Hidden Takings and the Communal Burden of Punishment

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Abstract

Legal scholars devote significant attention to the plight of incarcerated people, and they increasingly extend their focus to confront the social implications of incarceration for those outside the system. This Article goes further still: it argues that harsh conditions of confinement in the American criminal legal system may violate the constitutional rights of free people in the community—namely, the families of incarcerated people. To make this argument, we use the traditional critical methodology of "looking to the bottom": we draw on narratives collected through eight months of observations of a support group for family members of incarcerated people, along with twenty-seven in-depth interviews with such family members. We find that, in the face of governmental neglect of imprisoned populations, family members experience genuine coercion to provide their incarcerated loved ones with access to basic necessities, such as nutrition, physical safety, and post-release housing. In other words, informal social support networks, made up of civilians, backstop the state's carceral burden. In doing so, these networks become critical to the attainment of broadly beneficial objectives of the criminal legal system, like desistance from crime and successful reintegration upon release.

We translate the narratives of these participants into constitutional language, arguing that the participants have experienced takings that should be cognizable under the Fifth Amendment's Takings Clause. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." But, unlike traditional or regulatory takings, the extraction of property from the loved ones of incarcerated people occurs under extreme social or moral pressure rather than pursuant to legal directives. To capture the experience of the participants in this study, we introduce and defend the concept of "hidden takings": certain governmental seizures of private property that are effected by the excessively coercive, extra-legal pressure arising from the state's failure to uphold basic affirmative obligations to its people. We then show that hidden takings fit comfortably within current caselaw, as well as within numerous and varied theoretical accounts of what takings law should achieve. In some respects, in fact, the case for recognizing hidden takings is stronger than the case for recognizing per se or regulatory takings that the courts have long accepted. We situate hidden takings within broader ongoing debates about takings law and progressive constitutionalism, finding that both originalist and critical perspectives are conducive to acknowledging hidden takings.

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INTRODUCTION

The Supreme Court has acknowledged the state's affirmative constitutional obligation to protect the well-being of incarcerated people.[3] In drastically limiting the power of incarcerated people to provide for their own needs, the state assumes what Sharon Dolovich calls the "carceral burden" to meet those needs itself.[4] This burden is the price the state must pay for the "benefits of incarceration."[5] Yet it is widely accepted that the state neglects this obligation, or, at minimum, reads it quite narrowly.[6] A recurring theme in Eighth Amendment literature concerns the difficulty of bringing

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[3] [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

[4] Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 892 (2009).

[5] *Id.*

[6] *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525-41 (2021) (describing the arc of "prison law," which featured some notable victories for incarcerated people, especially in the 1970s, but then underwent "retrenchment" in the 1980s and beyond).

successful claims alleging cruel conditions of confinement, and scholars regularly lament the horrendous carceral conditions the courts have grown to tolerate.[7] Literature on due process reproduces the same pattern.[8]

Scholars have paid much less attention to the legal implications of the dynamic that inevitably follows from the state's inability (or refusal) to shoulder the burden of punishment fully: when the state fails to pay its constitutional debts, family, friends, and communities of incarcerated people must step up to defray the state's carceral burden.[9] Monetary sanctions, for example, constitute a "mechanism for offloading responsibility and enrolling individuals as third-party social control agents."[10] Family members who serve as bail cosigners transform into surveillants of their loved ones—a role with which they struggle not only because of the complicated emotions associated with laboring on behalf of the state, but also because their fates become directly intertwined with their loved ones'.[11] In addition to the emotional, psychological, and financial stress they endure, family members charged with surveilling their relatives also become subjects of surveillance and carceral control themselves. They turn over their personal information, face financial threats, receive unwanted communication from the state, and worry about the state's ability to track them in the future.[12] Yet monetary sanctions represent just one example of how the state seamlessly transfers its carceral obligations onto private citizens who accept these responsibilities because of their deep ties to those ensnared within the criminal legal system.

Although many legal scholars have noticed that incarceration implicates the social ties and wellbeing of people who are not incarcerated,[13]

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[7] *See* Dolovich, *supra* note 4, at 889; Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 341 (2022) (describing the Supreme Court's "prison law doctrine" as "predictably pro-defendant, highly deferential to prison officials, and largely indifferent to the impact of judicial decisions on the lived experience of people in custody"); Driver & Kaufman, *supra* note 6, at 516; Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 360 (2018) (arguing among other things, that "[t]he Court's interpretation of the Eighth Amendment's ban of cruel and unusual punishment, in particular, has radically undermined prison officials' accountability for tragedies behind bars-—allowing, even encouraging, them to avoid constitutional accountability").

[8] *See* Schlanger, *supra* note 7, at 360 (describing courts' interpretation of the Due Process Clause as part of the "central doctrinal limit" that has sharply restricted the ability of incarcerated people to bring legal challenges to their conditions of confinement).

[9] *See generally* Alysha McDonald, Luca Berardi, Kevin Haggerty & Sandra Bucerius, *Who Cares?: The Burdens of Care Borne By the Loved Ones of Incarcerated Men*, 27 PUNISHMENT & SOC'Y 380 (2025) (further documenting this phenomenon).

[10] Faith M. Deckard, *Surveilling Sureties: How Privately Mediated Monetary Sanctions Enroll and Responsibilize Families*, SOC. PROBS., July 2024, at 1.

[11] *Id.* at 10.

[12] *Id.* at 12.

[13] *See, e.g.*, Kimberly L. Alderman, *The Long Arm of the Law: Incarceration and the Ordinary Family*, 55 How. L.J. 293 (2012) (discussing how families adopt narratives to cope with having an incarcerated loved one); Justin P. Brooks & Kimberly Bahna, *"It's A Family Affair"—The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271 (1994) (noting some of the challenges faced by families of incarcerated people, such as handling childcare and parental rights when a parent is sent away); Christopher

legal analyses of these dynamics—especially constitutional analyses—are much harder to find.[14] The poor administration of criminal sentences creates a vacuum ultimately filled by private citizens, who are coerced into service by the state's neglect of those it sweeps up in the criminal legal system. The stressors that family members and friends face implicate the state's obligations because they undermine the well-being of the community at large—the very well-being cited to justify harsh criminal punishment in the first place.[15] In extreme cases, we argue in this Article, *the state's failure to care adequately for those under its supervision violates the constitutional rights of private citizens who remain free*. As outlined below, this Article analyzes that constitutional harm through the Fifth Amendment's Takings Clause.[16]

Wildeman & Sara Wakefield, *The Long Arm of the Law: The Concentration of Incarceration in Families in the Era of Mass Incarceration*, 17 J. GENDER RACE & JUST. 367 (2014) (summarizing research findings on the life outcomes for those with incarcerated loved ones).

[14] *See, e.g.*, Brittany L. Deitch, *Estate to State: Pay-to-Stay Statutes and the Problematic Seizure of Inherited Property*, 95 U. COLO. L. REV. 839 (2024) (arguing against certain states' seizures of inheritances under pay-to-stay statutes that charge people for their incarceration, but omitting a takings argument).

[15] Theoretically, the threat of imprisonment can promote community safety by facilitating what is known as "general deterrence," whereby individuals in the community recognize the risks of law-breaking behavior when they see others experience harsh punishments. Imprisonment can also promote public safety through a process that scholars have labeled "specific deterrence," whereby those who experience imprisonment are "chastened" and thus deterred from future law-breaking behavior. Finally, imprisonment can protect the community directly by "incapacitating" those that undermine public safety. Charles E. Loeffler & Daniel S. Nagin, *The Impact of Incarceration on Recidivism*, 5 ANN. REV. CRIMINOLOGY 133, 134 (2022). Although advocates of more punitive punishment policies often cite these rationales, research has shown that they do not always (or even often) work as intended. For example, research suggests that it is the *certainty of apprehension* rather than the *severity of punishment* that promotes deterrence. Daniel S. Nagin, *Deterrence in the Twenty-first Century*, 42 CRIME & JUST. 199, 199 (2013). Punitive policies such as lengthy prison sentences and mandatory minimum sentencing thus cannot be justified on the basis of deterrence. Most studies have shown that postconviction imprisonment has no discernible effects on criminal behavior following release, calling into question the plausibility of punishment policies predicated on specific deterrence. Loeffler & Nagin, *supra*, at 133. And in studies that do find a significant relationship between incarceration and post-release lawbreaking behavior, recidivism-reducing effects emerge in settings that emphasize rehabilitative programming. *Id.* In settings that lack such programming, on the other hand, incarceration is more likely to result in recidivism. *Id.*

[16] State constitutions often contain their own takings clauses. For some helpful background on the differences among state approaches to takings, see Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to* 51 Imperfect Solutions, 2020 U. ILL. L. REV. 1455, 1466-71 (2020). Despite the possibility for significant state-to-state variation, and aside from a few limited exceptions, approaches to takings appear to be relatively uniform across state and federal law. *See id.* at 1771-77 (noting this striking homogeneity and offering some speculative explanations for it).

One might be tempted to consider a second constitutional argument to capture the phenomenon documented in this Article—one that relies on the Due Process Clause rather than the Takings Clause. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 886 (2000) (noting that "[t]he Constitution contains two clauses that protect persons against governmental interference with their property" and identifying both the Takings Clause and the Due Process Clause). The Due Process Clause immediately precedes the Takings Clause in the Fifth Amendment. It states that no person "shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This second constitutional argument would assert that the state's neglect of incarcerated people results in the confiscation of private

The Takings Clause has recently become a prominent subject of debate. In response to the Supreme Court's ongoing expansion of the Takings Clause—largely to the benefit of the wealthy[17]—scholars have expressed grave concern. For instance, Nikolas Bowie recently lamented the Court's use of the Clause to "suppress democracy,"[18] while Benjamin Sachs[19] and Cynthia Estlund[20] have articulated worries specifically about the use of the Clause to benefit employers at the expense of workers. Against that background, Gali Racabi has proposed a counter-expansion of the Takings Clause to serve, rather than undercut, progressive values.[21] More specifically, Racabi argues for augmenting the coverage of the Clause to cover workers' entitlements to their jobs with private employers, potentially rendering at-will employment a constitutional taking.[22] Racabi acknowledges that his approach would require a "novel extension" of the doctrine,[23] but he observes that "[t]he constitutional stakes of this debate about the scope of the Takings Clause extend beyond the specific clause itself to a broader ongoing conversation about progressive constitutionalism."[24]

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property in violation of procedural or substantive due process rights. Although there may be value in exploring this possibility, we do not develop a version of this argument here. For one, it would require its own dedicated treatment because the Court has arguably adopted different definitions of "constitutional property" in takings contexts, procedural due process contexts, and substantive due process contexts. Merrill, *supra*, at 893. Moreover, in the case of substantive due process, "because of the dearth of precedent enforcing substantive due process in the context of property rights, we do not even have a very clear road map of what kinds of economic interests are enforceable . . . ." *Id.* at 982. There are also some complications that render takings a more promising framework in this context. For instance, much of the time, civilians who are compelled to backstop the state's carceral burden often do so by transferring their property (or certain rights in their property) to other private parties rather than the state. As we discuss below, that dynamic fits neatly into the law of takings but less so into something like procedural due process, which one might conceive of as encompassing entitlements "that cannot be terminated [by state action] unless some specific condition is satisfied." *Id.* at 965. More generally, one of the most notable features of the state's reliance on private citizens to provide essential support to incarcerated and recently released individuals is its offloading of affirmative state obligations. That feature fits quite harmoniously with the public-use prong of takings analysis, but it has no direct analog in due process contexts. A due process argument would likely have a broader and more libertarian character, whereas the takings argument stands to be both narrower and more progressive.

[17] *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 152 (2021) (holding that a long-standing state statute that required employers to permit union organizers onto their property for three hours a day on 120 days per year amounted to a per se taking of the employers' property).

[18] Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 161-62 (2021).

[19] Benjamin I. Sachs, *Safety, Health, and Union Access in* Cedar Point Nursery, 2021 SUP. CT. REV. 99, 103.

[20] Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotic Dominion" Gains Ground*, 2021 SUP. CT. REV. 125, 152-53.

[21] *See generally* Gali Racabi, *At Will as Taking*, 133 YALE L.J. 2257 (2024).

[22] *Id.* at 2268.

[23] *Id.* at 2280.

[24] *Id.* at 2300.

Racabi is right about the stakes, but his approach to the Clause is not the only one available. We need not expand the definition of "property" to harness the power of the Takings Clause for progressive purposes. Another approach—the approach we adopt in this Article—is to "look to the bottom," as critical scholars have urged for decades.[25] Looking to the bottom means listening to the lived experiences of marginalized people and, where possible, retelling their stories through the language of the doctrine. Scholars typically apply that approach to areas of the law obviously built to serve progressive values, such as reparations claims[26] or antidiscrimination law.[27] It may therefore seem counterintuitive to look to the bottom in an area historically used to protect capital. Subversive appeal aside, however, the Takings Clause is the perfect vehicle for a critical approach because many scholars agree it was intended to protect against political process failures.[28] In other words, the originalist approach to the Clause may be *inherently* critical, for nobody bears the weight of political process failures as much as the marginalized.[29] It is thus plausible that the Court has rendered the Takings Clause needlessly regressive because, in interpreting the Clause, it has genuinely lost its way.

Accordingly, this Article starts by looking to the bottom: Our argument draws on eight months of ethnographic observations[30] with a family support group and 27 in-depth interviews with family members of people in prison, all conducted by the second author. The narratives provided by these participants vividly illustrate the financial and social burdens they bear as a result of the state's failures to care properly for those it imprisons. Through their stories, we show that community members step in, often equivocally or even unwillingly, to help their incarcerated loved ones materially, socially, and

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[25] *See generally, e.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing for the need to look seriously to the experiences of marginalized populations in service of remedying their subordination, and articulating reparations claims for Japanese Americans and native Hawaiians through that lens by adapting extant legal frameworks).

[26] *Id.*

[27] *See generally, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (applying a similar approach to expanding constitutional protection against unconscious racial discrimination).

[28] *Infra* notes 182-84, 202-05 and accompanying text.

[29] *Infra* note 205 and accompanying text.

[30] "Ethnography" refers to a qualitative method of data collection and analysis. Although the precise definition of ethnography varies across disciplines, ethnographies generally: 1) involve a relatively long-term process of data collection; 2) take place in naturally occurring (rather than simulated) settings; 3) rely on participant observation, where researchers engage directly with a setting and its actors; 4) use a range of data sources (observations, interviews, focus groups, archival research, et cetera); 5) seek to document what is actually going on in the setting through richly textured descriptions; 6) emphasize the meaning that people in a setting ascribe to objects, practices, events, and behaviors; and 7) are holistic, seeking to describe social situations in all their complexity. Martyn Hammersley, *What is Ethnography? Can It Survive? Should It?*, 13 ETHNOGRAPHY & EDUC. 1, 3-4 (2018).

emotionally. Incarcerated people rely on loved ones on the outside—and not the state—to maintain bare minimum standards of health and safety. In the absence of accessible and reliable therapeutic care, family members and friends also bear the brunt of their incarcerated loved ones' psychological traumas. It is against the backdrop of these emotional and financial costs that family members and friends also face the daunting task of contemplating how to support their loved ones' post-incarceration reentry into the community.

