The Compensation of Erroneously Convicted Individuals in Pennsylvania

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To deprive a man of liberty, put him to heavy expense in defending himself, and to cut off his power to earn a living – these are sacrifices which the state imposes on him for the public purpose of punishing crime . . . and when it is found that he incurred these sacrifices through no fault of his own, that he was innocent, then should not the state at least compensate him, so far as money can do so?¹

I. INTRODUCTION

Since 1989, fourteen individuals have been exonERATED in the Commonwealth of Pennsylvania.² Due to no fault of their own, they were subjected to the most intolerable living conditions, forced to relinquish family relations, compelled to surrender their sense of society, and required to expend large sums of money to defend against crimes they did not commit. Currently, such individuals are offered only their freedom as remuneration and are forced to readjust to an ever changing society without counseling, assistance, or financial compensation. Unfortunately, the only hope for redress continues to lie in the compassionate hearts of a conservative legislature, as substantial barriers prevent the payment of damages for these egregious wrongs. The purpose of this comment is to provide a background of the history of compensation

for erroneously convicted individuals, as well as to outline remedies currently available in Pennsylvania.

II. BACKGROUND

Evidence indicates that the movement for governmental compensation of wrongfully imprisoned individuals began to take shape in late eighteenth century France. Interestingly, by the end of the nineteenth century at least ten countries had enacted legislation to deal with this particular predicament. It was not until 1938 that the United States government recognized an action for damages for unjust conviction and imprisonment, and it was not until 1941 that the first state enacted legislation to enable wrongfully incarcerated individuals to bring such claims. To date, the Commonwealth of Pennsylvania has not successfully passed any such enabling statute.

3. Edwin Borchard, European Systems of State Indemnity for Errors of Criminal Justice, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684, 689 (May 1912 – March 1913) [hereinafter “Borchard, European Systems”]. The first actual expression of legislative intent to compensate erroneously convicted individuals appears in a Prussian decree, dated 1766:

If a person suspected of crime has been detained for trial, and where, for lack of proof, he has been released from custody, and in the course of time his complete innocence is established, he shall have not only complete costs restored to him, but also a sum of money as just indemnity, according to all the circumstances of the case, payable from the funds of the trial court, so that the innocent person may be compensated for the injuries he has suffered.

Id. at 689 (citing Neue Verordnung um die Prozesse zu kürzen, § 9, cited from Berolzheimer’s Die Entschädigung unschuldig Verurteilter und Verhafteter, 1891, p. 7).


6. California was the first state to enact such legislation. See CAL. PENAL CODE §§ 4900-4906. As will be discussed in more detail, infra notes 48-134 and accompanying text, the following states and districts have enacted legislation to compensate individuals who have been wrongfully convicted: (1) Alabama, (2) California, (3) Illinois, (4) Maine, (5) Maryland, (6) New Hampshire, (7) New Jersey, (8) New York, (9) North Carolina, (10) Iowa, (11) Ohio, (12) Tennessee, (13) Texas, (14) West Virginia, (15) Wisconsin, and (16) the District of Columbia.

7. As will be discussed in more detail, infra notes 210-214 and accompanying text, various bills have been proposed by the state legislature to provide a scheme for compensation to erroneously incarcerated individuals; however, all of these bills have died in committee. See H.B. 1281 P.N. 1591 (Pa. 2003)(not enacted); H.B. 2413 P.N. 3439 (Pa. 1984)(not enacted); S.B. 267 P.N. 269 (Pa. 1977)(not enacted); S.B. 93 P.N. 93 (Pa. 1977)(not enacted); S.B. 1712 P.N. 2214 (Pa. 1976)(not enacted); S.B. 1361 P.N. 1657 (Pa.
Before delving into a discussion about the appropriate actions taken to seek redress in Pennsylvania, it is necessary to give a general overview of the topic of compensation for erroneously convicted individuals. Therefore, this section is broken down into the following subsections: (A) a brief overview of the theories underlying compensation; and (B) an overview of the three schemes through which a wrongfully convicted individual may seek redress.

A. Theories

Two main theories have emerged to justify the notion of compensation for erroneously imprisoned individuals, namely: (1) a theory following the rationale of "eminent domain," and (2) a theory following the rationale of "strict liability." The underlying basis for both of these theories is that "erroneous confinements are costs of operation to be borne by the system," since "the prosecution of a crime [becomes] the function of the state alone." The so-called "eminent domain" theory proposes that "the taking of an individual's freedom for the preservation of peace" is analogous to "the taking of property for public use." Specifically, the argument stems from the notion that private liberty is a right as sacred as property, and any governmental taking of such right should be compensated as a special damage. To illustrate this notion, Professor Borchard gave the following example:


9. King, supra note 8, at 1092.


11. King, supra note 8, at 1092. King was the first to label this rationale as the "eminent domain" theory. Id. However, the foundation for such an argument was set by Borchard as early as 1912. See Borchard, European Systems, supra note 2, at 685. The term "eminent domain" was used to "[connote] a constitutional mandate to compensate." King, supra note 8, at 1093 n.15. However, it is arguable whether or not Borchard used his rationale as persuasive theory to influence the legislature of the United States, or in its strict constitutional sense. Id. at 1092 n.14. According to King, Borchard's argument was purely persuasive, as many problems arise from a constitutional argument, such as the restrictive definition of the term "property." Id. at 1093 n.15.


