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EXONERATED PRISONERS

Improve remedial laws

Vivian Berger / Special to The National Law Journal

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The wrongful Convictions Tax Relief Act of 2007, S. 2421, recently introduced by senators Charles E. Schumer, D-N.Y., and Sam Brownback, R-Kan., would furnish certain tax benefits to exonerated prisoners without prior felony convictions. Most important, for 15 years or the number of years of incarceration (whichever is less), it would exempt them from federal income tax liability on the first \$50,000 of annual income received as reparations for their imprisonment. The bill is aimed at preventing others from suffering the plight of exonerate David Pope, who ended up owing nearly a quarter of the \$385,000 that Texas had awarded as recompense for the decade and a half of hard time he endured before being cleared of rape charges.

It does appear grossly unfair in these circumstances to give with one hand, then take with the other, even when giver and taker are separate government bodies. But worse, for the vast majority of inmates released from confinement on grounds of innocence taxes are the least of their worries. Few possess a right to any indemnity for their horrendous ordeal: Only 22 states, the District of Columbia and the federal government have statutes providing for compensation to the injured party.

In other jurisdictions, to obtain a recovery, the exonerated must try to secure the passage of private laws or bring tort or civil rights actions. Both avenues pose many pitfalls.

To be sure, a few lucky exonerates have benefited from "moral obligation" bills: In 2007, Connecticut granted James C. Tillman \$5 million on account of the 18-year loss of liberty, "enjoyment of life," "familial relationships," past income and future earnings, as well as the "mental pain and suffering" and physical and psychological injury, flowing from his wrongful convictions of kidnaping and sexual assault. Most, however, will not succeed in attracting a politically influential backer able to surmount the usual reluctance to allocate funds to ex-inmates, however deserving.

Lawsuits, for their part, present both legal and practical problems. The former include the prevalence of state and official immunities when government actors are defendants and onerous requirements such as the need to show the absence of probable cause in suits for malicious prosecution or false imprisonment. (More broadly, mistaken witness identifications, the chief producer of erroneous convictions, do not ordinarily implicate fault in the sense cognizable in such actions.) The latter include the difficulty of obtaining counsel to pursue a dicey proceeding, and the fact that often the only provably "guilty" targets — for example, lying jailhouse "snitches" — are judgment-proof.

Miserly compensation

Yet general compensation statutes hardly guarantee appropriate redress. First, few such laws have kept pace with the cost of living, and many were miserly from the outset. California, for example, allots \$100 per day of incarceration, with a \$10,000 maximum award. Thus, a convict unjustly imprisoned for two decades could receive but \$500 a year — about \$1.37 a day! The prevalence of caps ironically ensures that those who have been most gravely imposed on by the criminal justice system stand to benefit least on a per diem basis. Further, even ceilings exceeding California's often are appallingly low. In Illinois (the locus of 18 death-penalty exonerations), an exonerate who served more than 14 years can get a mere \$35,000. (For periods up to five years and between five and 14 years, the limits are, respectively, \$15,000 and \$30,000.) Montana, uniquely, offers only educational aid, and solely to inmates cleared by DNA testing.

Additional hurdles that claimants frequently have to surmount include: brief statutes of limitations, the prerequisite of obtaining a pardon, high burdens of proof and disqualification of defendants who pleaded guilty or confessed falsely. Certain legislators in Florida, which is considering adopting a compensatory statute, would even restrict it to individuals who have never committed a crime, thereby excluding someone wrongly imprisoned for murder for 25 years — if he had previously been convicted of petty larceny!

As cases of exoneration mount, states must enact remedial laws that do not add insult to injury. Like modern-day Rip Van Winkles, the wrongfully imprisoned reenter a world that has largely passed them by. Typically, they lack both education and work and interpersonal skills and, in another ironic twist, often have no access to the ameliorative programs afforded guilty released inmates.

New and amended statutes should follow the model of jurisdictions like New York and Maryland, which lack caps, and should reject elevated burdens of proof and delay-causing bureaucratic obstacles. Society owes a huge debt to exonerees — which, thus far, it has failed even minimally to repay.

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