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## Compensating acquitted pre-trial detainees

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### ABSTRACT

Western legal systems are far from having provided the same solution to the problem of whether acquitted pre-trial detainees should be compensated for the harm suffered as a result of detention on remand. Various arguments have been formulated in order to justify or criticize this compensation, but the possible incentive effects of this compensation on criminal behavior has not yet been considered. This paper analyzes these effects, focusing on the case where detention was lawfully and diligently carried out by State agents, and not having been caused by negligence on the part of the detainee. The paper shows that such compensation can either deter crime or encourage it, depending inter alia on the standard of evidence used to decide whether to compensate or not. Finally, the paper analyzes which standards of evidence maximize both deterrence and social welfare, and discusses some possible extensions.

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### 1. Introduction

Suspects of having committed a crime may be detained and held on remand until they are tried and subsequently condemned or acquitted. This pre-trial detention can be justified on the ground of preventing some risks such as those of the suspects fleeing and avoiding prosecution or punishment, destroying evidence, influencing witnesses or committing any additional criminal offense.

If defendants are sentenced to imprisonment, pre-trial detention does not cause them additional harm, since the period spent on remand is deducted from prison time. The problem arises when they are acquitted. Although not proven guilty, detainees have then suffered egregious harm (the deprivation of their liberty, often for several years), that cannot be compensated in kind (i.e. through the aforementioned deduction). This poses the question whether they should receive the corresponding monetary compensation for such harm.

Various arguments have been put forward for justifying such compensation. The most frequently invoked is the takings analogy.

Under the constitutions of several countries and the provisions of countless international treaties, Government may take property for a public purpose, in which case the affected owners are entitled to receive a just compensation for the loss.<sup>1</sup> As the U.S. Supreme Court has stated, the takings clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”.<sup>2</sup> Similarly, the State may detain suspects of having committed a serious crime. It may thus temporarily take their liberty in the public interest, i.e. in order to deter criminal behavior and protect society. But it would be unfair to force innocent detainees alone to bear this public burden. They should consequently have a right to be compensated for this exceptional harm suffered for the benefit of the whole society.<sup>3</sup>

<sup>1</sup> See, for example: Article 33.3 of Spanish Constitution; Article 17.1 of Charter of Fundamental Rights of the European Union; Fifth Amendment of U.S.A. Constitution; and Article IV.1 U.S.A.-Argentina Investment Treaty.

<sup>2</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>3</sup> *Bratholm* (1961), p. 834; *Rosenn* (1976), pp. 715 and 716; *Manns* (2005), pp. 1947 et seq.; *Michels* (2010), p. 416. The takings analogy has been also used in order to justify compensation for wrongfully convicted. See *Borchard* (1941), pp. 207–208; *Master* (2004), pp. 1072 et seq.; *Boucher* (2007), pp. 1072 et seq.; *Martinez* (2008), pp. 515 et seq.

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It has been said that it would be incongruous to compensate (by deducting from his sentence the time spent in detention) the convicted accused but not the acquitted.<sup>4</sup> It has also been argued that compensation may possibly: enhance the credibility and legitimacy of the criminal system by showing a willingness to admit mistakes and take the consequences of the application of forceful measures seriously<sup>5</sup>; provide a sense of moral satisfaction to the acquitted defendants<sup>6</sup>; shift the risk of wrongful detention to the party better suited to bear it (not the wrongfully detained person, but the community)<sup>7</sup>; and internalize, at least partially, the social costs of wrongfully detentions, thus encouraging State agents to prevent such detentions, by increasing the level of care taken when detaining people and/or by lowering the volume of detentions.<sup>8</sup>

In order to determine whether compensating acquitted pre-trial detainees is socially desirable from an economic point of view, it is also important to analyze the incentive effects of this compensation on the behavior of people running the risk of detention. As Fon and Schäfer have shown, compensating the wrongfully convicted induces some individuals not to commit crime, thereby lowering the level of criminal activity.<sup>9</sup> Similarly, one might think that compensating detainees who have been acquitted makes crime relatively less attractive and deters criminal offenses. But this would be a premature conclusion, because there are some relevant differences between making the State liable for wrongful convictions and making it liable for wrongful detentions. Compensating factually innocent acquitted detainees reduces indeed the cost of being a law-abiding citizen. However, we cannot neglect the possibility of factually guilty detainees being acquitted, in which case compensation increases the expected private benefits from crime.