13. Id.

14. Borchard, European Systems, supra note 3, at 685; see also Borchard, State Indemnity, supra note 8, at 207.
When we ask a citizen to become a juryman or a witness, when his diseased animal is killed for fear of contagion, when his house is destroyed to prevent the spread of conflagration, when his property is taken by eminent domain for public use, compensation is made for the special sacrifices he makes for the general benefit of society.\textsuperscript{15}

The "strict liability" or "social welfare" theory equates society to an entity comprised of many individuals that share a mutual interest in reaching a common end.\textsuperscript{16} Particularly, this theory stresses that in reaching this end there are bound to be mistakes and that it is unfair to place the burden of loss on a single individual injured during this process.\textsuperscript{17} This theory is analogous to the notion of workers' compensation, and follows the rationale that:

\begin{quote}
[In the operation of any great undertaking, such as the management of a large industry or the administration of the criminal law, there are bound to be a number of accidents . . . [and] it is unfair to the individuals injured that they alone should bear the entire loss resulting from the accident, and therefore society distributes the loss among its members.\textsuperscript{18}

In other words, since society in general is deriving a benefit from the administration of justice, and since there are bound to be mistakes in any such undertaking, society should "share the loss incurred by the victim of that error."\textsuperscript{19}

While there are many arguments to counter these assertions,\textsuperscript{20} the above-mentioned theories set the foundation for redress and give a rational basis on which reform should lie.
\end{quote}

\textsuperscript{15} Borchard, \textit{European Systems}, supra note 3, at 695.
\textsuperscript{16} Borchard, \textit{State Indemnity}, supra note 8, at 208. Specifically, Borchard states: Where the common interest is joined for a common end – maintaining the public peace by the prosecution of 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.

\textit{Id.}

\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} King, supra note 8, at 1093 n.14.

\textsuperscript{20} Borchard, \textit{European Systems}, supra note 3, at 694. Three arguments against compensation for erroneous governmental conviction are: (1) in administering justice, the state acts in its sovereign capacity and cannot be held accountable in law for burdens individuals may be forced to bear; (2) acting legally, the state cannot injure anyone; and (3) there can be no liability without fault. \textit{Id.} at 694-96.
B. Three Schemes for Redress

As aforementioned, there are three general schemes through which an erroneously convicted individual may seek redress, namely: (1) fault-based governmental tort liability, (2) private bills passed by the legislature, and (3) strict governmental liability in the form of enabling statutes. The following is an overview of each of these methods, as well as an outline of potential pitfalls.

1. Fault Based Governmental Tort Liability

Litigation based on governmental tort liability has only been successful in a limited handful of situations. Potential suits have been based on a multitude of theories, including (1) suits based on a theory of malicious prosecution against either (a) the state, or (b) an official of the state; and (2) suits based on a theory of false imprisonment against either (a) the state, or (b) an official of the state. However, the concept of governmental immunity combined with the burdens placed upon litigants in these situations creates an almost impenetrable barrier for any possibility of success.

   a. Burdens Placed Upon the Litigants

The burdens placed upon a wrongfully imprisoned individual are not limited to the courtroom. After release from confinement, “a potential wrongful imprisonment plaintiff often has no place to live, let alone any money to give a lawyer [for] a retainer or to pay the out-of-pocket expenses to develop a lawsuit.” Frequently, due to the ever-ticking clock behind the statute of limitations, much valuable time to file a civil lawsuit for compensation is lost in order for this individual to find a place to live and work. These hardships, combined with the burden of proof placed on the litigant, greatly reduce any chance of success in obtaining compensation for their erroneous imprisonment.

As mentioned above, two common forms of tort-based action pursued to seek compensation for wrongful imprisonment are

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22. Bernhard, supra note 21, at 86.
23. Id.
based on the theories of malicious prosecution and false imprisonment. This discussion will be limited to these causes of action.

The tort action of malicious prosecution "protects the personal interest of freedom from unjustifiable litigation." Specifically, "the essence [of this tort] is the perversion of proper legal procedures." To successfully bring suit on this theory, a litigant must generally prove the following elements: (1) the defendant either (a) initiated, or (b) procured the initiation of criminal proceedings against him; (2) he is not guilty of the offense with which he was charged; (3) the defendant either (a) initiated, or (b) procured the proceedings without probable cause; and (4) the proceedings have terminated in his favor. The two most problematic elements to prove are: (1) a lack of probable cause, and (2) that the proceedings were initiated for an improper purpose.

According to the Restatement (Second) of Torts, a lack of probable cause will not be found if the individual who continued or initiated the proceeding either correctly believed or reasonably believed all of the following:

(a) that the person whom he accuses has acted or failed to act in a particular manner; and

(b) that those acts or omissions constitute the offense that he charges against the accused; and

(c) that he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the prosecution.

Additionally, under the Restatement, unless the wrongfully imprisoned individual can establish that the initial conviction was obtained by either (1) fraud, (2) perjury, or (3) other corrupt means, the conviction will be taken as conclusive evidence of probable cause.

In order to establish improper purpose under the Restatement, a litigant must be able to illustrate that prosecution was initiated "for a purpose other than that of bringing an offender to justice."

In terms of a criminal prosecution, the principal situations in which an improper purpose have been found are as follows:

(1) when the accuser does not believe in the guilt of the accused, (2) when the proceedings are initiated primarily because of hostility or ill will towards the accused, (3) when the proceedings are initiated for the purpose of obtaining a private advantage even though the advantage might legitimately have been obtained in civil proceedings.32

Specifically, it has been stated that “[i]f the person initiating criminal proceedings does not himself believe in the guilt of the accused, it is plain that he cannot have a proper purpose.”33

Liability for “false imprisonment” has been found to exist “[w]henever a person unlawfully obstructs or deprives another of his freedom to choose his own location.”4 To successfully bring suit on a theory of false imprisonment, a litigant must generally prove the following elements: “(1) the defendant intended to confine him, (2) [he or she] was conscious of the confinement, (3) [he or she] did not consent to the confinement, and (4) the confinement was not otherwise privileged.”35 Unfortunately, unlawful detention only gives rise to a cause of action for false imprisonment when the confinement was obtained through an arrest not conducted “under a valid process issued by a court having jurisdiction.”36 Therefore, “[w]hen an unlawful arrest has been effected by a warrant an appropriate form of action is malicious prosecution.”37

b. Sovereign Immunity

Sovereign immunity is the hardest obstacle that a wrongfully incarcerated individual must overcome in terms of tort-based litigation. The concept of sovereign immunity is solidified in the Eleventh Amendment,38 and has been interpreted to bar suits

