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Liberty and Just [Compensation] for All: Wrongful Conviction as a Fifth Amendment Taking

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Note

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KELLY SHEA DELVAC

In the United States, over 2,900 people have been exonerated for crimes they did not commit. While some exonerees currently qualify for compensation for their wrongful convictions, less than 40% have received any type of financial support. This Note examines the history of wrongful convictions in America as well as the historical background of the Fifth Amendment. It then looks at the current compensation schemes available to exonerees and analyzes the evolution of takings jurisprudence. This Note argues that a wrongful conviction is a taking of an exoneree's labor under the Fifth Amendment and, therefore, constitutionally entitles an exoneree to just compensation.

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KELLY SHEA DELVAC*

INTRODUCTION

Judge Learned Hand remarked that our system of justice “has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”¹ Throughout Judge Hand’s lifetime, there were at least 230 known exonerations in America.² Today, there are over 130 exonerations each year.³ Of these exonerees, less than 40% have received any type of

* 2021 J.D. graduate of Pepperdine Law. This Note is dedicated to my exonerated friends David, Derrick, and Alex who encourage me to do better every day. To Prof. James McGoldrick who encouraged us to see where the law led to ridiculous results and challenged us to fix it. Special thanks to my husband, Bill, and to Professors Robert Pushaw and Shelley Saxer for their comments and edits to this Note. I would also like to thank the members of the Connecticut Law Review for careful editing and feedback. All errors are my own.

¹ *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923). Judge Hand lived from 1872 to 1961. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 1, 585 (2d ed. 2011).

² *Exonerations before 1989*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsBefore1989.aspx?View={43e04d15-8918-459f-bb8f-dddc168edf0d}&SortField=Exonerated&SortDir=Asc> (last visited Feb. 19, 2020) (“The National Registry of Exonerations . . . provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. The Registry also maintains a more limited database of known exonerations prior to 1989.”).

³ *Exonerations by Year: DNA and Non-DNA*, NAT’L REGISTRY EXONERATIONS, www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last visited Feb. 3, 2020); *see also Glossary*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Jan. 7, 2020) (“In general, an exoneration occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence More precise[ly], . . . [a] person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person’s guilt.”).

compensation for the time they spent wrongfully imprisoned.⁴ This reality is because “exoneration guarantees only one thing—release from prison.”⁵

The case of Nathan Myers and Clifford Williams exemplifies this injustice.⁶ In 1976, Williams and Myers were convicted of the murder of Jeannette Williams and the attempted murder of Nina Marshall.⁷ They were sentenced—Myers to life in prison, and Williams to death.⁸ They served forty-three years in prison before being exonerated in 2019.⁹ Under Florida’s Victims of Wrongful Incarceration Compensation Act,¹⁰ Myers received \$2 million.¹¹ Williams, however, was ineligible for any financial benefits because Florida law excludes exonerees who have more than one prior felony conviction, and Williams had two.¹² These men were accused of the same crimes, served the same forty-three years in prison, both innocent, but one received \$2 million, while the other received nothing.¹³ This disparity in compensation among exonerees is not an anomaly.¹⁴

Today, wrongful convictions are heavily covered in the media, with stories prevalent in today’s pop culture.¹⁵ It is this publicity that has led states, legislatures, and courts to make great strides in working towards developing compensation statutes, private bills, and civil actions to compensate these exonerees for the years taken from them.¹⁶ However,

⁴ Simon Cole, *Compensation for Exonerees*, NAT’L REGISTRY EXONERATIONS 2 (Sept. 11, 2017), <https://www.law.umich.edu/special/exoneration/Documents/Compensation%20for%20Exonerees%20Primer.pdf>.

⁵ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, INNOCENCE PROJECT 9–10 (2016) [hereinafter *Lost Time*], https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf.

⁶ Seth Miller, Opinion, *Wrongful Convictions Show Need for Criminal Justice Reform*, SARASOTA HERALD-TRIBUNE (Oct. 6, 2019, 6:08 AM), <https://www.heraldtribune.com/opinion/20191006/miller-wrongful-convictions-show-need-for-criminal-justice-reform>.

⁷ *Id.* See *Clifford Williams, Jr.*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5533> (last visited Feb. 1, 2020), for further information on this case.

⁸ Miller, *supra* note 6.

⁹ *Id.*

¹⁰ FLA. STAT. ANN. §§ 961.01–.07 (West 2013).

¹¹ Miller, *supra* note 6.

¹² *Id.*

¹³ *Id.*

¹⁴ See generally Cole, *supra* note 4.

¹⁵ Innocence Staff, *Must-See Wrongful Conviction Films and TV Shows*, INNOCENCE PROJECT (Oct. 28, 2016), <https://www.innocenceproject.org/wrongful-conviction-media/> (listing thirteen documentaries, eight television episodes, and eight movies about wrongful convictions); *Ten Great Books of the Decade*, INNOCENCE PROJECT (Dec. 31, 2009), <https://www.innocenceproject.org/ten-great-books-of-the-decade/>. See *Actual Innocence*, APPLE PODCASTS, <https://podcasts.apple.com/us/podcast/actual-innocence/id1102237078> (last visited Feb. 2, 2020); Jason Flom, *Wrongful Conviction Podcast*, LAVA, <https://www.wrongfulconvictionpodcast.com/> (last visited Feb. 2, 2020); *Season 1*, SERIAL PODCAST, <https://serialpodcast.org/season-one> (last visited Feb. 2, 2020); TRUTH & JUST. PODCAST WITH BOB RUFF, <https://www.truthandjusticepod.com/home> (last visited Feb. 2, 2020), for podcasts on wrongful convictions.

¹⁶ See *infra* Part II (discussing current compensation framework).

unfortunately, many exonerees still do not qualify for compensation under any of the current avenues.¹⁷

A possible remedy to this lack of compensation is the enforcement of the Fifth Amendment Takings Clause.¹⁸ The Takings Clause provides that a person shall not “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”¹⁹ Plainly stated, this means the government *is* allowed to take private property as long as it either provides due process *or* just compensation for that taking. The Supreme Court has held that just compensation means a property owner “is entitled to be put in as good a position pecuniarily as if his property had not been taken.”²⁰

A wrongful conviction is an infringement on an individual’s liberty and property rights that the safeguards of due process failed to protect.²¹ However, a wrongful conviction is also an illustration of how due process, borne out a second time in the post-conviction appeals process, can remedy the continued deprivation of the exoneree’s liberty rights.²² But it is just compensation that is the constitutionally required remedy for the taking of the exoneree’s property rights—in this case, the exoneree’s labor while wrongfully imprisoned.²³

An exoneree’s labor was “taken” by due process when he was convicted.²⁴ Nevertheless, when that due process proves to have resulted in an unjust result, the exoneree’s labor taken by that injustice must now be compensated for.²⁵ The Fifth Amendment demands this payment because the amendment “bar[s] 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.”²⁶

This Note argues that a wrongful conviction has done just that: required one person alone to bear a burden that, “in all fairness and justice, should be

¹⁷ See Cole, *supra* note 4, at 3–4.

¹⁸ U.S. CONST. amend. V.

¹⁹ *Id.* For further reading on the history and original intent of the Fifth Amendment Taking Clause, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

²⁰ Olson v. United States, 292 U.S. 246, 255 (1934).

²¹ *Infra* Section III.A.

²² See Nelson v. Colorado, 137 S. Ct. 1249, 1257 (2017) (“[T]he restoration of liberty on reversal of a conviction is not compensation . . .”).

²³ Knick v. Twp. of Scott, 139 S. Ct. 2162, 2172 (2019) (“Compensation under the Takings Clause is a remedy for the ‘constitutional violation’ that ‘the [owner] has *already* suffered’ at the time of the uncompensated taking.” (quoting San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting))).

²⁴ U.S. CONST. amend. V; see also *id.* amend. XIII, § 1 (allowing slavery or involuntary servitude where a party has been duly convicted).

²⁵ See *Knick*, 139 S. Ct. at 2172.

²⁶ Armstrong v. United States, 364 U.S. 40, 49 (1960). The argument of this Note relies heavily on this concept that individuals should not individually bear the public’s burden, specifically when due process has been proven faulty. See *infra* Part III.

borne by the public as a whole.²⁷ It argues that a wrongful conviction is a taking under the Fifth Amendment and, therefore, an exoneree is constitutionally entitled to just compensation.²⁸ Part I traces the history of wrongful convictions in America and its impact on society.²⁹ It also provides historical background on the Fifth Amendment, from the views of the Constitutional Framers on property to how the Supreme Court has developed its jurisprudence in this area.³⁰ Part II provides the current status of wrongful conviction compensation schemes.³¹ Part III analyzes the structure of the Fifth Amendment,³² how the Supreme Court recognizes takings, and how wrongful convictions fit into that framework.³³ Part IV looks at the impact recognizing a wrongful conviction as a taking would have on the legislature, society, and the criminal justice system as a whole.³⁴ The last Part concludes.³⁵

²⁷ See *infra* Part III.

²⁸ *Id.* This Note specifically limits the discussion to the recognition of a wrongful conviction as a taking and does not discuss the factors that would be included to decide what monetarily just compensation would or could be. See *id.* (analyzing how wrongful convictions are a taking under the Fifth Amendment). But see Erik Encarnacion, *Why and How to Compensate Exonerees*, 114 MICH. L. REV. FIRST IMPRESSIONS 139, 149–51 (2016) [hereinafter *Why and How*] (explaining what just compensation might look like based on income of similarly situated professions). This argument is not intended to be the most desirable avenue for compensation for all exonerees; it is specific to exonerees unable to qualify under other compensation schemes and, by the constitutional language, is limited to a remedy of just compensation. See *infra* Part II (reviewing how compensation schemes qualify and disqualify people for compensation); see also Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239 (2007) (examining the limits of a just compensation remedy). A further limitation on this Note is that this argument will focus on a takings action under the federal Constitution, as opposed to arguing similar causes of action that may be available under each state Constitution. See John Joseph Wallis, *The NBER/Maryland State Constitutions Project: Completed State Constitutions*, NBER/UNIV. MD. STATE CONSTS. PROJECT, www.stateconstitutions.umd.edu/index.aspx (last visited Feb. 26, 2021) (providing a searchable platform for the texts of every state constitution.). Today, all but two state Constitutions have a Takings Clause that give at least the same level of protection as the federal clause, if not more. See Donna M. Nakagiri, *Takings Provisions in State Constitutions: Do They Provide Greater Protections of Private Property than the Federal Takings Clause?*, 1 (Jan. 1, 1999) (J.D. fellowship essay, Michigan State University College of Law) (on file with the Michigan State University College of Law), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1004&context=king> (“[M]ost state constitutions are permeated with protections for private property and . . . most state takings provisions have additional language that provides a basis for greater protection of private property under state constitutions as compared to the federal Takings Clause.”). The two states that do not have a dedicated takings clause are Kansas and North Carolina, each of which grants similar protection in court precedent that has given each state a common law tradition of handling takings claims just as the federal clause does. *Id.* at 18 n.121.

²⁹ See *infra* Section I.A (explaining both the history and impact of wrongful convictions).

³⁰ See *infra* Section I.B (discussing the drafting of the Takings Clause through to the modern jurisprudence).

³¹ See *infra* Part II (examining the current state of the law for wrongful convictions compensation).

³² See *infra* Section III.A (analyzing Fifth Amendment construction).

³³ See *infra* Section III.B (arguing wrongful conviction as an inverse condemnation taking).

³⁴ See *infra* Part IV (discussing the impact this ruling would have on exonerees, society, and the legal system).

³⁵ See *infra* Conclusion (concluding the argument that a wrongful conviction should be ruled as an inverse condemnation Taking).

I. WRONGFUL CONVICTION AND TAKINGS JURISPRUDENCE

There are two historical paths to walk to grasp the relevant legal issues of this argument.³⁶ The first path looks at criminal law, the problem of wrongful convictions, and what compensation for the wrongly convicted currently looks like.³⁷ The second traces the history as well as the jurisprudential evolution of the Takings Clause.³⁸ These two paths intertwine through the concept of property and the rights that come with it.³⁹

A. *Wrongful Convictions*

1. *History of American Wrongful Convictions*

Even before America became a sovereign nation, wrongful convictions had already occurred on its shores with the first case reported in 1673.⁴⁰ When Thomas Cornell Jr.'s mother died, her death was first ruled an accident.⁴¹ However, Thomas was later accused of murdering her.⁴² He was convicted, in part, on the testimony of an uncle who said he had dreams of Thomas murdering his mother and was visited by her ghost, accusing him of the crime.⁴³ Thomas was executed for the murder.⁴⁴

Subsequently, the first recorded wrongful conviction after America became a nation occurred in 1806, but the legal exoneration did not happen until 1984.⁴⁵ Dominic Daley and James Halligan were sentenced to death and executed for the murder of Marcus Lyon.⁴⁶

There were many problems in this case.⁴⁷ For example, Daley and Halligan were given defense attorneys only forty-eight hours before their trial; the citizen who captured them was paid \$500;⁴⁸ they were the only minority visitors in town; they were convicted within minutes; and they were executed the next day.⁴⁹ In 1984, Governor Michael Dukakis issued a legal

³⁶ See *infra* Part I (tracing the history of the Takings Clause as well as the history of wrongful convictions).

³⁷ See *infra* Section I.A (explaining the history of wrongful convictions).

³⁸ See *infra* Section I.B (discussing the history and jurisprudence of the Takings Clause).

³⁹ See *infra* Sections I.A–B.

⁴⁰ ELAINE FORMAN CRANE, *KILLED STRANGELY: THE DEATH OF REBECCA CORNELL* 1–2 (2002).

⁴¹ *Id.* at 17.

⁴² *Id.* at 28, 48.

⁴³ *Id.* at 17–26.

