‘That’s Just Not Right’: Monetary Compensation for the Wrongly Convicted in Massachusetts

By Ashley H. Wisneski

Introduction

In 1968, Peter Limone was convicted, along with three other men, of the 1965 murder of Boston gangster Edward “Teddy” Deegan. Limone and the other men had been identified by a former Mafia hitman turned FBI informant. Knowing that the charges were false, and believing that a case against him could not be proved, Limone turned himself in to the police. To his surprise, Limone was convicted by a jury, and sentenced to death. In 1972, however, the United States Supreme Court declared the death penalty unconstitutional, and Limone’s sentence was automatically commuted to life in prison. During his prison term, Limone spent 23 1/2 hours a day in his cell, and he saw his four children only four times a year.

In 2000, 32 years after Limone’s conviction, attorney John Cavicchi reexamined Limone’s case, and uncovered old FBI documents proving not only that Limone and the other men were innocent of Deegan’s murder, but that the FBI had known of the wrongful conviction all along. In fact, Limone’s 33 years of incarceration had been but a small part of a widespread pattern of corruption and obstruction of justice among Boston’s FBI agents from the 1960s through the 1990s. Limone and his other surviving “accomplice” were exonerated on January 5, 2001. Subsequently, Limone filed a civil lawsuit against the FBI for $375 million.

In 1972, Lawyer Johnson was convicted of the 1971 murder of James Christian. Johnson was 19 at the time and was convicted solely on the testimony of a single witness, Kenny Myers, who had originally iden-

1. Wrongful Murder Convictions in Massachusetts, available at http://www.amnesty133.org/ai/actionteams/dp/mistake.htm [last visited Nov. 7, 2003] [hereinafter Wrongful Murder Convictions]. The other convicted men were Louis Greco, Joseph Salvati and Enrico Henry Tameleo. Id.


3. Id.

4. Id. at 62, 64. Greco and Tameleo were also sentenced to death, while Salvati received a sentence of life in prison. Wrongful Murder Convictions, supra note 1.

5. Fields-Meyer, supra note 2, at 64; see Furman v. Georgia, 408 U.S. 238, 239-40 (1972). The cases Jackson v. Georgia and Branch v. Texas were also included in this decision. Furman, 408 U.S. at 238.

6. Fields-Meyer, supra note 2, at 64.

7. Id. It was also uncovered that the FBI knew that Deegan was going to be murdered and did nothing to prevent it. Wrongful Murder Convictions, supra note 1.


9. Fields-Meyer, supra note 2, at 64; Wrongful Murder Convictions, supra note 1. Salvati was the other survivor. Wrongful Murder Convictions, supra note 1. Tameleo died in prison in 1985, and Greco had died in prison in 1995. Id. Both men received posthumous exonerations. See id.

10. Fields-Meyer, supra note 2, at 64.

tified a different man as the perpetrator. However, the first man accused by Myers had an iron-clad alibi; he was in prison at the time the murder was committed. Like Limone, Johnson was sentenced to death, but had his sentence commuted to life in prison when the Supreme Court declared the death penalty unconstitutional.

In 1980, a witness who had been a child at the time of Christian's murder came forward and told police that she had seen Kenny Myers, Johnson's accuser, shoot James Christian in 1971. She claimed that she had tried to inform authorities about what she had seen at the time of the murder, but that they had told her to "stop fooling around." Once she was able to offer testimony as an adult, Johnson's conviction was overturned and he was released from prison in 1982.

Under current Massachusetts law, Lawyer Johnson has virtually no remedy available to recover compensation. Indeed, the only remedy available to people like Johnson is to appeal to the legislature for redress through a special law. However, such awards are rare. In 1904, Cornelius Usher was pardoned and received $1,000 compensation through a special bill in the legislature. In 1957, Santos Rodriguez was released from prison, and the Massachusetts legislature subsequently awarded him a $12,500 indemnity. In 1992, Bobby Joe Leaster was awarded a $500,000 annuity through a special bill, in order "to discharge a moral obligation of the Commonwealth." Usher, Rodriguez and Leaster are the only former inmates ever to receive compensation awards from the Massachusetts legislature. Further, the approval process for these awards took a very long time; for example, Leaster's case was pending for nine years before relief was granted. Apart from the long delays inherent in obtaining relief under a special law, the ad hoc character of the system makes it impossible for claims to be reviewed by reference to any sort of uniform standard.

Limone, as the victim of egregious government misconduct, stands on a slightly better footing than Johnson in terms of his prospects for compensation, but even he faces difficult obstacles. On the basis of the official malfeasance in his case, Limone had the option of pursuing civil claims against the police and FBI. However, such litigation is very costly, takes years to prosecute and the outcome is never certain. In short, no victim of wrongful incarceration, at least under current law, has any guaranteed mechanism for obtaining prompt redress, regardless of the circumstances of his case.

Massachusetts is hardly alone in failing to provide any comprehensive system for compensating wrongly imprisoned former inmates. Indeed, at present, only 15 states, the District of Columbia and the federal government provide a statutorily defined rem-

12. Id.
13. Id.
15. Johnson, Guilty, supra note 11.
16. Id.
17. Id.
20. Wrongful Murder Convictions, supra note 1. Rodriguez was convicted of second-degree murder, based largely on a coerced confession that exploited the Puerto Rican immigrant's unfamiliarity with English. Id. Rodriguez served three years in prison before another man confessed to the murder. Id.
21. See Jehlen testimony, supra note 18. Leaster was convicted of first-degree murder in 1971 and sentenced to life imprisonment. Wrongful Murder Convictions, supra note 1. However, several years later a new witness was uncovered who had seen two men leaving the scene of the murder, neither of whom was Leaster, and it was revealed that the murder weapon had been used in a crime two weeks after Leaster had been arrested. Id.
22. See Stephanie Ebbert, Bill would compensate those wrongly convicted, BOSTON GLOBE, Nov. 30, 2002, at B1. This was due largely to the tenacity of Leaster's attorney and some political connections (Leaster had the support of Representative Thomas Finneran, the then-chairman of the House Ways and Means Committee and current speaker of the House. See id.; Jehlen testimony, supra note 18. The New York Law Review Commission cautioned the government about cases where political influence results in special laws, saying "the enactment of such legislation is simply an ad hoc approach which is not in the best interests of the State, not only because it can fail to compensate the truly aggrieved, but also because it can lead to charges of influence, political power, etc., that create an appearance of impropriety and undermine the integrity of the legislative process." Report of the Law Review Comm'n to the Governor on Redress for Innocent Persons Unjustly Convicted and Subsequently Imprisoned, 1984 N.Y. LAWS 2899, 2915. For additional reasons why some individuals receive special legislative compensation while others do not, see Adele Bernhard, When Justice Fails: Indemnification for Unjust Conviction, 6 U. Chi. L. SCH. ROUNDTABLE 73, 93-94 (1999).
24. See id; see also Johnson, Guilty, supra note 11.
edy for persons wrongly convicted of a crime.\textsuperscript{25} Moreover, these laws vary widely in terms of recovery caps and standards of proof.\textsuperscript{26} The remaining 35 states provide no regular system for statutory compensation.\textsuperscript{17}

Over the years, several bills that would have established a system of compensation have been considered by the Massachusetts legislature, but none has passed.\textsuperscript{28} A new bill, entitled “A Bill Relative to Compensation for Certain Erroneous Felony Convictions,” engrossed by the Massachusetts House of Representatives and now before the Senate, would provide up to $500,000 in compensation to people who have been wrongly convicted of a felony and imprisoned for any reason, regardless of whether or not official misconduct was involved.\textsuperscript{29} This proposed law, together with the practical and ethical underpinnings of such legislation in general, form the subject matter of this article.