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32. RESTATEMENT (SECOND) OF TORTS § 668 cmt. d (1977) (internal references omitted).
34. Broughton, 335 N.E. 2d at 314.
35. Broughton, 335 N.E. 2d at 314 (citing Restatement (Second) of Torts § 35); see also Bernhard, supra note 21, at 86.
36. Broughton, 335 N.E. 2d at 314.
37. Id.
38. U.S. CONST. amend. XI. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the
brought by a citizen in federal court against (1) his or her own state,39 and (2) state officials acting within the scope of their authority.40 Suits against a state or its officials are generally barred in state courts due to a lack of jurisdiction being conferred to the judiciary over such suits.41 In the absence of an express waiver in the form of a legislative act, aspirations of recovery on the basis of tort-liability are basically fruitless.42

2. Private Bills

A private bill, or moral obligation bill, is a “specifically drafted [act] generally used to pay otherwise unenforceable claims on behalf of individuals harmed by the state.”43 Although such legislation “[lacks] any foundation cognizable in law,”44 the justification for it “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.”

While private bills offer a wrongfully incarcerated individual an opportunity to receive compensation, they are a very problematic form of redress. Not only are they forbidden in certain states, but their success “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.” 46 Additionally, “the process can be lengthy and the outcome is always uncertain.”

3. Enabling Statutes

Currently, fifteen states,48 the District of Columbia, and the Federal Government have enacted legislation to compensate individuals wrongfully incarcerated. While each of these statutes sets

41. In order to have jurisdiction over a suit in state court, generally the state court must be granted jurisdiction by the state legislature. See King, supra note 8, at 1103.
42. King, supra note 8, at 1103.
43. Bernhard, supra note 21, at 93.
44. Id. (quoting Hawai'I Koike v. Board of Water Supply, 352 P.2d 835, 839 (Haw. 1960)).
45. Bernhard, supra note 21, at 93.
46. Id. at 94.
47. Id. at 94.
48. These states are: Alabama, California, Illinois, Maine, Maryland, New Hampshire, New Jersey, New York, North Carolina, Iowa, Ohio, Tennessee, Texas, West Virginia, and Wisconsin.
forth evidentiary requirements to illustrate actual innocence, they widely vary in the burden of proof a claimant must establish to seek redress. The most stringent requirements stipulate that a claimant receive a full pardon, while more liberal requirements provide a list of other means through which an individual can prove actual innocence. Additionally, each of these statutes vary in terms of levels of compensation. The following is a brief summary of each of these statutes.

In Alabama, eligibility requirements stipulate that the claimant establish the following prerequisites: (1) he or she was convicted and served time in a prison;\(^4\) (2) he or she had the conviction either vacated or reversed on grounds of innocence or grounds consistent with innocence;\(^5\) (3) he or she is not currently serving a term of imprisonment for any other crime;\(^6\) (4) he or she did not serve any part of a prison term in conjunction with the vacated or reversed conviction with a sentence for a different conviction;\(^7\) (5) he or she did not receive compensation from the Legislature;\(^8\) and (6) he or she was not subsequently convicted of a felony crime.\(^9\) If all of these requirements are met, a claimant is limited in his or her recovery to $50,000 for each full year of confinement and the pro rata share of any partial year served.\(^10\) However, the Committee on Compensation for Wrongful Incarceration has discretion to submit a bill to the legislature for any supplemental amounts they deem necessary for adequate compensation.\(^11\)

The eligibility requirements in California stipulate the following: (1) the claimant must prove either (a) the crime was not committed at all, or (b) the crime was not committed by him or her;\(^12\) (2) he or she did not intentionally or negligently contribute to his or her arrest or conviction;\(^13\) and (3) he or she has obtained either (a) a judgment of acquittal or discharge, (b) a pardon, or (c) release from imprisonment.\(^14\) If these requirements are met, a

\(^{49.}\) ALA. CODE § 29-2-156 (2004).
\(^{51.}\) ALA. CODE § 29-2-161(a) (2004).
\(^{52.}\) ALA. CODE § 29-2-161(b) (2004).
\(^{53.}\) ALA. CODE § 29-2-161(d) (2004).
\(^{54.}\) ALA. CODE § 29-2-161(e) (2004).
\(^{55.}\) ALA. CODE § 29-2-159(a) (2004).
\(^{56.}\) ALA. CODE § 29-2-159(b) (2004).
claimant is limited to an amount equal to $100 per day of confinement.\textsuperscript{60}

Illinois has one of the most stringent requirements, namely that the claimant be pardoned on grounds of innocence.\textsuperscript{61} If a claimant is successful in obtaining the pardon, he or she is limited to an amount of compensation based on the number of years wrongfully incarcerated.\textsuperscript{62} Specifically, if erroneously imprisoned less than five years, a claimant is limited to $15,000; if erroneously imprisoned between five and fourteen years, a claimant is limited to $30,000; and if erroneously imprisoned more than fourteen years, a claimant is limited to $35,000.\textsuperscript{63}

The requirements in Maine demand that a claimant prove the following by clear and convincing evidence: (1) he or she was convicted of a criminal offense,\textsuperscript{64} (2) he or she was sentenced to a period of incarceration and was actually incarcerated,\textsuperscript{65} (3) he or she received a full and free pardon,\textsuperscript{66} and (4) subsequent to a pardon, he or she was found innocent by the court.\textsuperscript{67} On the slight chance that a claimant is able to meet these stipulations, he or she is limited to compensation in the amount of $300,000.\textsuperscript{68}

