.[213] Satisfying it creates a presumption that unlawful intentional discrimination has occurred.[214] Given that presumption, if the defendant fails to respond, the plaintiff prevails.[215]

Satisfying the *prima facie* case shifts the burden of production to the defendant to set forth a non-discriminatory rationale for the employment decision.[216] Because that burden is of production, not persuasion, the defendant's rationale need not be demonstrated by a preponderance of the evidence.[217] If the defendant has satisfied its burden of production by meeting the prima facie case with sufficient clarity so that the plaintiff can respond in full,[218] the presumption of discrimination disappears.[219]

The burden of persuasion then shifts back to the plaintiff.[220] The plaintiff is provided a full and fair opportunity to shoulder its burden of showing by a preponderance of the evidence that the articulated rationale is actually a pretext for unlawful discrimination.[221] The plaintiff now must persuade the court either that "a discriminatory reason more likely motivated the employer or… the employer's proffered explanation is unworthy of credence."[222] Facts underlying the prima facie case and inferences from those facts can be used at this stage.[223]

In this context, courts can operationalize this burden shifting paradigm by imposing on plaintiffs the initial burden of setting forth a prima facie case of innocence. The plaintiff may not rely solely on the reversal or acquittal.[224] Nor would it be sufficient simply to identify pre-existing or newly discovered weaknesses in the government's case, such as the recantation of witness testimony. Rather, the plaintiff would be required to advance some affirmative evidence of factual innocence.

If the plaintiff is able to do so, the burden of production would then shift to the government to refute that *prima facie* case by seeking to undercut the evidence of innocence, to set forth existing or new evidence of guilt, or both. If the court concludes that the evidence of innocence outweighs the evidence of guilt, it should issue the certificate. If it is unconvinced,

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[211] *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).
[212] *Id*. (citation omitted).
[213] *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978).
[214] *Id*.
[215] *Id*. at 254.
[216] *Id*. at 254-55.
[217] *Id*. at 256-58.
[218] *Burdine*, 450 U.S. at 254.
[219] *Id.* at 253; *Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 143 (2000).
[220] *Burdine*, 450 U.S. at 254.
[221] *Id*. at 256.
[222] *Id*. (citing *Green*, 411 U.S. at 807).
[223] *Sanderson*, 530 U.S. at 143.
[224] *Osborn*, 322 F.2d at 842; *Abreu*, 2018 U.S. Dist. LEXIS 229911 at *16.

the burden of production shifts back to the plaintiff to attempt to rebut the government's evidence of guilt and/or its arguments casting doubt on the evidence of innocence.

The burden of persuasion remains on the plaintiff throughout. The burden shifting concept expands the court's narrow focus on the remaining evidence of guilt and whether the plaintiff can entirely explain it in a way that convinces the court he or she is altogether or truly innocent. The court's attention returns to evaluating whether plaintiff has established that it is more likely than not that they are innocent.

United States v. Herrera[225] is an example of a case which could result in a different outcome if burden shifting replaced room thinking. Herrera was tried and convicted on two counts of bank robbery. Surveillance video showed a Hispanic man with glasses and a Red Sox cap handing a teller a robbery note. As the video was publicized, several people, including a jailer, Herrera's cousin, and three tellers recognized the man as Herrera and so testified.[226]

After Herrera was convicted and incarcerated, there was a very similar third Texas bank robbery involving a Hispanic male with glasses and a different cap. A woman called Crime Stoppers and said she had information that one of the earlier robberies was committed by her boyfriend and his cousin, neither of whom were Herrera. Herrera filed a motion for a new trial and at a subsequent evidentiary hearing, Herrera's cousin withdrew her positive identification and the three tellers identified the robber as someone much smaller than Herrera. The judge granted the motion for a new trial, finding that Herrera would "probably" be innocent in light of the new evidence, and he was not retried.[227]

Herrera petitioned for a certificate of innocence. The judge denied the petition, using "room thinking." The court properly reviewed the newly discovered evidence. But the judge concluded that the evidence did not exclude Herrera as the robber.[228] The court imposed on Herrera the burden of refuting all inculpatory evidence and his failure to do so left the "room" necessary to deny the petition. The court concluded that the "new physical evidence and testimony do not definitely exclude Herrera, and there is still substantial evidence that implicates him as the perpetrator."[229] The judge focused entirely on the "room," and said there was substantial evidence in it rather than remaining true to the preponderance standard.[230]

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[225] *United States v. Herrera*, 2016 U.S. Dist. LEXIS 167265 (N.D.Tx. Dec. 5, 2016).
[226] *Id*. at *2.
[227] *Herrera*, 2016 U.S. Dist. LEXIS 167265 at *3-4.
[228] *Herrera*, 2016 U.S. Dist. LEXIS 167265 at *10 (the photo of the robber in the third robbery was "ambiguous" and did not "definitely depict" the person in the first two); *11-13 (testimony of Herrera's cousin and the robber's girlfriend does not "prove[] Herrera's innocence); *14 (discrepancy in physical descriptions do not "definitively exclude" Herrera).
[229] *Herrera*, 2016 U.S. Dist. LEXIS 167265 at *15. *See also United States v. Abreu*, 2018 U.S. Dist. LEXIS 229911 at *14 (S.D. Fla. Sept. 18, 2018) ("there is still room for the possibility that Defendant committed the crime").
[230] A similar case is *United States v. Gaskins*, 2019 U.S. Dist. LEXIS 226175 (D.D.C. Dec. 13, 2019). Gaskins was convicted of drug conspiracy charges. On appeal, the D.C. Circuit held not merely that the evidence of guilt was insufficient, but that there was "no affirmative evidence that Gaskins knowingly joined the narcotics conspiracy or had the specific intent to further its aims." *United States v. Gaskins*, 690 F.3d 569, 577 (D.C. Cir. 2012). The District Court nevertheless denied the petition for a certificate of innocence holding that it was more likely than not

A burden shifting approach would require the court to look at the evidence from different perspectives, rather than training its sights single-mindedly on demanding that the plaintiff dispel all doubt of innocence. Herrera would need to first make a prima facie case of innocence. Here, this would include evidence from the robber's boyfriend that he confessed to the crime. If that evidence is credible and reliable, the burden would shift to the government to offer evidence of guilt. The focus of attention is now where it belongs. What evidence of guilt remains? How credible, reliable, and persuasive is that evidence?

If the evidence is sufficient to overcome the plaintiff's evidence of innocence, the burden of production shifts to Herrera to counter the evidence of guilt. The court's ultimate task is not to determine whether Herrera has sufficient evidence to "definitely" exclude him, but whether, on balance, the evidence of innocence outweighs the evidence of guilt. "Room thinking" precludes evidence balancing. To be sure, it is possible that the court would come to the same conclusion, but it would approach the question in the way commanded by the statute and by being faithful to the preponderance standard.

I do not suggest that all courts are guilty of "room thinking." Take the example of Stephen Jones, one of the two men listed on the National Registry who were granted federal certificates of innocence.[231] A jury convicted Jones of possessing cocaine with an intent to distribute and he was sentenced to 20 years in prison. He later moved to vacate his conviction on the ground that his conviction rested largely on the testimony of a police officer, Carr, who testified that he saw Jones with a bag of cocaine. Well after the trial, Carr pled guilty to five felony counts relating to corruption in the course of his duties as an officer. The United States joined the motion and Jones' judgment of conviction was vacated.[232]

Police obtained a search warrant to search Jones' parents' apartment based on Carr's affidavit that said an informant told him that someone other than Jones was selling cocaine from the apartment.[233] When Carr did the search, he claimed to have seen Jones there with cocaine. Jones had shown that he did not live in the apartment and, without the officer's testimony, there was no evidence that Jones possessed cocaine.[234] The court held that "[w]hile reversal of a conviction based on the insufficiency of the prosecution's evidence is not enough to entitle a movant to a certificate of innocence…that is not the case here. When the non-credible evidence is stripped away, all that remains is the evidence of Jones' presence at the apartment. That act, however, was not a crime."[235]

"Room thinking" might lead a court to focus on the evidence of guilt from Carr and to conclude that just because Carr was corrupt in his work on other cases, it does not mean

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that "Gaskins knew of the conspiracy and participated in it anyway." *Gaskins*, 2019 U.S. Dist. LEXIS 226175 at *10.

[231] The opinion granting the petition for the other, Antonino Lyons, is *United States v. Lyons*, 726 F.Supp.2d 1359 (M.D. Fla. 2010).

[232] *Jones v. United States*, 2011 U.S. Dist. LEXIS 51029, at *3-5 (E.D. Mo. May 12, 2011).

[233] *Id*. at 4-5.

[234] *Jones*, at 2011 U.S. Dist. LEXIS 51029, at *5-6.

[235] *Id*. As discussed above, if the court had regarded Jones' presence at the apartment as an "act" for purposes of Prong 2(A), the petition would have been denied.

definitely that he was lying in this case. His lack of credibility may justify setting aside the conviction, but if Jones had the burden to clear the room of evidence of guilt, that would require an admission from Carr that he had lied. Jones, instead, is an example of unstated burden shifting. Jones offered evidence of innocence – that he did not live in the apartment and so any cocaine there was not his. Indeed, police suspected that another person was dealing drugs there. The burden of production then shifts to the government to provide some credible and reliable evidence of guilt and it could not do so.[236]

Prong 3

Prong 3 places the burden on the plaintiff to demonstrate that "he did not by misconduct or neglect cause or bring about his own prosecution."[237] It contemplates that there are situations in which a wrongly convicted person who is undeniably innocent of the acts charged or other offenses should nevertheless be denied compensation. Prong 3 raises two important interpretive questions. First, what is the nature of that disqualifying behavior? Second, what is the required causal connection between it and the prosecution?