I. Three Studies

A number of studies have attempted to compile accurate statistics on the number of innocent people convicted of crimes.\textsuperscript{30} Often researchers publish these findings hoping to bring the plight of innocent prisoners to the public’s attention, and so encourage greater accuracy and accountability in the legal system.\textsuperscript{31} As one author stated, “wrongful convictions, however infrequent, are anathema to the American due process system and to all who believe in the fairness of our law enforcement and judicial systems and the constitutional protections guaranteed individual citizens.”\textsuperscript{32}

In 1932, Edwin Borchard published an early and important study on wrongful convictions.\textsuperscript{33} Borchard selected 65 cases in which it was ultimately determined that an innocent person had been convicted, and from these cases identified several causes of wrongful convictions.\textsuperscript{34} According to Borchard, the two major sources of erroneous convictions were misidentification of the accused by eyewitnesses, and a jury’s natural, sympathetic tendency to view the victim as inherently more credible than the accused.\textsuperscript{35} Borchard also concluded that the use of circumstantial evidence played a large role in his sample cases of innocent defendants.\textsuperscript{36} Finally, Borchard cited errors by prosecutors and police,\textsuperscript{37} coerced


27. See Ebbert, supra note 22, at B1; Johnson, Compensation, supra note 26.

28. Johnson, Guilty, supra note 11.


30. See EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (1932); JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957); MICHAEL L. RALEFET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992). For additional analysis of these studies, see Bernhard, supra note 22, at 76-78. Bernhard also evaluates a 1996 report published by the National Institute of Justice, which documents 28 wrongful convictions, showing irrefutably that innocent people are convicted and further condemning eyewitness testimony as unreliable at best. Id. at 75-76.

31. See BORCHARD, supra note 30, at 376; SIMON DINTZ, FOREWARD to C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTIONS AND PUBLIC POLICY ix, xiii (1996); C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT 22 (1996); RADELET, supra note 30, at 278. For an interesting and fresh take on wrongful convictions and mistaken testimony, see Taryn Simon, Freedom Row, N.Y. TIMES MAGAZINE, Jan. 26, 2003, at 32.

32. DINTZ, supra note 31, at xii-xiii.

33. BORCHARD, supra note 30, at vii.

34. See id. at vii-viii.

35. Id. at xiii. Borchard discovered at least 29 of the wrongful convictions that he analyzed were due to mistaken victim identification. Id. For a psychological analysis of mistaken eyewitnesses, see ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 14-30 (1991).

36. See BORCHARD, supra note 30, at xiv. Eleven wrongful convictions occurred in cases where guilt was established by circumstantial evidence, while 11 more were due to circumstantial evidence with perjury as an ingredient, and 15 were a result of circumstantial evidence along with mistaken identification. Id. at xiv-xv. However, Borchard also found that circumstantial evidence had significant advantages that encouraged its continued use in court. Id. at xiv.

37. Id. at xv. Borchard does not give an exact number of these cases, but says that 16 convictions were a result of fault, carelessness or overzealousness on the part of the prosecution, and around 21 were due to zeallessness, gross negligence or suppression of evidence by the police or private detectives. Id. at xix, xxvi n.17, 18, 20.
confessions,\textsuperscript{38} strong public opinion and influence\textsuperscript{39} and testimony by unreliable expert witnesses as further reasons that innocent people were unjustly imprisoned.\textsuperscript{40}

Sixty years later, in 1992, another group of scholars, Michael Radelet, Hugh Bedau and Constance Putnam, conducted a study of erroneous convictions in capital cases over the preceding 30 years.\textsuperscript{41} Their review documented 416 instances in which "miscarriages of justice" resulted in convictions for capital (or potentially capital) crimes.\textsuperscript{42} Radelet and his colleagues also investigated the causes behind erroneous convictions; their results closely matched those of Borchard. The two most common sources remained mistaken eyewitness testimony and perjury by prosecution witnesses.\textsuperscript{43} Errors also occurred in cases where defendants aroused community passions, including cases where racist sentiment influenced convictions.\textsuperscript{44} Finally, like Borchard, the researchers found that errors in police work [whether negligent and incompetent or intentional and malicious] and overzealous prosecution often produced erroneous convictions.\textsuperscript{45}

With respect specifically to Massachusetts, the study documented 19 murder convictions that were ultimately discovered to be erroneous.\textsuperscript{46} In three of these cases, all in the early 20th century, the fairness of the defendants' convictions were called into serious question after they were executed.\textsuperscript{47} In addition, two men convicted of murder died in prison, but were ultimately absolved.\textsuperscript{48} Five of the 19 wrongful convictions were the result of mistaken eyewitness testimony.\textsuperscript{49} Twelve of the convictions were due to the perjury of witnesses, co-conspirators or informants, and other deceptive practices of the police or prosecution, supporting the notion that lying is the other major reason for incarcerating the innocent.\textsuperscript{50}

38. Id. at xvii. Borchard does not give an exact number of these cases, but in particular the cases of Johnson in Wisconsin and Stilow in New York. Id. at xvi, 112, 245.

39. Id. at xviii. Fourteen convictions were due in part to public opinion excited by the crime and the public's demand for a conviction out of vengeance. Id.

40. Id. at xix. Eight convictions stemmed from the unreliability or partiality of "expert" witnesses. Id.

41. Radelet, supra note 30, at ix.

42. Id. at ix-x.

43. Id. at 18. Radelet does not give exact numbers for these or the subsequent categories of errors, most likely because of the large size of the group that he and his colleagues were assessing. Id.; see Borchard, supra note 30, at xiii.

