

AN EMPIRICAL ASSESSMENT OF NEW JERSEY'S
MISTAKEN IMPRISONMENT ACT

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INTRODUCTION

In their article “Compensation for the Convicted Innocent in New Jersey: Problems and Recommended Solutions,” Professors D. Michael Risinger and Lesley Risinger masterfully recount the history and flaws of New Jersey’s Mistaken Imprisonment Act.² The professors recommend concrete and common-sense amendments to the Act. Their sound proposals, if enacted, would resolve statutory ambiguities, remedy bad public policy, and make more generous an Act intended to benefit the wrongfully convicted, but which often falls short of that goal.

The purpose of this article is to provide an empirical and comparative context for those proposals. By examining why the claims of exonerees had been denied or never made, this article probes the extent to which these, or other, recommendations might benefit exonerees. Over twenty-five years after the passage of the Mistaken Imprisonment Act (the “MIA” or “Act”), we have sufficient history to evaluate the actual results of the Act and to compare them with other states. This article concludes that, on many metrics, the New Jersey statute actually performs better than most other state wrongful conviction compensation statutes. The Act, though, is far from perfect. This data-driven and comparative assessment supports many of the Risinger proposals and may, with their fine article, serve as a basis for needed reform.

STATUTORY OVERVIEW

The Risinger article clearly describes the origins of the Mistaken Imprisonment Act and the central role attorney Paul Casteleiro had in using his client David Shephard’s wrongful

¹ The author wishes to thank Katherine Compton, GW Law ’25, for her invaluable research assistance and Maurice Possley, Ken Ottenbourg and Jessica Weinstock Paredes of the National Registry of Exonerations. .

² D. Michael Risinger and Lesley C. Risinger, Compensation for the Convicted Innocent in New Jersey: Problems and Recommended Solutions, Seton Hall Journal of Legislation and Policy, vol. 48 (forthcoming) (hereinafter the “Risinger Article”)

conviction to advocate for passage of the statute.³ The resulting Act was enacted in 1997 and took effect on August 25, 1997. N.J. STAT. ANN. § 52:4C-1 (2022). It provides that persons convicted and imprisoned of one or more crimes that they did not commit may file suit in New Jersey Superior Court against the New Jersey Department of the Treasury. § 52:4C-2(a).

Currently, the Act requires that a plaintiff establish the following by clear and convincing evidence:

- a.** That he was convicted of a crime and subsequently sentenced to a term of imprisonment, served all or any part of his sentence; and
- b.** He did not commit the crime for which he was convicted; and
- c.** He did not commit or suborn perjury, fabricate evidence, or by his own conduct cause or bring about his conviction. Neither a confession or admission later found to be false shall constitute committing or suborning perjury, fabricating evidence, or causing or bringing about his conviction under this subsection;⁴ and
- d.** He did not plead guilty to the crime for which he was convicted. § 52:4C-1.

Subsection (d), which I will call the “guilty plea bar,” was added to the statute in 2013.

The Risinger article⁵ explains that the framers of the 1997 statute intended subsection (c) to preclude compensation for those pleading guilty, but that some may have been compensated despite it.⁶ That apparent ambiguity led the legislature to pass legislation in 2012 to clarify that guilty pleas were *not* disqualifying. Governor Chris Christie, however, vetoed that bill and the New Jersey legislature reversed itself and enacted what is now subsection (d).

A claimant seeking MIA compensation must bring suit within two years of their release or pardon from the Governor. § 52:4C-4.⁷ Those released or pardoned between May 2, 1991 and May 2, 1996 were permitted to file suit within two years of enactment of the statute. *Id.*⁸

The 1997 statute provided that damages may not exceed twice the amount of the claimant’s income in the year prior to incarceration, or \$20,000 per year of incarceration, whichever is greater.⁹ 1996 N.J. S.N. 1036 § 5(A). In 2013, the New Jersey legislature increased

³ Risinger article, *supra* note 2.

⁴ The original 1997 statute read only that, “[h]e did not by his own conduct cause or bring about his conviction.” 1997 N.J. S.N. § 3(c).

⁵ Risinger article, *supra* note 2.

⁶ In *Mills v. State*, the Superior Court, Appellate Division ended any such ambiguity by holding that a guilty plea constituted conduct that caused or brought about a conviction. 435 N.J. Super 69, 86 A.3d 741 (Super. Ct. App. Div. 2014).

⁷ See *Watson v. New Jersey Dep’t. of Treasury*, 453 N.J. Super 42 (N.J. App. 2017) (applying two-year statute of limitations). It does not appear that any person listed in the National Registry of Exonerations as exonerated in New Jersey received a gubernatorial pardon.

⁸ As explained, *infra*, the National Registry of Exoneration records exonerations occurring in or after 1989. The five year “look back” window in the statute excluded one New Jersey exoneree, Damaso Vega, from seeking state compensation. He was exonerated in 1989.

⁹ In *Kamienski v. State*, 451 N.J. Super. 499, 517-21 (N.J. Sup. App. 2017), the court held that both the original and amended statutes allowed a successful claimant to receive either twice the amount of income in the single year prior

the amount to \$50,000 per year. N.J. STAT. ANN. § 52:4C-5(a)(1) (2022). Successful claimants are permitted to recover reasonable attorney’s fees and costs.¹⁰ In 2013, the legislature added a provision awarding successful claimants “other non-monetary relief as sought in the complaint including, but not limited to vocational training, tuition assistance, counseling, housing assistance, and health insurance coverage as appropriate.” § 52:4C-5(b).

In 2013, the legislature also added an offset provision. § 52:4C-2(b). It states that any award to a claimant arising from a case (typically a federal civil rights case) against the state, a political subdivision of New Jersey or an officer or employee of the state or subdivision must be offset by any award previously made under the MIA. *Id.* As explained below, fairly read, this provision provides a financial benefit to the civil rights case defendant and forgoes a potential benefit to the state.

Those in prison for crimes other than the one for which they were exonerated are not eligible to file a claim. N.J. STAT. ANN. § 52:4C-6(a) (2022). Nor are those who properly served time concurrently with the sentence resulting from the mistaken conviction. *Id.* § 52:4C-6(b).

