

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Due Process

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**Nelson v. Colorado, \_\_ U.S. \_\_ (2017)**

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*Shannon Nelson was convicted by a Colorado jury for the sexual and physical abuse of her children. In addition to imposing a prison sentence of 20 years, the trial court ordered her to pay \$8,192.50 in court costs, fees, and restitution. Nelson's conviction was subsequently reversed on an appeal, and she was found not guilty when retried. Nelson then moved for the return of moneys that had been withheld from her to pay those court costs, fees, and restitution. Colorado refused. State attorneys relied on the state Exoneration Act of 2013, which permitted exonerated defendants in Nelson's position to recover costs only if they could demonstrate in a civil procedure clear and convincing evidence of their innocence. Nelson claimed this procedure violated her due process rights under the Fourteenth Amendment. The trial court rejected this claim, and that decision was sustained by the Colorado Supreme Court. Nelson appealed to the U.S. Supreme Court.*

*The U.S. Supreme Court by a 7–1 vote reversed the Supreme Court of Colorado. Justice Ruth Bader Ginsburg's majority opinion held that states must refund all costs to a person assessed after the person was found guilty of a criminal offense if that conviction is later overturned. Justice Samuel Alito's concurring opinion agreed that Colorado had to give Nelson a refund but insisted that persons whose convictions were later reversed might still have to pay restitution in certain instances. Justice Clarence Thomas's dissent insisted that Nelson no longer had a property right in the money he had been assessed after being found guilty. Ginsburg and Alito debated whether the appropriate standard was laid down in *Mathews v. Eldridge* (1976) or *Medina v. California* (1992). What are the different standards prescribed by each decision? How do they lead the justices to different results? Which standard is appropriate in this circumstance? Why does Thomas insist that no property rights exist in this case? Is that assertion correct? Would the same rules apply to criminal fines?*

Justice GINSBURG delivered the opinion of the Court.

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The familiar procedural due process inspection instructed by *Mathews v. Eldridge*, (1976), governs these cases. Colorado argues that we should instead apply the standard from *Medina v. California* (1992), and inquire whether Nelson and Madden were exposed to a procedure offensive to a fundamental principle of justice. *Medina* "provide[s] the appropriate framework for assessing the validity of state procedural rules" that "are part of the criminal process." Such rules concern, for example, the allocation of burdens of proof and the type of evidence qualifying as admissible. These cases, in contrast, concern the continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution. Because no further criminal process is implicated, *Mathews* "provides the relevant inquiry."

Under the *Mathews* balancing test, a court evaluates (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. All three considerations weigh decisively against Colorado's scheme.

Nelson and Madden have an obvious interest in regaining the money they paid to Colorado. Colorado urges, however, that the funds belong to the State because Nelson's and Madden's convictions were in place when the funds were taken. But once those convictions were erased, the presumption of their innocence was restored. . . . Colorado may not retain funds taken from Nelson and Madden solely because of their now-invalidated convictions, for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.

That petitioners prevailed on subsequent review rather than in the first instance, moreover, should be inconsequential. Suppose a trial judge grants a motion to set aside a guilty verdict for want of sufficient evidence. In that event, the defendant pays no costs, fees, or restitution. Now suppose the trial court enters judgment on a guilty verdict, ordering cost, fee, and restitution payments by reason of the conviction, but the appeals court upsets the conviction for evidentiary insufficiency. By what right does the State retain the amount paid out by the defendant? . . .

Is there a risk of erroneous deprivation of defendants' interest in return of their funds if, as Colorado urges, the Exoneration Act is the exclusive remedy? Indeed yes, for the Act conditions refund on defendants' proof of innocence by clear and convincing evidence. But to get their money back, defendants should not be saddled with any proof burden. Instead, . . . they are entitled to be presumed innocent.

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Colorado argued on brief that if the Exoneration Act provides sufficient process to compensate a defendant for the loss of her liberty, the Act should also suffice "when a defendant seeks compensation for the less significant deprivation of monetary assessments paid pursuant to a conviction that is later overturned." The comparison is inapt. Nelson and Madden seek restoration of funds they paid to the State, not compensation for temporary deprivation of those funds. Petitioners seek only their money back, not interest on those funds for the period the funds were in the State's custody. 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.

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Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right. "Equitable [c]onsiderations," Colorado suggests, may bear on whether a State may withhold funds from criminal defendants after their convictions are overturned. Colorado, however, has identified no such consideration relevant to petitioners' cases, nor has the State indicated any way in which the Exoneration Act embodies "equitable considerations."

Colorado's scheme fails due process measurement because defendants' interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and the State has shown no countervailing interests in retaining the amounts in question. To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.

