Fourteenth Amendment — Due Process Clause — Criminal Procedure — Nelson v. Colorado

Crime never pays, but criminals do little else. States and municipalities earn considerable revenue from monetary exactions in the criminal justice system, partly from a blizzard of new fees, surcharges, and restitution payments.[1] Colorado's system went one step further, charging upon conviction ostensibly nonpunitive fines that were not refundable even if the conviction were reversed on appeal. Last Term, in *Nelson v. Colorado*,[2] the Supreme Court held that a refund must be available with minimal process for defendants whose convictions were vacated.[3] The Court cabined its holding with a distinction between refunds and compensation, but as a look to a similar precedent illuminates, this distinction is illusory and cannot explain why fees, but not time in prison, require recompense. A distinction rooted in the different constitutional remedies available for property and liberty deprivations would have resolved this discrepancy and grounded the case more securely.

Louis Madden and Shannon Nelson were separately found guilty of sexual assault and other criminal charges in Colorado.[4] Like all persons convicted in Colorado, they automatically incurred thousands of dollars in restitution and various fees based on their convictions.[5] Unlike most others, Madden and Nelson appealed their sentences and prevailed.[6] They asked for their money back. Nelson's trial judge held the court lacked authority to refund the money,[7] while Madden's returned everything except $910 in restitution, remarking that the ineffective counsel (the reason for reversal) "wasn't anything that [the victim] did wrong."[8]

The Colorado Court of Appeals reversed in both cases.[9] Judge Gabriel wrote for the panel,[10] which announced both decisions on the same day. Judge Gabriel reasoned that all fees and restitution must be tied to a conviction, and without a valid conviction violated Colorado law.[11] Since the fees were unlawful, the only question was whether trial

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[1] *See generally, e.g.*, Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [http://perma.cc/H7PT-R9B7] (detailing a trend of increasing fees).

[2] 137 S. Ct. 1249 (2017).

[3] *Id.* at 1252.

[4] People v. Madden, 399 P.3d 706, 707 (Colo. App. 2013); People v. Nelson, 369 P.3d 625, 627 (Colo. App. 2013).

[5] *Madden*, 399 P.3d at 707; *Nelson*, 369 P.3d at 627. Judges must consider imposing restitution in Colorado. *See* COLO. REV. STAT. § 18-1.3-601(2), -603(1) (2017).

[6] *Madden*, 399 P.3d at 707; *Nelson*, 369 P.3d at 627.

[7] *Nelson*, 369 P.3d at 627.

[8] *Madden*, 399 P.3d at 707 (alteration in original) (quoting the postconviction court).

[9] *Id.*; *Nelson*, 369 P.3d at 627.

[10] Judges Loeb and Vogt joined both opinions.

[11] *Nelson*, 369 P.3d at 628–29.

courts had the power to give a refund remedy under Colorado law.[12] The panel held that the trial court had ancillary jurisdiction to order a refund arising from its power over the case generally.[13]

The Colorado Supreme Court reversed.[14] Writing for the majority, Chief Justice Rice[15] first considered where the refund would come from.[16] It could not come from the victim compensation fund because various statutes strictly listed the circumstances under which money could be drawn from this fund and did not include refunds.[17] Next, the court considered the general treasury, emphasizing that the power to "authoriz[e] a refund from public funds" is "inherently legislative."[18] Because the Compensation for Certain Exonerated Persons Act[19] (Exoneration Act) provided for refunds upon a separate civil action,[20] the court held that the legislature had implicitly designated that process as the *sole* means by which public funds could be disbursed to the wrongfully convicted as refunds.[21] The court next briefly considered a due process claim, holding that the money was not taken wrongfully (since the fees *were* authorized when levied) and that the process given by the Exoneration Act satisfied *Mathews v. Eldridge*.[22]

Justice Hood dissented.[23] Rather than searching for authorization to spend public funds, he focused on the lack of any authorization to *retain* the money.[24] The presumption of innocence, he argued, required that the money be returned.[25] The Exoneration Act created too high of a hurdle, since it "flip[ped] the presumption of innocence," required clear

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[12] *Id.* at 629.

[13] *Id.* at 629–30; *cf.* Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861) (allowing a federal court to modify its judgment upon request of original parties, even though diversity no longer existed).

