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The Price Is Wrong: Reimbursement of Expenses for Acquitted Criminal Defendants

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THE PRICE IS WRONG: REIMBURSEMENT OF EXPENSES FOR ACQUITTED CRIMINAL DEFENDANTS

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ABSTRACT

“Not guilty”—these two simple words elicit intense relief from any defendant at the conclusion of a criminal trial. As one harrowing ordeal ends, however, a new one inevitably takes shape: picking up the pieces of a life shattered physically, emotionally, and, for non-indigent defendants, financially. Where do defendants who have successfully defended themselves against criminal prosecution turn for assistance in paying the debts incurred in securing their freedom?

Some states, as well as the federal government, have implemented laws that allow acquitted defendants to seek public reimbursement of certain legal expenses they incurred in their defense. These reimbursement methods differ substantially from one another—some offering limited reimbursement to all acquitted defendants and others offering greater reimbursement to smaller categories of defendants, such as public employees or defendants prosecuted maliciously. Moreover, state and federal courts alike must grapple with various issues that arise when interpreting and applying these laws.

Reimbursement laws incentivize the government to use restraint in making prosecutorial decisions and reduce the likelihood that innocent defendants will be prosecuted. Existing laws, however, generally suffer from the same defect: they do not provide comprehensive reimbursement for non-indigent defendants who

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incur legal expenses in successfully defending against criminal charges. Acquitted defendants—including defendants who are nolle prossed or suffer a mistrial—are presumed innocent and therefore ought to be made whole after enduring prosecution at the hand of the State. To address this issue, this Article discusses the reimbursement laws currently in existence and proposes a model statute that builds on these laws, expressly including details normally left to the courts. The model statute’s purpose is to enable expanded public reimbursement for a larger portion of acquitted defendants.

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INTRODUCTION

In a racially charged trial that captured the nation’s attention, a Florida jury found George Zimmerman not guilty of murder or manslaughter for the shooting of Trayvon Martin, a seventeen-year-old African-American.¹ Roughly one month after his acquittal, Zimmerman announced that he would ask the State of Florida to

1. Reuters, *Zimmerman Legal Fees: Trayvon Martin Killer Asks State to Reimburse Legal Expenses*, HUFFINGTON POST (Aug. 27, 2013, 1:28 PM), http://www.huffingtonpost.com/2013/08/27/zimmerman-legal-fees_n_3820537.html (noting that the jury reached its decision on July 13, 2013).

reimburse him for up to \$300,000 of legal expenses.² Under Florida law, acquitted defendants are entitled to reimbursement for certain costs expended in their defense, not including attorney's fees.³ The amount Zimmerman considered requesting, however, far exceeded the State's typical reimbursement amount of \$50 to \$100.⁴

Requests like this raise many questions regarding state reimbursement for acquitted defendants.⁵ Should acquitted defendants receive any reimbursement at all for their legal expenses? If so, should they be reimbursed unconditionally or only in certain

2. *Id.* According to Zimmerman's lead attorney, Mark O'Mara, expert witness fees constituted the greatest expense, at \$75,000 to \$100,000. Vivian Kuo, *George Zimmerman to Ask for \$200,000 from Florida for Court Costs*, CNN (Aug. 28, 2013, 8:20 AM), <http://www.cnn.com/2013/08/26/justice/george-zimmerman-court-costs/>. Transcripts also carried a hefty price tag, at approximately \$20,000. *Id.* Zimmerman's defense expenses included: \$95,000 for bail; \$61,747.54 for living expenses; \$56,000 for security; \$40,647.64 for law firm support and infrastructure; \$35,588.07 for case-related expenses; \$7,924.22 for PayPal and fund management fees; and \$3,201.04 for miscellaneous expenses. Alexandra Thomas, *Here's What Zimmerman Wants Florida to Pay for*, HLN (Aug. 29, 2013, 7:41 AM), <http://www.hlnv.com/article/2013/08/28/george-zimmerman-asks-florida-pay-legal-fees> (referencing the Zimmerman Defense Fund website, which was removed following the conclusion of Zimmerman's trial).

3. FLA. STAT. ANN. § 939.06 (West 2006 & Supp. 2014). Cris Martinez, the general counsel for Florida's Justice Administrative Commission, reports that the Commission receives an average of a half-dozen court orders per year regarding acquitted defendants' reimbursement requests. Greg Allen, *Florida Asked to Reimburse George Zimmerman for Court Costs*, NPR (Aug. 28, 2013, 4:53 AM), <http://www.npr.org/2013/08/28/216323330/florida-asked-to-reimburse-george-zimmerman-for-court-costs>. In another widely publicized Florida case, Casey Anthony filed a similar request after a jury acquitted her of murdering her two-year-old daughter in 2011. *See* Kuo, *supra* note 2.

4. Allen, *supra* note 3. Florida has paid out only \$55,000 total in reimbursement expenses since 2004. *State Should Reimburse George Zimmerman*, SUN SENTINEL (Sept. 18, 2013), http://articles.sun-sentinel.com/2013-09-18/news/fl-zimmerman-legal-fees-20130918_1_george-zimmerman-17-year-old-trayvon-martin-reimbursement. Zimmerman's attorneys never did file a motion to reimburse costs. E-mail from Don West, Don West Law Grp., P.A., to author (Oct. 14, 2014, 12:03 EST) (on file with author). "Frankly, when we did the research and looked at all the administrative hoops we had to jump through, and then at how little of the actual costs we were likely to recover, it didn't seem to be worth the effort." *Id.* "[I]t turns out that the actual reimbursable costs were nominal compared with the unreimbursable expert fees and deposition costs and yet it was the expert testimony and the discovery expense that made the acquittal possible." E-mail from Don West, Don West Law Grp., P.A., to author (Oct. 14, 2014, 13:22 EST) (on file with author).

5. In this Article, "reimbursement" laws also encompass laws that prevent acquitted defendants from bearing liability for certain defense expenses rather than providing reimbursement for such expenses after the fact.

circumstances? For which expenses should they be reimbursed? And which government entity should be responsible for the reimbursement?

This controversy is a national issue, affecting defendants prosecuted at both the federal and state levels.⁶ While the federal government has adopted a single, limited approach by which acquitted defendants may seek reimbursement,⁷ state approaches vary widely⁸—from providing no reimbursement whatsoever⁹ to

6. Civil-suit reimbursement is a separate but related issue. *See, e.g.*, S.C. CODE ANN. § 15-37-10 (2013) (providing that the attorney of a prevailing party in a civil suit may recover attorney's fees and disbursements from the adverse party); S.D. CODIFIED LAWS § 15-17-37 (2013) ("The prevailing party in a civil action or special proceeding may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial."). *See generally* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (discussing several rationales for attorney fee shifting in civil litigation but refraining from expressing a preference for or against fee shifting). This Article focuses only on reimbursement for acquitted criminal defendants.

7. The Hyde Amendment allows a prevailing party in a criminal case to recover attorney's fees and other expenses when the position of the United States was "vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (now codified at 18 U.S.C. § 3006A (2012)).

8. While states have taken various approaches to reimbursement, they have almost uniformly addressed the issue through legislation. *See, e.g.*, Bd. of Cnty. Comm'rs v. Sawyer, 620 So. 2d 757, 758 (Fla. 1993) ("Cost provisions are a creature of statute and must be carefully construed. This Court has held for over a century that cost provisions against the State must be expressly authorized . . ."); *People v. Lavan*, 218 N.W.2d 797, 798 (Mich. Ct. App. 1974) (stating that the trial court's award to acquitted defendant of his costs and attorney's fees violated the sovereign immunity doctrine because there was no statutory authorization for the award). *But see* *Latimore v. Commonwealth*, 633 N.E.2d 396, 398 (Mass. 1994) ("As a general rule, absent a statute or court rule authorizing the award of attorney's fees and costs, parties are responsible for their own costs of litigation." (emphasis added) (citing cases)), *superseded by amended rule*, MASS. R. CRIM. P. 15, as recognized in *Commonwealth v. Gonsalves*, 739 N.E.2d 1100, 1103 n.4 (Mass. 2000) (noting that Rule 15 was amended following *Latimore* in order to provide additional reimbursement). There are a few exceptions, however. For example, North Carolina provides for reimbursement through a constitutional provision, *see* N.C. CONST. art. I, § 23, and Massachusetts provides for reimbursement through court-made procedural rules, *see* MASS. R. CRIM. P. 15(d), 25(c)(2), 30(c).

9. *See, e.g.*, James J. Belanger, Frederick R. Petti & James Berchtold, *Seeking Attorney's Fees in Criminal Cases*, NEV. LAW., Mar. 2002, at 6, 32 ("Nevada currently has no mechanism for compensating a criminal defendant who has been forced to defend him or herself in a groundless action."). Not only do the remaining states provide no reimbursement to acquitted defendants, but a few of them partially charge acquitted indigent defendants for their legal representation. Six states currently have "recoupment" statutes that require acquitted indigent defendants to reimburse the state for a portion of their appointed defense counsel's

providing full reimbursement for legal expenses and attorney's fees in certain situations.¹⁰ For example, some states limit reimbursement to defendants acquitted of certain offenses,¹¹ while other states limit reimbursement to public employees¹² or to those who have been prosecuted in bad faith.¹³ Although there have been occasional scholarly efforts advocating compensation for acquitted criminal defendants,¹⁴ none reviews the existing state laws on reimbursement or how these laws are applied.

fees if they are able. *See* 725 ILL. COMP. STAT. 5/113-3.1(a)-(b) (West 2014); IOWA CODE § 815.9 (2013); KY. REV. STAT. ANN. § 31.120(1)(b) (West 2014); NEV. REV. STAT. § 178.3975(1)-(2) (2001); *Id.* § 178.398 (LexisNexis 2013); N.H. REV. STAT. ANN. § 604-A:9(I) (2014); N.D. CENT. CODE § 29-07-01.1(2) (2013). A seventh state, Michigan, does not allow for recoupment after the fact, but it does require all able defendants to contribute to the costs of their assigned defense. *See* MICH. CT. R. 6.005(C).

The United States Supreme Court, in *Fuller v. Oregon*, 417 U.S. 40 (1974), upheld the constitutionality of recoupment statutes, finding that requiring repayment does not interfere with, or have a chilling effect on, the constitutional right to counsel. *See id.* at 51-53. The Court found significant, however, that the statute at issue in *Fuller* imposed reimbursement obligations only upon defendants who were actually able to pay. *Id.*

Other states also have recoupment statutes, but those states recoup only from convicted defendants. *See, e.g.*, OR. REV. STAT. § 161.665 (2011). The American Bar Association recommends that states go even further by recouping from defendants "only in instances where they have made fraudulent representations for purposes of being found eligible for counsel." ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-7.2 cmt, at 92-93 (3d ed. 1992).

10. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 12-302(c)(4)(vi) (LexisNexis 2014) ("If the State loses the appeal, the jurisdiction shall pay all the costs related to the appeal, including reasonable attorney's fees incurred by the defendant as a result of the appeal."); WASH. REV. CODE § 9A.16.110(2) (2014) (reimbursing defendants acquitted by reason of self-defense for "all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in [the] defense").

11. *See, e.g.*, CAL. PENAL CODE § 1447 (West 2011) (misdemeanors or infractions); KY. REV. STAT. ANN. § 63.070 (West 2006) (impeachment proceedings); WYO. STAT. ANN. § 7-1-103 (2013) (misdemeanors).

12. *See, e.g.*, N.J. STAT. ANN. § 18A:16-6.1 (West 2014) (acts or omissions arising out of one's performance of official duties); N.Y. PUB. OFF. LAW § 19(2)(a) (McKinney 2008) (actions within the scope of one's public employment or duties).

13. *See* ARIZ. REV. STAT. ANN. § 22-327(B) (2013); CAL. PENAL CODE § 1447 (West 2011); IDAHO CODE ANN. § 19-3923 (2004); MICH. COMP. LAWS § 774.1d (2014).

14. *See, e.g.*, Fotios (Fred) M. Burtzos, *Should I Lose Just Because You Accuse?*, COLO. LAW., Nov. 2008, at 101, 102, 104 ("A defendant who prevails, regardless of how that takes place, should not be ruined or left significantly worse off for winning. . . . If the district attorney chooses to pursue someone in court and fails in that pursuit, the office of the district attorney should be required to try to

This Article discusses the various state reimbursement schemes and proposes a model statute that draws from and extends existing law. The proposed statute is designed to provide broader reimbursement to a larger class of acquitted criminal defendants. Part I divides reimbursement laws into five categories and describes the approaches of the relevant states. Part II discusses the most common issues arising from the application of these statutes, including which expenses are reimbursable, which defendants are eligible for reimbursement, what constitutes reasonable attorney's fees, and what qualifies as malicious prosecution. Part III argues for states to adopt a broader reimbursement scheme for acquitted defendants. Finally, Part IV recommends a comprehensive model statute that expands reimbursement beyond what any state currently provides and includes supplemental commentary to the model statute.

return that person to the same financial position he or she was in before the prosecution began.”); Omer Dekel, *Should the Acquitted Recover Damages? The Right of an Acquitted Defendant to Receive Compensation for the Injury He Has Suffered*, 47 CRIM. L. BULL. 474, 474 (2011) (contending that the “prosecution should bear the various costs of an acquitted defendant’s trial process”); Luciana Echazu & Nuno Garoupa, *Why Not Adopt a Loser-Pays-All Rule in Criminal Litigation?*, 32 INT’L REV. L. & ECON. 233, 234 (2012) (considering an economic model for implementing “a loser-pays-all rule” in criminal cases, with a focus on the rule’s effects on deterrence and legal error); Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583, 584, 600 (1995) (suggesting that fee shifting should be applied to certain classes of criminal cases, including cases in which defendants retained private counsel and were acquitted, but only if such defendants can “prove their actual innocence by a preponderance of the evidence”); Russell E. Lovell II, *The Case for Reimbursing Court Costs and a Reasonable Attorney Fee to the Non-Indigent Defendant upon Acquittal*, 49 NEB. L. REV. 515, 516-18 (1970) (advocating for reimbursement for non-indigent acquitted defendants using a tort-like remedy to make them whole again); Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705, 706 (1976) (noting the devastatingly high costs of criminal defense work and arguing for the creation of a “a right to compensation for damages resulting from erroneous criminal charges”); cf. Johan David Michels, *Compensating Acquitted Defendants for Detention Before International Criminal Courts*, 8 J. INT’L CRIM. JUST. 407, 408 (2010) (arguing that acquitted defendants “should have a right to compensation for the period spent in detention before an international criminal court”). *But see* David S. Jones, *How Many Shields Are Enough?*, COLO. LAW., Nov. 2008, at 101, 103 (responding to Burtzos’ article, *supra*, and stating that “[t]o say we need new legislation allowing [acquitted defendants] recovery of attorney fees, costs, or other damages from the government ignores not only the current safeguards for the accused, but also their existing remedies”).

I. SURVEY OF STATE LAWS

At least twenty states provide some form of reimbursement to certain defendants.¹⁵ Each of these states has adopted a unique scheme designed to enable prevailing defendants to recoup certain legal expenses if particular requirements or conditions are satisfied. These state laws fall into five categories. In the first category, the laws apply to all acquitted defendants and proceedings, thereby allowing such defendants to seek reimbursement of certain legal expenses.¹⁶ The second category encompasses laws that limit reimbursement to defendants acquitted of specific crimes or acquitted based on certain affirmative defenses.¹⁷ The third category consists of laws that allow certain public employees, such as judges¹⁸ or teachers,¹⁹ to recoup legal costs from the government once acquitted of a criminal charge.²⁰ The fourth category surveys laws that echo the federal Hyde Amendment, awarding reimbursement to

15. See N.C. CONST. art. I, § 23 (waiving certain costs for acquitted defendants); ARIZ. REV. STAT. ANN. § 22-327(B) (2013) (malicious prosecution); CAL. PENAL CODE § 1447 (malicious prosecution); FLA. STAT. ANN. § 939.06 (West 2006 & Supp. 2014) (general reimbursement statute); GA. CODE ANN. § 17-11-4 (2013) (malicious prosecution); IDAHO CODE ANN. § 19-3923 (2004) (malicious prosecution); LA. REV. STAT. ANN. § 13:5108.3(B) (2014) (public employees); MD. CODE ANN., CTS. & JUD. PROC. § 12-302(c)(4)(vi) (LexisNexis 2014) (certain unsuccessful appeals by the State); MICH. COMP. LAWS ANN. § 774.1d (West 2014) (malicious prosecution); MISS. CODE ANN. § 25-1-47(1) (2010) (public employees); MO. ANN. STAT. § 550.040 (West 2002 & Supp. 2014) (general reimbursement statute), *repealed by* S.B. 621, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014); N.J. STAT. ANN. §§ 2A:166-8 to -9 (West 2014) (shifting to the county certain costs for acquitted defendants); *id.* §§ 18A:12-20, 18A:16-6.1 (West 2014) (public educators); *id.* § 40A:14-155 (West 2014) (municipal police department members); N.Y. PUB. OFF. LAW § 19(2) (McKinney 2008) (public employees); TENN. CODE ANN. § 27-1-122 (Supp. 2013) (malicious prosecution on appeal); UTAH CODE ANN. § 52-6-201 (LexisNexis 2013) (public employees); VA. CODE ANN. § 51.1-124.28 (2013) (Retirement System members); WASH. REV. CODE ANN. § 9A.16.110 (West 2014) (self-defense); WYO. STAT. ANN. § 7-1-103 (2013) (misdemeanors); MD. R. 8-306(c) (shifting to the State certain costs related to automatic appeals for capital defendants); MASS. R. CRIM. P. 15(d), 25(c)(2), 30(c)(8)(B), 30(c)(9) (shifting to the State certain costs related to some types of unsuccessful appeals by the State); PA. R.J.A. No. 1922 (judges).

16. This category is discussed in Section I.A *infra*. In addition to acquittals, some states also allow reimbursement for dismissals. See *infra* Section II.B (discussing cases that define “dismissal” and “acquittal”).

17. See *infra* Section I.B (discussing the second category).

18. PA. R.J.A. No. 1922.

19. UTAH CODE ANN. § 53A-6-503 (LexisNexis 2013).

20. See *infra* Section I.C (discussing the third category).

acquitted defendants who were maliciously prosecuted.²¹ Finally, the fifth category consists of laws that allow for reimbursement of defense expenses incurred only in certain types of proceedings.²²

A. Reimbursement for All Acquitted Defendants

Four states²³ have adopted broadly applicable reimbursement laws²⁴: Florida,²⁵ Missouri,²⁶ New Jersey,²⁷ and North Carolina.²⁸ In contrast to the states whose laws fall under the remaining categories, the laws in this first category do not limit reimbursement by type of case or type of defendant. Thus, all defendants acquitted of criminal charges in these four states are potentially eligible to receive compensation for certain defense expenses.

21. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified as a note at 18 U.S.C. § 3006A (2012)); *see infra* Section I.D (discussing the fourth category).

22. *See infra* Section I.E (discussing the fifth category).

23. Arkansas also has a broadly applicable statute, but a recent decision by the Arkansas Supreme Court casts doubt on its continued viability. The statute provides in part:

(b) In all criminal or penal cases pending under indictment in the circuit courts, if the defendant shall be acquitted or if nolle prosequi shall be entered by the prosecuting attorney, except in cases where the prosecutor shall be adjudged to pay the costs . . . the costs shall be paid by the county.

. . . .

(d) Whenever the county shall be liable to pay the costs and expenses in criminal cases, the circuit court for the county in which the case was held shall adjust the costs and expenses and cause them to be certified to the county court.

ARK. CODE ANN. § 16-92-105 (2006). Following *Kiesling-Daugherty v. State*, 2013 Ark. 281, at 5 (Baker, J., dissenting), however, the applicability of the statute is uncertain. In *Kiesling-Daugherty*, the acquitted defendant relied on Arkansas' Supreme Court Rule 6-7(b), rather than on Arkansas' reimbursement statute. ARK. SUP. CT. R. 6-7(b); *Kiesling-Daugherty*, 2013 Ark. at 1 (majority opinion). The majority ruled that the defendant's claim was barred by sovereign immunity; however, a dissenting judge argued that the defendant had a statutory remedy under section 16-92-105. *Kiesling-Daugherty*, 2013 Ark. at 2, 5 (Baker, J., dissenting). Thus, it is unclear whether the defendant would have prevailed had she simply asked the county circuit court to "adjust the costs and expenses and cause them to be certified to the county court." ARK. CODE ANN. § 16-92-105.

24. *See, e.g., infra* notes 31-36, 76 and accompanying text (discussing cost-shifting schemes).

25. FLA. STAT. ANN. § 939.06 (West 2006 & Supp. 2014).

26. MO. ANN. STAT. § 550.040 (West 2002 & Supp. 2014), *repealed* by S.B. 621, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

27. N.J. STAT. ANN. §§ 2A:166-8 to -9 (West 2014).

28. N.C. CONST. art. I, § 23.

Aside from their broad applicability, little overlap exists in the language of these states' laws. Florida's statute is the narrowest of the four, limiting reimbursement to administrative costs.²⁹ The statute exempts acquitted defendants from liability for "costs or fees of the court or any ministerial office," as well as "any charge of subsistence" that may have accrued while the defendant was held in custody.³⁰ Missouri divides the reimbursement costs between the State and the county by statutorily declaring the State responsible for "the costs" when the defendant is acquitted in a capital case or a case "in which imprisonment in the penitentiary is the sole punishment for the offense";³¹ in all other trials, the county in which "the indictment was found or information filed" is responsible for reimbursing the costs of acquitted defendants.³²

29. FLA. STAT. ANN. § 939.06. The statute reads:

(1) A defendant in a criminal prosecution who is acquitted or discharged is not liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody. If the defendant has paid any taxable costs, or fees required under s. 27.52(1)(b), in the case, the clerk or judge shall give him or her a certificate of the payment of such costs, with the items thereof, which, when audited and approved according to law, shall be refunded to the defendant.

