REVISITING THE TAKINGS-BASED ARGUMENT FOR COMPENSATING THE WRONGFULLY CONVICTED

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INTRODUCTION

This Note argues that eminent domain principles may compel governments to compensate individuals who have been wrongfully convicted and imprisoned.[1] Professor Edwin Borchard raised the takings-based argument in favor of compensation as early as 1913 but was unsuccessful in persuading more than a handful of legislatures to adopt statutory compensation schemes on the basis of these and other arguments.[2] But recent developments in takings doc-

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1. Eminent domain principles, embodied in what are known as the "takings clauses" of state and federal constitutions, require government to compensate individuals under certain circumstances when it appropriates their property. The Takings Clause of the Fifth Amendment to the United States Constitution states that ". . . nor shall private property be taken for public use without just compensation. . . ." U.S. CONST. amend. V. State takings clauses, discussed *infra* Part II.A, have similar constructions but may provide more extensive protections of property rights.

2. *See* Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. CRIM. L. & CRIMINOLOGY 684, 695 (1913) (discussing the eminent domain principles under which several European nations had grounded systems of compensation for the wrongfully convicted). Professor Borchard wrote several other influential articles and books over the course of his career arguing for provision of compensation for the wrongfully convicted. One of the most influential of his subsequent works, *Convicting the Innocent*, led to passage of the first federal statute providing limited compensation for those wrongfully convicted of federal crimes. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT 417–21 (1932) (containing the text of a draft bill providing limited compensation for those wrongfully convicted of federal crimes) [hereinafter BORCHARD, CONVICTING THE INNOCENT]. *See* 28 U.S.C. §§ 1495 & 2513 (2000) (containing language similar to Borchard's model statute).

trine and increased public recognition of the losses suffered by victims of wrongful conviction grant new vitality to the takings-based argument for compensation.

Wrongful conviction currently produces large numbers of uncompensated victims. Throughout the nation, DNA identification technology, other scientific developments, and revelations of police or prosecutorial misconduct have helped free hundreds of prisoners wrongfully convicted of grave offenses. Yet the vast majority of these newly-freed individuals have been unable to obtain any compensation for lost wages, legal fees, psychological damage, or other economically-cognizable injuries caused by their wrongful imprisonment from the authority that wrongfully imprisoned them. Existing constitutional and common-law tort doctrines, requiring proof of intentional misconduct and providing broad immunity to state actors who brought about the wrongful conviction, bar all but a few wrongfully convicted individuals from recovering any damages from those who harmed them. Most state and federal legislatures have failed to adopt statutory compensation schemes to supplement existing common-law remedies, and even those that have done so tend to shortchange those who qualify under their terms. Recent advocacy for legislatively-enacted changes to tort doctrine or provision of remedial schemes has failed to augment more than a few states' compensation schemes. The absence of widespread legislatively-designed compensation schemes is not surprising, given the stigma attached to imprisonment and other institutional barriers standing between the wrongfully convicted and legislative recognition of their plight.

The Note examines recent decisions explicitly concluding that governmental appropriations of labor are compensable under state and federal eminent domain clauses to suggest a possible source of compensation. It concludes that the constitutional law of several jurisdictions support colorable claims by the wrongfully convicted that their imprisonment without cause effected a taking for which just compensation is due. It further determines that since no state or federal jurisdiction has held governmental appropriations of labor to be inherently ineligible for compensation under eminent domain principles, innovative constitutional arguments may be marshaled on behalf of the wrongfully convicted in all jurisdictions.

Part I highlights the need for compensation for the wrongfully convicted, reviews the obstacles to compensation in most jurisdictions, and explains why innovation in constitutional doctrine may be necessary if compensation is ever to be made readily available. Part II first examines the law of eminent domain related to govern-

mental appropriations of labor and develops arguments that wrongful conviction appropriates individuals' property without just compensation within the meaning of state or federal takings clauses. Next, it explores potentially constitutionally relevant distinctions between the wrongfully convicted and those who have already been successful in bringing "labor-takings" claims. Part II also suggests that due process principles may require provision of compensation upon a finding that a conviction is erroneous. Finally, this section of the paper briefly discusses the constitutionally-required remedies that would be available to the wrongfully convicted if they are successful in arguing that their property was taken without just compensation. The Note concludes in Part III by calling for advocacy to explore whether the governmental appropriations caused by wrongful conviction are compensable under eminent domain principles.

The Note uses the term "wrongfully convicted" to refer only to people who are actually innocent of the crimes for which they were charged but who were nonetheless convicted. Because the Note concludes that takings claims are not generally available to those who have violated important civic duties,[3] it does not examine remedies that may be available to those who committed crimes but were convicted under constitutionally defective procedures. The Note also does not address important and unanswered collateral issues, addressed in depth by other scholars and existing statutes administering compensation schemes for the wrongfully convicted, including the process that must be used to determine actual innocence; the standard of proof that a freed individual must meet to prove wrongful conviction; and other moral and pragmatic questions regarding justifications for compensating those who may have in fact committed a crime but who were convicted under constitutionally-defective processes.[4]

3. *See infra* Part II.A.2.

4. For a discussion of the difficulties involved in "proving" innocence, see, e.g., William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 385–91 (1995) (discussing the varying definitions of innocence and the challenges associated with assessing innocence in claims premised on wrongful conviction); Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971 (2002) (discussing the various types of claims of innocence that could have been brought by those asserting wrongful conviction). For a recommendation that a legal process be implemented to allow those who were acquitted of crimes, who had charges against them dropped, or whose convictions were overturned to obtain a legal determination of factual innocence, see Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297 (2000). For a summary of the standards of proof of innocence required by states that have adopted wrongful conviction com-

I.
WHY COMPENSATE THE WRONGFULLY CONVICTED?

A. The Problem of Unremedied Wrongful Conviction

1. The Criminal Justice System Produces Wrongful Convictions

We have long known that the criminal justice system can produce erroneous convictions. Early work by authors such as Edwin Borchard and Jerome and Barbara Frank raised awareness of the possibility that our criminal justice system generated mistakes.[5] The Innocence Project and other advocacy organizations have subsequently proven conclusively that hundreds of individuals have been imprisoned in recent years for crimes they did not commit.[6] These advocacy organizations relied heavily upon advances in forensic science to reach their disturbing findings.[7]

News media and some politicians are consequently gaining increased awareness of the criminal justice system's fallibility. Last year, former Illinois Governor George Ryan ordered a mass commutation of death sentences based on his lack of confidence in the state's process of determining guilt or innocence in capital cases,[8]

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pensation statutes as a condition precedent of recovery, see Adele Bernhard, *Table: When Justice Fails: Indemnification for Unjust Conviction*, 7 U. CHI. L. SCH. ROUNDTABLE 345 (2000) [hereinafter, Bernhard, *Table*] (summarizing existing wrongful conviction compensation laws). *See infra* Part I.A for a discussion of existing wrongful compensation statutes.

5. *See, e.g.*, BORCHARD, CONVICTING THE INNOCENT, *supra* note 2; JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957). **R**

6. The Innocence Project, an organization headed by Barry Scheck and Peter Neufeld, has at last count obtained the reversal of 142 wrongful convictions on the basis of DNA evidence that had not previously been tested. *See The Innocence Project*, *at* http://www.innocenceproject.org (last visited Mar. 2, 2004). *See also* JIM DWYER, PETER NEUFELD, & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (discussing cases in which individuals were found to be innocent of the crimes for which they were convicted due to the work of the Innocence Project); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

7. *See, e.g.*, Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Post-Conviction DNA Testing*, 151 U. PA. L. REV. 547, 550 n.12 (2002) (summarizing recent advances in DNA technology that have enabled scientists to obtain essentially exact matches between small DNA samples and individuals); Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (Nat'l Inst. of Justice, Series No. 161258, 1996), *available at* http://www.ncjrs.org/txtfiles/dnaevid.txt (last visited Mar. 2, 2004) (summarizing the use of recently-improved DNA testing technology to obtain the reversal of twenty-eight wrongful convictions).

8. *See* Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1 (discussing former Illinois Governor George Ryan's full pardon of four death row inmates and his mass commutation of

the convictions of those who were convicted of an infamous rape of a jogger in Central Park were reversed,[9] and dozens of African-American residents of Tulia, Texas, whom evidence suggests were wrongfully convicted of drug crimes based on the perjured testimony of a rogue police officer, neared full exoneration.[10] The PBS news program *Frontline* produced a documentary, entitled *Burden of Innocence*, that focused on the harms suffered by the wrongfully convicted and examined the causes and effects of several other individuals' wrongful convictions.[11] Newspapers have reported on other individuals' exoneration on the basis of newly-discovered physical evidence.[12] DNA testing may also free others who are now

all other state death sentences on the last day of his term as governor, following a moratorium on the death penalty that he imposed after twelve death row inmates were executed and thirteen were exonerated in the years since Illinois authorized its renewed death penalty in 1977).

9. In the "Central Park Jogger" case, five African-American youths were convicted of the rape and beating of a white woman who was jogging in Central Park on April 19, 1989, largely on the basis of their videotaped confessions. After another man named Matias Reyes, a convicted murderer and serial rapist, confessed to being the sole assailant and rapist of the jogger, the Manhattan District Attorney moved to vacate the teens' convictions. A Manhattan judge agreed to vacate the convictions in late 2002. *See* Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1. The five freed individuals are planning to seek statutory compensation from the State of New York and are also considering suing the state for violating the youths' civil rights by submitting them to improper questioning. *See* Daniel Wise, *D.A.'s Theory Gives Boost to Possible Civil Action*, N.Y.L.J., Dec. 20, 2002, at 1. Police and others, however, still contend that the youths in some way participated in the rape. Robert D. McFadden, *Boys' Guilt Likely in Rape of Jogger, Police Panel Says*, N.Y. TIMES, Jan. 28, 2003, at A1.

10. *See, e.g.*, Melissa Drosjack, *Perry Signs Bill to Free Tulia 13*, HOUSTON CHRON., Jun. 3, 2003, at 13A (discussing the Texas Governor's signature of a bill designed to expedite the release of the thirteen African-American Tulia residents remaining in prison based on apparently perjured police testimony, and mentioning the plight of an additional twenty-five residents of Tulia who were convicted based on the same testimony and who are awaiting exoneration).

11. *See Frontline: Burden of Innocence* (PBS television broadcast, May 1, 2003) (detailing the fates of six men who were wrongfully convicted of and imprisoned for serious crimes). A web site accompanying the documentary contains additional information on governments' failure to compensate the wrongfully convicted, as well as the complete transcript and video file of the program. *See Frontline: Burden of Innocence*, *at* http://www.pbs.org/wgbh/pages/frontline/shows/burden/ (last visited Mar. 2, 2004).

12. *See* Stephanie Hanes, *DNA's Secrets Set a Man Free*, BALT. SUN, Mar. 9, 2003, at 1A (discussing the exoneration of Bernard Webster, a man who had spent more than ten years in jail for a rape that DNA testing proved he could not have committed); Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, N.Y. TIMES, Mar. 11, 2003, at A14 (discussing the exoneration of Josiah Sutton, who was convicted and sentenced to twenty-five years in prison for a

imprisoned as these individuals gain access to the new technology, though there are a finite number of existing convictions obtained on the basis of physical evidence in which that evidence is still available but untested.[13]

2. The Wrongfully Convicted Lack Adequate Compensation

Wrongfully convicted individuals have suffered severe harm as a consequence of their imprisonment: they have lost their jobs and their good reputations, were unable to earn income while incarcerated, have often expended large amounts of money on legal services, have been deprived of liberty, sometimes for years, and have suffered detrimental psychological consequences. Yet under existing law, most of the individuals who are freed after being found innocent of the crimes for which they were convicted are unable to obtain any compensation from government or other sources for the losses they sustained.

Ellen Reasonover's experience illustrates the consequences of the widespread absence of compensation for those wrongfully convicted of crimes. Reasonover was convicted of a murder she did not commit and sentenced to life in a Missouri prison as a result of numerous constitutional violations by police and prosecutors at her trial. Among the violations that were disclosed in Reasonover's habeas proceedings were the state's purchase of an informant's false testimony and the prosecution's failure to turn over several secret jailhouse tape recordings that contained clearly exculpatory evidence. In 1999 a court ordered that she be released from prison but provided her no compensation for the almost seventeen years that she had lost in prison without cause, and no state right of action was available for her to obtain compensation. Within two years of Reasonover's release, she was essentially homeless, moving from her now-grown daughter's home to her mother's, hunting for employment, and psychologically scarred from her experience in prison. She remains without compensation for her ordeal.[14]

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rape that he did not commit when the Houston, Texas police laboratory erroneously concluded that the genetic material left by the rapist matched Sutton's).

13. In the future, as DNA testing becomes widely available for crimes in which dispositive physical evidence is available, wrongful convictions should result only when corrupt or incompetent police laboratories generate false matches. The potential for false matches continues to be a real one. *See* Liptak, *supra* note 12 (discussing widespread incompetence in the Houston police laboratory and the possibility that several other individuals in addition to Josiah Sutton were wrongfully convicted due to improperly administered DNA tests). R

14. *See* Najeeb Hasan, *Show Me the Money*, RIVERFRONT TIMES (St. Louis, Mo.), Apr. 11, 2001, at 1 (discussing Reasonover's struggles following her release from

Stories similar to Reasonover's are common. A study performed by the Innocence Project determined that only thirty-seven percent of recently exonerated individuals received even minimal compensation from the jurisdictions that wrongfully convicted them.[15] The Life After Exoneration project concluded that legal expenses and the absence of income during imprisonment deprived the vast majority of the wrongfully convicted of all of their assets, and that nearly half of all wrongfully convicted individuals earned less after their release than they did before their conviction.[16]

The psychological and physical trauma of wrongful conviction also cannot be underestimated. Clyde Charles, for example, picked cotton at the Louisiana State Penitentiary at Angola while being imprisoned for nearly eighteen years for a rape he did not commit. Prior to his conviction, he was earning a healthy income as a shrimp boat operator; after work by the Innocence Project conclusively demonstrated that he was innocent, he was released without any compensation for his lost earnings and was unable to find employment.[17] Though Charles eventually obtained $200,000 in governmental compensation after agreeing to settle a federal lawsuit alleging prosecutorial misconduct, he remained psychologically scarred and unable to adjust to life outside of prison. PBS's

prison in 1999); Associated Press, *Wrongfully-Convicted Missourians Struggle After Release*, ST. LOUIS POST-DISPATCH, Jan. 5, 2003, at D9 (discussing Reasonover's continuing difficulties finding employment and housing following her release from prison).