NEW JERSEY EXONERATIONS BY THE NUMBERS

As of January 19, 2024, the National Registry of Exonerations (NRE)¹¹ listed 68 persons who had been wrongly convicted of crimes in state courts of New Jersey since 1989.¹² The NRE is the definitive source of information on exonerations in the United States and is regularly cited by courts, policymakers, scholars, journalists, and attorneys.¹³ Of those 68 individuals, 58 were incarcerated.¹⁴ Excluding Mr. Vega, *see supra* note 8, 57 people were potentially eligible for compensation under the MIA.

The NRE also records the amount of time each exonerate wrongfully served in prison,¹⁵ from the date of conviction to the date of release. I refer to those as “lost years.” Those 58

to incarceration, or \$20,000 (now \$50,000) per year of incarceration, whichever is higher. Thus, assume a claimant earned \$100,000 in the year prior to incarceration and served five years. Such a person would be entitled now to \$250,000, which is higher than the alternative calculation - \$200,000. Kamienski’s argument that he was entitled to \$100,000 times the number of years of incarceration was rejected.

¹⁰ These fees do not include those incurred to defend the criminal prosecution or to pursue post-conviction relief. *Kamienski*, 451 N.J. Super. at 522-23.

¹¹ *Nat’l Registry of Exonerations*, LAW.MICH.EDU, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>

¹² *Nat’l Registry of Exonerations*, *supra* note 11.

¹³ Gerald Laporte, *Wrongful Convictions And DNA Exonerations: Understanding The Role Of Forensic Science*, 279 NAT’L INST. OF JUSTICE JOURNAL 11, 13–22 (2018); *Jordan v. Mississippi*, 138 S. Ct. 2567, 2571 (2018) (Breyer, J., dissenting); *The National Registry of Exonerations*, NAT’L INST. OF CORR., <https://nicic.gov/weblink/national-registry-exonerations>; Wendy Pamela Heath et al., *Sometimes the Snitch Recants: A Closer Look at the Use of Jailhouse Informants in DNA Exoneration Cases*, 4 WRONGFUL CONVICTION LAW REVIEW 71, 71–73 (2023); Tom Jackman, *More Than Half Of All Wrongful Criminal Convictions Are Caused By Government Misconduct, Study Finds*, WASH. POST, (Sept. 16, 2020, 7:00 AM), <https://www.washingtonpost.com/crime-law/2020/09/16/more-than-half-all-wrongful-criminal-convictions-caused-by-government-misconduct-study-finds/>.

¹⁴ Ten exonerates did not serve prison time and are thus not eligible for compensation.

¹⁵ <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>

wrongfully incarcerated persons served a total of 509.1 years in prison, an average of 8.8 years each.

Before delving into the numbers in more detail, it is worth noting that nearly a third of the New Jersey exonerees recorded in the National Registry of Exonerations, 22 in total,¹⁶ are also part of a “group exoneration.”¹⁷ Seventeen of the 22 served time in prison. Between 2005 and 2009, at least five police officers in the Camden Police Department’s Fourth Platoon engaged in a range of misconduct for which they were indicted. For purposes relevant here, much of this misconduct involved planting drugs on Black and Hispanic residents of Camden.¹⁸ Most of those arrested pleaded guilty because the amount of drugs planted was relatively small and the expected sentences were modest.¹⁹

Of the 57 potentially eligible incarcerated persons recorded in the Registry, 42 (or 72%) filed claims for compensation. Fourteen did not file claims and the statute of limitations for doing so has run. One (Dion Miller) was very recently exonerated. The statute of limitations has not expired for him to file a claim. He is coded as “premature.” Of the 42 filers, 30 received compensation, nine were denied and three claims remain pending. Of the 17 Camden exonerees, eight received state compensation, eight applied but were denied compensation and only one²⁰ did not file. This data is summarized in **Table 1**.

	Filed	Non-Filers	Premature	Pending	Grant	Deny
Camden	16 (94%)	1	0	0	8 (50%)	8 (50%)
Non-Camden	26 (65%)	13	1	3	22 (85%)	1 (4%)
Total NJ	42/57 (74%)	14	1	3	30 (71%)	9 (21%)

Table 1

Four important metrics for determining the effectiveness of a state compensation statute are:

- the percentage of exonerees filing claims;
- the percentage of filers who are awarded compensation;
- the percentage of incarcerated exonerees awarded compensation;
- and the percentage of years lost subject to a compensation award.²¹

¹⁶ This number counts one person, Robert Henderson, twice. Mr. Henderson was wrongly convicted of drug possession twice in the Camden scandal. Collectively, I call these the “Camden exonerees.”

¹⁷ *Nat’l Registry of Exonerations Groups*, NEWKIRKCENTER.UCI.EDU, <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/new-jersey-2009>. There were 70 persons whose convictions were vacated or whose charges were dismissed as a result of the Camden scandal. Many do not qualify for entry into the National Registry of Exonerations because they do not meet the definition of exoneration, which exclude, for example, those charged, but not convicted, of a crime.

¹⁸ One exoneree, Albert Cass, was exonerated of a weapons conviction.

¹⁹ *Nat’l Registry of Exonerations*, *supra* note 15. The 22 Camden exonerees served a total of 23.8 years in prison; five served no time. This constituted less than 5% of the lost years experienced by New Jersey exonerees.

²⁰ Nathaniel Ballard pleaded guilty. Had he filed a claim, it is likely that his claim would have been denied.

²¹ Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 395 (2017).

In theory, those recorded in the National Registry of Exonerations, with its rigorous and carefully applied methodology for entry, should have a good chance of receiving compensation under most state statutes. Low percentages of filing and/or low percentages of awards, however, suggest a possible barrier or multiple barriers to compensation.

How does New Jersey, then, compare to the other thirty-eight states²² and the District of Columbia with compensation statutes? **Table 2** provides that comparison.

	% filing	% filers paid	% exonerees paid	% lost years paid
New Jersey	74%	71%	53%	62%
United States ²³	59%	75%	44%	51%

Table 2

With the exception of the percentage of incarcerated filers who obtain a monetary award, New Jersey has significantly better outcomes than the national average. Thus, looking at just these metrics, nothing obvious suggests that New Jersey has a demonstrably less effective wrongful conviction compensation statute than those in other states.