(2) To receive a refund under this section, a defendant must submit a request for the refund to the Justice Administrative Commission on a form and in a manner prescribed by the commission. The defendant must attach to the form an order from the court demonstrating the defendant's right to the refund and the amount of the refund.

Id.

30. *Id.* § 939.06(1). Michigan has a similarly worded statute, which states that "[n]o [acquitted] prisoner or person under recognizance . . . shall be liable for any costs or fees of office or for any charge for subsistence while he was in custody." MICH. COMP. LAWS Ann. § 768.34 (West 2014). However, the Michigan Supreme Court has interpreted this language to mean that "an acquitted person cannot be made to pay for the administrative expenses incurred by the state in the prosecution of the case against him." *People v. Lavan*, 218 N.W.2d 797, 798 (Mich. Ct. App. 1974) (emphasis added). The *Lavan* court affirmatively stated that this statute "does not grant [an acquitted] defendant the power to have his costs taxed to the state." *Id.*

31. MO. ANN. STAT. § 550.040.

32. *Id.* The statute provides:

In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed.

Id.

Although New Jersey's and North Carolina's laws do not provide for reimbursement per se, they do prohibit the imposition of certain expenses upon acquitted defendants.³³ New Jersey's two broadly applicable statutes provide that, for all acquitted defendants, the county treasurer shall pay the clerk's and sheriff's fees,³⁴ and the county sheriff shall pay the witnesses' and constables' fees.³⁵ In North Carolina, the only state to address this issue solely in its constitution, "every person charged with crime has the right to . . . not be compelled . . . to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."³⁶ There is no need for the State to reimburse acquitted defendants for these legal expenses because defendants cannot be held liable for such expenses unless they are found guilty.

33. See *infra* notes 34-36; see also COLO. REV. STAT. § 16-18-101 (2013) ("(1) The costs in criminal cases shall be paid by the state pursuant to section 13-3-104, C.R.S., when the defendant is acquitted or when the defendant is convicted and the court determines he is unable to pay them. (2) The costs of preliminary hearings, including any reporters' transcripts thereof ordered by a defendant, shall be paid pursuant to subsection (1) of this section. Reporters' transcripts of preliminary hearings which are ordered by the prosecution shall be paid for by the prosecution, unless otherwise ordered by the court."); DEL. CODE ANN. tit. 11, § 4102 (2007) ("(a) If, upon indictment or information, the defendant is acquitted, the costs shall be paid by the county. (b) [In criminal cases] the court may order that the costs shall be paid by the defendant or by the prosecutor or by the county, as it deems just."); NEB. REV. STAT. § 29-1903 (2008) ("[I]n case such accused person is acquitted upon his or her trial, the fees of his or her witnesses shall be likewise paid out of such county treasury[.]."); TENN. CODE ANN. § 40-25-130 (Supp. 2013) ("The state, or the county in which the offense was committed or is triable, according to the nature of the offense, pays the costs accrued on behalf of the state, and for which the state or county is liable under § 40-25-129, in the following cases, when: (1) The defendant is acquitted by a verdict of the jury upon the merits; (2) The prosecution is dismissed, or a nolle prosequi entered by the state; . . . (4) The defendant is discharged by the court or magistrate before indictment preferred or found, or after indictment and before verdict . . .").

34. N.J. STAT. ANN. § 2A:166-9 (West 2014) ("On the acquittal of any person indicted for crime the fees of the clerk and the sheriff shall be paid by the county treasurer, upon the taxed bill of costs, duly verified by the clerk and the sheriff, and certified to be correct by the prosecutor.").

35. *Id.* § 2A:166-8. The statute provides:

Whenever, on any indictment or accusation, there is an acquittal, the sheriff of the county in which the trial was had shall pay the fees of the witnesses and constables . . . [T]he amounts so paid shall, on demand, be repaid to the sheriff by the county treasurer from any moneys in his hand belonging to the county, and such payments shall be allowed to the county treasurer in the settlement of his accounts.

Id.

36. N.C. CONST. art. I, § 23.

B. Reimbursement Limited by Type of Crime or Defense

Two states—Washington³⁷ and Wyoming³⁸—reimburse acquitted defendants based on the type or category of crime with which they were charged or based on the type of defense they raised. Wyoming is the only state in which defendants are reimbursed only for misdemeanor acquittals, not for felony acquittals.³⁹ In these misdemeanor cases, the county is the entity that is responsible for reimbursement.⁴⁰

Washington stands alone in providing reimbursement only for defendants acquitted based on self-defense. Once the trier of fact has found “that the defendant’s claim of self-defense was sustained by a preponderance of the evidence,” the State must reimburse “all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in [the] defense.”⁴¹

37. WASH. REV. CODE ANN. § 9A.16.110 (West 2014).

38. WYO. STAT. ANN. § 7-1-103 (2013).

39. *Bernard v. State*, 652 P.2d 982, 984 (Wyo. 1982) (holding that the prior version of the statute cannot be read to include felony offenses when the language refers only to misdemeanors).

40. WYO. STAT. ANN. § 7-1-103 (“In all misdemeanor cases the county shall pay the costs if the defendant is acquitted.”).

41. WASH. REV. CODE § 9A.16.110(2). The statute provides:

When a person charged with [assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime] is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. This reimbursement is not an independent cause of action. To award these reasonable costs the trier of fact must find that the defendant’s claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.

Id. However, “if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award.” *Id.* § 9A.16.110(3). And, “[i]n determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.” *Id.*; see *State v. Manuel*, 619 P.2d 977, 978-79 (Wash. 1980) (en banc) (concluding that the jury’s acquittal did not necessarily reflect a finding that the defendant had acted in self-defense and therefore declining to provide reimbursement). In addition to reimbursement, awarding interest for defense costs is another important issue to consider. See, e.g., *State v. Thiessen*, 946 P.2d 1207, 1208 (Wash. Ct. App. 1997) (holding that the State is not liable for interest on reimbursement for defense costs absent a statutory waiver of sovereign immunity).

C. Reimbursement Limited to Public Employees

At least seven states have laws allowing reimbursement specifically for certain publicly employed defendants⁴²: Louisiana,⁴³ Mississippi,⁴⁴ New Jersey,⁴⁵ New York,⁴⁶ Pennsylvania,⁴⁷ Utah,⁴⁸ and Virginia.⁴⁹ These laws are generally in lieu of, rather than in addition to, statutes providing for the reimbursement of *all* acquitted defendants.⁵⁰

Public-employee reimbursement laws typically share three characteristics: (1) they require that the employee be acquitted; (2) they require that the alleged misconduct arise out of the scope of employment;⁵¹ and (3) they apply to all public employees in any type

42. Although Kentucky and Tennessee do not provide reimbursement for public employees acquitted of crimes, they do provide some relief to public officials acquitted in impeachment proceedings. *See* KY. REV. STAT. ANN. § 63.070(2) (West 2006) (“In an impeachment proceeding prosecuted before the Senate, if the accused is acquitted the petitioner shall pay the costs of the accused”); *id.* § 63.075 (“In a proceeding for impeachment instituted by the House of Representatives without a petition from any person, if the accused be acquitted he shall be entitled to his costs”); TENN. CODE ANN. § 8-46-205 (2014) (“If the defendant [in an impeachment proceeding] is acquitted, . . . the state treasurer shall pay the witnesses and officer”).

43. LA. REV. STAT. ANN. § 13:5108.3(B) (2014).

44. MISS. CODE ANN. § 25-1-47(1) (2010).

45. N.J. STAT. ANN. §§ 18A:12-20, 18A:16-6.1, 40A:14-155 (West 2014).

46. N.Y. PUB. OFF. LAW § 19(2) (McKinney 2008).

47. PA. R.J.A. No. 1922.

48. UTAH CODE ANN. § 52-6-201 (LexisNexis 2013).

49. VA. CODE ANN. § 51.1-124.28 (2013).

50. *But see supra* notes 34-35 and accompanying text (discussing New Jersey’s statutes that prohibit holding any acquitted criminal defendant liable for certain administrative and witness fees).

51. *See* LA. REV. STAT. ANN. § 13:5108.3(B) (2014); MISS. CODE ANN. § 25-1-47 (2010); N.Y. PUB. OFF. LAW § 19(2)(a); UTAH CODE ANN. § 52-6-201(1). *But see* KY. REV. STAT. ANN. §§ 63.070-63.075 (West 2006) (omitting any requirement that the impeachment proceeding be based on conduct within the defendant’s scope of employment).

of criminal proceeding. Louisiana,⁵² Mississippi,⁵³ New York,⁵⁴ and Utah⁵⁵ generally follow this pattern, with a few exceptions. But for Mississippi, each of these states includes the first requirement that the public employee be acquitted or that the charges be dismissed before the employee may be reimbursed.⁵⁶ Utah's statute includes the additional qualification that the employee must not be "found guilty

52. See LA. REV. STAT. ANN. § 13:5108.3(B). The statute provides: Payment or reimbursement for payment of legal fees and expenses for defense of an official, officer, or employee of this state . . . shall not be made from public monies . . . unless: (1) The official, officer, or employee was charged with criminal conduct or made the target of a grand jury investigation due to conduct arising from acts allegedly undertaken in the performance of the duties of his office or employment with the state . . . and has been acquitted or the proceedings or investigation have been dismissed or abandoned

Id.

53. See MISS. CODE ANN. § 25-1-47(1). The provision reads: Any municipality . . . is hereby authorized and empowered, within the discretion of its governing authorities, to investigate and provide legal counsel for the defense of any claim, demand, or action, whether civil or criminal, made or brought against any state, county, school district, or municipal officer, agent, servant, employee, or appointee as a result of his actions while acting in the capacity of such officer, agent, servant, employee, or appointee; and such municipality is hereby authorized to pay for all costs and expenses incident to such investigation and defense.

Id.

54. See N.Y. PUB. OFF. LAW § 19(2)(a). The statute provides: [I]t shall be the duty of the state to pay reasonable attorneys' fees and litigation expenses incurred by or on behalf of an employee in his or her defense of a criminal proceeding in a state or federal court arising out of any act which occurred while such employee was acting within the scope of his public employment or duties upon his acquittal or upon the dismissal of the criminal charges against him

Id.

55. See UTAH CODE ANN. § 52-6-201(1). The statute reads: If a state grand jury indicts, or if an information is filed against, an officer or employee, in connection with or arising out of any act or omission of that officer or employee during the performance of the officer or employee's duties, within the scope of the officer or employee's employment, or under color of the officer or employee's authority, and that indictment or information is quashed or dismissed or results in a judgment of acquittal, . . . that officer or employee shall be entitled to recover reasonable attorney fees and court costs necessarily incurred in the defense of that indictment or information from the public entity

Id.

