
DECLARING INNOCENCE: USE OF DECLARATORY JUDGMENTS TO VINDICATE THE WRONGLY CONVICTED

FREDERICK LAWRENCE*

*“Who steals my purse steals trash . . .
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.”¹*

INTRODUCTION

H. L. Mencken is said to have observed, “When someone says it’s not about the money—it’s about the money.”² The “Rights of the Wrongfully Convicted” symposium, concerning the various ways in which society should vindicate a person wrongly accused and convicted of a criminal act, may provide the context for a notable exception to Mencken’s dictum. Many scholars, including the distinguished practitioners and colleagues who participated in this symposium, have addressed issues of compensation and the various kinds of resources that the exonerated desperately need, either through litigation, political administrative services, or other remedies.³ To be sure, there is certainly a need for wrongfully incarcerated people to be compensated for their losses: their lost time, job opportunities, reputation, and all of the other intangible harms that result from incarceration. Thus monetary compensation is clearly a key part of any effort to address the harm done to the wrongly accused or convicted.

But Mencken was not completely right. Compensation is just one of the necessary means for helping to fully restore the exonerated to society. In this paper, I propose an alternative, or, perhaps better put, an additional remedy for persons wrongly accused and convicted of crimes. The proposal is designed to

* Dean and Robert Kramer Research Professor of Law, George Washington University Law School. This Article is based on a talk presented at the Civil Rights Section of the Association of American Law Schools at the AALS Annual Meeting, January 9, 2009. My appreciation to Aaron Cohn, a member of the George Washington University Law School class of 2009, for his outstanding research and editorial assistance. © 2009.

¹ See WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3.

² H.L. Mencken, 1880-1956.

³ Heather Weigand, *Rebuilding a Life: America’s Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427 (2009); Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: an Overview*, 18 B.U. PUB. INT. L.J. 439 (2009); Adele Bernhard, *Statutory Remedies for the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 403 (2009).

create a remedy that will help the wrongfully accused or convicted protect or rebuild a personal reputation inevitably harmed by criminal accusations and convictions. That remedy is the right to a declaration of innocence. Under that right, persons wrongly convicted of criminal conduct would be allowed to sue in a civil court for a declaratory judgment declaring their innocence. This suit would not be for money damages and would not place the fault on any one actor. Rather, it would be a statement that the person was in fact innocent of any wrongdoing—not merely “not guilty” but actually “innocent.”⁴

Part I of this Article is a brief discussion of the legal remedies currently available for wrongly accused and incarcerated criminal defendants. Part II of this Article discusses the reputational harm to the innocent that arises from criminal accusations. As a remedy for this harm, Part III proposes a no-fault, no-money declaratory judgment suit — the declaration of innocence—that draws on analogies from the context of defamation law. Part IV concludes with some observations about the advantages of such a proposal.

I. LEGAL RECOURSE FOR THE WRONGLY ACCUSED

The criminal justice system is designed to produce as few false convictions as possible—ideally, if not realistically, none. The State bears a very high burden of persuasion in criminal cases—the “beyond a reasonable doubt” standard – precisely to protect the innocent, even at the cost of occasionally letting the guilty go free. In Blackstone’s often-quoted formula, it is “better that ten guilty persons escape than that one innocent suffer.”⁵ Nonetheless, even this high burden does not, and perhaps cannot, protect all innocent people. Many innocent persons are wrongly convicted of criminal acts and even more are wrongly accused.⁶ The Duke University Lacrosse scandal is one of the most notorious cases of false accusations in recent times.⁷ Many too have been wrongfully

⁴ “Not guilty” and “innocent” are two distinct concepts. A defendant may be found “not guilty” in the legal system even if he or she committed the criminal act. This situation may arise because the state failed to meet its heavy burden, or the defense was able to create reasonable doubt in the mind of the jury. A juror’s conclusion that there is reasonable doubt as to the guilt of the defendant does not mean that the juror believes that the defendant is innocent. A jury might well believe that it is more likely than not that the defendant committed the crime, comporting with the preponderance of the evidence standard associated with most civil litigation, but that belief is not sufficient to establish guilt beyond a reasonable doubt.

⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES *386.

⁶ See Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 75 - 80 (1999); Edward Connors, et al, *Convicted By Juries, Exonerated by Science: Case Studies in the use of DNA evidence to Establish Innocence after Trial*, US Dept of Justice, National Institute of Justice (1986).

⁷ See Duff Wilson & David Barstow, *Duke Prosecutor Throws Out Case Against Players*, N.Y. TIMES, April 12, 2007, at A1 (this case was about sexual assault charges levied against

incarcerated.⁸ Since the introduction of DNA evidence to the legal system, over two hundred people have been exonerated with post-conviction DNA evidence.⁹ That number does not begin to capture the total numbers of innocent persons wrongfully accused but ultimately saved from punishment.¹⁰ The FBI reports that 25% of primary sexual assault suspects are not prosecuted after DNA evidence proves their innocence.¹¹

Even with its procedural safeguards, no human criminal justice system can be perfect and thus even the best system will produce some number of false accusations and even false convictions. The matter of vindicating the wrongfully incarcerated is thus a pressing and unavoidable question.¹² Given that our civil system is based primarily on awards of money damages, many efforts in this field have been geared towards establishing a system of monetary compensation for the innocent.¹³ Indeed, wrongfully incarcerated and later exonerated persons should be entitled to some money as compensation for their loss of freedom and corresponding harms. Awarding monetary compensation to correct for wrongful incarceration is widely accepted in our society. Twenty-five states, the federal government and the District of Columbia have statutes on the books that allow exonerated individuals to receive compensation.¹⁴ Before

three Duke Lacrosse players that later turned out to be unfounded and, in part, fabricated by a North Carolina prosecutor).

⁸ See *Id.*; see also, Fernanda Santos & Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. TIMES, December 4, 2007 at § 4.

⁹ The Innocence Project; Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited April 19, 2009) (“Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued—until DNA testing (prior to conviction) proved that they were wrongfully accused.”)

¹⁰ See *Id.*

¹¹ See Bernhard, *supra* note 6, at 75 (noting that the FBI reported that since 1989, the primary suspect of a sexual assault case has been excluded about 25% of the time by forensic DNA testing.); See, generally, Terese L. Fitzpatrick, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Abuse*, 12 U. BRIDGEPORT L. REV. 175, 196-99 (1991).

¹² See Bernhard, *supra* note 6, at 74 (“[S]ociety has a moral obligation to assist the wrongfully convicted . . .”).

¹³ See generally, *Id.* (covering current legal remedies for the exonerated, all of which focus primarily on monetary compensation).

¹⁴ See 28 U.S.C. §§ 1495, 2513 (2006); ALA. CODE §§ 29-2-150 to -165 (LexisNexis 2003); CAL. PENAL CODE §§ 4900-4906 (West 2000 & Supp. 2009); 2008 CONN. PUB. ACTS 143; D.C. CODE §§ 2-421 to -425 (2006); 2008 FLA. LAWS 39; 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2009); IOWA CODE ANN. § 663A.1 (West 1998); LA. REV. STAT. ANN. § 15:572.8 (Supp. 2009); ME. REV. STAT. ANN. tit. 14, §§ 8241-8244 (2003); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 258D, §§ 1-9 (West 2008); MO. REV. STAT. § 650.055 (2009); MONT. CODE ANN. § 53-1-214 (2007); N.H. REV. STAT. ANN. § 541-B:14(II) (West 2007); N.J. STAT. ANN. §§ 52:4C-1 to -6 (West 2001); N.Y. CT. CL. ACT § 8-b (McKinney Supp. 2008); N.C. GEN. STAT. § 148-82

these monetary compensation statutes were enacted, there were other means of receiving compensation, such as private bills or civil rights and tort lawsuits, discussed at greater length elsewhere in this symposium.¹⁵