15. *See Frontline: Burden of Innocence: Frequently Asked Questions*, http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/faqsreal.html (last visited Mar. 2, 2004) (discussing the results of the Innocence Project's survey).

16. *See id.* (discussing results of a study by the Life After Exoneration Project that assessed the financial consequences of wrongful conviction and concluded that over ninety percent of exonerees lost all of their assets while imprisoned and almost half earn less than they did before their imprisonment).

17. Rhonda Bell & Pamela Coyle, *Law Professor: Let Freed Inmates File State Claim*, TIMES-PICAYUNE (New Orleans, LA), Jan. 16, 2000, at 14A; *see also Frontline: Burden of Innocence: Profiles: Clyde Charles*, http://www.pbs.org/wgbh/pages/frontline/shows/burden/profiles/charles.html (last visited Mar. 2, 2004); *Profile: Clyde Charles*, The Innocence Project, *at* http://www.innocenceproject.org/case/display_profile.php?id=63 (last visited Mar. 2, 2004) (discussing the background of Charles's case and his exoneration in more detail); *DNA test clears man of 1981 rape, implicates his brother*, CNN.com, *at* http://www.cnn.com/2000/US/11/25/dna.wrong.brother.ap/ (last visited Mar. 2, 2004) (discussing work that Charles performed while imprisoned).

Frontline found Charles living in his car and suffering from severe depression shortly after his release from prison.[18]

Vehicles for compensating the wrongfully convicted under common law and constitutional tort doctrines or, alternatively, through legislative action in the form of special bills or statutory compensation schemes, have simply not proven capable of providing meaningful remedies to most wrongfully convicted individuals.[19] As described in Adele Bernhard's important article on compensation for unjust conviction, *When Justice Fails: Indemnification for Unjust Conviction*, remedies at common law or via civil rights legislation have been largely unavailable, absent proof of egregious and intentional wrongdoing on the part of police or prosecutors, because immunity doctrines shield most individual wrongdoers from liability.[20] As of 2003, only fifteen states, the District of Columbia, and the federal government had established any statutory compensation schemes,[21] and the majority of those schemes provide inadequate remedies to those who qualify under their terms.[22] Other potential sources of compensation, such as private bills or special acts that provide designated compensation for a specific wrongfully convicted person, are unconstitutional in some states and in others are unavailable to all but the politically connected.[23]

18. *See Frontline: Burden of Innocence: Profiles: Clyde Charles*, http://www.pbs.org/wgbh/pages/frontline/shows/burden/profiles/charles.html (last visited Mar. 2, 2004).

19. *See* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86–101 (1999) (discussing shortcomings of current means by which wrongfully convicted individuals can currently obtain compensation).

20. *See id.* at 86–92.

21. *See id.* at 73 n.1. The states that have even technically provided for statutory compensation for the wrongfully convicted are Alabama (in a law passed in 2001), California, Maryland, Maine, Iowa, Illinois, New Hampshire, New Jersey, New York, North Carolina, Ohio, Texas, Tennessee, West Virginia, and Wisconsin. *See* Bernhard, *Table*, *supra* note 4 (describing relevant features of the state and federal compensation statutes passed before 2000); *Frontline: Burden of Innocence: FAQs: Compensating the Exonerated*, *at* http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/chart.html (last visited Mar. 2, 2004) (describing the status of all state wrongful conviction compensation statutes and pending legislation as of early 2003).

22. See *infra* notes 38–42 for a discussion of most statutes' unreasonable caps on compensation, including the federal government's $5000 total cap on compensation. R

23. *See* Bernhard, *supra* note 19, at 93–95; John J. Johnston, Comment & Note, Reasonover v. Washington*: Toward a Just Treatment of the Wrongfully Convicted in Missouri*, 68 UMKC L. REV. 411, 416–18 (2000) (discussing the Missouri Constitution's prohibition on private bills that could hypothetically provide Reasonover R

a. Currently Available Judicial Remedies for Wrongful Conviction

Professor Bernhard and other scholars have demonstrated why currently available common law and constitutional remedies are in most cases incapable of providing the wrongfully convicted with monetary relief.[24] This Note therefore will only provide a brief overview of the legal remedies and defenses available to governments and public officials who are subject to suit.

Currently, wrongfully convicted individuals may be able to recover in court under one of three different intentional tort theories: false arrest or imprisonment,[25] malicious prosecution,[26] and abuse of process.[27] Wrongfully convicted individuals may also be able to recover damages under federal civil rights statutes, including 42 U.S.C. § 1983, for conduct leading to conviction that vio-

and other wrongfully-convicted individuals with relief). *See also* BORCHARD, CONVICTING THE INNOCENT, *supra* note 2, at 375 ("In a few cases . . . indemnity has been granted to a particular unfortunate by special act. But such relief is spasmodic only and few victims of wrongful conviction have the necessary friends or influence to bring about the passage of a special legislative act."). R

24. *See* Bernhard, *supra* note 19, at 86–100; Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1098–1106 (1970) (discussing barriers to recovery even for fault-based torts by government officials that caused wrongful conviction); Michael J. Saks et al., *Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 NEW ENG. L. REV. 669 (2001) (suggesting model scheme for compensating the wrongfully convicted); Alberto B. Lopez, *$10 And A Denim Jacket? A Model Statute For Compensating The Wrongly Convicted*, 36 GA. L. REV. 665 (2002) (discussing shortcomings of current compensation schemes); *cf.* Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705 (1976) (discussing the legal barriers facing falsely-accused individuals seeking recovery for harms suffered). R

25. *See* RESTATEMENT (SECOND) OF TORTS § 35 (1965) (describing the tort of false imprisonment). Damages for false imprisonment claims, however, are limited only to those associated with the time between arrest and institution of legal process. *See* Heck v. Humphrey, 512 U.S. 477, 484 (1994) (quoting W. Page et al., PROSSER AND KEETON ON LAW OF TORTS § 888 (5th ed. 1984)).

26. *See* RESTATEMENT (SECOND) OF TORTS § 653 (1977):

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if
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> (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) the proceedings have terminated in favor of the accused.

27. *See* RESTATEMENT (SECOND) OF TORTS § 682 (1977) ("One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.").

lated their civil rights, often under a claim arising out of one of the three common-law torts associated with wrongful imprisonment and conviction.[28]

But these torts only enable recovery when a government official has deliberately acted wrongfully in a manner that caused the individual seeking recovery to be arrested, tried, and convicted even though the official knew that in actuality, probable cause did not exist to believe the accused was guilty. Tort law does not even hypothetically enable recovery when wrongful conviction was caused by negligent or reckless acts by police, prosecutors, and judges, much less when false or inaccurate witness testimony primarily caused the wrongful conviction. Strong official and sovereign immunity doctrines often prevent those who would otherwise be able to make out a claim of intentional harm from obtaining compensation. Public prosecutors and judges enjoy absolute immunity for acts in their official capacities which may have contributed to or even directly caused wrongful conviction, even when their decisions were made with the intent to wrongfully convict the individual.[29] Police officers by and large are immune from liability for false imprisonment suits, provided that their original arrest was made within the scope of their authority.[30] Governments generally enjoy sovereign immunity in claims directly against them for intentional torts such as wrongful imprisonment unless the immunity is waived by statute.[31] Recovery in court, unless pursuant to an already-estab-

28. *See Heck*, 512 U.S. at 477 (discussing the availability of Section 1983 claims for state prisoners whose convictions were overturned on the basis of common-law tort theories).

29. *See* RESTATEMENT (SECOND) OF TORTS § 656 cmt. b (1977) ("[The privilege] protects the public prosecutor against inquiry into his motives, and from liability, even though he knows that he has no probable cause for the institution of the proceedings and initiates them for an altogether improper purpose."); Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976) (holding that prosecutors were absolutely immune from suit under 42 U.S.C. § 1983 for malicious prosecution); Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001) (Easterbrook, J.) (holding that the tort of malicious prosecution is not actionable under Section 1983); Jeffrey F. Ghent, Annotation, *Civil Liability Of Judicial Officer For Malicious Prosecution Or Abuse Of Process*, 64 A.L.R. 3d 1251 (1975) (discussing the general rule that judicial officers are absolutely immune from prosecution for malicious prosecution unless they are acting outside the scope of their jurisdiction).

30. *See* Restatement (Second) of Torts §§ 118, 121–32 (1965) (discussing circumstances under which a law enforcement officer enjoys absolute privilege to arrest an individual without incurring liability for false imprisonment).

31. *See, e.g.*, VA. CODE ANN. § 8.01–195.3 (Michie 2003) (stating that the state's waiver of sovereign immunity does not apply to "any claim arising out of the institution or prosecution of any judicial or administrative proceeding, even if without probable cause"); King, *supra* note 24, at 1103–05 (discussing governmen- R

lished statutory scheme, has therefore been limited in recent years to a very small class of claimants, even when claimants are clearly factually innocent of the crimes for which they were charged and convicted.

Current doctrine's inability to provide the wrongfully convicted with meaningful remedies has led many to abandon efforts to seek judicial redress. Professor Bernhard, for example, while arguing that governments have a moral obligation to compensate, concludes that "[c]learly, states have no obligation, enforceable in law, to indemnify."[32] Instead, advocates for compensation have formulated moral and pragmatic arguments to persuade state and federal legislatures to pass statutes providing compensation for the wrongfully convicted.[33]

b. Legislative Grounds for Relief

Professor Bernhard has already analyzed and compared the relevant features of most state and federal compensation schemes,[34] and has discussed the limitations of the "private bill" as a means of providing fair payments to the wrongfully convicted.[35] Building on Professor Bernhard's work, this Note will focus on a few salient features of the existing statutes to demonstrate that, even when wrongfully convicted individuals reside in jurisdictions

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tal immunity from suit on most claims available to the wrongfully convicted). On the other hand, the federal government has waived its immunity in cases in which federal law enforcement officers (but not prosecutors or judges) have committed one of the intentional torts that gives rise to liability. *See* 28 U.S.C. § 2680(h) (2000). The provision states that general waiver of sovereign immunity for tort claims against the federal government does not apply to

> [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [the Federal Tort Claims Act] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

Id.

32. *See* Bernhard, *supra* note 19, at 92. **R**

33. *See supra* note 24 (listing articles advocating for legislatively-enacted compensation schemes). **R**

34. *See* Bernhard, *supra* note 19, at 101–10. **R**

35. *Id.* at 93–96 & n.85 (discussing problems associated with the private bill process and several states' constitutional limitations on the use of private or special bills).

that possess statutory compensation schemes, they are usually unable to receive reasonable compensation for their losses.

First, most existing compensation statutes require wrongfully convicted individuals to surmount onerous procedural obstacles in order to be eligible for compensation. The five jurisdictions that require pardons as conditions precedent to recovery politicize the process of compensation and prevent many individuals who were wronged by the state from obtaining meaningful recovery.[36] Even other states that do not require pardons as conditions precedent to recovery may impose procedural requirements on claimants that render many possible claims for compensation non-viable. For example, New York's requirement that convicted individuals obtain an acquittal or a dismissal on grounds of innocence prevented Betty Tyson, a woman who was released from prison after spending more than twenty-five years behind bars, from obtaining compensation despite proof of prosecutorial misconduct and a colorable claim of innocence.[37]

Second, even if the necessary procedural and substantive hurdles are overcome under these statutes and a wrongfully convicted individual is determined to be eligible for compensation, awards

36. *See* Bernhard, *supra* note 19, at 103–05 (criticizing the pardon requirements imposed by several states as imposing an element of political favoritism and arbitrariness); Bernhard, *Table*, *supra* note 4 (listing California, Maryland, Maine, Illinois, and North Carolina as requiring pardons as conditions precedent to recovery under the states' wrongful conviction statutory compensation schemes). Bernhard also lists Texas as requiring wrongfully convicted individuals to obtain a pardon before they can recover; this was true until 2001, when the state reformed its statutory scheme to allow individuals who were granted relief on the basis of actual innocence to qualify for compensation without also needing a pardon. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (Vernon 2001) (enabling an individual to obtain compensation for wrongful conviction without also requiring a pardon). R

37. *See, e.g.*, N.Y. CT. CL. ACT § 8-b(5) (2003) (requiring the individual seeking compensation to have been pardoned on the ground of innocence, have had a court specifically dismiss the charges against him or her on grounds consistent with innocence, or have been acquitted at retrial). In *State v. Tyson*, 698 N.Y.S.2d 410, 415–16 (N.Y. Ct. Cl. 1999), the court determined that it could not grant Betty Tyson's claim for compensation because her conviction was overturned on the basis of improper withholding of exculpatory evidence rather than on the statutorily-required basis of a finding of innocence. *See id.* ("[T]he Legislature, in its wisdom, has placed a high threshold upon those seeking recompense under this statute, and unfortunately for Betty Tyson, her claim cannot surmount that limitation. And note that this is a threshold, not a roadblock, because the remedy for which recompense is sought here is a statutory creation, not a common law right, and thus I am bound by the Legislature's draftsmanship. So unfortunately for Betty Tyson, there can be no recovery here, and no opportunity for her to prove her innocence, perhaps her ultimate goal.").