⁴⁴ *Id.* at 57–58.

⁴⁵ *The Daley & Halligan Bicentennial Commemoration*, HISTORIC NORTHAMPTON MUSEUM & EDUC. CTR., <http://www.historic-northampton.org/daleyandhalligan/daleyandhalligan.html> (last visited Nov. 27, 2021).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ \$500 in 1805 is equivalent to \$11,060.33 in 2020. CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1805?amount=500> (last visited Feb. 18, 2021).

⁴⁹ HISTORIC NORTHAMPTON MUSEUM & EDUC. CTR., *supra* note 45.

pardon to Halligan and Daley, 179 years after their execution.⁵⁰ Never was the maxim “the delay of justice, is great injustice” more poignant.⁵¹

Today, the National Registry of Exonerations keeps a current record of every modern exoneration since 1989.⁵² As of this writing, there have been more than 2,900 modern exonerations.⁵³ Those exonerees total more than 25,600 years of wrongful incarceration—an average of nine years per exoneree.⁵⁴ Over forty of those exonerees were incarcerated for thirty years or more.⁵⁵

What was once a hidden risk of the American justice system of which Judge Learned Hand spoke is hardly in the shadows any longer.⁵⁶ Today’s airwaves are inundated with media reports of wrongful convictions on the news, social media, podcasts, and websites.⁵⁷ Pop culture has also picked up on the trend with books, television shows, and movies.⁵⁸ Perhaps, if Judge Hand lived today, he would have called wrongful convictions a real and present nightmare instead of an “unreal dream.”⁵⁹

2. *Impact of Wrongful Conviction*

“It’s impossible to fully grasp the magnitude of the injustice and suffering these [exoneration] numbers represent: careers

⁵⁰ *Id.*

⁵¹ JOHN MUSGRAVE, ANOTHER WORD TO THE WISE, SHEWING THAT THE DELAY OF JUSTICE, IS GREAT INJUSTICE 1 (1646). See Fred Shapiro, *You Can Quote Them: “Justice Delayed is Justice Denied”*, YALE ALUMNI MAG. (Sept./Oct. 2010), <https://yalealumnimagazine.com/articles/2967-you-can-quote-them>, for further reading on historic uses of this phrase.

⁵² NAT’L REGISTRY EXONERATIONS, www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Mar. 14, 2020).

⁵³ *Exonerations Total by Year*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Dec. 21, 2021). The first year the registry started an accurate compilation of exonerations was 1989. *Id.*

⁵⁴ *Id.* While an average may be instructive for the big picture of the problem of wrongful convictions—and is indeed why it is being used here—it is wise to remember that these are not just numbers but years of a person’s life. See *infra* Section I.A.2.i.

⁵⁵ *Exonerations in 2018*, NAT’L REGISTRY EXONERATIONS 9 (Apr. 9, 2019), <http://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf>.

⁵⁶ See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (“Our [system of justice] has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”).

⁵⁷ Ames Grawert, *Wrongful Convictions*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/wrongful-convictions>; see also JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 93 (2009) (“On January 18, 1985, I [Ronald Cotton] was sentenced to life in prison plus fifty years. I stood there as the judge read my sentence. He called me one of the most dangerous men he had ever met; the district attorney said I was a ‘menace to society.’ I could scarcely look at anyone, but I caught a glimpse of my mom and some of my sisters who were able to make it to court that day. They were stunned, like someone had just slapped them. I pinched my right arm as hard as I could. The crescent indent marks on my skin appeared just as the court officers moved in to take me away: This was a nightmare I couldn’t wake up from.”).

⁵⁸ See *supra* note 15 (listing current movies, television shows, books, and podcasts about wrongful convictions).

⁵⁹ *Garsson*, 291 F. at 649.

and opportunities that were lost forever; children who grew up and parents who died while the innocent defendants were in prison; marriages that fell apart—or never happened.”⁶⁰

i. Impact on Exonerees

Financial consequences impact every exoneree, from lost wages to legal bills, compiled from the time of accusation through exoneration.⁶¹ Increasing the financial blow, many exonerees were wrongfully convicted when they were young and imprisoned, while their peers were finishing their education and building their careers.⁶² This creates educational and work history deficits that most exonerees can never surmount.⁶³

Adding insult to injury, services that are available to parolees—people who actually committed crimes, served their sentences, and are then released—such as job placement, temporary housing, and medical care—are generally not available to exonerees.⁶⁴ This is particularly problematic because these services provide a safety net for released prisoners to get back on their feet and reintegrate into society as active, productive members.⁶⁵ Exonerees are especially vulnerable at this reintegration stage because they face all the same struggles of reacclimating to life outside prison that

⁶⁰ *Milestone: Exonerated Defendants Spent 20,000 Years in Prison*, NAT'L REGISTRY EXONERATIONS (2018), <http://www.law.umich.edu/special/exoneration/Documents/NRE.20000.Years.Report.pdf>. See Sion Jenkins, *Secondary Victims and the Trauma of Wrongful Conviction: Families and Children's Perspectives on Imprisonment, Release and Adjustment*, 46 AUSTL. & N.Z. J. CRIMINOLOGY 119, 123–27 (2013) (reporting the effects of parental incarceration on the children of exonerees).

⁶¹ See *Lost Time*, *supra* note 5, at 9 (“After serving nearly 10 years in prison for a crime he didn’t commit, David Shephard’s wages were garnished for failing to pay child support because his girlfriend and their son had been on welfare for a year while he was away. Larry Peterson was expected to retroactively pay for his own public defender. The New Jersey Public Defender’s Office put a lien . . . on Peterson to pay for the cost of representing him. Peterson had to undergo litigation to have the lien removed.” (footnote omitted)).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 10.

⁶⁵ *Id.* David Shepherd was exonerated after spending ten years in prison for a crime he did not commit and then was turned away from four different agencies that provide services for ex-offenders. *Id.* at 9–10. The agencies told him “he could not receive their services since he had not committed a crime.” *Id.* at 10.

parolees do,⁶⁶ but with the added psychological trauma of being wrongfully imprisoned and without the added structural support.⁶⁷

Also compounding the situation is that exoneration does not automatically provide expungement,⁶⁸ which typically requires a separate time-consuming and costly legal proceeding.⁶⁹ Practically speaking, this means that when an exoneree applies for housing or a job, the conviction—but not the exoneration—will show up on a background check.⁷⁰ At best, this leads to an uncomfortable conversation; at worst, the exoneree will not be considered for the opportunity at all and will never get a chance to explain.⁷¹

An exoneree faces further hurdles in the form of detrimental effects from prison life, which often provokes and normalizes criminal behavior.⁷² This

⁶⁶ See Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165, 171 (2004) (finding that the exonerees “had marked and embarrassing difficulties in coping with ordinary practical tasks in the initial days and weeks—for example, crossing busy roads and going into shops. Some had more persistent difficulties (not knowing, for example, how to work central heating, TV remote controls, videos, credit cards, or cashpoints at banks) and experienced shame that prevented them from asking for help. One said, ‘It’s like when someone has a stroke; you have to be taught how to do things again.’ He felt humiliated by his lack of ability and the fact that his wife had to teach him elementary skills. The men also typically had little sense of the value of money, had difficulty budgeting, spent recklessly, and got into debt.”).

⁶⁷ *Id.* at 167–70 (finding evidence of long-term personality changes, PTSD, and other psychiatric disorders in exonerees specifically not found in parolees; the prison sentences for this study group ranged from nine months to nineteen years; all of the subjects had no psychological issues before incarceration). The long-term psychological effects found in this study were similar to the psychological effects found in war veterans. *Id.* at 175. These psychological consequences were found to be specific to long-term imprisonment coupled with the miscarriage of justice. *Id.* at 176 (“The miscarriage of justice typically entailed acute psychological trauma at the time of initial arrest and custody, involving experiences of overwhelming threat. In addition, there was chronic psychological trauma: years of notoriety, fear, and isolation in their claims of innocence. Most spent years preoccupied in pursuing their case, despite knowing or believing that they would never be released on parole as long as they refused to admit their guilt. Additional features specific to the wrongfully convicted were the absence of preparation for release and of post-release statutory support. The long-term imprisonment entailed psychological adaptation to prison, as well as losses – separations from loved ones, missed life opportunities, the loss of a generation of family life, for some, and of years of their expected personal life history.”).

⁶⁸ See *Lost Time*, *supra* note 5, at 10–11 (“Exoneree Keith Turner says, ‘I keep a copy of my pardon on me. Every job, you have to explain yourself. You have to put it on there—rape conviction—because they check it. I always write, ‘I’ll explain at the interview.’” Not all exonerees have a pardon to show; many resort to carrying a news article about their exoneration.”).

⁶⁹ *Id.* at 10.

⁷⁰ *Id.*

⁷¹ *Id.* at 11 (“Many employers are not willing to take a chance on hiring someone who has been in prison—innocent or not. ‘You would be surprised at how many people don’t know what exoneration is,’ Calvin Willis says. ‘The thing of it is that you’ve been to prison. You’ve been exposed. Being free is one thing, but you’ve also experienced being around the criminalistic environment. That right there is like you been contaminated.’”).

⁷² See generally Francis T. Cullen, Cheryl Lero Johnson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011); Paul Nieuwebeerta, Daniel S. Nagin & Arjan A. J. Blokland, *Assessing the Impact of First-Time Imprisonment on Offenders’ Subsequent Criminal Career Development: A Matched Samples Comparison*, 25 J. QUANTITATIVE CRIMINOLOGY 227 (2009); G. Matthew Snodgrass, Arjan A. J. Blokland, Amelia Haviland, Paul Nieuwebeerta & Daniel S. Nagin, *Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands*, 49 CRIMINOLOGY 1149 (2011).

exposure and acclimatization to prison life increases the risk that an exoneree will commit a crime after the exoneree is freed.⁷³ All of these challenges create an almost insurmountable barrier to the exoneree's ability to rebuild his life—a life taken by the government ostensibly intended to protect the public good.⁷⁴

ii. Impact on Society

Blackstone said, “[I]t is better that ten guilty persons escape, than that one innocent suffer.”⁷⁵ When someone is falsely convicted, it is not just that person who suffers, but society as well.⁷⁶ The harms include a more dangerous society, revictimization of victims, and financial costs to the justice system.⁷⁷

Wrongful convictions make society less safe.⁷⁸ First and foremost, they leave the real perpetrators free to commit more crimes.⁷⁹ Moreover, because the purpose of our criminal justice system is to deter crime specifically for the public good, when wrongful convictions occur it sends a message that criminals get away, and crime goes unpunished, thus diminishing the

⁷³ See generally Evan J. Mandery, Amy Shlosberg, Valerie West & Bennett Callaghan, *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553 (2013) (discussing recidivism in the exoneree population).

⁷⁴ See Press Release, Sen. Mark R. Warner, Warner, Cornyn Introduce Bill to Extend Tax Relief Deadline for Wrongfully Convicted (May 22, 2017), <https://www.warner.senate.gov/public/index.cfm/2017/5/warner-cornyn-introduce-bill-to-extend-tax-relief-deadline-for-wrongfully-convicted> (“These are people who, through no fault of their own, were wrongfully convicted by the government.”).

⁷⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES *352. This has come to be known as the Blackstone ratio. See *Blackstone Ratio*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095510389> (last visited Feb. 26, 2021) (“The ratio of 10:1 expressed in the maxim ‘Better that ten guilty persons escape than that one innocent suffer.’”).

⁷⁶ See Daniel Bier, *Quote Files: John Adams on Innocence, Guilt, and Punishment*, SKEPTICAL LIBERTARIAN (Aug. 11, 2014), <https://blog.skepticalibertarian.com/2014/08/11/quote-files-john-adams-on-innocence-guilt-and-punishment/> (quoting John Adams's opening statement for the Defense in the 1770 murder trial of eight British soldiers after the Boston Massacre: “We are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer. The reason is, because it's of more importance to community, that innocence should be protected, than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security. And if such a sentiment as this, should take place in the mind of the subject, there would be an end to all security what so ever.”).

⁷⁷ See *supra* Section I.A.1.i.

⁷⁸ See *infra* Section I.A.1.ii.

⁷⁹ See generally THOMPSON-CANNINO ET AL., *supra* note 57, at 130–33 (explaining that when Ronald Cotton was imprisoned for a rape that Bobby Poole perpetrated, Poole was free to subsequently commit twenty more crimes including robberies, burglaries, and rape before he was finally caught and convicted of one of those subsequent crimes). See also Frank R. Baumgartner, Amanda Grigg, Rachele Ramirez & J. Sawyer Lucy, *The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration*, 81 ALB. L. REV. 1263, 1264–65 (2017/2018) [hereinafter *Wrongful Liberty*] (documenting cases where subsequent crimes were committed by perpetrators who were free because others were falsely convicted of their previous crimes).

deterrent effect of the entire system.⁸⁰ This, in turn, decreases public confidence in the criminal justice system.⁸¹ Further, recidivism in the exoneree population is high, possibly showing that imprisonment of an innocent person creates criminal conduct in people otherwise not predisposed to that behavior.⁸²

Wrongful convictions also cost society financially.⁸³ Costs include those associated with trial and appeals, prison housing, and, in some cases, compensation for wrongful convictions.⁸⁴ Even the most aggressive, tough-on-crime advocates admit that the statistics prove wrongful convictions put an undue strain on state budgets.⁸⁵

Wrongful convictions also revictimize the victims of the original crime and their families.⁸⁶ First, a crime occurs, and the victim must go through the trauma of a trial, which may end in a conviction.⁸⁷ However, in the case

⁸⁰ See generally Nuno Garoupa & Matteo Rizzolli, *Wrongful Convictions Do Lower Deterrence*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 224 (2012).