44. Radelet, supra note 30, at 18.

45. Id.

46. Wrongful Murder Convictions, supra note 1. The Web site cites Radelet's study as the source for its list of 18 innocents; however, one Massachusetts man listed in Radelet's book was omitted from the Web site with no reason given. See id.; Radelet, supra note 30, at 340-41. There is also one case too recent to appear in Radelet's book, but which has been added to the Wrongful Murder Convictions Web site — that of Shawn Drumgold, convicted in the 1988 murder of a 12-year-old girl, but released after serving 15 years in prison when new evidence and possible official wrongdoing were discovered. See Dick Lehr & Mac Daniel, Conviction Invalidated, Inmate Drumgold Walks Free, BOSTON GLOBE, Nov. 11, 2003, at B2. Borchard also discusses the cases of some wrongful convictions in Massachusetts for other crimes, including petty theft and armed robbery. See Borchard, supra note 30, at 1, 46, 332, 338, 353, 362, 364. For a more recent compilation and analysis of wrongful conviction for all felonies, not just murder, in Massachusetts, see Fisher, supra note 19. Fisher divides the questionable convictions into three categories: officially exonerated persons whose factual innocence is undisputed, of which there are 15 cases; persons not officially exonerated but whose convictions were vacated under circumstances raising strong doubts about factual guilt, of which there are 12; and persons who were neither officially exonerated nor whose convictions were vacated but as to whose factual guilt strong doubts exist, of which there are six. Id. at 12-56. Another case is too recent to have been included in Fisher's compilation — that of Anthony Powell, who was convicted of multiple rape charges in 1992 but released in March 2004 after 12 years in prison because DNA evidence taken from the victim excluded Powell as her rapist. See John Ellement, Powell Freed from Prison, BOSTON GLOBE, Mar. 9, 2004, at B6. Powell is the eighth wrongly convicted person prosecuted in Suffolk County to be released from a Massachusetts prison since 1997. Id. 47. Wrongful Murder Convictions, supra note 1. Two men were the legendary Sacco and Vanzetti, whose innocence was never absolutely proven but the case was so notoriously full of prejudice and violations of due process that the executions are generally seen as erroneous. See Radelet, supra note 30, at 97-99. The third man was Charles Louis Tucker, who was convicted of first-degree murder in 1905 and executed the following year. Tucker’s innocence was never actually established, but his conviction and execution were shrouded with doubt after a trial witness confessed to perjury. Fisher contends that there are actually four people who were convicted and executed, three of them were in the 19th century and outside the scope of Radelet's study. See Fisher, supra note 19, at 47-56.

48. See supra note 9 and accompanying text. These men were Enrico Henry Tameleo and Louis Greco, convicted of first-degree murder because of false testimony given by an FBI informant. Id.

49. See Wrongful Murder Convictions, supra note 1. These cases are those of Gangi Cero [1927], Lawyer Johnson [1971], Bobby Joe Leaster [1971], Christian Amado [1980], Donnell Johnson [1996] and Marlon Passley [1996]. Id. Because of its currency and a pending investigation, it is unclear exactly why Shawn Drumgold was wrongly convicted, though one affiliated with the case cited unspecified new evidence and possible official wrongdoing. See Lehr & Daniel, supra note 46, at B2. If official wrongdoing was to blame and it was intentional, Drumgold would be eligible to file a civil suit against the law enforcement agencies involved. See discussion, infra p. 139, and supra note 24.

50. See id.; Radelet, supra note 30, at 340-41. These cases are those of Charles Louis Tucker [1906]; Nicola Sacco and Bartolomeo Vanzetti [1921], Santos Rodriguez [1954]; George A. Reissfelder [1966], Peter Limone, Louis Greco, Joseph Salvati, and Enrico Henry Tameleo [1968], Ella Mae Ellison [1974], Frank "Parthy" Grace [1974] and Christina Hill [1990]. See Wrongful Murder Convictions, supra note 1; Radelet, supra note 30, at 340-41. It is unclear why the 19th innocent, Kenneth Waters, was convicted, but he was ultimately exonerated by new DNA evidence indicating he was not involved in the murder. See Wrongful Murder Convictions, supra note 1.

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Radelet's 1992 study also evaluated whether there was any racial pattern among instances of wrongful conviction. The authors used anecdotal evidence from cases spanning 1919 to 1980 (largely from the deep South) to show that racial bias had permeated the criminal justice system to such an extent that people of color were less likely to receive a fair trial. Of the 416 cases cited, more than 200 involved African-Americans, and about 20 involved Hispanic persons, indicating a rate of wrongful conviction of minorities disproportionate to their representation in the general population. Prejudices likely play a role in explaining this discrepancy. In addition, when the accused are of a different race than the witnesses, the possibility of misidentification is increased.

In the Massachusetts cases, the racial patterns parallel the national study, with 10 whites, nine African-Americans and one Hispanic wrongly convicted of murder, numbers disproportionate to their representation in the general population of the state. Further, over the last 30 years every known wrongful murder conviction in Massachusetts, save one, was of an African-American. These racial discrepancies add a further troubling dimension to the general problem of wrongful convictions.

Finally, a third study conducted in 1996 by C. Ronald Huff, Arye Rattner and Edward Sagarin attempted to determine the number of innocent people convicted and incarcerated each year by reference to statistical models. The authors distributed surveys to criminal justice workers in Ohio asking for their perceptions of the system's accuracy and to estimate how many innocent people believed were convicted of crimes each year. Respondents, on average, reported that no more than 0.5 percent of convictions each year were erroneous, suggesting at first blush an impressively high degree of statistical accuracy.

However, in terms of real numbers, this means that out of the estimated 1,993,880 people convicted nationwide each year, about 10,000 are erroneous. Moreover, the researchers considered this result to be conservative in view of the likely pro-law enforcement views of the sample. By contrast, a sample comprising convicted innocents who had been exonerated and released estimated that anywhere from 25 percent to 40 percent of those behind bars were not guilty. Needless to say, this result also may reflect biases of the sample group. Finally, the study revealed that in 4 percent of all cases in which the judge believed that a guilty verdict was unwarranted, the jury nevertheless convicted the accused.

