COMPENSATING THE INNOCENT ACCUSED

KEITH S. ROSENN*

> [P]enal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy.**

The United States has lagged far behind many nations[1] in its failure to compensate the innocent victims of erroneous criminal accusations. Despite the relatively advanced development of tort law in the United States, no American jurisdiction presently provides for public compensation to an innocent person who has been duly acquitted, or against whom all criminal charges have been dismissed or dropped.[2] Indeed, only the federal government and four states have statutes that in certain circumstances provide for compensation to a person imprisoned after conviction for a crime that he did not commit.[3] Damages resulting from a formal criminal accusation can be

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* Professor of Law, The Ohio State University College of Law.

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** Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

[1] *E.g.*, Sweden, Norway, Denmark, France, Italy, West Germany, Switzerland, and Japan. *See* S. DANDO, JAPANESE LAW OF CRIMINAL PROCEDURE 527 *et seq.* (1965); Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 109 U. PA. L. REV. 833 (1961); Glod, *A Comparative Survey of the Unjust Conviction Laws in the United States, France and West Germany*, REVUE DROIT PEN. MILITAIRE 7 (1969); Righetti, *La Riparazione All'Imputato e All'Accusato e il Guidizio Sulle Spese in Caso di Abbandono del Procedimento Penale o di Assoluzione nel Diritto Cantonale e nel Diritto Federale (Art. 122 Procedura Penale Federale) in Particolare de Lege Ferenda*, 79 ZEITSCHRIFT FUR SCHWEIZERISCHES RECHT 421a (1960).

[2] *A Note on American Law*, 109 U. PA. L. REV. 845 (1961). One partial and short-lived exception was Nebraska's curious "Self-Defense Act," enacted in 1969. NEB. REV. STAT. § 29-114 (Cum. Supp. 1969). It provided, *inter alia*, that:

> When substantial question of self defense . . . shall exist, which needs legal investigation or court action for the full determination of the facts, and the defendant's actions are subsequently found justified . . . , the State of Nebraska shall indemnify or reimburse the defendant for all loss of time, legal fees, court costs, or other expenses involved in his defense.

This statute was declared unconstitutional on unrelated grounds in State v. Goodseal, 186 Neb. 359, 183 N.W.2d 258 (1971), *cert. denied*, 404 U.S. 845, and repealed by Leg. Bill 187, § 1, [1971] Neb. Laws 1st Sess.

[3] California and Wisconsin first adopted compensation statutes in 1913, followed by North Dakota in 1917, the federal government in 1938, New York in 1942, and Illinois in 1957. North Dakota repealed its statute in 1965. Ch. 203, § 86, [1965] Laws of N.D.

devastating to an innocent person, not only because of the high costs of criminal defense work, but also because of the sizeable reputation damage and mental anguish normally associated with such accusations.

This article argues that it is unconscionable to force the innocent to bear these often crushing costs of malfunctions of the criminal justice system, and that a right to compensation for damages resulting from erroneous criminal charges should be created. The article explores liability theories upon which this right might be based, as well as the difficulties in determining the meaning of innocence. Finally, the article suggests several techniques by which a right to compensation might be implemented.

The procedures for obtaining relief under these statutes vary. In California one who has been convicted, imprisoned, and pardoned by the governor, on the ground that the criminal act was either not committed or not committed by the accused, may present a claim to the state board of control. Not only must the claimant establish his innocence, but he must also show that he neither negligently nor intentionally contributed to his arrest or conviction. If satisfied that the claimant meets these strict requirements for compensation, the board may recommend to the legislature an award of compensation, not to exceed $10,000. CALIF. PENAL CODE §§ 4900-4906 (West 1970).

In Wisconsin a board must find that a petitioner is innocent beyond a reasonable doubt of the crime for which he was imprisoned, and that his act or failure to act did not contribute to his being convicted. The board may award up to $1,500 for each year of wrongful imprisonment, although the total award is limited to $5,000. WIS. STAT. § 285.05 (1958), *as amended* (Supp. 1975).

In Illinois and New York courts of claims have jurisdiction to hear suits for compensation for erroneous imprisonment. In both states the claimant must have served all or part of his term and have been pardoned by the governor because of innocence. ILL. REV. STAT. ch. 37, § 439.8(c) (1973); N.Y. CT. CL. ACT § 9 (3-a) (McKinney 1963). In Illinois the maximum award is $15,000 for up to five years of wrongful imprisonment, $30,000 for five to fourteen years, and $35,000 for more than fourteen years. In addition, the claimant is entitled to an award for attorney's fees, not to exceed 25% of the compensation awarded. There is no limit upon the amount of compensation that may be awarded under the New York statute.

The federal statute requires a claimant who has served all or part of his sentence to bring suit in the Court of Claims. As a condition of recovery the claimant must obtain either a pardon or a certificate of innocence, usually from the court which had convicted him, reciting that the claimant was innocent of the offense for which he was convicted and that his own conduct did not contribute to bring about his arrest or conviction. Recovery is limited to $5,000. 28 U.S.C. § 2513 (1970). Attorneys' fees may not be awarded. Marsh v. United States, 48 F.R.D. 315 (W.D. Va. 1969).

Some of the New York cases illustrate the gross inadequacies of these damage litigation provisions. In 1955 the court of claims awarded $112,290 for twelve years of erroneous imprisonment. Hoffner v. State, 207 Misc. 1070, 142 N.Y.S.2d 630 (Ct. Cl. 1968). In 1968 an award of $300,000 was made for erroneous confinement in a mental hospital for twelve years. Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

In many jurisdictions the only hope for a victim of erroneous imprisonment is passage of a private bill of compensation. *See* Note, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1107-09 (1970) [hereinafter cited as Note, *Compensation*].

I. PROSECUTING THE INNOCENT

In an ideal world only the guilty would be subjected to criminal prosecutions. However, the criminal justice system in the United States, as in most nations, is far from ideal. Because of the crudity of American criminal statistics it is difficult to estimate the number of innocent people charged with criminal offenses. Available data suggest that the number is substantial.