Each of these alternative means, however, has its limitations as a remedy, sometimes severely so. For example, private bills, legislative enactments to compensate individuals for wrongful incarceration, mostly benefit those exonerees who are well connected or whose cases generated a great deal of political attention.¹⁶ Similarly, litigation, another avenue by which the exonerated receive compensation, has its limits. Litigation may require pursuing a number of distinct claims, all of which must overcome substantial procedural obstacles.¹⁷ Those distinct claims include: civil rights claims against police or prosecutors under 42 U.S.C. § 1983 for violations of the exoneree's constitutional rights; tort claims of malicious prosecution; and claims of ineffective assistance by defense counsel.¹⁸ If these claims are not time-barred by a statute of limitations, wrongly convicted individuals must still overcome the doctrines of absolute and qualified immunity, which protect prosecutors and other state actors, or proof of intent, which is a high burden to meet.¹⁹

The third possibility for receiving compensation is by statutory provision. These laws, which are on the books in twenty-seven jurisdictions, are often referred to as indemnity laws.²⁰ Compensation statutes are codified provisions that specifically grant monetary compensation to people wrongly convicted and incarcerated.²¹ While statutory provisions are designed to compensate the

to -84 (2005); OHIO REV. CODE ANN. §§ 2743.48-.49 (LexisNexis 2008); OKLA. STAT. ANN. tit. 51, § 154 (West 2008); TENN. CODE ANN. § 9-8-108(a)(7) (Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001-.003 (Vernon 2005); UTAH CODE ANN. § 78B-9-405 (2008); VA. CODE ANN. §§ 8.01-195.10 to -195.12 (2000 & Supp. 2006); VT. STAT. ANN. tit. 13, § 5574 (2007); W. VA. CODE ANN. § 14-2-13a (LexisNexis Supp. 2006); WIS. STAT. ANN. § 775.05 (West 2001).

¹⁵ See Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: an Overview*, 18 B.U. PUB. INT. L.J. 439 (2009); Adele Bernhard, *Statutory Remedies for the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 403 (2009).

¹⁶ See Bernhard, *supra* note 6, at 94.

¹⁷ *Id.* at 81-91 (examining the many burdensome hurdles faced by plaintiffs suing over wrongful prosecution or incarceration).

¹⁸ *Id.*

¹⁹ Absolute immunity is a complete exemption from civil liability usually afforded to officials. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (explaining the legal history of absolute immunity). By contrast, qualified immunity is more fact specific and is usually offered to public officials performing a discretionary function so long as the conduct does not clearly violate clearly established constitutional or statutory rights. See, e.g., *Siegert v. Gilley*, 500 U.S. 226, 233 (1991) (explaining that qualified immunity involves immunity from suit rather than a mere defense to liability).

²⁰ See Bernhard, *supra* note 6, at 101-10.

²¹ See, e.g., 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2009) (providing jurisdiction to award compensation for time unjustly served); IOWA CODE ANN. § 663A.1 (West

wrongfully incarcerated, they still require the plaintiff to meet a high burden of proof before compensation will be granted.²²

All three means of compensating wrongly accused or convicted persons requires the exonerated plaintiff to overcome substantial procedural hurdles. Those hurdles are often sufficiently high, so that the process of receiving compensation is a difficult, if not impossible task for some. Moreover, even if the exonerated were able to overcome those hurdles and obtain monetary compensation for the harm of wrongful imprisonment or accusation, they may never be able to recover fully from the criminal stigma that attaches to their association with criminal punishment, and the receipt of a damage award alone will not address this injury, at least not in full.²³ Mencken was not correct in all circumstances: sometimes it is indeed not about the money.