that the individuals might receive under the statutory schemes often inadequately compensate for legal fees, lost wages while in prison, and medical and psychological expenses associated with the trauma of wrongful imprisonment. Of the seventeen statutory compensation schemes, eleven possess statutory caps on damages, and several of those twelve possess damage caps so low as to make their promises of compensation illusory.[38] The federal government's wrongful conviction compensation statute stands out in this regard as being particularly egregious; it authorizes only $5000 in *total* compensation for wrongful conviction, regardless of the duration of imprisonment or the actual damages suffered by the wrongfully convicted individual.[39] Illinois caps damages on a sliding scale that prevents recovery of more than $15,000 for up to five years of incarceration and more than $35,000 total, though the statute perversely indexes these small amounts of maximum recovery to the inflation rate.[40] Even states such as California, Texas, and North Carolina, which have recently revised their compensation statutes to increase the amount of money that a wrongfully convicted individual can hypothetically recover, still cap damages at levels inadequate for those who have suffered significant damages as a result of their wrongful imprisonment.[41] Only Maryland, New York, the District

38. The federal government, Alabama, California, Iowa, Illinois, Maine, New Hampshire, New Jersey, North Carolina, Texas, West Virginia, and Wisconsin are the twelve jurisdictions that possess statutory caps on damages. *See supra* note 21 and accompanying text (listing the jurisdictions that possess statutory compensation schemes and citing sources containing further information on the schemes). **R**

39. *See* 28 U.S.C. § 2513 (2000) (capping statutory damages available to the wrongfully convicted at $5000). Recent efforts by some in Congress to rectify this situation have been unavailing. The Innocence Protection Act of 2001 originally contained a provision that would increase the compensation provided in cases of federal wrongful imprisonment from $5000 in total to $50,000 per year for non-capital convictions and $100,000 per year for capital convictions. S. 486, 107th Cong § 301 (2001). This provision, as well as a provision that would have required states to assure the Attorney General that they are "reasonably compensating" individuals wrongfully convicted of capital offenses, *id.* § 302, were struck from the bill when the bill was reported from committee on October 16, 2002. S. REP. NO. 107-315 (2002). The bill did not pass during the 107th Congress; when it was revived in 2003 as part of a larger Democrat-sponsored domestic security bill, the provision providing for federal compensation was reinserted but watered down to allow for only $10,000 per year of wrongful incarceration, and the provision mandating that states provide reasonable compensation remained stricken from the bill. *See* S. 22, 108th Cong. §§ 6401–02 (2003).

40. *See* 705 ILL. COMP. STAT. 505/8(c) (2003).

41. *See* CAL. PEN. CODE § 4904 (West 2003) (increasing available compensation from a maximum of $10,000 to a recommended sum of $100 per day of imprisonment); N.C. GEN. STAT. §§ 148-82–148-84 (2002) (increasing available compensation from $10,000 per year to $20,000 per year and total available com-

of Columbia, Ohio, West Virginia and Tennessee do not limit recovery for wages lost during imprisonment, and only a subset of these states make recovery for other damages suffered freely available.[42]

B. Rationales for Compensation

This Note advocates for increased availability of publicly-funded compensation for the wrongfully convicted on the grounds that the failings of the current system produce inefficiency and injustice, and are inconsistent with legal developments since Borchard's time that have empowered individuals to obtain relief when government has wronged them.[43] The following section summarizes several utilitarian and moral arguments in favor of expanding compensation available to the wrongfully convicted.

1. Utilitarian Arguments

a. Compensation Motivates Government to Protect the Innocent from Wrongful Conviction

Expansion of governmental liability for erroneous convictions may benefit society if it encourages government to take greater care in using the criminal justice system to obtain convictions. By shifting costs of error from the wrongfully convicted individual to the government that secured the wrongful conviction, a full compensation regime should encourage government agents to take precau-

pensation from $150,000 to $500,000); TEX. CIV. PRAC. & REMEDIES CODE ANN. § 103.052 (Vernon 2003) (increasing the amount of compensation available from $50,000 total to $25,000 per year of incarceration up to a total of $500,000, plus one year of counseling).

42. *See Frontline: Burden of Innocence: FAQs: Compensating the Exonerated*, http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/chart.html (last visited Mar. 2, 2004) (detailing the absence of explicit caps on damages in those six jurisdictions).

43. For examples of cases in which courts have expanded remedies available to individuals harmed by government since Professor Borchard first proposed compensating the wrongfully convicted, see, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (determining that individuals could seek damages against federal officials for federal constitutional violations), and *First English Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (stating that compensation for temporary takings was constitutionally required), discussed *infra* Part II.C. The trend towards expansion of remedies available to those harmed by government is not a universal one, and remedies hypothetically available under *Bivens*, *First English*, and other cases may prove difficult to obtain. But the expansion of remedies judicially available to parties in circumstances similar to the wrongfully convicted nonetheless justifies a reexamination of Borchard's earlier arguments for compensation.

tions necessary to avoid wrongful convictions.[44] Assuming that government actors will be motivated by the threat of public or individual liability for the criminal justice system's mistakes,[45] provision of full compensation should cause prosecutors' motives to be properly aligned with their ethical duties to do justice and seek truth.[46] Increasing the availability of monetary relief for the wrongfully convicted may also encourage lawyers to represent those whom they believe to be wrongfully convicted, improving wrongfully convicted prisoners' ability to receive the full measure of justice to which they are entitled.[47]

b. Compensation as Social Insurance

An expanded compensation regime would also act as a form of social insurance to spread the risk of harm from a socially beneficial but still dangerous criminal justice system.[48] If governmental com-

44. *See, e.g.*, Rosenn, *supra* note 24, at 716–17 ("[I]mposition of strict state liability would bring important collateral benefits. First, imposing these costs on the state may discourage police and prosecutors from bringing groundless prosecutions, or at least induce greater circumspection in invoking the machinery of the criminal justice system."). R

45. Some have contested the claim that imposition of financial liability on government alone for constitutional injuries will cause government officials to change their behavior. *See, e.g.*, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that government actors focus on political rather than financial consequences of their actions and that therefore, a government compensation requirement may not effectively deter harmful conduct by government actors).

46. *See* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 312–15 (2001) (arguing that the prosecutor has an obligation to seek truth, despite the effect that this obligation may have on her ability to obtain convictions). Prosecutors' duty to seek truth, however, may interact with their desire to minimize government liability for wrongful convictions in unclear ways. If prosecutors are concerned about minimizing possible government liability once a potential error was discovered, they may have a stronger incentive to resist discovery of that error. While expansion of compensation may reduce the likelihood of error in the first instance, it may reduce already-wronged individuals' opportunities to vindicate themselves if the threat of compensation causes prosecutors to resist more stringently post-conviction procedures that could reveal actual innocence. Thanks to the Honorable Pierre Leval for illuminating this potential consequence of an expanded compensation regime for me.

47. *See* Bernhard, *supra* note 19, at 107 ("Parsimonious monetary limits dissuade counsel from pursuing wrongful conviction claims on behalf of exonerated individuals, and discourage counsel from assisting those who are still in prison and able to present a reasonable claim of innocence which requires development."). R

48. *See, e.g.*, BORCHARD, CONVICTING THE INNOCENT, *supra* note 2, at 390 ("Where the common interest is joined for a common end, with each individual subject to the same danger [i.e., erroneous conviction], the loss, when it occurs, R

pensation were freely available to remedy the criminal justice system's errors, society as a whole rather than a lone, injured individual would bear the costs of wrongful conviction.[49] Much as workers' compensation systems ensure that unfortunate individuals do not disproportionately bear the damages inflicted by a labor market that must exist but poses dangers, an adequate compensation regime for the wrongfully convicted would free the typical victim of wrongful conviction from total impoverishment while allowing the criminal justice system to continue to function.[50] This form of cost-shifting would internalize the social costs of wrongful conviction and enable society to strike a better balance between procedures that facilitate convictions and those that protect the potentially innocent suspect from wrongful conviction.

2. Moral Arguments

a. Fairness to Those Harmed By Government

Wrongfully convicted individuals also ought to be able to mount moral arguments that they are personally deserving of compensation for the harms that they suffered. The Court's claim in *Marbury v. Madison* that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury"[51] may be aspirational, particularly when a non-negligent accident causes injury. But at least in some circumstances, especially those in which individuals did not contribute to their own convictions and in which government actors could have avoided wrongful convictions by taking reasonable

should be borne by the community and not alone by the injured individual."); King, *supra* note 24, at 1096–97 ("Liability for erroneous confinements—'special sacrifices' demanded by the government of its citizens, who acquiesce in the use of an imperfect instrumentality [i.e., the criminal justice system]—should be imposed upon the government not because it was at fault by conventional standards but as a matter of social adjustment."). R

49. *See* King, *supra* note 24, at 1109 ("The avowed goal of the absolute liability approach is allocation of loss to the party better equipped to pass it on to the public: the superior risk bearer. . . . The policy . . . should be one of transferring losses only when necessary to achieve the overriding goal of proper loss allocation—when, in other words, the shift is from an inferior to a superior risk bearer.") (quoting Clarence Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1176 (1952)). R

50. *See* BORCHARD, CONVICTING THE INNOCENT, *supra* note 2, at 390 ("The workmen's compensation acts are perhaps the clearest illustration of this broad change in legal principle, which now applies to many cases in which any member of a large social group is subjected to the danger of recurring accident and where a more equitable distribution of the loss seems mandatory.").

51. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

precautions, one could argue persuasively that the wrongfully convicted ought to have this restitutionary right.

Some have also argued that government has a special obligation to compensate the wrongfully convicted, regardless of evidence of fault, because it controlled the instrumentality that inflicted the harm. Building on *Bivens*' discussion of government's unique ability to injure individuals,[52] this argument claims that the state's—and by extension, the public's—involvement in procuring and enforcing wrongful convictions makes them worthy of state compensation. As Professor Bernhard asserts:

> After all, it is the state, through operation of one of its most essential services—the criminal justice system—that has inflicted the harm. Although it may be impossible to hold any individual law enforcement officer, or any particular municipality, liable, the state's responsibility for the injury is sufficient to generate a moral obligation.[53]

b. Equal Treatment of Those Similarly Situated

Some advocates for compensation have also asserted that refusing to compensate the wrongfully convicted would be unfair when many with less of a claim on government coffers are already receiving compensation. This argument counters claims that providing adequate compensation to the wrongfully convicted would be infeasible because it is too expensive.[54]

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52. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 391–92 (1971). The court wrote:

> [Government r]espondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Id.

53. *See* Bernhard, *supra* note 19, at 93. R

54. BORCHARD, CONVICTING THE INNOCENT, *supra* note 2, at 387. Professor Borchard noted: R

> It may seem strange that this principle of compensation, so obviously just, which had, moreover, received the general recognition and support of jurists, publicists, and legislators, should have had to wait so many decades before acceptance in the actual legislation of modern states. The reason for the delay was, in part, the unwillingness to open already cramped treasuries to what seemed unlimited inroads . . . .

Id.

Professor Bernhard uses the universal availability of crime victims' compensation schemes, at the same time that compensation schemes for the wrongfully convicted are rare, to make this argument; Bernhard notes that all fifty states and the federal government have passed crime victims' compensation legislation since 1954.[55] According to a 1996 book on compensation for victims of crime, federal and state victims' compensation funds cost governments over $114 million per year in direct payments to victims, over and above the approximately $8 billion per year spent by government on social insurance to compensate crime victims.[56] Twenty-seven states' crime victims' compensation funds even offer compensation for wages lost as a result of victimization.[57]

Governments have figured out creative ways to fund victims' compensation schemes, despite budgetary limitations, many believing that they are morally obligated to compensate victims. The federal government, for example, funds its victims' compensation scheme in part by depositing certain federal fines into the compensation fund.[58] Florida has made its belief that it is morally obligated to compensate victims explicit in the statute establishing the scheme.[59]

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55. *See* Bernhard, *supra* note 19, at 97. R

56. *See* SUSAN KISS SARNOFF, PAYING FOR CRIME: THE POLICIES AND POSSIBILITIES OF CRIME VICTIM REIMBURSEMENT 2–5 (1996). *See also* DALE G. PARENT ET AL., NAT'L INST. FOR JUST., COMPENSATING CRIME VICTIMS: A SUMMARY OF POLICIES AND PRACTICES (1992), *cited in* Bernhard, *supra* note 19, at 97 n.98 (discussing government expenditures on victims of crime); Victims of Crime Act of 1984, Pub. L. 98–473, §§ 1402–04, 98 Stat. 2170, 2710–14 (codified as amended at 42 U.S.C. § 10601-04 (2002)) (establishing a federal crime victims' fund and authorizing issuance of grants from the fund to state crime victims' compensation programs). R

57. *See* SARNOFF, *supra* note 56, at 60–61 t.6.1 (listing compensation available from all fifty states' victims' compensation funds). R

58. *See, e.g.*, 42 U.S.C. § 10601(b) (2003) (listing types of fines paid to the federal government that are to be deposited in the federal crime victims' fund).

59. *See* FLA. STAT. ANN. § 960.02 (West 2002), *cited in* Bernhard, *supra* note 19, at 99 n.113: R

> The Legislature recognizes that many innocent persons suffer personal injury or death as a direct result of adult and juvenile criminal acts or in their efforts to prevent crime or apprehend persons committing or attempting to commit adult and juvenile crimes. Such persons or their dependents may thereby suffer disabilities, incur financial hardships, or become dependent upon public assistance. The Legislature finds and determines that there is a need for government financial assistance for such victims of adult and juvenile crime. Accordingly, it is the intent of the Legislature that aid, care, and support be provided by the state, as a matter of moral responsibility, for such victims of adult and juvenile crime.