The Federal Bureau of Investigation estimated that in 1974 there were 2,164,000 arrests in the United States for "major crimes."[4] Only eighty-one percent of the adults arrested for major crimes were actually prosecuted,[5] and only seventy percent of those prosecuted were convicted, of either the offense charged or a lesser offense.[6] This means that 43.3 percent of the adults arrested for major crimes, approximately 522,837 persons, were acquitted or had their cases dismissed. Unfortunately, these national statistics, like a few bone fragments from a newly discovered prehistoric creature, permit only a rough guess about the dimensions of the problem. They do not tell us how many of those arrested were not prosecuted because the authorities deemed it simpler to revoke probation or parole or to release them to another jurisdiction. Nor do they indicate how many of the convictions were reversed on appeal or set aside on collateral attack. They also tell us nothing about the reasons for dismissals. By lumping together acquittals, dismissals leading to subsequent prosecution or reinstitution of correctional measures, and dismissals resulting from such common causes as lack of probable cause, refusal of the victim to prosecute, insufficient evidence, interest of justice, and death or insanity of the accused, the Bureau's statistics run afoul of the familiar canon against adding apples and oranges.[7]

One important part of the explanation for the high percentage of criminal charges dismissed prior to trial involves the day-to-day functioning of the law of arrest. In legal theory arrests should be made without prior judicial approval only in exceptional cases.[8] But since the prerequisite for issuance of an arrest warrant for a fe-

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[4] F.B.I., UNIFORM CRIME REPORTS 179 (1974). "Major crimes" are defined as murder, manslaughter, forcible rape, robbery, aggravated assault, burglary, breaking and entering, larceny, theft, and auto theft.

[5] *Id.* at 46. Forty-one percent of these arrests were referred to juvenile authorities. The Uniform Crime Reports are silent about the number of exonerated juveniles.

[6] Sixty-one percent were guilty as charged, and the remaining nine percent convicted of a lesser included offense. *Id.*

[7] A more revealing statistical breakdown was available for California until 1964. CALIFORNIA BUREAU OF CRIMINAL STATISTICS, CRIME IN CALIFORNIA 48 (1964). *See also* section VIII *infra.*

[8] W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 15 (1965).

lony—probable cause—is the same as the prerequisite for a felony arrest without a warrant, few policemen bother to secure warrants to arrest suspected felons.[9] In most American jurisdictions a policeman can arrest a misdemeanant without a warrant only for an offense committed in the officer's presence,[10] though a few states have adopted statutes permitting arrests for misdemeanors committed outside the presence of the arresting officer to be made without a warrant.[11] Hence the great bulk of arrests are made without prior judicial approval. Even when police officers do seek an arrest warrant, judges routinely issue such warrants after a perfunctory examination of the legal sufficiency of the allegations.[12] In legal theory all arrests are made with the reasonable expectation of securing a conviction. In practice many arrests are made simply to harrass or to detain the suspect for further questioning.[13] This abuse of the criminal law is facilitated by criminal statutes that permit police to arrest for such vague crimes as being a "suspicious person" or a "vagrant."[14]

Pretrial screening of cases that should not be prosecuted is normally performed by four different agencies: prosecutor, magistrate, police, and grand jury. Which agency or combination of agencies performs this screening function varies widely from jurisdiction to jurisdiction. In jurisdictions where prosecutors exercise little supervision over the police, more cases are dismissed at the preliminary hearing for lack of probable cause and grand juries more often refuse to indict than in jurisdictions where prosecutors actively supervise the police.[15]

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[9] *Id.* at 17. That this common practice still has the Supreme Court's seal of approval was recently confirmed in United States v. Watson, 423 U.S. 411 (1976).

[10] W. LAFAVE, *supra* note 8, at 17.

[11] W. LAFAVE & A. SCOTT, CRIMINAL LAW 403-04 (1972).

[12] W. LAFAVE, *supra* note 8, at 15-16.

[13] *See* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 38-39; Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543, 580-86 (1960).

[14] *See* W. LAFAVE, *supra* note 8, at 301-16; Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); FOOTE, *Vagrancy Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956). The United States Supreme Court has declared several statutes of this type void for vagueness. Papchristou v. Jacksonville, 405 U.S. 156 (1972) (vagrancy ordinance); Palmer v. Euclid, 402 U.S. 544 (1971) (suspicious person ordinance); Coates v. Cincinnati, 402 U.S. 611 (1971) (loitering ordinance).

[15] For example, in Cook County, Illinois (Chicago), magistrates dismiss 43% of the cases brought before them for preliminary hearing, while in Los Angeles County only about 10% of the cases are dismissed at the preliminary hearing stage. In Los Angeles County as many as 50% of the cases presented by the police for prosecution are dropped before a charge is filed, while in Cook County a case normally does not come to the prosecutor's attention until after a charge is filed by the police and preliminary examination is held. L. HALL, Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 850-51 (3d ed. 1969) [hereinafter cited as HALL].

The key decision maker in the pretrial screening process in most jurisdictions is the prosecutor. Grand juries generally hear only the evidence a prosecutor wants to present, and are frequently criticized for being "rubber-stamps for the prosecutor."[16] In some states the information—an affidavit signed by the prosecutor—serves as the functional equivalent of a grand jury indictment for all crimes.[17] In other states felonies require a grand jury indictment, but misdemeanors may be prosecuted simply by information.[18] Judges and magistrates tend to be overly reluctant to dismiss charges at the preliminary hearing. The accused is generally forced to stand trial if the prosecutor can muster anything resembling a prima facie case.[19]

Prosecutors dismiss charges for many reasons. Lacking personnel, resources, and desire to prosecute every criminal case brought to their attention, prosecutors constantly have to pick and choose among the cases which they will attempt to pursue to conviction.[20] Further investigation may convince the prosecutor of the defendant's innocence, or disclosure of facts by the defendant or his attorney may persuade the prosecutor that alternatives to the criminal process—*.e.g.*, psychiatric treatment or restitution—would be more appropriate. Factors such as the death or disappearance of a witness, or the granting of a suppression motion, may convince the prosecutor that he is unlikely to be able to prove guilt beyond a reasonable doubt. Some charges may be dropped or reduced in exchange for a plea of guilty or for an agreement to testify or inform against other offenders.[21] Sometimes charges are dismissed for technical defects and refiled after rectification of the defects. Or the prosecutor's office may have a policy against prosecuting certain kinds of offenses, such as violations of the "blue laws" or social gambling, and uniformly dismiss all such cases referred to it.[22]

The U.S. criminal justice system casts its net much too broadly.

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[16] Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 295 (1931); Whyte, *Is the Grand Jury Necessary*, 45 VA. L. REV. 461 (1959).

[17] HALL, *supra* note 15, at 788-89.

[18] *Id.*

[19] *See, e.g.*, Note, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. PA. L. REV. 589, 606 (1958); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1166-69 (1960).

[20] F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154-72 (1970); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-35 (1970); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965).

[21] *See* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 67-130 (1966); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

[22] Other reasons commonly given for refusing to prosecute are: (1) the victim has asked

Included within its sweep are many who may be technically guilty but whom society's representatives do not wish to prosecute, as well as large numbers of persons who are innocent in fact or who cannot be proved guilty. Most of these persons are screened from the system prior to trial, but not before many innocent persons suffer substantial damages in the form of pretrial detention, counsel fees, lost wages, humiliation, and loss of reputation.