The only requirement in Maryland is receipt of a full pardon stating that the conviction has conclusively been shown to be in error.\textsuperscript{69} There is no predetermined amount of damages, as the level of compensation is set at “actual damages sustained by the individual,”\textsuperscript{70} including “a reasonable amount for any financial or other appropriate counseling for the individual.”\textsuperscript{71} There is a lack of case law discussing the definition of the phrase “reasonable amounts,” as the value of this figure is left to the discretion of the Board of Public Works.\textsuperscript{72}

New Hampshire does not explicitly outline any requirements that a claimant must satisfy in order to receive compensation from

\begin{thebibliography}{9}
\bibitem{60} CAL. PENAL CODE § 4904 (2004).
\bibitem{61} 705 ILL. COMP. STAT. 505 § 8(c) (2004).
\bibitem{62} Id.
\bibitem{63} Id.
\bibitem{64} 14 ME. REV. STAT. § 8241(a) (2004).
\bibitem{65} 14 ME. REV. STAT. § 8241(b) (2004).
\bibitem{66} 14 ME. REV. STAT. § 8241(c) (2004).
\bibitem{67} 14 ME. REV. STAT. § 8241(d) (2004).
\bibitem{68} 14 ME. REV. STAT. § 8342 (2004).
\bibitem{69} MD Code § 10-501(b) (2004).
\bibitem{70} MD Code § 10-501(a) (2004).
\bibitem{71} Id.
\bibitem{72} Id.
\end{thebibliography}
the state; however, the amount of recovery cannot exceed $20,000.\textsuperscript{73}

The state of New Jersey requires a claimant to establish the following by clear and convincing evidence: (1) he or she was convicted of a crime and subsequently sentenced to a term of imprisonment;\textsuperscript{74} (2) he or she served this term in whole or in part;\textsuperscript{75} (3) he or she did not commit the crime for which he or she was convicted;\textsuperscript{76} and (4) he or she did not bring about the conviction by his or her own conduct.\textsuperscript{77} Additionally, a claimant will not be entitled to compensation if (1) he or she is currently serving a term of imprisonment for any other crime,\textsuperscript{78} or (2) he or she served his or her sentence for mistaken conviction concurrently with a conviction for another crime.\textsuperscript{79} Damages are limited to reasonable attorney's fees\textsuperscript{80} plus the greater of (1) twice the amount of the claimant's income in the year prior to his or her incarceration, or (2) $20,000 for each year of incarceration.\textsuperscript{81}

In New York, a claimant must meet the following requirements: (1) he or she was convicted of one or more felonies or misdemeanors;\textsuperscript{82} (2) he or she was subsequently sentenced to a term of imprisonment and served all or part of this term,\textsuperscript{83} (3) he or she either (a) was pardoned on grounds of innocence, (b) had the judgment of conviction reversed or vacated, or (c) was found not guilty at a new trial,\textsuperscript{84} (4) he or she did not commit any of the acts charged or his personal acts or omission did not constitute a felony or misdemeanor;\textsuperscript{85} and (5) he or she did not bring about the conviction by his or her own conduct.\textsuperscript{86} There is no cap on the amount of compensation a claimant is entitled to receive, and the only stipulation is that this amount be fair and reasonable.\textsuperscript{87}
North Carolina requires a claimant to have received a full pardon for his or her conviction, as well as to have served all or a part of his or her sentence.\(^8\) Damages are limited to $20,000 per full year of confinement and the pro rata share of this amount for any partial year; however, the total amount of compensation cannot exceed $500,000.\(^9\)

The requirements in Iowa stipulate the following: (1) the claimant must have been charged with commission of a public offense;\(^10\) (2) the claimant must not have plead guilty to the charge or to any lesser included offense;\(^11\) (3) the claimant must have been sentenced to a term of incarceration;\(^12\) (4) the claimant must have had his or her conviction vacated, dismissed, or reversed;\(^13\) and (5) the claimant must have been imprisoned solely on the basis of the conviction that was vacated, dismissed, or reversed.\(^14\) Damages are limited to the following: (1) “amounts paid for restitution for any fine, surcharge, other penalty or court costs imposed and paid;\(^15\) (2) reasonable attorney fees and “expenses incurred in connection with all criminal proceedings and appeals;\(^16\) (3) $50 per day of wrongful incarceration;\(^17\) (4) the value of any lost wages, salary, or other earned income up to $25,000 per year;\(^18\) and (5) the reasonable value of any attorney fees in bringing a claim for compensation.\(^19\)

Ohio requires a claimant to meet the following requirements: (1) he or she was charged with violating the criminal code;\(^20\) (2) he or she was found guilty, but did not plead guilty to either the charge or a lesser included offense;\(^21\) (3) he or she was sentenced to a term of imprisonment;\(^22\) (4) his or her conviction was vacated or dismissed, or reversed on appeal;\(^23\) and (5) either an error in procedure resulted in release or it was determined by the court
that either he or she did not commit the act or that the act was not committed by anyone.\textsuperscript{104} If these requirements are met, a claimant is limited to receipt of the following amounts: (1) any fine or court costs imposed and paid;\textsuperscript{105} (2) reasonable attorney fees and other expenses incurred in connection with all associated criminal proceedings and appeals;\textsuperscript{106} (3) $40,330 per full year of imprisonment or the applicable pro rata share;\textsuperscript{107} (4) any loss of wages, salary, or earned income;\textsuperscript{108} and (5) any payments made to the Department of Rehabilitation for co-payments of services, cost of housing or feeding, cost of supervision, and cost of any ancillary services.\textsuperscript{109}

The state of Tennessee requires that a claimant either (1) have been exonerated, or (2) have received an unconditional pardon on grounds of innocence.\textsuperscript{110} A limit on potential damages is set at $1,000,000.00.\textsuperscript{111}