Unlike the other prongs, the 1938 statute used precisely the same language Borchard drafted in 1912: "he has not either intentionally, or by willful misconduct, or negligence, contributed to bring about his arrest or conviction."[238] For reasons not stated in the legislative history, the 1948 recodification arguably narrows the bar by using the term "cause" rather than "contribute," and "prosecution" rather than "arrest or conviction."

In Borchard's survey of the European approaches to wrongful conviction compensation, he noted that "[t]he statutes of some of the countries, such as Germany, Hungary, Norway, and Sweden, specifically mention certain limitations in cases where the detention or conviction may be said to have been due to the act of the claimant himself – thus, for example, where there has been an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion, or an analogous attempt to suppress such testimony or opinion"[239] Borchard adopted that bar, but his rationale was brief: "[t]his carries out simply the equitable maxim that no one shall profit by his own wrong or come into court with unclean hands." [240]

There are, in these examples which I will call the "Borchard list," two types of disqualifying misconduct. The first are suspicious actions taken by an innocent person that one would expect a guilty person would do during or after a crime (flee, remove inculpatory evidence, induce false exculpatory evidence) to avoid detection or conviction. The second are

[236] *United States v. Lyons*, 726 F. Supp. 2d 1359 (M.D. Fla. 2010), the only other case involving a successful claim for compensation under the federal statute, involved the same kind of analysis. In *Lyons*, the government relied on evidence of Lyons' being a drug dealer to support its case that he had the intent required to commit a carjacking and engage in the sale of counterfeit goods. When the drug charges, based largely on testimony from 26 jailhouse snitches, were dismissed, the evidence supporting the intent required for the other crimes eroded even though there might yet be room to find guilt. *See Lyons*, 726 F. Supp. 2d at 1367-68.
[237] 28 U.S.C. § 2513(a)(2).
[238] 18 U.S.C. § 730.
[239] S. REP. NO. 74-2339, *supra* note 42; *Keegan*, 71 F. Supp. at 638.
[240] S. DOC. NO. 62-974 at 32.

actions taken by an innocent person for the opposite reason – to cast blame on themselves so as to take the fall for the actual culprit (false confession, removal of exculpatory evidence, inducing false inculpatory testimony). In both categories, the disqualifying acts need not themselves be crimes, but they "mislead[] the authorities as to his culpability."[241]

The problem with the Borchard list is two-fold. First, it does not seem to cover all of the possible behaviors contemplated by the substantially broader language of the statute. Surely, one could imagine forms of misconduct that arguably should be disqualifying but which are not ones intended to mislead the authorities toward or away from the plaintiff. Nor does the Borchard list include behavior that is negligent rather than intentional, leaving it uncertain what that type of behavior might be. Second, the Borchard list only includes conduct occurring after the alleged crime has occurred and is closely tied to the crime. One might imagine disqualifying acts that occur before or during the crime and that involve conduct separate and apart from the crime. This mismatch between the Borchard list and the statutory language has been a source of difficulty.

At the same time, the broad statutory language could be read to encompass acts or omissions that appear suspicious (having a gun, driving a stolen car, being around drugs, associating with criminals) and begin a chain of events that lead to prosecution. After all, except in cases involving efforts to frame a person from the outset, there is usually something that causes the future exoneree to first become a suspect and later a criminal defendant. Viewed retrospectively, these acts appear innocent or explainable. But, one can prospectively view those acts as misconduct or neglect that caused the prosecution.

Worse are cases in which the conduct started a chain of events that included police and/or prosecutorial misconduct. The statute does not by its terms qualify the term "prosecution" with words like "fair," "just," "proper" or "lawful." As discussed further below, sometimes government misconduct is the proximate or supervening cause of the prosecution, not the future plaintiff's neglect or misconduct. But the statute does not define "cause."

Let's begin with the nature and scope of "misconduct." Recall the *Betts* case, the one involving the lawyer convicted of criminal contempt when he failed to attend a court hearing.[242] He knew when the hearing was and wrote a letter to the judge saying that he and his client could not attend.[243] Later, Betts did not show up to his show cause order because he was hiding in another county to avoid an arrest warrant.[244] And, he did not show up for a rescheduled hearing.

Betts could not have handled this situation worse and his prosecution hardly seems unjustified. But, the Seventh Circuit earlier vacated his conviction and found him innocent on grounds that make his behavior seem at least somewhat less blameworthy. Some might think it unfair to deny him a certificate of innocence. Yet, a fair reading of the misconduct provision points in the other direction.

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[241] *Betts*, 10 F.3d at 1285.
[242] *Id*.
[243] *Id*. at 1280.
[244] *Id*. at 1281.

The Seventh Circuit seized on the *Keegan* court's view that the language of the provision was "rather indefinite."[245] In order to understand the contours of disqualifying misconduct, the court examined the Borchard list[246] and described it as barring compensation for those who would "have acted or failed to act in such a way as to mislead the authorities into thinking he had committed the offense" or who have "it within his means to avoid prosecution but elects not to do so, instead acting in such a way as to ensure it."[247] Betts' failure to timely alert the court that he would not attend and his failure to attend these hearings were not designed to cast blame on another or himself.[248]

This narrow interpretation of misconduct makes the Prong 3 analysis much easier for courts. The *Betts* court wanted to avoid having "to assess the virtue of a petitioner's behavior even when it does not amount to a criminal offense."[249] There is no reason to make moral judgments that distinguish misconduct from something less. Moreover, the *Betts* court suggested that Prong 3's disqualifying neglect or misconduct cannot be the allegedly criminal act itself, of which the plaintiff has been proven innocent.[250] Rather, the disqualifying misconduct has to be something separate and apart from the acts underlying the crime itself, like those actions in the Borchard list.[251]

The Fourth Circuit in *United States v. Graham,*[252] however, took a much different approach.[253] Graham was the Executive Director of non-profits focused on the aging.[254] His employment contract permitted him to convert his sick leave into cash if he became ill or his contract ended.[255] Nonetheless, without satisfying either those conditions, in 2003 Graham asked the Board, which had an average age of over 80, to convert some sick leave to cash and it agreed.[256] Graham converted additional sick leave hours to cash on his own in 2004.[257] The Board found out and ordered Graham to return the funds, which he did.[258] He was later indicted on 39 counts of fraud, tax violations, and embezzlement.[259]

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[245] *Betts*, 10 F.3d at 1284 (quoting *Keegan*, 71 F. Supp. at 638).
[246] *Id*. at 1285 (quoting *Keegan*, 71 F. Supp. at 638).
[247] *Id*. at 1285 ("there must be either an affirmative act or an omission by the petitioner that misleads the authorities as to his culpability).
[248] *Id*. at 1286.
[249] *Id*. at 1285.
[250] *Id*. at 1285. As the dissent in Graham put it, "It must follow that to give meaning to all of the words in the statute, one cannot 'cause' one's one prosecution by engaging in the very conduct which was found to be non-criminal in the first part of the inquiry." *Graham*, 608 F.3d at 180 (Gregory, J., dissenting).
[251] *Betts*, 10 F.3d at 1285; *Graham*, 608 F.3d at 181 (Gregory, J., dissenting) (interpreting *Betts* as requiring "additional misconduct" that misleads the authorities).
[252] *Graham*, 608 F.3d 164.
[253] *See* Amy Oxley, *Not Innocent Enough: The Denial of A Certificate of Innocence Based on Neglect in United States v. Graham*, 608 F.3d 164 (4th Cir. 2010), 36 S. ILL. U. L.J. 425, 426 (2012).
[254] *Graham*, 608 F.3d at 167.
[255] *Id*.
[256] *Id*. at 170.
[257] *Id*.
[258] *Id*. at 167.
[259] *Id*. at 166.

Following a bench trial, Graham was acquitted on all counts except the charge of embezzlement arising from the 2004 sick leave conversion.[260] The court acquitted him of the 2003 conversion on the ground that his request for Board approval undercut his intent to steal.[261] Presumably, if he intended to steal, he would not have raised the issue with the Board.[262] Such, though, was the scenario with the 2004 conversion.

The Fourth Circuit reversed the conviction on appeal.[263] It reasoned that since the Board had in 2003 permitted him to cash in his sick leave, Graham's subsequent cash-out without Board approval was also insufficient to demonstrate an intent to steal.[264] The Board effectively altered the terms of his employment contract. Graham then sought a certificate of innocence, which was denied by the district court.[265] It reasoned that Graham's actions constituted neglect and that it brought about his prosecution.[266] The Fourth Circuit affirmed.[267]

Based on a plain reading of the statute, it is not hard to see why. The court did not cite the Borchard list and try to shoehorn what Graham did into one of those examples. The court hewed closely instead to what Congress actually wrote.[268] Contrary to the court in *Betts*, the Court held that the statute's use of the terms misconduct or neglect required it to make a moral assessment about the petitioner's behavior.[269]

Although one could view Graham's conduct as misconduct, the Fourth Circuit agreed with the district court that Graham's self-dealing constituted "neglect."[270] This is just not the sort of thing that non-profit directors should be doing; he lined his pockets at the expense of his organization. On the other hand, the basis for the determination of innocence was that Graham's board permitted him to do what he did.[271] Perhaps Graham was too pushy and took advantage of an unsophisticated and trusting board, but he did ask and the permission resulted in a de facto amendment to his contract.