⁸¹ See generally Marvin Zalman, Matthew J. Larson & Brad Smith, *Citizens' Attitudes Toward Wrongful Convictions*, 37 CRIM. JUST. REV. 51 (2012).

⁸² Recidivism is "[a] tendency to relapse into a habit of criminal activity or behavior." *Recidivism*, BLACK'S LAW DICTIONARY (11th ed. 2019). This term is problematic for exonerees, however, because they are not committing a crime *again*, but are merely committing a crime after imprisonment. See generally Mandery et al., *supra* note 73 (discussing recidivism in the exoneree population). That being said, for efficiency, the term will be used here to refer to an exoneree committing a crime after exoneration. This cycle illustrates the quintessential "but for" causation first year law students are taught to seek out. *But-for Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/but-for_test. (last visited Feb. 26, 2021). "But for" the wrongful conviction and imprisonment of this innocent person, this person would have never committed a crime now. See generally *id.* See generally Mandery et al., *supra* note 73 (showing lack of resources leads to recidivism); Bier, *supra* note 76 (stating when innocent men know they will be punished whether or not they commit a crime, they are more apt to commit a crime); Cullen et al., *supra* note 72 (analyzing how prisons normalize and create more criminal behavior), for theories on why recidivism in the exoneree population happens.

⁸³ See generally Erik Kain, *The High Cost of Wrongful Convictions*, FORBES (June 29, 2011, 12:25 PM), <https://www.forbes.com/sites/erikkain/2011/06/29/the-high-cost-of-wrongful-convictions/> (reporting on a study that found from 1989 to 2010 Illinois had eighty-five exonerations that cost Illinois \$214 million); Rebecca Silbert, John Hollway & Darya Larizadeh, *Criminal Injustice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System*, CHIEF JUST. EARL WARREN INST. L. & PUB. POL'Y 4 (2015) (finding that over a period of twenty-four years, California spent \$282 million on wrongful convictions, including \$120 million for incarceration alone).

⁸⁴ NCIP, *The Cost of Wrongful Conviction*, SANTA CLARA UNIV. SCH. L. (Nov. 8, 2016), <https://law.scu.edu/experiential/northern-california-innocence-project/the-cost-of-wrongful-conviction/>; Kain, *supra* note 83.

⁸⁵ See generally *supra* notes 83–84 and accompanying text.

⁸⁶ See *Wrongful Liberty*, *supra* note 79, at 1286 (documenting cases where subsequent crimes were committed by perpetrators who were free because others were falsely convicted of their previous crimes); SERI IRAZOLA, ERIN WILLIAMSON, JULIE STRICKER & EMILY NIEDZWIECKI, ICF INT'L, *STUDY OF VICTIM EXPERIENCES OF WRONGFUL CONVICTION* iv (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/244084.pdf> ("Victims described the impact of the wrongful conviction as being comparable to, or worse than, their original victimization.").

⁸⁷ See Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. & CRIMINOLOGY 1031, 1040–41 (2015) (discussing the role of the victim from crime through exoneration); see also IRAZOLA ET AL., *supra* note 86, at 4 ("If a suspected offender is identified

of a wrongful conviction, a subsequently litigated exoneration case brings the wrongfully convicted back into court to get them out of prison.⁸⁸ In cases of innocence, the victim frequently struggles with disbelief that the convicted was not, in fact, the perpetrator.⁸⁹ The victim may also struggle with guilt over their testimony and mistaken identification.⁹⁰ A mistake that put an innocent person in prison, robbed families from time with their loved one, and often led to other people being subsequently victimized by the real perpetrator.⁹¹ This guilt is often coupled with a fear that perhaps the perpetrator is still at large and could victimize them again.⁹² Furthermore, if the real perpetrator is apprehended—a much harder prospect after years of the crime being “solved,” and impossible if a statute of limitations has run—the victim may have to go through the whole trial process again.⁹³

With all of the above, the problem of wrongful convictions is not just the harm that they inflict, but that this harm violates the constitutional safeguards to liberty and property.⁹⁴ When a person is convicted and imprisoned, he suffers a loss of liberty, and, with that, his ability to work to realize the fruits of his labor.⁹⁵ This ability to work is what fundamentally allows individuals to create and possess property.⁹⁶ It is this property right that is taken when a person is convicted through due process, and it is this

and arrested, and the prosecutor decides to press charges, a victim may be subpoenaed to testify before a grand jury. Assuming the accused offender is indicted, the victim can choose to attend the arraignment. The time period between a crime and a trial can often be long and challenging for a victim However, it can also be a time of immense stress for crime victims, as they are called on to assist in the investigation and prosecution, testify in court, and discuss the impact the crime has had on their lives.”)

⁸⁸ See IRAZOLA ET AL., *supra* note 86, at 11 (describing the role of the crime victim in the exoneration process).

⁸⁹ *Id.* at iv (“A number of victims described the impact of the wrongful conviction as being comparable to, or worse than, their original victimization. Following the initial shock, many victims reported experiencing feelings of guilt and blame.”).

⁹⁰ *Id.* at 44 (“I was a mess. I was absolutely hysterical [and] distraught. This was way worse than being attacked. And I said over and over again, I’d rather [be victimized] again then [sic] go through this. This was horrible because . . . now I was a perpetrator.”).

⁹¹ *Id.* at 45.

⁹² *Id.* at 44 (“It was harder going through the revictimization than it was through the rape Now you have the same feelings of that pain. You have the same scariness. You have the same fear. You have the same panic, but now you have this flood of guilt on top of it.”).

⁹³ *Id.* at 12 (“In some cases DNA may identify the actual offender; however, without this identification, a closed case may become a cold case. Victims often want assurance that law enforcement will pursue the real perpetrator with the same vigor used to investigate the original crime; however, this is not possible in cases where the statute of limitations has passed.”); *see also Time Limits for Charges: State Criminal Statutes of Limitations*, FINDLAW (Apr. 16, 2020), <https://criminal.findlaw.com/criminal-law-basics/time-limits-for-charges-state-criminal-statutes-of-limitations.html> (listing each state’s criminal statutes of limitations).

⁹⁴ U.S. CONST. amend. V.

⁹⁵ *Infra* Part III.

⁹⁶ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 184–202 (Gryphon Eds. 1994) (1689) (explaining that in labor theory private property is the natural right of one’s own labor, for it is solely through labor that one can attain property).

right—when due process affords an exoneration—that requires just compensation to rectify that taking.⁹⁷

B. *History of the Takings Clause*

Property is considered “the most complete right” a person has.⁹⁸ Being the owner of property “implies the right to complete control of the good,” which means the right “to use property, to enjoy the yields of it, to alienate it, and even to destroy it.”⁹⁹ It is the protection of this intrinsic right that has been upheld and preserved throughout history, necessitating safeguards to be written into law.¹⁰⁰

1. *Pre-Drafting History and Constitutional Creation*

The Takings Clause under the Fifth Amendment has antecedents tracing back to the Magna Carta in 1215 AD.¹⁰¹ The Magna Carta stated that no man should be stripped of his rights or possessions except by lawful judgment.¹⁰² This document drew a line between private individual rights and royal powers, including the royal power to take an individual’s property.¹⁰³ Distinguished English theorists¹⁰⁴ expounded upon the ideas put forth in the

⁹⁷ First Eng. *Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 321 (1987) (“[W]here the government’s activities have already worked a taking . . . no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”).

⁹⁸ Boudewijn Bouckaert, *What Is Property?*, 13 HARV. J.L. & PUB. POL’Y 775, 794 (1990).

⁹⁹ *Id.* See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712–13 (1996), for further reading on what a property right is.

¹⁰⁰ *Infra* Sections I.B.1–2.

¹⁰¹ See Brenda Hale, *Magna Carta: Our Shared Heritage*, 41 J. SUP. CT. HIST. 135, 135 (2016).

¹⁰² *English Translation of Magna Carta*, BRITISH LIBR. (July 28, 2014) [hereinafter *Magna Carta*], <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>.

¹⁰³ Jelena Ristik, *Right to Property: From Magna Carta to the European Convention on Human Rights*, 11 SEEU REV. 145, 145–46 (2015), <https://content.sciendo.com/view/journals/seeur/11/1/article-p145.xml>. King John I would seize property by declaring that the property owner was in violation of a law and subject to the punishment of loss of property; however, he would declare new laws on a whim and announce his subjects in violation of his made-up laws ex post facto. *Id.* at 146. The Magna Carta was written by King John’s barons in an attempt to quash this practice by protecting private owners from royal, sovereign theft. *Id.* It is undisputed that all the barons who drafted the Magna Carta—who represented only the top 20% of the population at the time—were not in agreement on what they wanted from King John. Mark Cartwright, *Magna Carta*, ANCIENT HIST. ENCYC. (Nov. 20, 2018), https://www.ancient.eu/Magna_Carta. This dissension allowed King John, before the royal seal was dry, to appeal to the Pope who declared the Magna Carta illegal and invalid. *Id.* It is not the immediate effect of this practice on society that was the foundation of American law. *Id.* Rather it was the theory and concepts laid out in the document that shaped the minds of English thinkers that influenced the Founding Fathers in how they drafted the founding documents. See *Eminent Domain—The Basic Law*, L. OFF. STIMMEL, STIMMEL & ROESER, <https://www.stimmel-law.com/en/articles/eminant-domain-basic-law> (last visited Nov. 7, 2019) (citing Founding Fathers quotes on theories of property).

¹⁰⁴ See Michael B. Kent, Jr., *From “Preferred Position” to “Poor Relation:” History, Wilkie v. Robbins, and the Status of Property Rights Under the Takings Clause*, 39 N.M. L. REV. 89, 95–96, 111 (2009) (discussing John Locke, Sir William Blackstone, and Sir Edward Coke’s contribution to legal scholarship specific to property interests). Sir Edward Coke (1552–1634) authored *Petition of Rights* and

Magna Carta¹⁰⁵ and from the Bible's teaching on human dignity,¹⁰⁶ putting forth the understanding that a person's property first and foremost came from the ability to work, to create, and to attain that property.¹⁰⁷ Hence, property rights were given through creation, not by governmental rulers.¹⁰⁸

In the American colonies, laws were based on English common law and thus had a strong focus on protecting individual property rights from government interference.¹⁰⁹ During the tumultuous period after the Revolutionary War, under the weak Articles of Confederation, some new states passed laws that redistributed and destroyed individual property rights.¹¹⁰ This destruction was a significant factor in the push to replace the Articles of Confederation with a government that would and could protect individual private property rights.¹¹¹ Accordingly, the Founding Fathers drafted the Constitution and subsequent Bill of Rights, placing national sovereignty with the people, but delegating to the government the role of protecting the rights of the individual.¹¹²

2. *American Takings Jurisprudence*

The government has the power to take property through eminent domain,¹¹³ which generates one of two types of actions under the Takings Clause.¹¹⁴ First, and most widely known, are condemnation actions, which occur when the government files suit in advance to take specific property

Institutes of the Law of England, both expounding on the role of common law in protecting ancient rights against royal power. Edward J. Sullivan, *A Brief History of the Takings Clause*, WASH. UNIV. ST. LOUIS SCH. L., http://landuselaw.wustl.edu/Articles/Brief_Hx_Taking.htm (last visited Jan. 5, 2020). John Locke (1632–1704) wrote in *Two Treatises on Government* that sovereignty resided not in the state but in the legislature that ruled for and as appointed by the people. *Id.* William Blackstone (1723–1780) wrote *Commentaries on the Laws of England*, used for the foundation of legal education in both England and the American colonies, stressing the importance of common law as a protection against royal powers. *Id.*

¹⁰⁵ See generally *Magna Carta*, *supra* note 102.

¹⁰⁶ *Genesis* 1:27 (describing that God created people in His image, and that the people's role as God's image-bearers is the basis on which human dignity lies).

¹⁰⁷ See LOCKE, *supra* note 96, at 185–89.

¹⁰⁸ *Id.* at 188–91.

¹⁰⁹ Jonathan Lahn, Note, *The Uses of History in the Supreme Court's Takings Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233, 1251 (2006).

¹¹⁰ Treanor, *supra* note 19, at 790. See also Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, for further reading on the history and theory of property that formed the basis for the Founders' ideals.

¹¹¹ JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 22–23 (1990).

¹¹² See Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 526–28 (2007) (analyzing how the Founding Fathers came to limit the government's authority over individual rights to a protective role).

¹¹³ *Eminent Domain—The Basic Law*, *supra* note 103.

¹¹⁴ ROBERT MELTZ, CONG. RSCH. SERV., TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY (2015).

and pays just compensation to the owner.¹¹⁵ In contrast, a property owner initiates the second type of lawsuit, claiming that the government, either directly or by conduct, has taken her property without just compensation.¹¹⁶ This takings action is called “inverse condemnation” because it is effectively the procedural reverse of a condemnation action.¹¹⁷ While the majority of takings cases have involved severe regulation of land use, the Takings Clause encompasses all property, real and personal, tangible and intangible.¹¹⁸

Initially, the Fifth Amendment restricted only the federal government.¹¹⁹ However, the Due Process Clause of the Fourteenth Amendment, adopted in 1868, allowed the Bill of Rights to be incorporated to the states.¹²⁰ Incorporation of each right, however, was not automatic.¹²¹ It was not until 1897 that the Takings Clause was incorporated to the states under the Fourteenth Amendment by the Supreme Court.¹²²

A few years after the Fourteenth Amendment was adopted, the legislature passed the Civil Rights Act of 1871, commonly known as Section 1983, which gave private citizens a cause of action to sue a *state* actor for constitutional violations.¹²³ Subsequently, in 1887 the Tucker Act was passed, which allowed an individual to sue the *federal* government for takings infractions.¹²⁴ Citizens now had an equal cause of action to sue for federal constitutional violations, regardless of whether it was the federal or state government that had committed the violation.¹²⁵ Thus, the state or

¹¹⁵ *Id.* The property owner-defendant in a condemnation action will usually challenge a condemnation action arguing the taking is not proper under eminent domain because it is not being taken for the public use. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* The government brings a condemnation action against a property owner, a property owner brings an inverse condemnation action against the government. *Id.* *Inverse Condemnation*, LEGAL DICTIONARY (Apr. 4, 2017), <https://legaldictionary.net/inverse-condemnation/> (“The taking of land, by a government entity, without providing just compensation.”).

