

**AMERICAN BAR ASSOCIATION
SECTION OF CRIMINAL JUSTICE**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges federal, state, local and
2 territorial jurisdictions to enact statutes to adequately compensate persons who have been
3 convicted and incarcerated for crimes they did not commit.
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5 FURTHER RESOLVED, The American Bar Association urges jurisdictions to
6 consider the following factors in drafting a compensation statute:
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8 A. Conditions Precedent:
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10 1. Statutes should require claimants to have been incarcerated as the result
11 of a conviction.
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13 2. Claimants must be able to show that their convictions were vacated or
14 pardoned on a ground demonstrating actual innocence, which for this
15 purpose requires that the claimant did not commit the crime, or the crime
16 did not occur.
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18 3. The claimant's own misconduct should not have substantially
19 contributed to the conviction. A false confession or guilty plea does not
20 automatically bar recovery.
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22 B. The size of the award:
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24 1. The award should be in proportion to the time served;
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26 2. The award should be based upon economic loss;
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28 3. The award should include non-economic losses, such as pain and
29 suffering, humiliation, loss of consortium, and loss of reputation; and
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31 4. Claimants are eligible for compensation only if, but for this conviction,
32 the claimant would not have been incarcerated. The government should
33 have the burden of demonstrating that the claimant would have otherwise
34 been incarcerated.
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36 C. A successful claimant shall be entitled to receive reasonable attorneys
37 fees in connection with establishing the claim of actual innocence.
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- D. Judgment should include relief from all governmental obligations incurred as a result of the trial, conviction and incarceration of the claimant, and restoration of all rights lost as a result thereof.

 - E. The court or executive authority that releases an individual based on actual innocence should give that person notice of the statutory compensation scheme.
 - 1. Any suit must be brought within one year of notice.

 - 2. If the claimant was not given notice, suit must be commenced within two years after exoneration is final or after the adoption of a compensation statute.

 - F. Jurisdictions should assist the innocent to reenter the community.
 - 1. Assistance should be provided that is at least equivalent to that available to individuals on probation or parole.

 - 2. The erroneous judgment of conviction should be expunged from the innocent's criminal record.

REPORT

Introduction

The number of individuals exonerated of serious crimes, including capital offenses, has dramatically increased in the last few years. More than 150 individuals have had their innocence established by DNA. Other exonerations have occurred as a result of re-investigations spurred by police or forensic scandals, recantations by witnesses, confessions by the actual person who committed the crime, or other evidence that establishes the true perpetrator's guilt. Individuals who have been wrongfully convicted often see their lives and families destroyed by their lengthy incarceration. Only a minority of jurisdictions currently has statutes to compensate these individuals. Moreover, a number of these statutes are quite restrictive in identifying who will be compensated, and cap the amount of recovery at artificially low levels. Most of those who are exonerated are not even entitled to the services given to people who are guilty of the crimes for which they were convicted.

While exonerated individuals can never recover the time they spend in prison, which may include time housed on death row or labeled as sexual predators, it is time to recognize that those who are innocent of the crime for which they were convicted should be reasonably compensated. Some may argue that post-conviction incarceration is no different than time spent in jail awaiting trial before acquittal. However, pretrial detention is of relatively limited duration and not intended as punishment. Similarly, incarceration before a reversal on direct appeal does not result in compensation, except in limited circumstances such as when the arrest lacked probable cause. Again, direct appeal has a predictable timeframe, and many reversals are based on evidentiary or constitutional violations that vindicate the integrity of the system, not a determination of innocence. In contrast, most of those who have been exonerated have spent years protesting their innocence with no realistic expectation that collateral attacks on their convictions will be heard, let alone result in their exoneration.¹ While it may be unrealistic to expect that the criminal justice system can be perfect, when individuals who have been convicted and incarcerated are clearly identified as innocent, it is fitting that we should acknowledge an obligation to restore their lost lives through the only means at our disposal: compensation and social services.