The majority opinion in *Graham* rejected the notion advanced by the dissent and suggested in *Betts* that the disqualifying misconduct be something separate and apart from the acts charged.[272] Graham's distasteful but non-criminal self-dealing was squarely part and parcel of what the government charged. The majority said that if the disqualifying misconduct had to be something different from the charged acts, then the statute would have included language like "separate", "other," additional" or "subsequent", so indicating.[273]

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[260] *U.S v. Graham*, No. CRIM 506-00025, 2006 WL 2527613, at *5 (S.D.W.Va. Aug. 30, 2006).
[261] *Id*. at *1.
[262] *Id*.
[263] *United States v. Graham*, 269 F. App'x 281 (4th Cir. 2008).
[264] *Id*. at 286.
[265] *United States v. Graham*, 595 F. Supp. 2d 681 (S.D.W.Va. 2008).
[266] *Id*. at 686.
[267] *Graham*, 608 F.3d 164.
[268] *Id*. at 171.
[269] *Id*. at 170.
[270] *Betts*, 10 F.3d at 1273.
[271] See Amy Oxley, *supra* note 253, at 440.
[272] *Graham*, 608 F.3d at 175-76.
[273] *Id*. at 175

One sees the Fourth Circuit's dilemma as the one that the *Betts* court tried to avoid. The *Betts* court acknowledged that Betts' behavior was not "upstanding" and not "fitting behavior for an officer of the court."[274] It did not want to get into the business of finding misconduct in questionable but legal behavior because doing so might yield an uncomfortable conclusion that entirely lawful conduct can be disqualifying.[275] The Fourth Circuit held, in effect, that the statute required it to assess the plaintiff's moral virtue and, once it did, the statute gave it no choice but to find that Graham lost on Prong 3.

United States v. Valle[276] followed the *Graham* approach. Valle was a New York police officer who, over an extended period of time, discussed with others on the dark Web his ideas to kidnap and sexually torture his wife and other women.[277] He was convicted on conspiracy to kidnap, but the court set aside the conviction for lack of sufficient evidence. The court held that no reasonable juror could regard these conversations as reflective of actual intent rather than fantasy role playing, or could reasonably conclude that these conversations culminated in an actual plan to kidnap. Valle sought a certificate of innocence.[278]

If the word "misconduct" means anything at all, it has to cover Valle's horrible actions. No difficult moral lines need be drawn here. Any reasonable judge would recoil at having to grant someone like Valle a certificate of innocence. It is therefore not surprising that the court rejected Valle's argument that the court should follow *Betts* and require the disqualifying misconduct to be something separate and apart from the acts charged. The *Valle* instead followed *Graham* making the result an easy one – Valle's vile online chatting was discovered by police and resulted in his prosecution.

The *Valle* court took comfort that in many cases, it would not be necessary to make these virtue assessments. It offered as examples, "where a defendant is convicted based on the perjured testimony of a cooperating witness or law enforcement officer."[279] That confuses the concepts of misconduct and causation. The misconduct of third parties or the government may be the proximate cause of the prosecution (or conviction) and thus make the lack of causation easier to prove by the plaintiff. But, Prong 3 requires the court to focus initially on the behavior of the plaintiff, not others.

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[274] *Betts*, 10 F.3d at 1285.

[275] To be sure, that behavior also has to cause the prosecution. When that behavior is the basis for the prosecution, that is a hard conclusion to avoid. The *Betts* court tried, in dicta, to say that it was not the proximate cause of the prosecution. That was the misreading of the order to command his presence in court on a particular date and time. *Id*. at 1285-86.

[276] 2020 U.S. Dist LEXIS 107519 (S.D.N.Y Jun. 18, 2020).

[277] *Id*. at *2.

[278] The Court held that Valle met Prong 2 because "it is more likely than not the case that Valle is innocent of the kidnapping conspiracy charge…" *Id.* at *21. The Court misreads Prong 2(A). The question is not whether he is innocent of the crime, but whether he committed any of the acts charged. Here, those acts would certainly have included engaging in these horrible conversations. The *Mills* court would have had no difficulty rejecting the petition on that ground.

[279] *Id*. at *27.

An example is *Gates v. District of Columbia*,[280] a case in which the plaintiff sought compensation under the D.C. Unjust Imprisonment Act.[281] Gates alleged and a jury later agreed that two police officers induced a snitch to falsely testify that he heard Gates confess the crime to him, exactly the scenario noted in *Valle*.

The D.C. Act precludes compensation for those "who by his or her misconduct, cause or bring about his or her own prosecution."[282] In *Gates*, the defendant had attempted to snatch the purse of a young woman in the same area in which a subsequent rape and murder of another young woman had occurred. That earlier crime made Gates a suspect in the latter. The District of Columbia argued that there was a causal connection between the earlier crime and Gates' prosecution for the rape/murder that he did not commit.

In *Gates*, the government pointed to disqualifying misconduct separate and apart from the acts underlying the crime charged and behavior not on the Borchard list. While *Graham* held that the statute did not *require* the alleged misconduct to be separate from the crime, it did not hold that it may not be independent. With respect to causation, but for Gates' earlier nearby purse snatching, he would not have appeared on the police radar, and if that had not triggered suspicion, he would not have been prosecuted.

Just as Valle is the sort of person one would not want to compensate, Gates is precisely the sort of person one would. As a result of police misconduct, he was incarcerated for twenty-seven years for a rape and murder that DNA analysis later concluded he did not commit. But, the two cases could have come out the same way. The statute does not distinguish between cases in which the alleged misconduct is part and parcel of the crime for which the person is innocent (*Graham, Valle*) and those in which is separate and apart (*Gates*).

The court in *Gates* could have solved this problem by relying on causation. Gates' purse-snatching did not cause his prosecution; the police misconduct was the supervening cause that did. *Betts* makes the same sort of point. Betts did not cause his prosecution; the government's misreading of the unclear court order regarding the hearing date did.[283] But, the *Gates* court did not do that.

The district court rejected the District's argument, but not because, as *Valle* suggests, it was unnecessary in wrongful conviction cases involving police misconduct to assess whether the earlier crime was misconduct. Instead, the court held that the prior crime did not "establish any of the essential elements of the charges in [the] rape and murder," and that the "past crimes were not part of the same enterprise of illegal activity."[284] The court identified the types of misconduct that the D.C. Council suggested would be disqualifying.[285] Relying on caselaw

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[280] *Gates v. District of Columbia*, 66 F.Supp.3d 1 (D.D.C. 2014). In the interest of full disclosure, the author was one of the attorneys representing Mr. Gates.

[281] The version of the Act in place during the Gates litigation may be found at DC ST 1981 § 1-1221.

[282] D.C. Code § 2-422(a)(4). The D.C. Act differs from the federal statute only by omitting the word "or neglect."

[283] *Betts*, 10 F.3d at 1285-86.

[284] *Gates*, 66 F.Supp.3d at 14.

[285] "Congress intended [the federal statute] to preclude a certificate [of actual innocence] '[w]here there has been an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give

developed under Section 2513, and referring to the Borchard list of disqualifying misconduct, the court held that a prior crime fell outside that list. Instead, it was "separate and distinct" from the crime for which Gates was convicted and occurred outside "the time of the crime at issue or immediately afterwards."[286] Thus, could not serve as a basis for disqualifying misconduct. The logic was opposite of that of *Betts.* While *Graham* and *Valle* suggest that the disqualifying misconduct can be part of the crime, *Gates* held that it must be.[287]

The court was worried that the District's reading of "misconduct, would yield a conclusion that "anyone who has been rightfully convicted or arrested of a crime in the past is no longer able to recover…"[288] That's not a fair slippery slope conclusion to draw. This was not a case in which Gates' general rap sheet caused him to be prosecuted. The real question is the required causal connection between the misconduct and the prosecution. And there was such a connection, although the intervening police misconduct broke it in *Gates*.[289]

Limiting an interpretation of the statute to the Borchard list – acts that mislead authorities as to one's culpability – might not be entirely satisfactory either. A classic act that misleads police in this way is featured in every police show: not talking to the police. *Eastridge v. United States*[290] is, in part, an example. Three men and Jones were convicted of stabbing a man to death. Of the three, one had passed away in prison, and the other two, Eastridge and Sousa, were found innocent following a habeas proceeding.[291] The United States, however, argued that their ties to Jones and the crime constituted disqualifying misconduct. Those connections included helping Jones escape, refusing to reveal any information about the murder in keeping with a "Pagan Code," and concealing knives.

These are tenable arguments, but this case also involved a situation in which "[p]etitioners sat in prison for decades after a prosecution with shifting theories and an unconstitutional vise that severely restricted their trial defense…[i]t would make a mockery of the Unjust Conviction Act if these Petitioners were denied a remedy for the unrelated misconduct upon which the Government rests its argument."[292] The statute, though, could have been so interpreted.