[14] People v. Nelson, 362 P.3d 1070, 1071 (Colo. 2015). As had the lower court, the Colorado Supreme Court released two opinions on the same day with the same voting breakdown and reasoning. *See* People v. Madden, 364 P.3d 866 (Colo. 2015).

[15] Chief Justice Rice was joined by Justices Coats, Eid, Márquez, and Boatright.

[16] *Nelson*, 362 P.3d at 1074–75.

[17] *Id.*

[18] *Id.* at 1075–76.

[19] COLO. REV. STAT. § 13-65-101 to -103 (2013).

[20] The statute also required proof of actual innocence by clear and convincing evidence. *Id.* § 13-65-101(1)(a).

[21] *Nelson*, 362 P.3d at 1076–78. The opinion is ambiguous on whether the critical feature was the general rule that public funds may not be spent without positive statutory authorization, or the specific remedy provided by the Exoneration Act which impliedly became the sole remedy.

[22] *Id.* at 1078–79 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). The due process argument had not been briefed by either party (since the decisions below addressed only state law), and appears to have been prompted by the dissent. *See* Brief in Opposition for the State of Colorado at 8 n.1, *Nelson*, 137 S. Ct. 1249 (No. 15-1256), 2016 WL 4268975.

[23] *Nelson*, 362 P.3d at 1079 (Hood, J., dissenting). Justice Gabriel was recused, presumably because he, as then-Judge Gabriel, wrote the opinion below. *Id.* at 1081.

[24] *Id.* at 1079.

[25] *Id.* at 1080.

and convincing evidence, and by its own terms could not provide relief for many cases.[26]

The Supreme Court reversed.[27] Writing for the majority, Justice Ginsburg[28] first determined that *Mathews v. Eldridge* applied.[29] In four sentences, she dismissed the test from *Medina v. California*,[30] explaining that the instant case concerned "continuing deprivation of property" (suited to traditional procedural due process analysis) rather than "criminal process" (which *Medina* covers).[31]

Next, she applied *Mathews*' three factors, "evaluat[ing] (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake."[32] Under that framework, the petitioners' interest in recovering their payments constituted the private interest to be weighed.[33] In a quotable (and already quoted)[34] portion, Justice Ginsburg explained that "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions."[35]

Second, echoing Justice Hood, she found a high risk of erroneous deprivation. Here, the Court explained that the Exoneration Act had a high risk of error because it did not cover misdemeanors, its standard of proof was clear and convincing evidence, and many (especially those with low-valued claims) would not pursue the remedy at all since the costs of trying are high compared to the amounts at stake.[36] She also noted that the relevant persons at risk of erroneous deprivation were not all those who were fined by the state (for whom criminal procedures likely guaranteed a low risk of error), but all those who were fined *whose convictions were overturned*.[37]

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[26] *Id.* at 1081.

[27] *Nelson*, 137 S. Ct. at 1255.

[28] Justice Ginsburg was joined by Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan. Justice Gorsuch took no part in the consideration or decision of the cases.

[29] *Nelson*, 137 S. Ct. at 1255.

[30] 505 U.S. 437 (1992).

[31] *Nelson*, 137 S. Ct. at 1255.

[32] *Id.* (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[33] *Id.*

[34] *E.g.*, United States v. Libous, 858 F.3d 64, 67 (2d Cir. 2017).

[35] *Nelson*, 137 S. Ct. at 1256.

[36] *Id.* at 1256–57.

[37] *Id.* Given the Court's conclusion that a refund would remedy continued property deprivation, the flavor here is that *any* procedural obstacle by definition has a high risk of erroneous deprivation. Colorado conceded this implication at oral argument. Transcript of Oral Argument at 51, *Nelson*, 137 S. Ct. 1249 (No. 15-1256) ("[T]he only burden that could, perhaps, be placed on a criminal defendant would be proving the amounts that were, in fact, taken from the defendant, and . . . there could be, for example, time limits put in place.").