Justice GORSUCH took no part in the consideration or decision of these cases.

Justice ALITO, concurring in the judgment.

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The proper framework for analyzing these cases is provided by *Medina v. California* (1992). *Medina* applies when we are called upon to "asses[s] the validity of state procedural rules which . . . are part of the criminal process," and that is precisely the situation here. These cases concern Colorado's rules for determining whether a defendant can obtain a refund of money that he or she was required to pay pursuant to a judgment of conviction that is later reversed. In holding that these payments must be refunded, the Court relies on a feature of the criminal law, the presumption of innocence. And since the

Court demands that refunds occur either automatically or at least without imposing anything more than “minimal” procedures, it appears that they must generally occur as part of the criminal case. For these reasons, the refund obligation is surely “part of the criminal process” and thus falls squarely within the scope of *Medina*. Under *Medina*, a state rule of criminal procedure not governed by a specific rule set out in the Bill of Rights violates the Due Process Clause of the Fourteenth Amendment only if it offends a fundamental and deeply rooted principle of justice. And “[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental.” . . .

The Court, by contrast, turns its back on historical practice, preferring to balance the competing interests according to its own lights. The Court applies the balancing test set out in *Mathews v. Eldridge*, a modern invention “first conceived” to decide what procedures the government must observe before depriving persons of novel forms of property such as welfare or Social Security disability benefits. Because these interests had not previously been regarded as “property,” the Court could not draw on historical practice for guidance. *Mathews* has subsequently been used more widely in civil cases, but we should pause before applying its balancing test in matters of state criminal procedure. “[T]he States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition.” . . . Where long practice has struck a particular balance between the competing interests of the State and those charged with crimes, we should not lightly disturb that determination. . . .

Under *Medina*, the Colorado scheme at issue violates due process. American law has long recognized that when an individual is obligated by a civil judgment to pay money to the opposing party and that judgment is later reversed, the money should generally be repaid. . . . As both parties acknowledge, this practice carried over to criminal cases. When a conviction was reversed, defendants could recover fines and monetary penalties assessed as part of the conviction.

The rule regarding recovery, however, “even though general in its application, [was] not without exceptions.” The remedy was “equitable in origin and function,” and return of the money was “not of mere right,” but “rest[ed] in the exercise of a sound discretion.” . . . The central question courts have asked is whether “the possessor will give offense to equity and good conscience if permitted to retain [the successful appellant’s money].”

This history supports the Court’s rejection of the Colorado Exoneration Act’s procedures. The Act places a heavy burden of proof on defendants, provides no opportunity for a refund for defendants (like Nelson) whose misdemeanor convictions are reversed, and excludes defendants whose convictions are reversed for reasons unrelated to innocence. These stringent requirements all but guarantee that most defendants whose convictions are reversed have no realistic opportunity to prove they are deserving of refunds. Colorado has abandoned historical procedures that were more generous to successful appellants and incorporated a court’s case-specific equitable judgment. Instead, Colorado has adopted a system that is harsh, inflexible, and prevents most defendants whose convictions are reversed from demonstrating entitlement to a refund. . . .

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. . . [I]f the *status quo ante* must be restored, why shouldn’t the defendant be compensated for all the adverse economic consequences of the wrongful conviction? After all, in most cases, the fines and payments that a convicted defendant must pay to the court are minor in comparison to the losses that result from conviction and imprisonment, such as attorney’s fees, lost income, and damage to reputation. The Court cannot convincingly explain why *Mathews’* amorphous balancing test stops short of requiring a full return to the *status quo ante* when a conviction is reversed. But *Medina* does.

The American legal system has long treated compensation for the economic consequences of a reversed conviction very differently from the refund of fines and other payments made by a defendant pursuant to a criminal judgment. Statutes providing compensation for time wrongfully spent in prison are a 20th-century innovation: By 1970, only the Federal Government and four States had passed such laws. . . . Many other jurisdictions have done so since, but under most such laws, compensation is not

automatic. Instead, the defendant bears the burden of proving actual innocence (and, sometimes, more).  
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The Court's disregard of historical practice is particularly damaging when it comes to the question of restitution. The Court flatly declares that the State is "obliged to refund . . . restitution" in just the same way as fees and court costs. This conclusion is not supported by historical practice, and it overlooks important differences between restitution, which is paid to the victims of an offense, and fines and other payments that are kept by the State.

Although restitution may be included in a criminal judgment, it has many attributes of a civil judgment in favor of the victim. This is clear under Colorado law. Although the obligation to pay restitution is included in the defendant's sentence, restitution results in a final civil judgment against the defendant in favor of the State *and the victim*. Entitlement to restitution need not be established beyond a reasonable doubt or in accordance with standard rules of evidence or criminal procedure. . . .