One might argue that there was a causal connection between their failure to provide potentially exculpatory information and their prosecution. After all, they had the means to avoid prosecution, perhaps by fingering Jones and/or offering an alibi, but intentionally chose not to deploy them. Asserting one's Fifth Amendment rights, even if doing so is in keeping with some

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false testimony or opinion, or an analogous attempt to suppress such testimony or opinion.'" *Id.* (citing *Graham*, 608 F.3d at 173–74).

[286] *Id*. at 16.

[287] For a case following *Gate*s, *see Ruffin v. United States*, 135 A.3d 799 (D.C. 2016).

[288] *Id*.

[289] In the *Gates* case, there were allegations, proven at trial, that the chain of causation was effectively superseded by several acts of police misconduct that there the proximate cause of Gates' prosecution. *Id*. at 11.

[290] *Eastridge v. United States*, 602 F. Supp. 2d 66 (D.D.C. 2009), *aff'd sub nom. Diamen v. United States*, 604 F.3d 653 (D.C. Cir. 2010).

[291] *Eastridge v. United States*, 372 F. Supp. 2d 26 (D.D.C 2005).

[292] *Eastridge*, 602 F. Supp. 2d at 73.

"Pagan Code," is perhaps not misconduct, but it misleads police every day into thinking that the person might be culpable. It may be that their silence drew the suspicion of the police and was a factor in the decision to prosecute.

The court avoided that result by holding, like *Gates*, that none of their "actions or omissions was related to the charged crime."[293] In particular, the court acknowledged that helping the murderer escape was a closer question, but suggested that, since there was no evidence that the men knew Jones killed the victim, driving him was not misconduct.[294] But, in reality, these acts and omissions were related to the murder, more closely than Gates' purse snatching was related to the later rape and murder for which he was wrongly convicted.

Again, the result seems to be a good one. These men were innocent of murder, but they had certain connections to it that made them "murder adjacent." The court understandably explains why they were exonerated in the first place.[295] In light of the exoneration, these actions which may have appeared suspicious when the crime was investigated now appear innocent and unrelated. But, the statute's focus on what actually caused the prosecution does not appear to contemplate this sort of retrospective logic.

Even more difficult are cases in which it is shown that either 1) no crime actually occurred or 2) the plaintiff can show innocence by a preponderance of the evidence, but that the potentially disqualifying acts of misconduct or negligence are related to the charged crime. In both, almost by definition, there is some inculpatory evidence. Either that evidence, which looks suspicious, does not add up to a criminal act, or innocence is established because that evidence is outweighed by exculpatory facts. If the existence of those suspicious inculpatory facts alone causes the plaintiff to fail Prong 3, then a lot of innocent people would not be compensated.

At bottom, Prong 3 must be handled with care because, when it applies, it denies compensation to people who have demonstrated their innocence. The language of the statute does not distinguish between cases like *Valle* and *Gates* that rest on the polar opposites of Borchard's conception of the "deserving." Thus, again, courts have dealt with the statute by inconsistently employing extra-statutory concepts like virtue assessment, the relationship between the alleged conduct and the crime and notions of causation to arrive at results they regard as just.

Section IV

Abu-Shawish to the Rescue

As we have seen, the federal wrongful conviction compensation statute has a long and checkered history plagued by statutory language that is either unexplained or erroneously described in the legislative history, and by interpretations of that language which are adhere to it but bad policy, or unfaithful to it and reflective of sound policy. Together, the statute has become at least partly unmoored from even Borchard's limited vision of its scope. The

[293] *Id*. at 71.
[294] *Id*.
[295] *Id*. at 72.

remarkable and unusual case of Mhammad Abu-Shawish offers an interesting opportunity to stress-test the statute and to rethink it.

Mhammad Abu-Shawish was the executive director of Arabian Fest/American Festival, Inc, a non-profit organization that hoped to redevelop a portion of Milwaukee's Muskego Avenue.[296] In 2001, his organization sought a grant to research and prepare a development proposal from a Milwaukee city entity that distributed block grant funding from the U.S. Department of Housing and Urban Development. Abu-Shawish's organization received $75,000.[297]

About a year later, Abu-Shawish submitted his redevelopment plan to the city. The problem was that the plan was almost identical to another plan prepared for a different Milwaukee non-profit. Because HUD had paid for a proposal that Abu-Shawish seemingly did not prepare, he was charged with federal program fraud.[298] 18 U.S.C. § 666(a)(1)(A) prohibits theft from organizations receiving federal assistance funds, here, the City of Milwaukee. In 2005, following a trial before Judge J.P. Stadtmueller in which he testified on his own behalf, a federal jury found him guilty and he was sentenced to three years in prison. On appeal, Abu-Shawish argued that the statute he was convicted of violating required that the defendant be an agent of the defrauded entity. His argument was simple – because he was not an agent of the City of Milwaukee, he could not have violated this statute. The Seventh Circuit agreed, and his conviction was vacated.[299] By this time, he had already served his sentence.[300]

With a measure of judicial exasperation, the court concluded that the government charged Abu-Shawish with the wrong crime. The court flatly concluded that the evidence did show that he defrauded Milwaukee.[301] It wondered whether he should have instead been prosecuted for mail or wire fraud.[302] Not surprisingly, federal prosecutors took the hint, and indicted him for mail and wire fraud and transporting money obtained fraudulently. This time, following a 2008 trial in which he did not testify, he was acquitted.[303]

At first glance, from a compensatory perspective, this case looks like a long-shot. First, his conviction for a federal fraud charge was reversed on grounds that the legislative history specifically regarded as "technical" or "procedural." The indictment was faulty; it charged him with a crime that he could not have committed because his status did not satisfy one of the essential elements of the crime.

Second, at Abu-Shawish's sentencing hearing in which he considered a sentence enhancement for obstruction of justice, Judge Statmueller, who would fifteen years later decide Abu-Shawish's petition for a certificate of innocence, savaged his credibility. Stating that Abu-

[296] *Abu-Shawish*, 507 F.3d 550, 551 (7th Cir. 2007).
[297] *Id*.
[298] *Id*.
[299] *Id*. 553-58.
[300] *Abu-Shawish*, 898 F.3d at 731.
[301] *Abu-Shawish*, 507 F.3d at 558.
[302] *Id*.
[303] *Abu-Shawish*, 898 F.3d at 732.

Shawish's conduct "just defies all reality," the judge regarded him as a "prevaricator, someone who will twist the acts to meet his view of what the law ought to be."[304] For Judge Stadtmueller, this was "not even a close question," even though he thought the Seventh Circuit might come to a different view.[305] The Seventh Circuit did not more than hinting that Abu-Shawish was guilty of different sorts of frauds, for which he was later charged, but acquitted.

Third, there was essentially no dispute that he committed the acts for which he was twice charged. That fundamental act was submitting a plan for which his organization was given a grant that was nearly identical to a plan furnished by another group. His claim of innocence rested on grounds of intent: that he did not intend to defraud. His burden is a difficult one because he must prove a negative – that he lacked fraudulent intent. Fourth, given that he did submit this plagiarized plan, he would seemingly have to wrestle with the question of whether his misconduct or neglect caused his prosecution. Despite these apparently insurmountable hurdles, Abu-Shawish won.

In 2014, Abu-Shawish undertook a convoluted procedural path to obtain a certificate of innocence.[306] In 2015, he petitioned for a certificate of innocence in the U.S. District Court for the Eastern District of Wisconsin, the court of conviction. In 2017, the district court dismissed his petition without even waiting for the government to respond, much less holding an evidentiary hearing.[307] On appeal, the Seventh Circuit reviewed the federal wrongful conviction compensation statute and reversed on procedural grounds.[308] It held that the district court imposed too high a pleading standard on Abu-Shawish, erroneously requiring him to offer in his complaint evidence of innocence when Rule 8 only required him to allege it. It ordered the district court to proceed to the merits and to allow both sides to present evidence.[309]

The Seventh Circuit took a tour through the legislative history of the statute and, like courts before it, noted that "the statute's distinction between acquittal and innocence as setting a high bar for petitioners."[310] It quoted from the House Report that "[t]he claimant cannot be one whose innocence is based on technical or procedural grounds, such as lack of sufficient evidence, or a faulty indictment…"[311] It repeated the notion that Congress did not intend that every person whose conviction was set aside to be compensated.[312] It noted that he had the burden of production and persuasion.[313] It said that the statute is strictly interpreted as a waiver of sovereign immunity.[314] History was not on his side either; only in *Betts* had a court reversed the

[304] *Abu-Shawish*, 2020 U.S. Dist. LEXIS 132322 at *22.
[305] *Id.*
[306] *Id*.
[307] *United States v. Abu-Shawish*, 228 F. Supp. 3d 878 (E.D. Wis. 2017).
[308] *Abu-Shawish*, 898 F.3d 726.
[309] *Id*. at 738.
[310] *Id*. at 735
[311] *Id*. (quoting H.R. REP. NO. 75-2299 at 2 (1938)).
[312] *Abu-Shawish*, 898 F.3d at 735.
[313] *Id*. at 733.
[314] *Id.*

denial of petition for a certificate of innocence.[315] It did all the table-setting courts do when they are poised to deny a petition for a certificate of innocence.