WHAT CAN EXPLAIN NON-FILING AND DENIALS?

That is not to say that the statute cannot be improved. One way of discerning potential problems in a statute lies in trying to figure out why exonerees chose not to file a claim and why filed claims were denied. It is often difficult to obtain clear answers to these questions for every exoneree. Why someone (a “non-filer”) did not apply for compensation is often unknowable, but some educated guesses can be made in certain cases. Learning why certain claims were denied is possible if those denials are memorialized in an accessible judicial opinion or administrative order.

Let’s start with New Jersey non-filers. The percentage of Camden filers, interestingly, is extremely high. Only one Camden exoneree did not file a claim under the Act. That he pleaded guilty could explain it, although other Camden plaintiffs who pleaded guilty nevertheless filed. And, according to the Risinger article, at least until the *Mills* case, see supra note 6, some managed to get a compensation award. What is more perplexing is why so many sought compensation.

Two factors might predict a low filing rate—the comparatively small amount of time these claimants spent in prison²⁴ and New Jersey’s relatively ungenerous pre-2013 compensation

²² The number is actually now 37. Montana had a temporary compensation statute. In 2023, the Governor vetoed a bill, H.B. 423, making that statute permanent, so Montana is currently without one. MT 68th Reg. Sess. § 46-32.

²³ “United States” refers to the remaining states (and the District of Columbia) with compensation statutes.

²⁴ See Gutman and 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 NU LAW. REV. 694, 744, 746 (2019) (documenting correlation between years lost and likelihood of filing state compensation claims).

amount of \$20,000 per year.²⁵ Why bother filing? What might explain this unexpected result is that the Camden scandal was well-publicized and the subject of a large civil rights case involving many of the Camden victims.²⁶ Thus, many of the Camden filers had legal counsel and, thus, perhaps a source of representation or guidance in seeking MIA compensation.

In contrast, thirteen non-Camden exonerees did not file for MIA compensation. Why not? A good hypothesis might be that they had pleaded guilty and were thus statutorily barred from compensation, at least after 2014. In reality, though, the descriptions of each of these cases in the National Registry of Exonerations reveal that only three entered guilty pleas and those pleas may not fully explain why two of them did not file for compensation under the Act.²⁷

Why the remaining ten exonerees chose not to file for MIA compensation cannot easily be determined. All but two were exonerated prior to the 2013 amendments that imposed the “guilty plea bar.” The compensation amount was only \$20,000 per year. Perhaps the relative ungenerosity of the statute deterred filing, but that was not the experience of the Camden filers and is not a compelling justification nationally.²⁸

Sometimes, non-filing can be explained by imprisonment for a relatively modest period of time.²⁹ It may not be terribly worthwhile to file a claim that will not generate much money. But, here, all but three non-filing exonerees were incarcerated for at least 4 ½ years. Sometimes, non-filing can be explained by an exoneree’s death or subsequent conviction on valid criminal charges, but those too do not appear to apply to the non-filers. Sometimes, non-filing can be explained by a desire simply to move on and not to revisit one’s wrongful conviction by relitigating it. But, here, eight of the thirteen non-filers filed civil rights or malpractice suits.³⁰

At bottom, it is not possible to determine or even guess exactly why these exonerees chose not to file. What is clear is that the guilty plea bar does not explain the vast majority of them.

Let’s turn next to why those who did file claims lost them. With respect to the Camden exonerees, it is quite clear from *Mills* that three of those denied lost their claims for

²⁵ But see Gutman and Sun, *supra* note 17, at 749-50 (finding no apparent relationship between rates of filing and generosity of state compensation).

²⁶ *National Registry of Exonerations Groups*, *supra* note 17; *In re Camden Police Cases*, 2011 WL 3651318 (D.N.J. 2011).

²⁷ Ronald Prati was tried for sexual assault. After his exoneration, the government reinstated a previously dropped sexual assault case against him, for which he pled guilty in exchange for a sentence of time served. Prati might thus have been disqualified for compensation by *Id.* § 52:4C-6(b). Similarly, Terence Worthy was exonerated of a firearms charge for which he had pleaded guilty and was sentenced to seven years. *Terence Worthy*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5245>. At the same time, he pleaded guilty to an escape charge for which he was sentenced to a concurrent term of five years. Both were exonerated prior to 2013, when the statute was amended. Their guilty pleas do not seem to be a good explanation for their non-filing. The third person is Rodney Roberts, exonerated in 2014, who is the subject of substantial discussion in the Risinger article, *supra* note 2.

²⁸ *See* note 25.

²⁹ *See* note 24.

³⁰ Four received settlements: John Dixon, George Gross, Lawrence Simmons and Isaac Wright. The complaints of three were dismissed: Vincent Landano, Margaret Michaels and Terence Worthy. Rodney Roberts’ case, filed in 2015, remains pending.

compensation as a direct result of their guilty pleas.³¹ The claim of a fourth, Kenneth Pitts, was separately rejected based on *Mills*.³²

Among the 13 plaintiffs in *Mills* were denied filers Jherelle Bailey, Gilbert Becerra and Bryheem Frazier. The appellate decision in *Mills*, which specifically dealt with whether guilty pleas bar claims, said, “[t]he [trial] judge granted the State's motion for summary judgment as to nine of the thirteen plaintiffs for reasons not related to this appeal.” 435 N.J. Super 69, 86 A.3d 741, 744 (Super. Ct. App. Div. 2014). The rationale for these denials (which included Bailey, Becerra and Frazier) must be something other than the guilty plea bar at issue in *Mills*.³³ What it was is not clear because the trial court’s ruling is not available.

The one non-Camden exoneree whose MIA claim was denied, Curtis Knight, lost because he did not file within the statute of limitations.³⁴ What all this means is that the guilty plea bar might explain some non-filing and clearly explains some denials, but not as many as one might predict. Thus, while the Risinger proposal to get rid of the guilty plea bar is very sound, it is doubtful whether it might, if implemented, substantially increase the percentage of New Jersey filers and increase the percentage of claims that result in an award of compensation.