The universal presence of crime victims' schemes, when contrasted with the general absence of wrongful conviction victims' schemes, which are largely absent, rankles Professor Bernhard. If governments are morally obligated to compensate individuals harmed by criminals without any direct involvement of government in inflicting the harm, according to Bernhard, then they certainly should be morally obligated as well to compensate wrongfully convicted individuals harmed directly by their criminal justice systems.[60]

c. Solicitude Towards the Politically Powerless

The reasons why crime victims are found deserving of compensation, while victims of wrongful conviction generally are not, require close examination to determine whether the wrongfully convicted may be deserving of special judicial solicitude. Professor Borchard argued in 1932 that wrongfully convicted individuals were undercompensated because those subject to erroneous conviction were "a weak social group."[61] The Supreme Court in *United States v. Carolene Products* recognized a few years after Borchard wrote his statement that "discrete and insular minorities" may suffer from prejudice that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," and that in this situation, a "more searching judicial inquiry" may be required.[62]

Today's "discrete and insular minorities" run a far higher risk of wrongful conviction than other groups. Evidence suggests that "those affected by wrongful arrest and conviction" continue to be a "weak social group" for at least two reasons. First, ethnic and racial minorities have been disproportionately subject to imprisonment, both proper and improper.[63] For example, seventy-three percent

60. *See* Bernhard, *supra* note 19, at 93–94. R

61. BORCHARD, CONVICTING THE INNOCENT, *supra* note 2, at 390 ("[T]hose affected by wrongful arrest or conviction are a weak social group, whose voice is almost unheard, and whose rights are only at this late day securing slight recognition because of a general altruistic sense of social justice."). R

62. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

63. *See, e.g.*, The Sentencing Project, *Facts about Prisons and Prisoners*, *at* http://www.sentencingproject.org/brief/pub1035.pdf (last visited Mar. 2, 2004) (explaining that 45% of prison inmates in 2001 were black and 18% were Hispanic, and that black males have a 32% chance of serving time in prison at some point in their lives, while Hispanic males have a 17% chance of serving time in prison and white males only have a 6% chance of spending time in prison); Bureau of Justice Statistics, *Lifetime Likelihood of Going to State or Federal Prison* (March 1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/llgsfp.pdf (Mar. 2, 2004) (providing

of the wrongfully convicted individuals freed thanks to the work of the Innocence Project are members of racial minority groups.[64] Meanwhile, crime victimization rates are similar across racial and ethnic lines.[65] This may help explain why crime victim compensation legislation has been so successful, even while wrongful conviction compensation legislation has tended to languish. Second, public stigmatization of those who have been imprisoned[66] even if innocent,[67] may further hinder the ability of wrongfully convicted individuals to obtain redress through the political process.

If one believes in the logic and moral calculus of *Carolene Products*, then the judiciary ought to explore means of remedying the harms suffered by the wrongfully convicted after concluding that lack of legislative commitment to the wrongfully convicted's "just cause" derives at least in part from their low social status. John Hart Ely's work building on *Carolene Products* concludes that "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can."[68] Since representative government has through its sustained inaction shown that, by and large, it cannot be trusted to provide reasonable compensation for the wrongfully convicted, this Note turns to constitutional law for a possible avenue to compensation.

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more detailed statistics on the likelihood of being incarcerated in prison for various demographic groups and noting that the statistics do not include individuals' likelihood of being incarcerated in a local jail rather than in a state or federal correctional facility).

64. Innocence Project, *Mistaken I.D.*, *at* http://www.innocenceproject.org/causes/mistakenid.php (last visited Mar. 2, 2004) (discussing the racial composition of those whose convictions were overturned due to the work of the Innocence Project and explaining that 61% of those exonerated were African-American and 73% of those exonerated were members of minority groups).

65. *See* Bureau of Justice Statistics, *Criminal Victimization 2001* (Sept. 2002) *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv01.pdf (last visited Mar. 2, 2004) (concluding that crime victimization rates were similar across racial and ethnic groups in 2001).

66. *See* Doretha M. VanSlyke, Note, Hudson v. McMillan *and Prisoners' Rights: The Court Giveth and the Court Taketh Away*, 42 AM. U. L. REV. 1727, 1727 (1993) ("Prisoners have been described as the starkest example of a 'discrete and insular minority'; they are politically powerless and subject to public disdain and apathy.") (citations omitted); Rhodes v. Chapman, 452 U.S. 337, 358 (1981) (Brennan, J., concurring) ("Public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of the prisons.").

67. *See* Leipold, *supra* note 4, at 1299 (discussing the stigmatization from which those who were accused of a crime but later acquitted suffer). R

68. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 183 (1980).

C. The Possibility of Takings-Based Relief

This Note examines whether state and federal takings clauses can serve as this source of compensation. If this Note is correct in arguing that wrongfully convicted individuals are being undercompensated for their injuries; that full compensation would be both equitable and socially beneficial; and that legislators may nonetheless continue to refuse to provide meaningful relief to the wrongfully convicted, then development of constitutional or common-law legal doctrine may be necessary to provide the wrongfully convicted with the relief that they deserve. Other scholars have already argued for relaxation of restrictions on traditional tort-based causes of action,[69] but have generally failed to explore the possibility of takings-based relief in any depth.

These scholars have avoided discussion of takings-based relief despite eminent domain principles' longstanding use as a source for arguments that wrongfully convicted individuals are deserving of government compensation. Professor Borchard noted that the argument for compensation based on eminent domain principles was introduced as early as the nineteenth century in Europe.[70] Borchard himself claimed that eminent domain principles should support provision of a remedy for the wrongfully convicted, because if government must compensate when it takes property, how can it have the power to take the wrongfully convicted's liberty, at least as great of a right, with impunity?[71]

Opponents of this argument have responded by claiming that regardless of the fairness of the differential treatment afforded liberty and property interests, the eminent domain principles only require compensation for government appropriations of real property, not for appropriations of liberty interests.[72] Those who

69. For example, Professor King's comment, *supra* note 24, focuses on recommending revisions to tort doctrine that would allow expansion of compensation for the wrongfully convicted. R

70. *See* BORCHARD, CONVICTING THE INNOCENT, *supra* note 2, at 391 (discussing European scholars' doctrinal arguments for compensation based on eminent domain principles). R

71. *See id.* at 388–89.

72. Professor Rosenn, for example, stated that "[t]he eminent domain analogy is a strained basis for imposing liability on the government for erroneous prosecutions." Rosenn, *supra* note 24, at 715. Johnston, *supra* note 23, at 413, summarily dismisses the takings-based argument based on Rosenn's earlier analysis of the issue. Professor Bernhard was specifically referring to the takings-based argument when she stated that no legal obligation to indemnify existed. *See* Bernhard, *supra* note 19, at 92 n.78 (stating that Borchard's "attempts to discover a R R

argue against Borchard therefore must believe that government takes no property from those it wrongfully convicts and imprisons.[73]

But the argument that eminent domain principles are never implicated by wrongful imprisonment's deprivation of its victims' labor and liberty rests on a fallacy, for liberty and property interests are not mutually exclusive.[74] Recognizing this, courts have explicitly used eminent domain principles in recent years to require compensation for certain governmental appropriations of labor, and have suggested more generally that governmental appropriations of labor give rise to takings claims unless the appropriation is simply requiring performance of a duty already owed the state. Though this Note does not claim that liberty and property rights are synonymous, these recent cases' acceptance of the common sense notion that individuals have property rights in their productive labor should allow advocates to argue that the wrongfully convicted were also deprived of their property when they lost their productive labor to imprisonment.[75]

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legal obligation in the concept of eminent domain or through an analogy to compulsory jury or military service proved unpersuasive").

73. Professor King believed in 1970 that the takings-based argument would have difficulty succeeding, "due in part to restrictive definitions of 'property' for eminent domain purposes and the notion that the government should receive tangible benefit for the taking." King, *supra* note 24, at 1093 n.15. King did not, however, believe that a constitutional takings-based argument for compensation was incapable of success: **R**

> Failure to discuss a constitutional basis mandating compensation for erroneous confinements is not intended as a final rejection of such an argument. Indeed, those persons erroneously confined might allay the fear of unrestricted liability by providing the courts with a sufficiently well-defined class of plaintiffs and thus inspire serious consideration of a constitutionally based ground for compensation.

Id.

74. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). The court wrote:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

Id. (citing, *inter alia*, JOHN LOCKE, OF CIVIL GOVERNMENT (Ernest Phys ed., E.P. Dutton & Co. 1947) (1691)), *quoted in* Wayne McCormack, *Property and Liberty—Institutional Competence and the Functions of Rights*, 51 WASH. & LEE L. REV. 1, 4 n.9 (1994). McCormack argues that "[t]he terms property and liberty actually signify overlapping portions of a spectrum of human activity ranging from that which is most isolated to that which is most interlocked with other people." *Id.* at 1.

75. This Note does not contend that the common sense relationship between individual labor and property rights is universally agreed upon by legal scholars or

Developments in substantive takings law have increased the likelihood that the wrongfully convicted should be entitled to a financial recovery from the state if a taking is found to have occurred. Compensation is now compelled when government takes property, even temporarily. Recent case law also suggests that remedies under the federal Takings Clause may be constitutionally required, despite the existence of sovereign immunity.[76]

Courts' application of takings law to the wrongfully convicted would continue the use of eminent domain principles as tools to protect politically weak minorities from being harmed by government without recourse. Many have understood takings law as a tool to protect politically weak individuals from exploitation.[77] Expanding takings remedies available to the wrongfully convicted also would provide a form of social insurance[78] and create incentives for government to take due care to reduce erroneous convictions as effectively as an expanded tort doctrine or statutory compensation scheme.[79]

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philosophers. Instead, it seeks to build its argument on already-existing legal doctrine holding that individuals have legally-protected property rights in their labor. For a more in-depth discussion of the origins of the relationship between labor and property and the arguments marshaled for and against the legal recognition of this relationship, see Part II.A.4.

76. *See infra* Part II.C for discussion of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), which concluded that compensation was required for a temporary taking and asserted in dicta that government's obligation to compensate for takings trumped state sovereign immunity.

77. Professor Ely has interpreted the Fifth Amendment's Takings Clause "as yet another protection of the few against the many . . . ." ELY, *supra* note 68, at 97. **R** *See also* Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 593 n.8 (1998) (stating that "some understand the [Takings] Clause as a barrier against the exploitation of weaker groups or individuals").

78. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

79. *See* King, *supra* note 24, at 1092–93 n.14 ("Both foregoing theories [i.e., **R** tort-based and takings-based] involve a *quid pro quo* whereby the state would offer compensation in exchange for a necessary deprivation of the freedom of certain men. . . . It is irrelevant whether one speaks in terms of the 'risk' of erroneous confinement, or of the act of confinement as a 'taking.' The transaction would be the same regardless of the terminology—erroneous loss of freedom traded for compensation.").

II.
APPLYING TAKINGS DOCTRINE TO ARGUE FOR COMPENSATION FOR THE WRONGFULLY CONVICTED

This section of this Note discusses doctrine that could be used to advance arguments that eminent domain principles compel the provision of compensation for the wrongfully convicted. Takings doctrine has flourished over the past several decades as property-rights principles have gained influence in the United States Supreme Court and state high courts. Recent decisions holding that labor is a form of property protected by eminent domain principles enable individuals who were wrongfully convicted to argue that the productive value of their labor was taken from them while they were imprisoned. Supreme Court determinations that compensation is constitutionally mandated for a temporary taking should enable individuals to receive compensation for the period during which they were wrongfully confined by the state and incapable of laboring productively for themselves. Other developments in takings law have also made it easier for wrongfully convicted individuals to obtain relief.

This Note argues that the property that was "taken" within the meaning of state or federal takings clauses was the value of the productive labor that was appropriated by government during imprisonment and either left to waste or used to provide services within prison for little or no compensation, because legal doctrine has in many jurisdictions developed in a manner favorable to this claim. Other losses associated with wrongful conviction may be compensable under eminent domain or due process principles,[80] and yet other substantial injuries to wrongfully convicted individuals' mental and physical health may both be worthy of compensation and not compensable under the takings doctrine discussed above. But this Note does not seek to insure that the wrongfully convicted receive the full measure of compensation that would restore them to the exact position they were in before they were injured by the state. Instead, it seeks to ensure that the wrongfully convicted receive fair compensation for government harm to a property interest that has been recognized in many jurisdictions.[81]

80. *See infra* note 140 and accompanying text (discussing cases holding that wrongfully-convicted individuals must be compensated under due process principles for fines paid as part of their sentence). **R**

81. This Note also does not address the possibility that those who were wrongfully arrested as well as those who were wrongfully convicted might be entitled to some form of restitution under eminent domain or other principles, though much of the following discussion may be applicable to these individuals as well. *See, e.g.*,

A. The Threshold Question: Is Labor Protected By the Takings Clause?

The initial challenge facing a wrongfully convicted individual who seeks compensation under a takings-based theory is the need to demonstrate that his or her conviction and imprisonment appropriated a property interest that state or federal eminent domain principles protect. Fortunately for the wrongfully convicted, many jurisdictions have already held that governmental appropriations of labor may give rise to a claim for compensation under state or federal takings principles. Other jurisdictions have avoided reaching the question by positing that government is not "taking" labor when it is simply requiring performance of a civic duty already owed to it, but these jurisdictions have not decided the matter unfavorably to wrongfully convicted individuals who are seeking relief.

1. Many Jurisdictions Have Already Held That Labor Is Protected Under State or Federal Takings Clauses

Nine states and the United States Court of Appeals for the District of Columbia Circuit have either explicitly held or strongly indicated in dicta that a governmental appropriation of labor can require just compensation under state or federal takings clauses.[82]

Carolyn Shelbourn, *Compensation for Detention*, 1978 CRIM. L. REV. 22, 24–5 (discussing other nations' practices of compensating individuals who were detained but not convicted as well as those who were wrongfully convicted); Leipold, *supra* note 4 (advocating for establishment of a process to enable acquitted defendants to prove their innocence and repair damage caused by false accusations of guilt). R

82. The states that have explicitly held governmental appropriations of labor to be protected by state or federal takings clauses, absent a finding of duty, are Alaska: DeLisio v. Alaska Super. Ct., 740 P.2d 437, 440–41 (Alaska 1987); Arkansas: Arnold v. Kemp, 813 S.W.2d 770, 775 (Ark. 1991); Indiana: Sholes v. Sholes, 760 N.E.2d 156, 163–64 (Ind. 2001); Kansas: State *ex rel.* Stephan v. Smith, 747 P.2d 816, 842 (Kan. 1987) ("We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection."); Kentucky: Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972) ("It is in the public interest that the administration of criminal justice proceed fairly, impartially, expeditiously and efficiently. Therefore, it appears elemental that the public interest in the enforcement of criminal laws and the constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive *him* of *his* property without just compensation."); Iowa: McNabb v. Osmundson, 315 N.W.2d 9, 16 (Iowa 1982) (concluding that, since 1850, Iowa has "held that [when a] statute required the court to appoint counsel and the lawyer in turn could not refuse to provide services, the latter had a 'right' to reasonable compensation for those services. That right was described as 'complete, without further legislative enactment,' and a 'fundamental rule of right,' foundationed on the constitutional mandate 'that private property shall not be taken without just compensation.'" (quoting Hall v. Washington County, 2 Greene 473, 476, 478 (Iowa 1850))); Missouri: State *ex rel.* Scott v.