II. PRETRIAL DETENTION IN THE UNITED STATES

Whether an accused will be subjected to pretrial confinement in the United States is largely a function of the bail system.[23] An arrested person is typically brought before a judge or magistrate who, except in capital cases, will set a monetary sum as bail. In theory, this sum is to be determined by the judge's best guess at the amount necessary to secure the accused's appearance at trial.[24] In practice most judges also consider the seriousness of the charge and the dangerousness of the accused.[25] If he and his family or friends can post bond, or pay the nonrefundable premium demanded by a professional bail bondsman—usually ten percent of the face amount of the bond—the accused is released. If they cannot, the accused remains in jail until his case is resolved.[26]

Each year hundreds of thousands of persons are detained in American jails,[27] under conditions generally much harsher than those

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that the offender not be prosecuted; (2) the costs of the prosecution would be excessive, considering the nature of the violation; (3) prosecution would cause undue damage to the offender; (4) alternative civil proceedings are sufficient. *See* LaFave, *supra* note 20, at 534-35.

[23] *See generally,* STUDIES ON BAIL (C. Foote ed. 1966); R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM (1965); D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964 (Report to Nat'l Conf. on Bail and Criminal Justice, 1964).

[24] Stack v. Boyle, 342 U.S. 1 (1951).

[25] D. FREED & P. WALD, *supra* note 23, at 18-21.

[26] In recent years the bail system has been subjected to much scathing criticism, and reform efforts have made considerable headway in some jurisdictions. The Bail Reform Act of 1966, Pub. Law 89-465, 80 Stat. 214, modified the federal bail system to permit release on personal recognizance or unsecured appearance bond unless a judicial officer determines that such release "will not reasonably assure the appearance of the person as required." 18 U.S.C. § 3146(a)(1970). If such determination is made, the judicial officer may impose restrictions upon freedom of movement, require execution of a cash bond, or require deposit of only ten percent of the face amount of the bond, which is refundable if the conditions of the bond are met.

In 1964 Illinois effectively eliminated the bail bondsman by permitting the accused to deposit with the court the ten percent bail bond premium formerly paid to the bondsman. If the accused appears for trial, 90% of the sum deposited is refunded. ILL. REV. STAT. ch. 38, § 110-7 (1973). Ohio adopted a similar measure in 1973, OHIO RULES CRIM. P. 46 (Page 1975), as did Kentucky in 1976. KY. REV. STAT. § 431.530 (Baldwin Temp. Issue 1977). The constitutionality of the Illinois statute was upheld in Schlib v. Kuebel, 404 U.S. 357 (1971).

[27] The percentage of defendants who cannot secure their release on bail varies considerably

of postconviction imprisonment,[28] solely because of their financial inability to post bail. A substantial percentage of those detained will never be convicted.[29] Moreover, while the evidence is inconclusive, empirical studies suggest that, *ceteris paribus,* a detained defendant is more likely to be convicted than a defendant free on bond.[30]

III. THE ENORMOUS COST OF PRESENTING AN ADEQUATE CRIMINAL DEFENSE

The cost of properly defending a criminal prosecution can be staggering, impoverishing all but the very rich or the already indigent. Recent, highly publicized cases illustrate this point vividly. Nixon's aide, John Ehrlichman, reportedly spent $400,000 on his defense.[31] Patty Hearst's defense by F. Lee Bailey is expected to cost at least $175,000;[32] Bailey himself spent $350,000 for his own defense against charges of conspiracy to defraud investors arising from his involvement with Glenn Turner.[33] Even though the Pentagon Papers prosecution was aborted in mid-trial because of governmental misconduct, the cost of defending Daniel Ellsberg and Anthony Russo reached $900,000.[34]

To be sure, such expenditures are atypical. The typical criminal defense consists of negotiating a plea bargain.[35] However, the ade-

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from place to place. For example, in past years it has been 79% in St. Louis, 75% in Baltimore, 71% in Miami, 57% in San Francisco, 54% in Boston, 48% in Detroit, and 44% in New Orleans. D. FREED & P. WALD, *supra* note 23, at 40.

[28] *See* A. TREBACH, THE RATIONING OF JUSTICE: CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCESS 82-83, 264 (1964); L. KATZ, L. LITWIN & R. BAMBERGER, JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 56-58 (1972).

[29] In the New York Bail Study, 163 of the 1660 detainees (9.8%) had their cases dismissed following a refusal by the grand jury to indict. Of the 89 detainees who went to trial, 18 (20.2%) were acquitted. Roberts and Palermo, *A Study of the Administration of Bail in New York City,* 106 U. PA. L. REV. 693, 726-27 (1958). In the Philadelphia Bail Study one-fifth of all detainees were not convicted—nearly two-thirds of these persons were acquitted, and the other third were either not indicted or had charges dismissed. Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031, 1050 (1954).

[30] This was conceded by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 533 n.35 (1972) (citing Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study,* 39 N.Y.U.L. Rev. 631 (1964)). Rankin, *The Effect of Pretrial Detention,* 39 N.Y.U.L. Rev. 641 (1964), found that 47% of those on bail were not convicted, while 27% of those detained were not convicted. This ratio remained more or less constant even when some of the more obvious variables were controlled. Similar correlations were suggested by the New York and Philadelphia Bail Studies, *supra* note 29. *But see* Landes, *Legality and Reality: Some Evidence on Criminal Procedure,* 3 J. LEG. STUDIES 287, 333-37 (1974).

[31] TIME, Jan. 13, 1975, at 14.

[32] TIME, Feb. 16, 1976, at 49.

[33] *Id.* at 50.

[34] TIME, May 21, 1973, at 30.

[35] Between 70 and 85% of all felony defendants enter guilty pleas; the percentage of guilty pleas is even higher in misdemeanor cases. Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN

quacy of most criminal defense work is questionable.[36] Despite the poor quality of representation in most criminal cases, counsel fees for defending a felony charge frequently run several thousand dollars. Additionally, there may be outlays of several hundred dollars per day for investigators and/or expert witnesses, plus a bail bond premium, which is likely to cost somewhere between $200 and $1,000.

None of these expenditures can be recouped if the defendant is acquitted or the charges are dropped. Indeed, these expenditures are usually not even tax deductible.[37] Thus for most nonindigent American families the costs of a criminal defense constitute a crushing hardship, regardless of the guilt or innocence of the accused.