Still, although it is a steep climb for people like Abu-Shawish, the Seventh Circuit held that it was wrong of the district court not to let Abu-Shawish try. While it had wide discretion in the absence of statutory procedures to craft a process for deciding the petition, it could not simply dismiss it when it satisfied Fed. R. Civ. P. 8's pleading requirements. The court then proceeded to the prongs of proof.

Prong 1

Abu-Shawish is a very unusual case. In virtually all cases, after a conviction is reversed, the government will either drop the charges or retry them. Here, because Abu-Shawish was initially charged, tried, and convicted of a crime the elements of which could not fit the undisputed facts, the government retried him for violating different criminal statutes that it believed better fit those facts.

This odd scenario requires us to pause at Prong 1. This is a Prong 1(A) case. The crime for which he was wrongly convicted was federal program fraud. Had Abu-Swawish been retried and acquitted for *that* crime, Prong 1(B) would surely apply. But, here, he was found not guilty on retrial not of the crime for which his conviction was reversed, but of different ones.[316] Looking at Prong 1(A), the Seventh Circuit quickly found it to have been satisfied because his "conviction was reversed on the merits."[317]

The court's interpretation of Prong 1 was not faithful to the language of the statute. The question that the statute poses is not whether the reversal was "on the merits," but whether the conviction was set aside on the ground that he was "not guilty of the offense of which he was convicted." Was this the case for Abu-Shawish?

On one hand, this seems an easier case than Maria Hernandez'. Her conviction was reversed on ineffective assistance of counsel grounds, a rationale grounded in her right to a fair trial, not on her guilt or innocence. For the drafters of the 1948 statute and the court in *Hernandez* interpreting it, the basis for the reversal was insufficiently connected to her substantive guilt or innocence to welcome her into the ranks of the potentially deserving. She got off on a procedural technicality; she might have still done the crime.

In contrast, Abu-Shawish could never have committed the crime of federal program fraud because the undisputed evidence was that he was not employed by the defrauded party, a prerequisite to conviction under the statute. His guilt, like that of Betts, was a legal impossibility. Thus, it could be concluded that his conviction was set aside on the "ground that he is not guilty of the offense." The Seventh Circuit could have said that but it did not.

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[315] *Id*. at 733, n.3.
[316] 28 U.S.C. § 2513(a)(1)'s Prong B says that "on new trial or rehearing he was found not guilty of *such offense*." (emphasis added). He was not tried for "such offense."
[317] *Id*.

On the other hand, a less forgiving court could conclude that his conviction was not set aside on grounds that he was not guilty, but on grounds that the indictment was faulty. Thus, Abu-Shawish falls within the disfavored class of persons specifically mentioned in the legislative history who benefited from a technical reversal.[318] Cummings would view Abu-Shawish as someone whose conviction was reversed on whether "the facts charged and proven constituted an offense under some statute."[319] Like Hernandez, his conviction was set aside not because of his innocent actions, but the blameworthy actions of a third party – for Hernandez, her poor lawyer, and for Abu-Shawish, his prosecutor charging the wrong crime.

On balance, this latter argument should not carry the day. It was particularly unlikely in the Seventh Circuit, which has held that reversals of convictions for failure of proof, also specifically mentioned as technical or procedural in the legislative history,[320] nevertheless satisfy Prong 1.[321] Abu-Shawish rightly survived Prong 1, but his path to success was not quite as straightforward as the court made it seem.

Prong 2: and/or

That brings us to Prong 2 and requires a brief re-examination of the "and/or" problem in the statute discussed above. With respect to innocence, what does Abu-Shawish have to prove? Prong 2(A) requires him to prove that he did not commit "any of the acts charged." The federal program charge or the mail fraud charge? Or both? Alternatively, or in addition, does he have to show that he did not commit any uncharged offenses? Prong 2(A) and/or Prong 2(B)?

This does not seem like a difficult question. One asks for a certificate of innocence of crimes for which one was wrongly convicted and imprisoned. That would be the federal program fraud charge for which Abu-Shawish was imprisoned for three years and, thus, if successful, would ultimately receive about $150,000. He would have to show, in Prong 2(A), that he did not commit any of the acts charged in the federal program fraud indictment.

That would seem close to impossible because he *did* commit the key act charged – submitting the report. [322] But, a court in the Seventh Circuit (like the Eastern District of Wisconsin), bound to follow *Betts*, would (mis)interpret "acts" as "crime," conclude that, like Betts, Abu-Shawish's conviction was a legal impossibility, that he was necessarily innocent of that charge, and that Prong 2(A) was therefore satisfied. If he need only prove Prong 2(A), Abu-Shawish moves on to Prong 3 without ever having to prove innocence of mail fraud and similar crimes.

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[318] H.R. REP. NO. 75-2299, at 2 (1938) (listing "faulty indictment" as the type of reversal that does not prove innocence).
[319] H.R. REP. NO. 75-2299, at 3 (1938).
[320] *Id*. at 2, 3.
[321] *Pulungan v. United States*, 722 F.3d 983, 984 (7th Cir. 2013). The plaintiff was charged with attempting to export defense articles without a license. His conviction was reversed when the Seventh Circuit concluded that the evidence did not show beyond a reasonable doubt that he knew that the items in question were defense articles or that licenses were required to export them.
[322] *See* Indictment, United States v. Abu-Shawish at ¶ 18, No. 03-cr-00211 (E.D. Wis. Oct. 7, 2003), ECF No. 6.

Recall that Borchard's original proposal would have required Abu-Shawish to prove the he was innocent of the act charged *and* other offenses against the United States. However, the statute that emerged said "or" instead.[323] The odd posture of the *Abu-Shawish* case highlights the wisdom of Borchard's conjunctive requirement. He viewed the deserving as those innocent of the crime for which they were wrongly convicted (here, federal program fraud) and of any other related crimes (here, mail fraud). He would not be happy that the eventual statute appears to be unintentionally helpful to Abu-Shawish. What did the Seventh Circuit have to say about this?

Although it is not completely free from doubt, the court seemed to have interpreted Abu-Shawish's burden consistent with what the statute should have said, not what it actually did say. The court decided "Abu-Shawish's claim will succeed or fail based on the second requirement – whether his actions constituted any crime under federal or state law."[324] It appears to suggest that Abu-Shawish has to prove innocence of any crime, charged or uncharged, relating to his Milwaukee grant.

Thus, it seems that Abu-Shawish's burden on remand is demonstrating that he satisfied Prong 2(B). However, is that because it was clear to the court that he had or could easily satisfy Prong 2(A), using *Betts*, and that he must also satisfy Prong 2(B) (supporting a conjunctive interpretation)? Or, is that because Abu-Shawish could not satisfy Prong 2(A) and thus had to satisfy Prong 2(B) (supporting a disjunctive interpretation)? The court does not say, but if the court had *Betts* in mind, the former possibility is more likely than the latter.[325] The Seventh Circuit again read the statute in a manner that makes sense as a matter of policy, but not as a matter of sound statutory interpretation.

Prong 2: room/preponderance

The district court had no occasion to wrestle with this problem. The parties briefed this as a Prong 2(B) case – whether he showed by a preponderance of the evidence that his acts or omissions did not constitute mail fraud.[326] In his opening brief in support of his Petition for a Certificate of Innocence, Abu-Shawish argued that fraud requires proof of specific intent and that he did not have it.[327] On the surface, demonstrating innocence through lack of intent seems particularly difficult. Claims of lack of intent turn on questions of knowledge and motive and thus, on the credibility of the actor. These types of cases would seem particularly susceptible to "room thinking" because dents in credibility and inferences drawn from logic can leave room for the possibility of guilt. That certainly seemed to be the case here where Abu-Shawish's credibility was seriously doubted by the court.

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[323] Most courts have interpreted Prong 2 in the disjunctive. *See Mills*, 773 F.3d at 567; *Osborn*, 322 F.2d at 841; *but see Hadley v. United States*, 66 F.Supp. 140, 141-42 (Ct. Cl. 1946).

[324] *Abu-Shawish*, 898 F.3d at 739. *See* Report and Recommendation Granting Petition for Certificate of Innocence at 17, United States v. Abu-Shawish, No. 03-cr-00211-JPS (E.D. Wis. Jan.12, 2017), ECF No. 344 [hereinafter "Abu-Shawish R. & R."]. Note that the court uses the word "crime" that is not in the statute.

[325] *But see* Abu-Shawish R. & R. at 17-18 (stating that Prong 2(A) and Prong 2(B) are phrased in the disjunctive.

[326] *See* Mem. in Supp. of Def.'s Petition for Certificate of Innocence at 12, United States v. Abu-Shawish, No. 03-cr-00211-JPS (E.D. Wis. Jan.12, 2017), ECF No. 330; Abu-Shawish R. & R. at 19.

[327] I'm ignoring the crime of transporting more than $5,000 obtained by fraud in foreign commerce. Mem. in Supp. of Def.'s Petition for Certificate of Innocence at 12, *supra* note 326.