These courts have done so in cases deciding that attorneys who have been appointed by courts to represent indigent defendants in civil or criminal suits cannot be compelled to serve without just compensation for their services.[83]

In Missouri, for example, the state in which Barbara Reasonover was convicted and wrongfully imprisoned for almost seventeen years,[84] the Supreme Court of Missouri held in *State ex rel. Scott v. Roper* that labor was protected by the takings clause of its state constitution.[85] Rejecting claims made in an earlier federal case, *United States v. Dillon*, that a court could require a lawyer to serve without compensation because of lawyers' historic treatment as "officers of the court,"[86] the *Roper* court held instead that lawyers in the United States historically were not subject to a duty to represent indigent civil litigants without any compensation from the state.[87] Nor, according to the court, did lawyers accept membership in the legal profession subject to the condition that they serve as appointed counsel free of charge when called upon to serve. Instead, the court found that "since the colonial period, a lawyer's services have been recognized as a protectable property interest. It was noted in 1812 that '[i]ndustry and faculties are most valuable prop-

Roper, 688 S.W.2d 757, 769 (Mo. 1985); Oklahoma: Bias v. State, 568 P.2d 1269, 1272 (Okla. 1977) (concluding that forced provision of "extraordinary professional services" to indigent clients without just compensation would take a lawyer's private property); Utah: Bedford v. Salt Lake County, 447 P.2d 193, 195 (Utah 1968) ("Until the legislature provides a method by which a lawyer can be paid for compulsory services to an indigent person, a statute requiring such services is unconstitutional as requiring one to give services (a form of property) without just compensation being paid therefor. It matters not that the service is to be rendered to one other than the state. It would still be an involuntary taking by the state."). The D.C. Circuit concluded in dicta that excessive appropriation of lawyers' labor would amount to a taking of property without just compensation. *See* Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984), discussed *infra*, note 93 and accompanying text.

83. Many states appear to have been influenced by David Shapiro's article, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 771–77 (1980), which argues that lawyers were not historically under a universal duty to serve without compensation, and that therefore recovery may be available under eminent domain principles for lawyers who are uniquely burdened by the imposition of requirements to provide legal services without pay. *See, e.g.*, *DeLisio*, 740 P.2d at 440 (citing to Professor Shapiro's article); *Roper*, 688 S.W.2d at 764 (same).

84. *See supra* note 14 and accompanying text. R

85. *Roper*, 688 S.W.2d at 757.

86. 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1965).

87. *See Roper*, 688 S.W.2d at 765–68 (citing Shapiro, *supra* note 83). R

erty in a republic.'"[88] Because the state constitution required just compensation for appropriations of property and guaranteed "that all persons have a natural right to . . . the enjoyment of the gains of their own industry,"[89] the court concluded that lawyers could not be required to represent indigent civil litigants without just compensation.

In Alaska, the state's high court concluded that lawyers could not be appointed to represent indigent criminal defendants without just compensation. The court, basing its holding on the takings clause of the Alaska Constitution,[90] concluded:

> We see no language in our takings clause to indicate that services should be excluded from the section's protections, and we are unaware of any constitutional convention history indicating such exclusive intent. Consequently, we perceive no reasoned basis for excluding such services.
>
> Indeed, excluding personal services from the clause's provisions is manifestly unreasonable. It has long been recognized that "labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner."[91]

Federal courts have also stated in dicta that people may have a cognizable property interest in their labor and that, under certain conditions, a governmental appropriation of labor may constitute a taking of property deserving of compensation. The United States Supreme Court indicated in *Butler v. Perry*, a 1916 case upholding a statute requiring that individuals work on public roads for several days each year without compensation, that "for some purposes labor must be considered as property."[92] In 1984, the United States Court of Appeals for the District of Columbia Circuit, in *Family Division Trial Lawyers v. Moultrie*, stated that an especially burdensome compulsory appointment may rise to the level of a taking: "while we

88. *Roper*, 688 S.W.2d at 768–69 (quoting Bynre v. Stewart, 3 Des. 466, 468 (1812)).

89. MO. CONST. art. I § 2, *quoted in Roper*, 688 S.W.2d at 769.

90. "Private property shall not be taken or damaged for public use without just compensation." ALASKA CONST. art. I, § 18.

91. DeLisio v. Alaska Super. Ct., 740 P.2d 437, 440 (Alaska 1987) (quoting Coffeyville Vitrified Brick & Tile Co. v. Perry, 76 P. 848, 850 (Kan. 1904)) (brackets omitted).

92. 240 U.S. 328, 333 (1916) (upholding a statute requiring that individuals work on public roads for several days each year without compensation and stating that: "Conceding for some purposes labor must be considered as property, it is evident from what already has been said that to require work on the public roads has never been regarded as a deprivation of either liberty or property.").

agree with the district court that some *pro bono* requirements do not constitute a 'taking,' we think it equally clear that an unreasonable amount of required uncompensated service might so qualify."[93]

2. Understanding the "Civic Duty Rule"

Many jurisdictions, however, have not yet reached the question of whether labor is protected by state or federal takings clauses. They take their cue from a line of appellate decisions that have allowed government to appropriate labor when it is asking for performance of a traditional or preexisting civic duty. Other cases establish the principle that no takings occur when an individual loses property as punishment for violation of a civic duty, or is prevented from using his or her property in a manner that violates a duty towards others. These doctrines, which the Note collectively terms the "civic duty rule," have limited the development of the law governing takings of labor.

The Supreme Court has established that individuals possess an affirmative civic duty to provide labor to government without being entitled to compensation for the compulsory service. Earlier cases examined the rule in the context of Thirteenth and Fourteenth Amendment challenges to compulsory government service. In *Butler v. Perry*, the Court relied on Blackstone and pre-Revolutionary practice to conclude that individuals historically could be required to work on public roads without compensation.[94] Historical practice then led the Court to conclude that a Florida statute requiring this form of labor did not violate the Thirteenth or Fourteenth Amendments because "to require work on the public roads has never been regarded as a deprivation of either liberty or property."[95] In the *Selective Draft Law Cases*, the Court stated that "the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation," in this case, the wartime draft, could not be unconstitutional.[96] Other historically-required public duties, in-

93. 725 F.2d 695, 705 (D.C. Cir. 1984).

94. 240 U.S. at 330 ("In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, unless restrained by some constitutional limitation, a State has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public. The law of England is thus declared in Blackstone's Commentaries . . . .").

95. *Id.* at 333.

96. 245 U.S. 366, 390 (1918).

cluding jury service and night patrol, have also been upheld against constitutional challenge.[97]

The Supreme Court applied the civic duty rule to takings claims involving government appropriations of labor in a 1973 case, *Hurtado v. United States*.[98] Hurtado represented a class of Mexican immigrant workers who had been imprisoned as material witnesses in trials of those who had illegally imported them into the country. These witnesses received only one dollar per day in statutory compensation for the duration of their confinement. They filed a class action challenging their meager compensation as, *inter alia*, a violation of their rights to property under the Fifth Amendment's Takings Clause by depriving them of their ability to earn income while they were in prison.[99] The *Hurtado* Court rejected this claim on the ground that, just as owners of real property could not obtain compensation under the Takings Clause for required expenditures in performance of a duty owed to the state,[100] an individual could not be entitled to compensation for compelled performance of a preexisting civic duty, no matter how burdensome it may be. According to the Court, "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed."[101] Because the Court's historical analysis led it to conclude that individuals traditionally could be compelled to serve as witnesses without compensation, it found that the *Hurtado* plaintiffs could not sustain a takings claim:

> It is beyond dispute that there is in fact a public obligation to provide evidence, and that this obligation persists no matter how financially burdensome it may be. The financial losses suffered during pretrial detention are an extension of the burdens borne by every witness who testifies. The detention of a

97. *See* Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 323–29 (2002) (discussing other civic duties that courts had recognized in the past, including duties to serve on night patrol and assist with frontier defense); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II— Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 131–40 (1990) (discussing government appropriations of labor that have not historically given rise to takings claims).

98. 410 U.S. 578 (1973).

99. *Id.* at 579.

100. *See* Monongahela Bridge Co. v. United States, 216 U.S. 177, 193–94 (1910) (holding that the federal government did not have to compensate a bridge owner who was required to make modifications to a bridge that was obstructing river traffic because the bridge owner owed a duty to maintain the navigability of the river below), *cited in Hurtado*, 410 U.S. at 588–89.

101. *Hurtado*, 410 U.S. at 588.

> material witness, in short, is simply not a taking under the Fifth Amendment, and the level of his compensation, therefore, does not, as such, present a constitutional question. It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.[102]

Reasoning similar to that of *Hurtado* has allowed a number of jurisdictions to avoid addressing the scope of state or federal takings clauses' protection of labor in the context of mandatory provision of legal services to the indigent, the only area of law in which the labor-takings concept has received sustained attention in recent years. Many of these jurisdictions take their lead from the decision of the Ninth Circuit in *United States v. Dillon*.[103] The *Dillon* court concluded that lawyers have a civic duty to represent the indigent upon court appointment pursuant to the "ancient and established tradition" of provision of legal services without just compensation.[104] Since it determined that, even if labor were a form of property protected by the Takings Clause, governmental appropriation pursuant to a civic duty already owed the state did not constitute a taking, it did not actually decide whether labor was protected by the federal Takings Clause: "Since we have arrived at the conclusion that there was no 'taking', in the constitutional sense, of [Dillon's] services, it is unnecessary for us to consider whether the services rendered by [Dillon] constitute 'property' within the meaning of that term as used in the Fifth Amendment."[105] Several jurisdictions, including Massachusetts[106] and Nevada,[107] have explicitly followed *Dillon*'s logic to avoid reaching the question of whether labor

102. *Id.* at 589 (internal citations, punctuation marks, and footnotes omitted).

103. 346 F.2d 633 (9th Cir. 1965).

104. *Id.* at 635–36 ("Such decisions [granting attorneys Due Process rights in their licenses] do not support [Dillon's] claim that there has been a taking of his services without just compensation when he performs an obligation imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice.").

105. *Id.* at 636.

106. Abodeely v. County of Worcester, 227 N.E.2d 486, 489 (Mass. 1967).

107. Daines v. Markoff, 555 P.2d 490, 493 (Nev. 1976).

is protected by state or federal takings clauses and to conclude that lawyers owe a duty to serve without compensation.

Few scholars have attempted to understand the rationale for the civic duty rule.[108] Only a 1990 article by Andrea Peterson offers a compelling account of the rule, explaining that the Court's takings jurisprudence as a whole could be understood as requiring compensation only when government deprives individuals of their property without moral justification.[109] Professor Peterson analogizes between cases authorizing uncompensated government appropriations of labor and cases that have upheld broad taxation schemes, even when the schemes might be burdensome to the individual or business being taxed.[110] Professor Peterson's analysis of taxation cases in turn leads her to explore why takings challenges cannot generally be brought against broad taxation schemes. She concludes universal obligations such as taxation do not implicate the Takings Clause because they reflect the community's moral judgment that every citizen ought to pay his or her "fair share" to support a program that benefits the community as a whole:

> Ordinarily, we do not consider it wrong of someone not to contribute money to be spent for the benefit of third parties. Yet if we view [a citizen] as a member of the political community, and if a decision has been made by that political community to carry out a governmental program that benefits third parties, then we consider it wrong of [the citizen] not to pay her fair share to fund that program.[111]

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108. *See, e.g.*, Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1096–97 (1999) (arguing that the civic duty analysis applies only to appropriations of labor but questioning its logic).

109. *See* Peterson, *supra* note 97, at 131–40. R

110. *Id.* (arguing that the "civic obligations" justification for appropriating both labor and taxes are justifiable by reference to the universality of the requirements). Broad taxation schemes have been upheld against takings challenges at least since *R.R. Co. v. County of Otoe*, 83 U.S. 667, 674 (1872), which stated: "But the clause prohibiting taking private property for public use without just compensation has no reference to taxation. If it has, then all taxation is forbidden, for 'just compensation' means pecuniary recompense to the person whose property is taken equivalent in value to the property." *But cf.* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 295–303 (1985) (arguing that taxes that are intended to redistribute wealth rather than to impose general obligations on the public effect an impermissible taking of private property without just compensation).

111. Peterson, *supra* note 97, at 133; *see also* E. Enters. v. Apfel, 524 U.S. 498, R
555–56 (1998) (Breyer, J., dissenting) (arguing that the Takings Clause does not apply to "the creation of a general liability"). Robert Brauneis also points out that broad taxation is necessary as a practical matter to enable payment of takings claims. *See* Robert Brauneis, Eastern Enterprises, Phillips, *Money, and the Limited*

Peterson's account of the civic obligations shaping takings doctrine also explains why individuals may be compelled to refrain from particular uses of labor or may have their labor appropriated as punishment for a crime without being entitled to compensation. Peterson finds that civic duties to *refrain* from engaging in uses of property that effect a nuisance or to which individuals are not traditionally entitled may be enforced without invoking the Takings Clause.[112] According to the Court in *Lucas v. South Carolina Coastal Council*, decided soon after Peterson wrote her article:

> In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional.[113]

The "existing rules or understandings" barring individuals from putting their property to particular uses are forms of civic duties, as reliant on historical practices for their legitimacy as the affirmative civic duties cited in cases such as *Hurtado* as a justification for permitting government to extract essentially uncompensated services from individuals.