IV. HYPOTHETICAL CASES FOR COMPENSATING THE INNOCENT ACCUSED

Consider the plights of these three hypothetical defendants, each the victim of an erroneous criminal charge:

(1)

Paul Poe is indicted on a robbery charge after being positively identified as the perpetrator by the victim. Bail is set at $10,000; in default thereof Poe is confined to the county jail for five months awaiting trial. Poe adamantly insists on his innocence, and refuses numerous entreaties from his court-appointed counsel to plead guilty to a lesser offense. Shortly before Poe is scheduled to go on trial, the police arrest Jones on a robbery charge. While questioning Jones an alert policeman notices that Jones closely resembles Poe, and asks Jones about the robbery for which Poe has been indicted. Jones readily admits committing that crime. On seeing Jones and Poe together, the victim retracts his identification of Poe and states that Jones was indeed the culprit. The prosecutor, with permission from the court, enters a *nolle prosequi,* and Poe is released from custody with sincere apologies from the prosecutor's office. After his five month jail stay Poe discovers he has lost his job and his wife.

(2)

Rita Roe is arrested and indicted on a forgery charge after being identified by the victim from a suggestive display of photographs. Bail is set at $10,000 and Roe is released on bond. Roe hires an able criminal defense attorney to represent her. Defense counsel

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CRIMINAL PROCEDURE 11-12 (4th ed. 1974).

[36] *See* Bazelon, *The Defective Assistance of Counsel,* 42 U. CIN. L. REV. 1, 2-4 (1973); Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession,* 1 L. & SOC. REV. 15 (1967).

[37] Only if the criminal charge arises from a defendant's business-related activities will the expenses of defending against it be deductible. *See* Commissioner v. Tellier, 383 U.S. 687 (1966).

succeeds in suppressing the out-of-court identification, and at trial presents a handwriting expert who establishes that the forged instrument was not written by Roe. Had the police and prosecutor investigated the case more carefully, they would have realized that Roe was not the forger. The jury brings in a verdict of acquittal. As a result of the erroneous prosecution, Roe has used up her life savings to pay her attorney a fee of $10,000, plus $1,000 for the bail bondsman and $1,000 for the expert witness. In addition, profits at Roe's advertising agency have fallen $500 a month during the year in which she was under indictment.

(3)

Following an argument with a prostitute over the value of services rendered, Clarence Coe is arrested and charged with rape. Bail is set at $10,000 and Coe is released on bond. In obtaining the indictment the prosecutor failed to inform the grand jury that the complainant's reputation and credibility were dubious, and falsely represented to the grand jury that a paint stain on Coe's shorts was actually blood which matched the type of the complainant. Because on a prior occasion the complainant had falsely accused a client of rape, the prosecutor offers to reduce the charge to assault in return for a plea of guilty. Coe insists upon his innocence. Coe's attorney demolishes the prosecution's case, and the jury acquits. As a result of the rape charge, Coe has incurred expenses of $10,000 for his attorney, $1,000 for the bail bond premium, $500 for a chemist, and $500 for an investigator. He was also fired from his job as a high school principal.

In all three hypotheticals the law would regard any damages suffered by the defendants as *damnum absque injuria.* Had Poe, Roe, or Coe been convicted and sentenced to prison before discovery of the mistake, they would have an action against the government for damages only if the prosecution had been initiated by the federal government, California, Illinois, New York, or Wisconsin.[36] And since Poe's entire confinement was pretrial, no American jurisdiction affords him a right of recovery against the government.

If, as in Coe's case, the complainant had instituted the prosecution maliciously and without probable cause, the accused would have a cause of action for damages against her.[37] However, since the complainant is likely to have a very shallow pocket, any judgment would probably remain unsatisfied even if such a suit were successful. Had

[36] *See* note 3 *supra.*

[37] The elements of the tort of malicious prosecution are usually stated as: (1) institution or continuation of a criminal proceeding by the defendant against the plaintiff, (2) acquittal or dismissal of the criminal proceeding, (3) lack of probable cause for the criminal proceeding, and (4) malicious intent on the part of the defendant, *i.e.* his primary purpose was not to bring an offender to justice. *See generally* W. PROSSER, TORTS 834-50 (4th ed. 1971).

the police made an arrest without probable cause, Poe, Roe, or Coe might have civil actions for false imprisonment against the arresting officers.[40] Or had the police violated their constitutional rights, *e.g.*, by engaging in unreasonable searches or seizures, the defendants would have actions for damages against the police under the Civil Rights Act of 1871.[41] But even if the prosecutor knowingly presents perjured testimony and wilfully misrepresents the evidence, as in the third hypothetical, the victim of such prosecutorial misconduct has no damage remedy under state or federal law.[42] In all three hypotheticals the defendants' only hope of receiving compensation would be enactment of a private bill by the state legislature. If past

[40] Despite the high incidence of illegal arrests in the United States, relatively few successful actions against the police for wrongful imprisonment have been maintained, and even fewer have resulted in actual recovery of substantial damages. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). Probable cause and good faith are generally considered valid defenses. During a twelve year period in Los Angeles, the police won 91% of the false imprisonment cases; damages in the successful suits averaged only .05% of the amount claimed. Coakley, *Law and Police Practice: Restrictions in the Law of Arrest*, 52 NW. U.L. REV. 2, 5 (1957).

[41] In Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court sustained a civil action for damages under 42 U.S.C. § 1983 against the Chicago police for an unlawful invasion of the plaintiff's home and illegal search, seizure, and detention. Subsequent cases have imposed liability on state officials for unlawful arrest, Rhoads v. Horvat, 270 F. Supp. 307 (D. Colo. 1967), and wrongful imprisonment, Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968). *See generally* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965). Liability for an illegal search or false arrest was extended to federal law enforcement officers in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Similar liability has been extended to the United States government by Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. In response to a series of unconstitutional "no-knock" raids by federal narcotics agents, Congress amended the Federal Torts Claims Act, 28 U.S.C. § 2680(h) (Supp. 1974), to deprive the federal government of the defense of sovereign immunity in cases in which law enforcement officers, acting under federal law, commit the torts of assault, battery, malicious prosecution, or abuse of process.