56. See LA. REV. STAT. ANN. § 13:5108.3(B); N.Y. PUB. OFF. LAW § 19(2); UTAH CODE ANN. § 52-6-201. *But see* MISS. CODE ANN. § 25-1-47 (lacking any requirement that the employee be acquitted or the charges be dismissed).

of substantially the same misconduct that formed the basis for the indictment or information.”⁵⁷

The remaining states—New Jersey, Pennsylvania, and Virginia—while generally conforming to the aforementioned characteristics, limit reimbursement to specific categories of public employees. New Jersey, for example, in addition to having a broadly applicable reimbursement statute,⁵⁸ also has laws specifically providing reimbursement for public educators⁵⁹ as well as for

57. UTAH CODE ANN. § 52-6-201(1).

58. *Supra* notes 34-35 (quoting New Jersey’s general public employee reimbursement statutes).

59. N.J. STAT. ANN. § 18A:12-20 (West 2014) (members of boards of education). The provision reads:

Whenever a civil, administrative, criminal or quasi-criminal action . . . [is] brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

Id. New Jersey has a separate statute providing reimbursement for officers and employees of boards of education, which includes public school teachers. *Id.* § 18A:16-6.1. The law states:

Should any criminal or quasi-criminal action be instituted against any [officer or employee of a board of education] for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.

Id.; see also UTAH CODE ANN. § 53A-6-503 (LexisNexis 2008):

(2) . . . [A]n educator is entitled to recover reasonable attorneys’ fees and costs incurred in the educator’s defense against an individual or entity who initiates an action against the educator if: (a) the action is brought for any act or omission of the educator during the performance of the educator’s duties within the scope of the educator’s employment; and (b) it is dismissed or results in findings favorable to the educator. (3) An educator who recovers under this section is also entitled to recover reasonable attorneys’ fees and costs necessarily incurred by the educator in recovering the attorneys’ fees and costs allowed under Subsection (2).

Id. New York has a similar statute:

[I]t shall be the duty of the local sponsor of a community college to pay reasonable attorneys’ fees and litigation expenses incurred by or on behalf of an employee in his or her defense of a criminal proceeding in a state or

members of municipal police departments.⁶⁰ Notably, New Jersey's statute for municipal police department members does not require that those members be acquitted in order for the municipality to provide for their defense, unless the "criminal proceeding [was] instituted by . . . the municipality."⁶¹ Pennsylvania, through a court rule, provides reimbursement only for judges.⁶² Virginia is an outlier in that it provides reimbursement only to "any trustee, advisory

federal court arising out of any act which occurred while such employee was acting within the scope of his or her public employment or duties, upon his or her acquittal, or upon the dismissal of the criminal charges against him or her

N.Y. EDUC. LAW § 6309(2)(a) (McKinney 2010).

60. N.J. STAT. ANN. § 40A:14-155 (West 1986). The statute provides: Whenever a member or officer of a municipal police department or force is a defendant in any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in the furtherance of his official duties, the governing body of the municipality shall provide said member or officer with necessary means for the defense of such action or proceeding, but not for his defense in a . . . criminal proceeding instituted as a result of a complaint on behalf of the municipality. If any such . . . criminal proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense.

Id. Several states have statutes with similar provisions. *See, e.g.*, ALA. CODE § 36-21-1 (LexisNexis 2013) (limiting reimbursable expenses to \$2,000); CONN. GEN. STAT. ANN. § 53-39a (West 2012 & Supp. 2014); MINN. STAT. ANN. § 465.76 (2008).

61. N.J. STAT. ANN. § 40A:14-155.

62. PA. R.J.A. No. 1922(A). This Rule provides:

A judge may be reimbursed for legal fees paid in the defense of a criminal action only if the following criteria are met: (1) Notice must be given . . . within a reasonable time after the charges are filed. (2) The criminal charges must arise directly from the judge's performance of his or her official duties. (3) The judge must be acquitted of the crimes charged or the charges must have been dismissed or nolle prossed. (4) The legal expenses must be reasonable and necessary.

Id.

committee member, officer, or employee of the Retirement System” for alleged securities violations.⁶³

D. Reimbursement Limited to Malicious Prosecution

In some states and under federal law, acquitted defendants may be reimbursed for their legal costs only when the government prosecuted the defendant in bad faith. The federal Hyde Amendment awards acquitted defendants reasonable attorney’s fees and “other litigation expenses” when the defendant can prove that the prosecution’s suit was “vexatious, frivolous, or in bad faith.”⁶⁴ In addition to the federal statute, at least six states—Arizona,⁶⁵ California,⁶⁶ Georgia,⁶⁷ Idaho,⁶⁸ Michigan,⁶⁹ and Tennessee⁷⁰—have similar statutory provisions. Under Idaho’s statute, “if the court certif[ies] in the minutes that the prosecution was malicious or

63. VA. CODE ANN. § 51.1-124.28 (2013). The provision states:
Upon the acquittal, dismissal of charges, nolle prosequi, or any other final disposition concluding the innocence of any trustee, advisory committee member, officer, or employee of the Retirement System brought before any regulatory body, summoned before any grand jury, investigated by any law-enforcement agency, arrested, indicted, or otherwise prosecuted on any criminal charge arising out of any act committed in the discharge of his official duties which alleges a violation of state or federal securities laws, the Board may reimburse all or part of the cost of employing legal counsel and such other costs as are demonstrated to have been reasonably necessary for his defense. The Board shall provide for the payment of such legal fees and expenses out of funds appropriated for the administration of the Retirement System.

Id.

64. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified as a note at 18 U.S.C. § 3006A (2012)). The law places the burden of proof on the defendant, but it does not define “vexatious,” “frivolous,” or “bad faith.” *Id.*; United States v. Pritt, 77 F. Supp. 2d 743, 747 (S.D. W. Va. 1999). A defendant’s chances of succeeding on a malicious prosecution claim under the Hyde Amendment are typically very low. Robert S. Litt & Evelina J. Norwinski, *Hyde and Seek: Getting the Prosecution to Pay Your Fees in a Criminal Case*, LITIG., Summer 2001, at 19, 19 (“[F]rom the passage of the Hyde Amendment in late 1997 through late 2000, approximately 100 claims were filed under the law (out of approximately 3,000 acquittals during that period). Only nine resulted in awards to the defendants, and the government is appealing three of those and considering appealing a fourth.”).

65. ARIZ. REV. STAT. ANN. § 22-327 (2013).

66. CAL. PENAL CODE § 1447 (West 2011).

67. GA. CODE ANN. § 17-11-4 (2013).

68. IDAHO CODE ANN. § 19-3923 (2004).

69. MICH. COMP. LAWS ANN. § 774.1d (West 2014).

70. TENN. CODE ANN. § 27-1-122 (Supp. 2013).

without probable cause, it may order the prosecutor to pay the costs of the action.”⁷¹ Arizona’s,⁷² California’s,⁷³ and Georgia’s⁷⁴ statutory provisions mirror Idaho’s language; California’s statute, however, is limited to misdemeanor or infraction cases.⁷⁵ Michigan’s statute is substantively similar to the other four laws, except that the government can be made liable only for “the costs that accrued *to the court*, [such as] the witness and jury fees.”⁷⁶ Moreover, similar to

71. IDAHO CODE ANN. § 19-3923. This statute reads:

When the defendant is acquitted, either by the court or by the jury, he must be immediately discharged; and if the court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action . . . within thirty (30) days after the trial.

Id.

72. ARIZ. REV. STAT. ANN. § 22-327 (2013). This provision states:

A. When defendant is acquitted either by the court or the jury, he shall be immediately discharged.

B. If the court certifies in the minutes that the prosecution was malicious or without probable cause, it may order the complainant to pay the costs of the action . . . within thirty days after the trial.

Id.

73. CAL. PENAL CODE § 1447 (West 2011).

When the defendant is acquitted in a misdemeanor or infraction case, if the court certifies in the minutes that the prosecution was malicious and without probable cause, the court may order the complainant to pay the costs of the action, or to give an undertaking to pay the costs within 30 days after the trial.

Id.

74. GA. CODE ANN. § 17-11-4 (2013). This statute provides:

(a) The prosecutor’s name shall be endorsed on every indictment, and he shall be compelled to pay all costs and jail fees upon the acquittal or discharge of the person accused when: (1) The grand jury, by its foreman, on returning “no bill,” expresses as its opinion that the prosecution was unfounded or malicious; (2) A jury on the trial of the prosecution finds it to be malicious; or (3) The prosecution is abandoned before trial. When it is thus abandoned, the officer who issued the warrant shall enter a judgment against the prosecutor for all the costs and enforce it by an execution in the name of the state or by an attachment for contempt.

(b) A magistrate may, in his discretion, assess costs and jail fees against the person who instigated the prosecution when, at a committal hearing, the action is dismissed for want of probable cause and the magistrate finds that the complaint was unfounded and malicious. This subsection shall not apply to law enforcement personnel.

Id.

75. CAL. PENAL CODE § 1447.

76. MICH. COMP. LAWS ANN. § 774.1d (West 2014) (emphasis added). The provision reads:

California's statute, it is limited to misdemeanors and ordinance violations.⁷⁷ Tennessee's statute is unique in that it applies only to vexatious *appellate* proceedings.⁷⁸

E. Reimbursement Limited by Type of Proceeding

Two states—Maryland⁷⁹ and Massachusetts⁸⁰—do not provide reimbursement for any of an acquitted defendant's trial-level expenses; rather, they limit reimbursement to the expenses incurred in certain appellate proceedings, such as unsuccessful appeals by the State or Commonwealth.

In Maryland, the State can appeal from an appellate court's judgment only in limited circumstances, and "[i]f the State loses the appeal, the jurisdiction shall pay all the costs related to the appeal, including reasonable attorney's fees incurred by the defendant as a result of the appeal."⁸¹ Maryland provides an automatic appeal in

If the accused is acquitted in a misdemeanor or ordinance violation case, he or she shall be discharged immediately. If the court, before whom the trial is held, finds and certifies in its minutes that the complaint was wilful, malicious, and without probable cause, the complainant shall pay all of the costs that accrued to the court, including the witness and jury fees, in the proceedings held upon the complaint.

Id.

77. *Id.*

78. TENN. CODE ANN. § 27-1-122 (Supp. 2013). The provision reads: When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Id.

79. MD. CODE ANN., CTS. & JUD. PROC. § 12-302(c)(4)(vi) (LexisNexis 2014); MD. R. 8-306(c).

80. MASS. R. CRIM. P. 15(d), 25(c)(2), 30(c)(8)(B), 30(c)(9).

81. MD. CODE ANN., CTS. & JUD. PROC. § 12-302(c). Section 12-302(c) provides:

(2) The State may appeal from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment, or inquisition.