Although the subjects of this study were demographically diverse, the findings stand out against the stark racial disparities among those subjected to incarceration in the United States. To have a loved one in prison is not necessarily to belong to a suspect class, but it is an experience much more common among people of color—especially Black Americans—than white Americans, and much more common among those with limited means than the wealthy.[31] The findings of this study therefore directly implicate racial and economic inequality. Moreover, even bracketing racial and financial disparities, those who support an incarcerated loved one unquestionably bear the social stigma and disregard that comes from being tied tightly to people who are ostracized and marginalized because of their contact with the criminal legal system.

In short, we argue that the displacement of the carceral burden onto the shoulders of community members should prompt a reckoning with the broader communal implications of incarceration, especially among legal scholars. We also supply a vocabulary to frame that reckoning: the constitutional language of takings. The narratives of the participants in this study illustrate that the state's practices surrounding incarceration create the

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[31] *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that the criminal legal system has reproduced the racial caste system that prevailed during the era of slavery in the United States, primarily using the legal and social processes through which it marginalizes Black Americans). With gradual reductions in the size of the prison population generally, the United States has witnessed a decline in the staggering racial inequality fueled by mass incarceration. Yet racial disparities in punishment remain alarmingly high: The lifetime risk of imprisonment for Black men born in 1981 (one in three) has dropped significantly for those born in 2001 (one in five), but it remains nearly four times greater than the risk of incarceration faced by white men. Nazgol Ghandgoosh, *One in Five: Ending Racial Inequality in Incarceration*, SENT'G PROJECT 3 (Oct. 2023), https://www.sentencingproject.org/app/uploads/2024/02/One-in-Five-Ending-Racial-Inequity-in-Incarceration.pdf [https://perma.cc/SMH6-6H9F]. Even before the rise of mass incarceration, however, when imprisonment was first institutionalized in the United States in the mid-19th century, it functioned as a means to control purportedly "deviant" populations, most of whom were poor people and recent immigrants from Europe. Loïc Wacquant, *The Place of the Prison in the New Government of Poverty*, *in* AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 23, 25 (Mary Louise Frampton, Ian Haney López & Jonathan Simon eds., 2008). The criminalization of poverty has transformed but persisted in modern-day America, where it is now characterized by a pernicious intersection of race and class, reflected in the devastating consequences of mass incarceration on "residents of destitute, predominantly Black neighborhoods." Megan Comfort, *"It Was Basically College to Us": Poverty, Prison, and Emerging Adulthood*, 16 J. POVERTY 308, 309 (2012).

urgent need for an injection of money and labor that only private citizens are willing to supply. Our findings also speak clearly to how the contribution of these assets serves the public good by promoting desistance from crime and community reintegration.

The dynamic captured in these narratives fits exceptionally well with the Court's classic description of constitutional takings as "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[32] Further, in contrast to Racabi's campaign to expand the definition of "property" for takings purposes, most of the property we found study participants forfeiting fits cleanly within the Court's longstanding definition. From a takings perspective, there is one especially distinctive feature of familial support for incarcerated people: the use of extreme social or moral pressure rather than direct legal pressure to extract and redistribute assets. To account for this notable feature, we introduce and defend the concept of *hidden takings*—the coercive confiscation of private property for the public good through extreme extra-legal pressure rather than through explicit legal means. These takings are hidden in the sense that the government surreptitiously coerces private citizens into contributing property through extreme neglect of its duties rather than through an overt, affirmative directive like a statute or regulation.[33]

There is a surprisingly sturdy basis—supported by a peculiar diversity of considerations—for acknowledging the category of hidden takings. First, the concept fits cleanly within the spirit (and, to a significant extent, even the language) of modern takings cases. Additionally, arguments for the judicial recognition of hidden takings find support in a variety of different, influential scholarly attempts to capture the principles underlying takings law. Third, as noted above, there are compelling moral and methodological reasons for channeling the experiences of marginalized people through constitutional doctrine as an exercise in progressive constitutionalism. To take seriously the experience of marginalization requires attending to the costs and effects of the state's neglect, and this study demonstrates that the state's neglect of affirmative duties results in the genuinely coerced confiscation of property from many of those supporting a loved one in prison.

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[32] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[33] We see hidden takings as an example of what Mari Matsuda calls a "critical legalism." *See* Matsuda, *supra* note 25, at 326 (introducing the concept). According to Matsuda, a critical legalism is "a legal norm suggested by the experience of people of color that may be attractive to those who accept the [Critical Legal Studies] utopian vision." *Id.* She introduces reparations for racism as an example. *Id.* at 362. People of color would not be the only ones due compensation for hidden takings, but there is good reason to think that racism correlates with—and ultimately causes—a significant share of the state's extreme neglect that lies behind hidden takings. *See infra* Part IV (describing hidden takings in more detail).

Notably, despite the traditional and well-established tension between critical and originalist approaches,[34] hidden takings may fit even better with an original understanding of the Takings Clause than modern, settled elements of takings law like regulatory takings. In fact, there is a fascinating story to tell about the relevance of hidden takings that is simultaneously critical and originalist. Thus, whether we emphasize the thrust of modern takings cases, scholarly efforts to boil that area of law down to animating principles, or the moral importance of acknowledging the distinct experiences of those saddled with stigma and disadvantage, all factors converge in favor of understanding the secondary costs of harsh carceral conditions as hidden takings.

This Article proceeds in four parts. In Part I, we provide background on the documented effects of familial imprisonment to establish context for the study that forms the basis of this Article.[35] In Part II, we describe the methods and findings of the study, which was undertaken by the second author. The narratives from this study reveal that family members supporting loved ones in prison experience a sharp form of social or moral coercion to provide the material support necessary to meet their loved ones' basic needs for safety, health, nutrition, and rehabilitative opportunities. The findings also poignantly document the heavy burden under which family members labor in providing these various forms of support, and the exploitative circumstances they confront in doing so.

In Part III, we turn to an exposition of the current state of the law around the Fifth Amendment's Takings Clause, as well as a review of some of the most influential efforts to understand the principles that animate takings law. This Part sets the stage for a translation of the burdens experienced by this study's participants into constitutional language. Finally, in Part IV, we introduce and defend the concept of hidden takings. We distinguish this category from recognized forms of takings, demonstrate how it captures the experiences of the participants in this study, urge the formal recognition of hidden takings as a matter of legal doctrine, and anticipate objections. We argue that the efforts of study participants serve a significant and demonstrable public benefit—namely in reducing recidivism and homelessness—and that the absence of a legal directive coercing their contributions is neither morally nor legally relevant. We also introduce limiting principles for hidden takings.

I. The Consequences of Imprisonment For Family Life

Imprisonment does not only harm those who are confined in prisons and jails; the negative consequences of imprisonment also encapsulate

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[34] *See generally* G. Alex Sinha, *Original(ism) Sin*, 95 St. John's L. Rev. 739 (arguing that originalism generally entails both privileging the perspectives of an elite demographic and generating regressive results as a matter of policy).

[35] In this Part, we generally cite relevant social science research directly, rather than legal scholarship that summarizes it.

incarcerated people's partners,[36] children,[37] parents,[38] and even entire neighborhoods/communities.[39] Over the last few decades, social scientists began to recognize and study the ways in which imprisonment harms those not formally within the grip of the prison system. For example, researchers documented how imprisonment strains romantic relationships[40] and heightens the risk of marital dissolution.[41] The pressure on intimate partnerships is partially attributable to the forced distance that is introduced in a relationship when one partner is incarcerated,[42] but it also stems from the stressors that partners of incarcerated people themselves endure.[43] For instance, loved ones visiting incarcerated people absorb prison norms through a process known as "secondary prisonization."[44] Despite not being confined in prisons themselves, family members are exposed to—and pressured to internalize—prison norms that demand subservience. When family members visit their loved ones, they become "temporary occupants" of a prison, and they must adhere to its security protocols or risk forfeiting their visit entirely. Clothing, for example, ceases to serve as a tool for self-expression. Prison officials strictly assess visitors' attire, and violations of a prison's dress code protocol (which is often inscrutable to begin with) can result in denial of entry.[45] In many ways, then, families who enter prison (even if only as visitors) themselves become a "peculiar category of 'prisoner.'"[46] Researchers have also documented the intergenerational consequences of incarceration for the children of incarcerated parents,[47] and the pressures that surrogate

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[36] *See, e.g.*, Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271, 281-83 (2007); Michael Massoglia, Brianna Remster & Ryan D. King, *Stigma or Separation? Understanding the Incarceration-Divorce Relationship*, 90 SOC. FORCES 133, 143-46 (2011); Janani Umamaheswar, *Shadow and Light: Online Narratives of Relationship Dissolution Among Former Partners of Incarcerated Men*, 62 BRIT. J. CRIMINOLOGY 607, 608-09 (2022).

[37] *See, e.g.*, Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 166-70 (2008); Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 233-39 (2009).

[38] *See, e.g.*, Janani Umamaheswar, *"When My Mother Died, I Think a Part of Me Died:" Maternal Fusion and the Relationship Between Incarcerated Men and Their Mothers*, 42 J. FAM. ISSUES 253, 255-56 (2021).

[39] *See, e.g.*, John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 132-34 (1999).

[40] Umamaheswar, *supra* note 36, at 608-09.

[41] Massoglia et al., *supra* note 36, at 143-46.

[42] *See id.*

[43] Comfort, *supra* note 36, at 281-83.

[44] *Id.* at 279.

[45] Megan Comfort, *In the Tube at San Quentin: The "Secondary Prisonization" of Women Visiting Inmates*, 32 J. CONTEMP. ETHNOGRAPHY 77, 93-95 (2003).

[46] *Id.* at 79.

[47] *See, e.g.*, Holly Foster & John Hagan, *Incarceration and Intergenerational Social Exclusion*, 54 SOC. PROBLEMS 399, 405-06 (2007); Peggy C. Giordano, Jennifer E. Copp, Wendy D. Manning & Monica A. Longmore, *Linking Parental Incarceration and Family Dynamics Associated with Intergenerational Transmission: A Life-course Perspective*, 57 CRIMINOLOGY

caregivers face when parents are incarcerated.[48] Social scientists have studied numerous dimensions of the collateral consequences of confinement[49] and the "symbiotic" harms of imprisonment—the negative effects of incarceration that flow in both directions between incarcerated people and their families.[50] As we noted above, legal scholars have begun to engage with these dynamics as well.[51]

Imprisonment has been particularly damaging among families and communities already facing social and economic marginalization.[52] At its peak, mass incarceration represented a "new stage in the history of American racial inequality,"[53] and parental incarceration became a novel form of childhood risk in the United States among Black children and children with low-education parents in particular.[54] Mass incarceration has had devastating consequences for social equality, but recent research offers some reason for optimism, with declining risks of lifetime imprisonment for Black men, the group worst-hit by the prison boom.[55]

Despite a gradual reduction in carceral populations in recent years,[56] as many as 600,000 individuals reenter the community following

395, 397 (2019); Kristin Turney, *The Intergenerational Consequences of Mass Incarceration: Implications for Children's Co-Residence and Contact with Grandparents*, 93 Soc. Forces 299, 302-04 (2014); Kristin Turney, *The Unequal Consequences of Mass Incarceration for Children*, 54 Demography 361, 364 (2017); Kristin Turney & Christopher Wilderman, *Redefining Relationships: Explaining the Countervailing Consequences of Paternal Incarceration for Parenting*, 78 Am. Socio. Rev. 949, 971 (2013).

[48] *See, e.g.*, Lauren E. Glaze & Laura M. Maruschak, Bureau of Just. Stat., Special Report: Parents in Prison and Their Minor Children (2010); Jillian J. Turanovic, Nancy Rodriguez & Travis C. Pratt, *The Collateral Consequences of Incarceration Revisited: A Qualitative Analysis of the Effects on Caregivers of Children of Incarcerated Parents*, 50 Criminology 913, 919 (2012); Molly N. Williams, *The Changing Roles of Grandparents Raising Grandchildren*, 21 J. Hum. Behav. Soc. Env't 948, 948-62 (2011); Diane S. Young & Carrie Jefferson Smith, *When Moms Are Incarcerated: The Needs of Children, Mothers, and Caregivers*, 81 Fams. Soc'y 130, 134 (2000); Kristin Turney, *Hopelessly Devoted? Relationship Quality During and After Incarceration*, 77 J. Marriage & Fam. 480, 480-95 (2015).

[49] Hagan & Dinovitzer, *supra* note 39, at 122; David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 Ann. Rev. Criminology 171, 172 (2018).

[50] *See* Rachel Condry & Shona Minson, *Conceptualizing the Effects of Imprisonment on Families: Collateral Consequences, Secondary Punishment, or Symbolic Harms?*, 25 Theoretical Criminology 540, 546 (2021).

[51] For some examples, see *supra* note 13.

[52] *See, e.g.*, Mark Halsey & Simone Deegan, *'Picking Up the Pieces': Female Significant Others in the Lives of Young (ex)Incarcerated Males*, 15 Criminology & Crim. Just. 131, 145 (2014); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 Am. Socio. Rev. 151, 152-53 (2004); Western & Wildeman, *supra* note 37, at 953.

[53] Western & Wildeman, *supra* note 37, at 221.

[54] *Id.*

[55] *See* Jason P. Robey, Michael Massoglia & Michael T. Light, *A Generational Shift: Race and the Declining Lifetime Risk of Imprisonment*, 60 Demography 977, 985-91 (2023).