EXTENT OF NEW JERSEY COMPENSATION

Table 1 shows that 30 New Jersey exonerees have received compensation under the MIA. That amounts to just over one per year since the Act was passed in 1997. I have filed a series of New Jersey open records (OPRA) requests and have obtained the amounts of most of those payments. In three cases, the amount attributed to the MIA is not entirely clear.

In a number of cases, MIA claims have been joined with federal civil rights cases arising from state court wrongful conviction in federal court.³⁵ This periodic joinder of claims is unique among the states. Why does this occur? One possibility is New Jersey’s idiosyncratic Entire Controversy Doctrine, which “encapsulates the state’s longstanding policy judgment that the adjudication of a legal controversy should occur in one litigation and in only one court.” *Ricketti v. Barry*, 775 F.3d 611, 613 (3d Cir. 2015).

Whether this doctrine actually requires MIA claims and federal civil rights claims to be joined is not the point. It is enough that some plaintiffs’ attorneys think it might. For our purposes here, this is important because, when those cases settle, the settlement agreement typically does not clearly state how the settlement amount is allocated among claims or defendants. In the absence of clarity, I have simply divided the amount in half – attributing half of the settlement to the MIA claim and half to the other claims.

With that assumption, the total amount paid by the state of New Jersey in claims under the Act is nearly \$10,942,000 or an average of just \$421,000 per year since 1997. The average

³¹ Albert Cass, Robert Henderson, and Antoine Rolax. *Mills v. New Jersey*, 435 N.J. Super 69, 86 A.3d 741 (Super. Ct. App. Div. 2014).

³² 2015 N.J. Super. Unpub. LEXIS 2568 (N.J. App. Nov. 6, 2015).

³³ That lower court decision is not publicly available.

³⁴ *Estate of Knight v. State*, 2007 N.J. Super. Unpub. LEXIS 829 (App.Div. Mar. 21, 2007).

³⁵ See, e.g. *Washington v. Wilson*, Civ. No. 22-00749-KNW (D.N.J Sept. 26, 2023) (unpub)

amount paid per year of lost time is just under \$36,000 per year. That relatively modest figure reflects the fact that the statutory award rate was \$20,000 per year before 2014. That amount is about half the national average.

	Avg. Annual Payment	% of lost years paid
New Jersey	\$35,758	62%
United States	\$69,482	52%
New York	\$162,235	58%
Illinois	\$15,421	65%
Texas	\$114,679	57%

Table 3

Compared to the national average, New Jersey compensates for a higher percentage of years lost, but at a substantially lower amount of money per year of incarceration. The three highest states in terms of numbers of exonerations are included in **Table 3** for comparison purposes.

One way of explaining that result is that New Jersey’s statutory payment metric is simply less generous than most other states. Of the 37 states and the District of Columbia, only 10 states have an average annual payment less than that of New Jersey. The average annual award in New York, which has no cap, is 4½ times that of New Jersey. At the same time, neighboring Pennsylvania and Delaware have no state compensation statute at all.

Another factor may be noteworthy. If one goes to the National Registry of Exonerations website, clicks “resources,” looks at the interactive data display and clicks “non-federal,” one sees in the resulting graph a generally gradual increase in the exonerations over time. In fact, the number of state court exonerations in the 24 years between 1989 and 2013 and the ten years since 2013 are nearly the same. If one clicks on New Jersey, the picture looks different. There were a large number of Camden exonerations in 2010, but only 18 New Jersey exonerations (or 26%) occurred during the last decade – after 2013.

What does this mean? It means that the accelerating pace of exonerations nationally is not present in New Jersey. Why that is, is beyond the scope of this Article. It is clear that a lot of the New Jersey exonerations occurred when the compensatory metric was only \$20,000. If more of them occurred after 2013, the average payment per year would have been higher. That is not a reason to be satisfied with a \$50,000 per year compensatory metric. There are, as the Risinger article points out, many reasons not to be – including the very modest amount of MIA compensation New Jersey pays each year on average. It only means that New Jersey’s relatively poor showing on this metric can, in part, be explained by a very low prior compensation amount and a lot of claims being paid during that comparatively ungenerous period.

RECOMMENDATIONS FOR REFORM

The Risingers’ recommendations for reform are well-framed and merit careful analysis. In this section, I share my thoughts on several of them and offer others for consideration.

Administrative vs. Judicial. There is no question, as the Risinger article explains, that an adversarial tort model, like that in New Jersey, can encourage “partisan excess” and slow the process for awarding compensation.³⁶ One can see the appeal of the Risingers’ proposal to create a substitute administrative model with no rules of evidence. It is, however, not always the case that an administrative model delivers faster and surer compensation. It really depends on who or what is doing the administering.

California, a very blue state, for example, has lodged its compensation program in the Crime Victim Compensation Board. Although recent statutory reforms and personnel changes have resulted in more compensation awards in California, the program has been plagued by delay and difficulties overcoming the objections of prosecutors sitting on the Board. In many cases, the proceedings have been very adversarial and lengthy.³⁷ **Table 4** tells part of the tale:

	% filing	% filers paid	% exonerees paid	% lost years paid
New Jersey	74%	71%	53%	62%
California	39%	65%	26%	41%

Table 4

On each metric, New Jersey’s judicial model has done better, mostly much better, than California’s administrative model.

Maryland, another blue state, is another example. For years, compensation decisions were made by the Board of Public Works, whose members were high-level elected government officials. Claims languished.³⁸ Maryland has now placed this function in its Office of Administrative Judges, which has worked better. The kind of administrative process appears to make a difference in Maryland. Indiana lodges its compensation decisions with the Institute of Criminal Justice and the resulting process has been quite slow.³⁹ In contrast, the Texas Office of

³⁶ They note that this may be driven in part because juries can hear these claims. A simple, although perhaps partial, fix is that MIA claims be heard by judges without juries. Indeed, many jurisdictions, such as the District of Columbia, for example, expressly call for bench trials.

³⁷ Justin Brooks & Alexander Simpson, *Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins*, 49 SAN DIEGO L. REV. 627, 635–41 (2012).