¹¹⁸ Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. 105, 109–10; Meltz, *supra* note 114.

¹¹⁹ John Raeburn Green, *The Supreme Court, the Bill of Rights and the States*, 97 U. PA. L. REV. 608, 609 (1949).

¹²⁰ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 14 (5th ed. 2015).

¹²¹ *Id.*

¹²² *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (incorporating the Fifth Amendment Takings Clause to the states).

¹²³ Aditya Bamzai & David N. Goldman, *The Takings Clause, the Tucker Act, and Knick v. Township of Scott*, YALE J. ON REG.: NOTICE & COMMENT BLOG (Oct. 9, 2018), <https://www.yalejreg.com/nc/the-takings-clause-the-tucker-act-and-knick-v-township-of-scott-by-aditya-bamzai-david-n-goldman/>.

¹²⁴ Tucker Act, ch. 359 § 1, 24 Stat. 505 (1887) (current version at 28 U.S.C. §§ 1346(a), 1491).

¹²⁵ See Nick Daum, Case Comment, *Section 1983, Statutes, and Sovereign Immunity*, 112 YALE L.J. 353, 355 (2002) (explaining how Section 1983 allows for constitutional tort actions against a state). The most recent Supreme Court decision to analyze whether § 1983 and Tucker Claims were truly equal found that precedential decisions had given rise to an unequal cause of action between the two. See *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). Takings jurisprudence under § 1983 required an exhaustion in state courts first. *Id.* at 2167. This exhaustion effectively barred the federal claim under the doctrine of Full Faith and Credit. *Id.* Thus, *Knick*, in 2019, overturned the exhaustion requirement, allowing § 1983

federal government could take private property from individuals as long as two constitutional criteria were met: (1) the property must be taken for “public use,” and (2) the property owner must receive “just compensation.”¹²⁶

As early as the 1870s, and for the next fifty years, the issue of inverse condemnation was before the Supreme Court many times, with the Court evaluating not only when the government physically took land from a private citizen, but also when government interference would rise to the level of a taking.¹²⁷ The majority of interference cases finding a taking arose from situations where a government dam flooded private land, and the Court consistently found that the property was taken just as if the government had formally invoked a condemnation action.¹²⁸

In the early years of takings jurisprudence, the Court mainly focused on the question of whether an interference equated to a total physical taking (invasion and appropriation).¹²⁹ If a taking was found, then the Court evaluated whether or not just compensation had been paid.¹³⁰ This focus shifted about a quarter of a century later when the Court began to consider whether government *regulation* could rise to the level of a taking.¹³¹

The landmark case was *Pennsylvania Coal Co. v. Mahon*, where a city passed a law that prohibited mining under homes and residential streets.¹³² This law was enacted after a coal company, which owned mineral rights to

takings claims to come immediately to the federal courts, just as is allowed in Tucker Claims. *Id.* at 2172; see also Miriam Seifter, *Opinion Analysis: Court Overrules Takings Precedent, Allowing More Suits in Federal Court*, SCOTUSBLOG (June 22, 2019, 9:32 AM), <https://www.scotusblog.com/2019/06/opinion-analysis-court-overrules-takings-precedent-allowing-more-suits-in-federal-court/>; see generally Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057 (1989). A federal exoneree, who does not qualify under the federal compensation statute, would have to bring the action under the Tucker Act in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1) (Tucker Act); see also 28 U.S.C. § 1495 (“Damages for Unjust Conviction and Imprisonment”); 28 U.S.C. § 2513 (“Unjust Conviction and Imprisonment”). A state exoneree would have the option to bring a 1983 claim in federal court or sue in state court under the state Constitution. See Ryan Sugden & Marc Simpson, *Owners Can Sue in Federal Court for Inverse Condemnation*, COLO. REAL EST. J. (Oct. 25, 2019), <https://crej.com/news/owners-can-sue-in-federal-court-for-inverse-condemnation/> [hereinafter *Owners Can Sue*] (explaining plaintiffs historically were required to bring their claims against the State or its agencies in state court first until *Knick v. Twp. of Scott*, 139 S. Ct. 2162. In *Knick v. Twp. of Scott*, the Supreme Court ruled that an owner with a takings claim against a State did not first have to exhaust his remedies in state court. *Knick*, 139 S. Ct. at 2172.

¹²⁶ Sullivan, *supra* note 104.

¹²⁷ Meltz, *supra* note 114, at 1.

¹²⁸ For cases in which the Court found a Taking of land because of governmental flooding, see *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Welch*, 217 U.S. 333 (1910); *United States v. Lynah*, 188 U.S. 445 (1903); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

¹²⁹ See *supra* note 128 (listing cases where government interference was ruled a Taking).

¹³⁰ See *id.* (citing cases where a Taking had occurred but just compensation had not been paid).

¹³¹ Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles—Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1325 (1989).

¹³² *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412–13 (1922) (“The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation . . .”).

land, had previously sold the surface rights to developers; the law essentially vitiated the company's minerals rights because they were no longer able to mine the coal.¹³³ In this case, the Court used a partial substantive due process analysis, holding "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹³⁴

For the next fifty years, the Supreme Court erratically used this analysis, creating no consistent approach, often leading to wildly varied results.¹³⁵ The Court did, however, provide some enduring principals,¹³⁶ most notably in *Armstrong v. United States*, which held that the "Fifth Amendment[.] . . . bar[s] 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."¹³⁷

It was not until 1978 that the Court established a coherent approach to deciding takings in *Penn Central Transportation Co. v. New York City*.¹³⁸ Almost ten years later, this led to the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, where it ruled that if a regulatory taking had occurred but was subsequently repealed, the property owner must be compensated for the time the regulation was in effect.¹³⁹ Moreover, recently, in *Horne v. Department of Agriculture*, the Court held that the government has a duty to compensate when it physically takes property, both real and personal (in this case, a farmer's raisin crop).¹⁴⁰ The Court also held that this duty to compensate may not be avoided by saving a property owner a contingent interest.¹⁴¹

¹³³ *Id.* at 413 ("As applied to this case the statute is admitted to destroy previously existing rights of property and contract.").

¹³⁴ *Id.* at 415.

¹³⁵ Meltz, *supra* note 114; *see also* Peterson, *supra* note 131, at 1328–29.

¹³⁶ *See infra* notes 137–48148 and accompanying text.

¹³⁷ 364 U.S. 40, 49 (1960). The argument of this Note relies heavily on this concept that individuals should not individually bear the public's burden specifically when due process has been proven faulty. *See id.*

¹³⁸ 438 U.S. 104 (1978). Through this case the Court laid out three factors to be weighed to determine if a regulatory taking occurred. *Id.* at 124. Those factors were the "(1) economic impact of regulation on [the] property owner; (2) extent to which regulation interferes with distinct investment-backed expectations; and (3) 'character' of government action (meaning principally that regulation of use is less likely to be a taking than physical invasion)." Meltz, *supra* note 114, at 11.

¹³⁹ 482 U.S. 304, 319 (1987) ("Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.").

¹⁴⁰ 576 U.S. 350, 361 (2015) ("[P]eople still do not expect their property, real or personal, to be actually occupied or taken away.").

¹⁴¹ *Id.* at 352 ("The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly when that interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here.").

Over the last 150 years, the Court has allowed takings claims for property including land,¹⁴² worker's benefits,¹⁴³ natural resource rights,¹⁴⁴ interest,¹⁴⁵ trade secrets,¹⁴⁶ liabilities,¹⁴⁷ and raisins.¹⁴⁸ This clearly shows the comprehensive protection the Court has afforded holders of all types of property.¹⁴⁹ Specifically, the Takings Clause allows for the distribution of an individual's privately held property for public use.¹⁵⁰ Still, while the individual bears the burden, the law requires the individual to be compensated as justly as possible for that burden.¹⁵¹ That public burden is never as heavily borne by one person than in the case of wrongful convictions.¹⁵²

II. CURRENT COMPENSATION FRAMEWORK FOR THE WRONGLY CONVICTED

“After years—sometimes decades—in prison for crimes they did not commit, most exonerates never receive meaningful compensation or any consistent, coordinated post-release assistance. They continue to suffer the consequences of wrongful conviction for the rest of their lives.”¹⁵³ “Compensation . . . can never make up for these losses. . . . But if you don't have . . . money[,] . . . you can't afford medical care[,] . . . and you can't get a car[,] . . . a job[,] . . . [or an] education [T]hat's what happens to so many . . . people.”¹⁵⁴

¹⁴² *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980) (finding “property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868 . . . implied an obligation on the part of the Government to make just compensation to the Sioux Nation”).

¹⁴³ *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (finding a taking where a new law required the paying of medical benefits to a company's employee coal miners when the company was no longer in business).

¹⁴⁴ *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (finding a taking when a law stopped a mining company from mining its coal under inhabited areas).

¹⁴⁵ *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (holding the interest on an account taken by the government was a taking because the interest was owned by the client who was the holder of the principal).

¹⁴⁶ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 988 (1984) (explaining the publishing of trade secrets was a taking where the company had a “reasonable investment-backed expectation” from those secrets).

¹⁴⁷ *Griggs v. Allegheny Cnty.*, 369 U.S. 84 (1962) (discussing that the air rights of an airport operated like an easement to land, and its infringement over a residential area constituted a taking that required just compensation).

¹⁴⁸ *Horne v. Dep't of Agric.*, 576 U.S. 351, 361 (2015) (holding that personal property has just as much protection as real property in an appropriations case). See generally Meltz, *supra* note 114, for a further discussion on property the Supreme Court has protected through the Fifth Amendment.

¹⁴⁹ See Saxer, *supra* note 118, at 110 (analyzing the taking jurisprudence for both real and personal property).

¹⁵⁰ Shelley Ross Saxer, *Paying for Disasters*, 68 KAN. L. REV. 413, 414–15 (2020).

¹⁵¹ *Id.* at 417.

¹⁵² See *supra* Section I.A (explaining history of wrongful convictions in America and their impact on the wrongfully accused); see also *infra* Section III.B. (explaining the public good society receives from the incarceration of someone they believe was rightly convicted).

¹⁵³ *The Problem, AFTER INNOCENCE*, <https://www.after-innocence.org/the-problem> (last visited Jan. 8, 2019) (emphasis omitted).

¹⁵⁴ See *Compensation for Exonerates*, *supra* note 4, at 1 (quoting Barry Scheck, Co-Director, INNOCENCE PROJECT in *Frontline: The Burden of Innocence* (PBS television broadcast 2003)).

When an exoneree does get compensation, there are three primary avenues through which it may be obtained: state statutes, lawsuits, and private bills.¹⁵⁵ Each of these methods comes with unique benefits and pitfalls.¹⁵⁶

A. State Statutes

Currently, thirty-seven states, Washington, D.C., and the federal government have compensation statutes.¹⁵⁷ That leaves thirteen states with no legislative avenue for compensation.¹⁵⁸ Generally speaking, state compensation statutes allow an individual to pursue a claim for compensation against the state.¹⁵⁹ State statutes are regarded as the most equitable compensation mechanism in comparison to lawsuits and private bills.¹⁶⁰ The point of statutes is to streamline the process for compensation,¹⁶¹ and statutes are usually hailed by politicians and society as a win for justice.¹⁶² However, each state designs its own compensation statute, with its own parameters that exonerees must meet to qualify for compensation.¹⁶³ These parameters are written to disqualify exonerees from compensation and

¹⁵⁵ *Id.*

¹⁵⁶ See *infra* Part II (explaining the current framework of compensation claims).

¹⁵⁷ *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <https://www.innocenceproject.org/compensating-wrongly-convicted> (last visited Dec. 8, 2021). Of the thirteen states without legislative compensation statutes, two states have recently tried to pass legislation: Delaware, 2021 Bill Tracking DE H.B. 118 (LEXIS), and Oregon, 2021 Bill Tracking OR S.B. 499. See *Compensating the Wrongly Convicted, supra*. Of the remaining eleven states, six have had bills in their legislatures that have failed: Alaska, 2017 Bill Tracking AK H.B. 118 (LEXIS); Arizona, 2019 Bill Tracking AZ S.B. 1359 (LEXIS); Georgia, 2019 Bill Tracking GA H.B. 172 (LEXIS); New Mexico, 1997 Bill Tracking NM H.B. 267 (LEXIS); Pennsylvania, 2013 Bill Tracking PA H.B. 1885; and South Carolina, 2019 Bill Text SC H.B. 3303 (LEXIS). See *Compensating the Wrongly Convicted, supra*. This leaves the last five states—Arkansas, Kentucky, North Dakota, South Dakota, and Wyoming—showing no legislative movement on the topic. *Id.*

¹⁵⁸ See *Compensating the Wrongly Convicted, supra* note 157.

¹⁵⁹ Lauren C. Boucher, Comment, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1084 (2007).

¹⁶⁰ *Compensation for Exonerees, supra* note 4, at 3.

¹⁶¹ See, e.g., Assemb. Bill 316, 2009 Reg. Sess. (Cal. 2009) (enacted) (explaining that the intent of the statute is to “remedy some of the harm caused to all factually innocent people . . . and . . . ease their transition back into society”).