Monetary compensation for the wrongly accused and convicted is thus difficult to obtain in many instances and ill-suited to compensate for certain harms, particularly stigmatization and reputational damage. Compensation, therefore, although needed for wrongly incarcerated individuals, is not and cannot be a complete remedy for harms that can be inflicted through errors in the criminal justice system.

II. REPUTATIONAL HARM ARISING FROM FALSE CRIMINAL ACCUSATIONS

The stigma associated with criminal proceedings is often great and can linger even when the wrongly accused are able to vindicate themselves through the legal system.²⁴ That stigma, which is manifested in the man or woman's damaged reputation, violates one of those intangible rights that courts have recognized as vital, yet found difficult to remedy. Indeed, the Supreme Court came close to making the right to protect one's reputation a constitutional right in *Rosenblatt v. Baer*.²⁵ In Justice Stewart's concurring opinion in *Rosenblatt*, he eloquently said: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."²⁶ For Justice Stewart, the right to defend one's reputation lay at the center of a civilized society.

1998) (granting \$50 per day for wrongful incarceration, loss of salary and reasonable attorneys fees); TENN. CODE ANN. § 9-8-108(a)(7) (Supp. 2007) (empowering a state board to hear compensation claims and grant relief up to \$1 million).

²² See, e.g., IOWA CODE ANN. § 663A.1 (requiring proof of innocence by clear and convincing evidence); D.C. CODE §§ 2-422 (same).

²³ See Eric Rasmusen, *Stigma and Self-fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 521-22, 540 (1996).

²⁴ See, e.g., Janet Roberts & Elizabeth Stanton, *Free and Uneasy, A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, at 38.

²⁵ See *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (suggesting a constitutional right to the protection of one's reputation).

²⁶ *Id.*

Justice Stewart's ringing words in *Rosenblatt* take on a special meaning in the context of the criminal justice system. It is beyond question that criminal accusations are harmful to one's reputation. Wrongly accused or convicted persons may lose credibility and trustworthiness in the eyes of their community and of the general public. Nor is it a fluke that stigma results from wrongful convictions and even wrongful prosecutions. Criminal stigma is not an accidental byproduct of the criminal justice system. It is precisely what the criminal justice system is supposed to provide.²⁷ Under any theory of punishment, stigmatization of the criminal is essential for the working and coherence of the criminal justice system.²⁸

The essence of a retributive theory of punishment is that the criminal deserves to be punished.²⁹ It is incoherent to speak of desert in the absence of stigma. Indeed, in a tautological sense, we could define stigma as that which attaches to the very statement that a person has violated society's criminal code and thus deserves to be punished. Similarly, consequentialist theories of punishment require a kind of criminal punishment that will deter criminals—the defendant himself or any potential wrongdoer—from engaging in future criminal conduct.³⁰ The stigma associated with the conviction for a crime can be seen as performing a kind of signaling function as to what conduct and results are viewed negatively by society.³¹ It thus informs the would-be criminal what to avoid doing.³² In the absence of stigma, the deterrent power of the system would be greatly weakened.³³

The stigma that arises from criminal accusations is seen in a stronger sense under an expressive view of criminal punishment – the idea that the criminal law expresses normative beliefs that are and should be internalized by members of society.³⁴ Expressive theories of punishment evaluate given behavior according to how well it comports with societal values.³⁵ That is precisely what a

²⁷ See Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 594-608 (1996).

²⁸ *Id.* at 601-04.

²⁹ See *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring); see also Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 61 (2003); JEFFRIE MURPHY, *Retributivism, Moral Education, and the Liberal State*, in RETRIBUTION RECONSIDERED 15, 21 (1992).

³⁰ See Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 183-84 (2009).

³¹ See Kahan, *supra* note 27, at 602-04.