These studies and their results illustrate the extent

51. See Radelet, supra note 30, at 102-138.
52. See id. The cases, discussed in detail by Radelet, include those of Walter Lee Irvin, Samuel Shepherd and Charles Greenlee; Clarence Brandley, Jess Hollins; and Roosevelt Collins, among others. Id. at 282-356.
53. See id. at 80.
55. Id. This factor has been discovered to apply both to whites trying to identify blacks and blacks trying to identify whites, as well as American Indians, Chinese American and Japanese American subjects trying to identify people of different races. See id. at 100.
56. See Wrongful Murder Convictions, supra note 1. This tally also includes the recent case of Shawn Drumgold, discussed above. See supra note 46.
57. See id. Anthony Powell, who is the most recent case of a prisoner released after being wrongly convicted of multiple counts of rape, is also African-American. See Ellement, supra note 46, at B6.
58. See Huff, supra note 31, at xxii.
59. Id. at 54-55. The researchers distributed surveys to judges, prosecuting attorneys, public defenders, sheriffs, police chiefs and state attorneys general of all 50 states and four territories. Id. at 55. They had a response rate of about 65 percent. Id. They then chose to specifically study Ohio as a sample state. For the reasons that Ohio was used and more specifics about the execution of the survey see id. at 53-58.
60. Id. at 61. Bernhard also discusses the Huff study and alleges that the resulting statistics may actually underestimate the number of wrongful convictions. Bernhard, supra note 22, at 79.
61. Huff, supra note 31, at 61-62. The authors determined that the likelihood of a felony conviction, based on the best available data, was 70 percent. Id. at 62. The figure of persons arrested and charged, which is 2,848,400, comes from the U.S. Department of Justice's Bureau of Justice Statistics for the year 1993. Id. at 61. Seventy percent of the arrests will equal the number of convictions. Id. at 62. These statistics also refer only to what are called "index crimes," eight serious crimes that are used as an index of criminality in the United States: murder and non-negligent manslaughter, forcible rape, aggravated assault, robbery, burglary, larceny-theft, motor vehicle theft, and arson. Id. at 82 n.2.
62. Id. at 54-55. Most members of the criminal justice system surveyed have every reason to defend the system's accuracy and underestimate error. In contrast, public defenders, who probably hold a more skeptical opinion of the system, were only 9 percent of respondents. Id. at 55.
63. Id. at 57.
64. Id. The authors, in citing these prisoner testimonials, caution that most of those interviewed, having been wronged themselves and subsequently freed, are more likely to believe those around them who proclaim innocence, and these numbers are likely inflated and inaccurate. Id.
65. See Huff, supra note 31, at 59. The authors, noting that this statistic could be misleading, clarified:

Our study focuses on the falsely convicted (false positives), not on those improperly freed (false negatives). It is possible that some of the 4% questioned by the judges were in fact guilty and the jury was exercising more wisdom than the judge; it is likewise possible that the judge might not have considered the accused innocent, but only that guilt was not established beyond a reasonable doubt, or that his finding of not guilty would have been based on technical reasons, rather than belief in innocence. Nonetheless,
II. Current Statutory Schemes

Partially as a result of statistical and anecdotal evidence indicating that innocent people are convicted on a regular basis, several states have passed statutes aimed at compensating individuals who have been erroneously convicted and incarcerated. At the time of Borchard's study in 1932, only three states had passed statutes that recognized the government's obligation to indemnify victims of errors in the justice system, although the subject had been argued extensively by Professor John Wigmore before the 62nd Congress over 20 years earlier. Borchard, contending that the rest of the states and the federal government should also enact such statutes, commended the laws of European nations, many of which provided for restitution.

Today, the movement for restitution has made some progress: 15 states, the District of Columbia and the federal government all have enacted specific statutes providing compensation for people wrongly convicted of crimes. However, these statutes have a wide range of compensatory limits, and many impose different threshold requirements for making a successful claim.

A. Typical State Indemnification Statutes

Despite the considerable differences between individual compensation statutes, the basic procedure for making a successful claim is essentially the same in all jurisdictions. Each claim for restitution undergoes a two-pronged evaluation. First, to show eligibility for compensation, the claimant must show that he spent time in prison for a crime he did not commit. After the claimant meets the burden of proof with respect to innocence, the state then calculates the amount of compensation owed. This basic structure is where the similarities among the various state statutes end; the range of compensable crimes, the type of proof that must be produced and the amount of compensation all differ according to the particular statute involved.

First, there is a discrepancy among the states as to what types of wrongful convictions warrant restitution: the District of Columbia, for example, authorizes compensation for any wrongful criminal conviction, while California allows indemnification solely for wrongful felony convictions. Still another state, Iowa, provides compensation for wrongful aggravated misdemeanor or felony convictions.

Second, the statutes diverge on the question of what constitutes adequate proof of innocence. Some states require the claimant to obtain a formal pardon, declaring that the person is innocent of the crime for which he was convicted. Other states allow a claimant to demonstrate innocence by showing that a court dismissed, reversed or vacated the conviction on grounds consistent with actual innocence. Two states, New Hampshire and Texas, do not specify the type of proof required to show the claimant's innocence. In addition, many of the statutes require the claimant to establish that he did not bring about his arrest or conviction by any action or omission, either purposely or negligently.

Third, the scope of damages recoverable for a wrong-
ful conviction fall along a broad spectrum. Only New York and West Virginia do not limit the sum of money an innocent person can recover; their statutes specify that a claimant can receive the amount that a court determines is fair and reasonable compensation. Most other states, however, place a cap on damages, regardless of the crime involved or the amount of time that the innocent person was incarcerated.

Some states provide for generous compensation caps, including Ohio, which authorizes restitution up to $25,000 per year of incarceration in addition to wages lost as a direct result of imprisonment, and Maine, which allows up to $300,000 in damages regardless of the amount of time spent behind bars. Two states, California and Iowa, have created “per diem” compensation systems, where it is recommended that a wrongly convicted person receive $100 or $50, respectively, for each day he was incarcerated. On the opposite end of the spectrum, New Hampshire limits recovery for wrongful incarceration to $20,000, and Wisconsin to $25,000.

B. Federal Indemnification Statute

The federal compensation statute employs procedural requirements similar to those found in the cognate state statutes, but sets a comparatively low limit for compensation. To prove innocence under the federal statute, a claimant must demonstrate that his conviction has been set aside or reversed because he did not commit the crime, that he was found not guilty at a subsequent trial or that he has been pardoned on the basis of innocence. Even after satisfying the first element, to ensure that the conviction was overturned due to innocence, he also must show that he did not commit any offense against the United States in connection with the charge. Further, as in many state statutes, he must prove that he did not bring about his own prosecution through misconduct or negligence. However, even if the claimant can provide all the required proof, he receives little relief: the federal statute authorizes only up to $5,000 for erroneous incarceration, regardless of the crime or length of imprisonment. The limited nature of this relief has been addressed in recently proposed federal legislation, known as the Innocence Protection Act.

C. The Innocence Protection Act

In 2000 and 2001, Senator Patrick Leahy (D-VT) suggested a revision of the federal statutory compensation scheme as part of the Innocence Protection Act. Leahy introduced the bill in order to spur national debate on the subject of erroneous convictions and to reduce the risk of mistaken executions. The bill proposes “basic, common-sense reforms to our criminal justice system that are designed to protect the innocent and to ensure that if the death penalty is imposed, it is the result of informed and reasoned deliberation, not politics, luck, bias, or guesswork.” One of the provisions of the act would amend the current federal compensation statute so that the restitution limit would be increased to $50,000 per year in a non-death penalty case, and $100,000 per year in a death penalty case. The act would encourage states to maintain effective procedures for reasonably compensating wrongfully convicted persons who were sentenced to death, and to investigate the causes of unjust convictions to prevent recurring mistakes.