¹⁶² See Jameson Cook, *Wrongful Conviction Compensation Bill Passes State Legislature*, VOICE (Dec. 14, 2016), https://www.voicenews.com/news/wrongful-conviction-compensation-bill-passes-state-legislature/article_7218138e-f52a-5e14-bb8b-54e98d0d7127.html (reporting on the passage of a compensation bill in Michigan); Brad Cooper, *UPDATED: Legislature Passes Bill Compensating Wrongfully Convicted*, SUNFLOWER STATE J. (May 3, 2018), <https://sunflowerstatejournal.com/senate-agrees-to-compensation-for-wrongfully-convicted> (updating on the passage of a Kansas compensation bill); Betsy Z. Russell, *Wrongful Conviction Compensation Bill Passes House Unanimously*, IDAHO PRESS (Feb. 19, 2020), https://www.idahopress.com/eyeonboise/wrongful-conviction-compensation-bill-passes-house-unanimously/article_8137126d-8c2e-53d8-a7c4-7476a7effbc8.html (celebrating the passage of an Idaho compensation bill).

¹⁶³ Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, 23 CRIM. JUST. POL’Y REV. 352, 358–59 (2012).

typically fall into a few categories: (1) disqualifying behavior;¹⁶⁴ (2) exoneration rulings;¹⁶⁵ (3) standards of proof;¹⁶⁶ (4) statute of limitations,

¹⁶⁴ Statutes with these provisions disqualify exonerees for a variety of behaviors including having a prior felony conviction, engaging in behavior that contributed to the wrongful conviction, or entering a guilty plea. Miller, *supra* note 6; Norris, *supra* note 163 at 359. This disqualifier, a felony conviction, was the reason Clifford Williams, the exoneree from Florida in the introduction, was not able to collect compensation. Miller, *supra* note 6. *See also Facts and Figures*, FALSECONFESSIONS.ORG, <https://falseconfessions.org/fact-sheet> (last visited Jan. 20, 2020) (“According to the Innocence Project, 25% of wrongful convictions overturned by DNA evidence involve a false confession . . .”). A contributing factor can be a misconstrued finding of fact. Justin Brooks & Alexander Simpson, *Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins*, 49 SAN DIEGO L. REV. 627, 649–50 (2012). In the case of Timothy Atkins, the administrative commission reviewing his claim for compensation found he contributed to the conviction because he ran when the police first approached him. *Id.* at 644, 650. The compensation commission found this even though Atkins’s testimony was ruled credible and was not a factor considered by the original trial court influencing his conviction. *Id.* at 644. *See Innocents Who Plead Guilty*, NAT’L REGISTRY EXONERATIONS (Nov. 24, 2015), www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf (explaining 15% of known exonerees pled guilty). In 1996, Rodney Roberts, who was working a good job and living with his infant son, was arrested for an altercation with a friend. *Why Rodney Roberts Pleaded Guilty to a Crime He Did Not Commit*, INNOCENCE PROJECT (Jan. 30, 2017), <https://www.innocenceproject.org/why-rodney-roberts-pleaded-guilty>. The prosecutors offered to accept a guilty plea in exchange for a seven-year sentence. *Id.* His court appointed attorney advised him to take the deal or he would risk receiving a life sentence. *Id.*

¹⁶⁵ A second parameter in some statutes is the exoneration ruling required to qualify for compensation. *See* Brooks & Simpson, *supra* note 164, at 639–40; *see also* Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 371 nn.7–8 (2017) [hereinafter *Reexamination*] (listing Colorado, D.C., Iowa, Louisiana, Maine, Massachusetts, Michigan, Nebraska, New Jersey, Oklahoma, and Wisconsin as places requiring an actual innocence ruling and Maine, Maryland, North Carolina, and Tennessee as states requiring a pardon from the governor). For a deeper comparison of compensation laws, *see* Norris, *supra* note 163.

¹⁶⁶ A third parameter in some statutes is the requirement of a separate ruling on the facts of a case, after and separate from the exoneration proceeding, to decide if an exoneree qualifies for compensation. Brooks & Simpson, *supra* note 164, at 641–42. The separate ruling will typically require a specific burden of proof, either innocent by a preponderance of evidence or clear and convincing evidence. *Id.* “Clear and convincing evidence” means that the evidence is highly and substantially more likely to be true than untrue, or highly probable. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). “Preponderance of the evidence” means there is a greater than 50% chance the claim is true. *Preponderance of the Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Feb. 5, 2020); *see also Clear and Convincing Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/clear_and_convincing_evidence (last visited Feb. 5, 2020) (explaining a “clear and convincing” standard is more rigorous than a “preponderance” standard, but less rigorous than a “beyond a reasonable doubt” standard). This evidentiary showing will be required in whatever forum the state sets up by statute to hear compensation claims, separate from the exoneration ruling, under a separate ruling body. *See* Brooks & Simpson, *supra* note 164, at 644 (discussing exoneree Tim Atkins’s compensation claim before the California Victims Compensation Board).

access, and timing issues;¹⁶⁷ and (5) waiver of other claims.¹⁶⁸ These parameters are problematic because if a statute does not *actually* allow exonerees to get compensated, the statute is not a win for anyone.¹⁶⁹ Even though state statutes seek to give streamlined and uniformed processes for compensating the wrongfully convicted, in actual effect, these disqualifiers provide convoluted and irregular results, leaving many exonerees without any compensation or recourse.¹⁷⁰

B. *Civil Lawsuits*

Another avenue that may be available to compensate an exoneree is a civil lawsuit for misconduct against government officials.¹⁷¹ This avenue is only available to exonerees who can prove official wrongdoing.¹⁷² If the conviction was based on misidentification, outdated science, perjury by a layperson, or a false confession—without more—then it is not official misconduct, and the exoneree will have no legal remedy.¹⁷³ Further complicating this remedy, government officials are frequently shielded from civil liability by immunity doctrines that create a very high bar to succeed in

¹⁶⁷ A fourth parameter in some statutes can involve a statute of limitations, access to the compensation system, and other timing issues. See Daniel S. Kahn, *Presumed Guilty until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 144–45 (2010) (explaining these parameters). A statute of limitations balances the competing interests of giving the exoneree enough time to file a claim and giving the state protection from an onslaught of delayed claims that undermine its ability to plan for budgetary liabilities. *Id.* at 144.

¹⁶⁸ The fifth and last parameter in some statutes is the requirement that an exoneree waive all other claims and remedies. *Compensation for Exonerees*, *supra* note 4, at 3. Waiver is reasonable in states that have a robust compensation award system. *Id.* By contrast, when an exoneree has a case of egregious misconduct and is in a state with a more modest statutory scheme, the exoneree must choose between a tort claim that could yield millions or possibly nothing, and a far inferior but more certain award under the state's statutory compensation. *Id.* (“Lawsuits can result in larger payouts than state statutes, but they require exonerees to take risks. The exoneree may win big or lose altogether. Lawyers may be unwilling to take such lawsuits if the prospects for a favorable outcome are not great.”).

¹⁶⁹ See Brooks & Simpson, *supra* note 164, at 635 (explaining that statutes are frequently flawed and misinterpreted).

¹⁷⁰ See *id.* (analyzing the flaws in state compensation statutes).

¹⁷¹ See generally Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439 (2009) (dissecting the legal hurdles to litigating civil claims from a wrongful conviction).

¹⁷² *Id.*

¹⁷³ See generally *id.*

a tort claim.¹⁷⁴ Additionally, this method is costly, time consuming, and requires a civil attorney.¹⁷⁵

C. *Private Bills*

The final and most complicated avenue for compensation is a private bill—state legislation providing individual relief.¹⁷⁶ This type of legislation requires political clout, extraordinary advocacy, and a protracted timeframe of legislative procedures—all with no guaranteed or consistent results.¹⁷⁷ This method has never been an efficient, predictable, or sustainable avenue for compensation.¹⁷⁸ It is particularly limited in its effectiveness due to the recent upswing in the number of exonerations occurring each year.¹⁷⁹

III. ANALYZING A TAKINGS REMEDY FOR WRONGFUL CONVICTION COMPENSATION

A wrongful conviction is an infringement on an individual's liberty and property rights that the safeguards of due process did not protect against.¹⁸⁰ However, a wrongful conviction is also an illustration of how due process, borne out a second time in the post-conviction appeals process, can remedy that deprivation of the exoneree's liberty rights.¹⁸¹ Following logically, where due process restores the exoneree's liberty, just compensation is the constitutionally required remedy for the taking of the exoneree's property—in this case, the exoneree's labor.¹⁸²

¹⁷⁴ *Id.* at 440 n.5 (“A principal source of difficulty with respect to these claims, as with all § 1983 claims, is the judge-made doctrine of qualified immunity In general, . . . a wrongfully convicted person will be denied a civil rights remedy unless he can prove not only that his constitutional rights were violated, but that a reasonable officer would have known that his specific conduct violated clearly established constitutional rights. In the hands of conservative jurists this doctrine is a considerable hurdle for plaintiffs to overcome.”).

¹⁷⁵ Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403, 403 (2009).

¹⁷⁶ See *Compensation for Exonerees*, *supra* note 4, at 3 (“Private bills are inequitable and inefficient. Politically connected, well represented, or especially sympathetic exonerees may get compensated, while others are not.”).

¹⁷⁷ See Bernhard, *supra* note 175, at 407–09.

¹⁷⁸ *Id.*

¹⁷⁹ See Interactive Data Display on Exonerations by State and Total by Year, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Jan. 24, 2020) (showing exonerations by state and other information, updated daily).

¹⁸⁰ *Supra* Section I.A.2.ii.

¹⁸¹ See generally *Merges*, *supra* note 22.

¹⁸² *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2172 (2019) (“Compensation under the Takings Clause is a remedy for the ‘constitutional violation’ that ‘the [l]owner has *already* suffered’ at the time of the uncompensated taking.” (quoting *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 654 (1982) (Brennan, J., dissenting))).

A. *Fifth Amendment Construction*

The Fifth Amendment primarily provides constitutional protections for individual rights against the police power.¹⁸³ The government is limited by the Fifth Amendment, primarily in the context of prosecutions, but it also limits the government's power to take property from its citizens.¹⁸⁴

There is a significant difference between the liberty rights stated at the beginning of the Fifth Amendment and the concluding clause that gives protection to private property.¹⁸⁵ It feels out of place, but this last clause is the only clause in the Fifth Amendment with a separate remedy.¹⁸⁶ The first listed rights seek to protect an individual's liberty and offer due process as a way to remedy violations of these rights.¹⁸⁷ While these pieces of the Amendment point toward due process—what must be done and how to ensure the process is fair—the last piece gives a substantive remedy: just compensation.¹⁸⁸ Therefore, when the interests of the public infringe on an individual's property rights, this Amendment dictates that just compensation is required.¹⁸⁹

B. *Wrongful Convictions Are Akin to an Inverse Condemnation Taking*

In the instance of a conviction, due process allows the government to incarcerate a person for the public good.¹⁹⁰ This incarceration includes the complete appropriation and regulation of an inmate's labor.¹⁹¹ Thus, when

¹⁸³ *Fifth Amendment: An Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fifth_amendment (last visited Nov. 6, 2019).

¹⁸⁴ *The Fifth Amendment*, VOICE OF AM. (Jan. 19, 2018), <https://editorials.voa.gov/a/the-fifth-amendment/4216357.html>.

¹⁸⁵ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

¹⁸⁶ *Id.* (“without just compensation”).

¹⁸⁷ See generally *The Fifth Amendment: An Overview*, *supra* note 184 (breaking down the rights enumerated in the Fifth Amendment and the remedies provided by the plain text).

¹⁸⁸ *Id.* (explaining compensation is a substantive remedy). A common argument is calling everything in the Fifth Amendment “substantive due process.” *Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process (last visited Feb. 25, 2020). I reject this theory and propose that the clauses were not intended to be combined, hence the semicolon. *But see generally* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 589–90 (2009) (discussing the debate among scholars if the Fifth Amendment protects only substantive rights, only procedural rights, or both).

¹⁸⁹ Gedicks, *supra* note 188, at 665–66.

¹⁹⁰ See generally Joshua A. Jones, *Wrongful Conviction in the American Judicial Process: History, Scope, and Analysis*, 4 INQUIRIES J. (2012), www.inquiriesjournal.com/articles/682/wrongful-conviction-in-the-american-judicial-process-history-scope-and-analysis (explaining the judicial process in the United States).

¹⁹¹ See *infra* Section III.B.1–2 (discussing how the appropriation and regulation of an exoneree's labor is a taking).

the conviction is later overturned by the due process of a post-conviction proceeding, the second due process nullifies the first, making the original conviction and incarceration no longer justified.¹⁹²

The Court was clear in *Nelson v. Colorado* that the second due process resulting in exoneration *erases* the conviction.¹⁹³ Accordingly, the Fifth Amendment demands just compensation for the property interest that was taken: the exoneree's labor.¹⁹⁴

Historically, courts have answered a few questions when deciding takings claims. Was there a taking of property?¹⁹⁵ How did the taking occur?¹⁹⁶ When did the taking occur?¹⁹⁷ Was the taking from government action and for the public good?¹⁹⁸ These are the same questions that need to be answered to recognize a wrongful conviction as a taking.¹⁹⁹

1. *Was There a Taking of Property?*

“‘Property’ is a word of very broad meaning, and when used without qualification, expressly made or plainly implied, it reasonably may be construed to include obligations, rights, and other intangibles as well as physical things.”²⁰⁰ To that end, the Supreme Court has explained that the Constitution does not create property interests—it merely protects them.²⁰¹ Property interests are thus determined “by existing rules of understandings that stem from an independent source such as state law.”²⁰² Put plainly, the Supreme Court has articulated that the entitlement of a property right is grounded in state law, and such a right, once given, is then protected by the Constitution.²⁰³ In light of this, it is state law, affirmed and galvanized by

¹⁹² See *Nelson v. Colorado*, 137 S. Ct. 1249, 1255, 1258 (2017) (holding that when a conviction is invalidated with no prospect of re-prosecution, due process requires that the presumption of innocence attaches ab initio).