Texas requires that (1) the claimant serve a sentence in whole or in part;\textsuperscript{112} and (2) the claimant have either (a) received a full pardon on the basis of innocence,\textsuperscript{113} or (b) have been granted relief on the basis of actual innocence for the crime he or she was sentenced.\textsuperscript{114} Additionally, a claimant is barred from receiving compensation if he or she concurrently served any part of the sentence for the wrongful conviction with a conviction for another crime.\textsuperscript{115} The amount of damages recoverable is based on the amount of time an individual was wrongfully imprisoned.\textsuperscript{116} If the individual was wrongfully imprisoned less than twenty years, he or she is entitled to $25,000 per year or its pro rata share.\textsuperscript{117} If the individual was wrongfully imprisoned more than twenty years, he or she is entitled to $500,000.\textsuperscript{118} However, if the claimant is either (1) subsequently convicted of a felony, or (2) dies, payments will be terminated.\textsuperscript{119}

\textsuperscript{104.} OR. REV. STAT. § 2743.48 (A)(5) (2005).
\textsuperscript{105.} OR. REV. STAT. § 2743.48 (E)(2)(a) (2005).
\textsuperscript{106.} Id.
\textsuperscript{107.} OR. REV. STAT. § 2743.48 (E)(2)(b) (2005).
\textsuperscript{108.} OR. REV. STAT. § 2743.48 (E)(2)(c) (2005).
\textsuperscript{109.} OR. REV. STAT. § 2743.48 (E)(2)(d) (2005).
\textsuperscript{110.} TENN. CODE. ANN. § 9-8-108(a)(7) (2004).
\textsuperscript{111.} TENN. CODE. ANN. § 9-8-108(a)(7)(A) (2004).
\textsuperscript{112.} TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(a)(1) (2004).
\textsuperscript{113.} TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(a)(2)(a) (2004).
\textsuperscript{114.} TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(a)(2)(b) (2004).
\textsuperscript{115.} TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(b) (2004).
\textsuperscript{116.} TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (2004).
\textsuperscript{117.} TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(1) (2004).
\textsuperscript{118.} TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(2) (2004).
\textsuperscript{119.} TEX. CIV. PRAC. & REM. CODE ANN. § 103.154 (2004).
In West Virginia, a claimant must establish the following by clear and convincing evidence: (1) he or she was arrested and imprisoned for one or more felonies and the charges were dismissed against him or her when another person was subsequently charged;\(^\text{120}\) (2) he or she was convicted and sentenced to a term of imprisonment and has served all or part of this term;\(^\text{121}\) and (3) either (a) he or she received a pardon on grounds of innocence, (b) his or her judgment of conviction was reversed or vacated, or he or she was found not guilty at a new trial, or (c) the situation on which the conviction was based violated either the Constitution of the United States or the Constitution of West Virginia;\(^\text{122}\) (4) he or she did not commit any of the acts charged;\(^\text{123}\) and (5) he or she did not bring about the conviction by his or her own conduct.\(^\text{124}\) The amount of compensation is limited to an amount that the court determines to be fair and reasonable.\(^\text{125}\)

Wisconsin requires that (1) the petitioner be innocent of the crime for which he or she suffered imprisonment,\(^\text{126}\) and (2) the petitioner did not contribute to his or her conviction.\(^\text{127}\) Compensation is capped at a total amount of $25,000, and the petitioner is limited to $5,000 per year of incarceration or its pro rata share.\(^\text{128}\)

In order for a claimant to receive compensation in the District of Columbia, the claimant must have been (1) unjustly convicted, and (2) subsequently imprisoned for a criminal offense.\(^\text{129}\) No other stipulations or limitations are stated.\(^\text{130}\)

To bring a claim against the Federal Government, a claimant must establish the following through either a certificate of the court or a pardon:\(^\text{131}\) (1)(a) his or her conviction has been reversed or set aside on grounds that he or she is not guilty, (b) he or she was found not guilty at a new trial, or (c) he or she received a pardon;\(^\text{132}\) and (2)(a) he or she did not commit any of the acts, deeds, or omissions charged, and (b) he or she did not bring about his or

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\(^\text{125}\) W. VA. CODE § 14-2-13a(g) (2004).
\(^\text{126}\) Wis. STAT. § 775.05(3) (2003).
\(^\text{127}\) Wis. STAT. § 775.05(4) (2003).
\(^\text{128}\) Id.
\(^\text{130}\) Id.
her own prosecution by either misconduct or neglect. If a claimant successfully makes this showing, the cap placed on amounts that are recoverable depend on the nature of the individual's sentence. These caps apply as follows: (a) if he or she was incarcerated and unjustly sentenced to death the amount is capped at "$100,000 for each 12-month period of incarceration," and (b) if he or she was incarcerated but not sentenced to death the amount is capped at "$50,000 for each 12-month period of incarceration."

As the above statutes illustrate, the burdens of proof placed on a claimant, as well as the applicable level of compensation, vary considerably from state to state. However, each of these statutes represents a recognition of the hardships faced by a wrongfully imprisoned individual, as well as an attempt to redress egregious wrongs committed.

III. THE COMMONWEALTH OF PENNSYLVANIA

Due to the lack of an enabling statute in Pennsylvania, the only paths open to an individual victimized by an unjust and wrongful conviction are: (1) to bring a claim based on tort liability against either (a) the Commonwealth, or (b) an officer of the Commonwealth; or (2) to lobby the legislature to pass a private bill to grant compensation through special legislation. However, the ability to traverse these avenues is hindered severely by problematic potholes, including but not limited to (1) state immunity extending to governmental actors, and (2) a lack of success in terms of lobbying the state legislature to pass private bills.