Finally, Justice Ginsburg found that the public interest in the money in this case was zero.[38] Since the state had no right to the money, it could not invoke equitable considerations either, and in any event had none.[39] Because all three factors favored the petitioners, the majority held that "anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated" would violate procedural due process.[40]

Justice Alito concurred in the judgment.[41] He agreed with the majority that the money was the petitioners' property, but argued that *Medina*, not *Mathews*, should apply.[42] In his view, the entire dispute was wrapped up in criminal process, since the Court held that no more process than the criminal case (or its vacatur) could be demanded, and the presumption of innocence applied.[43] For questions wrapped up in criminal process, *Mathews* balancing was not sufficiently deferential to states' criminal law prerogatives.[44] Under *Medina*, a state criminal procedure rule violates due process "only if it offends a fundamental and deeply rooted principle of justice."[45] Applying *Medina*, Justice Alito explained that courts have always had the power to require disgorgement after erroneous judgments in civil suits; this power migrated to the criminal side as the power to issue refunds for monetary fines; and this latter practice was by now so deeply embedded that it constituted a fundamental principle of justice.[46] His rationale differed from the majority's on restitution, for which he would look to the precise scheme, since some scenarios existed, such as when a criminal conviction was overturned on a basis that would not be problematic in a civil case,[47] in

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[38] *Nelson*, 137 S. Ct. at 1257. This is a puzzling claim. Providing restitution to victims and funding the criminal justice system both seem in the public interest. The assumption here might be that no legitimate public interest is served by confiscations irrespective of the private interests at stake. Still, at minimum, some interest in finality and predictable budgeting is served by retaining the money. *Cf.* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 45 (1990) (acknowledging Florida's "interest in stable fiscal planning" and suggesting procedures that would make refunds more predictable, including "enforc[ing] relatively short statutes of limitations applicable to such actions").

[39] *Nelson*, 137 S. Ct. at 1257.

[40] *Id.* at 1258.

[41] *Id.* (Alito, J., concurring in the judgment).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 1258–59.

[45] *Id.* at 1258 (citing Medina v. California, 505 U.S. 437, 445 (1992)).

[46] *See id.* at 1259–60; *cf.* Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994). Colorado is the sole modern exception. *See* Brief for Petitioners at 2, *Nelson*, 137 S. Ct. 1249 (No. 15-1256), 2016 WL 6819304.

[47] For example, the exclusionary rule or Confrontation Clause. *Nelson*, 137 S. Ct. at 1262 (Alito, J., concurring in the judgment).

which restitution should not be refundable.[48] Finally, he criticized the Court for failing to explain why returning defendants to the status quo ante does not require compensation "for all the adverse economic consequences."[49] *Medina*, by contrast, easily explained this by reference to history.[50]

Justice Thomas dissented.[51] He criticized both the majority and concurrence as answering the wrong question — rather than explaining *which* procedural due process test applies, the Court first should have explained why the petitioners had a substantive entitlement to which procedural protections attach.[52] He next explained that the entitlement could come either from state law or substantive due process.[53] No entitlement arose from state law because the Colorado Supreme Court had, in the ruling below, explained that the fees had become "public money."[54] Since property is a creature of state law, this pronouncement, on Justice Thomas's view, eliminated any ground for a claim of entitlement.[55] No entitlement arose from substantive due process because the petitioners waived this argument,[56] the Supreme Court gave no explanation or precedents supporting this view, and because, in Justice Thomas's persistent (if minority) view, there is no substantive component to the Fourteenth Amendment's Due Process Clause.[57]

Nelson's central problem is why the petitioners' substantive entitlement to a refund is different from an entitlement to compensation for wrongful imprisonment. The Court classified a refund not as compensation, but as merely recovering something unlawfully withheld. This classification is dubious, since the original money is gone, so any "refund" must come from a separate source. An old tax refund precedent shows how tenuous the Court's refund/compensation distinction is. Instead, the Court could have distinguished between property and liberty, since the Constitution itself grants different remedies for deprivations of each: compensation for property deprivations (the Takings Clause), and

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[48] *Id.* Thus, Justice Alito alone agreed with the trial judge in *Madden* who had allowed a refund for various fees but not for restitution. *See* People v. Madden, 399 P.3d 706, 706 (Colo. App. 2013).

[49] *Nelson*, 137 S. Ct. at 1260–61 (Alito, J., concurring in the judgment).

[50] *Id.* at 1261.

[51] *Id.* at 1263 (Thomas, J., dissenting).