The Court ignores the distinctive attributes of restitution, but they merit attention. Because a restitution order is much like a civil judgment, the reversal of the defendant's criminal conviction does not necessarily undermine the basis for restitution. Suppose that a victim successfully sues a criminal defendant civilly and introduces the defendant's criminal conviction on the underlying conduct as (potentially preclusive) evidence establishing an essential element of a civil claim. And suppose that the defendant's criminal conviction is later reversed for a trial error that did not (and could not) infect the later civil proceeding: for example, the admission of evidence barred by the exclusionary rule or a Confrontation Clause violation. It would be unprecedented to suggest that due process requires unwinding the civil judgment simply because it rests in part on a criminal conviction that has since been reversed. And a very similar scenario could unfold with respect to a Colorado restitution judgment. The only salient difference would be that, in the Colorado case, the civil judgment would have been obtained as part of the criminal proceeding itself. It is not clear (and the Court certainly does not explain) why that formal distinction should make a substantive difference.

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Nor does the Court consider how restitution's unique characteristics might affect the balance that it strikes under *Mathews*. The Court summarily rejects the proposition that "'equitable considerations'" might militate against a blanket rule requiring the refund of money paid as restitution, but why is this so? What if the evidence amply establishes that the defendant injured the victims to whom restitution was paid but the defendant's conviction is reversed on a ground that would be inapplicable in a civil suit? In that situation, is it true, as the Court proclaims, that the State would have "no interest" in withholding a refund? Would the Court reach that conclusion if state law mandated a refund from the recipients of the restitution? And if the States and the Federal Government are always required to foot the bill themselves, would that risk discourage them from seeking restitution—or at least from providing funds to victims until the conclusion of appellate review?

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Justice THOMAS, dissenting.

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The Court assumes, without reference to either state or federal law, that defendants whose convictions have been reversed have a substantive right to any money exacted on the basis of those convictions. By doing so, the Court assumes away the real issue in these cases. As the parties have agreed, the existence of Colorado's obligation to provide particular procedures depends on whether petitioners have a substantive entitlement to the money. . . . If defendants in their position have no entitlement to the money they paid pursuant to their reversed convictions, there would be nothing to adjudicate. In light of these concessions, I can see no justification for the Court's decision to address the

procedures for adjudicating a substantive entitlement while failing to determine whether a substantive entitlement exists in the first place.

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The Fourteenth Amendment provides that no State shall “deprive any person of *life, liberty, or property*, without due process of law.” To show that Colorado has violated the Constitution’s procedural guarantees, as relevant here, petitioners must first establish that they have been deprived of a protected property interest. . . .

The parties dispute whether, under Colorado law, the petitioners or the State have a property interest in the money paid by petitioners pursuant to their convictions. Petitioners contend that the money remains their property under state law Colorado counters that when petitioners paid the money pursuant to their convictions, the costs and fees became property of the State and the restitution became property of the victims.

The key premise of the Colorado Supreme Court’s holdings in these cases is that moneys lawfully exacted pursuant to a valid conviction become public funds (or the victims’ money) under Colorado law. The Colorado Supreme Court explained in petitioner Shannon Nelson’s case that “the trial court properly ordered [her] to pay costs, fees, and restitution pursuant to valid statutes” and that “the court correctly distributed th[ose] funds *to victims and public funds*, as ordered by the statutes.” The Colorado Supreme Court further noted that, “[o]nce the state disburses restitution to the victims, the state no longer controls that money.”

The Colorado Supreme Court explained that “Colorado’s constitution protects” the Colorado Legislature’s “control over public money,” and thus a “court may authorize refunds from public funds only pursuant to statutory authority.” The Exoneration Act, the Colorado Supreme Court held, provides the only statutory authority for refunding costs, fees, and restitution when a defendant’s conviction is overturned. Because petitioners had not sought a refund under the Exoneration Act, “the trial court lacked the authority to order a refund of Nelson’s costs, fees, and restitution.”

The majority responds by asserting, without citing any state law, that Colorado “had no legal right to retain [petitioners’] money” once their convictions were invalidated. If this were true as a matter of state law, then certain provisions of the Exoneration Act—which require the State to return costs, fees, and restitution only in limited circumstances following a conviction’s reversal—would be superfluous. Thus, to 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.

Because defendants in petitioners’ position do not have a substantive right to recover the money they paid to Colorado under state law, petitioners’ asserted right to an automatic refund must arise, if at all, from the Due Process Clause itself. But the Due Process Clause confers no substantive rights. . . .