³⁸ Ovetta Wiggins and Erin Cox, *Md. board that could pay millions to the wrongly convicted splits over whether to do so*, WASH. POST, (Sept. 4, 2019 5:26 PM), https://www.washingtonpost.com/local/md-politics/maryland-lawmakers-urge-the-board-of-public-works-to-pay-exonerated-prisoners/2019/09/04/e6ce1816-cea3-11e9-8c1c-7c8ee785b855_story.html; Ovetta Wiggins, *They spent 120 years in prison for crimes they didn’t commit. Will Maryland compensate them?*, WASH. POST, (Aug. 6, 2019 7:30 AM), https://www.washingtonpost.com/local/md-politics/they-served-81-years-in-md-prisons-for-crimes-they-didnt-commit-will-the-state-compensate-them/2019/08/14/33bab9f8-b302-11e9-951e-de024209545d_story.html; Ovetta Wiggins, *Maryland moves toward clear plan for paying people who were wrongly convicted*, WASH. POST, (Feb. 10, 2021 4:12 PM), https://www.washingtonpost.com/local/md-politics/maryland-wrongly-convicted-compensation-/2021/02/10/93c53cea-6bb8-11eb-9ead-673168d5b874_story.html.

³⁹ Jeffrey Gutman, *Compensation Under the Microscope: Indiana*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Documents/Under%20The%20Microscope%20Indiana.pdf>.

the Comptroller, not an obvious place to administer wrongful conviction compensation, does an effective job of doing so.

In short, moving from a judicial to an administrative model is not, alone, a panacea. Ultimately, advocates for wrongful conviction compensation want a process that tries to achieve two goals that are somewhat in tension with each other – accuracy and speed. Much of what makes certain compensation systems more successful than others is not whether they are administrative or judicial, but instead the culture that develops among participants in the process.

If government officials, often in the state Attorney General’s Office, have an oppositional mindset, sometimes borne of a belief or suspicion that the exoneree is not really innocent, an adversarial process will unfold whether the context is judicial or administrative. Of course, these government attorneys have an ethical obligation to their client, the state, and its taxpayers. But, the adversarial culture in some offices, such as those in states like Michigan⁴⁰ and Ohio, seems tempered to some degree by a genuine understanding of the purposes of these programs and a willingness to settle at least some particularly meritorious cases reasonably quickly rather than to devote government resources to potentially unproductive litigation.

It is not necessary, however, to choose between a judicial and an administrative model. The District of Columbia is unique in giving claimants a choice. D.C. Code § 2-421. Claimants can pursue a judicial remedy in which damages are uncapped, or an administrative remedy in which damages are capped. *Id.* This system has not been in effect long enough to make a judgment of its efficacy, but the concept has considerable appeal. Claimants can choose whether to trade speed for potentially higher damages depending on their personal circumstances.⁴¹

The Risingers are right in focusing attention on delays in obtaining compensation. While an adversarial tort-based judicial compensation model might result in lengthy litigation in some cases,⁴² the MIA, as currently structured, has one advantage in this regard. It is a one-stop shop. The court decides liability and damages in the same proceeding. Many states, in contrast, have a bifurcated process in which an entity, often a court, decides state liability – whether the claimant satisfies the standard for compensation – and another, often a court of claims, decides on compensation.⁴³ That two-stop procedure can cause delay.

Standard of Proof. The Risingers argue that the New Jersey statute should replace the clear and convincing evidence standard with a preponderance of the evidence standard. It is difficult to know how many additional cases would be won by claimants, either at trial or in

⁴⁰ See Anna Clark, *They Were Wrongfully Convicted. Now They’re Denied Compensation Despite Michigan Law*, PROPUBLICA (Jan. 05, 2024 5:00 AM), <https://www.propublica.org/article/why-michigan-failing-compensate-wrongly-convicted-despite-law>.

⁴¹ See note 21 at 426-30, 436-37

⁴² New Jersey might consider a provision like that in Massachusetts, which permits the claimant to move for expedited discovery and speedy trial. ALM GL CH. 258D § 3 (2023).

⁴³ Two-stop shop states include Alabama, Florida, Illinois, Iowa, Minnesota, Nevada, and Ohio.

settlement, with the lower burden of proof, but the recommendation is entirely sensible. Indeed, many states have explicitly adopted a preponderance of evidence standard.⁴⁴

Just as an administrative claims resolution process is not a panacea, we should be careful to recognize that a preponderance standard is not either. It all depends on the approach of the decisionmaker. As I have explained elsewhere, courts sometimes engage in what I have called “room thinking,” regardless of the standard of proof in the statute.⁴⁵ Judicial “room thinking” is a form of analysis which denies a claim of innocence when there remains some room to conclude that the claimant is guilty. “Room thinking” requires the claimant to extinguish all doubt of innocence. It is entirely inconsistent with a preponderance standard, but nevertheless can be observed in a number of compensation cases.

Thus, I have proposed a burden-shifting regime in which the claimant would first be required to establish a modest *prima facie* case for entitlement to compensation.⁴⁶ That case would require the plaintiff or claimant to advance some affirmative evidence of factual innocence. If satisfied, it would be the government’s burden to demonstrate flaws in the evidence of innocence, present evidence of guilt, or both. If the court concludes that the evidence of innocence is stronger than the evidence of guilt (essentially a preponderance standard), it should issue the certificate of innocence or make a finding that would lead to compensation. If it does not yet conclude that, then the burden shifts back to the plaintiff to try to make that showing.

This burden shifting approach does not require statutory change. Courts can adopt it as a way of implementing a preponderance standard. The purpose of the approach is to divert a court’s attention from whether the plaintiff or claimant has cleared the room of all doubt of innocence to whether he or she has demonstrated that it is more likely than not that they are innocent.⁴⁷

California has taken a bolder approach, one that is more in keeping with the bedrock principle that one is innocent until proven guilty. That notion requires placing the burden of persuasion on the government, not the plaintiff. In California, if a person obtains certain forms of post-conviction relief based upon a judicial finding of innocence, that finding requires the Crime Victim Compensation Board to award the person compensation. Cal. Pen. Code § 4902(a). In other cases, in which the Attorney General opposes the petition for compensation, the Board will have a hearing. “At the hearing, the Attorney General shall bear the burden of proving by clear and convincing evidence that the claimant committed the acts constituting the offense.” Cal. Pen. Code § 4903(b).