Role of the Just Compensation Clause in Protecting Property "in its Larger and Juster Meaning", 51 ALA. L. REV. 937, 945 n.40 (2000). Brauneis wrote:

> [I]t might be argued that the Just Compensation Clause assumes the practice of taxation, for where else, practically speaking, is a government going to get the funds to pay just compensation awards? Thus, when the *Armstrong* Court states that the Clause's purpose is to prevent the 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,' it surely has in mind taxation as the mechanism by which the public burden will be placed on the shoulders of the public as a whole.

Id. (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

112. Peterson, *supra* note 97, at 133 ("For example, if the government prohibits *A* from using her land in a manner that would seriously harm surrounding residents, the government is preventing *A* from engaging in behavior that is considered blameworthy wholly apart from the notion that *A* has certain obligations as a citizen."). R

113. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)) (internal citations omitted).

3. The Civic Duty Rule Does Not Bar Compensation for the Wrongfully Convicted

What could be considered a third form of the civic duty rule allows government to punish an individual by taking his or her property as a punishment for violating a civic duty without incurring takings liability.[114] One scholar has phrased the requirement another way: individuals may have an affirmative duty to submit to punishments such as fines and imprisonment for committing a crime.[115]

But there is no theory establishing an affirmative civic duty to submit to punishment for a crime that one did not commit. An innocent person who has committed no wrong has no such duty to be punished, just as a citizen who has done no wrong has no affirmative duty to subject her property to uncompensated government appropriation.[116] Moreover, there is no historical tradition concluding that individuals are subject to a civic duty to submit to wrongful conviction; unjustified imprisonment is not like jury duty or military service in this regard.

There still may be circumstances under which individuals who were wrongfully convicted could be held to have violated a duty that justifies some level of punishment. States that have established statutory schemes providing recovery to the wrongfully convicted, for example, have determined that wrongfully convicted individuals should not be entitled to recovery when their conviction was due to their own improper acts (e.g., perjury or commission of another unpunished offense).[117] But absent evidence that a wrongfully con-

114. *See* Peterson, *supra* note 97, at 114–15 ("[T]he takings cases can best be explained by focusing on whether the lawmakers were seeking to prevent or punish conduct that they reasonably believed the people of that jurisdiction at that time would consider wrongful."). R

115. *See* JACOB ADLER, THE URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT (1991) (concluding that guilty individuals have an affirmative duty to submit to punishment).

116. *See id.* at 38 ("If a state that aspires to minimal legitimacy proposes to make systematic use of any but the most innocuous punishments, it must show that those subjected to the punishments have a moral obligation to submit to them . . . ."), 111–12 ("Punishment imposed by others upon the punishee must therefore involve treatment that would usually be wrong or unjust if imposed upon the innocent."); *cf. infra* Part II.B.1.b (discussing cases concluding that government must under the Due Process clause return fines paid by wrongfully convicted individuals).

117. *See, e.g.*, N.Y. CT. CL. ACT § 8-b(5)(d) (2003) (requiring a wrongfully convicted individual to demonstrate that "he did not by his own conduct cause or bring about his conviction" in order to recover under the state's compensation scheme).

victed individual's violation of a civic duty brought about his or her wrongful conviction, the civic duty rule should not prevent the wrongfully convicted from making a successful takings claim. If the civic duty rule does not apply, then *Hurtado*, *Dillon*, and related cases cannot be used by jurisdictions that have not yet assessed whether labor can be protected under takings principles to avoid consideration of this difficult issue.

4. Arguing that Labor Is Protected Under Takings Principles

Jurisdictions considering for the first time whether labor is protected under state or federal takings clauses will need to understand the contested nature of claims regarding the nature of labor, the rights inhering in an individual's labor, and the legitimacy of arguments that labor ought to be treated as a form of property that cannot be taken without just compensation.

The most basic argument in favor of applying takings claims to government appropriations of labor relies on the soundness of reasoning in jurisdictions that have already concluded that labor is protected under takings principles. Nothing other than substantive differences in jurisdictions' beliefs about lawyers' civic duties to serve without pay grounds the distinction between jurisdictions that have found labor to be protected under state or federal takings principles and those that have not yet reached this question.[118] Furthermore, if the Supreme Court is prepared to grant takings protection to some forms of intangible property, one could argue that courts should also grant this protection to labor under emi-

118. *See supra* Part II.A.1 (discussing the jurisdictions that have already concluded that labor is protected under state or federal takings clauses). With the exception of Indiana's and Arkansas's constitutions, which have especially strong takings provisions, *see* IND. CONST. art. I, § 21 ("[N]o person's particular services shall be demanded, without just compensation."); ARK. CONST. art. II, § 22 ("The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."), the takings clauses upon which the jurisdictions finding labor to be protected relied contain language similar or identical to the federal Takings Clause. *See, e.g.*, IOWA CONST. art. I, § 18 ("Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof . . . ."). Kansas has concluded that labor is protected by the Fifth Amendment to the United States Constitution. *See* State *ex rel.* Stephan v. Smith, 747 P.2d 816 (Kan. 1987). The District of Columbia Circuit, of course, relied on the federal Takings Clause in *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695, 705–06 (D.C. Cir. 1984), to argue in dicta that an "unreasonable" amount of uncompensated service requirements would give rise to a valid takings claim.

nent domain principles.[119] The advocate for compensation must note, however, that the uncertain intersection between state and federal law on the subject of property interests may complicate efforts to argue that the federal Takings Clause, rather than individual states' eminent domain clauses, requires compensation for a state-defined and state-protected property interest.[120]

But for courts not persuaded by legal arguments regarding the constitutional protections that ought to be accorded to labor, one must address likely questions about the nature of labor and whether the treatment of labor as a form of property is conceptually coherent, historically sound, and prudent. This Note adopts a pragmatic approach to addressing the question, believing that Margaret Jane Radin was correct in contending that labor is subject to "incomplete commodification," in the sense that there are aspects of labor that inherently cannot be bought or sold (e.g., labor necessary for self-preservation), and other forms of labor that should not

119. *See* Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984). The court wrote:

> Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause. That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court.

Id.; *see also* McUsic, *supra* note 77, at 608–09 (1998) (arguing that intangible property is as deserving of protection under the Takings Clause as tangible property).

120. *See Monsanto*, 467 U.S. at 1001 (concluding that intangible property interests, like other property interests, "'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'") (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 499 U.S. 155 (1980)) (brackets in original). Yet state constitutions may independently expansively define substantive definitions of property. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."). This leaves federal law in what some scholars have called a "positivist trap," in which the scope of the federal Takings Clause's protections is defined solely by reference to principles outside the federal Constitution itself. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 934–42 (2000) (discussing the complications in federal takings jurisprudence caused by the "positivist trap" and arguing for a more independent definition of property interests protected by the federal Takings Clause). The "positivist trap" may cause problems if states recognize labor as property for some purposes but conclude that it is not deserving of protection under eminent domain principles. Courts interpreting federal law would then have difficulty separating states' definition of property rights from the protections that states choose to attach to those rights.

in a civilized society be bought or sold (e.g., selling babies for hire), even while productive wage labor by individuals with capacity to sell their labor is legitimately treated as a form of property to be bought and sold in regulated markets.[121]

The position that labor is at least partly property may be deeply unsatisfactory to those philosophers and legal theorists who believe that labor, by its nature, cannot possess the attributes of property[122] or who claim that the "plain meaning" of the word "property" excludes labor.[123] The treatment of labor as property may also dis-

121. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 104–110 (1996); Margaret Jane Radin, *Market-Inalienability,* 100 HARV. L. REV. 1849, 1918–19 (1987) ("Work and housing are possible examples of incomplete commodification. . . . Although work has not been fully decommodified, it is incompletely commodified through collective bargaining, minimum wage requirements, maximum hour limitations, health and safety requirements, unemployment insurance, retirement benefits, prohibition of child labor, and antidiscrimination requirements.").

122. *See, e.g.*, J.P. Day, *Locke on Property*, 16 PHIL. Q. 207 (1966) (mounting an extended argument that labor cannot be property because it is an activity rather than a thing); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 753 (1996) ("To believe that a contract conceptually requires the exchange of property rights necessitates treating all beneficial relations, whether in personam or in rem, as species of property. This leads to all kinds of absurdities, like treating one's labor as something one owns."); Alan Ryan, *Self-Ownership, Autonomy, and Property Rights*, *in* LOCKE'S MORAL, POLITICAL, AND LEGAL PHILOSOPHY 241 (J.R. Milton ed., 1999) (arguing that Locke's treatment of labor as a form of property cannot be taken seriously as a claim that labor ought to be vested with rights accorded to other forms of property).

123. Richard Epstein is a primary exponent of this position. His position on the availability of the Takings Clause to remedy governmental appropriations of labor, however, is curious and more than a little ironic, given his reliance on Lockean principles elsewhere in his work. Professor Epstein claims to argue that the Constitution and the Takings Clause are based on Lockean principles. *See* EPSTEIN, *supra* note 110, at 7–18 (quoting LOCKE, *supra* note 74, at ¶ 27 ("every man has a property in his own person") and asserting that the Lockean position "forms one of the pillars of the subsequent analysis in this book"). But Epstein then relies on Blackstone, rather than Locke, for the "ordinary meaning" of the term "property." *See id.* at 23 ("Blackstone's account of private property explains what the term means in the eminent domain clause."). Blackstone famously defined property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." *See id.* at 22 (quoting 2 BLACKSTONE, COMMENTARIES 2 (1794)). R

Epstein then uses the Blackstonian definition of property to draw a distinction between property and labor, arguing that

> restrictions on hours or wages are without question limitations on the power of the employer to dispose of property. The claim of the employee, ironically, might not fit under the eminent domain clause because the restrictions are upon his right to dispose of his labor, not property. Yet the employee is also sharply limited in his right to acquire property by the use of his labor. It is possible, if unlikely, that the liberty interests in personal services are covered

turb normative theorists who are concerned that treating labor as a commodity will harm laborers' efforts to equalize bargaining power with employers, fail to address fundamental imbalances in power between laborers and capitalists,[124] or dehumanize social interactions involving labor.[125]

This Note acknowledges that many of these theorists' arguments have merit. But once these claims are considered, law and contemporary practice remain favorable to the treatment of at least an individual's productive labor as a property interest, the rights which inhere in the individual laborer. Of course, legal rules treating productive labor as the laborer's own property interest can be abused by those seeking to deregulate the labor market and take advantage of competition among laborers for work,[126] and a

by the eminent domain clause as well, since they routinely were covered by the principle of freedom of contract . . . .

EPSTEIN, *supra* note 110, at 280. Thus, Epstein's half-hearted reliance on Locke enables him to determine that the Takings Clause (as opposed to other constitutional provisions) does not protect laborers from uncompensated government appropriation. **R**

124. *See, e.g.*, James G. Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071 (1987) (arguing that *Lochner*-era theory treating labor as a commodity has created a "Labor Black Hole" in the Constitution, preventing courts from protecting workers' rights). P.J. Proudhon, the socialist property theorist, stated the argument in the following manner: "To tell a poor man that he HAS property because he HAS arms and legs . . . is to play upon words, and to add insult to injury." PIERRE JOSEPH PROUDHON, WHAT IS PROPERTY? 61 (Benj. R. Tucker trans., Howard Fertig ed. 1966). Further discussion of socialist theories' treatment of labor is, unfortunately, beyond the scope of this Note.

125. *See, e.g.*, JOSEPH WILLIAM SINGER, ENTITLEMENT 95–139 (2000).

126. The infamous *Lochner v. New York*, 198 U.S. 45 (1905), which struck down a maximum-hour law on the ground that it interfered with laborers' (and employers') constitutionally-guaranteed "liberty of contract," demonstrates the abuse to which valorized "free labor" could be subjected. *See id.* at 57. The Court wrote:

> There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State.

Id. The argument that labor is owned by the laborer and cannot be taken without just compensation should not be equated with Lochnerism, however; the *Lochner* line of cases was objectionable because it prevented beneficial labor regulations from surviving constitutional scrutiny, not because it recognized a self-ownership principle.

labor market that commodifies too much can dehumanize individuals.[127]

Yet granting individuals property rights in their labor can also do much good, not only for the wrongfully convicted but also for others whose labor was wrongfully appropriated or who are dependent on labor as their sole source of financial support. For example, people enslaved by German businesses during the Holocaust successfully settled suits seeking compensation under an unjust enrichment theory. The Holocaust slave labor plaintiffs' theory of damages explicitly treated the slaves' labor as the property of value that was unjustly appropriated by the slaveowning businesses.[128] The importance of earnings from labor to personal wealth has motivated many states to consider enhanced earning capacity obtained during marriage to be a form of marital property subject to division at divorce.[129]

Courts may also give weight to the principle's historical legitimacy when deciding whether wrongfully convicted individuals possess property rights in their labor. The notion that an individual has a property right in his or her labor found its origin in John Locke's influential theory of government. Locke argued that "[t]hough the earth and all inferior creatures be common to all

127. *See* Radin, *Market-Inalienability*, *supra* note 121, at 1921 ("[I]ncomplete commodifications can be seen as responses in our nonideal world to the harm to personhood caused by complete commodification of work."). R

128. *See* Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 617–18 (2003) (explaining the unjust enrichment basis for the slave laborers' claims); Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 656–57 (2003) (discussing the use by slavery reparations advocates of unjust enrichment claims treating slave labor as property that was not properly paid for, and expressing concern about the moral implications of these claims).

