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## SYMPOSIUM

### INTRODUCTION: SYMPOSIUM ON REMEDIES FOR EXONERATED PRISONERS

JACK M. BEERMAN\*

Exoneration of wrongfully convicted prisoners is not a new thing, but it seems to be more common with advances in the availability and utility of DNA evidence. Given the number of exonérations that have occurred in recent years, it is increasingly difficult to dismiss inmates' ubiquitous claims of innocence. Is it still a safe assumption that the vast majority of claims of innocence are false? Do we trust that post-conviction and appellate procedures will sort the wheat from the chaff?

Regardless of how we answer the questions raised above, there is one question society must answer—how should the wrongfully convicted be treated? Should they receive compensation or social services? Can their pre-conviction reputations be restored? These are the questions that the participants in this symposium address. Very little has been written about the availability of compensation and services post-exoneration. Adele Bernhard, one of the participants in this symposium, has published two articles on the subject,<sup>1</sup> and while general civil rights scholarship is relevant, given the number of exonérations that have occurred in recent years in the United States, it seems appropriate to look beyond innocence toward compensation and services.

There is surprisingly much to learn about life for exonerees after exoneration. News reports treat us to images of a smiling or tearful exoneree telling the world that he is grateful for his release and just wants to get home and get on with his life. The spotlight rarely lasts more than a day or two, perhaps with a follow up report at a later date. Rarely, if ever, does an exoneration result in sustained attention to the successes or failures of society's treatment of the exoneree after exoneration. Legal successes may draw some renewed attention,

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<sup>1</sup> Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004); Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999).

but by and large, the focus has been on the process of exoneration rather than on its consequences.

Heather Weigand's article for this symposium is unique in that it comes from a non-lawyer who works with exonerees.<sup>2</sup> Ms. Weigand's experience leads her to make several specific recommendations on how to help the exonerated and their families rebuild their collective lives. Ms. Weigand's Article makes four extremely interesting points that stood out to me. The first is that the legal system's treatment of the wrongfully convicted is a form of torture. Obviously, being convicted of a crime and sentenced to prison is no picnic for anyone, but I had not focused before on the unique experience of the wrongfully convicted who know, day after day, that they are innocent. They must experience unimaginable anxiety over their inability to convince the system (and perhaps family, friends and community members) of their innocence. The trauma does not evaporate at the moment of release, and Ms. Weigand presents a powerful case for providing appropriate services to deal with this trauma. The second thing I learned is that many exonerees receive no compensation or services, and may actually be treated worse than a guilty defendant who has completed a sentence. Those released after serving a deserved sentence may receive pocket money and reentry services that the innocent do not receive, perhaps due to a misguided belief that the innocent do not need them. Third, I learned that media attention can actually add to the trauma experienced by the wrongfully convicted. What others may consider small disappointments, such as the cancellation of an interview or television appearance, may reignite extreme feelings of worthlessness and abandonment in the exoneree. The exonerated need help dealing with the media process along with all the other issues they face. Fourth, recognition of innocence and reclaiming one's good name appear to be extremely important to exonerees. It may be the foundation upon which the exonerees' post-release life will be built, and insistence by judges, prosecutors and police that the exoneration is erroneous may be devastating to the exoneree.

Michael Avery's article provides a thorough analysis of the federal civil rights remedies that may be available to the exonerated.<sup>3</sup> Exonerees may pursue federal civil rights remedies if state compensation is not available, or if compensation under state law is very small compared to potential compensatory damages under 42 U.S.C. § 1983. The main problem that many exonerees face is that in most cases they have been convicted pursuant to appropriate legal process. As Professor Avery's Article illustrates, they face a potential maze of elements for making out a claim under accepted legal doctrines. Even if they can plead and prove all of the elements, civil rights plaintiffs may have

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<sup>2</sup> See Heather Weigand, *Rebuilding a Life: America's Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427 (enclosed) (2009).