¹⁹³ *Id.*

¹⁹⁴ See generally Martin S. Goldberg, *Recent Developments: First English Evangelical Church of Glendale v. County of Los Angeles: Tile Evolution of the Just Compensation Clause—Court Requires Monetary Compensation for Temporary Regulatory Taking of Property*, 18 U. BAL. L.F. 33 (1987) (discussing the evolution of takings jurisprudence); see also *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304 (1987) (holding if a regulation takes property, where the government believes it can rightly take it, the Takings Clause requires compensation to be paid from the time the taking occurred until the date it was returned).

¹⁹⁵ See *infra* Section III.B.1 (explaining what property was taken).

¹⁹⁶ See *infra* Section III.B.2 (arguing a wrongful conviction could be a regulatory or physical appropriation taking); see also, e.g., *Horne v. Dep't of Agric.*, 576 U.S. 350, 359–61 (2015) (holding that personal property has just as much protection as real property in an appropriation case); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (ruling a taking when a law stopped a mining company from mining its coal under inhabited areas).

¹⁹⁷ See *infra* Section III.B.3 (describing when a taking occurred).

¹⁹⁸ See *infra* Section III.B.4 (discussing why there was government action for the public good).

¹⁹⁹ See *infra* Section III.B.

²⁰⁰ *Fidelity & Deposit Co. of Md. v. Arenz*, 290 U.S. 66, 68–69 (1933).

²⁰¹ *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

²⁰² *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

²⁰³ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

the Supreme Court, that will lay the foundation for the argument that an exoneree has a compensable property right in her labor that was taken by her wrongful conviction.²⁰⁴

Many arguments have historically been made on what should be considered property that was taken from an exoneree.²⁰⁵ This Note argues that a compensable property right taken from an exoneree by a wrongful conviction is the taking of an exoneree's labor during incarceration.²⁰⁶ Labor has been held to be a property right in twenty-three states²⁰⁷ and upheld by

²⁰⁴ See *id.* (“The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’ [citations omitted]”).

²⁰⁵ See Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684, 697 (1912) (arguing that a loss borne by an individual should be borne by the whole, but not making a direct property argument); Erik Encarnacion, *Backpay for Exonerees*, 29 YALE J.L. & HUMANS. 245, 246–48 (2017) (comparing incarceration to holding a job and suggesting that compensation could be paid as a wage for time served); *Why and How*, *supra* note 28, at 145 (arguing that a wrongful conviction is a strict liability wrong and thus exonerees should be entitled to compensation, further setting up what adequate compensation might look like); John Martinez, *Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property”*, 59 HASTINGS L.J. 515, 516 (2008) (arguing that a wrongful conviction is a taking of liberty, which should be looked at just as if it were a taking of property); Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 97–98 (2004) (making a takings-based argument for compensation of an exoneree's labor based on states that have already ruled that labor is property). Master wrote his Note in 2004, when most states did not have compensation statutes. *Id.* at 104. His Note argues that a takings argument is a stop gap until legislative schemes catch up to the demand of the injustice. *Id.* at 148.

²⁰⁶ See *infra* note 212 and accompanying text (discussing the Founders' understanding of labor, not only as property but as the source of all property, derived from the work of John Locke). See also *Holden v. Hardy*, 169 U.S. 366, 391 (1898) (“As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.”).

²⁰⁷ See *Eliasberg Bros. Mercantile Co. v. Grimes*, 86 So. 56, 58 (Ala. 1920) (“Money or any other thing of value, acquired as gain or profit from capital or labor, is property; in the aggregate these acquisitions constitute income; and, in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property.”); *De Lisio v. Alaska Superior Ct.*, 740 P.2d 437, 442 (Alaska 1987) (holding the appropriation of an attorney's labor is a taking); *New Method Laundry Co. v. MacCann*, 161 P. 990, 991–92 (Cal. 1916) (“This right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property. Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner.”) (citations omitted); *Bd. of Comm'rs v. Rocky Mountain News Printing Co.*, 61 P. 494, 496 (Colo. App. 1900) (“Everything which has an exchangeable value is property. The right of property includes the power to dispose of it according to the will of the owner. Labor is property.”) (citations omitted); *State v. Wordin*, 14 A. 801, 802 (Conn. 1887) (noting that a doctor's services are a property that may be utilized by the community); *Fortune v. Braswell*, 77 S.E. 818, 819 (Ga. 1913) (“Indeed, it will not be seriously controverted that the right to labor and the right to contract with others to labor upon one's property are to be regarded as property within the meaning of the constitutional guaranty.”); *W. & Atl. R.R. Co. v. Bishop*, 50 Ga. 465, 470 (1873) (“Labor is property, and the laborer has, and ought to have, the same right to contract in reference to it as other freemen have in reference to their property.”); *Olson v. Idora Hill Mining Co.*, 155 P. 291, 293 (Idaho 1916) (“[L]abor is property for which due compensation is to be paid.”); *Mathews v. People*,

67 N.E. 28, 32 (Ill. 1903) (“[T]he privilege of contracting . . . is a property right. . . . Labor is property.”) *Ritchie v. People*, 40 N.E. 454, 455 (Ill. 1895) (“The right to use, buy, and sell property and contract in respect thereto is protected by the constitution. Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner.”); *Republic Iron & Steel Co. v. State*, 66 N.E. 1005, 1007 (Ind. 1903) (“Labor is property. It is exchangeable for food and raiment and comforts, and may be bought and sold, and contracts made in relation thereto, the same as concerning any other property.”); *Coffeyville Vitriified Brick & Tile Co. v. Perry*, 76 P. 848, 850 (Kan. 1904) (“Labor is property. The laborer had the same right to sell his labor and to contract with reference thereto as any other property-owner.”); *Dasch v. Jackson*, 183 A. 534, 538 (Md. 1936) (“It is a recognized principle of American constitutional law that every man has the right to labor, to contract, to hold property, and in his own way to pursue happiness.”); *Raymer v. Trefry*, 132 N.E. 190, 192 (Mass. 1921) (“Property is a word of large import. It has been interpreted as including the right to make contracts for labor and for personal service.”); *Bogni v. Perotti*, 112 N.E. 853, 855 (Mass. 1916) (“It was settled that the right to labor and to make contracts to work is a property right Controversy on that subject before this court must be regarded as put at rest The right to work, therefore, is property. One cannot be deprived of it by simple mandate of the Legislature. It is protected by the Fourteenth Amendment to the Constitution of the United States and by numerous guarantees of our Constitution. It is as much property as the more obvious forms of goods and merchandise, stocks and bonds. That it may be also a part of the liberty of the citizen does not affect its character as property.”); *S. Bus Lines, Inc. v. Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am.*, 38 So. 2d 765, 771 (Miss. 1949) (“Labor is property. To deprive the laborer and the employer of this right to contract peaceably with one another is to violate the Fifth and Fourteenth Amendments of the Constitution of the United States”); *State ex rel. Evans v. Gordon*, 149 S.W. 638 (Mo. 1912); *Branson v. Indus. Workers of the World*, 95 P. 354, 361 (Nev. 1908) (“The right to labor is property. It is one of the most valuable and fundamental of rights. The right to work is the right to earn one’s subsistence, to live and to support wife and family. The right of master and servant to enter into contracts, to agree upon the terms and conditions under which the one will employ and the other will labor, is property.”); *Bayonne Textile Corp. v. Am. Fed’n of Silk Workers*, 168 A. 799, 804 (N.J. Ch. 1933) (“Labor is property; capital is property; both must be safeguarded.”); *W. Walley, Inc. v. Saks & Co.*, 41 N.Y.S.2d 739, 744 (N.Y. App. Div. 1943) (“The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.”) (citations omitted); *Kealey v. Faulkner*, 7 Ohio N.P. (n.s.) 49, 60 (Ct. Com. Pl. 1907) (holding labor and the right to contract is property); *Nation v. Chism*, 6 P.2d 766, 770 (Okla. 1931) (“[T]he right to labor or to seek employment, or to continue the relation of employer and employee, is also a property right.”); *Commonwealth v. Brown*, 8 Pa. Super. 339, 343 (1898) (“Labor is property, and every laboring man has the indefeasible right to enter into any contract for the sale of his labor that in his opinion will be the most advantageous and remunerative to himself, provided he does not infringe upon the rights of others in so doing.”); *Ex parte Hollman*, 60 S.E. 19, 30 (S.C. 1908) (“It is equally true that labor is property, and the right to contract for labor is a property right.”); *State v. Smith*, 273 S.W.2d 143, 147 (Tenn. 1954) (“[T]his Court has held that labor is property.”); *Jordon v. State*, 103 S.W. 633, 634 (Tex. Crim. App. 1907) (“As we understand the question, labor is property, and the laborer has the same right to sell his labor and make contracts with reference thereto as he would any other property he had.”); *State v. Cadigan*, 50 A. 1079, 1081 (Vt. 1901) (“To deprive one of the right to labor and transact business is to deprive him of his liberty, and also of his property.”); *Int’l Ass’n of Machinists Dist. 10 v. Wisconsin*, No. 2015CV000628, 2016 Wisc. Cir. LEXIS 1, at *10 (Wis. Cir. Ct. 2016) (“Plaintiffs plainly theorize that services constitute property under the law and the Court agrees. The conclusion is logical. Labor is a commodity that can be bought and sold. A doctor, a telephone company, a mechanic—all would be shocked to find they do not own the services they perform.”).

In some states, the idea that labor is property has been discussed in dissenting opinions. *McNamara v. State*, 181 N.E. 512, 516 (Ind. 1932) (“Employment or labor and the right to labor constitute property . . . and whatever deprives one of his right to labor deprives him of his property.”) (Martin, J., dissenting); *Benschoter v. Hakes*, 8 N.W.2d 481, 493–94 (Iowa 1943) (“It is an inalienable and inherent right of every man and woman . . . to deal with and make contracts affecting their property and right to labor as they

the U.S. Supreme Court multiple times.²⁰⁸ Therefore, as the Massachusetts Supreme Court held in 1916, “[i]t [is] settled that the right to labor . . . is a property right,” and one hundred years later, that right is still well-settled.²⁰⁹

2. *How Did the Taking Occur?*

A wrongful conviction can be argued either as a physical appropriation taking or a regulatory taking.²¹⁰ A regulatory taking, in effect, says that while one’s property is not physically taken, the government’s regulation of it, for the public benefit, deprives the property owner of all economic use of the property.²¹¹ Hence, in an exoneration context, imprisonment strips an inmate of all economic benefit of his labor, depriving him of the only exertion—work—that can bring about property.²¹²

In *Pennsylvania Coal Co. v. Mahon*, the regulatory takings case about the coal company, expounded on above, held that “the right to coal consists in the right to mine it.”²¹³ “To make [mining coal] commercially impracticable . . . has very nearly the same effect . . . as appropriating or destroying it.”²¹⁴ The ordinance in *Mahon* did not take the company’s physical property, but impeded the ability of the company to use its labor to extract value from its property.²¹⁵ Likewise, a person who is wrongly

see fit. Such rights are recognized and safeguarded by provisions of both the state and United States Constitutions.”) (Bliss, J., dissenting); *O’Connell v. State Bd. of Equalization*, 25 P.2d 114, 123 (Mont. 1933) (noting that labor is a piece of the whole that makes up property) (Callaway, C.J., dissenting); *Int’l Union of Operating Eng’rs v. Sand Point Country Club*, 519 P.2d 985, 991 (Wash. 1974) (“With the right to labor and to contract for labor regarded as a property right under the American common law.”) (Hale, C.J., dissenting).

²⁰⁸ See *Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020) (holding the theft of labor can undergird a theft of property case); *Butler v. Perry*, 240 U.S. 328, 333 (1916) (“[F]or some purposes labor must be considered as property.”); *Adair v. United States*, 208 U.S. 161, 172 (1908) (“[L]iberty and [property] right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one’s own labor . . .”); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) (“[P]ursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of . . . rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.”).

²⁰⁹ *Bogni v. Perotti*, 112 N.E. 853, 855 (Mass. 1916) (citing *Adair*, 208 U.S. at 173–75; *Coppage v. Kansas*, 236 U.S. 1, 10 (1915)).

²¹⁰ See Tom R. Shapiro & Tava M. Ostrenger, *Preparing for and Litigating Unexpected Inverse Condemnation Claims*, LEAGUE CAL. CITIES pt. II (May 4, 2016), <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Spring-2016/5-2016-Spring-Preparing-for-and-Litigating-Unexpec> (“The [government], in most cases, has not engaged in the activity with the intent to take the property, but merely to assert some form of control over its use through the implementation of a regulation or an exercise of its police power to protect public health, safety, and welfare.”).

²¹¹ See *id.* at Section II.B (explaining what a regulatory taking is).

²¹² LOCKE, *supra* note 96, at 184–202 (explaining ownership of private property is based on the natural right of one’s ownership of one’s own labor, and the right to nature’s common property to the extent that one’s labor can utilize it).

²¹³ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (quoting *Commonwealth v. Clearview Coal Co.*, 256 Pa. 328, 331 (1917)).