(3) The State may appeal from a final judgment if the State alleges that the trial judge: (i) Failed to impose the sentence specifically mandated by the Code; or (ii) Imposed or modified a sentence in violation of the Maryland Rules.

(4)(i) In a case involving a crime of violence . . . and in cases [involving drug offenses greater than simple possession], the State may appeal from a

capital cases “of both the determination of guilt and the sentence.”⁸² Although the State provides no actual reimbursement to defendants when such an appeal takes place, the State is responsible for paying “the cost applicable to the sentencing proceeding” in the automatic appeal.⁸³

Massachusetts provides reimbursement through four court rules. Under the first rule, the Commonwealth must pay the defendant’s “costs of appeal” and reasonable attorney’s fees for unsuccessful State interlocutory appeals from suppression rulings.⁸⁴ The purpose of this rule is “to ‘provide[] a needed measure of protection to the rights of defendants by seeking to equalize the

decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Maryland Constitution, or the Maryland Declaration of Rights. . . . (vi) *If the State loses the appeal, the jurisdiction shall pay all the costs related to the appeal, including reasonable attorney’s fees incurred by the defendant as a result of the appeal.*

Id. (emphasis added).

82. MD. R. 8-306(c)(1). Maryland has repealed the death penalty, effective October 1, 2013. Joe Sutton, *Maryland Governor Signs Death Penalty Repeal*, CNN (May 2, 2013, 2:53 PM), <http://www.cnn.com/2013/05/02/us/maryland-death-penalty> (“In those cases in which the state has filed a notice to seek a death sentence, the notice shall be considered withdrawn and it shall be considered a notice to seek a sentence of life imprisonment without the possibility of parole under specified circumstances” (internal quotation marks omitted)).

83. MD. R. 8-306(c)(3). Rule 8-306(c)(3) states: “The statement of costs required by Rule 8-413 (c) shall separately state the cost applicable to the sentencing proceeding. The State shall pay those costs.” *Id.* Rule 8-413(c), in turn, states that the lower court clerk shall prepare “a statement of the cost of preparing and certifying the record, the costs taxed against each party prior to the transmission of the record, and the cost of all transcripts and of copies, if any, of the transcripts for each of the parties.” MD. R. 8-413(c).

84. MASS. R. CRIM. P. 15(d).

If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, *shall* determine and approve the payment to the defendant of his or her costs of appeal together with reasonable attorney’s fees to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.

Id. (emphasis added); *see also* *Commonwealth v. Lopez*, 717 N.E.2d 254, 256 (Mass. 1999) (“The rule and the governing law establish that payment of the defendant’s attorney’s fees and costs is mandatory, and, as a consequence, there is no basis to support any of the Commonwealth’s arguments that the payment lies within the discretion of the appellate court.”).

resources of the defendant with those of the Commonwealth.”⁸⁵ As the Supreme Judicial Court of Massachusetts has explained, “[a] defendant who is able to retain private counsel may not have the funds for an interlocutory appeal from a suppression motion on which he has prevailed. The lawyer should not be placed in the untenable position of either volunteering his services on the appeal or abandoning the defendant.”⁸⁶

Unlike the mandatory nature of the previous rule, the other three rules permit, but do not require, the appellate court to grant reimbursement of the same costs and fees as under the first rule.⁸⁷ The second rule applies where the Commonwealth unsuccessfully appeals from a required finding of not guilty or a reduction of a verdict,⁸⁸ the third rule applies generally where the Commonwealth unsuccessfully appeals from an order granting a new trial,⁸⁹ and the fourth rule applies specifically where the Commonwealth unsuccessfully appeals from an order granting a new trial in a capital case.⁹⁰

II. APPLICATION OF CURRENT REIMBURSEMENT LAWS

This Part discusses case law regarding which expenses are reimbursable, what constitutes an acquittal or dismissal, what

85. Commonwealth v. Rosario, 934 N.E.2d 807, 809 (Mass. 2010) (quoting Commonwealth v. Gonsalves, 739 N.E.2d 1100, 1103 (Mass. 2000)).

86. *Id.* (footnote omitted).

87. *See, e.g.*, Commonwealth v. Cornish, 547 N.E.2d 948, 952 (Mass. App. Ct. 1989) (“Whether we approve the request made by motion with supporting affidavits, all in conformity with the requirements of [Rule 30(c)(8)(B)], is a matter within our discretion.”).

88. MASS. R. CRIM. P. 25(c)(2) (“If an appeal or application therefor is taken by the Commonwealth, the appellate court . . . *may* determine and approve the payment to the defendant of his costs of appeal together with reasonable attorney’s fees, if any, to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.” (emphasis added)).

89. *Id.* R. 30(c)(8)(B) (“If an appeal or application therefor is taken by the Commonwealth, . . . the Appeals Court or the Supreme Judicial Court *may* determine and approve payment to the defendant of the costs of appeal together with reasonable attorney’s fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application.” (emphasis added)).

90. *Id.* R. 30(c)(9) (“If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E [for capital cases], . . . the Supreme Judicial Court *may* determine and approve payment to the defendant of the costs of appeal together with reasonable attorney’s fees to be paid on order of the trial court after entry of the rescript or the denial of the application.” (emphasis added)).

constitutes malicious prosecution, and which government entity is responsible for reimbursing defendants.

A. Which Expenses Should Be Reimbursed to Acquitted Defendants?

While a handful of states' laws limit reimbursement to specific and narrowly defined expenses,⁹¹ other states' laws allow for reimbursement of the defense's "costs," without defining what this may entail.⁹² The types of costs most frequently addressed by reimbursement statutes and case law include witness fees, legal document fees, attorney's fees, detention costs, and "loss of time."

When laws fail to define which of the defense's incurred expenses are reimbursable, courts are left to decide which expenses qualify.⁹³ Most reimbursement statutes authorize acquitted defendants to recoup witness fees, including expert witness fees and witness travel expenses.⁹⁴ For example, North Carolina's constitution specifies that acquitted defendants cannot be held liable for the

91. See, e.g., FLA. STAT. ANN. § 939.06 (West 2006 & Supp. 2014) (providing reimbursement only for "costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody"); N.J. STAT. ANN. §§ 2A:166-8 to -9 (West 2014) (limiting reimbursement to "fees of the clerk and the sheriff" and "fees of the witnesses and constables").

92. See, e.g., IDAHO CODE ANN. § 19-3923 (2004) (permitting court to order the prosecution to pay the "costs of the action" for malicious prosecution); LA. REV. STAT. ANN. § 13:5108.3(B) (2014) (allowing reimbursement for "legal fees and expenses"); MO. ANN. STAT. § 550.040 (West 2002 & Supp. 2014) (referring only to "the costs"), *repealed by* S.B. 621, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014). Some statutes stipulate that reimbursable expenses must be reasonable or necessary to the defense. See, e.g., UTAH CODE ANN. § 52-6-201(2) (LexisNexis 2013) (referring to "reasonable attorney fees and court costs necessarily incurred in the defense"); VA. CODE ANN. § 51.1-124.28 (2013) (referring to "[costs] reasonably necessary for [their] defense"); PA. R.J.A. No. 1922 ("[L]egal expenses must be reasonable and necessary.").

93. See *Holton v. State*, 311 So. 2d 711, 711 (Fla. Dist. Ct. App. 1975) (noting that, although Florida law authorizes reimbursement, "[i]t is left to the courts to determine costs to be taxed").

94. See, e.g., MICH. COMP. LAWS ANN. § 774.1d (West 2014) (stating that in cases of malicious prosecution, "the complainant shall pay all of the costs that accrued to the court, including the witness . . . fees"); N.J. STAT. ANN. § 2A:166-8 (asserting that when a defendant is acquitted, the county sheriff, rather than the defendant, "shall pay the fees of the witnesses"); *Wolf v. Cnty. of Volusia*, 703 So. 2d 1033, 1033-34 (Fla. 1997) (highlighting that Florida's reimbursement statute covers ordinary witness fees, but not expert witness fees); *State v. Koenen*, No. 40276-9-II, 2011 WL 2556935, at *1 (Wash. Ct. App. June 28, 2011) (affirming the trial court's grant of reimbursement for defendant's "expert and witness fees").

“necessary witness fees of the defense”;⁹⁵ New Jersey law states that the county sheriff “shall pay the fees of the witnesses” whenever a defendant is acquitted.⁹⁶

Some states also include reimbursement for legal document fees, such as court reporter fees, transcript costs, and the cost of photocopying records and exhibits.⁹⁷ These document costs also cover communication fees, which include postage and long distance phone calls. For example, in Missouri the costs of depositions are reimbursable.⁹⁸ Some states, however, do not consider such expenses reimbursable. The Supreme Court of Florida, for example, has held that defendants cannot recoup court reporter and transcription expenses, videotaped deposition expenses, process service expenses by private process servers, or copy and duplication expenses.⁹⁹

Ten states reimburse at least some acquitted defendants for their attorney’s fees.¹⁰⁰ While no state provides attorney’s fees

95. N.C. CONST. art. I, § 23.

96. N.J. STAT. ANN. § 2A:166-8.

97. See COLO. REV. STAT. § 16-18-101 (2013). This statute provides:

(1) The costs in criminal cases shall be paid by the state pursuant to section 13-3-104, C.R.S., when the defendant is acquitted or when the defendant is convicted and the court determines he is unable to pay them.

(2) The costs of preliminary hearings, including any reporters’ transcripts thereof ordered by a defendant, shall be paid pursuant to subsection (1) of this section. Reporters’ transcripts of preliminary hearings which are ordered by the prosecution shall be paid for by the prosecution, unless otherwise ordered by the court.

Id.

98. *State v. Wilbur*, 450 S.W.2d 458, 461 (Mo. Ct. App. 1970).

99. See *Wolf*, 703 So. 2d at 1033-34 (finding that these expenses were “not embraced within the plain meaning of section 939.06”); see also FLA. STAT. ANN. § 939.06(1) (West 2006 & Supp. 2014) (limiting reimbursement to “costs or fees of the court or any ministerial office, or . . . any charge of subsistence while detained in custody”).

100. The ten states are: Louisiana, Maryland, Massachusetts, Mississippi, New Jersey, New York, Pennsylvania, Utah, Virginia, and Washington. See LA. REV. STAT. ANN. § 13:5108.3(B)(1) (2014) (permitting “payment of legal fees and expenses for defense”); MD. CODE ANN., CTS. & JUD. PROC. § 12-302(c)(4)(vi) (LexisNexis 2014) (stating that for certain unsuccessful appeals by the State, “the jurisdiction shall pay all the costs related to the appeal, including reasonable attorney’s fees incurred by the defendant as a result of the appeal”); MISS. CODE ANN. § 25-1-47(1) (2010) (authorizing municipalities “to investigate and provide legal counsel” to public employee defendants); N.J. STAT. ANN. § 18A:12-20 (West 2014) (stating that, for boards of education members, “the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses”); *id.* § 18A:16-6.1 (stating that, for officers and employees of boards of education, “the board of education shall reimburse [them] for the cost of defending

reimbursement to *all* acquitted defendants, every state allowing for reimbursement of *public employees* includes such fees in their reimbursement laws.