[56] The Sent'g Project, Mass Incarceration Trends (May 21, 2023), https://www.sentencingproject.org/app/uploads/2024/05/Mass-Incarceration-Trends.pdf [https://perma.cc/5E2Y-MUY5].

imprisonment each year,[57] many with very little support. As these individuals confront challenges related to securing housing, transportation, healthcare, and employment, they often turn to their families for assistance.[58] Much of the research on families of people in prison has focused on their feelings of shame and grief, especially in a society where their loss goes unrecognized.[59] We know less, however, about how family members feel about the distinctive role—and all its accompanying obligations—that they assume when their loved one becomes incarcerated. In addition to the support that family members provide during imprisonment, familial ties during reentry are crucial. Family members supply reentering people with support that is interactional (such as by extending guidance and advice), instrumental (such as by providing housing and transportation), and emotional (by offering a sense of love and belonging). Importantly, whereas the interactional and emotional support that families offer reentering persons is valuable, it is the material (instrumental) support they provide that is most helpful in facilitating their loved ones' successful reentry.[60] Provision of this support, however, comes at a steep cost to family members who are independently facing their own challenges.[61]

Our data shed light on how family members of people in prison respond to the support-giving responsibilities that are (often very suddenly) thrust upon them when their loved ones become incarcerated. Prisons in the United States are defined by material, emotional, financial, and social deprivation, but being in prison is nevertheless very expensive, in part because the state often shifts the financial burden of the criminal legal system onto those who become mired in it. For example, jurisdictions across the country have introduced "pay-to-stay" policies that charge incarcerated people a per-diem fee that offsets the cost of their own incarceration.[62] States have simultaneously cut budgets for what they deem "nonessential" services, such as education, substance abuse counseling, and vocational programs that have been shown

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[57] Off. of the Assistant Sec'y for Plan. & Evaluation, *Incarceration & Reentry*, https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0 [https://perma.cc/K2XY-AN2S] (last visited Mar. 1, 2025).

[58] *See* Rebecca L. Naser & Nancy G. La Vigne, *Family Support in the Prisoner Reentry Process: Expectations and Realities*, 43 J. Offender Rehab. 93, 99-100 (2006).

[59] Joyce A. Arditti, *Families and Incarceration: An Ecological Approach*, 86 Fams. Soc'y 251, 253-55 (2005).

[60] Thomas J. Mowen, Richard Stansfield & John H. Boman, *Family Matters: Moving Beyond "If" Family Support Matters to "Why" Family Support Matters During Reentry from Prison*, 56 J. Rsch. Crime & Delinq. 483, 500-16 (2019).

[61] *See* Halsey & Deegan, *supra* note 52, at 132-33.

[62] Brittany Friedman, *Unveiling the Necrocapitalist Dimensions of the Shadow Carceral State: On Pay-to-Stay to Recoup the Cost of Incarceration*, 37 J. Contemp. Crim. Just. 66, 71-74 (2021); Gabriela Kirk, April Fernandes & Brittany Friedman, *Who Pays for the Welfare State? Austerity Politics and the Origin of Pay-to-Stay Fees as Revenue Generation*, 63 Socio. Persps. 921, 923 (2020).

to reduce the risk of recidivism.[63] Budgets for basic material goods, including food and hygiene products, have also decreased.[64] Almost all states in the United States have reduced the amount of money they spend on feeding people in prison.[65] Taken together, these shifts point toward a pattern of the government abdicating its responsibility to care for those it forces into carceral facilities.

Social scientists appropriately critique the impact of these shifts on those who come into direct contact with the criminal legal system, and they further recognize that "most people [in prison] have to rely on financial support from friends and family on the outside."[66] Yet there is very little analysis of how these friends and family respond to the unique pressures of being forced into an intense caregiving role as a result of the *state's* decision to imprison their loved ones. In this Article, we marshal novel data on how family members cope with having a loved one in prison, integrate legal scholarship with sociological literature, and explore how the carceral burden problematically shifts from the state to the families of incarcerated people. In so doing, we bridge the gap between normative questions about who *should* shoulder the responsibility of caring for incarcerated people (both legally and morally) and empirical questions about who actually *does* shoulder this responsibility.

II. Data and Methodology

A. Background on the Study

Data for this Article stem from the second author's larger project exploring how families impacted by incarceration construct and leverage communities of support to help them weather the harms of familial imprisonment. Data come from two sources:

Ethnographic observations

Between October 2021 and June 2022, the second author observed a virtual family support group run by a non-profit restorative justice organization in the southeastern United States that assists incarcerated and formerly-incarcerated persons, as well as their loved ones. The family support group met twice a month for ninety minutes, and shifted to an exclusively virtual format during the COVID-19 pandemic. In total, the second author

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[63] Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, 139 Daedalus 62, 67 (2010).

[64] Tommaso Bardelli, Zach Gillespie & Thuy Linh Tu, *Surviving Austerity: Commissary Stores, Inequality and Punishment in the Contemporary American Prison*, 25 Punishment & Soc'y 955, 958 (2023).

[65] *Id.*

[66] *Id.*

observed thirteen full sessions over a span of eight months. Participants were free to drop in and out of support group sessions as they wished, and sessions typically attracted between eight and ten family members. The sessions were run by two staff members of the restorative justice organization, and usually followed one of two formats: "open forum" sessions (in which family members were simply given the floor to share any challenges they were facing and ask questions) and themed or special topic sessions. During the latter, guest speakers were invited to discuss specific topics of interest (such as how to support a loved one during reentry, the ins and outs of parole, the experience of incarceration, or even prison food). In every session, participants were encouraged to share their challenges with one another and exchange advice. Out of respect for the safe space that the group had constructed, the second author did not record the group sessions; instead, she took brief notes to record direct quotes and document notable observations and initial impressions. She then converted these notes into fuller field notes that she analyzed as part of the broader data set.

In-depth interviews

After several weeks of observations, the second author invited the support group members to participate in individual interviews with her. The second author also recruited family members who were unaffiliated with the support group by posting a research flyer on social media groups, sending the flyer to other reentry organizations, and distributing it within the restorative justice organization's community. The final interview sample included twenty-seven participants, thirteen of whom identified as Black, seven of whom identified as white, four of whom identified as Hispanic, and three of whom identified as mixed-race. Participants' ages ranged from twenty to seventy-seven years, with an average age of forty-two years. Eight participants were members of the restorative justice organization's family support group, and another nineteen participants were unaffiliated with the group. Most interview participants identified as women (twenty-three), with three participants identifying as men and one identifying as non-binary.

The second author conducted the interviews on the phone or on Zoom, based on participants' preferences.[67] She emailed participants informed consent forms for them to review before the interview, and she obtained oral consent before beginning the interview. In addition to asking for participants' demographic information (including details on their own incarceration

[67] For consistency, we cite interviews from this study as "telephone interviews," though only some took place by phone and the rest took place over Zoom. To maintain the anonymity of the research subjects in this study, we refer to the participants using pseudonyms. We include the race and age of each interview participant. We do not include this information for support group members who did not participate in an interview with the second author because she was unable to verify their demographic details.

histories), she asked participants mostly open-ended questions related to two broad themes:

1) Experiences of familial incarceration: Questions here included, for example, "What is the hardest part of having an incarcerated family member?", "Can you tell me how you felt when you learned that your [family member] was going to be incarcerated?", and "How close do you feel to your [family member]?".
2) Participants' coping and support-building strategies: Questions here included, for example, "What are some things you have tried to do to cope with the challenges you described [in the first segment of the interview]?", "How comfortable do you feel sharing your challenges with other people?", and "What would help you the most in coping with your [family member's] incarceration?".

The interviews generally lasted approximately seventy-five minutes, with some extending to two hours. The second author audio-recorded interviews and field notes with participants' consent and thereafter transcribed them verbatim before inductively analyzing them.

B. Study Findings

The study revealed a range of difficulties confronted by the study participants. In this section, we pull together some of their narratives concerning the provision of financial and logistical assistance, emotional support, and post-release resources (such as housing). The incarceration of their loved ones introduced family members to a range of difficulties for which they felt wholly unprepared. Participants found themselves pulled into a web of bureaucratic challenges that they did not know how to navigate, and they realized very quickly that their loved ones were almost entirely dependent on them for financial, emotional, psychological, and social support.

Bernadette (47, Black) struggled with intense feelings of guilt when her nephew became incarcerated because she felt that his predicament was partially related to her inadequate support for him when he was younger.[68] Bernadette's guilt also stemmed from the fact that she had moved away from the small town in which she grew up (and where her family, including her nephew, remained).[69] Having climbed the socioeconomic ladder, Bernadette stated that she was "happy" to provide financial support for her nephew in prison because she was "in a position to do it."[70] Despite this, Bernadette

[68] Telephone interview with Bernadette (Jan. 14, 2022) [hereinafter Interview with Bernadette].

[69] *Id.*

[70] *Id.*

expressed frustration with the extent to which her nephew seemed to take her financial support for granted:[71]

> Anytime my mother tells me he needs new shoes, or he wants more money for snacks or whatever, I am always doing it. And so when my mother was here visiting me a few months ago and he asked me for money, he was on the phone with her, and I was cooking or doing stuff, and he told her to tell me to send him some money, and I said, "Mom, can you tell him I just did? I cannot send him money every time he wants it." And it's not that I couldn't. It's just that I wanted him to be more responsible for it, and not to see me as a bank that he can just constantly withdraw money from.

Participants' sense of obligation toward—and their fear for—their family members was rooted in their awareness of the prison conditions their loved ones were navigating, particularly as they related to physical safety. In one support group session, Bahar lamented that she had "paid lots of money for inmates to protect [her son]"[72] and Frances (69, Black) affirmed Bahar's struggle by noting that she too had "paid thousands and thousands of dollars" for the same reason.[73] Bernadette's narrative underscores how the burden of ensuring that—at the very minimum—loved ones in prison were able to stay alive fell not on the shoulders of the state that incarcerated them in the first place, but on family members whose emotional investment in their loved ones compelled them to take on this burden, regardless of the cost of doing so:

> There's tremendous stress. There is so much fear about what is happening to him in prison. I have nightmares all the time about bad things happening to him, and I'll just wake up, and I tell my husband, I'll say, "Honey, you know I hate that he's in prison, right?", and [he] says, "I know, honey." And I say, "You know, I feel helpless. I cannot protect him." One morning, I woke up to a text message from my sister saying that he had called her in the middle of the night. This was a text message that came through like at 2:00 in the morning, but I didn't see it until I woke up, and her saying that he said that he needs $400 to give to someone or they were going to stab him the next day. What do I do? Do I give him $400 to give this person who is then going to start milking him for money all the time? Do I not, and risk them taking his life?[74]

Despite the amount of time and energy she was expending on her nephew, Bernadette stated that she no longer felt close to him. She explained

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[71] *Id.*

[72] Family support group observation (Feb. 28, 2022).

[73] *Id.*

[74] Interview with Bernadette, *supra* note 68.

that she had "pulled back a little bit because it hurts so much to see him like this." She described how her relationship with her nephew would "paralyze" her if she did not "put it in a small box" that she picked up only when he called or needed something.[75] Bernadette's story reveals how familial imprisonment eroded the affective value of family members' relationships with their loved ones while simultaneously sharpening the responsibility they felt vis-à-vis these loved ones. We highlight these emotional traumas to underscore that participants did not feel that their support for their incarcerated loved ones was a matter of choice; the guilt and fear they harbored *compelled* them to step in and care for their incarcerated relatives, even as their relationships with these relatives withered.[76]

Bernadette noted that the hardest part of her nephew's incarceration was her awareness that "the system is probably failing him in ways that I can't even . . . I haven't even really processed right now."[77] Most tellingly, Bernadette explicitly stated that what would have helped her most would have been for the prison system to step up and safeguard her nephew's well-being after imprisoning him (at which point Bernadette and her family could not ensure his survival on their own). The best support that Bernadette could have received from the state would therefore have been liberation from the burden of caring for her nephew's welfare almost entirely on her own:

> I think if I knew that he was getting help, mental health care in prison. If I knew that he was safe, that they were protecting him physically. If the system, the prison system was sufficiently resourced so that he wouldn't always need money for shoes, or new this. So I think if the system was sufficiently resourced.[78]

Note that while Bernadette expressed concerns about the system failing her nephew, her ultimate wish was that this system were better resourced to support her nephew.[79] Contradicting Bernadette's view that the system needs *more* resources, research has shown that states' correctional expenditures nearly quadrupled in the two decades prior to 2012.[80] Subsequent reductions

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[75] *Id.*

[76] It is important to note that most participants believed that their family members were at least partially responsible for their own predicament. Their opinions regarding their loved ones' blameworthiness, however, were distinct from the obligation they felt to support them, especially when their loved ones had little to no other support. Sharon (50, mixed race) captured the turmoil that family members experienced as they grappled with the anger they felt toward their family members alongside their sense of obligation: "He's my kid and he's in a shitty place and dealing with shitty circumstances and it's self-inflicted." Telephone interview with Sharon (Jan. 14, 2022) [hereinafter Interview with Sharon].

[77] Interview with Bernadette, *supra* note 68.

[78] *Id.*

[79] *Id.*

[80] *See* Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, Vera Inst. Just. (July 20, 2012), https://vera-institute.files.svdcdn.com/production/downloads/publications/price-of-prisons-updated-version-021914.pdf [https://perma.cc/MHF6-Z8HT].

in spending resulted from slashes to funding for rehabilitative programs and for the provision of basic material goods and services,[81] suggesting that the issue is not *how much* money the prison system can garner, but how it chooses to allocate this money. Indeed, to cope with their harsher conditions of confinement, people in prison are compelled to pay extortionary amounts for basic goods purchased through commissary.[82] With average wages as low as $0.86 per hour[83] and average monthly expenses as high as several hundred dollars,[84] it is no surprise that people in prison must rely on family members on the outside for financial support. Participants obviously recognized the deprivations that their loved ones were enduring in prison, and they provided financial support so their family members could acquire basic material goods—which are exorbitantly priced in prisons[85]—that would marginally improve their lives.

Maritza (20, Hispanic), for example, recalled how she began supporting her brother financially when she was only fifteen years old, adding her weekly $75 salary from a job at an ice cream store to the pool of money her family spent on her brother.[86] A few years older at the time of the interview, Maritza had increased her level of financial support. It brought her some measure of relief to know that her brother had access to food and some basic goods while incarcerated: "… Now that I'm older I'm able to send him money and it's just a relief because I'm like, 'Okay, I know I'm sending him money. I know he's getting food. I know I'm sending him money. I know he's getting books or something to distract him.'"[87]

Illuminating the weight of the financial burden family members experienced, Stacy (44, white) longed for "someone to help figure out the finances."[88] Stacy's husband was serving a lengthy prison sentence, and she was grateful that their finances were separated: "If our finances were connected then they could come after me, take me to collections, garnishment, whatever for the bill he's racked up at $3 a day plus court costs and all of that sort of stuff. They'd be coming after me for that if our finances were connected."[89] Despite having separate finances, Stacy had no idea what to

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[81] *See* Bardelli et al., *supra* note 64, at 958 (internal citations omitted).

[82] *See id.*; *see also* Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L.J. 3, 7-9 (2020).

[83] Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, Prison Pol'y Initiative Blog (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/9DK3-A9ZR].

[84] Bardelli et al., *supra* note 64, at 961.