The Innocence Protection Act has been introduced again in the 108th Congress, and it has garnered significant bipartisan support in both the Senate and the House of Representatives. At last count, 32 senators and 250 representatives from both parties had signed on in support of the bill. In addition, the Senate Judiciary

86. Lopez, supra note 25, at 702.
88. See Lopez, supra note 25, at 703.
93. Id. § 2513(a)(1).
94. Id. § 2513(a)(2).
95. Id. § 2513(e).
99. See S.486 § 301.
100. See id. § 302.
Committee of the 107th Congress approved a version of the bill by a vote of 12 to seven.\textsuperscript{103}

It remains to be seen whether the current Congress will adopt the bill that, according to Senator Leahy, "enjoys the support of ordinary Americans across the political spectrum."\textsuperscript{104} However, significant arguments, both legal and ethical, have been advanced in support of the passage of the Innocence Protection Act. The same types of arguments would likewise support passage of the Massachusetts Bill Relative to Compensation for Certain Erroneous Felony Convictions.\textsuperscript{105}

### III. Factors Supporting Passage of a Compensation Bill in Massachusetts

#### A. Unavailability of Alternative Remedies

One of the strongest arguments in favor of comprehensive and specific compensation legislation in Massachusetts (or elsewhere for that matter) is that wrongfully convicted persons have few alternative remedies, notwithstanding that various theories of recovery have been advanced over the years. Specifically, three approaches have been commonly proposed. First, some commentators, likening the government's taking of life and liberty through wrongful convictions to the taking of property barred by the Fifth Amendment of the United States Constitution, have suggested that compensation might be available on a "takings" clause theory.\textsuperscript{106} A second possible avenue of recovery focuses on the Fourth Amendment right against unlawful searches and seizures.\textsuperscript{107} Under this approach, the wronged individual might be entitled either to some form of common law recovery or to bring a claim pursuant to 42 U.S.C. § 1983 for damages against any responsible individual acting under color of state law.\textsuperscript{108} Finally, most if not all states recognize a cause of action for malicious prosecution. However, none of these approaches has proved successful in practice; indeed, each is beset with significant obstacles.

1. The Fifth Amendment Claim

The Fifth Amendment reads, in part, "... nor shall private property be taken for public use, without just compensation." This language, known as the takings clause, originally was implicated only when the government physically took privately owned property for a public purpose, a practice known as eminent domain.\textsuperscript{109} The takings clause has been liberally construed by the courts over the years, however, and now has been deemed to allow for recovery not only when property is taken outright, but also when citizens lose merely the use of their property through government action.\textsuperscript{110} The definition of "public use" has also been broadly interpreted over the years.\textsuperscript{111} General benefit to the public, not actual public ownership, appears to be what matters.\textsuperscript{112}

Some supporters of compensation statutes have relied on the takings clause to justify the adoption of remedial provisions.\textsuperscript{113} For example, State Representative Patricia Jehlen, who introduced the proposed wrongful conviction statute to the Massachusetts legislature, said in her testimony to the Committee on Public Safety:

> When individuals damage others, justice demands restitution. When the state damages an individual, justice demands some form of restitution. We certainly accept this principle in the case of property; if the state takes your property, we expect the state to pay, and we expect the amount to be subject to court rulings. Life and liberty should not be valued less than property.\textsuperscript{114}

A problem with this approach, however, is that courts have traditionally defined "property" for the pur-

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103. See id.
105. \textit{See infra} Parts III and IV.
111. See Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Justice Holmes formulated the rule for regulatory takings, as they are called, holding that "property may be regulated to a certain extent, [but] if regulation goes too far it will be recognized as a taking." \textit{Id.}
112. See O'BRIEN, supra note 110, at 285.
113. Id.
115. \textit{See} Jehlen testimony, supra note 18.
poses of the takings clause as tangible or real property. To compensate on the basis of the loss of life or liberty would require a radical rethinking of this definition of property. An alternative might lie in focusing on the convicted person’s future earnings or lost personal property. This would more closely track existing concepts of “property” in the takings clause context. However, even this approach has not been adopted by courts in any jurisdiction, and so at present represents an unlikely source of authority for providing compensation for wrongful imprisonment.

3. Section 1983 Claims

An individual claiming that his constitutional rights have been violated by another person acting under color of state law may bring suit under 42 U.S.C. § 1983, which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The statute allows for recovery against individuals employed by the government and also against municipal governments, but only “when execution of a gov-

116. See O’Brien, supra note 110, at 285-88. A broad reading of the term “property” in the Fifth Amendment to include intangibles such as life and freedom would not be unprecedented; this is analogous to the reading of the First Amendment protection of freedom of speech to include protection of certain actions and behaviors that, while not technically “speech,” nevertheless represent a person’s beliefs and attempt to convey a message. See, e.g., Reno v. ACLU, 521 U.S. 844, 870-71 (1997); holding that Internet pornography is protected speech; U.S. v. Eichman, 496 U.S. 310, 315 (1990); holding that flag burning is protected speech; Texas v. Johnson, 491 U.S. 397, 406 (1989); same); Spence v. Washington, 418 U.S. 405, 409-10 (1974); holding that defacing a flag is protected speech; Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 505-06 (1969); holding that wearing black armbands is protected speech); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (holding that participation in a silent sit-in is protected speech); Stromberg v. California, 283 U.S. 359, 369 (1931) (holding that flying a red flag is protected speech). The First Amendment reads, in part, “Congress shall make no law...abridging the freedom of speech...” U.S. Const. amend. I. The First Amendment is applied to the states through the Due Process Clause of the Fourteenth Amendment. See Fiske v. Kansas, 274 U.S. 380 (1927).

117. See Borchard, supra note 30, at 391. Borchard lamented this discrepancy in the law:
When property is taken for the public use, the Anglo-American, like most other systems, prescribes that just compensation shall be paid. This is a historic tradition in a free society. On the other hand, when, in the safeguarding of society by the punishment of crime, an equally governmental function, the community takes from an innocent individual his personal liberty, a privilege at least as sacred as private property, and in addition causes incalculable mental anguish, it

118. See U.S. Const. amend. IV; Lopez, supra note 25, at 690.


120. U.S. Const. amend. IV. See Borchard, supra note 30, at 196, and Radelet, supra note 30, at 167-68, for examples of extreme circumstances in which the accused person could not have committed the crime, but was still arrested and convicted in what could be a violation of his Fourth Amendment right against unreasonable seizures.

121. Hunter v. Bryant, 502 U.S. 224, 227 (1991); Anderson v. Creighton, 483 U.S. 635, 641 (1987). Prosecutors, on the other hand, enjoy absolute immunity from suit for any actions they may have taken “in initiating a prosecution and in presenting the State’s case.” Imbler v. Pachtman, 424 U.S. 409, 431 (1976). This absolute immunity extends to actions apart from the courtroom that is within the prosecutor’s function as an advocate. Without such protection, “harshest of ungrounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.” Burns v. Reed, 500 U.S. 478, 485 (1991), quoting Imbler, 424 U.S. at 423. See also Andersen v. Bishop, 304 Mass. 395, 400 (1939) (the public interest requires absolute immunity for prosecutors to insure “zealous and fearless administration of the law”).