129. *See, e.g.*, O'Brien v. O'Brien, 489 N.E.2d 712, 717–18 (N.Y. 1985) (holding that enhanced earning capacity due to a license obtained during marriage constitutes marital property); Lesli F. Burns & Gregg A. Grauer, *Human Capital as Marital Property*, 19 HOFSTRA L. REV. 499 (1990) (exploring *O'Brien*, paths taken by other states, and potential solutions to residual problems with *O'Brien*). Use of human capital in the form of increased earning capacity as a form of marital property reflects the importance of wage labor as a creator of wealth. Wages from labor provide the most important source of revenue for United States taxpayers, accounting for over 70% of all income reported to the IRS. *See* Internal Revenue Service, *1999 Individual Income Tax Returns, Table A: Selected Income and Tax Items for Selected Years, 1995 to 1999*, http://www.irs.gov/pub/irs-soi/99intba.pdf (last visited Mar. 2, 2004) (stating that in 1999, taxpayers reported over $4.1 trillion in wages and salaries to the IRS, while they reported $1.8 trillion in net other sources of income).

men, yet every man has a 'property' in his own 'person'. This nobody has any right to but himself. The 'labour' of his body and the work of his hands, we may say, are properly his."[130] The leaders of the Revolutionary era,[131] the abolitionist movement,[132] and the post-Civil War and contemporary Supreme Courts[133] all invoked

130. LOCKE, *supra* note 74, at 130. R

131. Intellectual historians have found strong reference to Lockean principles in the work of the Framers and the rhetoric of the Constitution. See JEROME HUYLER, LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA (1995), for a discussion of Locke's profound influence on the Founders. Advocates for granting property rights in labor and personhood also cite Madison's 1792 essay, *Property and Liberty*, which suggests an expansive definition of property that includes individual capabilities as well as the labor based on those capabilities:

> In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. . . . If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, *in the labor that acquires their daily subsistence*, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

JAMES MADISON, *Property and Liberty*, *in* THE COMPLETE MADISON 267–69 (Saul K. Padover ed., 1953) (emphasis altered). Jennifer Nedelsky has argued that, seen in the context of *Federalist No. 10*, which focuses on protections for individuals' ability to obtain property in light of their differing abilities, and Madison's other work, his inclusion of labor as a form of property worthy of protection should be seen as anomalous. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 28–30 (1990). But other scholars have argued that the Founders' use of the term "property" as it appears in the Takings Clause and other constitutional provisions reasonably could have referred to rights to intangibles such as labor rather than simply land and chattels. *See* Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 135–37 (1990) (discussing how in the Founding Era, property in its "broader sense" included intangible rights, including rights to labor); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 219 (1969) ("Eighteenth-century [American] Whiggism . . . made no rigid distinction between people and property. Property [was] defined not simply as material possessions but . . . as the attributes of a man's personality that gave him a political character. . . . Property was not set in opposition to individual rights but was of a piece with them.") (quoted in Underkuffler, *supra*, at 137 n.53).

132. *See* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 20–22 (1998) (arguing that "[l]egitimating wage labor was a central part of the abolitionist project" and quoting abolitionist Theodore Weld's 1838 assertion that "SELF-RIGHT is the *foundation* right—*the post in the middle*, to which all other rights are fastened").

133. The post-Civil War Court drew heavily on Lockean principles to argue that government regulation of labor violated laborers' constitutional rights. Justice Field's famous *Slaughterhouse Cases* dissent, for example, quotes Adam Smith's

Lockean self-ownership principles to justify their claims. While we now live in an era in which labor is subject to heavy regulation, core elements of the Lockean self-ownership principle remain firmly embedded in contemporary law and practice.

B. Applying the Takings-Based Analysis to Governmental Appropriations of the Wrongfully Convicted's Labor

If a wrongfully convicted individual is able to persuade a jurisdiction to agree, at least in principle, that a governmental appropriation of labor not covered by the civic duty rule may give rise to a takings claim, she must still convince the jurisdiction that wrongful conviction and imprisonment effected a taking or otherwise gave rise to a government obligation to compensate. The following section focuses on three considerations that might affect the wrongfully convicted individual's ability to recover even if another individual who was compelled to serve government, e.g., a lawyer providing services without pay, could secure a takings award. First, while the government intentionally appropriates the labor of the attorney for clear public purposes, the government originally appropriates the wrongfully convicted's labor to execute a punishment that later turns out to be erroneous. This distinction may allow opponents of compensation to argue that state or federal takings clauses do not require erroneous appropriations of property to be compensated, though case law and commentary suggest that this distinction may be irrelevant under takings or due process principles. Second, while the attorney's labor is only partly appropriated when he or she is forced to serve a client, the wrongfully convicted individual's labor is wholly appropriated by incarceration. This dis-

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Wealth of Nations to claim that governmental restrictions on the location of slaughterhouses and the butchering profession were unconstitutional:

> The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbour, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book 1, ch. 10 (R. H. Campbell & A.S. Skinner eds., 1976) (quoted in *The Slaughterhouse Cases*, 83 U.S. 36, 110 (1872) (Field, J., dissenting)). For an example of a contemporary case that cites Locke for the proposition that rights to liberty and property are interdependent, see, e.g., Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

tinction should bolster arguments that a taking occurred as a result of imprisonment, even if a lawyer who is compelled to spend a small part of her productive labor serving the public is not deserving of compensation. Third, the government obtains a tangible benefit from the attorney who is serving the indigent for which it would need to pay if it could not order uncompensated service, while government does not generally obtain financially measurable benefits from the wrongfully convicted. While this distinction seems intuitively powerful, the Court's recent takings jurisprudence makes clear that the measure of damages in a takings claim is the loss to the injured individual, not the amount by which the government gained from the appropriation. This section also briefly examines whether the Thirteenth Amendment's authorization of involuntary servitude by those "duly convicted" affects the availability of relief and concludes that the Amendment should not bar recovery if other preconditions for a takings claim are met.

1. The Role of Error in the Availability of Relief

a. Responding to Arguments that Takings Remedies Might Not Be Available for Erroneous Appropriations of Property

Several scholars have claimed that an unauthorized or erroneous appropriation of property should not be compensable under takings jurisprudence, though it may be actionable under another constitutional or statutory provision.[134] This argument rests on language contained in concurrences and dissents in recent Supreme Court cases suggesting that some members of the Court would not allow individuals to bring a takings claim for an unauthorized appropriation of property,[135] as well as on a nineteenth-century Supreme Court case holding that the Court of Claims lacked jurisdiction over claims for damages caused by unauthorized wrongful acts by government officials that would otherwise sound in tort.[136]

134. *See* John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1048 (2000) (arguing that a compensable taking cannot be caused by government conduct that constitutes "any type of illegality"); Matthew Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245 (1998) (arguing that appropriations made by governmental officials without authorization should not be compensable under the Takings Clause). *But see* Richard H. Seamon, *An Analysis of Jurisdictional Issues Arising From* Eastern Enterprises v. Apfel, 51 ALA. L. REV. 1239, 1256–58 (2000) (arguing that unconstitutional government conduct can cause a taking).

135. *See* Echeverria, *supra* note 134, at 1058–64 (discussing cases suggesting that the Takings Clause does not provide the appropriate vehicle for evaluating unauthorized or illegal government acts). R

136. *See* Schillinger v. United States, 155 U.S. 163, 168 (1894):

But the Supreme Court and the weight of scholarly commentary appear to have concluded that erroneous appropriations of property can give rise to takings claims. First, several decisions and scholarly analyses of takings law suggest that the law in fact supports recovery under a takings-based theory for deliberate government actions that are subsequently judged to be illegal or unconstitutional.[137] Second, the Supreme Court recently concluded in *City of Monterey v. Del Monte Dunes, Ltd.*, that an inverse condemnation suit could be brought under Section 1983 as a claim asserting a tortious governmental failure to pay for property it appropriated: "When the government repudiates this duty [to pay just compensation], either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well."[138] The Court's willingness to conclude that wrongful government acts may give rise to takings claims suggests that the mere fact of a conviction's erroneousness should not prevent the wrongfully convicted from obtaining takings-based relief.

This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the court of claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

137. *See* Seamon, *supra* note 134, at 1258. Seamon writes: R

If an official violates statutory limits on his or her authority, the official's action cannot support a takings claim. If the official acts within the general scope of his or her statutory authority, his or her actions can support a takings claim, even if they are unconstitutional. Likewise, an Act of Congress that causes a taking of private property for public use triggers an obligation to pay just compensation, even if the Act violates some other constitutional provision.

Id. Some have argued that the test articulated in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), that a government action "effects a taking if [it] does not substantially advance legitimate state interests," can be understood as an implicit indication that an improper government act that appropriates property can be considered a taking. *See* Echeverria, *supra* note 134, at 1073–74 (discussing this argument). For R example, a relatively recent takings claim by Japanese-Americans whose property was appropriated in the World War II-era forced relocation, which was held at the time to be justified but that was ultimately denounced, was held to state a claim for relief but was ultimately barred by the statute of limitations governing takings claims against the federal government. *See* Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), *aff'd*, 847 F.2d 779 (Fed. Cir. 1988).

138. 526 U.S. 687, 717 (1999).

b. Federal Due Process Principles May Also Require Relief for Erroneous Appropriations of Property

Advocates for compensation could also resort to another constitutional source of claims for compensation if the takings remedy is held to be unavailable for claims of erroneous appropriation of property interests. The Supreme Court has consistently held that the Due Process Clause of the Fourteenth Amendment requires states to be amenable to claims by those who assert that they were erroneously assessed taxes, even though states would otherwise be able to claim sovereign immunity from suit for damages.[139] Courts have applied this due process principle directly to claims brought by wrongfully convicted individuals in cases holding that wrongfully assessed fines must be returned by the government, an influential decision concluding:

> The Fifth Amendment prohibition against the taking of one's property without due process of law demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law. Fairness and equity compel this result, and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of prosecution.[140]

If prisoners' labor is also held to be a form of property that was erroneously appropriated, then due process principles should also require restitution of the value of that appropriation.[141]

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139. *Ward v. Bd. of County Comm'rs.*, 253 U.S. 17 (1920), introduced the principle that the Constitution commands provision of reasonable procedures to allow individuals to obtain restitution of improperly extracted taxes. *See id.* at 24 (quoting Marsh v. Fulton County, 77 U.S. 676, 684 (1870)). *Reich v. Collins*, 513 U.S. 106, (1994), held that the Due Process Clause overcame state claims of sovereign immunity from suit for recovery of taxes paid in circumstances in which the taxes were extracted by compulsion. *See id.* at 109–10.

140. United States v. Lewis, 342 F. Supp. 833, 836 (E.D. La. 1972) *aff'd*, 478 F.2d 835 (5th Cir. 1973); *accord* State v. Superior Court, 40 P.3d 1239 (Alaska Ct. App. 2002) (relying on *Lewis* to conclude that Due Process principles require compensation when a fine is wrongfully collected); *Ex parte* McCurley, 412 So. 2d 1236 (Ala. 1982) (same); People v. Nance, 542 N.W.2d 358, 359 (Mich. Ct. App. 1995), *appeal denied*, 554 N.W.2d 899 (Mich. 1996) (same).

141. Opponents of compensation could assert that the type of property interest represented by a wrongfully convicted person's labor is different enough from tangible property or cash to render it undeserving of compensation under Due Process principles. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court held that a state court was protected by sovereign immunity from hearing a federal claim for state employees' overtime wages based on the Fair Labor Standards Act, even though the state had apparently obtained an unjust benefit from its employees by

2. Degree to which the Wrongfully Convicted's Labor is Appropriated

Takings jurisprudence recognizes a clear distinction between governmental acts that physically appropriate property and acts that regulate property and restrict its use or require a portion of it to be dedicated to public uses.[142] While a complete physical appropriation of property by government will almost always give rise to a valid takings claim under *Loretto*'s *per se* rule that permanent physical occupation by the government effects a taking,[143] a governmental effort to regulate property will not always effect a taking unless it denies the owner of the property all economically viable use of the property.[144] Governmental regulations that deprive the owner of property of some economically beneficial use of the property may or may not be considered takings based on a multi-factor test that

compelling overtime for which it did not pay statutorily required compensation. It sought to explain away *Reich* by saying that "[In the *Reich*] context, due process requires the State to provide the remedy it has promised. The obligation arises from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own courts." *Id.* at 740 (internal citations omitted). But this statement then prompts the question: why should *Reich* be read to apply only to restitution of taxes wrongfully paid and not to restitution of other things of value wrongfully appropriated by the state? The seeming anomaly has been explained by some scholars as a result of the distinction between the statutory basis of the right to overtime in *Alden* (making it a "new property" right) and the right to capital not collected pursuant to a valid tax scheme (an "old property" right). *See, e.g.*, Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919, 933–35 (2000) (arguing that the new property/old property distinction may provide an explanation for the Court's limitation of the *Reich* constitutional remedy). Even if this distinction is relevant, property rights in labor cannot be considered a "new" property right in light of the principle's historic origins, *see supra* Part II.A.4. Therefore the erroneous uncompensated appropriation of labor could not be considered purely a statutory violation of the type suffered by the claimants in *Alden*, and would present a court with a situation more analogous to *Reich* than to *Alden*.

142. *Compare* Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (introducing the regulatory taking concept by stating that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking"), *with* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982) (holding that permanent physical occupation and control of private property by the government is *per se* a taking).

143. *See Loretto*, 458 U.S. at 434–35, 439–40.

144. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) ("The second situation in which we have found categorical treatment [concluding that a taking occurs] appropriate is where regulation denies all economically beneficial use of land.").

examines, among other things, the degree to which a given regulation interferes with "investment-backed expectations."[145]

Fitting governmental appropriations of labor into this complex framework presents several challenges. First, what exactly is appropriated when, for example, a court requires a lawyer to represent an indigent client without pay? The court is not taking physical control over the lawyer; he or she is not prohibited from going home in the evenings or even from representing other clients, provided that time and resources would permit this. But on the other hand, the government is making direct use of the lawyer's labor for the time during which he or she is serving the client. The fact that the lawyer's labor is not a tangible asset, such as a machine that could be commandeered by government for a period of time or a factory that could be partly occupied by government, renders it difficult to determine whether such an appropriation would be evaluated under physical takings or regulatory takings jurisprudence. Similar questions have been asked by other scholars examining the interaction between other intangible property rights and takings jurisprudence.[146]

Many of the courts that favorably evaluated lawyers' takings claims have seemed to conclude implicitly that the regulatory taking analysis is most appropriate, since it enables the government to appropriate some of the economic value of the lawyer's labor without giving rise to a compensation requirement.[147] Language from another case, however, appears to suggest that a full government takeover of a lawyer's labor, compelling him or her to act according

145. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002) (stating that "we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine a number of factors rather than a simple mathematically precise formula") (internal quotation marks omitted).