[85] In one study of fifty formerly incarcerated men in New York, participants reported spending on average $1,249 per year on commissary expenses, $257 on tobacco, $130 on clothes, $1,972 on phone calls, and $110 on fines. All of these charges amounted to an average of $3,719 on prison expenses. Bardelli et al., *supra* note 64, at 962.

[86] Telephone interview with Maritza (Jan. 27, 2022) [hereinafter Interview with Maritza].

[87] *Id.*

[88] Telephone interview with Stacy (Feb. 3, 2022) [hereinafter Interview with Stacy].

[89] *Id.*

do about the case-related bills that kept arriving in the mail.[90] She stated that they were "probably just going to have [her husband] declare bankruptcy" to get out from under the costs of his situation.[91] In Stacy's case, the state quite literally transferred the cost of imprisonment onto the families of the imprisoned:

> Anybody whose family member is in a secure unit at one of the local jails, they're paying a daily fee. If they're in general population, they're not paying a daily fee. But if they're in a secure unit, including the mental health unit, if they're in a secure unit, they're being charged daily. And the families are expected to pay that. And that, at $3 a day, 30 days in a month, [is] $90. If you're talking about a family that is suddenly going to a single income, and maybe the remaining spouse isn't really working, $90 is a lot of money.[92]

Valeria (57, Hispanic/Indigenous) echoed Stacy's sentiments when she described the toll of the financial burden she was shouldering for her incarcerated partner. This burden was so heavy that Valeria worried that, unless she imposed limitations, she herself would not be able to make ends meet. In a remarkable twist, therefore, the state's refusal to provide for the people it incarcerates risks producing a separate group of people—incarcerated people's family members—who could become reliant on state-sponsored financial assistance:

> In the beginning, it was yes, yes, yes. And if I did that, I would be probably living off the government, which is not me. I'll give you an example because I just did it. […] So November of '19 to current, I've only put $300.00 on his books and I put maybe $150.00 on his phone. And our method, and it's been for years now, but currently, it can be one call a week. Currently, where he's at, it's not even a 10-minute call. I'm lucky if I get to talk to him seven minutes. Because in the beginning, you fight. You want this, you want that. It's like they're moving into a college dorm. They need this, this, this, and this. "Okay, well you got yourself there. Figure it out." That's how I was, but I understand too. I think he makes $0.43 a day when he's able to work or when they tell him to work, and yet a roll of toilet paper is $2.75.[93]

Frances offered a cutting critique of the perversity of a criminal legal system that wrenches people away from their families and then requires that those same families pay for their loved ones' care in prison.[94] Frances's

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Telephone interview with Valeria (Jan. 25, 2022) [hereinafter Interview with Valeria].

[94] Telephone interview with Frances (Feb. 23, 2022) [hereinafter Interview with Frances].

words reveal participants' anger toward a system that claimed to be taking care of their loved ones, but that in practice did little more than keep them caged:

> One point I really would like to make in this study is this: I think that it is the height of insensitivity, the height of evil or whatever you want to call it, that this country has a tax law that discriminates against the families of incarcerated people. If [my son] were in college, I could deduct him and get tax credit for him. Because he's incarcerated, the tax law says that the State of [REDACTED] is taking care of him. That is on the surface. It's a complete misnomer because the way that the penal system is set up, the phone calls that you make, the commissary that they receive, the hygiene that they receive, is grossly overpriced. And this burden falls on the families of incarcerated people, the people in this society who could least support those crises. And to add insult to injury, we have a tax law that says that people with incarcerated family members, like myself, cannot claim that incarcerated person on their taxes. Because I tell you, the quality of food that they have is terrible in the prisons. So family members who care end up paying so that their loved one can pay for decent food and commissary.[95]

Participants also expressed frustration with state actors who actively made decisions that not only made the lives of those confined in prison more difficult, but that also heightened the burden that family members outside prison faced. Sharon (50, mixed-race) described how the "financial burden is always going to be there" because she wanted her son to be able, for example, to "call and talk whenever he wants."[96] Sharon discussed how she and other members of a different support group were actively advocating for a video visitation option during the COVID-19 pandemic as well as for telehealth services and education and rehabilitation programs in prisons.[97] Their efforts were futile, however, because of "legislators that have been working against that."[98] In the absence of these services, the burden of ensuring that her son was "upbeat, motivated, and . . . hopeful" fell on Sharon's shoulders.[99]

The carceral burden that family members shouldered was best captured in Valeria's narrative. At the time of the interview, Valeria was steadfastly supporting her partner, with whom she shared a loving, committed relationship.[100] Despite the fierce affection that motivated her support, however,

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[95] *Id.*

[96] Interview with Sharon, *supra* note 76.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Interview with Valeria, *supra* note 93.

the weight of her responsibilities was sometimes too difficult to bear.[101] As she lamented how family members are overlooked or altogether erased in conversations about penal harm, Valeria drew attention to how the criminal legal system *assumed* that family members would shoulder at least some of the carceral burden.[102] The system, in Valeria's eyes, relied far too heavily on family members to secure loved ones' well-being when they were in prison:

> It's money, money, money. You want the clients of the system to be close to the families, to give support, to keep them from going astray and being harmful to themselves and others while incarcerated. Yet, you put the struggles on the family. We're victims too by you, because I have a job. And even at times, it's like, "I can't do this."[103]

Maritza highlighted how the carceral burden entailed much more than financial aid. In addition to offering whatever financial assistance she could afford, Maritza had become a "second attorney" for her brother, investing a great deal of time and energy into his case.[104] At only 15, Maritza scoured the internet to understand her brother's charges more fully.[105] She began to suspect that something was awry with her brother's case, and when she shared her research and concerns with his attorney, they discovered that he had a "false charge," which was ultimately dropped.[106] Maritza's narrative illuminates how, even beyond monetary support, family members often feel compelled to shoulder the responsibility of correcting the state's failures:

> I'm like his second attorney. I stay on the case. I check it all the time. I try to look for little clues that could help his attorney. I've done it a couple times to be honest, where they're like, "Wow, that has helped." And they really do use, take it into consideration.[107]

Linda and Greg (both 77, white) tried to help their son fight what they regarded as a clear case of wrongful conviction. Linda and Greg had hired a post-conviction attorney to assist with their son's case, but their more pressing concern was their grandchildren, whose care they became partially responsible for after their son's incarceration.[108] As Valeria noted above, the criminal legal system itself recognizes how valuable familial relationships are for supporting the reentry and reintegration of people returning to the

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[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] Interview with Maritza, *supra* note 86.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Telephone interview with Linda and Greg (May 2, 2022) [hereinafter Interview with Linda and Greg].

community from prison.[109] Linda and Greg's struggles, however, reveal that this awareness does not translate into practices that support familial bonds. Linda and Greg expressed a deep exasperation with how difficult it was for them to coordinate visits between their grandchildren and their son, demonstrating how family members take on the burden of struggling to protect the relationships that could ensure that people released from prison do not return—purportedly one of the most significant goals of the prison system:

> … So there's potential for doing video visitation remotely. But, because of the [specific charge], they have to get permission from some committee to review it, except for they don't tell you who the committee is, how to contact the committee. It's all done in the black world. You don't know. And so they refused to allow the kids to do video visitation.[110]

Thus far, we have focused primarily on those family members who were both able and willing to support their loved one in prison, even if they harbored some frustration with their loved one for forcing them into that role. For several family members, however, the price of fulfilling the obligation to support their loved one was dishearteningly steep. Lauren (22, Black), for example, described the weight of being one of the only people in her brother's life who could offer him emotional support. She lamented the "wedge" between her and her brother caused by her inability (or unwillingness) to be perpetually accessible to him.[111] Lauren explained, "I know it's because he just needs that communication, but I can't always provide it to him."[112] Lauren's brother's incarceration also represented the starting point in a downward spiral in her mother's health, and Lauren drew a direct thread between the compulsion her mother felt to support her brother and the physical toll that offering him this support took on her well-being:

> My mom, it affected her the most. Absolutely. She had a stroke, and this happened later on down the line, but she did her best to support him financially. But I know it kind of ate away at her because she was just like an alcoholic. She was drinking a lot, she smoked cigarettes, and she just wouldn't stop. But I know one thing she always would do was just be like, "You know, yeah, I'm going to send him some money." Anytime she got money, she would send money. But it affected her the most, I would say, and eventually caused her to have a stroke.[113]

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[109] *See supra* text accompanying note 60.

[110] Interview with Linda and Greg, *supra* note 108.

[111] Telephone interview with Lauren (Jan. 19, 2022).

[112] *Id.*

[113] *Id.*

Bahar had been tirelessly supporting her son as he cycled in and out of the criminal legal system for many years, and she was emphatic that her son's legal troubles were related to his mental health issues. Her son was in his mid-20s, but "his brain is like five years old, six years old."[114] As a single mother with a low income, Bahar shared the utter exhaustion she felt with having to confront the never-ending battle of connecting her son with the psychiatric care he so desperately needed: "He has anger management . . . manic depression or bipolar or something. That's why they have to do a neuropsych evaluation. It costs $2,000 to $5,000. And I couldn't pay $2,000."

In the early stages of the second author's observation period, Bahar's son had recently been released from prison, and Bahar was supporting him in finding a job.[115] A few weeks later, however, he was arrested after he violently assaulted her. The narrative below underscored Bahar's caregiving role as she tried to ensure that her son was taking the medication for his mental health issues, but it also highlighted the immense dangers of even a minor misstep in her enactment of this role. As she explained, through tears:

> My son again is in [a] detention center since last night. He didn't take his medication. Before I controlled, I checked to make sure he was taking his medication. And then he became so wild. He scratched, he hit me. And I ran away, and I called my neighbor and they took me to hospital. They took me to the hospital. There was a lot of bleeding and bruises because he hit me with the fist. He's bigger than me.[116]

Toward the end of the observation period, Bahar expressed pessimism about her ability to continue caring for her son. The family support group sessions often focused on the need for family members to maintain boundaries with their incarcerated loved ones, but Bahar's story reveals the high cost of enforcing these boundaries. Bahar knew that withdrawing from her son's life would virtually guarantee that he would not receive the mental health support he needed. As a mother, she therefore did not feel like cutting ties with her son was an option. When Bahar tried to enforce the boundaries that others in the support group encouraged her to maintain, she put her very survival at risk. Bahar's story highlighted how family members paid the price for the state's failure to respond to the genuine needs of those in its grip. Their "choice" to support their incarcerated loved ones was thus often not a choice at all: "I know why he was so mad and he did that to me. Because at the end I became like his father. I said, 'you're not welcome to my home.' Before I used to say, 'our home.'"[117]

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[114] Family support group observation (Apr. 25, 2022).

[115] Family support group observation (Apr. 25, 2022).

[116] Family support group observation, *supra* note 72.

[117] Family support group observation (Apr. 11, 2022).

Other participants expressed an intense anger toward their loved ones for demanding their support. Those whose relationships were healthy and intact before being disrupted by incarceration generally managed to weather the strain of imprisonment; relationships that were already conflict-ridden, however, became increasingly difficult to sustain. Andrea's (39, Black) relationship with her former partner had been volatile for some time before he became incarcerated. At the time of the interview, the dominant feeling she felt toward him was anger.[118] Andrea felt compelled to stay in touch with her former partner because he was the father of her children, but his presence in her life generated a persistent sense of obligation that Andrea acutely resented.[119] She described how she had willingly offered him such support in the past because, in her words, "You watch all these shows and stuff. I'm like 'eh, all this stuff going on in jails. Oh my gosh.'"[120] Andrea did not deny that his need for financial support was still very real, but she forced herself not to think of it because she did not want to support him any longer.[121] Andrea's narrative demonstrates how the pressure that family members felt to support their loved ones eroded what little was left of relationships that were already tenuous, further degrading the prospects for those contending with prison conditions:

> I don't feel like he takes into account that the world is still moving out here and people have bills to pay and kids to take care of and stuff and just . . . He's stressful, just to downplay, even the $10. That $10, I can't give to you because I need that $10. It may not be a lot to him or to other people, but what he doesn't realize, that $10 could be the difference in my bank account being negative or not, or me getting gas or getting food or something. He doesn't . . . and he's rude.[122]

Whether participants were supporting their incarcerated family members willingly or not, most were operating under the specter of their family members' impending or eventual release, which meant that they were responsible not only for their loved ones' survival and wellbeing while incarcerated, but also for the success of their reentry and reintegration. Frances was disheartened by the complex bureaucracy that she had to navigate to ensure that her son would have health insurance when he was released from prison.[123] Frances's son had been cycling through the criminal legal system for some time, and to control her own financial costs, she was involved in a never-ending process of adding him onto her insurance plan

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[118] Telephone interview with Andrea (Jan. 23, 2022).