A. Claims Based on Tort Liability

In Pennsylvania, claims brought by or on behalf of individuals wrongfully incarcerated have generally been barred by the concept of "sovereign immunity." This immunity stems from Article I, Section 11 of the state constitution, which maintains that "suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." It is from this notion that the well-established principle averring "that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sov-

ereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity.\textsuperscript{136} Immunity for the Commonwealth has only been waived in nine categories of cases, namely: (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate; (5) potholes and other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines.\textsuperscript{137} However, immunity for employees of local agencies have been waived in actions "for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act

\ldots caused the injury and that such act constituted a crime, actual fraud, actual malice, or willful misconduct."\textsuperscript{138} Additionally, immunity of a state agency has been waived for the above mentioned nine categories; however, liability will only be imposed if "the injury was caused by the negligent acts [not including acts of conduct constituting a crime, actual fraud, actual malice, or willful misconduct] of the local agency or an employee thereof acting within the scope of his office or duties."\textsuperscript{139}

1. Suits Against the Commonwealth or a State Agency

As a result of the above mentioned requirements for bringing suit against the Commonwealth or a state agency, such tort-based actions for wrongfully incarcerated individuals have not been successful. For instance, in \textit{Jones v. Packel},\textsuperscript{140} the Commonwealth Court of Pennsylvania refused to disregard the concept of sovereign immunity in an action for false imprisonment.\textsuperscript{141} The plain-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} 42 PA. CONS. STAT. § 8522 (2004); \textit{see also} Wesley, No. 03-4137, 2004 U.S. Dist. LEXIS 11938 at *26 n.3. Interestingly, should a litigant's claim fit into one of these categories, damages are capped at $250,000 for a single plaintiff, or $1,000,000 for multiple plaintiffs, and are only recoverable for (1) "past and future loss of earnings and earning capacity," (2) pain and suffering," (3) medical and dental expenses," (4) loss of consortium, and (5) property loss. 42 PA. CONS. STAT. § 8528(c) (2004).
\item \textsuperscript{138} 42 PA. CONS. STAT. § 8550 (2004).
\item \textsuperscript{139} 42 PA. CONS. STAT. § 8542(a)(2) (2004).
\item \textsuperscript{141} \textit{Jones}, 342 A.2d at 436-37.
\end{enumerate}
\end{footnotesize}
Erroneously Convicted Individuals

tiff, a wrongfully incarcerated individual who spent nineteen and one half years in jail, requested the Court to either strike-down sovereign immunity or to find that the legislature waived this concept for individuals in his position.\textsuperscript{142} In addressing these contentions, the Court reaffirmed the idea that “discretion to effectuate change [in sovereign immunity] lies not with the judiciary, but with the legislature,”\textsuperscript{143} and that in order to constitute a waiver, the legislature explicitly must state that it consents to suit through appropriate legislation.\textsuperscript{144}

2. Suits Against Employees of Local Agencies

As aforementioned, immunity for employees of local agencies has been waived when the employee has caused injury and the employee’s actions have constituted a crime, actual fraud, actual malice, or willful misconduct.\textsuperscript{145} In order to prove “actual malice,” a plaintiff must show that the defendant intentionally committed “a wrongful act without lawful or justifiable excuse.”\textsuperscript{146} To prove “willful misconduct,” a plaintiff must illustrate “conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied.”\textsuperscript{147} And, to prove “actual fraud,” a plaintiff must demonstrate “(1) misrepresentation of material fact, (2) scienter, (3) intention by the maker to induce the recipient to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as a proximate result.”\textsuperscript{148}

In \textit{Ferber v. City of Philadelphia},\textsuperscript{149} a wrongfully incarcerated individual brought suit against various police officers, alleging “malicious prosecution, civil conspiracy, abuse of process, intentional infliction of emotional distress and loss of consortium.”\textsuperscript{150} The plaintiff had been wrongfully incarcerated for three and a half years after being convicted and sentenced to death for two mur-

\begin{itemize}
\item \textsuperscript{142} \textit{Id.} The plaintiff argued that the legislature had waived immunity in suits for compensation based on false imprisonment due to periodic allocation of funds from the treasury for individuals in his position. \textit{Id.}
\item \textsuperscript{143} \textit{Id.} at 436.
\item \textsuperscript{144} \textit{Id.} at 437.
\item \textsuperscript{145} 42 PA. CONS. STAT. § 8550 (2004).
\item \textsuperscript{147} Robbins v. Cumberland County Childrens & Youth Services, 802 A.2d 1239, 1252 (Pa. Commw. Ct. 2002).
\item \textsuperscript{150} \textit{Ferber}, 661 A.2d at 472.
\end{itemize}
At trial, the jury concluded that the "police officers conspired to convict Ferber by misusing their positions as police officers," by fabricating a tip from an informant, manipulating witnesses, misrepresenting a statement by a witness as a positive identification, suborning perjury from a prisoner regarding a confession, and misrepresenting a polygraph test.

On appeal to the Commonwealth Court, the plaintiff sought to have the City of Philadelphia found liable for the misconduct of its employees. While the Court found that the City was unable to waive immunity, it reaffirmed in dictum that the defendant police officers were not immune from suit, as their actions constituted criminal conduct and willful misconduct.

Therefore, while a wrongfully incarcerated individual is precluded from recovering damages from the Commonwealth directly, he or she may be able to receive compensation from an employee of the Commonwealth. Unfortunately in terms of recovery, the employee most likely will have relatively "shallow pockets," and will not be entitled to indemnification from the agency for which he or she is employed unless he or she was acting in good faith within the course and scope of his or her duties.