[52] *Id.*; *cf.* Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) ("To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it." (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972))).

[53] *Nelson*, 137 S. Ct. at 1263 (Thomas, J., dissenting).

[54] *Id.* at 1264–65 (quoting People v. Nelson, 362 P.3d 1070, 1077 (Colo. 2015)).

[55] *Id.* at 1264.

[56] *See* Reply Brief for Petitioners at 1, *Nelson*, 137 S. Ct. 1249 (No. 15-1256), 2016 WL 7449173 ("Our argument sounds in *procedural* due process. . . . Colorado errs in arguing . . . our 'asserted substantive right is founded in the Due Process Clause.' In fact, it is founded in state property law.").

[57] *Nelson*, 137 S. Ct. at 1265–66 (Thomas, J., dissenting).

release through habeas corpus for liberty deprivations (the Suspension Clause). Though not without its own complications, this approach would resolve the case's central problem in a more cogent way, while still allowing the Court to come to the same commonsense result.

The Court's distinction between refunds and compensation relies on a deceptively simple analogy: "Just as the restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction."[58] Nelson's money had been spent on restitution or legal system costs, but the Court treated that money as fungible in a way that we cannot conceive of time as being. Suppose Nelson had paid her fines with gold bars bearing her initials, and they were stolen, or passed directly to victims as restitution. The state could not give Nelson back her property, since it would be gone — just as it cannot in real life give her back her lost years in prison. It *could* pay a cash equivalent of the gold, taking money from elsewhere, just as it could compensate her for wrongful imprisonment. It seems clear that the cash equivalent of the gold in this scenario would be compensation, not a refund. So what makes Nelson's real cash different from Nelson's imagined gold?

One intuitive answer is traceability. If one can trace something originally taken as still in the government's possession, then failing to return it continues the deprivation. At first glance, this seems to be what the Court did — Colorado "retain[s]"[59] the fees, since money is fungible. If it spent the money, that means it did not have to spend other money, giving it an equivalent. Yet this analysis does not work; as Justice Alito pointed out, money earmarked for and paid to victims is different from other fees partly for historical reasons, but partly because that money, like the years in prison, is gone.[60] The tracing rationale would require knowing whether the payment triggered a corresponding expenditure (such as restitution to victims), but the majority treated all fees the same way, without examining Colorado's restitution scheme. Such treatment shows that what mattered to the Court is not what the government still has, but instead what the payer *does not* have — her money. There is a term for refunds like that: compensation.

A comparison to an arrestingly similar 1920 case, *Ward v. Board of County Commissioners*,[61] reveals the failure of the Court's distinction between refunds and compensation. In 1898, Congress granted land to the Choctaw Tribe that would be nontaxable by the state for twenty-one years.[62] In 1908, Congress repealed the tax exemption, and Love

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[58] *Id.* at 1257 (majority opinion).
[59] *Id.* at 1256.
[60] *Id.* at 1262 (Alito, J., concurring in the judgment).
[61] 253 U.S. 17 (1920).
[62] *Id.* at 19.

County immediately imposed property taxes.[63] The Choctaw sued to enjoin collection of the taxes, arguing that the twenty-one-year tax exemption was a vested property right.[64] Oklahoma courts ruled against them, and while appeals were pending, some Choctaw members paid the taxes to avoid an eighteen percent penalty.[65] They prevailed on appeal.[66] The county returned land that had been seized for nonpayment, but would not provide a refund.[67] The Oklahoma Supreme Court agreed, holding there was no state law basis for a refund.[68] The Supreme Court held the lack of statutory authorization insufficient, and reversed.[69]

The two cases are closely analogous. Both cases have the time-lapse issue — the tax and restitution respectively were apparently valid when imposed, but the court decisions authorizing them were later reversed. The Supreme Court explained that the time-lapse problem could not resolve *Ward*, since "[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law."[70] Both cases also have the tracing issue. Oklahoma argued that providing a refund is different from returning the same seized land, since the refund money would be different money from other taxpayers.[71] The Court also disregarded the tracing problem, explaining that the county knew the tax liability was disputed, and could not reduce its responsibility to return it by passing it over to the general treasury.[72]

Yet the cases are different in a few ways. First, in *Ward*, the source of the *initial* property right — the tax exemption — was federal law.[73] Second, *Ward* analyzed the state law question as "not only whether the

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[63] *Id.*

[64] *Id.* at 19–20.