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Interview with Frances, *supra* note 94.

when he was released and then dropping him from her plan when he was reincarcerated.[124] Frances conveyed the stress she felt as a family member who was responsible both for assisting her son financially and for managing his affairs when he was released:

> Once you get incarcerated, they drop you from Medicaid. They drop you from Social Security Income and they don't make it easy to get back on. So what happened is when I found out my son had a shot at getting into a facility, the last few weeks I've been involved in calling the jail, asking the medical person to please file a reinstatement of Medicaid for my son. Couple of people I talked to were helpful. Some told me to stop calling so much, but I did get his Medicaid reinstated. The next thing is when he gets out with nothing, again, the burden is going to be 100% on me, first of all in terms of finances. My son was talking to me today, "Mom, when I get out, are you going to help me with rent? I won't have a place to stay. I don't think I can be homeless again." And so I'm faced with that.[125]

Like Bahar, Frances's thoughts on how she could or would support her son were influenced by their volatile (and occasionally physically abusive) relationship, to which Frances did not feel she could commit, and from which she could not fully escape.[126] Ultimately, Frances simply longed for some sort of intervention that would alleviate the burden she felt to look after her son:

> So training, access to job[s], all these things would be of help to the families because all of these falls wearily on the shoulders of the family. Training their loved one when they get out, helping them find a job, housing them. And if they have mental health issues like my son, you can't house them permanently. The shape my son was in, I couldn't let him live here. It broke my heart. But if he's going to be barricading me in the home, pushing my wash machine up against my garage door so I can't get out, my living room furniture against my front door, other furniture against my back door, if he's threatening to murder me, housing is a whole separate issue.[127]

In the very first group session the second author observed, Julia (whose relationship with her son resembled Frances's) expressed concerns about where her son would live when he was released from prison. Julia had heard from another staff member about her son's eligibility for housing support, and she was frustrated by how much advocacy was required of her to ensure

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*

that he received this support.[128] Julia described her relationship with her son as "broken" and she explained that she wanted the "mental health part to be the first of many things he does because that is such a key part."[129] The group facilitators reassured Julia that her son was eligible to participate in a reentry support program that would offer him, among other things, mental health services and housing support.[130] Nevertheless, Julia expressed the concern that all the participants in the study felt when she asked the group facilitators: "Had I not advocated for him, would he currently be in the [reentry support] program?"[131]

Justin arrived at one session hoping that other members could shed light on why he and his wife had traveled all the way to the facility where their son was incarcerated only to be turned away when they were supposed to have a visit with their son.[132] Visitation oversight had recently been transferred to an "outside entity," and Justin described the change as "a monkey wrench in the loop"; he and his wife simply could not figure out what they needed to do to see their son.[133] Justin spent the first couple of minutes before the session formally started sharing these challenges.[134] When it was time to begin, the group facilitators guided participants through a "progressive muscle relaxation" exercise that was intended to be restorative.[135] Justin participated in this exercise reluctantly, and it was evident that his focus and attention were on trying to understand how he and his wife could see their son.[136] This anecdote underscores the limits of services and programs that attempt to remedy the harms of familial imprisonment at the individual rather than institutional or structural level.[137] Justin did not seem interested in engaging in wellness-focused activities; he needed concrete help in supporting his son. Without the state stepping in to alleviate the carceral

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[128] Family support group observation (Oct. 25, 2022).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Family support group observation (Nov. 8, 2022).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *See generally* Janani Umamaheswar, *The Construction of Capital Among Family Members of People in Prison*, 64(6) Brit. J. Criminology 1259 (2024) (demonstrating the limitations of locating solutions to the inequality produced by familial imprisonment at the individual or group—rather than institutional or structural—levels). Support groups allow family members to feel more empowered, and they give them a venue for expressing their anger and frustration with their loved ones. They do little, however, to challenge the systems of inequality that push family members to the margins of society. Redressing these systems requires major structural changes aimed at providing tangible, material support for incarcerated and reentering people as well as their loved ones. Although support groups offer family members a sense of solidarity and belonging, state-sponsored support for incarcerated and reentering individuals would be far more helpful in relieving the burden of sustaining loved ones through incarceration and community reintegration.

burden they carried, however, Justin and so many other participants had no choice but to try to reap the limited benefits of the family support group as they treaded water, carrying little hope that more tangible relief would ever arrive.

III. Why Takings?

The family members' narratives presented above should leave readers uncomfortable, and not just because of the personal suffering they reveal. There is something untoward about the state extracting money and labor from private parties—parties disproportionately concentrated in communities of color and communities with sharply limited resources[138]—by subjecting their loved ones to unduly harsh conditions of confinement and dim prospects upon release. We claim this arrangement offends not just moral intuitions, but constitutional ones as well. In fact, there is a well-developed constitutional vocabulary for capturing what is problematic about the dynamic documented above. More specifically, we suggest that the dire need for private support for those who are incarcerated or recently released amounts, functionally, to a governmental taking under the Takings Clause ("the Clause") of the Fifth Amendment of the U.S. Constitution. To set the stage for making this argument and to explain the basis for recognizing the category of hidden takings introduced in the following Part, this Part briefly lays out the present state of takings law as well as some influential interpretations of the principles animating takings law.

A. The Current State of Takings Law

The Takings Clause encompasses the final prohibition listed in the Fifth Amendment, specifying that "private property [shall not] be taken for public use, without just compensation."[139] Many takings cases focus on instances where the government appropriates privately-owned real property for some wider public benefit, so cases on eminent domain must generally contend with the Clause's strictures.[140] But courts will also apply the Clause to the

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[138] *See supra* note 31 (briefly noting pointed racial disparities in the American criminal legal system).

[139] U.S. Const. amend. V. The Court has incorporated the just-compensation requirement of the Takings Clause against the states through the Fourteenth Amendment's Due Process Clause. *See* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 238-39 (1897).

[140] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 472 (2005) (framing the question presented in a landmark eminent domain case as "whether the city's proposed disposition of [the property in question] qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution"); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231-32 (1984) (framing the opinion in another key eminent domain case through the language of the Takings Clause).

confiscation of money,[141] intellectual property,[142] and certain other rights and liens.[143] In certain circumstances, the right to a job may be protected by takings law.[144] Relatedly, some courts also conceive of labor as property for takings purposes, both under the Fifth Amendment's Takings Clause and under certain state takings clauses—generally in the context of disputes over compensation for court-appointed attorneys representing indigent defendants.[145] These results make sense, given the history of the Clause. James Madison, the primary force behind the framing of the Fifth Amendment's Takings Clause, appears to have worried that two types of property were particularly vulnerable to uncompensated takings: land and—paradoxically but importantly for present purposes—chattel property in the form of enslaved people.[146] The Court has used the term "*per se* taking" to refer to instances where the government fully confiscates private property for public benefit—that is, when it takes the title to the property in question—or when it physically occupies property or authorizes certain third parties to occupy the property, even without formally acquiring title.[147] Such physical appropriations constitute takings "whether [they are] permanent or temporary."[148]

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[141] Richard A. Epstein & Eduardo M. Peñalver, *The Fifth Amendment Takings Clause*, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/amendments/amendment-v/clauses/634 [https://perma.cc/73Y6-55XH] (last visited Mar. 1, 2025); *see, e.g.*, Horne v. Dep't of Agric., 576 U.S. 350, 358 (2015) ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home. . . . [The Takings Clause] protects 'private property' without any distinction between different types."); Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998) (holding that interest accumulating in IOLTA accounts amounts to property under the Takings Clause); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980) (holding that interest from an interpleader account amounts to property under the Takings Clause).

[142] *See* Valancourt Books, LLC v. Garland, 82 F.4th 1222, 1231-32 (D.C. Cir. 2023) ("By requiring copyright owners to provide physical copies of books, the mandatory deposit provision 'effect[s] a "classic taking in which the government directly appropriates private property for its own use."' . . . A demand for personal property would not be a taking, however, if it involved a voluntary exchange for a governmental benefit.").

[143] *See* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 319-20 (2007) (itemizing categories of property courts have recognized under the Takings Clause and collecting cases).

[144] *See generally* Racabi, *supra* note 21 (mapping out the landscape on this issue in great detail).

[145] *See* Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. Ann. Surv. Am. L. 97, 121-24 (2004) (collecting and discussing cases).

[146] William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 850-51 (1995). The nature of these concerns supports a reading of the Fifth Amendment's Takings Clause aimed at preventing political process failures, *id.* at 856, which becomes significant in the analysis below, *see infra* Part IV. As this study's participants reported, money and labor are two major assets that the support networks of incarcerated people provide.

[147] *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 147-48 (2021) (defining the term "*per se* taking").

[148] *Id.* at 153.

Even a de minimis physical occupation of a private citizen's property could amount to a per se taking.[149]

The Court has also found that interference with private property that falls short of taking title or effecting a physical occupation can constitute a taking. More specifically, the Court has extended its caselaw to "regulatory" takings—cases where use restrictions on private property "go too far."[150] Scholars regard the foundational case for this expansion, *Pennsylvania Coal*,[151] as "perhaps the single most important decision in the takings literature."[152] In that opinion, the Court observed that the government need not confiscate property to render it nearly devoid of value. Regulations that limit the use of property may reduce its value so much that they operate economically like a confiscation, and therefore such regulations may also constitute a taking for constitutional purposes.[153] The Court has since acknowledged that regulatory takings are assessed on an ad hoc basis, balancing a variety of factors.[154] The critical factors include "the impact of the regulation on the investment-backed expectations of the landowner," "the character of the governmental action," and "the nature of the public interest at stake."[155] For instance, a statute or regulation that prevents the construction of almost any structure on a parcel of private land might amount to regulatory taking.[156] The Court has described its aim in recognizing regulatory takings as targeting regulations that *function* as an actual appropriation of private property.[157]

Whatever one's views on the desirability of recognizing regulatory takings, note that they are indirect in a meaningful sense, at least in comparison

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[149] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (finding "a minor but permanent physical occupation of an owner's land authorized by government" constituted a taking for Fifth Amendment purposes); *see also Cedar Point*, 594 U.S. at 151 (describing *Loretto* as a per se takings case).

[150] *Cedar Point*, 594 U.S. at 149 (internal quotation marks omitted).

[151] *See* Jerry L. Anderson & Daniel B. Bogart, Property Law: Practice, Problems, and Perspectives 840-41 (2d ed. 2019); *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[152] Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 12.

[153] *See Pa. Coal*, 260 U.S. at 414 ("What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.").

[154] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[155] Anderson & Bogart, *supra* note 151, at 892; *see also Penn Cent.*, 438 U.S. at 124-25 (discussing these factors).

[156] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (finding that beachfront preservation regulations "that deprive [privately owned land] of all economically beneficial use" constitute a taking for constitutional purposes unless "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with"). The Court in this case also explicitly acknowledged the "permanent physical occupation" and "confiscatory regulation" branches of its takings jurisprudence. *Id.* at 1015, 1028-29.

[157] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (noting that to bring a successful regulatory takings claim, a plaintiff must "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").

to per se takings. One scholar aptly describes regulatory takings as "unacknowledged exercise[s] of eminent domain."[158] In per se takings cases, the government either overtly and undeniably seizes the property by requisitioning title, or it effects a physical occupation. If its seizure is defensible, it rests on the premise that the public benefit can only be secured by putting the property to a specific use—a use that will be undertaken by giving ownership or some measure of physical control of the property to some other party altogether. By contrast, the basis for regulatory takings is comparatively narrow. In regulatory takings cases, whether or not the seizure of property rights has grave economic implications for the true owner, it does not typically deprive the owner of the right to exclude that courts regularly see as most fundamental to property ownership.[159] The premise behind any given regulatory taking is that the public benefit can be secured if the true owner is prevented from using the property in a particular way,[160] but the government need not strip the owner of title or occupy the land.

Although regulatory takings are jurisprudentially secure today, they were first recognized by the Court only about 100 years ago,[161] so their place in the jurisprudential landscape was established much later than their per se counterparts. Regulatory takings are controversial in certain scholarly circles in part because, at least according to the prevailing story, the original meaning of the Takings Clause only captured per se takings.[162] For instance, despite Justice Holmes's rejection of the distinction between per se and regulatory takings in *Pennsylvania Coal*,[163] William Michael Treanor has argued that James Madison had a principled reason for focusing exclusively on physical takings, and the Court ought to repudiate regulatory takings and return to the original understanding of the Clause.[164]

As the language of the Takings Clause suggests, both per se and regulatory takings require that the taking serve a "public use." The Court has long interpreted that phrase to mean that the taking supports some capacious conception of *public benefit*.[165] As a result, property seized by the state under the Takings Clause need not be turned over to the public in the most literal

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[158] Meltz, *supra* note 143, at 310.

[159] Cedar Point Nursery v. Hassid, 594 U.S. 139, 149-50 (2021).

[160] *See, e.g.*, *Lucas*, 505 U.S. at 1007 (describing a challenged statute that prevented construction of single-family homes on beachfront property).

[161] *See generally* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[162] Treanor, *supra* note 146, at 782.

[163] *See supra* note 153 and accompanying text.

[164] Treanor, *supra* note 146, at 818-19 (arguing that Madison, who was behind the Takings Clause, privileged physical confiscation for a reason).

[165] Kelo v. City of New London, 545 U.S. 469, 480 (2005) ("Without exception, our cases have defined [the term "public purpose"] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."). This is one area where state approaches to takings may diverge notably from the standards adopted under federal law. In response to the *Kelo* decision, various states have adopted a narrower understanding of "public use." *See* Brady, *supra* note 16, at 1471 (briefly describing this phenomenon).

sense, in the form of a park, a road, or a public utility;[166] rather, the state may confiscate property under the Clause in pursuit of a wider array of governmental objectives, such as combating blight,[167] promoting general economic revitalization,[168] and pursuing ecological preservation.[169] Crucially, to realize this public benefit, the Court has even permitted the government to transfer the seized property to another private party.[170]

Of course, there remain irregularities, infelicities, and difficult questions embedded in takings law,[171] which one scholar describes as "famous for its incoherence."[172] But, as the preceding summary suggests, recent court decisions expand rather than contract the reach of the Takings Clause. *Cedar Point* is perhaps the most salient example,[173] but that trend holds even in areas where the doctrine has not yet been settled. Consider the example of "judicial takings," a notion introduced by Barton H. Thompson, Jr., years before the Court confronted the possible existence of the category.[174] Judges lack the power of eminent domain, but the idea behind judicial takings is that courts may nevertheless effect a taking for constitutional purposes by modifying common law in a way that strips owners of various property rights.[175] The Court has never formally recognized judicial takings, but it has "recognized that there should be some constraint on the judicial erosion

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[166] *See* Anderson & Bogart, *supra* note 151, at 820-21. *But see Kelo*, 505 U.S. at 494 (Thomas, J., dissenting) (resisting the Court's broad interpretation of "public use").

[167] *See, e.g.*, Berman v. Parker, 348 U.S. 26, 36 (1954) (approving takings effected as part of a plan to combat blight in Washington, D.C.).

[168] *See, e.g.*, *Kelo*, 545 U.S. at 489 (sanctioning the seizure of property that was central to a city's broader economic development plan).

[169] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (declining to invalidate a regulation that prevented construction of habitable structures on certain beachfront property as part of a plan to prevent erosion damage to the state's beaches).

[170] *See Kelo*, 545 U.S. at 480 (noting that the Court has "without exception" endorsed a broad definition of the term "public purpose," including in cases where property taken from private parties is transferred to other private parties); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 243-44 (1984) (noting that the government's transfer of property to other private parties does not necessarily prevent the taking from effecting a public purpose).

[171] The foregoing summary omits discussion of the uneven evolution of takings law, the precise trajectory of which does not bear on our analysis here. For instance, Andrea Peterson has argued that "the Court has [actually] employed four different tests in its recent takings decisions to determine whether regulation or physical action by the government effects a taking," and that "the Court has [also] offered conflicting definitions of 'property' in its takings decisions" by sometimes focusing on "tangible things" and at others focusing on legal rights of various stripes. 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, 56-57 (1990)

[172] Treanor, *supra* note 146, at 880.

[173] *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 150-52 (2021).

[174] *See generally* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990) (raising and evaluating the possibility that a court's "reshuffl[ing]" of property rights through the revision of common law might amount to a taking for Fifth Amendment purposes).