Most of these ten states expressly provide in their reimbursement laws that the attorney's fees be reasonable; the courts must therefore determine the boundaries of "reasonableness."¹⁰¹ Courts consider various factors in determining whether a particular award of attorney's fees is reasonable.¹⁰² In Washington, for example, an "award of reasonable legal fees . . . must include but shall not exceed the sum of (a) legal fees the defendant has paid in the past, plus (b) legal fees the defendant has become legally

such proceeding, including reasonable counsel fees"); *id.* § 40A:14-155 (West 2014) (providing that, for members of municipal police departments, "the municipality shall provide said member or officer with necessary means for the defense"); N.Y. PUB. OFF. LAW § 19(2)(a) (McKinney 2008) ("[I]t shall be the duty of the state to pay reasonable attorneys' fees and litigation expenses incurred by or on behalf of an employee in his or her defense of a criminal proceeding . . ."); UTAH CODE ANN. § 52-6-201(1) (LexisNexis 2013) ("[Public] employee[s] shall be entitled to recover reasonable attorney fees and court costs necessarily incurred in the defense . . ."); *id.* § 53A-6-503(2) ("[A]n educator is entitled to recover reasonable attorneys' fees and costs incurred in the educator's defense . . ."); VA. CODE ANN. § 51.1-124.28 (2013) (stating that, for acquitted members of the Virginia Retirement System, "the Board may reimburse all or part of the cost of employing legal counsel"); WASH. REV. CODE ANN. § 9A.16.110(2) (West 2014) (providing that, for a defendant acquitted by reason of self-defense, "the state of Washington shall reimburse the defendant for all reasonable costs, including . . . legal fees incurred . . . in his or her defense"); PA. R.J.A. No. 1922(A) ("A judge may be reimbursed for legal fees paid in the defense of a criminal action . . ."); *supra* notes 84, 88-90 (quoting Massachusetts' four relevant court rules permitting reimbursement of a defendant's "reasonable attorney's fees" for certain unsuccessful appeals by the Commonwealth).

101. *E.g.*, State v. Barnd-Spjut, No. 67161-8-I, 2011 WL 5147743, at *7 (Wash. Ct. App. Oct. 31, 2011) (explaining that the state law reimburses a defendant for the "amount equal to the attorney[']s fees the defendant paid . . . with the limitation that the State is obligated to reimburse only the *reasonable* costs the defendant incurs" (footnote omitted)). In *Barnd-Spjut*, the court remanded the case to the trial court to calculate the defendant's reimbursable attorney's fees because the trial court failed to adequately explain why it had reduced the requested amount when the defendant presented evidence that the amount was reasonable. *Id.* at *9.

102. Several state courts have adopted the so-called "lodestar" method to calculate reasonable attorney's fees. *See* Stratos v. Dep't of Pub. Welfare, 439 N.E.2d 778, 786 (Mass. 1982). The "lodestar" figure is derived by multiplying hours reasonably spent by a reasonable hourly rate. *Id.* The calculation of reasonable hourly rates begins with the average rates in the attorney's community for similar work by attorneys of the same years' experience. *See, e.g., id.* at 786-87 (adopting the "lodestar" method in Massachusetts); *infra* notes 105-06.

obligated to pay in the future.”¹⁰³ In Massachusetts, the “determination of what constitutes a reasonable fee . . . [is] measured according to what would be reasonable for private counsel to charge in the circumstances,” not according to “the hourly rate paid to court-appointed counsel.”¹⁰⁴ Additionally, the “[c]alculation of reasonable hourly rates should begin with the average rates in the attorney’s community for similar work by attorneys of the same years’ experience.”¹⁰⁵

The party requesting an award of attorney’s fees typically has the burden of proving their reasonableness.¹⁰⁶ An acquitted defendant can bring evidence of the reasonableness of attorney’s fees in the form of testimony or affidavits.¹⁰⁷ Where the trial court fails to explain how it calculated the reimbursed attorney’s fees, the award should be remanded for the entry of such findings.¹⁰⁸

Reimbursement for certain detention costs is addressed by three states—North Carolina (by constitution), and Florida and Georgia (by statute).¹⁰⁹ All three states’ reimbursement schemes expressly

103. *State v. Anderson*, 863 P.2d 1370, 1376 (Wash. Ct. App. 1993) (footnote omitted) (interpreting legal fees to include the amount a “defendant legally owes pursuant to an enforceable contract”).

104. *Commonwealth v. Phinney*, 863 N.E.2d 496, 501 (Mass. 2007).

105. *Commonwealth v. Ennis*, 808 N.E.2d 783, 788 (Mass. 2004) (quoting *Stratos*, 439 N.E.2d at 787) (concluding that the number of hours defendant’s appellate counsel stated he worked was unreasonable because his opposition to the appeal was brief and the State’s “claim on appeal was limited to a single, circumscribed issue”). The *Ennis* court also stated: “The amount of a reasonable attorney’s fee is largely discretionary with the judge, who is in the best position to determine how much time was reasonably spent on a case, and the fair value of the attorney’s services.” *Id.*

106. *See id.* at 787 (stating that the defendant “has the burden of showing that the claimed rate and number of hours are reasonable” (internal quotation marks omitted)); *Cornish Coll. of the Arts v. 1000 Va. Ltd. P’ship*, 242 P.3d 1, 17 (Wash. Ct. App. 2010) (“[T]he party seeking fees bears the burden of proving the reasonableness of the fees.” (quoting *Mahler v. Szucs*, 957 P.2d 632, 651 (Wash. 1998))).

107. *E.g., Ennis*, 808 N.E.2d at 787-88 (finding that the acquitted defendant’s counsel’s affidavit did not satisfy the burden of showing the reasonableness of the requested reimbursement amount, in part because it did not “describ[e] his usual billing rate or that of attorneys with similar years of criminal appellate experience who practice in his locale”).

108. *See State v. Barnd-Spjut*, No. 67161-8-I, 2011 WL 5147743, at *9 (Wash. Ct. App. Oct. 31, 2011) (instructing the trial court to award the defendant his reasonable costs, including attorney’s fees, after the trial court had denied reimbursement without explanation).

109. N.C. CONST. art. I, § 23; FLA. STAT. ANN. § 939.06(1) (West 2006 & Supp. 2014); GA. CODE ANN. § 17-11-4 (2013).

refer to charges for subsistence while the defendant remained in custody.¹¹⁰ Because the State or municipality likely covers subsistence costs regardless of the outcome of the case, more states do not expressly reimburse these costs.

Reimbursement for “loss of time” is only addressed by Washington’s statute.¹¹¹ Washington courts interpret loss of time to include loss of earnings and loss of the opportunity to seek employment.¹¹² Therefore, a defendant who establishes eligibility for a reimbursement award is entitled to receive compensation for lawful earnings he or she “would have received but for being prosecuted.”¹¹³ Judges have considerable discretion in determining the amount of lost wages.¹¹⁴ For example, a court may deny an acquitted defendant’s request for lost wages if the defendant failed to mitigate losses.¹¹⁵ Loss of time does not, however, include “loss of ‘the opportunity to be free to enjoy life,’” and any such reimbursement request is therefore not reasonable by definition.¹¹⁶

Courts have had difficulty interpreting ambiguous language in reimbursement statutes. Florida case law provides a detailed list of

110. Relatedly, the State of Washington will not necessarily reimburse bail payments. The reimbursed expenses must be “directly related to defending against the charges.” *State v. Koenen*, No. 40276-9-II, 2011 WL 2556935, at *2 (Wash. Ct. App. June 28, 2011). In *Koenen*, the court determined that the defendant did not necessarily need to be out on bail in order to help prepare his defense; accordingly, his bail payment was not reimbursable. *Id.*

111. WASH. REV. CODE ANN. § 9A.16.110(2) (West 2014) (“[T]he state of Washington shall reimburse the defendant for all reasonable costs, including loss of time . . . and other expenses involved in his or her defense.”).

112. See *Koenen*, 2011 WL 2556935, at *3 (establishing that lost wages must be mitigated in order to be reimbursable).

113. *State v. Anderson*, 863 P.2d 1370, 1375 (Wash. Ct. App. 1993); see also R.I. GEN. LAWS § 42-28.6-13(g) (2007) (“In the event that the law enforcement officer is acquitted of any felony related thereto, the officer shall be reinstated and reimbursed forthwith for all salary and benefits that have not been paid during the suspension period.”).

114. See, e.g., *Anderson*, 863 P.2d at 1376 (exemplifying the discretionary role of the judge in deciding how to determine reasonable lost wages).

115. See *Koenen*, 2011 WL 2556935, at *3 (finding that the defendant could not be reimbursed for lost wages because he failed to show documentation demonstrating that he mitigated those losses). A defendant is entitled to recover lost earnings that he would have received but for being prosecuted. *Id.* However, the defendant must be able to show what these amounts are, and he must be able to show that he mitigated whatever damages he could. See *id.*

116. *Anderson*, 863 P.2d at 1375 (citation omitted) (deciding that acquitted defendants were not entitled to reimbursement for every hour that they were incarcerated because it is not the State’s duty to pay for the ability to be free, to look for employment, or to enjoy life).

the costs that may or may not be included in what its statute calls “taxable costs,”¹¹⁷ or costs for which a defendant may seek reimbursement.¹¹⁸ The Florida Supreme Court has interpreted this language as limiting reimbursement to three types of costs: “witness fees, sheriff expenses, and clerk of the court expenses.”¹¹⁹ On numerous occasions, defendants have unsuccessfully attempted to expand this list of categories. An illustrative, though non-exhaustive, list of suggested expenses includes attorney’s fees,¹²⁰ investigative costs,¹²¹ pre-trial bail bond premiums,¹²² transcript expenses,¹²³ travel expenses,¹²⁴ and expert witness fees.¹²⁵

B. What Constitutes an Acquittal or Dismissal?

Significantly, courts differ on which dispositions qualify defendants for reimbursement. Some states’ laws specify that the defendant must be acquitted to be eligible for reimbursement,¹²⁶ while others include dispositions such as dismissal and nolle prosequi.¹²⁷ Due to the variety of ways in which defendants can be relieved of charges, however, courts are left to decide whether dispositions such as plea bargains and mistrials also enable defendants to seek reimbursement.

California’s and Missouri’s statutes both specify that the defendant must be acquitted; however, each state’s courts have

117. FLA. STAT. ANN. § 939.06(1) (West 2006 & Supp. 2014) (“If the defendant has paid any *taxable costs* . . . the clerk or judge shall give him or her a certificate of the payment of such costs, . . . which . . . shall be refunded to the defendant.” (emphasis added)). The statute specifically states that no acquitted defendant in a criminal prosecution is “liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody.” *Id.*

118. *See, e.g.,* Wolf v. Cnty. of Volusia, 703 So. 2d 1033, 1034 (Fla. 1997).