The statute has been used to recover for violations of the Fourth Amendment by police officers, but so far section 1983 has not been used successfully to obtain redress for wrongful convictions. The burden of proof on the claimant to show a constitutional violation is difficult to meet, as the probable cause threshold for obtaining a search or arrest warrant is low. In addition, police officers have qualified immunity when performing their occupational duties, and are protected from liability under section 1983 in almost all circumstances. Moreover, even apart from questions of burden of proof or applicable defenses, the remedy would still not be available for the vast majority of cases where there is no official misconduct amounting to a constitutional violation (a prerequisite for recovery), but rather malfeasance of a private party or just good-faith mistake.

4. Malicious Prosecution

To make out a case of malicious prosecution in Massachusetts, the plaintiff bears the burden of demonstrating that: (1) the defendant instituted criminal proceedings against the plaintiff; (2) with malice; (3) and without probable cause; (4) and that those proceedings terminated in favor of the plaintiff. However, a federally-based malicious prosecution claim is difficult to prove, in part due to prosecutors' absolute immunity from liability. The Supreme Court has warned that the threat of a malicious prosecution action could lead a prosecutor to approach cases warily, overly conscious of the possibility of civil liability. The notion is that "the public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions."

5. Obstacles

While these remedies, at least theoretically available to victims of wrongful conviction and imprisonment, might appear at first glance to hold some promise for recovery, in fact all are beset by significant obstacles. Further, apart from the aforementioned impediments, statutes of limitations would bar suits in many cases of wrongful incarcerations. In most jurisdictions, the statute of limitation requires that claims be filed between one and three years from the point at which a plaintiff knows or reasonably should know that the tortious conduct has occurred. These relatively short limitations periods, together with the inherent weaknesses in the legal arguments themselves, make these forms of recovery impractical for victims of wrongful conviction.

In view of the difficulty of pressing such claims, if legislatures want to provide relief, they must pass specific compensation statutes. There are strong ethical and policy arguments favoring such an approach.

B. Ethical and Policy Arguments in Support of Restitution Statutes

Where people are wrongly convicted of crimes and are unjustly imprisoned, fundamental fairness and a variety of public policy concerns strongly support restitution. Some proponents of statutory compensation...
schemes argue that restitution is simply a matter of fundamental fairness; when someone is harmed, the entity responsible makes amends equivalent to the harm done. Alternately, others contend

which he or she did not commit are infrequent. But, when such a case is identified the legislature and the legal system have a responsibility to admit the mistake and diligently attempt to make the person as whole as is possible where the person has been deprived of his freedom and forced to live with criminals. Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime. Another court has defined this moral responsibility as “an obligation which, though lacking any foundation cognizable in law, springs from a sense of justice and equity, that an honorable person would entertain, but not from a mere sense of doing benevolence or charity.”

A variation on the fundamental fairness rationale takes the approach that the state should compensate those wrongly convicted not merely on the basis of moral responsibility, but because the risks and costs of error should be shifted to the party best suited to both bear the cost and limit the risk of mistake in the first place. Borchard argued for this position:

Where the common interest is joined for a common end — maintaining the public peace by the prosecution of the crime — each individual member being subject to the same danger [erroneous conviction], the loss when it occurs should be borne by the community as a whole and not by the injured individual alone.

This idea hews to the standard model for tort liability in the context of inherently risky enterprises, and is perhaps grounded as much in concepts of economic efficiency as in a pure concept of fairness.

A final fairness argument is premised on the idea

or even because it was useful. The legislation was enacted because it seemed morally right to a public scared of crime and frightened of being victimized." Bernhard, supra note 22, at 100.

136. See Jehlen testimony, supra note 18.
137. See Leahy Statement, News Conference, supra note 102.
138. Bernhard, supra note 22, at 93.
139. Jehlen testimony, supra note 18.
140. Cele Hahn, Going to Bat for an Ex-Con, Aug. 17, 2002, available at http://www.celehahn.org/Columns020304/Celecolumns081702.html [last visited Apr. 8, 2004] [hereinafter Hahn, Going to Bat]. Representative Hahn has also stated that “[w]e often describe inmates as paying their debt to society. In cases of wrongful incarceration, society owes them a debt. Although no amount of money can recompense a person for the loss of their youth, [the Massachusetts bill] establishes a reasonable means of resolving that debt.” Jehlen testimony, supra note 18.
142. O’Neil, 13 Ohio App. 3d at 322, 469 N.E.2d at 1013.
that if some people are compensated under the current system, "basic fairness" requires compensation for all. This rationale holds that, if some states provide compensation through special laws or otherwise, it is fundamentally unfair that compensation is not available to all people in all states through a general statute. Forcing some of the wrongly convicted to seek compensation through special budgetary amendments, lawsuits, or not at all is simply unjust.46

2. Reintegration into Society and Resumption of Credibility

Compensation would also go a long way toward assisting the wrongly convicted in their return to public life and the world outside prison, as many have lost their homes, jobs, savings and even their families while incarcerated.48 One legislator argues the case for compensation by employing a constituent’s story:

... Angel spent 13 years ... in prison for a rape he didn’t commit. He was released from prison just last year, thanks to DNA evidence that proved that he couldn’t have been the rapist ... Angel lost his home. His wife. His job. Even his kids. Now, 13 years later, and his life is gone.49

Often the wrongly convicted have spent what money they have on their criminal defense and appeals, leaving them little to reestablish productive lives in the community.50 In a typical example, a man incarcerated for 10 years for a rape he did not commit was in dire straits when he was released from prison:

When he left prison, [Neil Miller] said he had $500 in savings. He spent half of that money on eyeglasses. He spent more money for clothes, a driver’s license, a Social Security number. Paying for psychiatric care was out of the question, even though he felt his anger mounting.51

Without the funds or the opportunity to rehabilitate themselves and acquire job training in order to normalize their lives, the wrongly convicted may find themselves unemployed, angry and likely to re-offend.52

In addition to the loss of concrete assets like savings and family, many wrongly convicted people find that they have also lost their credibility and trustworthiness in the eyes of the general public.53 Many innocent people released from prison find it difficult to obtain employment; as one legislator noted, “[i]t’s not easy getting a job when you’re an ex-con, even if you weren’t guilty. Who believes you? No real job training, no college education.”54 Another exonerated man not only found it difficult to obtain employment, but also had trouble holding onto the job he ultimately found because of the psychological trauma of his unjust conviction.55 Although these people were innocent