[175] *Id.* at 1449.

of property rights."[176] Four conservative Justices have endorsed judicial takings, however, and have explicitly stated their view that *any* state actor can effect a taking.[177] This is a point we will revisit below.[178]

B. Diverse Accounts of the Principles behind the Takings Clause

In making sense of the arc of takings law, it is also helpful to distill the Court's takings jurisprudence to its irreducible, animating principles. There may be no uncontroversial method of locating such principles, but it is remarkable how varied perspectives and approaches to this question converge to lend support to the notion of compensating certain governmental seizures of private property that are effected by the excessively coercive, extra-legal pressure arising from the state's failure to uphold basic affirmative obligations. We lay out some prominent possibilities here and apply them to such hidden takings in the subsequent Part.

The Court has described the heart of the Takings Clause as a bar on the government "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[179] In reconciling this language with the thrust of the Court's takings cases, Andrea Peterson has hypothesized that "a compensable taking occurs whenever the government intentionally forces *A* to give up her property, unless the government is seeking to prevent or punish wrongdoing by *A*."[180] The government intentionally forces someone to give up property, according to Peterson, when it "affirmatively desire[s] to deprive *A* of her property, or if [it] knew or should have known that its actions would be substantially certain to deprive *A* of her property."[181]

Some scholars have argued that the best way to interpret the Takings Clause is to see it as a safeguard against political process failures. Daniel Farber has argued that public choice theory counts in favor of viewing the Takings Clause as protecting weaker constituencies against discrimination

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[176] *See* Anderson & Bogart, *supra* note 151, at 891.

[177] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 715 (2010) (emphasis in original) ("[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."). Notably, three of the four Justices who signed onto this language are still on the Court: Chief Justice Roberts, Justice Thomas, and Justice Alito.

[178] *See infra* Part IV.

[179] Peterson, *supra* note 171, at 56 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978)).

[180] *Id.* at 59. Peterson's analysis predates some recent takings cases, but it remains quite compelling as a descriptor.

[181] *Id.* at 60.

in the exercise of the government's power over their property.[182] Similarly, Saul Levmore argues "that politics works least well when it affects citizens who have difficulty influencing political bargains," so "the requirement of explicit compensation . . . for some takings might be understood as protective of individuals who cannot easily make politics part of their business."[183] William Fischel shares Farber's and Levmore's premise, but appears even more sensitive to finding civilians on the wrong side of a process failure.[184]

Others take a broad reading of the Clause for different reasons, including those deploying an originalist methodology—an especially notable result in the context of introducing hidden takings because of the conservative tilt of today's Court. Justice Scalia, a prominent, self-identified originalist,[185] authored some of the Court's central regulatory takings opinions,[186] even though the original meaning of the Takings Clause most likely did not extend to such takings.[187] In an influential article on takings that has been interpreted as an attempt to discern the original intent behind the Clause,[188] Joseph Sax defends another principle for identifying takings: "[W]hen economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required." [189] By contrast, "losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power."[190] Sax defines the "enterprise capacity" as an economic function—the government's role in "acquir[ing] economic resources . . . [from] the citizenry," which it must then put to various uses.[191] By contrast, the "arbitral capacity" refers to the

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[182] *See* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 Int'l Rev. L. & Econ. 125, 138 (1992) (summarizing this argument in terms of promoting equality).

[183] Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 308 (1990).

[184] *See* William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent L. Rev. 865, 893 n.90 (1991) (noting that Farber and Levmore do not distinguish between "small local governments and large state and national governments"). Fischel suggests that much national legislation is driven by special interests while much local legislation is driven by majority preferences at the expense of minorities; failure to recognize the latter means overlooking process failures of the sort that may justify the payment of compensation. *Id.*

[185] *See* Sinha, *supra* note 34, at 776 (discussing Justice Scalia's originalism); *see also* Antonin Scalia, *The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) (laying out Scalia's originalist commitment in his own words).

[186] For example, Justice Scalia authored *Lucas v. South Carolina Coastal Council* and *Nollan v. California Coastal Commission*. In *Nollan*, the Court required California to compensate property owners for imposing a public-use easement across privately-owned beachfront land. 483 U.S. 825, 841-42 (1987).

[187] *See* Treanor, *supra* note 146, at 805-08 (criticizing Scalia's regulatory takings decision in *Lucas* on originalist grounds).

[188] *See id.* at 810 (characterizing Sax's article in precisely this way).

[189] Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 63 (1964).

[190] *Id*.

[191] *Id.* at 62.

government's role as a mediator between competing private interests.[192] Under Sax's view, operating an airport[193] or maintaining a highway system[194] are exercises of the government's enterprise capacity, suggesting that operating prisons and jails would be as well.

Richard Epstein's book-length treatment of takings also applies an originalist-style methodology to analyzing the Takings Clause.[195] Epstein's perspective on takings is perhaps the broadest of all; for him, "*[a]ll* regulations, *all* taxes, and *all* modifications of liability rules are takings of private property prima facie compensable by the state."[196] To the extent this conclusion rests on Epstein's understanding of the dominant strains of political philosophy at the time of the Framing (rather than on the Framers' own interpretations of the limits of the Clause itself), the foundation for his view may be relatively widely shared.[197] Given how much further this view extends beyond the Court's cases, it is sufficient for present purposes to note its breadth and prominence, which also point generally in favor of recognizing hidden takings.[198]

Finally, William Michael Treanor offers an especially interesting interpretation, arriving at a process-failure theory of takings through an originalist analysis. He argues that modern takings cases should take seriously the original understanding of the Clause to require physical takings for compensation,[199] but he further advocates a "translation" of the Framers' vision of the text of the Clause in accordance with "the underlying values that 'We the People' embraced."[200] Among other benefits, he claims that such an approach both "allows for the interpretive flexibility that the [F]ramers desired" and "aspires to be faithful to the text, history, and structure of the Constitution, while avoiding the problems of a narrow, inflexible originalism that offers an inadequate account of continuity and change in constitutional interpretation."[201]

According to Treanor, this approach provides an originalist justification for a version of the process-failure accounts accepted by Farber, Levmore, and Fischel.[202] As noted above, Treanor argues that James Madison's pri-

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[192] *Id.* at 62-63.

[193] *Id.* at 69.

[194] *Id.* at 70.

[195] *See* Richard Epstein, Takings: Private Property and the Power of Eminent Domain 19-31 (1985) (describing his methodology in decidedly textualist terms).

[196] *Id.* at 95 (emphasis in original).

[197] *See* Treanor, *supra* note 146, at 817 (noting that other prominent scholars also share Epstein's view that Lockean political philosophy lay in the background of the Framers' views of the Takings Clause). Treanor himself disagrees, however. *Id.* at 824.

[198] Courts have not generally treated taxes as takings under the Fifth Amendment. For one possible explanation, see Sax, *supra* note 189, at 75-76.

[199] *See* Treanor, *supra* note 146.

[200] *Id*. at 857.

[201] *Id.* at 858.

[202] *See* Farber, *supra* note 182; Levmore, *supra* note 183; Fisher, *supra* note 184.

mary concern in drafting the Takings Clause was to guard against the possibility that the political process might eventually fail to protect against two kinds of seizures. One was the taking of the real property of landowners, effected by growing numbers of non-landowners seeking to redistribute real estate, and the other was the release of enslaved people, who might be freed (against the will of slaveowners) by abolitionist forces.[203] As a result of circumstances shifting substantially since the Framing,[204] Treanor argues that the Takings Clause ought now to be especially alert to the mistreatment of the property rights of "insular minorities," who are "unusually likely to be the victims of process failure."[205]

This is hardly an exhaustive tour of scholarly engagements with the Takings Clause, but it encompasses a diverse set of influential interventions that all lend themselves, each in their own way, to the recognition of hidden takings. The following Part makes these linkages explicit.

IV. Hidden Takings

The state of federal takings law, and the numerous scholarly efforts to distill its core principles presented above, collectively establish a firm basis for recognizing the circumstances described by the participants in this study as effecting a constitutionally cognizable taking of their property. Most fundamentally, the trends in takings case law surveyed above run in the direction of expanding rather than contracting the reach of the Clause.[206] Takings

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[203] *See* Treanor, *supra* note 146, at 849-54 (explaining the basis for this conclusion in detail).

[204] *See id.* at 863-66 (describing the relevant changes).

[205] *Id.* at 875. Accordingly, Treanor emphasizes the relevance of the Clause for environmental justice. *Id.*

[206] As we noted above, Justice Thomas dissented in *Kelo* because he disapproved of the Court's embrace of an especially broad conception of "public use." *See* Kelo v. City of New London, 545 U.S. 469, 507 (2005) (Thomas, J., dissenting). The basis for that resistance is narrow; his view has not taken hold with a majority of the Court; and his position would not threaten the argument advanced in this Article even if it became the prevailing view. In *Kelo*, Justice Thomas worried that permitting the government to rely on "incidental public benefits" to justify a taking would "wash out any distinction between private and public use of property—and thereby effectively . . . delete the words 'for public use' from the Takings Clause . . . ." *Id.* at 494 (Thomas, J., dissenting). More specifically, Justice Thomas worried that the general economic development cited by the government in Kelo provided too diffuse and indirect a public benefit to justify a compensated taking, and he specifically feared that it would expose too much private property to state seizure. In the same dissent, Justice Thomas defended a slightly less broad understanding of "public use" that included fighting blight (even by seizing parcels of land that were not themselves blighted) and disrupting an oligopoly. *Id.* at 500. We would argue that public benefits such as reducing recidivism and homelessness are more akin to combating blight than the vague pursuit of general economic development. Additionally, Justice Thomas's stance should not be confused with an embrace of a narrow view of takings more generally. In other cases, including much more recent ones, Justice Thomas has sided with the majority's broad view of when the government takes private property for constitutional purposes. *See, e.g.*, Cedar Point Nursery v. Hassid, 594 U.S. 139, 160-62 (2021) (holding that a statute requiring certain private property owners to permit state agents on their property for limited periods amounted to a per se taking); *see also* Merrill, *supra* note 16, at 895 (labeling Justice Thomas, as well as several now-retired conservative Justices, the "'pro-property' wing of the Court"). In short,

now cover both explicit seizures of property executed for the purpose of conferring a public benefit, and regulatory restrictions that function like a taking by leaving property in the hands of private citizens while scaling back their rights to use it.[207] Courts have understood the property covered by the Clause to include money and labor,[208] and the Supreme Court has interpreted the "public use" provision of the Clause broadly.[209] The Court also appears primed to find that any state actor, not just a legislature, can effect a taking.[210]

The narratives presented in Part II detail the state's extraction of money and labor from people supporting a loved one who is incarcerated or has recently been released. There are two primary hurdles to overcome in making the case that the participants in this study have experienced takings for constitutional purposes. First, a proper takings analysis requires demonstrating that the property taken is put to some public use. This obstacle is not especially great, but we must still overcome it. Second, and more challenging: in a typical takings case, the government *legally* coerces a private party into giving up the property in question, often by following a specified process for condemnation proceedings[211] or by imposing some other sort of regulation via the legislative process.[212] By contrast, in the incarceration context, the state *socially* coerces private parties into giving up property by imposing dire conditions on their loved ones; it is lawful for private citizens *not* to provide the property needed by an incarcerated loved one, even if providing it would yield a public benefit. We address each of these two hurdles in turn.

A. The Public Benefit of Rehabilitative Resources

There is little doubt that the resources supplied by the participants in this study provide a significant public benefit—a benefit that falls comfortably within the Court's broad definition of the term.[213] Over 1.9 million

Justice Thomas maintains a broad view of when the government takes private property, and a slightly narrower (but still broad) view of when those takings are constitutionally valid (so long as they are compensated).

[207] *Supra* section III.A.

[208] *See* Epstein & Peñalver, *supra* note 141.

[209] *Supra* section III.A.

[210] *See supra* notes 176-77 and accompanying text.

[211] That is how *Kelo* began, for instance. *See Kelo*, 545 U.S. at 475. Much of the legal scholarship on condemnation is quite dated, but Timothy Hansen offers a recent description of the condemnation process. *See* Timothy V. Hansen, Note, *Ensuring Just Compensation: Ending Lowball Offers in Eminent Domain*, 39 Va. Env't L.J. 233, 238-39 (2021).

[212] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007-08 (1992) (clearing the way for a lower court's finding that a state statute imposed a regulatory taking on the landowner).

[213] *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 149-52 (2021); *Kelo*, 545 U.S. at 487-88; Pa. Coal Co. v. Mahon, 260 U.S. 393, 394 (1922); *see also* Treanor, *supra* notes 162-64 and accompanying text.

people are incarcerated in the United States,[214] the vast majority of whom will return to the community.[215] In part out of concern for community safety, some policymakers have come to accept that coercive measures (such as parole revocation or rearrest) may be less helpful in promoting individuals' desistance from crime than policies that focus on reentering individuals' material needs (such as food and shelter) and access to services (such as substance-abuse counseling or healthcare).[216] Whereas the state often cites the well-being of the community to justify incarcerating people, it is the families of these people who step in to take the concrete measures that eventually promote community safety. For example, in Part II, we documented how family members worked tirelessly to ensure that their loved ones would have a place to stay when they were released from prison.[217] They assumed this responsibility out of a sense of affection or obligation toward their loved one, but it should not be overlooked that their actions provide a massive benefit to the community. Homelessness is a predictor of recidivism,[218] and social scientists have argued that access to free or subsidized housing should be incorporated into coordinated responses to reentry.[219] In providing such housing, families support reentering individuals' movement away from crime even as they simultaneously facilitate the state's ongoing abdication of its own responsibility to ensure community safety.

Similarly, insufficient access to healthcare is a major reason that reentering individuals reoffend and return to prison, and researchers have found that increased access to healthcare through Medicaid coverage reduces recidivism among those convicted of both violent and public-order crimes.[220] Even prior to the reentry stage, better mental health in prison is correlated with reduced rates of recidivism upon release.[221] Although provision of healthcare is mandatory in correctional facilities, access to health services is often challenging for incarcerated people. For example, they may have to endure extended wait times for treatment, and their co-payments for treatment may be so high that one doctor's visit can cost them a week's pay.[222]

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[214] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie*, Prison Pol'y Initiative (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/9EQ7-8PHM].

[215] Loeffler & Nagin, *supra* note 15, at 133.

[216] Faith E. Lutze, Jeffrey W. Rosky & Zachary K. Hamilton, *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 Crim. Just. & Behav. 471, 472 (2014).

[217] *See supra* section II.B.

[218] Lutze et al., *supra* note 216, at 471.

[219] *Id.*

[220] Erkman G. Aslim, Murat C. Mungan, Carlos I. Navarro & Han Yu, *The Effect of Public Health Insurance on Criminal Recidivism*, 41 J. Pol'y Analysis & Mgmt. 45, 45 (2022).

[221] Danielle Wallace & Xia Wang, *Does In-Prison Physical and Mental Health Impact Recidivism?*, SSM - Population Health, Aug. 2020, at 8.