<sup>3</sup> See Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: an Overview*, 18 B.U. PUB. INT. L.J. 439 (enclosed) (2009).

trouble pinning liability on any one of the many actors involved in the criminal justice process, including police, prosecutors, witnesses and judges. Prosecutors, witnesses and judges have absolute immunity from civil rights damages for action taken as part of the adjudicatory process,<sup>4</sup> although, as Professor Avery points out, prosecutors who fabricate evidence before bringing charges, and police who fabricate evidence, may face liability. Professor Avery was part of the team of lawyers that won a \$102 million judgment against the United States Government in a case brought under the Federal Torts Claim Act involving four wrongfully convicted men who served lengthy terms in prison for a murder that federal authorities apparently knew they had not committed.<sup>5</sup> It remains to be seen whether that judgment will stand up on appeal. If it does, it may provide a model for future litigation, although the extreme circumstances of that case are unlikely to be repeated very often.

Adele Bernhard's article addresses statutory remedies for exonerees.<sup>6</sup> She begins by taking us to the streets with stories about wrongful convictions and what happens to exonerees after exoneration. The example of David Shephard is a real eye opener. After serving more than eleven years for a rape he did not commit, Shephard was released only to find difficulty in securing employment at the same level he had prior to his conviction, and an order from the state to pay for the welfare benefits the state paid to the mother of his child while he was in prison. The state of New Jersey did not provide statutory compensation, and because his conviction was based on the victim's identification, he had no realistic hope for compensation through a lawsuit against any of the actors in the criminal justice system. Professor Bernhard raises the possibility that legislatures can pass private bills compensating the wrongfully convicted in states without compensation statutes, although recognizing that while this process works in some jurisdictions, it may not in others. Even in states that have compensation statutes, Professor Bernhard illustrates how difficult they are to navigate. The table in the appendix to her article provides useful details on existing statutes. Professor Bernhard also sounds a theme that comes through in Ms. Weigand's Article: wrongful convictions seem to result from flaws in the criminal justice system involving eyewitness identification and coercive interrogation. Obviously, Professor Bernhard wishes that compensation statutes were not needed, and her analysis suggests ways in which wrongful convictions themselves can be minimized.

Dean Fred Lawrence's paper addresses the theme of reputation—how can the legal system address the reputational harm associated with wrongful con-

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<sup>4</sup> On immunities in civil rights litigation, see generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 526-57 (5<sup>th</sup> ed. 2007).

<sup>5</sup> See *Limone v. United States*, 497 F. Supp.2d 143 (D. Mass. 2006).

<sup>6</sup> Adele Bernhard, *Statutory Remedies for the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 403 (2009).

viction?<sup>7</sup> As we have already learned from Ms. Weigand's paper, restoring an exoneree's reputation can be an extremely important part of recovery from the trauma of wrongful conviction. The problem with civil litigation as a mechanism for accomplishing this goal is that the possibility of monetary remedies may inspire potential defendants to strongly resist claims of innocence by exonerees, when capitulation can result in large damages awards. The same effect may lead the state itself to resist admitting exonerees' innocence. Dean Lawrence, building on Judge Pierre Leval's proposal for a no-damages defamation action to vindicate the plaintiff's reputation,<sup>8</sup> proposes enabling exonerees to sue for their reputations and receive a declaration of innocence. In light of Ms. Weigand's report that exonerees highly value establishing their innocence, the importance of Dean Lawrence's proposal to exonerees may be greater than most of us might think. A note of caution is in order, however. Given the vehemence with which some state officials insist that exonerees were actually guilty, Dean Lawrence's action for a declaration of innocence may provoke the same level of resistance as would be encountered in response to an action for damages, especially if the defendants' own professional and personal reputations might be impugned by a finding of innocence.

In conclusion, I would like to express my gratitude to the authors of the articles in this symposium for advancing our understanding of the needs and rights of the wrongfully convicted. They have reminded us that exoneration is but a first step toward healing the wounds caused by a wrongful conviction. With this publication we are cognizant that repairing the damage that is done to people, families, and communities by wrongful convictions takes more than printed words on the pages of a law journal. Thus, it is my hope that this symposium will contribute to a greater understanding of the issues among lawyers, legal scholars, law students and even policymakers who will be faced with reintegrating the next generation of wrongfully convicted and exonerated prisoners back into society.

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<sup>7</sup> Frederick Lawrence, *Declaring Innocence: Use of the Declaratory Judgment to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L. J. 391 (2009).

<sup>8</sup> Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287 (1988).