³² *Id.*

³³ *Id.*

³⁴ See, e.g., FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 163-67 (1999); Robert Reiner, *Crime, law and deviance: the Durkheim legacy*, in DURKHEIM AND MODERN SOCIOLOGY, 176-82 (Steven Fenton ed., 1984); see generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

³⁵ See LAWRENCE, *supra* note 34, at 164.

criminal accusation is about: expressing the values of a society with respect to that individual's act.³⁶ With a criminal accusation and conviction, the State is denouncing the conduct of the accused and accordingly stigmatizing that individual for that conduct.

Because stigmatization is a necessary element of criminal punishment, it is also an unavoidable result of wrongful accusations and convictions. The full rectification of the harm from false accusations and convictions therefore requires a system to help the exoneree regain his standing in society, that is, to be "de-stigmatized." As discussed above, monetary compensation can only do so much to advance this process of de-stigmatization.³⁷ That is why we need a judicial declaration of innocence.

III. PROTECTING WRONGFULLY ACCUSED WITH A DECLARATION OF INNOCENCE

As a remedy to the stigma suffered by persons wrongfully accused or convicted of criminal acts, this Article proposes that persons wrongfully accused of criminal acts have a right to sue for a declaration of innocence. The judicial declaration, in the form of a declaratory judgment, would create a new remedy in some states, and would formalize processes that exist in others, such as findings of exoneration or tainted conviction, and the quashing or dismissal of an indictment. It would formalize these various holdings into a single civil, declaratory judgment focused precisely on the issue of innocence. The plaintiff, the former defendant in the criminal case, would need to meet the preponderance of the evidence standard.³⁸

A declaration of innocence addresses many of the problems exonerees face. Criminal accusations carry strong societal assumptions of guilt that are likely to damage any defendant's reputation despite the system's presumption of innocence. Even for those acquitted of criminal wrong-doing, the negative aura of a criminal accusation may linger in the public eye and continue to harm the plaintiff's credibility beyond the proceedings.³⁹ Without a judicial declaration of innocence, there is no recourse for the innocent who are wrongfully accused or convicted. There is no other remedy that is aimed directly at the restoration of their damaged reputations.

With a declaration of innocence by a court, wrongfully accused persons

³⁶ See Kahan, *supra* note 27, at 594-601.

³⁷ See *supra*, Part II.

³⁸ The statutory language might say the following: Any person who suffers injury to reputation from a false criminal accusation, prosecution, or incarceration, shall be entitled to a declaration of innocence by the court. A claim of false criminal accusation, prosecution, or incarceration must be proven by a preponderance of the evidence and shall be brought under the rules providing for Declaratory Judgments.

³⁹ See Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 N.W.U. L. REV. 1297, 1305-06 (2000).

would receive a significantly stronger vindication than that provided by a verdict of not guilty. Indeed, the verdict of “not guilty” is perhaps best captured by the verdict used in Scottish courts of “not proven.”⁴⁰ A person who is in fact guilty of the crime charged might well be found not guilty because the prosecution failed to marshal sufficient evidence to meet the purposefully onerous “beyond a reasonable doubt” standard. Nor is this a flaw in the system. It is precisely the role of this high burden on the prosecution to strive never to convict the innocent, even at the expected and accepted cost of sometimes acquitting the guilty. A judicial declaration of innocence would be a strong and official statement that the defendant was in fact wrongly accused or convicted, and not just that a potentially guilty defendant escaped conviction due to police or prosecutorial error, or the inability to marshal sufficient evidence of guilt to meet the beyond a reasonable doubt standard.

The problem of vindicating the wrongfully accused or convicted is analogous to the challenge of addressing the harm suffered by the victim of defamation. The common law of defamation was founded upon the compelling societal interest in preventing and compensating for attacks on a person’s reputation.⁴¹ Here, we have been discussing the stigma of the wrongfully accused or convicted. The analogous stigma from defamation was addressed by Judge Pierre Leval in his influential 1988 article in the *Harvard Law Review* proposing a no-fault, no-damages defamation suit.⁴² The argument for a declaration of innocence would apply Judge Leval’s proposal to the context of the criminal justice system and the problem of wrongful accusations and convictions.