146. *See* Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(And How* Not *To)*, 79 TEX. L. REV. 1037, 1069–70 (2001) (noting that scholars and courts have difficulty determining whether a governmental appropriation of intellectual property should be evaluated under the Supreme Court's regulatory takings or physical occupation takings jurisprudence); Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 558–565 (1998) (arguing that only regulations or government appropriations that deprive intellectual property owners of virtually all of the property's economic value are certain to be considered takings, but that the physical appropriation strand of takings case law provides the most appropriate doctrinal vehicle for analysis).

147. *See, e.g.*, Bias v. State, 568 P.2d 1269, 1272 (Okla. 1977) (holding that only the required provision of "extraordinary professional services" would rise to the level of a taking).

to the government's command, would constitute a physical appropriation of the lawyer's labor and a *per se* taking under *Loretto*.[148]

But incarceration of the wrongfully convicted presents a very different set of circumstances from those facing the lawyer who is compelled to serve, circumstances leading to the conclusion that a taking could be found under the regulatory or physical appropriation lines of cases. During the entire time of her wrongful incarceration, the wrongfully convicted prisoner is unable to earn any outside wages due to both the very real physical restraints and control imposed by prison officials, and the regulatory prohibition imposed by prison life on engaging in productive outside labor while remaining incarcerated. Thus, even if they are forced to proceed under a regulatory takings analysis, wrongfully convicted individuals should be able to invoke the rule in *Lucas* that a regulation depriving individuals of all economic value of their property effects a *per se* taking.[149]

3. "Use" to the Government vs. Harm to the Individual as a Measure of Takings Damages

Some have expressed concern that government has no takings-related obligation to compensate wrongfully convicted individuals because it received no tangible benefit from the appropriation of their labor.[150] Those who provide legal services for the indigent under court order, for example, are providing something that clearly is useful to government, for absent the compelled service the government would either have to pay a competitive wage to a lawyer to provide constitutionally adequate counsel or, in cases where individuals lack legal entitlement to a lawyer, reduce individuals' access to justice. Meanwhile, the wrongfully convicted have given no direct benefit to government for the duration of their imprisonment, except perhaps for incidental services provided while in prison. Professor Jed Rubenfeld argues that the public use portion of the federal Takings Clause acts as a limitation on *compensation* as much as it does on exercise of authority, requiring

148. *See* Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 706 n.13 (D.C. Cir. 1984) (noting that "[i]n takings law, a direct government takeover long has been a key indicium of compensation") (quoting William H. Rodgers, Jr., *Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resource Law*, 10 ECOLOGY L.Q. 205, 234 (1982)) (internal quotation marks omitted).

149. *See Lucas*, 505 U.S. at 1015.

150. *See supra* note 73, which expresses King's concern that the wrongfully convicted's takings claims would not succeed due to "the notion that the government should receive tangible benefit for the taking." King, *supra* note 24, at 1093 n.15. R R

compensation only when property is actually used by government, rather than simply destroyed by it to advance the public interest.[151] A few older state court cases support this claim.[152] If Rubenfeld's requirement found widespread acceptance, it would seem to defeat the wrongfully convicted's claim for compensation.

But current law is not on Professor Rubenfeld's side. The Supreme Court recently affirmed that the measure of damages under the federal Takings Clause is harm to the individual rather than use to the government, definitively rejecting the principle that the government must obtain a benefit in order for its compensation obligation to be invoked. According to the Court in *Brown v. Legal Foundation of Washington*, decided this past term, "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. This conclusion is supported by consistent and unambiguous holdings in our cases."[153] As long as the measure of damages in takings continues to be the amount by which the person whose property was appropriated was injured, the wrongfully convicted individual should be able to recover for losses suffered during wrongful imprisonment.

4. The Role of the Thirteenth Amendment

The Thirteenth Amendment of the United States Constitution may also affect the analysis of whether states could appropriate labor via an otherwise legal, but ultimately erroneous, conviction without being subject to liability under federal or state Takings Clauses.[154] The Thirteenth Amendment prohibits slavery or involuntary servitude, but contains an exception for individuals who are "duly convicted." Courts have read this provision to permit prisoners to be subjected to chain gangs, forced labor, and other conditions akin to slavery while they are incarcerated for committing a

151. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1114–15 (1993) (advancing the argument that "a taking for public use, as we are construing the phrase, can occur only when some productive attribute or capacity of private property is exploited for state-dictated service").

152. *See, e.g.*, Willard v. City of Eugene, 550 P.2d 457, 459 (Or. Ct. App. 1976) (holding that government demolition of a hazardous building did not give rise to a takings claim because the city did not "acquire[ ] any right or thing that the public could use").

153. 538 U.S. 216, 235–36 (2003) (internal citation omitted).

154. "Neither slavery nor involuntary servitude, *except as a punishment for a crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII § 1 (emphasis added).

crime.[155] Lower courts have denied prisoners' claims that they deserve higher levels of compensation for their labor while in prison under a valid conviction.[156]

But since the Thirteenth Amendment is a rights-expanding provision rather than a rights-limiting one, courts have not treated its "duly convicted" exception as a bar to recovery for violations of other constitutional provisions. The Thirteenth Amendment, for example, has not been held to limit the availability of prisoners' claims that the labor that they were forced to perform while in prison constituted cruel and unusual punishment, in contravention of the Eighth Amendment.[157] Under this same logic, an individual who otherwise possesses a valid takings claim for appropriation of her productive labor while wrongfully imprisoned should not be prevented from recovering by the mere existence of the constitutional clause allowing governments to put the "duly convicted" to work.

C. Obtaining a Remedy

Even if wrongfully convicted individuals are able to mount a claim for compensation under state or federal takings clauses, they may face yet another obstacle to recovery if states against whom recovery is sought assert sovereign immunity as a defense to the suit. Recent cases have sharply limited private litigants' ability to obtain

155. *See, e.g.*, United States v. Reynolds 235 U.S. 133, 149 (1914) ("There can be no doubt that the State has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the Thirteenth Amendment, and such punishment expressly excepted from its terms.").

156. *See, e.g.*, Marchese v. United States, 453 F.2d 1268, 1272 (Ct. Cl. 1972) (holding that a convicted prisoner "would not be entitled to the normal wages of a citizen 'outside', since he was properly in jail and could not have earned that kind of pay. His was still the limited world of the prison, and any compensation which he could demand would be measured by the standards of that special universe.").

157. *See, e.g.*, Ray v. Mabry, 556 F.2d 881 (8th Cir. 1977) (holding that a prisoner could make out a claim that the hard labor to which he was subjected constituted cruel and unusual punishment in contravention of the Eighth Amendment, notwithstanding the provision of the Thirteenth Amendment authorizing states to impose involuntary servitude as a punishment for a crime); Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989) (relying on *Ray* to hold that forcing prisoners to work in unsafe environments constituted cruel and unusual punishment in contravention of the Eighth Amendment); Choate v. Lockhart, 7 F.3d 1370, 1376 (8th Cir. 1993) (supporting *Ray's* holding, while dismissing prisoner's claim on other grounds).

retrospective monetary relief from state governments in state or federal courts.[158]

But another line of recent cases suggests that the compensation requirement of the federal Takings Clause trumps state sovereign immunity even for temporary takings. The Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[159] indicated that if the government temporarily takes property, it cannot evade compensation for the temporary taking simply by giving up its appropriation, notwithstanding the existence of state sovereign immunity.[160] While many commentators have concluded that the decision in *First English* abrogates state sovereign immunity and requires states to provide a monetary remedy to individuals when they take an individual's property,[161] a recent Supreme Court concurrence, as well as a recent article by Professor Richard Seamon, have questioned whether the decision itself requires states to make themselves amenable to suits for just compensation despite the commands of the Eleventh Amendment.[162] Seamon ultimately concludes, however, that the Court should require states under the Due Process Clause of the Fourteenth Amendment to ensure "reasonable, certain and adequate provision" of a financial remedy for takings in some forum, even if it is through an administrative body or another statutory vehicle, or else waive their sovereign immunity in their own state courts to fed-

158. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (extending sovereign immunity to suits against states for retrospective monetary relief brought in state court as well as suits brought in federal court); *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (concluding that Congress could not abrogate state sovereign immunity to allow private suits for damages authorized by a provision of the federal Americans with Disabilities Act).

159. 482 U.S. 304 (1987).

160. *See* 482 U.S. 304, 316 n.9 (1987) (concluding that the obligation to pay compensation for a taking overcomes state sovereign immunity because "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking").

161. *See* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1072 n.19 (2001) (citing scholars who have concluded that *First English* requires states to waive their sovereign immunity when presented with a claim for just compensation under the federal Takings Clause).

162. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 714 (1999) (Kennedy, J., joined by Rehnquist, C.J., and Stevens & Thomas, J.J.) (stating that *First English* did not resolve whether "the sovereign immunity rationale retains its vitality" in the takings context); Seamon, *supra* note 161, at 1072–75 (contending that the *First English* Court did not reach the question of whether a claim for just compensation actually abrogated state sovereign immunity in part because sovereign immunity was not actually at issue in the case: the defendant was a locality, which was not entitled to Eleventh Amendment sovereign immunity). R

eral takings claims.[163] Another scholarly analysis suggests more broadly that Eleventh Amendment sovereign immunity does not apply to claims brought under the federal Takings Clause.[164]

Professor Seamon's analysis suggests that states may be able to meet their obligations to the wrongfully convicted by establishing fair and adequate administrative compensation schemes, assuming that the wrongfully convicted would otherwise be able to assert a valid takings claim against the state. Few states have established such schemes,[165] leaving the remainder of states subject to suits for compensation by the wrongfully convicted under Professor Seamon's analysis, notwithstanding the existence of state sovereign immunity.

First English did conclusively resolve another possible challenge to provision of a remedy for the wrongfully convicted. While those who oppose compensation might claim that because an individual's wrongful confinement was temporary and has ceased, no compensation is required, the Court in *First English* firmly held that governments were obligated to compensate individuals even for temporary takings: "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."[166] Nothing in the

163. *See* Seamon, *supra* note 161, at 1101–17 (concluding that states need to provide a "'reasonable, certain and adequate provision for obtaining compensation'" in the event of a taking to meet constitutional commands) (quoting Williamson County Reg'l Plan. Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985)). R

164. *See* Eric Berger, The Collision of Takings and State Sovereign Immunity Doctrines (June 10, 2003) (unpublished manuscript, on file with the author) (arguing that a textual and structural reading of the Takings Clause compels the conclusion that takings remedies are compelled by the Constitution, notwithstanding state sovereign immunity).

165. *See supra* notes 35–42 and accompanying text (discussing the shortage of states with adequate legislatively-established compensation schemes). The District of Columbia, D.C. CODE ANN. § 2-416 (2003), Ohio, OHIO REV. CODE ANN. § 2743.48(E)(2)(c) (2002) (providing that the wrongfully convicted individual shall receive compensation for "[a]ny loss of wages, salary, or other earned income that directly resulted from the wrongfully inprisioned individual's arrest, prosecution, conviction, and wrongful imprisonment"), and New York, N.Y. CT. CL. ACT § 8-b(6) (Consol. 2002) ("[I]f the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him."), are among the states that promise full compensation and do not require a gubernatorial pardon or other discretionary act before the entitlement to compensation vests. Most other states lack these guarantees. R

166. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987).

Court's recent decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[167] which determined that a temporary building moratorium did not constitute a *per se* temporary regulatory taking of property, affected the Court's prior holding in *First English* that if a taking could be proven, compensation would be due for the period of the taking.[168]

III.
CONCLUSION

Strong moral and pragmatic arguments support provision of compensation for the wrongfully convicted, who have disproportionately and unjustly borne the burdens of errors in the administration of criminal justice. State and federal legislatures have not addressed the need for compensation, even as increasing numbers of people prove that they have not committed the crimes for which they were convicted and imprisoned. This Note has argued that takings remedies in several jurisdictions may be available to assist the wrongfully convicted, despite legislative inaction.

Wrongfully convicted individuals' lawyers must test this argument by bringing takings claims on behalf of their clients asserting the right to compensation under state and federal constitutional law. While no state has yet prohibited the wrongfully convicted from obtaining takings-based relief, test litigation on behalf of the wrongfully convicted would be most supported by circumstances and legal doctrine in states such as Missouri and Alaska that lack statutory means of relief for the wrongfully convicted but that have already explicitly held that governmental appropriations of labor require compensation under the takings clauses of their state constitutions. Litigation in other jurisdictions may also be successful if wrongfully convicted individuals are able to demonstrate that governmental appropriations of labor not covered by the civic duty rule can give rise to takings claims.

This Note revisits Edwin Borchard's underappreciated takings-based claim for of compensation because powerful arguments can be marshaled on its behalf. But as Professor Borchard stated in 1932, "[w]hatever the most convincing theory, compensation responds to an elementary demand for justice harbored in every

167. 535 U.S. 302 (2002).

168. *See id.* at 336–30 (stating that *First English* addressed the remedial question of whether compensation was due if a temporary taking could be demonstrated, but did not speak to whether a temporary restriction on use of property constituted a taking).

human breast. . . . The least the community can do to repair the irreparable, is to appease the public conscience by making such restitution as it can by indemnity."[169] Takings-based remedies that compensate wrongfully convicted individuals for damage to recognized property rights may be both available and necessary, but the "elementary demand for justice" will not be satisfied until adequate compensation is provided in all jurisdictions to those who have lost their liberty and property as a result of their wrongful conviction and imprisonment.

169. BORCHARD, CONVICTING THE INNOCENT, *supra* note 2, at 392. **R**