This proposal limits recovery to individuals who have been incarcerated. However, an issue deserving of further study is whether to compensate individuals who did not suffer incarceration, but whose lives may also have been dramatically affected by their wrongful conviction. Probation may result in a significant loss of liberty. A wrongful conviction may have left their reputations in tatters, impacted their relationships with family, friends and limited their business opportunities. Given that no compensation statute has as of yet encompassed this category of exonerees, it was felt that their inclusion at this time would hinder the acceptance of a statutory scheme to compensate

¹ See Lawrence C. Marshall, *Do Exonerations Prove That "The System Works?"* 86 *Judicature* 83 (September-October 2002), arguing that a review of 13 death sentences, shows in only three were the reversals arguably in the normal course of appellate review.

the typical claimants who spent many years behind bars unsuccessfully protesting their innocence.

1. Each jurisdiction should enact a statute to adequately compensate persons who have been convicted and incarcerated for crimes they did not commit.

Indemnification statutes are necessary because other legal avenues rarely succeed in obtaining monetary awards for those who have been convicted and later exonerated. Lacking a compensation statute, an attorney can pursue two routes on behalf of a wrongly convicted client. The first is to bring a lawsuit in either tort or under the civil rights statutes. The second is to draft a private legislative bill and try to have it introduced in the state legislature. However, counsel cannot rely on either of these approaches to be successful, since each is fraught with difficulty.²

Litigation promises the most generous verdict and can result in the defendants changing practices, but is extremely challenging, expensive, and time-consuming.³ Potential defendants - police officers and prosecutors - are generally protected from suit by doctrines of immunity.⁴ In some states even public defenders are protected by immunity.⁵ In others, while defense counsel can be sued for malpractice, a plaintiff can only prevail where the defense counsel has been so inadequate as to be constitutionally ineffective.⁶

While an individual legislative enactment might provide relief in an individual case, some jurisdictions have constitutional prohibitions on private legislative bills.⁷ Moreover, to the extent such bills are permissible, individuals who have been exonerated must find a state representative to draft such legislation, introduce it, ensure its passage, and gain the governor's signature. This is a highly political process that does not guarantee logical or consistent results. Similarly, the ability to obtain compensation as a result of clemency varies significantly among the states. Without a uniform compensation scheme, recovery has been likened to a lottery, in which the first exoneree in Georgia received \$500,000, while two others exonerated later received nothing.⁸

A statute that provides compensation for everyone who can establish that they have been unjustly convicted and incarcerated, later exonerated, and were actually innocent appears to be the best approach. Statutes provide a uniform remedy for every claimant in the jurisdiction. They can be drafted to ensure that only the truly innocent

² See generally *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. Chi. L. Sch. Roundtable 73, 87 (1999) and Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly convicted and Later Exonerated*, 52 Drake L. Rev. 703 (2004). This report relies extensively on both of these articles.

³ See generally Bernhard, *When Justice Still Fails*, *supra* note 2, at 732-736.

⁴ See *Imbler v Pachtman*, 424 US 409, 410 and (1976); *Kalina v Fletcher*, 522 US 118 (1997) (prosecutorial immunity); *Hunter v Bryant*, 502 US 224, 229 (1991) (law enforcement immunity).

⁵ E.g., 745 I.L.C.S. 19/5, IL ST CH 745 § 19/5 (2000).

⁶ See Bernhard, *When Justice Fails*, *supra* note 2, at 90.

⁷ See e.g., Ore Const Art III, § 24.

⁸ See Bernhard, *When Justice Still Fails*, *supra* note 2, at 709.

recover. They can speed the process from exoneration to recovery. They do not require extensive discovery and can be drafted to permit recovery of a reasonable amount.

Currently, nearly two thirds of the states do not have indemnification statutes.⁹ Moreover, many of the existing statutes need modernization. Some states cap awards severely.¹⁰ Similarly, federal legislation capped recovery at \$5000,¹¹ prior to the recent passage by Congress of the Innocence Protection Act, which increases compensation to \$50,000 per year, with those subject to death eligible for \$100,000 per year.¹² However, the federal legislation does not control compensation in the states, although one provision states that it is “the sense of Congress that States should provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death.”¹³ In contrast, Montana has enacted a statute that gives no monetary support at all.¹⁴ Several states require claimants to obtain a pardon as a prerequisite for filing¹⁵ - a requirement that could throw the applicant back into the political process that the statute was designed to avoid. Finally, others create difficulties for claimants through careless drafting.