B. Private Bills/Moral Claims

Since 1969, twenty-nine private acts advocating for "[appropriations] to the Office of the Attorney General for the payment of certain moral claims against the Commonwealth of Pennsylvania"
have died in committee.\[^{158}\] These twenty-nine separate acts represent legislation proposed on behalf of only ten wrongfully imprisoned individuals.\[^{159}\]

Specifically, each of these proposed acts have called for the appropriation of certain sums of money to be paid for "an alleged commission of a crime in violation of the penal laws of this Commonwealth which later discovered evidence has proven such person to be innocent."\[^{160}\] Additionally, all of the appropriations were for "loss due to personal injury or sickness, including but not limited to loss of reputation, good will, savings, attorney fees and other fees in defense against the prosecution of aforesaid crimes . . . other physical or mental deprivation . . ., [and] deprivation of personal and civil rights."\[^{161}\]

Proposed payments have ranged from $450,000 for six years of wrongful imprisonment\[^{162}\] to a mere $24,000 for twenty-six years of wrongful imprisonment.\[^{163}\] Roughly, an estimate of the proposed payments average approximately $18,000 of compensation per year of wrongful containment,\[^{164}\] with about half of the twenty-nine

\[^{158}\] Id.


\[^{160}\] See supra note 157 for a list of the relevant proposed acts.

\[^{161}\] See supra note 157 for a list of the relevant proposed acts.


\[^{163}\] H.B. 1082 P.N. 1615 (Pa. 1975). This amount did not include $16,000 allocated to damages for the loss of four fingers. Id. Previously, legislation proposed on behalf of this individual would have allocated $40,000 for the combined damages of wrongful imprisonment and the loss of his fingers. H.B. 1082 P.N. 1243 (Pa. 1975), H.B. 2499 P.N. 3475 (Pa. 1974). Subsequent legislation proposed allocation of $50,000 for these combined damages. H.B. 1082 P.N. 2709 (Pa. 1975).

\[^{164}\] The following amounts have been proposed for the following number of years of wrongful imprisonment: (1) $200,000/10 years, (2) $325,000/19.5 years, (3) $60,000/5 years,
proposed acts offering less than $10,000 per year of confinement.\textsuperscript{165} The highest proposed average appropriation per year of confinement was $75,000 per year for 6 years,\textsuperscript{166} with $20,000 per year for 10 years being the second highest proposed appropriation.\textsuperscript{167} Ironically, in 1975, proposed H.B. 1082 P.N. 2709 specifically allocated $16,000 to the loss of an individual’s four fingers.\textsuperscript{168} As can be seen through analysis of these figures, the proposed amounts have been random and any hope of receiving compensation has been slim.

C. Proposed Alternative Routes

Due to inherent problems in bringing a tort-based suit against either the Commonwealth or an official, as well as the difficulties in lobbying to have a private bill passed for a moral claim, at least nine bills have been proposed to provide alternative routes to compensation for wrongfully incarcerated individuals in Pennsylvania. However, much like the ill-fated private bills mentioned above, all of these propositions have died in committee.\textsuperscript{169} In summary, they can be categorized into two distinct groups: (1)

\begin{itemize}
  \item [(1)] H.B. 2365 P.N. 3058 (Pa. 1980) – approximately $2,900 per year for 34 years of confinement;
  \item [(2)] H.B. 1444 P.N. 1716 (Pa. 1977) – approximately $2,100/year for 35 years of confinement;
  \item [(3)] H.B. 1082 P.N. 2709 (Pa. 1975) – approximately $2,000/year for 26 years of confinement;
  \item [(4)] H.B. 1082 P.N. 1615 (Pa. 1975) – approximately $900/year for 26 years of confinement;
  \item [(5)] H.B. 1082 P.N. 1243 (Pa. 1975) and H.B. 898 P.N. 1060 (Pa. 1973) – approximately $1,500/year for 26 years of confinement;
  \item [(6)] H.B. 1596 P.N. 1949 (Pa. 1975) – approximately $7,000/year for 19 years of confinement;
  \item [(7)] H.B. 2499 P.N. 3475 (Pa. 1974) and H.B. 161 P.N. 184 (Pa. 1973) – approximately $9,800/year for 19 years of confinement;
  \item [(8)] H.B. 262 P.N. 292 (Pa. 1973) and H.B. 2491 P.N. 3342 (Pa. 1972) – approximately $9,000/year for 11 years of confinement;
  \item [(9)] S.B. 697 P.N. 939 (Pa. 1971) and S.B. 967 P.N. 742 (Pa. 1971) – approximately $5,700/year for 13 years of confinement.
\end{itemize}

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proposed bills advocating for the creation of a recommendation committee and (2) proposed bills advocating for the right of a wrongfully incarcerated individual to bring a claim for damages against the state.

1. Proposed Creation of a Recommendation Committee

Since 1972, eight bills have been proposed for the creation of a review committee to which moral claims of wrongfully imprisoned individuals could be submitted. These bills would have created many advantages to the current system of lobbying for appropriations as they entitled one to a reduction in time for potential compensation, required that claims for compensation be backed by evidence instead of mere impassioned speech, and eliminated the need to lobby for appropriations. The first set of these proposed bills dealt with the creation of a “State Board of Moral Claims Examiners.” The second dealt with the creation of a “Commonwealth Moral Claims Board,” and the third dealt with notification to the Office of General Council.

a. State Board of Moral Claims Examiners

The proposed acts providing for the creation of a State Board of Moral Claims Examiners would have enlisted this board to “review all applications for the payment of moral claims arising against the Commonwealth due to wrongful imprisonment.” The board was to consist of three individuals, one of whom was to be an attorney appointed by the Governor after consent by two-thirds of the Senate. It was proposed that these three individuals would initially serve staggering terms of two years, four years, and six years, with each of their predecessors serving six year
terms. Additionally, all actions would have required the presence of a quorum consisting of at least two individuals.