[65] *Id.* at 20.

[66] *E.g.*, Choate v. Trapp, 224 U.S. 665, 679 (1912).

[67] *Ward*, 253 U.S. at 20.

[68] Bd. of Comm'rs v. Ward, 173 P. 1050, 1050–52 (Okla. 1918). Frustratingly, Oklahoma had authorized refunds as part of another statute, but that law was struck down because the state constitution required "that every act of the Legislature shall embrace but one subject which shall be clearly expressed in its title." Johnson v. Grady Cty., 150 P. 497, 502 (Okla. 1915). Similarly, Colorado's Supreme Court barred refunds on the theory that the legislature implicitly eliminated previous remedies by passing the Exoneration Act. People v. Nelson, 362 P.3d 1070, 1076 (Colo. 2015). Thus, in both *Nelson* and *Ward*, the injustice rested more on inept statutory drafting than malice.

[69] *Ward*, 253 U.S. at 24–25.

[70] *Id.* at 24.

[71] *Id.* at 21.

[72] *Id.* at 24.

[73] *Id.* at 22.

[federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support."[74] Thus, the *Ward* Court was, in part, construing state law, and declaring the state supreme court to be in error.[75] The *Nelson* Court did not address this issue — thus the dissent's objection.[76] Implicitly, the majority seems to have concluded that the Colorado Supreme Court's determination that no property right existed was error.[77] Finally, in *Ward*, the Court drew no distinction between refunds and compensation, but rather seemed to require the refund as a form of compensation.[78]

These differences are related. There was no fear in *Ward* of overprotecting liberty deprivations because the substantive right was clearly defined in federal law. Because of that, it did not matter whether the remedy was compensation or not. The *Nelson* Court, by contrast, needed to distinguish these two because it was, at least in part, defining the scope of the substantive right. The *Ward* Court's examination of state law obstacles to a federal entitlement also explains its disregard for the Oklahoma Supreme Court's explanation that the county no longer had the money. It did not matter, because the Court was prepared to require compensation, and so it focused on the Tribe's being made whole. Besides, "[s]ome review of state-court state-law determinations seemed inevitable if the supremacy of federal law was to be maintained."[79] In *Nelson*, however, the inattention to whether the state had the money — or even the equivalent — belies the refund versus compensation distinction. In short, the *Nelson* Court devised a nominally noncompensatory rationale for its remedy holding, but ignored the limiting principle of that rationale. Recall the example of paying with initialed gold bars that are later stolen. *Ward*'s rationale would require a repayment of equivalent value. *Nelson*'s rationale cannot, since it would be compensation. That does not seem sensible.

Instead of drawing a line between compensation and refunds, the Court could have distinguished between compensating for deprivations

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[74] *Id.*

[75] *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 972 n.394 (1986).

[76] *Nelson*, 137 S. Ct. at 1265 (Thomas, J., dissenting) ("[T]o the extent the majority implicitly suggests that petitioners have a state-law right to an automatic refund (a point about which the majority is entirely unclear), it is plainly incorrect.").

[77] Alternatively, perhaps it believed petitioners' argument that the Colorado Supreme Court acknowledged a property right. Either way, the silence is peculiar since the respondent argued forcefully that the decision below was that no property right existed.

[78] *Ward*, 253 U.S. at 24 (quoting Marsh v. Fulton Cty., 77 U.S. (10 Wall.) 676, 684 (1870)) ("[I]f a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.").

[79] Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1957 (2003).

of liberty or of property. The Fourteenth Amendment requires due process for deprivation of liberty or property without distinction. Analyzing the issue in refund/compensation terms forced the Court to say that there was no liberty deprivation (now) but there was a property deprivation (now). A better approach would distinguish based on remedies. The Constitution mentions remedies twice: the Suspension Clause and the Takings Clause.[80] The Takings Clause specifies just compensation as the remedy for deprivations of property,[81] but no provision requires *compensation* for deprivations of liberty. Rather, the remedy there is habeas corpus.[82] This remedy-based approach better distinguishes wrongful imprisonment compensation from compensation for unlawful fines, is consistent with *Ward*, and prevents an ad hoc determination of traceability of the funds through various restitution schemes or formalistic distinctions between payments in fungible cash or other property.