Typically, compensation statutes either provide for either an administrative remedy or decision by a court. Some states appear to use existing administrative agencies,¹⁶ while others use a review process solely for exonerations. In several states, the Court of Claims decides the compensation award.¹⁷ Few of the statutes appear to contemplate a jury trial. This proposal does not recommend any specific forum or methodology to obtain recovery, since the method of recovery is likely to be enacted in accord with existing state practice. However, regardless of the forum, timeliness of recovery is particularly important for those who return to the community after lengthy imprisonment with few employment skills and no current job history.

2. In drafting a compensation statute, jurisdictions should consider the following factors:

A. Conditions Precedent:

⁹ For a table of indemnification statutes current through 1999, see Adele Bernhard, *Table: When Justice Fails: Indemnification for Unjust Conviction*, 7 U. Chi. L. Sch. Roundtable 345 (2000). While legislation has been introduced recently in several states, the Innocence Project’s website lists a total of 22 states with pending or enacted compensation schemes.

¹⁰ See, e.g., 705 Ill. Comp.Stat. 505/8© (2004) (for imprisonment of 5 years or less, not more than \$15,000; for imprisonment of 14 years or less but over 5 years, not more than \$30,000; for imprisonment of over 14 years, not more than \$35,000).

¹¹ See Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 Ga. L. Rev. 665, 673 (2002).

¹² H.R. 5107, § 431 (cleared for white House approval 10/9/2004).

¹³ *Id.* at § 432.

¹⁴ Mt. Code Ann § 53-1-214 (2003) (tuition support).

¹⁵ See, e.g., Cal. Penal Code § 4900 (2003); Md. Code Ann. State Fin. & Proc. § 10-501(b) (2003).

¹⁶ See, e.g., Md. Code Ann. State Fin. & Proc. § 10-501(a)(2) (2003) (Board of Public Works); N.C. Gen. Stat. § 148-83 (2002) (Industrial Commission).

¹⁷ See, e.g., 705 Ill. Comp. Stat. 505/8 (2004); Ohio Rev. Code Ann. § 2743.48(B)(1) (2004).

1. Statutes should require claimants to have been incarcerated as the result of a conviction.

Compensation should be available to all claimants: 1) who were convicted of a crime they did not commit; 2) who served time for that crime; 3) who were later exonerated of that crime; and 4) who can prove that they are innocent of that crime.

Most states appear to limit recovery to felony convictions.¹⁸ However, a wrongful conviction resulting in imprisonment of whatever length should be a valid ground for recovery, especially where such misdemeanors could have resulted in increased penalties for any subsequent convictions. The causation requirement that a claimant must be incarcerated as a result of the conviction eliminates potential claims by individuals who are incarcerated for other crimes during the same period that they are serving a sentence due to the wrongful conviction.

2. Claimants must be able to show that their convictions were vacated or pardoned on a ground demonstrating actual innocence, which for this purpose requires that the claimant did not commit the crime, or the crime did not occur.

Every statute requires claimants to set forth prima facie proof of innocence.¹⁹ However, several mandate that the claimant must be pardoned.²⁰ While clemency provides an important avenue to exonerate erroneously convicted individuals, in most jurisdictions such a requirement would be inconsistent with the goal of creating a uniform remedy, since pardons have declined over time, are highly discretionary, and are often subject to political considerations. To the extent that clemency does not carry with it any compensation for individuals erroneously convicted of crime, jurisdictions should be encouraged to draft legislation providing this remedy.²¹

In addition, statutes should be drafted so that the compensation remedy is available to everyone whose conviction is vacated on grounds consistent with innocence and whose charges have subsequently been dismissed or re-tried to acquittal. The term “consistent with actual innocence” is intended to be interpreted broadly, since claimants will be required to establish actual innocence. Thus, even if the grounds for a dismissal are not stated, so long as the rationale for the vacation does not indicate the guilt of the claimant, it should be sufficient to meet this criteria.

Concern that the person requesting compensation is not guilty because of legal or procedural barriers, rather than being actually innocent of the crime, should be allayed by the definition of actual innocence. In addition, since the proceeding is civil in nature, the Fourth Amendment exclusionary rule typically does not apply. In rare situations where

¹⁸ See e.g., Ala. Code § 29-2-156 (2002); Cal. Penal Code § 4900 (2004).

¹⁹ See Bernhard, *supra* note 2 at 102.