⁴⁴ CAL. PEN. CODE § 4900(e) (2023); CONN. GEN. STAT. § 54-102uu(c) (2023); FLA. STAT. § 961.03(4)(a) (2023); HAW. REV. STAT. § 661B-3(a) (2023); IDAHO CODE § 6-3502(2) (2023); BURNS IND. CODE ANN. § 5-2-23-2(b) (2023); K.S.A § 60-5004(c)(1) (2023); MISS. CODE ANN. § 11-44-7(1) (2023); NEV. REV. STAT. ANN. § 41.9(2) (2023); 2022 BILL TEXT OR S.B. 1584(5)(a); R.I.GEN. LAWS § 12-33-4(a) (2023).

⁴⁵ Jeffrey Gutman, *Are Federal Exonerees Paid?*, 69 CLEVE. ST. L. REV. 219, 253-62 (2019).

⁴⁶ *Id.* at 257-60.

⁴⁷ *Id.* at 259.

No other state appears to place the burden of demonstrating guilt to defeat a claim for compensation on the government. The New Jersey legislature might consider a similar approach if it revisits the MIA.

Guilty Plea Bar. New Jersey’s guilty plea bar should be removed from the Act, for all the reasons the Risingers describe.⁴⁸ New Jersey is not the only state with such a bar.⁴⁹ Iowa’s bar was discussed at length in *Rhodes v. State*, 880 N.W.2d 431 (Iowa 2016) (Iowa statute categorically bars those pleading guilty, even if plea is later set aside, from compensation). That bar seems to have had real effect in Iowa – four⁵⁰ of 11 exonerees who did not file for compensation pled guilty. But, the claim deterrence effect appears decidedly less dramatic in Oklahoma and Ohio.

Cause and Contribute Bar. The Risinger article rightly focuses on New Jersey’s requirement that the claimant show that they “did not by his own conduct cause or bring about his conviction.” It does not appear that any New Jersey exoneree has been denied as a clear result of the application of this provision, but it is flawed for two reasons.

First, it is the sort of statute that makes some intuitive sense as a general rule, but requires exceptions to account for evolving understandings of the causes of wrongful convictions. Coerced confessions and, as the Risingers point out, coerced guilty pleas are prominent among them. Thus, statutes like New Jersey’s have tried to make exceptions that account for actions that seem voluntary (and thus warrant denial of compensation), but actually are not. But, those exceptions cannot anticipate or account for additional exceptions, raised in certain cases, that would be sensibly added to the statute, but are not.

The better approach is for statutes, if they must, to identify particular acts or omissions that reflect a degree of culpability of the exoneree that is so significant that it merits a compensation bar. California has an example. The Crime Victim Compensation Board will deny compensation if it is shown by a preponderance of the evidence that the claimant pleaded guilty “with the specific intent to protect another from prosecution.” CAL. PEN. CODE § 4903(c). Even this provision is problematic if the claimant falsely pleaded guilty because, for example, they or

⁴⁸ See also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 180 (2014). According to the National Registry of Exonerations, as of December 26, 2023, of 3298 persons exonerated of crimes for which they were convicted in state courts, 812 pled guilty.

⁴⁹ D.C. CODE § 2-425 (2023) (unless an Alford plea); IOWA CODE § 663A.1(1)(b) (2023); 51 OKL. ST. § 154(B)(2)(b) (2023); ORC ANN. § 2743.48(A)(2) (2023). In Massachusetts, the statute requires the plaintiff to show that he or she did not plead guilty “unless such guilty plea was withdrawn, vacated or nullified by operation of law on a basis other than a claimed deficiency in the plea warnings required by section 29D of chapter 278.” ALM GL CH. 258D, § 1(C)(iii). In Virginia, to be wrongfully incarcerated, one must have “have entered a final plea of not guilty or an Alford plea, or, regardless of the plea, the person incarcerated was convicted of a Class 1 felony, a Class 2 felony, or any felony for which the maximum penalty is imprisonment for life.” VA. CODE ANN. § 8.01-195.10(B).

⁵⁰ *Nat’l Registry of Exonerations*, LAW.MICH.EDU, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?SortField=ST&View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=Group&FilterValue1=P&SortDir=Asc>

a family member had been threatened if they did not do so. But, the point is for the state legislature to list specific disqualifications rather than a general one, with exceptions.

Second, these kinds of statutes wrongly place the burden on the claimant to establish a negative – that they did not engage in disqualifying conduct.⁵¹ Better is to take the approach that Hawaii does. The Hawaii statute identifies a number of affirmative defenses which the government may plead. Proof of those defenses rests on the government by a preponderance of evidence. HAW. REV. STAT. § 661B-3(b) (2023).

Monetary Compensation. The Risingers recommend a \$100,000 annual monetary cap and elimination of the “rich person’s cap.” The \$100,000 per year recommendation would clearly place New Jersey among the most generous states in terms of compensation. Given the relatively modest number of New Jersey exonerees over the last decade, that is not an unrealistic ask. It might also be offset by a proposal made below.

Elimination of the “rich person’s cap” may permit an exoneree with a large income earned the year before a wrongful conviction to receive a larger annual compensation amount than a person without such a substantial wage loss. It is not obvious that this has happened in practice in New Jersey, but it is potentially inequitable. It seems unfair that the “base rate” provided to exonerees depends on one’s pre-conviction income.

While the “base rate” should, for that reason, be uniform, a few states do allow claimants to seek lost wages in addition to the “base rate.”⁵² This is sensible, because it recognizes that, in addition to the damages associated with loss of liberty, wrongful incarceration visits economic harm on exonerees. To be sure, calculating lost wages may well require expert testimony from a labor economist, and, per year, the lost wage calculation will be higher for people with deeper education and work histories. But, compensating exonerees for lost wages separately from the base wage does not raise the same inequity concerns that the Risingers identified in the unique New Jersey statute.