One objection might be that Colorado was invoking its police power, not eminent domain. Ordinary criminal fines, of course, do not require compensation. Yet, as the Court acknowledged by using *Mathews* rather than *Medina*, the fees in *Nelson*, though parasitic on the convictions, were ostensibly civil, not punitive.[83] One suggestive analogy is civil forfeiture.[84] There, the Court has explained that compensation is not required *because* civil forfeiture satisfies due process.[85] And such an approach teases out the negative implication: when due process is lacking, compensation is required.[86] The point here is not that the *Nelson* petitioners actually presented a sound takings claim.[87] Rather,

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[80] U.S. CONST. art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ."); *id.* amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[81] *See generally* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

[82] *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008).

[83] *Nelson*, 137 S. Ct. at 1255; *cf.* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 15–17 (2006) (describing the Court's bifurcated due process jurisprudence).

[84] Civil forfeiture is a civil proceeding to seize property (generally contraband or things used to facilitate crime such as drug money or vehicles). *See* Caleb Nelson, Feature, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2448–49 (2016).

[85] *See* Bennis v. Michigan, 516 U.S. 442, 452 (1996).

[86] One objection may be that the deprivation does not satisfy *Daniels v. Williams*, 474 U.S. 327, 333 (1986) (holding that negligent acts do not give rise to constitutional deprivations), because the payments were taken in good faith. But the *deprivation* was quite intentional — only its lawlessness was unintended.

[87] Most obviously, they did not brief a takings claim. Moreover, there are knotty problems for Takings Clause claims premised on unauthorized action or error. *See* John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1058 (2000) (summarizing the mutually contradictory rulings on whether governmental error supports or precludes a takings claim as "confusion of astonishing proportions"). Ordinarily, unauthorized acts cannot obligate the state to compensate. *See* Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 79, 95 (2012). Instead, actions against the officer are appropriate. That argument should fail here, since no one disputes that collecting

the point is that a distinction between property and liberty, instead of refunds and compensation, would have been cleaner and emanates from the same remedial distinctions in the Constitution itself.

Nelson was decided 7–1, and its seven-page majority opinion is both uncontroversial and intuitive. But it achieved this minimalism by creating a rule so narrow it probably will apply only to Colorado.[88] In the end, Justice Thomas's charge was largely correct: if there is a substantive entitlement, the procedural due process analysis is patent. For future cases, a theory following the holding in *Ward* and relying on the remedial distinctions drawn from the Takings and Suspension Clauses rather than the Fourteenth Amendment in isolation is likely to better explain the difference in remedies between deprivations of property and of liberty. An intriguing possibility is that Justice Ginsburg saw that the distinction between compensation and refunds is tenuous, and hoped this decision could be a step toward mandating compensation for imprisonment as well.[89] More likely, however, the Court saw a dysfunctional system that fined without convictions and recoiled, vindicating the Justices' common sense.[90]

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the fees was authorized when it occurred. The remedy should be against the state, not an individual.

[88] Occasionally, in cases like this, the Court gestures at tradition and pulls an outlier back into a national consensus. *See, e.g.*, Honda Motor Co. v. Oberg, 512 U.S. 415, 427–28 (1994) ("Every other State in the Union affords postverdict judicial review . . . ."); Santosky v. Kramer, 455 U.S. 745, 749–50 & n.3 (1982); *cf.* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 370 (1992) ("The Court's role in civil liberties . . . has been that of a follower, not a leader. It extirpates in the name of the Constitution practices that have already disappeared or dwindled among the states. It obliterates outliers."). Justice Alito would have looked to history and consensus, but the majority primarily used other grounds to accomplish the same thing.

[89] Some scholars have proposed this approach, decrying the "scandalously unjust" lack of compensation for liberty deprivations, which "cannot be justified by any of the theories of just compensation law that are taken seriously by the courts or commentators." Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L.J. 1029, 1064–65 (2004).

[90] "Now, there's something wrong with that. I'm trying to put my finger on it." Transcript of Oral Argument at 44, *Nelson*, 137 S. Ct. 1249 (No. 15-1256) (Breyer, J.).