However, victims of illegal arrests, searches, or seizures by county or municipal law enforcement officers have generally been frustrated in their search for a "deeper pocket" by the Supreme Court's rulings that municipalities and counties are not "persons" within the meaning of 42 U.S.C. § 1983 and hence are immune from suit under § 1983. Monroe v. Pape, *supra*, 365 U.S. at 187-91 (1961); Moor v. County of Alameda, 411 U.S. 693, 698-710 (1973). Attempts to impose liability on municipalities for constitutional torts of their officers by invoking the constitution directly, as in Bivens v. Six Unknown Named Agents, *supra*, have met with mixed success in the lower courts. *See* Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 927-29 (1976). And an attempt to press 42 U.S.C. § 1981 into service to impose liability upon a municipality for an allegedly racially motivated unlawful arrest was recently quashed by the United States District Court for the Western District of Pennsylvania. Mahone v. Waddle, D.C. Civil No. 75-760 (Dec. 12, 1975), *pending appeal* Nos. 76-1377 and 76-1378.

[42] Prosecutors and other law enforcement officers are generally held to have immunity from malicious prosecution suits. *See generally* W. PROSSER, TORTS 837-38 (4th ed. 1971). The same considerations underlying common-law immunity have led the Supreme Court to the conclusion that prosecutors have absolute immunity in damage suits brought under 42 U.S.C. § 1983. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

experience is any guide, the likelihood that such a bill would be enacted and would provide adequate compensation is extremely small.[43]

V. THEORETICAL BASES FOR COMPENSATION

Three legal theories have been suggested to impose liability on governments for damages resulting from criminal prosecution of innocent persons: (1) fault-based torts of its agents, (2) eminent domain, and (3) strict enterprise liability.[44] The third theory is conceptually superior.

When the agents of the state willfully or negligently prosecute an innocent person, the familiar tort concept of *respondeat superior* should apply. In hypotheticals (2) and (3) above, the exercise of due care by police, prosecutor, or judge would have avoided the prosecution of an innocent person. Imposition of vicarious liability on the state makes sense in such cases. No sound tort principle would distinguish the innocent victim of a negligently operated postal truck from the innocent victim of a negligently operated criminal justice system. The doctrine of sovereign immunity is as obsolete and intellectually bankrupt in either situation.[45]

The basic difficulty with a negligence-vicarious liability theory is that it does not go far enough. It offers no cause of action to the victim of an honest mistake, such as Poe in the first hypothetical. Moreover, the burden of proving negligence by the police or prosecutor would be extremely difficult for the typical accused. Fault or negligence is too thin a strand to support governmental liability in this area.

The eminent domain analogy is a strained basis for imposing liability on the government for erroneous prosecutions. The law of eminent domain was developed to deal with governmental appropriation of private property, not personal liberty. Indeed, the cases hold

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[43] E. RADIN, THE INNOCENTS 239-56 (1964) collects sixty-nine cases in which innocent persons were convicted. In fifty-two cases no compensation was awarded. In two cases from New York awards in excess of $100,000 were made by the court of claims, and in one case a $5,000 award was made by the United States Court of Claims. In the remaining fourteen cases the legislatures passed private bills awarding compensation. These bills totalled $165,000 for sixty-eight years of wrongful imprisonment, an average of $2426.27 per year.

[44] Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U.L. REV. 201, 207-08 (1941), suggests two theories: (1) the eminent domain analogy and (2) the workmen's compensation analogy. *See* Note, *Compensation*, *supra* note 3, at 1098, 1107, 1112 for a discussion of tort liability and a recategorization of Borchard's workmen's compensation analogy as strict enterprise liability.

[45] *See* Mikva, *Sovereign Immunity: In a Democracy the Emperor Has No Clothes*, 1966 U. ILL. L.F. 828, 839-41; Note, *Compensation*, *supra* note 3, at 1103-07.

that compensation is not required if the government curtails property rights in exercise of the police power.[46] While it is often difficult to distinguish taking under the power of eminent domain from property regulation under the police power,[47] the latter is clearly the source of governmental authority to arrest persons accused of crime. The principal utility of the eminent domain analogy is to identify the paradoxical inversion of values in our legal structure: the taking of private property for public benefit requires compensation while taking of an innocent person's liberty does not.

The preferable doctrinal basis for requiring the state to compensate the innocent accused is strict enterprise liability.[48] Regardless of the standard of care exercised by police and prosecutors, wholly innocent people will sometimes be subjected to criminal prosecutions. Some of these people, through no fault of their own (unless poverty be considered a fault), will be confined prior to trial; others may be financially or emotionally crushed by the trial. As between the accused and the state, it is more just to place the loss caused by the inevitable errors of the criminal justice system on the state. Not only is the defendant the innocent victim, but also insuring against such loss is not yet practicable.[49] The state has erroneously set in motion the criminal justice system, which may be appropriately analogized to a dangerous instrumentality. Moreover, the state is the ideal agency to spread the risk of loss over the entire society.[50] The reparation of damages caused by erroneous criminal accusations, irrespective of how well founded they seemed, is properly a cost of the operation of the criminal justice system. It is difficult to see why the innocent victims should be forced to absorb this cost.

In addition to righting serious injustices, imposition of strict state liability would bring important collateral benefits. First, imposing these costs on the state may discourage police and prosecutors from bringing groundless prosecutions, or at least induce greater circumspection in invoking the machinery of the criminal justice system. Second, some innocent persons who presently plead

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[46] *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

[47] *See* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *supra* note 46.

[48] *See* Note, *Compensation*, *supra* note 3, at 1109-11.

[49] Growth of group legal services programs is beginning to fill part of this insurance gap. *See generally*, Bernstein, *Legal Services as a Social-Political Movement*, 4 U. TOL. L. REV. 423 (1973); Comment, *Group Legal Services and the Organized Bar*, 10 COLUM. J.L. & SOC. PROB. 228 (1974).

[50] *See* Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

guilty—often in exchange for a sentence of time served while awaiting trial—would have more of an incentive to insist upon their innocence.[51] Third, the compensation award might serve as a much-needed status elevation ceremony for innocent victims of criminal charges. Even if the accused has been acquitted or had the criminal charges dropped, the mere existence of the formal accusation results in a status deprivation. Insurance companies and prospective employers will ask whether an applicant has ever been arrested, and many will presume guilt despite the dismissal or acquittal.[52] As the next section makes clear, an acquittal or dismissal of criminal charges does not prove the defendant's innocence. Seldom does a defendant have a mechanism to clear himself completely of any suspicion of misconduct.

VI. THE SIGNIFICANCE OF AN ACQUITTAL

In the United States an acquittal in a criminal prosecution does not necessarily mean that the defendant is innocent in fact—that he did not do what he was alleged to have done. An acquittal means only that the prosecution failed to satisfy the judge or jury of the defendant's guilt beyond a reasonable doubt; it is consistent with a variety of hypotheses, which should be treated differently for the purposes of compensating the "innocent" accused.