²⁰ See e.g., Me. Rev. Stat. Ann. Title 14, § 8241(2)(C) (2002); Md. Code Ann. State Fin. & Proc. § 10-501(b) (2003); N.C. Gen. Stat. § 148-82 (1997).

²¹ See proposal relating to clemency in accompanying draft regarding systemic remedies.

statutory bars prohibit evidence, such as wiretaps, from admission at any proceeding, the ethical obligation of defense counsel not to present false evidence will still prevent a bogus claim of actual innocence.²² In other words a “[d]efense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.”²³ This duty would be applicable after the prosecution notified defense counsel of the inadmissible evidence.

Existing statutes vary as to the standard required to demonstrate innocence. While most statutes require proof of innocence by clear and convincing evidence, given the variety of ways that innocence may be established, it is open to debate whether any standard that is higher than exists in the vast majority of civil cases is necessary. Certainly dna exonerations would also satisfy any higher standard. The current proposal takes no position on the standard to be applied.

3. The claimant’s own misconduct should not have substantially contributed to the conviction. A false confession or guilty plea does not automatically bar recovery.

Often, indemnification statutes prohibit recovery if the defendant’s behavior contributed to the conviction.²⁴ Care should be taken in drafting this affirmative defense. For example, confessions per se should not preclude recovery since some of them may be coerced, while others admissible under our present standard of defining coercion, may in fact be unreliable because influenced by police tactics. This is of particular concern regarding juveniles and those suffering from mentally illness or other mental impairments.²⁵ Similarly, guilty pleas should not automatically bar recovery, since innocent individuals may plead guilty in exchange for a shorter sentence, rather than face a much lengthier sentence if convicted. This is of particular concern when the plea is later overturned because of police corruption. Obviously, such cases will be highly fact specific.

B. The size of the award:

Awards should not be unduly limited. Professor Bernhard, an expert in this field, suggests that A[l]arger awards, and provision for attorney's fees, will not only ensure that the wrongly convicted are adequately and fairly compensated for their loss, but will ensure that claimants can find counsel to assist them to pursue indemnification.”²⁶ A jurisdiction should determine whether any cap is appropriate. If a cap is enacted, it should be in keeping with any other existing caps in the jurisdiction, such as those for medical malpractice or other tort claims.

²² See Defense Function Standard 4-7.5(a).

²³ *Id.*

²⁴ See e.g., W. Va. Code § 14-2-13a(e) (2003).

²⁵ See report accompanying ABA Policy on videotaping of custodial interrogations, adopted Feb. 2004, discussing the literature concerning false confessions.

²⁶ Bernhard, *supra* note 2 at 108-09.

In determining the size of the award, damages should be permitted for non-economic as well as economic losses. Non-economic damages would include pain and suffering, as well as humiliation, loss of consortium, and loss of reputation. The condition of incarceration should also be a factor. Similarly, being subjected to the death penalty should be a legitimate factor increasing the amount of compensation. To prohibit such damages results in extremely low recoveries, particularly given the deprivation of liberty inherent in incarceration. However, the recovery of punitive damages is not an appropriate remedy.

Economic damages include any lost wages, costs associated with the earlier trial, and medical expenses that might be required after release, such as psychological counseling. Some statutes include an amount of recovery for each day or year a person is wrongfully incarcerated. This appears to be a very mechanical approach that is typically set to restrict the recovery. Professor Saks' model statute includes a provision giving the court discretion to order structured payments, rather than a single award.²⁷

The Law Commission of New Zealand in enacting a compensation statute for the wrongfully convicted noted that

Apart from loss of liberty, the harshness and indignities of prison life, and suspension of voting rights, imprisonment often involves loss of livelihood and future employment prospects, loss of one's home and other personal property; breakup of family, the loss of children and other personal relationships and stigmatization and damage to reputation.²⁸

Those who have been imprisoned for crimes they did not commit should not be treated shabbily when the error is discovered. However, on occasion, an individual will be exonerated on one charge, but still be lawfully incarcerated due to other valid convictions. The compensation scheme for innocents does not extend to these individuals. In addition, the prosecution may decide not to prosecute or try other charges available at that time, after obtaining a conviction that includes a lengthy sentence. While the statute of limitations may bar criminal prosecution for such charges when the original conviction is later determined to be erroneous, this is not the type of case that justifies compensation for those who are truly innocent. However, at the time of exoneration it will be quite difficult for a claimant to prove a negative, i.e., that he or she would not otherwise have been charged and convicted of some other crime, since such evidence is in the possession of the prosecution. Therefore, the burden has been placed on the government to demonstrate that the claimant would have otherwise been incarcerated.