119. *Id.* at 1034 (quoting Cnty. of Volusia v. Wolf, 672 So. 2d 563, 564 (Fla. Dist. Ct. App. 1996) (per curiam), *aff’d*, 703 So. 2d 1033 (Fla. 1997)).

120. Hillsborough Cnty. v. Martinez, 483 So. 2d 540, 542 (Fla. Dist. Ct. App. 1986) (highlighting that Florida’s reimbursement statute does not authorize the reimbursement of any attorney’s fees).

121. Bd. of Cnty. Comm’rs v. Sawyer, 620 So. 2d 757, 758 (Fla. 1993); Orange Cnty. v. Love, 703 So. 2d 1138, 1140 (Fla. Dist. Ct. App. 1997); Benitez v. State, 350 So. 2d 1100, 1101 (Fla. Dist. Ct. App. 1977).

122. Doran v. State, 296 So. 2d 86, 87 (Fla. Dist. Ct. App. 1974).

123. *Wolf*, 703 So. 2d at 1033-34.

124. Volusia Cnty. v. Carrin, 666 So. 2d 603, 604 (Fla. Dist. Ct. App. 1996).

125. *Love*, 703 So. 2d at 1140; *Carrin*, 666 So. 2d at 604.

126. *See, e.g.,* Gikas v. Zolin, 863 P.2d 745, 754 (Cal. 1993) (en banc).

127. *See infra* text accompanying notes 131-32.

interpreted “acquitted” differently.¹²⁸ California courts have held, based on legislative intent, that a dismissal is not included under the definition of “acquitted” in its reimbursement statute.¹²⁹ Rather, they have held that a “defendant is acquitted only when the ruling of the judge, whatever its label, actually represents a resolution [in the defendant’s favor], correct or not, of some or all of the factual elements of the offense charged.”¹³⁰ In contrast, Missouri courts do permit reimbursement for some dismissals or nolle prosequi dispositions, even though the statute mentions only acquittals.¹³¹ A dismissal “only equate[s] to an acquittal if the dismissal occurs after the trial has begun and [double] jeopardy has attached” to those charges.¹³²

Louisiana’s statute expressly allows reimbursement for dismissals, leading courts there to consider what constitutes a “dismissal.” The statute permits reimbursement when a public employee “has been acquitted or the proceedings or investigation have been dismissed or abandoned.”¹³³ A Louisiana state appellate court has held that a dismissal of charges pursuant to a plea agreement does not qualify as either a dismissal or acquittal under this statute.¹³⁴ The court looked at the definitions of “acquittal” and

128. See CAL. PENAL CODE § 1447 (West 2011) (“[w]hen the defendant is acquitted”); MO. ANN. STAT. § 550.040 (West 2014) (“if the defendant is acquitted”), *repealed by* S.B. 621, 97th Gen. Assem., 2d Reg. Sess. (Mo. 2014).

129. *Gikas*, 863 P.2d at 754; see also *Agresti v. Dep’t of Motor Vehicles*, 7 Cal. Rptr. 2d 353, 356-58 (Ct. App. 1992) (finding that the record did not disclose the reason for the dismissal, and thus, it was not an acquittal).

130. *Gikas*, 863 P.2d at 754 (quoting *United States v. Scott*, 437 U.S. 82, 97 (1978) (internal quotation marks omitted)).

131. See *State v. Morris*, 197 S.W.3d 638, 641 (Mo. Ct. App. 2006).

132. *Id.* (“Sound public policy considerations support this requirement under Section 550.040: the recovery of costs is permitted after an acquittal because jeopardy has attached and the defendant cannot be retried on the same charge(s). Thus, a dismissal can only equate to an acquittal if the dismissal occurs after the trial has begun and jeopardy has attached.”). In *Morris*, the appellate court reversed the trial court’s grant of reimbursement to the defendant because jeopardy had not yet attached. *Id.* (“[N]o trial date had been set, much less a jury impaneled or evidence introduced.”). The State could thus refile the sodomy charge against the defendant. *Id.*; see also *State v. Jarvis*, 809 S.W.2d 460, 461 (Mo. Ct. App. 1991) (“Generally, in a jury trial, jeopardy attaches when the jury is impaneled and sworn, while in a court heard case, jeopardy attaches upon the introduction of evidence.”).

133. LA. REV. STAT. ANN. § 13:5108.3(B)(1) (2014).

134. See *Burt v. Cannon*, 689 So. 2d 492, 496 (La. Ct. App. 1997); see also *Kerwick v. Mayor of Trenton*, 445 A.2d 482, 483-84 (N.J. Super. Ct. Law Div. 1982) (holding that a plea agreement does not constitute a dismissal or acquittal under N.J. STAT. ANN. § 40A:14-155).

“dismissal” in *Black’s Law Dictionary* and found that resolution by way of plea bargain did not meet either definition.¹³⁵ The court also reasoned that the legislature could not have intended to reimburse defendants for “charges [that] probably would not have been dismissed but for the plea bargain.”¹³⁶ Therefore, the defendant in that case was not entitled to reimbursement for his legal fees and expenses for the dismissed charges.¹³⁷

Scant case law exists regarding reimbursement for a mistrial. In one Washington case, a defendant was tried twice; the first trial resulted in a hung jury and the second trial resulted in an acquittal.¹³⁸ The State argued that the defendant should not receive any reimbursement for expenses incurred in the first trial because it did not end in an acquittal.¹³⁹ The court disagreed, however, and held that both trials should be viewed as part of the same prosecution.¹⁴⁰ The court did not address whether a hung jury mistrial would count for purposes of the reimbursement statute if the prosecution chose to dismiss the charges rather than pursue a second trial.

Similarly, little case law exists regarding reimbursement when the defendant is found not guilty by reason of insanity. At least one state, Missouri, has addressed this issue and concluded that, under the state reimbursement statute, acquittal by reason of insanity constitutes a reimbursable acquittal limited to post-prosecution costs relating to hospital expenses.¹⁴¹ This approach is not adopted in the model statute proposed in this Article, because the broad reimbursement provided by the model statute should apply only to

135. *Burt*, 689 So. 2d at 496.

136. *Id.* at 497 (“We certainly do not believe that the legislature envisioned that public monies could be used for the payment of legal fees on criminal charges that were dismissed or never brought by indictment because of a plea bargain.”).

137. *Id.* (upholding trial court’s order requiring the defendant to repay the \$84,277.46 of public money he used for his defense).

138. *State v. Jones*, 964 P.2d 398, 399-400 (Wash. Ct. App. 1998).

139. *Id.* at 401 (“A defendant claiming [reimbursement] under RCW 9A.16.110 must meet at least two ‘threshold’ criteria. He or she must show (1) that a jury acquitted, and (2) that the same jury found, by a preponderance of the evidence, that he or she acted in self-defense.”).

140. *Id.*

141. *See State v. Page*, 592 S.W.2d 549, 551 (Mo. Ct. App. 1980) (en banc) (“Where a defendant is acquitted on the grounds of mental disease or defect, his care and treatment expenses in a state mental hospital are to be taxed as costs. Who must bear the costs is set forth in § 550.040 [the general reimbursement statute].” (citations omitted)).

defendants who walk free following the disposition of their cases.¹⁴² Defendants acquitted by reason of insanity are not released following the conclusion of their cases, but rather are committed to custody in a state institution.

C. What Constitutes Malicious Prosecution?

All six state statutes authorizing malicious-prosecution reimbursement assert that the trial court may certify in the record that the prosecution was malicious, thereby allowing the defendant to recover expenses.¹⁴³ The trial judge has the authority to make such a determination. The essential elements for showing malicious prosecution typically are: (1) a criminal prosecution; (2) that terminates in favor of plaintiff; (3) with defendants as prosecutors; (4) actuated by malice; (5) without probable cause; and (6) causing damages.¹⁴⁴ These statutes provide an expedient avenue for an

142. See *infra* Part IV (proposing model statute); cf. Rosenn, *supra* note 14, at 720 (arguing for the creation of a right to compensation for acquitted defendants and proposing a three-prong eligibility test). Professor Rosenn's test requires:

(1) that [the defendant] has been formally charged with a criminal offense (excluding minor misdemeanors), (2) that he has been acquitted, or that the charge has been dropped, and (3) that he did not commit either the offense with which he was charged or a lesser included offense. For the purpose of this test, *an acquittal by reason of insanity should be considered a conviction.*

Id. at 720 (emphasis added).

143. See *supra* Section I.D (summarizing the Arizona, California, Georgia, Idaho, Michigan, and Tennessee statutory provisions).

144. *Overson v. Lynch*, 317 P.2d 948, 949 (Ariz. 1957); *Bird v. Rothman*, 627 P.2d 1097, 1100 (Ariz. Ct. App. 1981) ("The elements of malicious prosecution include (1) the institution of a proceeding, (2) actuated by malice, (3) without probable cause by the defendant in this action, (4) which terminated in the plaintiff's favor, and (5) caused him damages. The failure to establish lack of probable cause is a complete defense."). Idaho's requirements are almost identical; the plaintiff—the acquitted defendant—must allege and prove: "(1) there was a prosecution; (2) the prosecution terminated in favor of the plaintiff; (3) the defendant was the prosecutor; (4) the prosecutor was actuated by malice; (5) there was not probable cause; and (6) the amount of damages that plaintiff has sustained." *Butler v. Elle*, 281 F.3d 1014, 1022 n.7 (9th Cir. 2002); see also *Clark v. Alloway*, 170 P.2d 425, 427-28 (Idaho 1946). The Idaho Supreme Court describes malice as "'the intentional commission of a wrongful or unlawful act, without legal justification or excuse and with ill will, whether or not injury was intended.'" *Beco Constr. Co. v. City of Idaho Falls*, 865 P.2d 950, 955 (Idaho 1993) (quoting *Anderson v. City of Pocatello*, 731 P.2d 171, 183 (Idaho 1986)).

Similarly, in order to receive reimbursement under the Hyde Amendment, an applicant must prove that: (1) the applicant's case was pending on

acquitted defendant to recover legal expenses because the defendant need not bring a separate civil action for malicious prosecution. An absence of case law in this area may suggest that these statutes are underutilized; it is unclear, however, whether this indicates a lack of documentation or a lack of reliance on these statutes.