Moreover, at least two states permit the decisionmaker to supplement the standard award when the claimant can show that misconduct caused the wrongful conviction.⁵³ In part, the purpose of these provisions appears punitive – to punish the state by making it pay more.⁵⁴ The conceptual problem with this sort of statute is that the state is punished when it actually is the county or municipality that engaged in the misconduct that caused the wrongful conviction. That logic has caused at least two Governors, those of Montana and Missouri, to veto changes to their state compensation statutes. The result in Montana has been a lapse of a temporary statute.

The problem, largely solved by the District of Columbia statute described above, is that a claimant seeking additional compensation on grounds tantamount to that of a federal civil rights case, will need to develop a considerably broader case that will require much more time to

⁵¹ See note 45 at 262–71.

⁵² IOWA CODE § 663A.1(6)(c); ORC ANN. 2743.48(E)(2)(c); TENN. CODE. ANN. § 9-8-108(a)(7)(A); MINN. STAT. § 611.365(2)(1).

⁵³ Louisiana and Virginia.

⁵⁴ .

litigate and will likely be strenuously opposed by the government. Perhaps for these reasons, these statutes appear not to be invoked frequently.⁵⁵ [JWP1][JWP2]

At least three other states,⁵⁶ in somewhat different ways, allow enhanced award in extraordinary circumstances. A fixed per year of incarceration metric implicitly assumes that all people are harmed equally by wrongful incarceration. Permitting a judge (or jury) to enhance that amount by providing proof of extraordinary harm – being victimized by assault, contracting a serious disease as a result of incarceration or receiving poor treatment that promises to reduce life expectancy or enjoyment, and the like – recognize that not all exonerees experience their incarcerations the same. The standard compensatory metric may not fairly compensate certain exonerees and a more flexible approach is thus warranted.

Some states increase their annual compensation amount by a measure of annual inflation,⁵⁷ and others do so indirectly by keying their annual compensation amount by a function of state median gross income.⁵⁸ Recent spikes in inflation highlight the need for a built-in inflationary adjustment. Keying compensation to the cost of living or median income in the state is also sensible. It recognizes that these economic data points are different from state to state and accounts for those differences.

In addition, a few states expressly award compensation for time incarcerated prior to conviction.⁵⁹ Doing so recognizes that low-income future exonerees were unable to post bail and that this lost time is no different than that experienced after conviction. More states compensate exonerees for post-release time during which their liberty has been limited as a result of probation or designation on a state sex offenders registry.⁶⁰ New Jersey should adopt a similar approach.

Non-Monetary Compensation. New Jersey permits successful claimants to obtain certain non-cash benefits, “including, but not limited to vocational training, tuition assistance, counseling, housing assistance, and health insurance coverage as appropriate.” N.J. STAT. ANN § 52:4C-5(b). It is fair to question the value of such non-monetary benefits awarded at the conclusion of lengthy litigation when they are no longer as useful for the exoneree. Instead, given that most states do not extend the services offered to parolees upon release to exonerees,

⁵⁵ There is no evidence that Louisiana has paid additional amounts for this reason. In Virginia, the Norfolk Four were? Indeed, there is some indication that the Virginia statute was amended to benefit them, but it does not appear to have been used for other Virginia exonerees. Jeffrey Gutman, *How Does State Compensation Work in Virginia and Why Does It Work So Well?*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exonerat ion/Documents/Virginia%20v.f%20%281%29.pdf>.

⁵⁶ Alabama, Connecticut, and Hawaii.

⁵⁷ See, e.g., Florida, Ohio, Oregon and Virginia.

⁵⁸ Connecticut, Maryland, and Utah.

⁵⁹ Hawaii, North Carolina, and Washington. The statutes of several other states are unclear on this point and, in some, courts have determined whether pre-conviction time incarcerated is or is not compensable. In West Virginia, persons arrested, confined and charged, but later released when another person is convicted of those crimes, may file a claim. W. VA. CODE § 14-2-13a(c)(1)(B).

⁶⁰ Colorado, District of Columbia, Idaho, Kansas, Minnesota, Nevada, Oregon, Texas, Washington.

one might argue that such benefits be scrapped in favor of the same sort of basket of services that a parolee might receive.

That recommendation, too, is entirely sensible. Whether released because of an exoneration or the end of a valid prison sentence, returning citizens need, often urgently, a range of supportive reentry services, such as housing, vocational training, job placement and medical and mental health coverage.⁶¹ Offering exonerees the same basket of services as parolees presents three practical problems. But, none are insurmountable.

The first is that for many individuals who face release from prison, the state has substantial time to plan for reentry. Such is not the case with most exonerees. Just hours may pass from a court ruling to release, leaving little time to line up housing, health care and other needed reentry services. At the same time, however, some exoneration followed quickly by releases are not unexpected and a state reentry specialist can be tasked with developing a basket of services that can be quickly be rolled out for successive exonerees.

The second is that the parolee reentry package may not be entirely suitable for exonerees. The orientation of certain parolee support programs may be to avoid recidivism. The goals and benefits of such programs may be cabined by the parolee's criminal history. Exoneree support, in contrast, should not be grounded in a desire to avoid recidivism and should not be bounded by criminal history. For example, some wrongful conviction compensation statutes incorporate mechanisms for expungement; others do not. For those states which do not, exoneree reentry support may need to include expungement and other approaches to clear barriers to employment, housing and training.

In short, there are aspects of parolee reentry support programs that may similarly benefit exonerees. But, the Venn diagram may not entirely overlap. Exonerees may require particular approaches and services to meet their special needs that are not commonly found in the basket of services offered parolees. States should be mindful of those potential differences and craft an exoneree support program accordingly.