[222] Diane C. Hatton, Dorothy Kleffel & Anastasia A. Fisher, *Prisoners' Perspectives of Health Problems and Healthcare in a US Women's Jail*, 44 Women & Health 119, 130-32 (2006).

As we demonstrated above, family members in the instant study recognized the inadequacy of prison-based healthcare, and they took it upon themselves to navigate institutional bureaucracies at least to *try* to connect their loved ones to the physical and mental health treatment they urgently needed. Once again, despite the obvious—and well-established—link between robust health and desistance from crime, it fell on family members to attend to their loved ones' healthcare needs.

The state's responsibilities to its citizens are fulfilled by its supportive "left" hand (that provides access to social services such as housing, healthcare, and education) and its punitive "right" hand (responsible for, among other things, the workings of the criminal legal system). With the rise of neoliberalism in the United States, the left hand of the state has been supplanted by the right, as punitive policies have gained precedence over social welfare.[223] As we detailed in Part II, family members are sharply aware of this dynamic; they recognized the state's inadequate (or even non-existent) support when it came to the provision of services that would promote their loved ones' successful reintegration into the very same communities whose safety state actors cited when advocating for punitive law-enforcement policies.

The state's commitment to punitive social control is thus not mirrored in an equivalent commitment to social services, even when this commitment would promote public safety and well-being. As a result, families felt they had little choice but to coordinate and fund their loved ones' access to housing, food, healthcare, and employment. Importantly, only a handful of family members explicitly recognized that they were fulfilling obligations that the state ought to have shouldered; most family members stepped in simply to help their loved ones. In these circumstances, the state relies passively and inappropriately on family members' affective ties to sidestep its own obligations to those it imprisons. If relatively vague commitments to economic revitalization or ecological preservation provide sufficient public benefit to ground a taking, then combating crime and homelessness surely qualify as well. Notably, although the resources provided by family members often flow in the first instance to private parties—namely, to the incarcerated people themselves or to private vendors of important goods and services—that is no bar to finding a taking; what matters is that these forms of support provide a clear public benefit.[224]

To be clear, the public benefit served by these resources does not lie in incarceration per se, but rather in the broader societal benefits of improving the conditions and support for people once they have been removed from their communities and neglected in state custody. Not one of the participants

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[223] Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity 6 (2009).

[224] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 394 (1922) (demonstrating that a public benefit can arise, and therefore a taking can occur, when the state transfers property from one private owner to another).

in this study *wanted* their loved one imprisoned, nor did their resources go toward incarceration itself. Rather, the labor, money, and property participants felt compelled to provide all went toward sanding down the rough edges of a brutal system that is neither designed to ensure the health of those it holds nor calibrated to reduce recidivism and homelessness. The forms of support the participants provided—support for the physical and mental health of a vulnerable population—would provide a public benefit even outside the context of incarceration.

B. The Absence of an Operative Legal Directive

The more difficult question behind hidden takings concerns the source of governmental pressure on private citizens to sacrifice their property. As we noted above, in per se and regulatory takings cases, the state compels compliance through some formal process, such as by condemning land or implementing a statute or regulation. By contrast, the participants in this study ceded their property for powerful social or moral reasons—to meet the pressing basic needs of loved ones whom the state had neglected. Strictly speaking, and critically, it would have been lawful for the participants not to contribute their property.

This is an important distinction, and it defines what is unique about hidden takings. Although this distinction could be legally meaningful in certain cases, we argue that that meaning drops out when the consequences of resisting the government's social pressure approaches or surpasses the consequences of resisting its legal pressure. In the context of supporting an incarcerated loved one, the social pressure to cough up scarce resources for public benefit can plainly exceed the legal pressure to turn over real estate for a municipal redevelopment project. Parties on the wrong end of an assertion of eminent domain may exercise their legal rights to challenge the government's taking of their property in court, as Susette Kelo and her neighbors famously did.[225] If unsuccessful, those parties will be required to leave the property, having been paid its fair market value (or, in certain cases, even more).[226] By contrast, there is generally, as yet, no viable legal mechanism for forcing the state to provide necessary resources to maintain the reasonable health and safety of those in prison. As a result, there may be devastating consequences for failing to top up a loved one's commissary account to give them access to supplemental nutrition, for declining to pay for a loved one's protection against violence in prison, or for refusing to house them after they are released.

In other contexts, the Court has proved sensitive to practical—rather than purely legal—coercion that is far less severe than the social and moral

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[225] Kelo v. City of New London, 545 U.S. 469, 475-76 (2005).

[226] *See* Brady, *supra* note 16, at 1472 (describing how some states may award greater "heritage value" for property taken under state versions of the Takings Clause).

coercion faced by families and loved ones of incarcerated persons. For instance, in upholding federalism norms, the Justices have struck down federal grants of money to state governments when the conditions attached to the grants amount to practical coercion rather than inducement.[227] That is the basis on which a majority of the Court invalidated Medicaid Expansion under the Affordable Care Act ("ACA") as an exercise of Congress' spending power.[228] Two separate opinions, authored collectively by a majority of the Court, converged on this conclusion. One opinion noted:

> [T]he legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power. . . . [T]heoretical voluntariness is not enough.[229]

The second opinion expressed a similar concern. It observed that failure to implement Medicaid Expansion under the ACA could cost the states all of their standing Medicaid funding—amounting to over 20% of the average state's annual budget[230]—and it analogized the threat of the loss of those funds to "a gun to the head."[231]

The same jurisprudential standards do not apply across all areas of constitutional law,[232] and federalism norms do not (and should not) necessarily decide takings cases. But the law accounts for coercion in numerous other contexts as well,[233] and the Court would be hard-pressed to deny that the "choice" faced by family members to allocate money and labor to protecting loved ones experiencing harsh conditions of confinement represents only "theoretical voluntariness."[234] The absence of legal coercion, such as that exerted through condemnation proceedings, does not change that result because the social or moral pressure to commit those resources is so high.

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[227] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

[228] *Id.*

[229] *Id.* at 678-79 (Scalia, J., dissenting).

[230] *Id.* at 581 (majority opinion).

[231] *Id.*

[232] *See* G. Alex Sinha, *First Amendment Analogies and Second-Class Rights Under* Bruen*: Is it Time for a Government-Arms Doctrine?*, Duke Ctr. For Firearms Law Blog (Oct. 4, 2023), https://firearmslaw.duke.edu/2023/10/first-amendment-analogies-and-second-class-rights-under-bruen-is-it-time-for-a-government-arms-doctrine [https://perma.cc/8MYQ-5TKD] (highlighting the Court's divergent standards for analyzing rights under the First Amendment and the Second Amendment).

[233] *See, e.g.*, Stephen R. Galoob & Erin Sheley, *Reconceiving Coercion-Based Criminal Defenses*, 112 J. Crim. L. & Criminology 265, 288-89 (2022) (listing examples, such as the vitiation of contracts concluded under coercive circumstances, federal labor law protections for workers that protect against coercion from employers and labor unions, and the Fifth Amendment's protection against the introduction at trial of criminal defendants' coerced confessions).

[234] *Sebelius*, 567 U.S. at 581; *id.* at 679 (Scalia, J., dissenting) (coining the term "theoretical voluntariness").

The price of refusal can be the ill health, homelessness, or even immediate death of a loved one. If a threat to a fraction of a state's annual budget amounts functionally to gun to the head, then what is the significance of an actual shiv to your nephew's ribs?[235] At its most extreme, the pressure experienced by the participants in this study looks less like a routine case of coercion and more like a dramatic case of blackmail.[236]

In fact, the use of social or moral rather than legal pressure to effect the taking makes the case for compensation more compelling rather than less: under conditions such as these, the taking is *hidden*. Triggered by governmental omission, rather than an explicit and affirmative exercise of its power, the state obscures its seizure, leaning quietly on the resources of those who cannot (morally) afford simply to stand by. Until hidden takings are recognized as such, the state has budgetary incentives to permit this dynamic to play out, both in the context illuminated in this Article and elsewhere.[237] The state is also likely to face relatively little scrutiny for such takings because its role in effecting them is less manifest, and the people who bear the heaviest cost are politically disempowered.

Notice that the difference between hidden takings, as introduced here, and the per se and regulatory takings canvassed above comes down entirely to their source. We have described that difference above, and we present it visually in Figure 1. In substance, by contrast, hidden takings largely take the form of a per se or physical taking.[238] Because of its coercive nature and public benefits, absorbing cash from the loved ones of incarcerated persons to provide for their basic needs is an example of a per se taking. Similarly, providing inadequate support to people released from prison can conduce to per se takings. For example, Bahar permitted her son to live in her home in between stints of incarceration even as she experienced brutal physical violence at his hands.[239] She continued to own her home, but the circumstances

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[235] *See* Interview with Bernadette, *supra* note 68 and accompanying text (describing how her nephew asked her for $400 to pay off an inmate threatening to stab him).

[236] Galoob & Sheley, *supra* note 233, at 290. At the theoretical level, scholars disagree about the best way to understand coercion. The dominant model revolves around the notion of wrongful pressure. *Id.* Advocates of this view focus on the link between one's normative expectations and the role of pressure in undermining one's agency. *Id.* Although the "wrongful pressure" model of coercion is capable of capturing the experience of the participants in this study, Scott Anderson has developed a compelling alternative, known as the "enforcement" model of coercion. *Id.* at 302. This model, which focuses on the power differential between the coercing and coerced parties, is arguably even better for capturing the phenomenon detailed above. *See id.* at 302-07 (illustrating the differences between the two models and endorsing the enforcement model over the wrongful pressure model).

[237] We introduce limiting principles below, however. *See infra* section IV.C.

[238] In limited instances, some of the study participants arguably describe per se takings that are not even hidden. *See, e.g.*, Interview with Stacy, *supra* note 88 and accompanying text (relating Stacy's experience that assets held jointly with her incarcerated husband are vulnerable to confiscation to help defray the cost of his incarceration). Another example of a per se taking that is not hidden in this context might arise from pay-to-stay statutes. *See generally* Deitch, *supra* note 14 (describing these statutes, albeit not in terms of takings).

[239] *See supra* notes 115-16 and accompanying text.

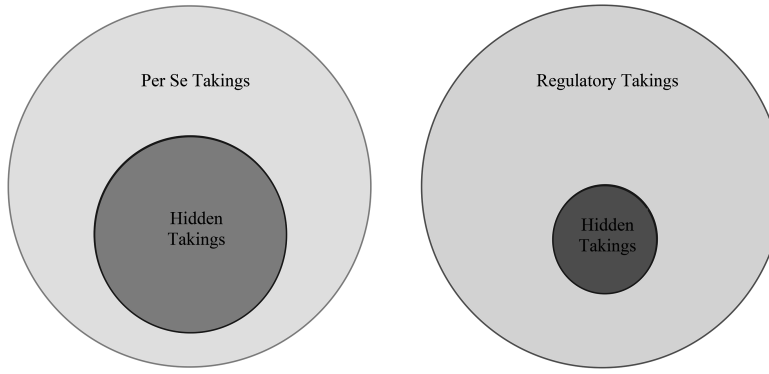
coerced her into sharing it because her son had nowhere else decent to go. Notably, to the extent that hidden takings largely take a per se form, their valuation is fairly straightforward.

Despite our findings, it is at least conceivable that hidden takings could share the form of a regulatory taking, albeit derived from a social or moral source. For example, the need to provide housing for a released loved one might seriously constrain one's ability to sell or modify a home, substantially diminishing its economic value. Because the hidden takings we found in this study are generally per se in nature, however, we have reason to think that is more typical. We depict this dynamic visually in Figure 2, illustrating that hidden takings will take a regulatory form less frequently than they take a per se form.

FIGURE 1. Takings Classified by their Source

Type of Taking	**Immediate Source**
Per Se Taking	State-imposed confiscation of private property or state-authorized physical occupation of private property (whether by agents of the state itself or by third parties)
Regulatory Taking	Certain state-imposed restrictions on the use of private property
Hidden Taking	Extreme social or moral pressure arising from the state's failure to uphold an affirmative obligation in an area of state authority and responsibility

FIGURE 2. Takings Classified by their Nature or Form[240]



[240] This visual conveys the general thrust of the findings from the study discussed in this Article, in which the hidden takings experienced by the participants generally resembled per se takings in form even as hidden regulatory takings remain conceivable. The relative sizes of the circles are not intended to capture a precise ratio between hidden per se takings and hidden regulatory takings.

C. Refining and Justifying Hidden Takings

Acknowledging hidden takings may seem to open the floodgates to a worrisome array of claims, but we suggest three limiting principles that reasonably restrict the contexts in which such claims might arise. The first principle is that a hidden taking requires the provision of property under conditions that are genuinely coercive—otherwise the property is merely given, not taken. The second principle ties back to the language of the Takings Clause itself: The property must actually provide a meaningful public benefit. For instance, suppose our carceral system actually provided for the basic needs of those held within it.[241] Family members of people incarcerated under such circumstances might still feel significant, even coercive, pressure to contribute resources to improving their loved ones' lives in prison, but there is little reason to think that the provision of less urgent forms of support will have the same effect as the provision of necessities on recidivism, reintegration, and general community well-being.[242] The third and final limiting principle is that the taking must occur against the background of governmental neglect of one of its affirmative obligations. Incarceration provides one such context because, in the course of incarcerating someone, the state deprives her of the ability to provide for her own basic needs.[243]

Together, these principles screen out private acts of generosity and beneficence, like charitable donations, and leave us with the genuinely coercive and improperly concentrated extraction of private resources for public benefit. There will almost certainly be colorable hidden takings claims in

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[241] Such systems do exist. Penologists use the term "Scandinavian exceptionalism" to refer to Scandinavia's low rates of punishment and its humane prison conditions. *See* John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism*, 48 BRIT. J. CRIMINOLOGY 119, 119-22 (2008) (using that phrase in the title of his article and describing the conditions in Scandinavian prisons). In Scandinavia, people are sent to prison as punishment, rather than for punishment. *Id.* Since deprivation of freedom itself is seen as the punishment, prison conditions are designed to approximate life on the outside as much as possible (as opposed to prison conditions in the U.S., which are designed to degrade people). *Id.* Even Scandinavia's "closed prisons" (as opposed to "open prisons" that minimize barriers to the outside world and offer incarcerated people significant freedom of movement) grant incarcerated people privacy and relative material comfort. *Id.* Sharing cells, for example, is rare, and most incarcerated people work or receive full-time education. *Id.* Incarcerated people have access to spaces to cook their own food, and, in lower-security facilities, they may visit local shops to purchase ingredients. *Id.* The food served in the cafeteria is generous in both portion and nutrition. *Id.* Incarcerated people are also allowed to wear their own clothes during visitation, and most facilities provide a space where partners and children of incarcerated people can stay for weekends free of charge. *Id.* "Conjugal relations" are both encouraged and facilitated in Scandinavian prisons. *Id.* Importantly, there is reason to think the rehabilitative emphasis of Scandinavian prisons works. Norway, for instance, has a recidivism rate of only 20%, one of the lowest rates in the world. Carolyn W. Deady, *Incarceration and Recidivism: Lessons from Abroad*, PELL CTR. INT'L RELS. PUB. POL'Y 3 (Mar. 2014), https://salve.edu/sites/default/files/filesfield/documents/Incarceration_and_Recidivism.pdf [https://perma.cc/VNC6-73S2].