C. A successful claimant shall be entitled to receive reasonable attorneys fees in connection with establishing the claim of actual innocence.

²⁷ See Michael J. Saks et al., *Model Act: Model Prevention and Remedy of Erroneous Convictions Act*, 33 *Ariz. St. L.J.* 665, 711-12 (2001).

²⁸ Quoted in C. Ronald Huff, *Examining Procedures in Other Countries Where Wrongful Conviction Rates Appear to be Lower May Offer Some Lessons for the U.S.*, 86 *Judicature* 91, 96 (2002).

ABA Criminal Justice Standard for Providing Defense Services 5-6.2 provides that “counsel should be provided in all proceedings . . . including but not limited to . . . postconviction relief . . . regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.” Several of the existing compensation statutes permit the recovery of attorneys fees.²⁹

D. Judgment should include relief from all governmental obligations incurred as a result of the trial, conviction and incarceration of the claimant.

Individuals who are exonerated should not be subject to any recovery for costs associated with their prosecution and incarceration. As a result, this provision would bar recovery from the claimant for public defender fees, prison costs, medical care during incarceration, among others

E. The court or executive authority that releases an individual based on actual innocence should give that person notice of the statutory compensation scheme.

Limitations typically range from six months to three years. Several states require a claim for compensation to be brought within two years of exoneration.³⁰ A shorter time requirement, such as the six month California limit,³¹ is unwise in light of the typical financial and emotional condition of the released innocent and the difficulty of obtaining counsel. Jurisdictions should provide that the judge who releases an individual based on innocence must inform that person of any statutory remedy for compensation.

F. Jurisdictions should assist the innocent to reenter the community.

Unlike probationers or parolees who may have help navigating access to public services or benefit from reentry plans, the newly released innocent person is simply set free. Job and vocational training, mental health counseling, substance abuse programs, assistance in obtaining housing or food stamps and a monetary stipend sufficient to tide the individual over the first few months of freedom are all possibilities. This function could be lodged in a probation department or in an existing department with responsibilities for mental health services. People who have spent a significant number of years in prison cannot easily readjust to the outside world without support. Many of them are found to be suffering from symptoms that may indicate they suffer from post traumatic stress disorder due to their wrongful convictions or have other serious medical problems. Today, these individuals leave prison solely dependent on relatives and friends until they can re-establish themselves in the community. The government should recognize a responsibility to assist their reintegration.³² There has been some discussion

²⁹ See, e.g., Iowa Code § 663A.1, Section 6a (2002); McKinney's Court of Claims Act § 8-b (2004).

³⁰ See e.g., Ala. Code § 2902-162 (2002); New Jersey Stat. Ann. § 52:4C-4 (2004).

³¹ Cal. Penal Code § 4901 (2004).

³² See generally Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 Am. Crim. L. Rev. 157 (2004).

that such individuals would benefit from receiving services akin to those provided to victims of human rights abuses. The Innocence Project in conjunction with the DNA Identification Technology and Human Rights Center of Berkley, California have formed a “Life After Exoneration Project” to coordinate a national network of resettlement programs to assist exonerees in restarting their lives.³³

Jurisdictions also must ensure the expungement of the erroneous conviction from the innocent’s criminal record. Some of those who have established their innocence nonetheless find it difficult to obtain employment or professional licenses because their criminal record still reflects the crime. Housing and other public benefits may also be affected. While jurisdictions should adopt procedures to automatically delete the erroneous conviction from the court and police record, uniform procedures should be adopted by which an innocent can petition for expungement if the conviction is not deleted. If necessary, legislation should be drafted to provide that the innocent is entitled to respond to a question under penalty of perjury that he or she has not been convicted of the crime. A person exonerated of crime should be entitled to be treated as if the conviction had never occurred for purposed of any collateral sanction or discretionary disqualification.

Respectfully submitted,

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³³ See www.exonerated.org.