Just as prosecutors frequently drop charges for reasons having nothing to do with a defendant's actual guilt,[53] judges and juries regularly acquit for a myriad of reasons unrelated to whether the defendant acually committed the activity charged. Consider this simple hypothetical: *D* is charged with the murder of *V* and is acquitted. An acquittal would be consistent with a jury's believing one or more of the following hypotheses:

(1) *D* did not kill *V*.

(2) More probably than not *D* killed *V*, but there still remains a reasonable doubt.

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[51] There are a variety of reasons for an innocent person to plead guilty. *See* Note, *Voluntary False Confessions: A Neglected Area in Criminal Administration*, 28 IND. L.J. 374 (1953). There are no data as to the frequency with which innocent people plead guilty in order to resolve their status quickly and avoid the uncertainty of a trial sometime in the future, but the incidence is high enough to cause trial judges concern. D. NEWMAN, *supra* note 21, at 24. *See also* A. TREBACH, *supra* note 28, at 84-87.

[52] *See* Schwartz and Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROB. 133 (No. 2, 1962), describing an experiment in which the authors found that "an individual accused but acquitted of assault has almost as much trouble finding an unskilled job as one who was not only accused of the same offense but also convicted."

[53] *See* notes 20-22 *supra* and accompanying text.

(3) *D* killed *V* in self-defense.
(4) *D* killed *V* in circumstances establishing the defense of necessity.
(5) *D*'s act of killing *V* was involuntary (*e.g.*, committed during an unconscious or somnambulistic state).
(6) *D* killed *V* by accident or mistake.
(7) At the time *D* killed *V*, *D* was insane, or there was at least a reasonable doubt about *D*'s sanity.

To convict, not only must the prosecution prove that *D* killed *V* (*actus reus*), but it also must establish the requisite mental state (*mens rea*). The prosecution must also be able to negative such affirmative defenses as mistake, duress, necessity, or self-defense. Even then *D* is not legally guilty of the crime unless the prosecution can establish these factual propositions in a procedurally regular fashion and in compliance with constitutional rules designed to protect the integrity of the process.[54]

In some instances a defendant is acquitted only because the prosecution failed to prove its case properly. Poor police investigation, death or disappearance of a key witness, or unconstitutional police behavior may all result in the inability of the prosecutor to prove guilt beyond a reasonable doubt. A coerced confession, an illegal wiretap, or an unlawful search may clearly establish the defendant's guilt as a matter of fact, but the exclusionary rule makes such evidence inadmissible in court.[55] The prosecutor himself may cause a dismissal in a case in which evidence of guilt is overwhelming, such as when he fails to prosecute soon enough to ensure a speedy trial,[56] or engages in intentional misconduct.[57]

Even when the prosecution has proved the defendant's guilt beyond a reasonable doubt, juries and even judges may still acquit. Such acquittals are often the product of sentiment that the penalties prescribed are too harsh, that the activity involved ought to be decriminalized, that the victim received what he deserved, that the defendant has already been punished enough, or that alternative private sanctions or treatment will be effective.[58]

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[54] Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 16-17 (1964).

[55] Lee v. Florida, 392 U.S. 278 (1968) (excluding illegal wiretap evidence); Mapp v. Ohio, 367 U.S. 643 (1961) (excluding illegally seized evidence); Spano v. New York, 360 U.S. 315 (1959) (excluding an involuntary confession).

[56] The only remedy for denial of a defendant's right to a speedy trial is dismissal with prejudice. Barker v. Wingo, 407 U.S. 514 (1972); Strunk v. United States, 412 U.S. 434 (1973).

[57] It has been held that double jeopardy is a bar to prosecution after a mistrial provoked by the introduction of evidence that the prosecutor knew to be false. United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976).

[58] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 242-312 (1966); D. NEWMAN, *supra* note 21, at 131-96.

VII. LIMITING THE CLASS OF DEFENDANTS ENTITLED TO RECOVER

Compensation of the entire group of defendants who have been acquitted or who have had charges against them dismissed would be politically unpalatable and socially unwise. Some members of this group are factually guilty, others could be factually and legally guilty, and others should be considered as if they were. There are two principal problems: drawing the line between the compensable and non-compensable accused, and deciding what procedure should be used to distinguish between the two groups.

A. *Which Innocent Persons Ought To Be Compensated?*

One might try restricting the right to compensation to those who are innocent "in fact." But what does this mean? Is the person who kills during a trance or deep sleep innocent in fact?[59] Is the person who has had sexual relations with a minor whom he reasonably believed to be above the age of consent innocent in fact in a jurisdiction like California, which recognizes such mistake as a defense?[60] Is the person acquitted of a charge of larceny solely because his voluntary intoxication negatived an intent to steal innocent in fact?[61] Is the person acquitted solely because the police entrapped him innocent in fact?[62]

Innocence often does not separate neatly into the two categories of factual and legal innocence. In many cases the determination that a person is innocent of a crime is a mixed determination of law and fact. Whether a person who has been entrapped into committing an offense is factually innocent depends to a large extent upon the legal theory of entrapment to which one subscribes.[63] In England a suc-

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[59] Such a person would be acquitted in the United States, either on the theory that he has not engaged in a voluntary act (no *actus reus*), or that he lacked the requisite mental state to commit the offense (no *mens rea*). W. LAFAVE & A. SCOTT, *supra* note 11, at 337.

[60] Most American courts hold that reasonable belief that a minor was above the age of consent is no defense to a statutory rape charge. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965). In People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964) the Supreme Court of California reversed sixty-eight years of precedent and recognized such a defense.

[61] Case law in the United States recognizes such a defense. Edwards v. State, 178 Miss. 696, 176 So. 57 (1937); Jamison v. State, 53 Okla. Crim. 59, 7 P.2d 171 (1932).

[62] Entrapment is generally recognized as a defense to certain kinds of crime. *See* DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F.L. REV. 243 (1967).

[63] A majority of the United States Supreme Court has adhered to the theory that, as a matter of statutory interpretation, the legislature impliedly did not intend to punish the "unwary innocent" who were lured into the commission of a criminal offense by the instigation of law enforcement officers. This approach would deny the defense to persons predisposed to commit the offense. A strong minority of the Supreme Court has viewed the function of the

cessful insanity defense results in a verdict of guilty but insane; in the United States the verdict takes the form of an acquittal by reason of insanity. In many states the effect of an acquittal by reason of insanity is indefinite incarceration in a state institution that is, with the exception of its name, remarkably similar to a state penal institution.[64] Depending on which legal theory a state employs, a person who believes he is buying stolen goods that are not in fact stolen may be considered both legally and factually innocent of any crime, or guilty of an attempt to receive stolen goods.[65]

Focusing on technical concepts of guilt and innocence tends to obscure the real issue: which persons should be entitled to bring a claim for compensation for being erroneously charged with a crime? The right to make such a claim ought to be extended to every person who can demonstrate: (1) that he 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. An affirmative defense to such a claim should be that the charge against the claimant was triggered by his misconduct or negligence, unless the police or prosecution have displayed even greater fault, in which case the claimant's fault ought to mitigate damages. But good faith behavior by the police or prosecutor should not be a general defense.