Magistrate Judge Nancy Joseph held an evidentiary hearing on July 30, 2019 during which Abu-Shawish testified. She reviewed the transcripts of both trials, received evidence submitted by the parties, and issued her Report and Recommendation on December 10, 2019.[328] She and Judge Stadtmueller, who reviewed her Report and Recommendation, focused on whether Abu-Shawish was innocent of mail fraud and transporting goods fraud, with a particular eye as to whether he had specific intent to defraud by plagiarizing the report.[329]

Judge Stadtmueller could have easily rested on his prior doubts about Abu-Shawish's credibility and, in them, found the room necessary to deny the petition on the ground that Abu-Shawish had failed to demonstrate that he was "truly" or "entirely" innocent of fraud. But, he did not:

> This Court has repeatedly – and reasonably expressed serious incredulity about Abu-Shawish's version of the events. But even if Abu-Shawish's testimony is appropriately considered through the lens of extreme skepticism, the surrounding evidence corroborates it.[330]

Relying on the evidence in the 2008 trial, Judge Stadtmueller ultimately concluded to apparently its own surprise, that "against all odds, Abu-Shawish has demonstrated by a preponderance of the evidence that is innocent of any crime involving fraud, deprivation, or misappropriation of property."[331]

To see how Abu-Shawish snatched victory from the jaws of defeat, more background is needed. Abu-Shawish led the annual Arabian Fest cultural event in Milwaukee and it was quite successful.[332] He wanted to use a portion of Muskego Avenue as a destination place for a thriving Arab-American business community, which he told to a new alderman, Donovan, who liked the idea and suggested that he seek a grant.[333] At the same time, Donovan was the founder of his own non-profit, Milwaukee Alliance, and aspired to redevelop a larger portion of Muskego Avenue.

One of Milwaukee Alliance's employees, Sanfilippo, contacted a professor, Roth, to write a plan for the revitalization of the area.[334] Not surprisingly, given their mutual interests, the paths of Roth and Abu-Shawish crossed, and they attended meetings together.[335] During this research phase, Donovan assigned Sanfilippo and her cousin to help Abu-Shawish with the project to develop a business plan to recruit new businesses to Muskego Avenue for which he had received a $75,000 grant from the city.[336]

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[328] Abu-Shawish R. & R.
[329] *Id*. at 18-19; 2020 U.S. Dist. LEXIS 132322 at *4.
[330] 2020 U.S. Dist. LEXIS 132322 at *26.
[331] *Id*. at *37.
[332] 2020 U.S. Dist. LEXIS 132322 at *9; R. & R. at 6.
[333] *Id*.; R. & R. at 7.
[334] *Id*. at *10.
[335] *Id*. at *11; R. & R. at 8, 10.
[336] *Id*. at *11-13.

Ultimately, Roth finished his 35-page report for circulation and included information that Sanfilippo had compiled under Abu-Shawish's supervision.[337] Roth was not enthusiastic about an Arabic business center in a Hispanic neighborhood, so his report spoke more generally of an international business district.[338] Sanfilippo received the report and shared it with Donovan. Donovan thought that the report focused too much on Milwaukee Alliance interests and too little on those of other stakeholders in the redevelopment plan. So, at his direction, Sanfilippo edited it and made it more general so that other groups could use the plan.[339] The edited report was apparently reduced to 22 pages and did not specifically mention the Arab-American business center Abu-Shawish championed.[340]

Donovan told Sanfilippo to send the report to Abu-Shawish and she did. Abu-Shawish did not look at the report for several months; he spent a time on other aspects of redevelopment planning. When he did look at the report, he testified that he thought it was Sanfilippo's final draft.[341] Still, it did not mention Arabian Fest, so Abu-Shawish made a few small changes to it, such as adding references to Arabian Fest, and submitted it to the City.[342].

Although the court did not explicitly use a burden shifting analysis, its reasoning was consistent with such an approach. Abu-Shawish could show innocence if he were able to demonstrate that he did not know that Roth was preparing a report for another group, and that he had not seen the Roth report prior to submitting his own on behalf of Arabian Fest.[343] A prima facie case would require Abu-Shawish to advance credible evidence of this lack of knowledge. He testified to that effect at his trial and at the evidentiary hearing.

The burden then shifted to the government. The Government's argument was that assessing Abu-Shawish's claims of lack of intent turn on his credibility. It contended that a prior conviction for mortgage fraud and suggestions by the trial judge in his federal program fraud trial that he likely obstructed justice by lying in his testimony shattered his credibility. As a result, the Government argued that Abu-Shawish's assertions of a lack of culpable intent should be disregarded.[344] Without them, the substantial similarity between the Roth report and his submission and the fact that the men met and worked together on this project permit an inference that Abu-Shawish took the Roth report and passed it off as his own.[345] That would shift the burden back to Abu-Shawish. The court said repeatedly that his burden was to demonstrate innocence by a preponderance of the evidence.[346]

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[337] *Id*. at *15-*16. Roth was paid from a city HUD grant through Milwaukee Alliance.
[338] R. & R. at 12.
[339] 2020 U.S. Dist. LEXIS 132322 at *16-17.
[340] *Id*. at *17.
[341] R. & R. at 14.
[342] 2020 U.S. Dist. LEXIS 132322 at *18.
[343] R. & R. at 18.
[344] Gov't's Mem. in Opp. to a Certificate of Innocence at 10, United States v. Abu-Shawish, No. 03-cr-00211-JPS (E.D. Wis. Jan.12, 2017). *See also* 2020 U.S. Dist. LEXIS 132322 at *25.
[345] 2020 U.S. Dist. LEXIS 132322 at *24.
[346] *Id*. at *7, 8, 23, 24, 25, 28, 37.

The Court agreed that Abu-Shawish had credibility problems but concluded that he had shown by a preponderance of the evidence that he had no specific intent to defraud the City.[347] The court found that Donovan's Milwaukee Alliance general redevelopment plan for Muskego Avenue and Abu-Shawish's more limited project for an Arab-American-centered redevelopment of a portion of the street blurred, resulting in confusion about their purposes, personnel, and specific role of Roth and his report.[348] Judge Joseph credited Abu-Shawish's testimony that he thought Roth was providing research for the Arabian Fest plan, and that he did not know that Roth was writing a report for Milwaukee Alliance.[349]

The court recognized that a comparison of the Roth report and Abu-Shawish report shows them to be very similar, but the court did not regard that similarity as proof of intent. Instead, the court concluded that there was no evidence that Abu-Shawish knew of Roth's report or had seen the first draft of it which referred extensively to Milwaukee Alliance. Instead, the court credited Defilippo's testimony that she made changes to the Roth report at Donovan's direction before providing a copy to Abu-Shawish.[350] Indeed, the 35-page Roth report was cut to a smaller document, and FBI searches of Abu-Shawish's residence did not uncover the original Roth report.[351]

The court observed that the City grant did not actually require Abu-Shawish himself to write the plan.[352] Even if the plan did not have much value given the separate submission of the Roth plan, Abu-Shawish and his subordinates did business development, neighborhood improvement and data compilation work that added value to the report, leading the court to conclude that the City was not defrauded.[353] In any event, the court concluded that Abu-Shawish reasonably believed that Sanfilippo's work product was the result of a "collective plan" of several people, including himself, and not the sole product of Roth.[354]

The court found that Abu-Shawish did not subjectively realize that he was not supposed to use the report that [Sanfilippo] gave him and present it as a product of Arabian Fest."[355]The court did not resort to "room" thinking. It edid not focus its attention solely on the inculpatory facts. The opinion instead reflects a careful and balanced weighing of difficult facts. A "room thinking" approach would be easier. Abu-Shawish's credibility issues, the substantial similarity in the reports, his frequent contact with Roth, and receipt of a draft report that oddly omitted any mention of Arabian Fest create room for the possibility of guilt. The court did not ignore those issues, but it did not solely focus on them either. Nor did it simply accept Abu-Shawish's story without question. Instead, it placed reliance on the credible testimony of third parties and

[347] *Id*. at *27, 34; R. & R. at 19.
[348] *Id*. at *26-27, 32-33; R. & R. at 20-21.
[349] R. & R. at 22.
[350] 2020 U.S. Dist. LEXIS 132322 at *271; R. & R. at 23.
[351] *Id*. at *27, 31; R. & R. at 22-23.
[352] *Id*. at *28
[353] *Id*. at *29; R. & R. 25-26.
[354] *Id*. at *35-36.
[355] *Id*. at *34-35.

carefully weighed the competing evidence and inferences, mindful of the preponderance standard.

Prong 3

In *Abu-Shawish*, the government did not make a Prong 3 argument.[356] But, it might have argued that Abu-Shawish's behavior was something like Graham's. He understood that he was to provide the city a report. Submitting a proposal in connection with a government grant is a big deal. Presumably, one would want the proposal to be very compelling so that the city would be inclined to implement it. At worst, one might worry that if the report were terrible, the city might ask questions about why it provided a grant for it. Submitting the grant-required report requires care and attention.

Abu-Shawish, however, the government might argue, made only a few small technical changes to it. Had he studied it with the care and attention it deserved, and asked questions about it, like why there was no mention of Arabian Fest in it, he might have come to see the similarity between it and the Roth report. That, the government would argue, was at least neglect. His submission of a seemingly plagiarized report certainly caused his prosecution.