²¹⁴ *Id.*

²¹⁵ *Id.* at 412–14.

imprisoned has his ability to use his labor—the only means of earning property—taken by his incarceration.²¹⁶ The taking in *Mahon* is analogous to the taking of an exoneree’s work because the work of mining being hindered meant no right to labor, and thus no realization of the property—coal.²¹⁷ Likewise, the taking of an exoneree’s ability to work means no realization of the fruits of his labor.²¹⁸

A wrongful conviction is also analogous to a taking of an exoneree’s work by physical appropriation.²¹⁹ This is because while imprisoned, the government *actually* physically appropriates the exoneree’s labor and has the constitutional authority to do so by the Thirteenth Amendment.²²⁰ The Thirteenth Amendment allows the appropriation of an inmate’s labor as punishment for a valid conviction.²²¹ However, once the conviction is invalidated, that appropriation, once allowed as a punishment, must now be compensated for as a taking.²²²

This taking by physical appropriation argument is supported by *Horne v. Department of Agriculture*, mentioned previously, where raisin growers had a portion of their crops physically set aside for government use.²²³ Tellingly, in deciding *Horne*, the Supreme Court was divided on whether the case should be ruled a regulatory takings case or a physical appropriation takings case.²²⁴ The majority of the Court held *Horne* as an appropriation case because a portion of the raisins were physically required to be set aside.²²⁵ The Court held that it was “the government’s ‘categorical duty’ under the Fifth Amendment to pay just compensation when it ‘physically takes possession of an interest in property,’” including personal property.²²⁶ So when the government has complete control over a prisoner, including complete control over his labor—a personal property interest—then that

²¹⁶ See *Rights of Inmates*, FINDLAW (July 20, 2017), <https://civilrights.findlaw.com/other-constitutional-rights/rights-of-inmates.html> (listing the limited rights an incarcerated person has).

²¹⁷ *Mahon*, 260 U.S. at 412–14.

²¹⁸ See *id.* at 414 (“To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”).

²¹⁹ See *infra* pp. 29–31.

²²⁰ U.S. CONST. amend. XIII, § 1.

²²¹ *Id.*

²²² *Accord* *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (holding when a conviction is invalidated with no prospect of re-prosecution, due process requires that the presumption of innocence attaches *ab initio*).

²²³ *Horne v. Dep’t of Agric.*, 576 U.S. 351, 354 (2015).

²²⁴ *Id.* at 354–70. *But see id.* at 377–88 (Sotomayor, J., dissenting) (arguing against the majority’s view that the Taking was by physical appropriation and that it should be held as regulatory, and thus the retained interest was reasonable and would cut off a claim for just compensation).

²²⁵ *Id.* The dissenting opinion clearly argued against the majority’s holding specifically by viewing the case as a regulatory taking (where the majority saw it as a physical taking) and therefore explained that as a regulatory taking, without total deprivation, there can be no taking. *Id.* at 377–88 (explaining the retention of an interest vitiates a claim for a *per se* taking).

²²⁶ *Id.* at 357 (majority opinion) (quoting *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012)).

interest has been completely physically appropriated by the government.²²⁷

Complicating the analysis in *Horne* was that the raisin growers were not paid for the portion of raisins taken, but the Hornes reserved an interest in any net profit if the government utilized the appropriation.²²⁸ The Court held that allowing the owner to retain an interest in the appropriated raisins was by no means equivalent to paying just compensation.²²⁹ This is helpful to the exoneration analysis because many exonerees earn a wage from prison jobs, and these wages are analogous to the Hornes's retained interest.²³⁰ All of the circuit courts agree that prisoners are generally not considered employees in their prisons, and thus are not entitled to compensation or protection under the Fair Labor Standards Act.²³¹ Indeed, multiple circuits have held that inmates have no constitutional right to compensation for their labor as inmates, and any such wage is "by grace of the state."²³² Just as the Court found in *Horne* that the retained interest did not preclude a physical appropriation takings claim for just compensation, the retained wages of an exoneree's prison labor also should not vitiate a claim for just compensation from the taking of the exoneree's labor once the underlying conviction has been invalidated.²³³

Further, when an inmate is imprisoned, he is physically under the control of the governmental corrections agency.²³⁴ It is the correctional agency that chooses to contract out the inmate's labor, to use the labor within the prison, or

²²⁷ See *infra* notes 230–31 and accompanying text.

²²⁸ *Horne*, 576 U.S. at 352 (explaining that, in the two years prior to the case filing, the Hornes did not receive any money from this retained interest).

²²⁹ *Id.* at 363. *But see id.* at 385–86 (Sotomayor, J., dissenting) (explaining that the retention of an interest vitiates a claim for a per se taking).

²³⁰ See PRISON POL'Y INITIATIVE, *Prison Labor: Prison Labor in the Federal Prisons; Prison Labor in the States*, in THE PRISON INDEX: TAKING THE PULSE OF THE CRIME CONTROL INDUSTRY, <https://www.prisonpolicy.org/prisonindex/prisonlabor.html> (last visited Jan. 25, 2020) (citing U.S. GEN. ACCT. OFF., GAO/GGD-93-98, PRISONER LABOR: PERSPECTIVES ON PAYING THE FEDERAL MINIMUM WAGE 19 (1993)). These jobs pay on average less than \$2 per hour. See Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 28, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> (reporting the average low wage as \$0.14 per hour, and the average high wage as \$1.41 per hour).

²³¹ *Tourscher v. McCullough*, 184 F.3d 236, 243–44 (3d Cir. 1999); *Gambetta v. Prison Rehab. Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1124–25 (11th Cir. 1997); *Danneskjold v. Hausrath*, 82 F.3d 37, 43–44 (2d Cir. 1996); *Reimonenq v. Foti*, 72 F.3d 472, 475 n.3 (5th Cir. 1996); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 684–87 (D.C. Cir. 1994); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993); *Hale v. Arizona*, 993 F.2d 1387, 1392–98 (9th Cir. 1993) (en banc); *Franks v. Okla. State Indus.*, 7 F.3d 971, 972 (10th Cir. 1993); *Miller v. Dukakis*, 961 F.2d 7, 8–9 (1st Cir. 1992); *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992).

²³² *Vanskike*, 974 F.2d at 809 (quoting *Sigler v. Lowrie*, 404 F.2d 659, 661 (8th Cir. 1968)); *cf. Draper v. Rhay*, 315 F.2d 193, 197–98 (9th Cir. 1963).

²³³ *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (holding when a conviction is invalidated with no prospect of re-prosecution, due process requires that the presumption of innocence attaches ab initio).

²³⁴ *Vanskike*, 974 F.2d at 809.

to do nothing with it.²³⁵ The inmate has no ability to choose his own calling,²³⁶ contract for his own labor,²³⁷ choose to forego working, or even bargain for a better employer.²³⁸ The inmate's labor—his property—during the time of imprisonment is completely taken by the government for its own use.²³⁹

In deciding between a regulatory and physical appropriation taking for a wrongful conviction claim, the best argument comes down to whether a prisoner was allowed to work and whether he was paid for his prison labor or not.²⁴⁰ The physical appropriation classification argument should prevail when an exoneree worked and received wages from his prison job.²⁴¹ By contrast, an exoneree who was not paid for labor or was not given a prison job has an equally strong argument for a regulatory taking.²⁴² These classifications are distinct because the Court has imposed standards on regulatory takings that it has not imposed on physical appropriation takings.²⁴³ For a regulatory taking to prevail, the claimant must show “all economically beneficial uses” of the property interest were taken.²⁴⁴ So if an inmate was not allowed to work or was not paid for his work, he will want to argue that the taking of his labor was a regulatory taking.²⁴⁵ But if the inmate was paid anything for his work, then, like in *Horne* where the raisin owners retained an interest in the taken property but the Court said that they were still entitled to just compensation, so too should the exoneree argue that her work was physically appropriated and her retained interest in the vastly inferior “wage” also does not equate to just compensation.²⁴⁶

3. *When Did the Taking Occur?*

To answer the question of when a taking occurred, *First English*

²³⁵ *Id.*

²³⁶ *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) (“[P]ursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of . . . rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.”).

²³⁷ *Holden v. Hardy*, 169 U.S. 366, 391 (1898) (“As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.”).

²³⁸ *Vanskike*, 974 F.2d at 809.

²³⁹ *Accord id.*

²⁴⁰ *See infra* notes 243–46 and accompanying text.

²⁴¹ *See infra* notes 243–46 and accompanying text.

²⁴² *See infra* notes 243–46 and accompanying text.

²⁴³ *Horne v. Dep’t of Agric.*, 576 U.S. 351, 377–88 (2015) (Sotomayor, J., dissenting) (discussing the case law and restrictions of regulatory takings).

²⁴⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

²⁴⁵ *See supra* notes 243–44 and accompanying text. *See also infra* note 246 and accompanying text.

²⁴⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419, 441 (1982) (holding that retaining any interest in a regulatory taking defeats a claim for just compensation).

Evangelical Lutheran Church v. County of Los Angeles gives guidance.²⁴⁷ In this case, a church owned land in a flood protection area.²⁴⁸ After flooding occurred in the flood zone, the county passed an ordinance prohibiting building within that zone.²⁴⁹ In response to this restriction on the church's land, the church brought an inverse condemnation action.²⁵⁰ The ordinance was subsequently invalidated, but the Supreme Court was asked if compensation was required for the time the regulatory taking was in effect before the invalidation.²⁵¹ The Court held that the government was required to pay for the temporary taking that occurred while the ordinance was in effect.²⁵²

This holding gives guidance as to the duration of the taking and whether it commences when the imprisonment begins or from the time the conviction is overturned and the exoneree is released.²⁵³ The county of Los Angeles in *First English* believed it was acting in its rightful official capacity for the public good by creating the flooding ordinance, much like a trial court that has confidence in its conviction.²⁵⁴ However, once the Court in *First English* held that the ordinance was invalid, the Supreme Court held Los Angeles County liable for the appropriation from the time the ordinance was put into effect until it was rescinded.²⁵⁵ Likewise, it follows that once due process vitiates a wrongful conviction, the government also owes just compensation to the exoneree from the time his work was first taken, even though at the initial time of the taking the government believed it was acting in its rightful capacity.²⁵⁶

Case law supports the argument that a taking of an exoneree's labor is both a regulatory and appropriated taking, and thus, either way a court chooses to analyze the claim, the taking should be justly compensated for.²⁵⁷ Therefore, just like the land regulated temporarily in *First English*, the exoneree should be justly compensated for the whole time he was

²⁴⁷ 482 U.S. 304, 304–05, 311 (1987).

²⁴⁸ *Id.* at 307.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 308, 316 (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”).

²⁵¹ *Id.* at 308.

²⁵² *Id.* at 318–19, 322 (“[T]emporary’ takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”).

²⁵³ *See infra* pp. 38–39.

²⁵⁴ *First English*, 482 U.S. at 321 (“Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function ‘for Congress and Congress alone to determine.’ Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.”) (citation omitted).

²⁵⁵ *Id.* (“We merely hold that where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”).

²⁵⁶ *Id.*

²⁵⁷ *Supra* Section III.B.1–2.

wrongfully incarcerated because his property—his labor—was regulated and appropriated during that whole time.²⁵⁸

4. *Was the Taking by Government Action, and Was It for the Public Good?*

Obviously, a criminal conviction results from government action, so this is satisfied.²⁵⁹ Moreover, a vital pillar of the criminal justice system is that it protects the public from harm.²⁶⁰ It is the whole system—from policing to bringing charges to judging to imposing penalties—that falls under this umbrella of protection by the government for the public good.²⁶¹ While the Fifth Amendment states a taking must be for “public use,” the Court has consistently ruled that invasions and regulations for a public purpose or benefit also satisfy the “public use” language of the Fifth Amendment.²⁶² Criminal laws benefit the public, and therefore the government’s application of those laws constitutes a “public use.”²⁶³ Thus, a person is imprisoned for the public good, and when that imprisonment is found to be invalid, the exoneree has experienced a taking of property—the value of his labor—for the whole period of wrongful incarceration.²⁶⁴

²⁵⁸ See *supra* Section III.B.1–2.

²⁵⁹ U.S. *Criminal Justice System*, CORRECTIONALOFFICER.ORG, <https://www.correctionalofficer.org/us-criminal-justice-system> (last visited Jan. 23, 2020); see also John Martinez, *Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property”*, 59 HASTINGS L.J. 515, 526 (2007) (discussing wrongful conviction as a government action).

²⁶⁰ See *An Overview of the 5 Objectives of the Criminal Justice System*, ISFMA (Dec. 29, 2015), <https://www.isfma.com/insider-report/an-overview-of-the-5-objectives-of-the-criminal-justice-system/> (describing how the criminal justice system is set up to keep the public safe).

²⁶¹ See *Guide to the U.S. Criminal Justice System*, CRIMINALJUSTICE.COM, <https://www.criminaljustice.com/resources/guide-to-us-criminal-justice-system/> (last visited Feb. 23, 2021) (explaining the scope of the criminal justice system).

²⁶² See *Kelo v. City of New London*, 545 U.S. 469, 476 n.4, 489–90 (2005) (ruling a city’s plan to condemn homes in a residential neighborhood and give the acreage to a private developer for \$1 for a ninety-nine-year lease to create an upscale development did not violate the Fifth Amendment’s requirement that takings of property be for a “public purpose”); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (holding the property need not go to government hands to avoid a finding of private use); *Berman v. Parker*, 348 U.S. 26, 31–33, 36 (1954) (holding that a city’s plan to tear down a slum, including a privately owned store, for city revitalization, even though some of the land was sold to private developers, was for the public “purpose,” “welfare,” and “interest,” and because the plan was from the legislature, it was also an appropriate use of police power); see generally Brent Nicholson & Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in Kelo v. City of New London*, 41 GONZ. L. REV. 81 (2005–06) (analyzing how modern takings jurisprudence has evolved and expanded).

²⁶³ See *supra* Section III.B.1.

²⁶⁴ See *supra* Section III.B.1.