146. Id.
147. See id. According to this argument, “although private bills are not the solution for the wrongly convicted, they embody the rationale for the solution. If the state recognizes its obligation to one wrongly convicted individual, it recognizes its obligation to all.” Id. at 96. However, this argument assumes that the process of individual moral legislation provides compensation equally to all who seek it, this is rarely the case. “[The success of any such private bill depends more on the political connections of the person introducing the bill and the political climate of the day than on the merits of the case....[In addition] the process can be lengthy and the outcome is always uncertain.” Id. at 94.
149. Hahn, Going to Bat, supra note 140, see also Latour, State Lags in Aid, supra note 148.
150. See Huff, supra note 31, at 156-57. Borchard noted as far back as 1933 that “in the majority of these cases the accused were poor persons, and in many of the cases their defense was for that reason inadequate. The practice of assigning attorneys or the inability to engage competent attorneys makes it often impossible for the accused to establish his innocence.” BORCHARD, supra note 30, at xx. Huff also notes that the majority of wrongly convicted people are poor and unlikely to have significant savings or earning power. See Huff, supra note 31, at 156.
152. See id. Latour tells the story of Neil Miller and his angry outbursts that cost him a job, and his inability to subsequently find another position. Id. There are some stories that are not as discouraging, however, like that of Donnell Johnson, who spent five years behind bars for murder. See Francie Latour, Wrongfully Convicted Ex-Prisoner Faults Hub Police in Suit, BOSTON GLOBE, Apr. 20, 2002, at B1 [hereinafter Latour, Wrongfully Convicted Ex-Prisoner]. After Johnson’s exculpation and subsequent release from prison, he went to college at Mississippi Valley State University, where he was pursuing a degree in criminal justice. Id. Johnson filed a civil suit against the police and certain detectives for false testimony and withholding evidence leading to his conviction. Id.
153. See Hahn, Going to Bat, supra note 140; Latour, State Lags in Aid, supra note 148.
154. Hahn, Going to Bat, supra note 140.
155. See Latour, State Lags in Aid, supra note 148, at B1. Since [Neil Miller] won his freedom in 2000, ending a decade behind bars for a rape he didn’t commit, he has had only one job, as a liquor store clerk. It ended in a moment of weakness, when he took out his unresolved anger on someone inside the store. "Burger King was just the beginning," he said.... "I’ve gone to McDonald’s, Uno’s, Strawberries. Nobody will hire me. And that’s sad, that a liquor store is the only place that would hire me. That’s just not right.”
of the crimes for which they served time, "they bear many of the same scars as any incarcerated inmate released to the world: the rage from stifled dreams, the shock of walking down a public street or sleeping on a queen-size bed." \(^{1156}\)

Compensation would give the wrongly convicted an opportunity to start their lives over, find decent places to live and tide them over during periods of unemployment.\(^{1157}\) One proponent observed, "Greater places to live and tide them over during periods of un-employment..."

One commentator asserts that if the problem of wrongful convictions goes unremedied, it will gradually become more difficult to secure convictions because of jurors' distrust of police, prosecutors, judges and other government officials.\(^{1163}\) Providing compensation to those wrongly convicted would likely provide a financial incentive for the government to ensure that the correct person is charged with a crime, and so increase public confidence in the system.\(^{1164}\)

4. Comparison to Crime Victims' Compensation Statutes

Between 1954 and 1992, every state enacted a statute providing for compensation to victims of crimes.\(^{1165}\) Supporters believed that the government has a responsibility to protect its citizens from violent crime, and when it fails in its duty, it must compensate them.\(^{1166}\) Proponents argue that such laws serve not only to make the victim as whole as possible, but also work to restore the victim's respect for the legal system.\(^{1167}\)

Victims' compensation laws were not enacted because victims have a legal right to restitution; rather, these statutes were enacted because both lawmakers and the public believed that compensation was ethically required.\(^{1168}\) Legislators carefully avoided bestowing a right to compensation upon victims; instead, the legislatures drafted statutes proclaiming that the government has...
necessary to add additional provisions to fully address these concerns.

A. Provisions of the Proposed Massachusetts Legislation

The current bill incorporates the elements of a typical compensation statute, while expanding upon many of the provisions found in other states' statutes. The Massachusetts bill would compensate only for felony convictions, and would require claimants to be innocent, to have received a pardon or reversal of the sentence or indictment and to be free of any pending related criminal proceeding. The claimant would have to establish clear and convincing evidence that he had been wrongfully convicted, had not pleaded guilty to the offense, and had been incarcerated for not less than one year and that the imprisonment was based solely on the erroneous conviction. Also, Massachusetts would cap the amount of damages that a claimant could recover; initially, the limit was $200,000, but Jehlen later changed that to $500,000 because that was the amount awarded to Leaster in his special budgetary amendment. In addition, the Massachusetts legislation expands upon some of the terms in other states' statutes and includes several particularly innovative and useful provisions. Under the proposed Massachusetts law, claimants who were convicted and released before the bill's enactment have a three-year window after the adoption of the statute in which to appeal to the Su-

stance. The Legislature finds and determines that there is a need for government financial assistance for such victims of adult and juvenile crime. Accordingly, it is the intent of the Legislature that aid, care, and support be provided by the state, as a matter of moral responsibility, for such victims of adult and juvenile crime.

The basis of victims' compensation legislation is virtually identical to that of wrongful conviction legislation: provision of a legal remedy for some individuals based upon the status of the claimant and the harm unjustly inflicted upon him. As one scholar has observed, "[s]hould we not be equally committed to compensating and reintegrating the victims of our criminal justice system, the wrongfully convicted and their families, who have suffered unjustly?" The proposed legislation currently before the Massachusetts legislature attempts to right the wrongs done to the convicted innocent, but there is even more that needs to be done.

IV. The Proposed Massachusetts Statute and Suggested Improvements

On October 22, 2003, the Massachusetts House of Representatives engrossed the bill entitled "A Bill Relative to Compensation for Certain Erroneous Felony Convictions," introduced by Representative Patricia Jehlen. This proposal, which is currently before the Massachusetts Senate, would provide compensation for the wrongly convicted based on the actual costs of the trial and the duration of the innocent's incarceration. As noted already, Massachusetts does not currently have a law allowing all wrongly convicted persons to collect compensation. While the current bill, if passed, would address many of the practical and equitable matters raised in the previous section, it may be


"This is really extraordinary," Scheck said of the contrast between two states long seen as being at opposite extremes in attitudes toward criminal justice. "The problem here in Massachusetts, that you don't have compensation, or even provisions for DNA testing, that really strikes me as unworthy of this great state."

Id. See also BARRY SHECK et al., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPARAGES FROM THE WRONGLY CONVICTED (2000).

180. Id. § 5; see Jehlen testimony, supra note 18.
181. See Mass. H.B. 4255, see supra Part II A.
This is a full year more than any other state currently allows for wrongfully convicted people to file a claim for redress. Any claimants who are released after the enactment of the bill have two years after the grant of the pardon or judicial relief to bring an action for compensation. The Massachusetts statute would also expunge or seal the records of any person found to be unjustly convicted of a crime, making it considerably easier to find employment and housing.