Judge Leval, now of the Court of Appeals for the Second Circuit but formerly of the District Court for the Southern District of New York, was the trial judge on the General William Westmoreland defamation case, brought against CBS.⁴³ There was an unusual focus on defamation at the time. As the *Westmoreland* trial took place, Ariel Sharon brought the equally celebrated defamation case against *Time* magazine.⁴⁴ There was a strong sense in both cases that what the defendants really wanted more than compensation was a restored reputation.⁴⁵ Prior to his trial, for example, General Westmoreland said that he would donate whatever compensation he received as a result of his defamation

⁴⁰ See Samuel Bray, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1301 (2005).

⁴¹ See Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems*, § 1.2.2, 1-7 (3d ed. 2008) (noting the long American tradition of protecting one’s reputation with the law of defamation).

⁴² Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287 (1987-88) (advancing an alternative type of libel action, in which no damages would be awarded).

⁴³ See M.A. Farber, *The Westmoreland Case: A Broken West Point Tie*, N.Y. TIMES, February 24, 1985, at § 1.

⁴⁴ See David Margolick, *Risks in Litigation*, N.Y. TIMES, February 19, 1985, at B7

⁴⁵ *Id.*

suit, clearly showing that it was “not about the money.”⁴⁶

In the context of defamation, it is not surprising that in at least some cases, monetary compensation is less significant than the effort to reclaim one’s reputation, to receive, as it were, a reputational clean bill of health. Former Secretary of Labor, Ray Donovan, famously asked after his acquittal in a 1987 corruption trial, “Where do I go to get my reputation back?”⁴⁷ That concern may well have influenced Judge Leval in his celebrated 1988 article.

Influenced dramatically by the *Westmoreland* suit over which he presided and the roughly contemporaneous *Sharon* suit in the same District Court, Judge Leval proposed a suit for a declaratory judgment that statements leveled against the plaintiff were in fact false.⁴⁸ It would be a no-fault, no-damages suit.⁴⁹ The advantage of such a system, Leval said, was that a plaintiff would be relieved of the substantial burdens that are quite properly placed on a plaintiff in order to protect the media defendants in most defamation cases because the plaintiff would not be seeking money damages from that defendant.⁵⁰ The plaintiff would not have to prove that the defendant published the false statements with knowledge of falsity or reckless disregard of the truth.⁵¹ Similarly, media defendants would be spared the invasive nature of discovery—production of reporter’s notes and the like—in addition to receiving immunity from money damages.⁵²

The “no-fault” standard of Judge Leval’s proposal does not require a plaintiff to show malice as required by the Supreme Court in *New York Times v. Sullivan*.⁵³ Rather, the plaintiff strictly has to prove that the statement was false by a preponderance of the evidence. The idea of the no-fault, no-damage defamation suit is not to provide a plaintiff (or cause a defendant to pay) monetary compensation. Instead, such a defamation suit would provide what *Westmoreland*, *Sharon* and presumably many other defamation plaintiffs seek: a clean bill of health to restore their reputations. The lawsuit would result in a statement by the court acknowledging that the allegedly defamatory statements were, in fact, false. Simply put, it would repair, or at least aim directly to repair, the reputation of the plaintiff.

The parallels of the exonerated criminal defendant and the victim of defamation are not perfect, but they are apt. Judge Leval sought to avoid all of the plaintiff’s procedural burdens in defamation cases that stem from having to

⁴⁶ See M.A. Farber, *Westmoreland Suit Against CBS Begins Today with Jury Selection*, N.Y. TIMES, October 8, 1984, at A1.

⁴⁷ See Andrew Ross Sorkin, *NASD Ends Case Against Quattrone*, N.Y. TIMES, June 2, 2006, at C1.

⁴⁸ Leval, *supra* note 42, at 1288.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1291-98.

⁵¹ *Id.* at 1293.