C. *The Way Forward*

To have wrongful convictions recognized as a taking, “test cases” brought in multiple jurisdictions are needed.²⁶⁵ Test cases require strategic litigation across many circuits²⁶⁶ and are designed to culminate before the Supreme Court to seek a favorable ruling on a point in question, thus creating binding precedent on all courts.²⁶⁷ The time is ripe for this issue to go before the Court because of the recent public spotlight and outpouring of concern over wrongful convictions.²⁶⁸

Historically, test cases have come under public scrutiny because critics argue that these cases push the Court to rule in areas the Constitution did not intend.²⁶⁹ However, that is distinctly not the issue here because a taking is a protected constitutional right, and the jurisprudence leads logically to this outcome.²⁷⁰ Further, the Founders viewed labor as property; therefore, this argument satisfies an originalist, as well as a textualist, constitutional interpretation.²⁷¹ Critics also argue that when the Court rules where the legislature should step in, the Court is not acting “for the people.”²⁷² This generally brings criticism about “activist judges” legislating from the

²⁶⁵ The most famous test case example is *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”), which culminated Charles Hamilton Houston’s twenty-year strategy to have the “separate but equal” doctrine ruled unconstitutional in public education. J. Clay Smith, Jr., *Forgotten Hero*, 98 HARV. L. REV. 482, 488 (1984) (reviewing GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983)). Methodically, Houston litigated for integration by starting with graduate education and gradually working his way down to elementary school students. *Id.* His strategy also included public campaigns to change the cultural view about segregation before asking the courts to move in that direction. *Id.* It was this strategy that changed the country and paved the way for the Supreme Court’s ruling that segregation was unconstitutional. *Brown*, 347 U.S. at 495. *Brown v. Board of Education* was won at the Supreme Court four years after Mr. Houston’s death. Smith, *supra*, at 492.

²⁶⁶ *Test Case*, ENCYCLOPEDIA.COM (May 29, 2018), <https://www.encyclopedia.com/social-sciences-and-law/law/test-case> (expounding on the history of test cases in American jurisprudence).

²⁶⁷ *Id.*

²⁶⁸ See *supra* note 15 and accompanying text.

²⁶⁹ Jay Cost, *The Supreme Court Has Been Making Policy*, NAT’L REV. (July 16, 2018, 6:30 AM), <https://www.nationalreview.com/2018/07/supreme-court-should-not-make-policy-not-what-founders-intended/>.

²⁷⁰ See *supra* Section III.B.

²⁷¹ See *supra* Sections III.A–B. See generally Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185 (2003) for further reading on constitutional interpretation. The opposite originalist argument could be made that the Founders did not have in mind wrongful convictions as takings during the drafting of the Fifth Amendment. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (discussing how modern-day jurists are not tied to what the Founders believed).

²⁷² Akhil Reed Amar, *American Constitutionalism—Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 201–03 (2013), <https://harvardlawreview.org/2013/04/american-constitutionalism-written-unwritten-and-living/>.

bench.²⁷³ This critique, however, is unwarranted on this issue because thirty-seven states have already passed legislation for exoneration compensation.²⁷⁴ Thus, a majority of the American people seem to have spoken, and a ruling that says exactly that is merely judicial confirmation promoting uniformity across the country.²⁷⁵

The time is also right due to the current makeup of the Supreme Court.²⁷⁶ Conservative justices typically rule in favor of protection of an individual's property rights, while liberal justices favor heightened criminal justice reform.²⁷⁷ This issue gives the justices on both ideological sides a compelling reason to rule for this as a taking.²⁷⁸

Concededly, a takings remedy may not be the most lucrative or desirable remedy to an exoneree who has other available avenues for compensation.²⁷⁹ Instead, this remedy is, for the exonerees who are left behind without a remedy from a state statute, a cause of action for wrongdoing or the political pull to get a private bill passed.²⁸⁰ Takings actions do not provide a robust damages remedy but merely just compensation and, therefore, typically may not be as sizeable a remedy as alternative compensation schemes.²⁸¹ Thus, the argument is that this is a fallback remedy for those without another option by setting a constitutional floor.²⁸²

²⁷³ See Norm Ornstein, *How Activist Judges Undermine the Constitution*, ATLANTIC (Sept. 18, 2014), <https://www.theatlantic.com/politics/archive/2014/09/how-activist-judges-undermine-the-constitution/380413/> (discussing how activist judges undermine the Constitution).

²⁷⁴ See *supra* Section II.A (explaining the current framework of state compensation statutes).

²⁷⁵ See *supra* Section II.A.

²⁷⁶ *The Political Leanings of the Supreme Court Justices*, AXIOS (June 1, 2019), <https://www.axios.com/supreme-court-justices-ideology-52ed3cad-fcff-4467-a336-8bec2e6e36d4.html>; see also *supra* note 15 and accompanying text (illustrating the modern-day mainstream popularity of the issue of wrongful convictions).

²⁷⁷ See generally Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401 (2002) (analyzing how liberal and conservative justices differ in how they rule).

²⁷⁸ See, e.g., Jason Snead & Elizabeth Slattery, *Supreme Court's 9-0 Ruling Protects Americans Against Excessive Fines*, HERITAGE FOUND. (Feb. 21, 2019), <https://www.heritage.org/courts/Commentary/supreme-courts-9-0-ruling-protects-americans-against-excessive-fines> (illustrating how some "activist" issues unite the liberal and conservative judges).

²⁷⁹ See *supra* Part II. This is because just compensation only includes fair market value of the property taken. *Olson v. United States*, 292 U.S. 246, 255 (1934). Because this Note is only advocating for a taking of the labor property of the exoneree and not the exoneree's liberty property, the fair market value ascertainable would be more modest than a damages award in tort would be. See generally John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property"*, 59 HASTINGS L.J. 515, 516 (2008) (arguing that a taking of liberty has occurred which should be looked at as if it were a taking of property).

²⁸⁰ See *supra* Part II.

²⁸¹ See Julia Kagan, *Just Compensation*, INVESTOPEDIA (Jan. 13, 2020), <https://www.investopedia.com/terms/j/just-compensation.asp> (explaining what "just compensation" includes).

²⁸² See *supra* Part II (describing the current state of compensation schemes available).

IV. IMPACT

Recognition of a wrongful conviction as a taking, thus requiring compensation, would go a long way in helping to rebuild the lives of many exonerees.²⁸³ If the Court does make this ruling, a natural next step would be for Congress to use its Section 5 power under the Fourteenth Amendment to legislate this just compensation so that exonerees will not have to litigate their claims, but compensation would be automatic.²⁸⁴ For purposes of justice and efficiency, this should be the goal once a taking is established.²⁸⁵

This ruling would also have far-reaching effects on society.²⁸⁶ It would give exonerees an action to move forward for compensation that is certain instead of the gambles that the current schemes necessitate.²⁸⁷ This right to compensation would ensure that everyone who has suffered the “nightmare” of which Judge Learned Hand spoke would not be freed into a continuing nightmare of poverty but would have a way forward.²⁸⁸

Further, if law enforcement agencies, counties, and states know they are going to be held financially accountable for wrongful convictions, they would have an incentive to fix policies and procedures that lend themselves to this problem.²⁸⁹ Fixing these problems is crucial because it is not just wrongdoing that leads to wrongful convictions.²⁹⁰ Sometimes the problems are less-than-credible line-up techniques, coercive interrogation methods, or undue pressure to close a case, which is questionable but not legally liable wrongdoing.²⁹¹ All of these things lead to flawed due process that can be avoided, and perhaps there would be more of an incentive if there was known financial liability.²⁹²

It is easy to see how a fixed-compensation scheme could have some unintended consequences.²⁹³ The fight for exoneration could be opposed

²⁸³ See generally Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427 (2009) (explaining what exonerees need as they rebuild their lives).

²⁸⁴ See generally Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 674 (2001).

²⁸⁵ *Id.* at 679.

²⁸⁶ *Infra* Conclusion.

²⁸⁷ See generally Jeffrey S. Gutman & Lingxiao Sun, *Why Is Mississippi the Best State in Which to Be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 NE. U. L. REV. 694, 717–34 (2019) (discussing how different state compensation laws provide vastly different results for exonerees).

²⁸⁸ *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

²⁸⁹ See *Criminal Justice Reform Commissions: Case Studies*, INNOCENCE PROJECT (Mar. 1, 2007), <https://www.innocenceproject.org/criminal-justice-reform-commissions-case-studies/> (looking at exoneration cases that have led to criminal justice reform).

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² See *id.*

²⁹³ See *Why and How*, *supra* note 28, at 151–53 (analyzing unintended consequences of a fixed compensation scheme).

harder, and governors could be less inclined to grant pardons.²⁹⁴ A recent trend in prosecutors' offices is to have a conviction integrity unit investigating claims of innocence, but if the government knows it will be financially responsible, it may be less inclined to help in the process of exoneration.²⁹⁵

Another possible negative result of this test case approach is that litigation takes a long time.²⁹⁶ It is not a quick or inexpensive fix, and it is a big gamble for the exonerees who choose to be the first to test the theory in court.²⁹⁷ However, it is an option that has not yet been tried, and if it fails, the exoneree will be no worse off than she is in the current system.²⁹⁸

CONCLUSION

This taking action will not be for everyone, but it will be the only answer for some.²⁹⁹ For instance, exoneree Nathan Myers received \$2 million in compensation for his wrongful conviction; he will not need this.³⁰⁰ However, his co-defendant exoneree Clifford Williams does because he received nothing.³⁰¹ Exoneree Timothy Atkins defied all odds by proving his innocence, only to have the California Compensation Committee say he did not qualify for compensation.³⁰² Why? Because he ran from the police—a

²⁹⁴ *Id.* This could be especially problematic for elected judges and governors, who may feel pressure about their election chances should they overturn a conviction the public views as correct.

²⁹⁵ *Conviction Integrity Units*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (last visited Jan. 26, 2020). *Cf. ABA Seeks Review of Case Raising When Wrongly Convicted Person Can Seek Damages*, A.B.A. (Jan. 13, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/01/aba-seeks-review-of-case-raising-when-wrongly-convicted-person-c/> (describing an amicus brief filed by the ABA that details an alternative method of post-conviction relief: "[T]he 'prosecutor's office has conditioned the release of an unlawfully convicted defendant on his agreement to a new plea—rather than vacating the prior conviction before bringing any new charges.' Prosecutors do this, the brief suggested, to insulate their jurisdictions from paying civil monetary damages for wrongful incarcerations.").

²⁹⁶ *See generally* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 1 (2009), https://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf (analyzing the time it takes statistically to get a case through the district courts).

²⁹⁷ *See generally* Gutman & Sun, *supra* note 287 (discussing how different state compensation laws provide vastly different results for exonerees).

²⁹⁸ *See supra* Part II (discussing the current framework of wrongful conviction compensation).

²⁹⁹ *See* Miller, *supra* note 6 (explaining how some exonerees do not qualify for compensation in any form).

³⁰⁰ *Id.*

³⁰¹ *Id.* *But see* Laura Cassels, *He Didn't Do It: Exoneree Clifford Williams Files Claim for 43 Years of Wrongful Incarceration*, FLA. PHX. (Jan. 22, 2020), <https://www.floridaphoenix.com/2020/01/22/he-didnt-do-it-exoneree-clifford-williams-files-claim-for-43-years-of-wrongful-incarceration/> (explaining a private bill that has been introduced in the Florida Legislature to compensate Clifford Williams; the bill is currently pending).

³⁰² Brooks & Simpson, *supra* note 164, at 650.

fact that was not a contributing factor to his initial conviction.³⁰³ Mr. Atkins needs this.³⁰⁴

A takings action is needed because almost half of all exonerees do not qualify for compensation from their wrongful incarceration.³⁰⁵ The current exoneration compensation schemes—state statutes, civil lawsuits, and private bills—leave too many people out.³⁰⁶

A wrongful conviction is the taking of an individual’s liberty and property rights that due process failed to protect.³⁰⁷ It is then a second due process, through the appeals process, that remedies the exoneree’s liberty rights.³⁰⁸ Just compensation, however, is the constitutionally required remedy for a taking of the exoneree’s property rights.³⁰⁹ An exoneree’s labor is totally taken by regulation and physically appropriated upon incarceration, and where property is totally regulated or appropriated, the Court says that is a taking.³¹⁰

If the Court recognizes wrongful conviction as a taking, it will truly be the embodiment of the critical purpose of the Takings Clause: “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.”³¹¹ The wrongfully convicted have borne those public burdens for far too long, and it is beyond time that this wrong was righted.³¹²

³⁰³ *Id.*

³⁰⁴ *But see* Kevin Davis, *After Years, Even Decades, the Exonerated Leave Prison Walls Behind—Only to Find New Barriers*, A.B.A. J. (Jan. 1, 2011, 10:30 AM), www.abajournal.com/magazine/article/after_years_even_decades_the_exonerated_leave_prison_walls_behind/ (In Mr. Atkins’s case, “[a] community organization called Venice 2000, which counsels troubled youths to keep them away from gang life, agreed to pay for Atkins to attend college to learn counseling. Atkins has since gone to work as a counselor for the Venice Youth Build program. ‘They pretty much knew who I was and gave me a chance,’ he says.”). After a twelve-year battle for compensation, Mr. Atkins was awarded \$1,129,660 from the state of California in 2019. Maurice Possley, *Timothy Atkins*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3001> (last visited July 15, 2020).

³⁰⁵ *Compensation for Exonerees*, *supra* note 4, at 3.

³⁰⁶ *See supra* Part II (discussing the current framework of wrongful conviction compensation).

³⁰⁷ *See supra* Part III.

³⁰⁸ *See* *Nelson v. Colorado*, 137 S. Ct. 1249, 1257 (2017) (“[T]he restoration of liberty on reversal of a conviction is not compensation . . .”).

³⁰⁹ *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2172 (2019) (“Compensation under the Takings Clause is a remedy for the ‘constitutional violation’ that ‘the landowner has *already* suffered’ at the time of the uncompensated taking.” (quoting *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting))).

³¹⁰ *Horne v. Dep’t of Agric.*, 576 U.S. 351, 361 (2015) (holding that personal property has just as much protection as real property in an appropriation case).

³¹¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

³¹² *See supra* Section I.A.