Specifically, the board was to be set up to "investigate the veracity of the merits of each claim." The only burden to be placed upon a wrongfully incarcerated individual was to present "clear supportive evidence establishing the fact that [he or she] was not guilty of the offense charged and was imprisoned wrongfully of an offense which [he or she] had not committed." After investigation of each claim by the board, the board's findings were to be forwarded to the Attorney General. Following careful review of the evidence presented to the board, the Attorney General was to have discretion to either dismiss the claim or to "prepare suitable legislation for introduction to the General Assembly allocating such sums from the budget of the Department of Justice." The power to make the final determination regarding compensation was allocated to the legislature.

b. Commonwealth Moral Claims Board

The duty of the proposed Commonwealth Moral Claims Board, much like the duty of the proposed Board of Moral Claims Examiners, was to examine "all claims against the Commonwealth on behalf of released inmates of State penal institutions who have been unjustly or falsely incarcerated." However, this proposed board was to be given the additional duty of hearing claims against the Commonwealth brought on behalf of inmates alleging injury or death "as a result of aggravated assault and battery, criminal homicide or involuntary deviate sexual intercourse ... and as the result of the negligence of the Commonwealth or its employees in the performance of its duty to protect prisoners from such abuse."

Unlike the proposed Board of Moral Claims Examiners, the Commonwealth Moral Claims Board was to consist of three indi-
Erroneously Convicted Individuals, "all of whom [had to be] admitted to the practice of law by the Supreme Court of the Commonwealth and no more than two of whom [would have belonged] to the same political party," appointed by the Governor with the consent of a majority of the Senate. The terms of appointment mirrored the terms of the Board of Moral Claims Examiners, with one member initially serving two years, another serving four years, and the third serving six years. Each of the three member's successors would serve six year terms.

The proposed Commonwealth Moral Claims Board was to be managed more judicially and was to possess more powers than the proposed Board of Moral Claims Examiners. For instance, the Commonwealth Moral Claims Board would be endowed with the power to (1) "administer oaths or affirmations, examine any person under oath or affirmation and issue subpoenas requiring the attendance and giving of testimony and witness and require the production of any books, papers, documentaries, or other evidence;" (2) "to take or cause to be taken affidavits or dispositions within or without the State;" (3) "direct medical examinations of victims;" (4) "hear and determine all claims filed with the board . . . and to reinvestigate or reopen cases as . . . deem[ed] necessary;" (5) "request from any State institution, its superintendent, or employees, such assistance and data as [would] enable [it] to carry out its functions and duties;" and (6) "adopt, promulgate, amend and rescind suitable rules and regulations . . . including rules for the approval of attorney's fees for representation before the board or before the Commonwealth Court upon judicial review."

Each "hearing" would not require the presence of a quorum; instead, a single board member would have the power to examine a potential claim individually. This individual member was given the duty to "make a recommendation to the entire board either

188. Id.
189. Id.
190. Id.
195. S.B. 1712(3)(g) P.N. 2214 (Pa. 1976) and S.B. 267(3)(g) P.N. 269 (Pa. 1977).
granting an award or denying the claim. Determination of the compensation question was to be determined by a majority of the board through a voting process. Interestingly, it was proposed that the Attorney General be limited in his or her discretion over the matter to merely having the ability to appeal a decision to compensate to the Commonwealth Court within 30 days of the board's decision.

The only action that a wrongfully incarcerated individual had to take was to file a claim in writing with the executive secretary of the board within one year after his or her release. Unfortunately, awards given by the board would have been limited to $10,000 per year of unjust imprisonment.

c. Proposed Wrongful Imprisonment Review Act

After the filing of a claim, the Office of General Council would be permitted 90 days to "hold hearings, review evidence received and prepare a formal recommendation for legislative action." After careful review, "a recommendation for legislation action to compensate the wronged party [would have been] filed . . . with the representative and senator of the legislative district in which the wronged party lives or with the Majority Leader of the Chamber if the wronged party lives outside [the] Commonwealth." Final determination of appropriations for compensation would then be made by the legislature.

2. Proposed Creation of a Claim for Damages

In 2003, legislation was introduced to allow "any person incarcerated for one or more felonies or misdemeanors against the Commonwealth that the person did not commit . . . [to] file a claim for damages against the Commonwealth." The intent of the bill was to provide "an available avenue of redress over and above the existing tort remedies to seek compensation for damages."
The proposed bill placed a burden on the allegedly wrongfully convicted individual to show the following four requirements by clear and compelling evidence:

(1) the claimant was convicted of or was persuaded to plead guilty, no contest or nolo contendere to one or more criminal offenses against the Commonwealth and subsequently sentenced to a term of imprisonment and has served all or any part of the sentence;

(2) (i) the claimant was pardoned upon the ground of innocence of the crime or crimes for which the claimant was sentenced and which are the grounds for the complaint; or

(ii) the claimant's judgment of conviction was reversed or vacated, or his plea of guilty, no contest or nolo contendere was withdrawn by leave of court, and the indictment or information dismissed or, if a new trial was ordered, either the claimant was found not guilty at the new trial or was not retried and the indictment or information dismissed; provided that the count or counts dismissed were the sole basis for the imprisonment complained of;

(3) the claim is not time-barred under subsection (h); and

(4) the claimant was not incarcerated for any reason at the time of presenting the claim. 208

Upon meeting this burden, the claimant's recovery would be limited to the greater of the following: (1) a sum of money per day of incarceration equivalent to the highest amount of per diem pay a member of the General Assembly would have been entitled to receive that day, or (2) the claimant's actual salary or wage loss for the period of incarceration. 209 Additionally, the statute of limitations would begin to run two years from either the date of pardon or the date of dismissal by the Court. 210

IV. CONCLUSION

While Pennsylvania has attempted to take the necessary steps towards addressing the problem of a lack of compensation for er-

208. H.B. 1281(c) P.N. 1591 (Pa. 2003).
ronely convicted individuals, compared to other states it is far behind in terms of reform. Denial of recognition for damages based on these egregious societal wrongs, as well as refusal to waive sovereign immunity in these particular cases, have put Pennsylvania years (if not decades) behind more progressive states. In order to rectify this injustice, it is essential for Pennsylvania to enact an enabling statute, or at the very least to waive sovereign immunity for cases of such deplorable harm.

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