[242] *See supra* section IV.A (discussing the benefits of providing for the necessities of incarcerated people).

[243] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs, 489 U.S. 189, 199-200 (1989).

contexts aside from incarceration. One example might arise where a locality fails to provide lead-free drinking water to the populace, shifting the cost of securing that necessity to private citizens.[244] Hidden takings might also spring up when public school teachers in under-resourced districts pay out of pocket for essential school supplies.[245] There will be other contexts that meet the three limiting principles presented here, but the range of cases will not be overwhelming, and those claims that remain standing after the application of the relevant criteria will be morally compelling. It may not be possible to draw a line ex ante between voluntary donations and hidden takings, but that is no cause for concern. Regulatory takings are already assessed under a balancing test that requires a case-by-case balancing of indeterminate factors.[246]

With these limiting principles in place, it is apparent that the category of hidden takings slots neatly into the varied rationales for the Takings Clause that we surveyed above. In the context of familial support for incarcerated loved ones, we find a group of people who are being forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a WHOLE."[247] We can locate no compelling rationale for forcing people like those in this study to risk their own financial, psychological, and physical security to bear the weight of such a manifestly public burden.

The circumstances described in this Article also plainly meet the key features of Andrea Peterson's standard for when, under modern takings jurisprudence, a taking has occurred. Recall Peterson's claim that compensation should be due whenever "the government intentionally forces *A* to give up her property, unless the government is seeking to prevent or punish wrongdoing by *A*."[248] Recall further Peterson's definition of "intentional":

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[244] *See* Mira Cheng, *Two-thirds of Young Children in Chicago Are Exposed to Dangerous Lead Levels in the Water, Study Finds*, CNN (Mar. 19, 2024), https://www.cnn.com/2024/03/19/health/lead-contaminated-water-chicago-children/index.html [https://perma.cc/6WP8-6ZDC] (describing a recent study that found widespread civilian exposure to lead-tainted water in the Chicago area). For the argument to run parallel to the context at the center of this Article, the state would need to have an affirmative obligation to provide its populace with potable water. *See* Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167 (1983) (analyzing the obligations of the federal government to monitor state water quality standards under the Clean Water Act).

[245] A variety of courts have held that certain state constitutions impose a duty on the state to provide adequate public education. *See, e.g.*, Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ., 262 So. 3d 127, 129 (Fla. 2019) (analyzing Article IX, section 1(a) of the Florida Constitution, which imposes a "paramount duty" on the state to provide "by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education"); Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 492 (Ark. 2002) (summarizing Arkansas's "paramount duty" under its state constitution "to provide a general, suitable, and efficient system of free public schools"); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989) (discussing Texas's "obligation" under its constitution to create and maintain "an efficient system of public free schools throughout the state").

[246] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[247] *Id.* at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[248] Peterson, *supra* note 171, at 59.

either the government "affirmatively desire[s] to deprive *A* of her property, or [it knows] or should have known that its actions would be substantially certain to deprive *A* of her property."[249] In the present context, the government has no basis for punishing the informal social networks of those it has incarcerated, and it knows, or should know, that its actions will effectively coerce people like those featured in this study to provide material support to meet the basic needs of those it has detained for criminal punishment.[250]

To the extent that numerous judges and scholars deploying traditionally politically conservative methodologies appear receptive to the idea of a relatively broad understanding of takings,[251] there is no obvious feature of hidden takings that should invite opposition from that camp either. Recall Joseph Sax's account of takings, on which the government's acquisition of private resources for fulfilling its enterprise functions generally creates a taking while exercises of its arbitral capacity do not. If operating enterprises and institutions—like airports and highways—amounts to an exercise of governmental enterprise capacity, then the same must be true for the government's general administration of the criminal legal system (beyond its adjudication of individual defendants' guilt or innocence, which is clearly arbitral).[252] The claim we advance here is specifically that state actors across the United States regularly displace various costs of the administration of their own institutions and the enforcement of their laws onto private citizens, akin in structure to the confiscation of real estate for the creation of roads or the condemnation of easements over land to facilitate the flight of airplanes. And, if taxes are a taking as described by Richard Epstein, it is difficult to see why the narratives above would not describe even more egregious versions of the same phenomenon.[253]

Moreover, as we observed above, the hidden takings we have identified here are per se in nature, not regulatory. The participants in this study literally parted with their property, or sacrificed their right to exclude a formerly-incarcerated loved one from their home upon release. For scholars like Treanor, who are queasy about regulatory takings and find them inconsistent with the original meaning of the Takings Clause, no comparable objection is available here. Not only are the takings we describe physical in the strongest sense, but they are also extremely burdensome—much more burdensome than requiring owners of apartment buildings to permit the installation of utility cables.[254]

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[249] *Id.* at 60.

[250] *See supra* notes 179-81 and accompanying text (laying out Peterson's position).

[251] *See supra* notes 185-205 and accompanying text (describing a range of purportedly originalist approaches to takings).

[252] *See supra* notes 189-94 and accompanying text.

[253] Compare hidden takings with the approach outlined in Epstein's book. *See* EPSTEIN, *supra* note 195, at 19-31.

[254] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982).

Concerns about process failure are particularly well-suited to justifying the recognition of hidden takings. Because they are hidden—there is no specific legal directive that victims of hidden takings can point to in galvanizing public or political support for their plight—such takings are especially likely to elude proper consideration through the political process.[255] In this instance, the hidden takings at issue also overwhelmingly happen to target people of color and those with limited resources.[256] This aligns cleanly with Treanor's originalist story for what takings should be about: protecting insular minorities from neglect through the political process.[257] If Treanor is correct that the Clause initially arose out of a perceived need to protect landowners from being divested of their land, and slaveowners from being stripped of their slaves, it is particularly poetic to revisit that rationale today. It should not be controversial to assert that those most vulnerable to process failures are not the wealthy, but rather the most stigmatized communities with the fewest means.[258] Actually applying the Clause to those who are most vulnerable to political process failures quite simply means attending to governmental neglect, as neglect is a defining feature of marginalization.

Finally, there is independent merit in crediting the accounts of the research participants relayed above and translating their recitation of harms into legal language. From a critical perspective, this is what it means to look to the bottom.[259] As a demographic matter, our criminal legal system is notorious for sweeping up those at the bottom, and scholars increasingly recognize the need for crediting their perspectives.[260] Further, although public statistics already show that governmental actors have shifted the costs of incarceration toward private citizens,[261] the qualitative data presented above reveal something the statistics cannot: the extent of the coercion study participants experienced, and their ambivalent and (at times) outright resentful attitudes toward conduct that looks, from the outside, like run-of-the-mill familial support. The coercion and the resentment demonstrated in the data,

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[255] In fact, because many of those who become entangled with the criminal legal system lose their right to vote, they are affirmatively excluded from participating in the political process in the most direct form. *See* Hadar Aviram, Allyson Bragg & Chelsea Lewis, *Felon Disenfranchisement*, 13 ANN. REV. L. & SOC. SCI. 295, 300 (2017) (noting that, as of 2015, "approximately 6.1 million people in the United States have lost the right to vote owing to a felony conviction," and that "[t]his number has been steadily increasing in recent decades").

[256] *See generally* ALEXANDER, *supra* note 31 (documenting the relationship between race, class, and incarceration).

[257] Treanor, *supra* note 146, at 784.

[258] *Id.* Even a return to purely physical takings, as Treanor has advocated for, would capture a significant share of the hidden takings described by the participants in this study.

[259] *See generally* Matsuda, *supra* note 25 (defining and elaborating the significance of "looking to the bottom").

[260] *See generally* ALEXANDER, *supra* note 31. In addition to the large and growing literature on critical race theory, which emphasizes this approach, a newer offshoot—"participatory law scholarship"—emphasizes the experiences of those who have been treated harshly by the law, generally by featuring them as coauthors on legal scholarship. *See generally* Rachel López, *Participatory Law Scholarship,* 123 COLUM. L. REV. 1795 (2023) (describing this approach).

[261] *See supra* Part I (describing these data).

in turn, are the clues to the presence of a hidden taking and are actually essential to defining that category; it would be impossible to isolate hidden takings without accounting for the lived experiences of this politically disempowered and largely invisible group that is disproportionately carrying our collective rehabilitative burden.[262] In short, because of the participants' narratives, we can see that the state actions and omissions described above are "functionally equivalent to [a] classic taking,"[263] *genuinely experienced as a taking*, and should be treated as such.

D. Contextualizing Hidden Takings

With the case for hidden takings fully on the table, we may now return to the broader implications of recognizing them. Scholarly concerns about the regressive effects of takings law are sound;[264] given the link between property ownership and wealth, it is not at all surprising that the Takings Clause often benefits more powerful parties at the expense of weaker ones. But we need not—and should not—be committed to that result. As Gali Racabi recently illustrated, one might redirect takings jurisprudence in a more progressive direction by reconceiving what qualifies as property within the meaning of the Clause.[265] We hope to have illustrated the promise of a different approach, one built around recognizing how power differentials influence the government's means for taking property. Perhaps, in this domain, progressive constitutionalism requires holding that the government cannot launder its takings through dire neglect. Compelling the state to internalize the financial costs of these takings would force it to live up better to its obligations to incarcerated people, and help lower the financial basis for opposing more humane conditions of confinement.

To the extent that recognizing hidden takings would ostensibly force the state to spend more on incarceration, our proposal might seem to stand in tension with the various other progressive goals, such as the general reduction of prison funding or the abolition of prisons altogether.[266] Forcing the carceral system to shore up its humanity may also seem to legitimize the system at a time when many advocates hope to do the opposite.[267] These concerns would loom even larger if the basis for hidden takings lay in the

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[262] Resentment is not a necessary condition for a per se or regulatory taking, of course, and we do not suggest it should be necessary for a hidden taking. But it is important both as a social science finding and as a clue to the need for a deeper legal analysis.

[263] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

[264] *See supra* notes 17-20 and accompanying text.

[265] *See* Racabi, *supra* note 21.

[266] For some background on the prison abolition movement, see Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 Soc. Just. 212 (2000). For a more recent collection of literature on abolition, see Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 Wake Forest L. Rev. 245, 248 n.2 (2023).

[267] *See* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 114 (2019) ("Efforts to improve the fairness of carceral systems and to increase their efficiency or legitimacy only strengthen those systems and divert attention from eradicating them.").

public benefits of incarceration itself. As we noted above, however, the anchor for the "public use" prong of the foregoing argument is the demonstrable public benefit of providing social support to vulnerable populations.[268] Incarceration merely provides a compelling context for highlighting this public benefit because even the Court recognizes the state's affirmative obligation to sustain the well-being of those it incarcerates.

Further, the entire basis for the coercion prong of the argument is the unconscionable state of the carceral system; the argument highlights the neglect of the state, which is so severe that we argue it violates the constitutional rights of free people in the community. That is hardly an argument that legitimizes prisons. And, as a matter of policy, forcing the state to pay for more humane conditions of confinement—and provide greater support to people upon release—places downward pressure on the number of people the state can afford to incarcerate. States have not fully reckoned with the costs of overincarceration because they displace so much of the cost onto private citizens. If the courts were to recognize hidden takings, they would force states to bear these costs. The states that incarcerate the most aggressively would face the highest costs for their carceral practices, and therefore the most pressure to change them.

More generally, although hidden takings alone do not necessarily entail abolitionist outcomes, they could well advance such outcomes. It is possible that public opinion would be less skeptical of incarceration were the system to treat its subjects more humanely. But we think it more likely that a chain of judicial decisions on hidden takings, finding the cruelty of the criminal legal system so severe that it violates the constitutional rights of people outside the system, would draw further attention to the broader inhumanity of incarceration. Judicial interventions of this sort could well move members of the public to share the abolitionist's deeper concern for the treatment of people caught up in the criminal legal system.

It is also important not to lose sight of the broader context for assessing these possibilities. The United States is not even remotely close to abolishing incarceration. Given how much persuasive work lies ahead for abolitionists, the fear that recognizing hidden takings would enhance the popularity of the criminal legal system provides only a highly speculative and instrumental reason for opposing realistic efforts to improve the lives of hundreds of thousands of incarcerated people and the millions of civilians who support them. The moral urgency of that task—combined with its constitutional urgency, if the foregoing argument is correct—makes it an important progressive objective in its own right, even if it is only an intermediate objective for some.

Finally, as we noted above, hidden takings may arise in non-carceral contexts as well.[269] Hidden takings track serious state neglect of politically

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[268] *See supra* section IV.A.

[269] *See supra* notes 244-45 and accompanying text.

disempowered communities, and every application we can imagine is therefore progressive in nature. This makes sense; the concept itself is a "critical legalism," derived from the viewpoint of those at the bottom. To the extent that abolitionism reflects one specific instantiation of a broader concern about the mistreatment of stigmatized groups, there is a lot to like about hidden takings. Without prisons, there would be one fewer institution through which the state extracts resources from stigmatized communities, but there would remain other contexts (related, for example, to public health, education, and safety) in which hidden takings may help to identify political process failures that ought to be understood as violating constitutional rights. We therefore think that the recognition of hidden takings could become a powerful tool for progressive change more generally.

Conclusion

The primary aim of this Article is to demonstrate that the criminal legal system's neglect of those it incarcerates implicates the constitutional rights of free members of the community who may have no specific connection to the system beyond loving someone the system has imprisoned. To sustain this claim, we have introduced the notion of "hidden takings," the state's coercive extraction of private resources for public benefit through social or moral pressure rather than legal pressure, specifically in contexts where the government neglects an affirmative duty. We claim that hidden takings are exceedingly plausible as a legal matter, both under established takings jurisprudence and under a variety of diverse theories about what takings law ought to be designed to achieve. Whether judges ultimately explore the possibility of hidden takings is out of our control, but we believe the factual and jurisprudential predicates are in place. We also believe that recognizing hidden takings would advance a variety of progressive policy objectives. At a minimum, we hope hidden takings will influence ongoing debates about the trajectory of takings law and prompt greater scholarly engagement with the legal implications of the communal burden of punishment.