This paper analyzes the aforementioned incentive effects, pointing out under what conditions compensating acquitted detainees deters crime, as well as which the standards of evidence for compensation that minimize crime and social costs are. The paper proceeds as follows. Section 2 describes, from a comparative law point of view, different conditions and legal rules under which acquitted could be compensated for the time spent on remand. Section 3 shows an important difference between paradigmatic cases of wrongful conviction and wrongful detention that calls into question State liability in this latter case. Section 4 presents the analytical framework of the model and analyzes the incentive effects of compensation. Section 5 specifies the standards of evidence for compensation that maximize either deterrence or social welfare. Section 6 extends the model by considering the reputation cost of being denied compensation, analyzing its effects on deterrence and social costs. Section 7 suggests and discusses other possible extensions, and Section 8 concludes.

## 2. The law

Different rules could be – and, in fact, are – laid down to determine whether acquitted pre-trial detainees are entitled to be compensated for the time spent on remand.

### 2.1. Unlawfulness

In some legal systems, acquitted detainees have a right to be compensated only if they were unlawfully held on remand. This is

<sup>4</sup> Michels (2010), p. 417.

<sup>5</sup> Michels (2010), pp. 417–418.

<sup>6</sup> Michels (2010), p. 418.

<sup>7</sup> Beresford (2002), p. 634; Michels (2010), p. 418.

<sup>8</sup> See Manns (2005), pp. 1979 et seq., and, with regard to compensation for wrongful convictions, Boucher (2007), pp. 1088 et seq.

<sup>9</sup> Fon and Schäfer (2007).

the solution prescribed, for example, in the European Convention of Human Rights. Under its Article 5 § 5, “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”. A *sensu contrario*, such a right is not granted to individuals detained according to the conditions laid down in the European Convention.

### 2.2. Negligence

Negligence, both of State agents and detainees, could also be a relevant circumstance. On the one hand, compensation might be granted only if these agents did not take due care when detaining the suspect. It must be highlighted that unlawful detentions are not necessarily negligent. It may happen that State agents contravened the law in spite of having acted diligently, for example as a consequence of the fact that the infringed legal provision was unclear, ambiguous or imprecise, and its meaning was clarified by the Courts after the detention was carried out. Let us remember that the European Union and its Member States are liable for breaches of European Union Law only if the breach is “sufficiently serious”,<sup>10</sup> and this expression can be understood as “negligent”. As European Union Courts have stated, even though “the concept of fault does not have the same content in the various legal systems”,<sup>11</sup> “certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious”.<sup>12</sup> “Only the finding of an irregularity that an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances can render the Community liable”.<sup>13</sup>

On the other hand, compensation could be denied if the acquitted detainee caused his own detention negligently, for example by making a false confession with the aim of protecting a third person. This rule, which obviously encourages potential victims to act with due diligence in order to prevent being wrongfully detained, is well established in a lot of countries.<sup>14</sup>

### 2.3. Compensation if proven innocent

In some legal systems, innocence has to be established for the right of compensation to arise. Acquitted detainees are entitled to be compensated only if the evidence indicating their innocence exceeds a certain threshold, which is higher than the amount of such evidence needed to avoid conviction. The existing evidence can be strong enough for the accused to be acquitted (insofar as the principle of the presumption of innocence requires that “any doubt should benefit the accused”<sup>15</sup>; i.e. they may not be convicted unless their guilt is proven “beyond a reasonable doubt”<sup>16</sup>), but at the same time it can be not strong enough for them to receive compensation. The standard of proof in cases of State liability for pre-trial detention (e.g. “preponderance of evidence” or “clear

<sup>10</sup> See the judgment of the Court of Justice of 5 March 1996 (*Brasserie du Pêcheur and Factortame and others*, C-46/93 and C-48/93, §§ 51 et seq.).

<sup>11</sup> See the judgment of the Court of Justice of 5 March 1996 (*Brasserie du Pêcheur and Factortame and others*, C-46/93 and C-48/93, § 76).

<sup>12</sup> See the judgment of the Court of Justice of 5 March 1996 (*Brasserie du Pêcheur and Factortame and others*, C-46/93 and C-48/93, § 78).

<sup>13</sup> Judgment of the General Court of 3 March 2010 (*Artegodan*, T-429/05, § 62).

<sup>14</sup> See, e.g., Article 294 of the Spanish Organic Act of the Judiciary Power of 1 July 1985 (*Ley Orgánica 6/1985, del Poder Judicial*); § 5 No 2 and No 3 of the German *Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen (StrEG)*, 8 March 1971, as last amended by Act of 8 December 2010.

<sup>15</sup> Judgment of the European Court of Human Rights of 6 December 1988 (*Barberà, Messegue and Jabardo v. Spain*, 10590/83, § 77).

<sup>16</sup> Judgment of the U.S. Supreme Court of 31 March 1970 [*In re Winship*, 397 U.S. 358 (1970)].

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