Thus the person who falsely confesses to a crime because of a desire for notoriety or punishment is both legally and factually innocent; however, since he is largely to blame for his own arrest, compensation ought not be awarded. Similarly, a person acquitted of a larceny charge because he was too drunk to form the specific intent to steal may be both legally and factually innocent but should not be compensated because he brought the prosecution on himself. A person acquitted on a narcotics possession charge solely because the narcotics were illegally seized should not be entitled to compensation. His remedy would remain a civil rights damage action against the offending law enforcement officers, or a suit under the Federal Tort Claims Act if the perpetrators of the illegal search were federal law

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defense as policing the police, and would accord the defense to both those predisposed to violate the law as well as the "otherwise innocent." United States v. Russell, 411 U.S. 423, 440-43 (1973) (Stewart, J., dissenting). *See also* Hampton v. U.S., 96 S. Ct. 1646 (1976).

[64] *See* Goldstein and Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Goldstein and Katz, *Dangerousness and Mental Illness, Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960).

[65] *Compare* People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906), *with* People v. Siu, 126 Cal. App. 2d 41, 271 P.2d 575 (1954).

enforcement officers.[66] A person acquitted on a narcotics possession charge because of entrapment should be allowed to recover, though the extent to which his own misconduct brought about the charge may be considered in reducing the damage award.

B. *Procedure for Awarding Compensation*

Unlike a criminal prosecution, the burden of establishing nonculpability properly belongs on the claimant. As in civil actions for damages, the claimant ought to bear the burden of proving his case by a preponderance of the evidence. The difficult question is the type of procedure to be followed in deciding such damage claims. The compensation claim could be litigated as part of the criminal trial, in a separate civil action for damages, or in an action before a special administrative body.

1. Compensation Awards as Part of the Criminal Trial

There are several ways in which the issue of damages for erroneous pretrial detention might be resolved in a criminal trial. One is simply for the jury or the judge in a bench trial to award damages simultaneously with a verdict of acquittal. This implies a de facto shift to the tripartite verdict used in Scotland: guilty, not guilty, and not proven guilty.[67]

The principal advantage of this procedure is judicial economy. It avoids the necessity of a new trial to relitigate essentially the same material. But there are disadvantages. There is a serious risk that jurors will become confused about who bears the burden of proof, comparative fault, and the difference between the standards of "reasonable doubt" and "preponderance of the evidence." Some jurors might vote to convict in doubtful cases because of the mistaken impression that the acquitted defendant would be entitled to compensation if acquitted.

Jury confusion could be avoided by having the compensation issue decided by the trial judge following acquittal or entry of *nolle prosequi* after the start of the trial. But this procedure deprives the accused of a jury trial on the issue of damages. It also requires another trial, albeit abbreviated since the judge has already heard at least some of the evidence in the case. Alternatively, a separate hearing on damages might be held before the acquitting jury, which would

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[66] *See* note 41 *supra.*

[67] *See* Smith, *Scotland: The Trial Process*, in THE ACCUSED: A COMPARATIVE STUDY 68, 74-75 (J. Coutts ed. 1966).

be sent back to deliberate with specific instructions about the precise issues under consideration and the burden of proof on each.

2. Compensation Awards Through a Separate Civil Action

A second technique would be to permit the acquitted or discharged accused to bring a separate civil action against the state for damages arising from the erroneous criminal accusation. In this action the plaintiff would have to prove innocence by a preponderance of the evidence; however, evidence of the acquittal or dismissal should meet the burden of initial production on this issue. The state would be able to defend on the ground that the claimant brought about the criminal charge by his own negligence or misconduct. In rebuttal, the claimant should be allowed to show that the fault of the police or prosecutor exceeded his own.

This formulation has the disadvantage of requiring a second trial to relitigate issues which have been largely aired, but it would encompass claims by any innocent defendant rather than the more limited group of defendants actually acquitted at trial. Moreover, it would tender the issues in a straightforward, clear-cut proceeding, with more extensive discovery available. The most serious disadvantage of this proceeding is that the indigent accused would have difficulty finding a lawyer to bring his suit. Many such claimants would be indigent, and the inability to afford a lawyer might effectively preclude recovery.[68]

3. Compensation Awards by Special Administrative Agency

The use of a compensation board or claims agency has the advantages of a separate civil suit without some of the disadvantages. Any person acquitted of a serious criminal charge, or who has had such a charge against him dropped, would be entitled to bring a claim before such an administrative agency. The agency could be staffed by lawyers, who would make quasi-judicial determinations of the merits of each claim. Appellate judicial review should be permitted, as is now done with regulatory agencies, so that the ultimate responsibility for determining and regulating standards would be with the courts.

As in the separate civil action in the courts, the accused would have the burden of showing by a preponderance of the evidence that he did not commit the offense with which he was charged, and that his own misconduct did not invite the charge. The administrative agency could devise relatively relaxed rules of procedure and evi-

[68] *See* Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).

dence, facilitating the filing of *pro se* claims by indigents. Such an administrative agency could proceed far more quickly than a court, particularly if it adopted a schedular form of damages.[69] One tradeoff for this simplified procedure would be considerably reduced discovery. Another is that inviting a claimant to proceed without a lawyer may lead to nullification of his right to compensation in practice, for establishing one's innocence without a lawyer is likely to be a difficult task.

C. *Recoverable Damages*

The choice of procedure one adopts may be largely a function of one's approach to damages. Two basic methods for determining damages appear feasible: (1) a statutory damage schedule as used in the areas of workmen's compensation and no-fault insurance; and (2) the tort approach, in which the victim can recover all damages proximately caused by the wrongful accusation. Recoveries determined by either method should exclude punitive damages.

Under the first method the victim would be entitled to recover statutorily specified minimum and maximum sums for the wrongful arrest, pretrial detention, attorneys' fees (unless paid by the government), bail bond premium, and lost earnings. However, he would recover nothing, or only a nominal sum, for the mental anguish caused by the wrongful accusation, since the schedule would limit recovery to actual economic loss.[70] Even though under certain circumstances damage to one's reputation may be considered actual economic loss, the difficulties of proof would preclude recovery of more than a nominal sum for this item.[71]

Under the second method the victim would be able to recover actual out-of-pocket expenses, such as bail bonds or lawyers' fees, irrespective of whether these expenses totaled $1,000 or $100,000. Recovery would also be permitted for lost earnings or profits as well as other economic injuries. As in tort cases, recovery should include intangibles, such as injury to reputation and mental anguish, to the extent they can be proved.