Finally, the Massachusetts bill allows a judge to offer the freed prisoner a 50 percent tuition expense match to obtain state higher education, either at the University of Massachusetts or another state or community college. The proposed law would also provide the wrongly convicted with the opportunity for free counseling and medical care, provided that the conditions for which treatment is sought are directly related to the conviction and incarceration. However, even with these expanded provisions, the proposed Massachusetts statute lacks some important benefits.

B. How to Improve the Current Proposed Massachusetts Compensation Statute and Compensation Statutes Generally

Perhaps the most problematic element of many state compensation statutes — and the Massachusetts bill is no exception — is the imposition of a recovery cap. States may wish to limit the amount of awards out of fear that too many claims would strain the state’s finances. However, for supporters of compensation, the financial argument breeds little sympathy: “. . . we took people’s lives, and I think we should pay for it. Nobody complained about the cost of locking these guys up for ten years.”

Some believe that the only equitable way to determine the amount of awards would be to look to the terms and conditions of the incarceration, the crime of which a wrongly convicted person was accused and the amount of time spent behind bars. One scholar advocates the division of injuries into economic, or quantifiable, damages and non-economic, or pain and suffering, damages. According to this view, there would be no cap on the amount of economic damages recoverable; rather, compensation would be equal to the amount that the claimant can prove that he lost because of his conviction. It would not be possible to objectively determine the amount of non-economic damages recoverable, but an analysis of certain factors, such as length of incarceration, the crime for which the innocent person was convicted and the loss of professional and personal opportunities would guide courts in making appropriate awards.

Others advocate for the removal of compensation caps, but call for a different set of calculations. Under this scheme, economic damages would not be assessed completely objectively, because “given the economic status of most wrongfully convicted persons, the use of criteria such as ‘lost wages’ cannot begin to approximate the cost of time spent in prison as a result of false conviction.” Instead, the economic portion of the award would be either the actual lost wages, according to average income of the wrongly convicted during the three years before imprisonment, or the median state family income, whichever is greater, for each year of incarceration.

The other factors to be considered are:

183. Bernhard, supra note 22, at 109. "All indemnification statutes have standard and reasonable two year statutes of limitation, except for California which requires claims to be filed within six months from the triggering event: acquisition of a pardon, acquittal or dismissal of the charges." Id.
185. Id. § 7; see Hahn, Going to Bat, supra note 140.
187. Mass. H.B. 4255 § 5; Hahn, Going to Bat, supra note 140. Many freed innocents have trouble dealing with their rage and sense of loss. See Fields-Meyer, supra note 2, at 65, 67. Roberto Miranda, a man who spent 14 years in death row for a murder he did not commit, says, “I have all my anger in a black box and I don’t touch it.” Id. at 67. Gary Gauger, who spent three and a half years in jail accused of murdering his parents, says, “You can’t put this out of your head. It will always be with me.” Id. at 65.
188. See infra Part V B.
189. See Johnson, Compensation, supra note 26.
190. Bernhard, supra note 22, at 106.
192. See Lopez, supra note 25, at 712; Huff, supra note 31, at 158.
193. See Lopez, supra note 25, at 712.
194. Id. at 713. "Allowing recovery for lost wages is reasonable because, but for an erroneous conviction, a wrongly convicted person who was employed prior to the injustice would have earned wages during the period of incarceration." Id. But see Huff, supra, note 31 at 156 [noting that many of those wrongly convicted are poor and have low earning potential, so an award based on lost wages may not adequately compensate them].
195. See Lopez, supra note 25, at 714-15. Lopez advocates a comparison with legislatively enacted caps on non-injury awards in other areas of the law, including medical malpractice and other personal injury torts. Id. at 715. In addition, the court would assess damages according to the crime for which the innocent person served a sentence: a person wrongly convicted of first-degree murder would be eligible to recover greater noneconomic damages than a person convicted of armed robbery. Id. at 717-18. The jury could also individually evaluate the effect of the conviction on the innocent’s reputation and future job prospects, among other factors, in deciding how much noneconomic relief to award. Id. at 719.
197. Id. at 156.
198. Id. at 158.
would be the loss of liberty and separation from family, mental anguish, physical injuries incurred during incarceration and damage to reputation. While these proposed schemes would go beyond the Massachusetts bill, indeed beyond many state compensation statutes, they would go a long way toward making wrongly convicted persons whole.

Apart from providing adequate financial compensation, remedial statutes also must provide adequate access to health, education and counseling opportunities to promote reintegration into mainstream society, particularly vis-a-vis employment. As one scholar notes, "...the wrongly convicted person faces a competitive workplace with no employment history, no recent references, and a lack of technical skills frequently required to perform many jobs in our computerized society." As noted, the proposed Massachusetts law offers some health, education and counseling benefits. However, these provisions do not go far enough.

One proposed statute calls upon the government to include in a compensation package no-cost services of state employment agencies and other social service agencies, offering job training, educational opportunities, mental health services and home placement assistance. Such a comprehensive program is essential to achieving a smooth transition into productive life outside prison. Massachusetts should consider expanding the range of non-monetary compensation provided in the proposed new law to include a broader variety of outplacement, retraining, health care and education benefits. No statute can ever completely right the wrongs done to people who have been wrongly accused, convicted and incarcerated, but amending the statutes to include some of the aforementioned provisions would be an important step.

V. Conclusion

The Massachusetts General Court is considering a proposed statute that would require the state to compensate people who have been wrongly convicted of and incarcerated for crimes. As a result of today's advances in forensics and DNA evidence, it can no longer be denied that innocent people are convicted, despite honest efforts on the part of the legal system to prevent such injustices.

To date, courts have been reluctant to accept the legal bases put forward in litigation seeking compensation where there has been no malfeasance. There is, however, a moral imperative for a civil society to compensate those who have been wronged by the actions of the state, to attempt to alleviate the harms done to them, and to ease their transitions back into the community. As Borchard imploded the public in 1932:

Whatever the most convincing theory, compensation responds to an elementary demand for justice harbored in every human breast. Just as that demand is satisfied by conviction of the guilty, so it requires acquittal of the innocent. When, then, by a misguided or mistaken operation of the governmental machine there is a miscarriage of justice and the helpless innocent is actually convicted, the public conscience is and ought to be revolted and dismayed. The least the community can do to repair the irreparable, is to appease the public conscience by making such restitution as it can by indemnity.

Massachusetts should adopt a statute compensating people wrongly convicted of crimes. As one legislator stated, "No, no amount of money can make things right. No amount of money can erase the memories or the conviction or bring back jobs and families and homes. No amount of money can bring back youth, free time, walks in the park, softball games, picnics with the kids." But enacting this statute, perhaps with some revisions, would be the beginning of the healing process for a number of wounded innocent people, and provide remedies for the Peter Limones and the Lawyer Johnsons of Massachusetts.