For example, exonerees with children may have, for no fault of their own, substantial child support payment arrearages and have lost the ability to help their children save for higher education. A small number of states will pay the exoneree's child support arrearages.⁶² Colorado

⁶¹ Christine Kregg, *Right To Counsel: Mental Health Approaches to Support the Exonerated*, ADVOCATES' FORUM, (Jun. 1, 2016), <https://crownschool.uchicago.edu/student-life/advocates-forum/right-counsel-mental-health-approaches-support-exonerated>; Lauren Legner, *The Psychological Consequences of a Wrongful Conviction and How Compensation Statutes Can Mitigate the Harms*, MICH. ST. L. REV.: MSLR Forum, (Apr. 26, 2022), <https://www.michiganstatelawreview.org/vol-2021-2022/2022/4/25/the-psychological-consequences-of-a-wrongful-conviction-and-how-compensation-statutes-can-mitigate-the-harms>; Dr. Sarah Anderson, *Compensation for Exonerees*, MOST POLICY INITIATIVE, (Mar. 30, 2023), <https://mostpolicyinitiative.org/wp-content/uploads/2023/03/Compensation-for-the-Exonerated.pdf>.

⁶² C.R.S.A. § 13-65-103(2)(e)(3) (2023); D.C. CODE § 2-423.02(1)(B) (2023); MINN. STAT. § 611.365(a)(5) (2023); R.I. GEN. LAWS § 12-33-4(b)(1)(i) (2023); TEX. CIV. PRAC. & REM. CODE § 103.052(c) (2023); REV. CODE WASH. § 4.100.060(5)(c) (2023).

appears to be the only state that provides tuition waivers at state schools of higher learning if their parent was wrongly incarcerated for more than three years.⁶³

At bottom, the perfect should not be the enemy of the good. States with large numbers of exonerees who have served long sentences may develop an expertise in crafting and expediting non-compensatory service packages. Smaller states with fewer exonerees may not develop this expertise as readily. At a minimum, states should make known their standard reentry services approaches so that advocates can ask, if consistent with the state statute, for supplements to it that better serve their exonerated clients. Given considerable experience with parolees, states should be able to promptly implement that standard package for exonerees, with additional services ordered by a court or agency to follow.

The third problem may be the most difficult. A benefit that may not be awarded to parolees, but should be provided to exonerees, is an emergency cash award. A small number of states have provisions providing for such emergency relief, but they require a finding of state liability first.⁶⁴ Many exonerees need cash immediately and states are unlikely to give it without a determination that the released person meets statutory standards.

The fear of compensating the potentially “undeserving” explains the structure and limitations of many state compensation statutes. The Risinger article forcefully challenges that perspective with their thought experiment about whether both persons should be compensated when one knows that one is innocent and one is not. For those ultimately proving entitlement to state compensation, the emergency award can be deducted from the final award. For those who do not, the award can be treated like any state benefit overpayment. The number and amount of such “erroneous” awards should be relatively small, small enough to regard the benefits of such emergency payments to outweigh their cost.

Delay and Joinder In this connection, the Risinger article is entirely right to worry about delay in the receipt of monetary and non-monetary benefits. As noted earlier, New Jersey is the only state in which a state compensation claim is frequently litigated with a federal civil rights case in federal court. To the extent that this is the result of a quirk of New Jersey joinder of claims and preclusion rules, it is not helpful to claimants.

At least in theory, MIA claims, which do not require litigation over fault, should be litigated more quickly than federal civil rights cases. Litigating these claims together can and likely does slow the process for deciding the easier MIA cases. The state may be reluctant, for issue preclusion or settlement dynamic reasons, to settle such claims in the absence of a global settlement of all claims.

The solution to this problem is to draft an anti-joinder exception into the MIA. The result would be that MIA claims are decided (hopefully more quickly) in New Jersey Superior Court and that they need not be joined with federal civil rights cases filed in federal court.

⁶³ C.R.S. § 13-65-103(2)(e)(II)(B) (2023).

⁶⁴ D.C. CODE § 2-423.02(a)(2) (2023); V.A. CODE ANN. § 8.01-195.11(D) (2023).

Offsets. A fair-minded person can understand a state’s rationale for not wanting exonerees to be compensated through both state compensation statutes and federal civil rights cases. If any category of plaintiffs is deserving of a double recovery, it is the wrongly convicted. But, those states concerned about this typically do one of two things.

First, a number of states, most prominently Texas, require the claimant to release all civil rights claims in order to get state compensation.⁶⁵ Others, more sensibly, impose varying offsetting requirements.

The offsetting provision in the MIA is particularly odd. From the perspective of the state, an offsetting provision that requires a person who is awarded compensation under the Act, and later receives a higher civil rights award, to repay the state makes sense.⁶⁶ While not all state compensation recipients will also seek compensation under other theories, like violation of their federal civil rights, some will and some of those will win. The state can recapture some of the money it paid. And, if there is a civil rights case verdict or settlement favoring the plaintiff, that demonstrates or suggests fault of the defendant, typically a municipal or county government or employee. Requiring that entity to pay the full amount of the civil rights judgment or settlement better aligns payment of compensation with fault.

The New Jersey statute does the opposite. It states, in effect, that when there is an MIA award, a subsequent civil rights case judgment or settlement should be offset by the state award. The civil rights defendant then benefits because the amount of money it must pay is reduced. The state, which is typically not directly responsible for the wrongful conviction, does not benefit from the civil rights award recovery. Fault does not align with payment. To fix this problem, New Jersey should look to state statutes that call for the repayment of state compensation when there is a subsequent and higher civil rights case award.⁶⁷

CONCLUSION

The Risinger article does a great service in causing us to revisit the MIA and to think creatively about how to improve it. This is an opportune time to do so. Although many recent state compensation statutes have been passed or improved on a bipartisan basis, New Jersey now has a Democratic trifecta and progressive reform of the MIA is possible. —The Risinger Article comprehensively suggests several practical steps for improving the ~~Mistaken Imprisonment Act~~**MIA** and I have suggested others. Adopting those recommendations, supported by empirical data and comparative state analysis, will further New Jersey’s progress in supporting the wrongly convicted.

⁶⁵ *Brown v. City of Hous.*, 660 S.W.3d 749 (Tex. 2023); *Brown v. City of Hous.*, 65 F.4th 774 (2023).

⁶⁶ Jeffrey Gutman, *Compensation Under the Microscope: Washington*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Documents/Washington%20FINAL.pdf>.

⁶⁷ See, e.g., MONT. CODE ANN. § 46-32-107(2) (2023); COLO. REV. STAT. § 13-65-103(8)(b) (2023); IDAHO CODE § 6-3503(5) (2023).