⁵² See Leval, *supra* note 42, at 1294.

⁵³ See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

prove malice under the *Sullivan* standard. The declaration of innocence proposed here seeks to avoid the procedural traps that are waiting for the vindicated plaintiffs who were wrongfully accused or convicted of criminal acts. In a no-fault, no-damage case, which is not about whether there was deliberate fabrication or malicious prosecution, the plaintiff's case is narrowly focused on the falseness of the accusation or conviction. It is about a finding of innocence. From the plaintiff's point of view, this is analogous to avoiding the procedural hurdles that exist in the defamation context. A plaintiff seeking a declaration of innocence would avoid the higher burden of proving actual malice or intentionally malicious prosecution. Thus, Judge Leval's provocative proposal in the defamation context actually has a very powerful resonance in our parallel context of those who have suffered reputational damage from erroneous accusation and prosecution.

IV. ADVANTAGES OF A NO-MONEY, NO-FAULT SUIT FOR A DECLARATION OF INNOCENCE

If a conviction, or even prosecution, is designed to produce stigma, then the declaration of innocence is designed to undo that stigma when wrongfully imposed. A formal court proceeding that gives rise to this kind of a declaration is the best procedural method to accomplish this goal. As noted above, the advantage to the plaintiff who receives the declaration of innocence is different from a finding of not guilty.⁵⁴ The declaratory judgment of innocence goes well beyond a statement that something went wrong with the prosecution, or that the prosecution simply failed in meeting its burden. Innocent means just that; the defendant was innocent of the charges. The declaration could be held out as proof that the plaintiff's reputation should be held in good name.

Moreover, there could be some creative ways to use such a declaratory judgment in future compensation schemes. In a recent California case, *Tennison v. California Victim & Compensation Board*, the court of appeals considered whether a finding of factual innocence by a court could bind the state's Victim and Compensation Board in its decision whether to award compensation to the wrongfully convicted.⁵⁵ The court suggested that such a declaration could indeed bind the Victim and Compensation Board, although under the particular factual circumstances, the application of preclusion in this case was deemed inappropriate.⁵⁶ Even if the plaintiff did not receive the benefits of issue preclusion in *Tennison*, this case is a good illustration of the means by which a declaration of innocence could have preclusion effect, and thus establish innocence within states' compensation schemes.

If declarations of innocence bind the state generally, then they may play

⁵⁴ See *supra* text at note 40.

⁵⁵ *Tennison v. Cal. Victim Comp. & Gov't Claims Bd.*, 62 Cal. Rptr. 3d 88, 94 (Ct. App. 2007).

⁵⁶ *Id.* at 96-8.

some role in meeting the statutory burdens for compensation by providing the factual finding of innocence required for compensation. Also, if one lobbied for private bill, having this kind of a formal declaration certainly could provide a very strong basis for legislation, although it would not work as preclusion against the legislature *per se*.

The declaration of innocence would thus provide an important possibility for vindicating the innocent and restoring their reputations. And even in those instances in which Mencken's dictum was applicable, the declaration could advance suits or private bills for compensation by actual preclusion or force of argument.

V. CONCLUSION

A right to a declaration of innocence would fill a gap in our system that fails to protect the reputation of the wrongly accused. It would help restore an innocent person's reputation, relieving the exoneree of the stigma of crime, and for some former criminal defendants, help them to receive compensation. The parallels to defamation law are apt for a number of reasons. Both defamation law and this proposal are concerned with protecting reputation, and both areas of law contain procedural hurdles that make it difficult for plaintiffs to succeed. This proposal may be the best we can do to relieve the innocent of the stigma that attaches to criminal accusations or convictions. This is a remedy that does more than filling the purse that Shakespeare's Iago dismissed as "merely trash," and seeks to restore to the exoneree the invaluable "good name."⁵⁷

⁵⁷ See SHAKESPEARE, *supra* note 1.

