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## Property rights by fiat

By Ethan Blevins

If you're convicted of a crime in Colorado, you'll have to pay a bunch of fines and fees — victim restitution, court costs, and so forth. If you're exonerated, though, Colorado won't give you back that money unless *you* prove your own innocence. The U.S. Supreme Court held oral argument on Jan. 9 in *Nelson v. Colorado* to decide whether this guilty-until-proven-innocent approach violates due process.

The oral argument foundered early on a basic question: Who owns this money? After all, if Colorado actually owns the cash, then the state can toss up any procedural hurdles it wants, since the exoneree has no real right to that money in the first place. That the highest court in the land spent almost an hour puzzling over this simple issue speaks to the bizarre and perilous state of our property rights.

The Colorado solicitor general argued that once the state has taken a defendant's money pursuant to a conviction — even if that conviction turns out later to be invalid — that money belongs to the state. Period. One justice asked if the state could just decide to hold on to a \$15 million criminal fine even if the defendant was exonerated. The solicitor general said yes. The basic message: We're sorry for wrongfully imprisoning you and wrecking your life, but we'll be keeping your money. To hear this message again, dial zero.

The confusion here is not new. States have tried to redefine property rights by fiat for a long time, with some regrettable suc-

cesses. But can states just extinguish your property by a wave of the wand?

That answer could depend on where property comes from. Is it granted by government, or is it a right held apart from government? This question evokes Socrates' famous riddle: Do the gods value that which is good because it is good, or is something good just because the gods value it? We can rephrase it here: Do you have a property right because the state says so, or must the state honor property rights because those rights spring from some other source? And if a property right is based on a state's say-so, can the state just "say it ain't so"? Is it free to simply destroy what it creates?

Property is not just a privilege granted or withheld at the whim of the state. It is a fundamental right. Enlightenment philosophers argued that property in outward things springs from self-ownership. As Locke famously put it: "The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property." Kids grasp this the first time they earn twenty bucks for mowing a neighbor's lawn — I earned it, I own it.

But courts have begun to accept the idea that states can redefine property rights at will — even if you earned it or bought it with your earnings. That might make sense with government entitlements, like social security

or food stamps. To some extent, what the government gives, it can take away. But what about income or real estate? The fattening of the government dole may be blurring the difference between government largess and traditional property. Hence, the Supreme Court spent an hour discussing whether an exoneree even has any claim to the money she handed over to the state based on an invalid conviction.

Thankfully, the court seemed skeptical of Colorado's claim that it could snuff out property interests at will. Surely, once the legal predicate for taking a defendant's money — a valid conviction — ceases to exist, the government no longer has any entitlement to that money. The "because-I-say-so" battle cry might serve as a sufficient rationale in the world of parenting, but for policymaking?

After all, the Constitution's due process clause promises you not only that the government can't take your stuff without a fair procedure, but also that they can only deprive you of property through a legitimate "law." Colorado does have a "law" that allows them to keep the money unless exonerees can prove they deserve it back: the Exoneration Act. The act does some laudable things. It offers compensation for exonerated individuals based on the length of their wrongful detention. But it also says exonerees can't get back their money without proving their innocence. Can we call such an arbitrary and unjust requirement a real "law?" And if it isn't a law, doesn't it violate the constitutional requirement that the state

can only deprive you of life, liberty, or property if it does so with "due process of law"?

Many rulers throughout history have sought to claim that their word is law because of who they are, not because of whether that law is just or rational. Not unlike Colorado here. But a law is not a law just because the lawmaker has the power to enforce it. A law must have a rational relationship to a legitimate government purpose. Brute force and legitimate law are not the same. As Francis Bacon put it: "In Civil Society, either law or forces prevails. But there is a kind of force which pretends to law, and a kind of law which savours of force rather than equity." When Colorado lays claim to an exoneree's money for no real reason at all, it savors of force, not equity. The Supreme Court should remind Colorado that it cannot whisk property away from constitutional protections by deeming it to no longer be property at all.

**Ethan Blevins** is an attorney with *Pacific Legal Foundation*, who submitted an amicus brief in opposition to Colorado's policy.



**ETHAN BLEVINS**  
Pacific Legal Foundation