Had that argument been made, Abu-Shawish would be lucky he was litigating in the Seventh Circuit where *Betts* would be binding precedent. His behavior was not among those on the Borchard list. The court would not want to make moral judgments about Abu-Shawish's conduct, and even if it did, the disqualifying misconduct must be separate and apart from the alleged crime, which this was not. If this court arose in the Fourth Circuit, where *Graham* was decided, it is not hard to imagine the issue being decided the other way.

Section V

Lessons Learned

One imagines that Edwin Borchard would today be delighted that there is a National Registry of Exonerations, that thirty-five states and the District of Columbia have wrongful conviction compensation statutes, and that the reality of wrongful convictions and need for exonerees to be compensated is accepted in general principle, if not always in specific practice. He would likely be shocked that over $xxx has been paid to exonerees in state statutory compensation since 1989.[357] He would wonder why it was that that XX people on the National Registry who sought state compensation were denied.[358] And, he would also be disappointed that his federal wrongful compensation statute is rarely used and seldom successful. If he and his statutory editor Homer Cummings were to revisit the statute, what would they do?

Borchard and Cummings would see that there are still doubters – legislators worried that the underserving would get paid. They would see that their essential task remains – to draft a

[356] *Abu-Shawish*, 507 F.3d at 554; R. & R. at 17.
[357] Data on file with author.
[358] Data on file with author.

statute that results in compensation for all the deserving and none of those who are not. They would understand that it is not realistic to anticipate all the hard cases which make that task impossible. Then, the question is where the burden of error should fall – on the state paying a small number of those regarded as undeserving, or on the deserving uncompensated exoneree?

Borchard and Cummings did not have the benefit of history to answer that question. But, we do. The number of state wrongful conviction compensation statutes is growing, and some are being liberalized without substantial concern that they have gone too far by compensating the "undeserving." It is true that a small number have imposed modest additional restrictions.[359] However, those amendments have been in states with very generous and well-utilized statutes and have trimmed the compensatory formula. They have not been reactions to documented cases of the "undeserving" receiving compensation.

With that context, they would start with the fundamental notion that the essential characteristic that defines the deserving is innocence. So long as a conviction were set aside, it should not matter why. Barriers erected to prevent the opportunity to show innocence result in cases like that of Maria Hernandez. Those should be taken down. As a result, Prong 1 should simply require that:

> (1) The petitioner's conviction has been reversed or set aside, or on new trial or rehearing, the petitioner was found not guilty of such offense as appears from the record or certificate of the court setting aside or reversing such conviction.

Nothing is gained by requiring that the conviction be reversed "on grounds that the petitioner is not guilty." The plaintiff still needs to demonstrate innocence, leaving no possibility that someone regarded as undeserving would be compensated solely because they surmounted Prong 1. Most state statutes understand this and do not have the federal Prong 1 requirement,[360] or they modify it.[361] For example, Alabama permits the reversal be on grounds consistent with innocence[362] or, even better, Mississippi requires that it be reversed on grounds not inconsistent

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[359] *See* Gutman, *supra* note 4 at 401.

[360] The more recent state statutes do not impose limitations of the grounds of reversal. *See* IND. CODE ANN. § 5-2-23-1 (West) ("…whose conviction is vacated, reversed, or set aside…"); KAN. STAT. ANN. § 60-5004 (West) ("…the claimant's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the claimant was found to be not guilty"); MICH. COMP. LAWS ANN. § 691.1755 (West) ("The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty…"). Nevada's offers a variation. NEV. REV. STAt. § 41.900 (West) ("The plaintiff must prove by a preponderance of the evidence that…[t]he judgment of conviction was reversed or vacated and the charging document was dismissed"). States that retain a formulation similar to that in Section 2513(a) include: District of Columbia, D.C Code § 2-422; Hawaii, HAW. REV. STAT. § 661-B1 (West); Oklahoma, OKLA. STAT. ANN. tit. 51, § 154(B) (West).

[361] In Texas, for example, "wrongfully imprisoned person" includes someone who has been granted a writ of habeas corpus based on a court finding the person is actually innocent or if the state's attorney believes defendant is actually innocent or has no inculpatory evidence. TEX. CIV. PRACTICE & CODE ANN. § 103.002 (West). Washington, WASH. REV. CODE ANN. § 4.100.060 (West), requires that the conviction be reversed or vacated on the grounds of "significant new exculpatory information."

[362] Alabama, ALA. CODE § 29-2-157; Minnesota, MINN. STAT. ANN. § 590.11 (West). Minnesota defines "consistent with innocence" as either "exonerated, through a pardon or sentence commutation, based of factual innocence or "exonerated because the judgment of conviction was vacated or reversed, or a new trial was order, and there is any

with innocence.[363] Thus, there is no reason to think that amending the federal statute in this way will have unintended consequences.

The Prong 2(A) requirement, unexplained in the federal statute's legislative history, that the plaintiff prove that they did not "commit any of the acts charged," allows courts in cases like *Mills* to deny petitions for certificates of innocence to those who commit innocent acts that, separately or together, do not constitute crimes. Especially if a misconduct bar is retained, there is no obvious benefit to the provision. Courts have thus pushed back at the resulting unfairness by misreading the language of the statute in such a way to adopt Cummings' preference that plaintiffs demonstrate innocence of crimes, not acts. It is better to fix the statute than misinterpret it.

Parallel state wrongful conviction compensation statutes use terms like "crime," "act," or "offense" to define the thing a plaintiff must be innocent of.[364] Indeed, a small number of states tweak to various degrees the requirement of a showing of innocence.[365] There is no apparent evidence that these formulations have resulted in compensation to the undeserving. Only three states use the term "acts," and require the plaintiff to demonstrate innocence of each constituent element of a crime that is not a status.[366]

Thus, alternative redrafts of Prong 2(A) should make clear the burden of proof, and would require that the plaintiff allege and prove:

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evidence of factual innocence whether it was available at the time of investigation or trial or is newly discovered evidence." *Id*.

[363] Mississippi, MISS. CODE. ANN. § 11-44-7 (West); Massachusetts uses an unfortunate formulation that the grounds of reversal "tend to establish the innocence of the individual." MASS. GEN. LAWS ANN. ch. 278A, § 1.

[364] *See, e.g.*, Florida, FLA. STAT. ANN. § 961.02 (act or offense); Hawaii, HAW. REV. STAT. § 661-B1 (West) (crimes); Illinois, 735 ILL. COMP. STAT. ANN. 5/2-702 (West) ("offenses"); Indiana, IND. CODE ANN. § 5-2-23-1 (West) (offense or criminal act); Kansas, KAN. STAT. ANN. § 60-5004 (West) (crime or crimes); Mississippi, MISS. CODE. ANN. § 11-44-7 (West) (felony or felonies); North Carolina, N.C. GEN. STAT. § 148-82 (charge or charges); Texas, TEX. CIV. PRACTICE & CODE ANN. 103.002 (West) (crime); Washington, WASH. REV. CODE ANN. § 4.100.060 (West) (illegal conduct).

[365] Colorado, for example, requires a showing of actual innocence, but defines it as including findings that "his or her conviction was the result of a miscarriage of justice" and that "he or she presented reliable evidence that he or she was factually innocent…" COLO. REV. STAT. § 13-65-101(I)(a)(I), (II). Ohio includes in the definition of a "wrongfully imprisoned individual" those who after sentencing or during or after imprisonment found a Brady violation which resulted in their release). OHIO REV. CODE. ANN. § 2743.48(A)(5) (West). Connecticut perhaps goes the furthest in dispensing with the innocence requirement altogether. In Connecticut, a person may show eligibility for compensation if their conviction was vacated or reversed "on grounds of innocence," or on a ground "citing an act or omission that constitutes malfeasance or other serious misconduct" by a state agent. CONN. GEN. STAT. ANN. § 54-102(uu) (West). Virginia, VA. CODE ANN. 19.2-327.11 (West), requires those who seek a writ of actual innocence to allege factual innocence, but that appears to require only that newly discovered evidence, when combined with the existing record, "will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt").

[366] *See* D.C. CODE § 2-422(a)(4) (using language very close to the federal statute); Nevada, NEV. REV. STAt. § 41.900(2)(b) (West) (plaintiff must show that he or she did "not commit the acts that were the basis of the conviction."); New York, N.Y. CT. CL. ACT § 8-(b)(5)(c) (plaintiff must prove "he did not commit any of the acts charged").

"by a preponderance of the evidence that the petitioner did not commit the crime or crimes for which they were convicted;"[367]

"by a preponderance of the evidence that the Petitioner did not engage in the illegal conduct for which they were convicted;"[368]

"by a preponderance of the evidence that the petitioner is innocent of the crime or crimes for which they were convicted;"[369] or,

"by a preponderance of the evidence that the petitioner is innocent of the crime or crimes for which they were convicted because no crime was committed, or the crime was not committed by the petitioner."[370]

The burden still rests on the plaintiff to demonstrate innocence, and caselaw makes it clear that the reversal of the conviction alone is not enough to establish innocence.[371] It is important to include the burden of proof in the statute as an express legislative charge against "room thinking." The standard, and preferably the legislative history of the amendment, should remind courts that it is not the obligation of plaintiffs to demonstrate that they are "altogether" or "truly" innocent of the crime for which they were wrongly convicted if "altogether" or "truly" means that the record must leave no evidentiary doubt of their innocence. The concept of burden shifting serves to refocus the court's attention on the appropriate way to make the sensitive judgments inherent in many of these cases that room thinking precludes.