D. Who Foots the Bill?

Even after a defendant is acquitted, there still exists the question of who will provide the reimbursement. Some states divide reimbursement liability among different branches of their governments.¹⁴⁵ Missouri law, for example, mandates that the State cover certain reimbursement expenses of acquitted defendants in capital and penitentiary cases and that the county cover those expenses in all other cases.¹⁴⁶ In contrast, other states simply proclaim that acquitted defendants are not liable for certain court expenses incurred in their defense, but do not specify which level of government must pay the required compensation. Florida's statute, for example, provides that "[a] defendant in a criminal prosecution who is acquitted or discharged is not liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody."¹⁴⁷ By its language, this provision does not designate repayment by any particular government entity. North Carolina's constitutional provision also states that acquitted

or after November 26, 1997 (the date of the Amendment's enactment); (2) the case was a criminal case; (3) the applicant was not represented by appointed counsel; (4) the applicant was the prevailing party; (5) the prosecution was vexatious, frivolous, or in bad faith; (6) the attorney's fees were reasonable; and (7) there are no special circumstances that would make such an award unjust. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (now codified at 18 U.S.C. § 3006A (2012)).

145. See, e.g., ARK. CODE ANN. § 16-92-105 (2006); COLO. REV. STAT. § 16-18-101 (2013); DEL. CODE ANN. tit. 11, § 4102 (2007); N.J. STAT. ANN. § 2A:166-9 (West 2014); WASH. REV. CODE § 9A.16.110(2) (West 2014).

146. See MO. ANN. STAT. § 550.040 (West 2014), *repealed by* S.B. 621, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

147. FLA. STAT. ANN. § 939.06(1) (West 2006 & Supp. 2014). The subsequent subsection, § 939.06(2), requires that defendants seeking reimbursement submit a request to the Justice Administrative Commission, which is the central accounting, budget, and human resource office for Florida's judicial branch. *Id.* § 939.06(2); *History of the Justice Administrative Commission*, JUSTICE ADMIN. COMM'N, <http://www.justiceadmin.org/commissioners/history.aspx> (last visited Mar. 3, 2015). Because Florida's acquitted-defendant reimbursement statute designates a state-wide, centralized administrative commission as the body receiving reimbursement requests, it is likely that the State pays the costs despite the lack of an express designation in the statute. See FLA. STAT. ANN. § 939.06(2).

defendants have the right not to pay certain court costs, but fails to specify who should then pay them.¹⁴⁸

In Massachusetts, reimbursement is provided through the Commonwealth's rules of criminal procedure.¹⁴⁹ The Supreme Judicial Court of Massachusetts upheld the constitutionality of these rules, including the requirement that the prosecution be the party responsible for a defendant's attorney's fees and costs of appeal if the Administrative Office of the Trial Court does not have sufficient funds.¹⁵⁰ In reaching this holding, the court stated, "This court has the authority to order payment of a defendant's attorney's fees and costs by rule, and, implicitly the authority to specify the source of the payment."¹⁵¹ This state-by-state variation demonstrates the complexity in acquitted-defendant reimbursement liability.

III. MOVING TOWARD BROADER REIMBURSEMENT FOR ACQUITTED DEFENDANTS

While each of the aforementioned states provides some form of relief to at least some acquitted defendants, no state makes all acquitted defendants truly whole. Acquitted defendants ought to receive broad reimbursement because they are presumed innocent. "[A] person . . . who has been acquitted has the same status as a person against whom no indictment has ever been filed."¹⁵² It follows that acquitted defendants should be made whole by the reimbursement of the legal expenses they were forced to incur in defending themselves.¹⁵³

Imposing liability on the government for an acquitted defendant's court costs and other legal expenses "reduces the risk that innocent people will be convicted."¹⁵⁴ A criminal justice system

148. N.C. CONST. art. I, § 23.

149. See *supra* notes 84-90 and accompanying text (discussing Massachusetts' four relevant rules).

150. *Commonwealth v. Gonsalves*, 739 N.E.2d 1100, 1104 (Mass. 2000).

151. *Id.* at 1105 (citations omitted).

152. Dekel, *supra* note 14, at 487-88; see also Rosenn, *supra* note 14, at 726 ("Forcing the innocent citizen to subsidize the criminal justice system by absorbing the costs of its errors is not only grossly unfair to the individuals involved, but also cloaks from public scrutiny the true costs of operating the criminal justice system.").

153. Rosenn, *supra* note 14, at 724 (arguing for the creation of a right to compensation for acquitted defendants and comparing it to "the tort method," which "affords a more complete recovery" by "restor[ing] the plaintiff to the economic position which he would enjoy were it not for the wrongful act").

154. Dekel, *supra* note 14, at 482.

that requires the government to pay for unsuccessful prosecutions gives the defendant an incentive to fight persistently for his or her innocence and encourages the government to prosecute cases only where it has strong evidence in its favor.¹⁵⁵ It also incentivizes the prosecution to take precautionary measures when a conviction is unlikely.¹⁵⁶ As legal scholar Omer Dekel has observed, “While turning back the clock on an indictment is not possible, financial compensation is an important step towards bringing the two individuals—the unindicted and the wrongly indicted—on equal footing.”¹⁵⁷ The model statute in Part IV thus proposes a broad reimbursement scheme intended to make acquitted defendants whole, thereby reducing unfairness in the criminal justice system.

IV. MODEL STATUTE AND COMMENTARY

Reimbursement of Expenses for Acquitted Criminal Defendants

(1) **Purpose.** The purpose of this statute is to make whole defendants who incur legal expenses in their defense against criminal charges for which they are acquitted or discharged. The statute serves as an incentive for the government to use caution and restraint in making prosecutorial decisions.

(2) **Definitions.** For the purpose of this statute—

(a) *Acquitted.* A defendant is acquitted when the defendant has been judicially cleared of a criminal charge. Acquitted includes a disposition of nolle prosequi or mistrial, but does not include a judgment of not guilty by reason of insanity.

155. *Id.* at 482-84.

156. *Id.* at 483-84.

157. *Id.* at 489. *But see* Karlan, *supra* note 14, at 600 (arguing that “acquittal alone is not necessarily a sufficient justification for fee shifting” of retained defense counsel fees and suggesting limiting fee shifting to defendants “who prove their actual innocence by a preponderance of the evidence”). As an example of this option, Professor Karlan cites the Norwegian Criminal Procedure Act, which provides:

“If a person charged is acquitted or the prosecution against him is discontinued, he may claim compensation from the State for any damage that he has suffered through the prosecution if it is shown to be probable that he did not commit the act that formed the basis for the charge.”

Id. (quoting Norwegian Criminal Procedure Act § 444 (Norwegian Ministry of Foreign Affairs trans., 1992)).

(b) *Discharged*. A defendant is discharged when the charges against the defendant have been dismissed, even if the charges may be refiled. Discharged does not include defendants with charges that were dismissed as part of a plea bargain in which the defendant pled guilty to substantially the same misconduct.

(c) *Substantially the same misconduct*. Substantially the same misconduct is misconduct that arises out of the same transaction or event, misconduct that is part of a common scheme or plan, or misconduct that is substantively similar and close in time. Factors to consider in determining whether misconduct is substantially the same include the passage of time between each occurrence; the parties involved in each occurrence, including the victims; and the charges brought.

(3) **Eligible persons and expenses**. All acquitted or discharged criminal defendants shall be reimbursed for any expenses they incur in their defense, unless they have been convicted of substantially the same misconduct. Eligible expenses include, but are not limited to, reasonable: attorney's fees, litigation expenses, court costs, jail fees, and lost wages.

(a) There is no maximum amount a defendant may receive under this statute, provided that the amount is reasonable and the defendant provides a certified itemized statement of the requested expenses.

(b) The burden is on the government to rebut the defendant's assertion of reasonableness of the amount requested for reimbursement.

(c) The defendant has a duty to mitigate lost wages and to provide appropriate documentation of such efforts. If the defendant fails to fulfill this duty, the reimbursable amount for lost wages shall be reduced by the amount the defendant could reasonably have mitigated.

(4) **Proceedings included**. Provided that the defendant was ultimately acquitted or discharged, reimbursement shall include all of the defendant's eligible expenses incurred pre-trial; during trial; on appeal, including interlocutory appeals; and during state post-conviction review.

(5) **Malicious prosecution**. If the court certifies in the record that the prosecution was malicious or without probable cause, it may order the prosecution to pay the defendant's eligible expenses.

(6) **Time for reimbursement.** Reimbursement made under this statute shall be made within a reasonable amount of time. The amount of time is presumed unreasonable when the defendant must incur new expenses in defense of substantially the same misconduct before receiving reimbursement for prior eligible expenses. The government may rebut this presumption with a showing of good cause for why the defendant has not yet been reimbursed by that time.

Commentary

Section 2(a) specifies that a judgment of not guilty by reason of insanity is not included in the definition of “acquitted” because, in such cases, there has been no finding that the defendant did not in fact commit the crime charged and because the defendant is not entitled to walk free following the acquittal. Rather, the defendant will be criminally committed to a treatment facility. This section assumes that the State will pay such treatment costs. If this assumption is unfounded in a particular state, that state should consider incurring these costs.

Section (3) intentionally leaves to legislative discretion the determination of which government entity shall be responsible for reimbursement in order to accommodate the variety of repayment systems in place in the states. Section (5) provides an exception for cases of malicious prosecution.

Section (3) also does not specify that the acquitted or discharged defendant’s costs of subsistence are an eligible expense, because presumably the defendant will not be charged with such costs while detained. If detainees are charged with their subsistence costs, those costs are included within the definition of “jail fees” and are therefore an eligible expense for reimbursement.

Section (3)(b) intentionally shifts the burden to the government to rebut the reasonableness of the defendant’s reimbursement request. In the interest of making the defendant whole, the government should bear the burden after a defendant becomes eligible for reimbursement pursuant to this Statute.

Section (3)(c) includes lost wages as a reimbursable expense—although not directly related to the criminal case—to ensure that acquitted or discharged defendants are truly made whole.

Section (4) specifies that eligible expenses include the expenses incurred on appeal. This includes any expense incurred by the defense in opposing the prosecution’s application to seek an appeal,

if such application is required before the prosecution may file for appeal.

Section (5) provides courts with the discretion to order the prosecution to pay acquitted defendants' eligible expenses in malicious prosecution cases. The purpose is to deter malicious prosecutions, to hold prosecutors more accountable for such prosecutions, and to avoid requiring the defendant to bring a separate suit for malicious prosecution.

Section (6) intentionally leaves to judicial discretion the time limit for reimbursing acquitted or discharged defendants, because courts are best situated to balance the need for administrative flexibility with the need to make the defendants whole in a timely fashion.

CONCLUSION

Defendants charged with criminal offenses often accumulate significant legal expenses to secure their freedom. While several states and the federal government have taken the preliminary step of implementing limited reimbursement schemes, none of the existing laws fully compensate acquitted defendants for the financial losses they suffer in extracting themselves from the clutches of the criminal justice system. Expanding public reimbursement of acquitted defendants, as the model statute does, will diminish externalities by helping make acquitted defendants whole. The model statute's comprehensive reimbursement mechanism also encourages prosecutorial care and restraint, thereby reducing the likelihood that innocent defendants will be prosecuted. Though no one can restore the status quo ante once a defendant is acquitted, implementing laws within the guidelines of the model statute will go a long way toward helping individuals legally cleared of wrongdoing begin to rebuild their lives.