The advantages of the schedular method are speed, simplicity, and economy. It avoids difficult problems of proof that are typically

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[69] *See* section VII.C. *infra.*

[70] Workmen's compensation awards do not pretend to restore what the claimant has lost. Instead they are designed to give the claimant "a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others." Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 213 (1952).

[71] Recovery of any award of damages should go far toward erasing the damages to an innocent accused's reputation, for the award would be tantamount to an official certification of innocence.

resolved by jury verdicts in tort suits. The proceedings can be more informal; instead of courts and juries, an administrative hearing officer or board will suffice. Once a claimant establishes that he has been wrongfully accused, calculation of the damages due from the statutory schedule becomes largely a clerical task. Damage awards are likely to be considerably less than jury awards, particularly if there is a ceiling on the total recovery. A relatively low ceiling, such as $10,000 or $15,000, would permit a state to limit its exposure and may make the proposal more politically palatable.

The advantage of the tort method is that it affords a more complete recovery. The purpose of nonpunitive damage awards is to restore the plaintiff to the economic position which he would enjoy were it not for the wrongful act. Only rarely will the schedular method achieve this aim, for an innocent accused suffers many types of damage. One is time lost from gainful employment or other pursuits. For the accused who cannot make bail, the average period of pretrial detention is about a month, though in some jurisdictions the average runs as high as 110 days.[72] A substantial number of employed defendants lose their jobs when arrested; the percentage fired increases dramatically for those unable to make bail. There is a vast disparity in the amounts of income foregone because of criminal charges. Some defendants have no earnings to lose; others, such as lawyers or doctors suspended from practice until resolution of the charges against them, may have very substantial lost earnings.

Another variable is damage to one's reputation. A charge of rape or sodomy will be far more damaging to most people than a charge of violation of the antitrust laws or of illegal campaign contributions. For some defendants, particularly for professionals or political figures, virtually any criminal accusation represents a very real and substantial injury to reputation. Even if there has been an acquittal or a dismissal of all charges, the cloud of suspicion frequently remains, causing enormous hardship to the persons involved. On the other hand, many of those erroneously accused will be persons with long criminal records whose reputations are likely to suffer only nominal damage.

Still another variable is the suffering and humiliation caused by the arrest and/or pretrial confinement. The period of pretrial detention varies widely, as do the conditions of confinement. In many cases the conditions of confinement are much harsher for those awaiting trial than for those who have been convicted. Pretrial detention facili-

[72] The statistics vary considerably from city to city. *See* D. FREED & P. WALD, *supra* note 23, at 39-41.

ties are frequently overcrowded and offer few recreational opportunities; moreover, homosexual assaults are common in jails.[73] Utilization of a statutory formula for damages stemming from pretrial detention is likely to overcompensate some and undercompensate others.

Of course, it is possible to construct numerous variations on these two basic methods so that their differences begin to blur. Formulas can be worked out under which the amount recoverable varies with the seriousness of the offense charged, the number of days lost from work, and the actual sums expended on one's legal defense; specific sums can even be factored in for mental anguish and damage to reputation. Alternatively, jury verdicts could be limited to specified amounts or to actual pecuniary loss.

VIII. THE COSTS OF COMPENSATING THE INNOCENT ACCUSED

The objection will undoubtedly be raised that the costs of permitting recovery from the state for erroneous accusations will be astronomical. Professor Borchard, whose pioneering articles were largely responsible for the existing United States legislation compensating the wrongfully convicted, felt obliged to urge a ceiling of $5,000 on such awards to protect the public treasury.[74] In retrospect, such a ceiling has proved ridiculously low and wholly unnecessary.[75]

Nevertheless, compensating the convicted innocent involves considerably less exposure than compensating those merely accused. The high percentage of those arrested for serious offenses who have charges dismissed (nationally about forty-three percent) suggests substantial potential liability. However, the percentage of this group that will not be able to demonstrate lack of culpability will undoubtedly be quite large.

Experience under the Scandinavian compensation schemes suggests that the number of successful claimants will be small. In Norway during a five-year period (1953-1958) one author discovered only thirty-five persons who had been compensated, with the average award totaling about $1,300.[76] During a corresponding five-year pe-

[73] *See* Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 TRANSACTION 8 (1968); State v. Green, 470 S.W.2d 565 (Mo. 1971) (Seiler, J., dissenting).

[74] Borchard, *supra* note 44, at 209.

[75] *See* note 43 *supra*. One should recognize, however, that $5,000 in 1938 is the equivalent of $15,012 in terms of 1976 purchasing power.

[76] Bratholm, *supra* note 1, at 839-40.

riod in Denmark awards totaled only about $12,000.[77] To be sure, the United States has many more crimes than these countries. It is also possible that unfounded arrest and prosecution are less common under Scandinavian procedures.[78] But the figures do suggest at least that the costs involved will be manageable. If such costs prove excessive, a reasonable ceiling can be placed upon the damages recoverable. If such a limitation becomes necessary it will demonstrate that something is radically amiss in the administration of our criminal system.

IX. CONCLUSION

Adoption of a right to compensation of the innocent accused is long overdue in the United States. The proposition that governmental agencies ought to bear responsibility for private injuries resulting from their agents' tortious acts has become eminently respectable. There is no substantial basis for treating the injuries caused by the erroneous operation of the criminal justice machinery differently from those caused by any other piece of governmental machinery. The peculiarities of the criminal justice system do make the ascertainment of those entitled to compensation difficult, but the task is as feasible as many other court determinations. 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. Were these true costs transferred to a line item in governmental budgets, not only would serious wrongs be righted, but prompt and highly desirable reform of present free-wheeling police and prosecutorial practices might well result.

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[77] *Id.* at 840. *See also* Gammeltoft-Hansen, *Compensation for Unjustified Imprisonment in Danish Law*, 18 SCANDIN. STUD. IN LAW 27, 51-52 (1974), indicating that between 1966 and 1972 the Danish Ministry of Justice approved the award of compensation in only 34 cases: the total sum awarded was only about $12,500.

[78] *But see* Bratholm, *Arrest and Detention in Norway*, 108 U. PA. L. REV. 336, 339 (1960), which suggests that the practice of police arresting without a warrant is just as widespread in Norway as in the United States, even though the law theoretically requires a warrant.