Borchard might rewrite Prong 2(B) in a way somewhat narrower that he originally conceived of it. He would demand that plaintiff *also* show that his conduct related to the crime for which the plaintiff was wrongly convicted did not constitute any uncharged crimes. If federal prosecutors make accurate and comprehensive charging decisions (which did not occur in *Abu-Shawish*), it should not be necessary to require the plaintiff to prove that their conduct did not violate any uncharged federal crimes.[372] But, Borchard's conception of the deserving would argue in favor of a requirement that they disprove any similar state crimes that could have been charged by local district attorneys. Thus, Prong 2(B) might read:

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[367] IND. CODE ANN. § 5-2-23-1 (West), KAN. STAT. ANN. § 60-5004 (West), LA. STAT. ANN. § 572:8 (West), MASS. GEN. LAWS ANN. ch. 278A, § 1., NEV. REV. STAt. § 41.900, N.J. STAT. § 52:4C-3, OKLA. STAT. ANN. tit. 51, § 154(B) (West), UTAH CODE ANN. § 78B-9-404.

[368] VT. STAT. ANN. tit. 13, § 5574(a), WASH. REV. CODE ANN. § 4.100.060 (West).

[369] 735 ILL. COMP. STAT. ANN. 5/2-702 (West), NEB. REV. STAT. ANN. § 29-4603, N.H. REV. STAT. ANN. § 541-B:14, N.C. GEN. STAT. § 148-82, WIS. STAT. § 775.05.

[370] CAL. PENAL CODE § 4903(a), IOWA CODE § 663A.2, MISS. CODE. ANN. § 11-44-7 (West), OHIO REV. CODE. ANN. § 2743.48(A)(5) (West).

[371] *See supra* note 143. It should not be necessary to include this caveat in the statute, but some state compensation statutes have. *See* COLO. REV. STAT. § 13-65-101.

[372] For this reason, it should not be necessary for state wrongful conviction compensation statutes to require the plaintiff to demonstrate that their conduct did not constitute any uncharged state offenses. Even so, a number of state statutes specifically, but varyingly, require the plaintiff to show that they did not commit lesser included offenses, did not conspire to commit the crime in question, serve as an accessory and/or did not aid and abet those who did. COLO. REV. STAT. § 13-65-101; NEV. REV. STAt. § 41.900; MICH. COMP. LAWS ANN. § 691.1755.

> "by a preponderance of the evidence, petitioner did not commit the crime or crimes charged and his or her acts, deeds, or omissions in connection with such charge constituted no offense against the relevant[373] State, or Territory, including the District of Columbia."

At the same time, there is something uncomfortable about requiring the plaintiff to prove their innocence of uncharged crimes. What crimes? This could be resolved in the ordinary course of litigation if the government files a pre-trial motion for summary judgment. Presumably, if the government believes there was a Prong 2(B) issue, that motion would identify the potential uncharged crime(s) and offer an explanation as to why the plaintiff's conduct stood in violation of it or them.

Otherwise, a variation of the burden shifting concept would call upon the court or administrative entity to ask the government to identify those uncharged crimes, if any. Then, the burden would shift to the plaintiff to show that their conduct did not constitute a violation of them. Hawaii, alone among the states, has an inventive way of dealing with this problem. In Hawaii, the plaintiff's commission of other related crimes is specifically an affirmative defense that the government must prove by a preponderance of the evidence.[374]

Prong 3 was not particularly difficult for Borchard or Congress, which essentially cut and pasted his language into the statute. But, as explained, the examples of misconduct that Borchard thought of, and put in the Borchard list, are significantly narrower than the statute's broader language otherwise contemplates. That language has been (in *Graham* for example) applied to bar compensation in cases beyond those in which the plaintiff intended to mislead the government as to the perpetrator of the crime.

One option is to get rid of the misconduct bar altogether. After all, by making Prong 2(A) and 2(B) conjunctive, we are already asking plaintiffs to demonstrate that their uncharged conduct did not constitute a crime. Thus, the worst form of misconduct causing the prosecution has been taken care of. The remaining scope of the misconduct bar disqualifies those whose noncriminal but suspicious or morally dubious behavior attracted the attention of law enforcement. This requires courts to make difficult assessments of these acts or omissions and to assess the causal link between them and the prosecution. Many states, without apparent problems, have not included misconduct bars in their wrongful conviction compensation statutes.[375]

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[373] I included the word "relevant" to specify that the possible crime be in the same jurisdiction. If the alleged crime occurred in Iowa, it should not matter that the acts, deeds or omission would have been a crime in Arkansas if committed there.

[374] HAW. REV. STAT. § 661-B1 (West),

[375] ALA. CODE § 29-2-157, CAL. PENAL CODE § 4903(a), CONN. GEN. STAT. ANN. § 54-102 (West), IND. CODE ANN. § 5-2-23-1 (West), IOWA CODE § 663A.2, LA. STAT. ANN. § 15:572.8 (West 2017), MO. ANN. STAT. § 650.058 (West), MD. STATE FIN. & PROC. CODE § 10-501, MISS. CODE. ANN. § 11-44-7 (West), MONT. CODE ANN. § 53-1-214, N.H. REV. STAT. ANN. § 541-B:14, N.C. GEN. STAT. § 148-82, OHIO REV. CODE. ANN. § 2743.48(A)(5) (West), OKLA. STAT. ANN. tit. 51, § 154(B) (West), TENN. CODE ANN. § 40-27-109, TEX. CIV. PRACTICE & CODE ANN. § 103.002 (West), and UTAH CODE ANN. § 78B-9-404.

An alternative would be to hew more closely to the Borchard list and disqualify those whose act or omissions not only mislead the police, but who intend to do so. Four states have provisions along these lines, but rather than embodying the list concept, they use examples of such conduct. Washington's is a good example: "claimant did not commit or suborn perjury, or fabricate evidence to cause or bring about his or her conviction."[376] The use of the word "to" suggests that the acts were intended to cause the result. A different formulation that borrows from the cases would read: "the petitioner did not, by their acts or omissions, intend to mislead law enforcement authorities as to the actual perpetrator of the crime."

For some, including Borchard, that is not an entirely satisfactory result because it does not disqualify someone like Valle or, depending on how you feel about them, Betts and Graham. A number of state compensation statutes, including several in which the number of claims filed and granted is quite high, essentially track the language of Section 2513(b).[377] But, relatively few claimants lose on misconduct grounds. There are three imperfect, alternative ways of dealing with this problem.

The first would be to give the court equitable authority to deal with them. The provision might read: "in the interests of justice, the court may decline to grant a certificate of innocence on the ground that the petitioner engaged in acts or omissions, not to include a guilty plea or coerced confession, that caused their conviction." Such open-ended discretion can solve the Valle problem, but runs the potential risk of use against others, like Gates, regarded as more deserving.

The second would be to give the Court of Federal Claims authority, in the interests of justice, to decline to award the full $50,000 per year amount. Instead, they would be called upon to make a judgment as to the nature, severity, and causal connection between the act or omission and the conviction. This would not be a comparative negligence sort of calculation[378] because the court would not compare the relative faults of the claimant and the government. In many wrongful conviction cases, there is no demonstrable fault of the government.

The third is to look not at past misconduct, but to future behavior as many state statutes do.[379] Here, the $50,000 per year award would be paid in installments over time, rather than on a lump sum basis. Continued receipt of those installments would be conditioned on the recipient not being convicted of any future crime. Installment payments impose a measure of financial discipline on prevailing plaintiffs and a future misconduct bar provides an incentive to avoid future criminal activity.

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[376] *See* WASH. REV. CODE ANN. § 4.100.060 (West); *see also* MINN. STAT. ANN. § 590.11 (West), MISS. CODE. ANN. § 11-44-7 (West), NEB. REV. STAT. ANN. § 29-4603. Vermont's statute does not include an intent requirement. VT. STAT. ANN. tit. 13, § 5574(a).

[377] 735 ILL. COMP. STAT. ANN. 5/2-702 (West), D.C. CODE § 2-422, KAN. STAT. ANN. § 60-5004 (West), N.J. STAT. § 52:4C-3, N.Y. CT. CL. ACT § 8-(b)(5)(c), NEV. REV. STAt. § 41.900, VA. CODE ANN. 19.2-327.11 (West).

[378] Adam I. Kaplan, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227 (2008).

[379] *See, e.g.*, ALA. CODE § 29-2-161(e); COLO. REV. STAT. § 13-3-114(7)(b); TEX. CIV. PRACTICE & CODE ANN. § 103.154(a); UTAH CODE ANN. § 78B-9-405(3)(b) (payments tolled during incarceration for subsequent felony).

These statutory amendments and recommended approaches to implementing the preponderance of the evidence standard will result in a statute that is truer to Borchard's vision and Cummings' draftsmanship. They would better meet the drafting challenge that these compensation statutes present by permitting more exonerees an opportunity to present their substantive claims of innocence and creating a more balanced way of evaluating those claims through a burden shifting methodology. The result will not be revolutionary, but calls for substantially more liberal statutes are unlikely to gain considerable legislative traction in the budgetary environments we are likely to see in the foreseeable future. However, these reforms may bend the arc of justice a bit further in favor of those who so badly need it.