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FEE AT LAST? WORK RELEASE PARTICIPATION FEES AND THE TAKINGS CLAUSE

*Sara Feldschreiber**

Five days a week he works as a paralegal at a large law firm in New York, commuting back and forth from his apartment across the bridge. Two nights a week he returns to his once-permanent home—a correctional facility in New York. He is a work release participant, commuting back and forth between his status as a prisoner and a mainstream employee. The Department of Corrections trusts his rehabilitation enough to release him five days a week. The Department also trusts his earning potential, collecting twenty percent of his net salary to cover the costs of his room and board at the prison. The inconsistency should be obvious; twenty percent of the salary of a New York paralegal exceeds the cost of two nights at a New York prison facility.

INTRODUCTION

With the costs of incarceration rising steadily, almost every state has some form of reimbursement plan which defers the costs of prison away from taxpayers and onto prisoners.¹ These reimbursement plans

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1. U.S. Dep't of Justice, Nat'l Inst. of Corr., Fees Paid by Jail Inmates: Findings from the Nation's Largest Jails, Special Issues in Corrections 3 (February 1997), available at <http://www.nicic.org/pubs/1997/013499.pdf> [hereinafter *Fees Paid*]. The majority of the data on prison reimbursement plans comes from a survey done by the National Institute of Corrections ("NIC") Jails Division and Information Center. *Id.* at 1. The survey was sent to those jails with populations of over 1,000 inmates participating in the "Large Jail Network" ("LJN"). *Id.* In states without members of the LJN, the NIC sent surveys to the largest jails in those states. *Id.* The data is based on information provided by all states except Alaska, Louisiana and West Virginia. *Id.* Among the prisons surveyed, seventy-seven of them collect fees from inmates. *Id.* Forty-one states have passed legislation authorizing the collection of fees. *Id.* at 2.

Although this Note will focus on state reimbursement fees, it is important to note that reimbursement programs exist at the federal level as well. The Bureau of Prisons is authorized to release a prisoner to "work at paid employment in the community" if

"the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the

cover a wide range of expenses and operate on many different levels.² Typically the fees are divided into four different categories: per diem fees, medical service fees, non-program fees and program fees.³ Although reimbursement fees generally have the backing of the courts,⁴ not all members of the public consider the fees reasonable.⁵ This Note examines the constitutionality of work release program⁶ participation fees, specifically those that are generated by charging participants a percentage of their salary.

As of February 1997, nine states charged work release participants an uncapped percentage of their salary to cover the costs of the program.⁷ New York, the focus of this Note, charges prisoners a fee of twenty percent of their net salary to cover expenses that reasonably relate to their participation in the program.⁸ Although this system

Treasury to the credit of the appropriation available for such costs at the time such collections are made.”

18 U.S.C. § 3622(c)(2) (2002).

2. See generally *Fees Paid*, *supra* note 1, at 2. Prisons charge inmates fees ranging from telephone use to room and board. *Id.* In Connecticut, inmates are responsible for “the costs of certain services and programs such as sick calls; dental procedures; eyeglasses; elective and vocational educational programs; extended family visits; and lab tests to detect illegal drugs, if the results are positive.” George Coppolo, *Requiring Inmates to Pay for Their Incarceration*, OLR Research Report, Nov. 8, 2002 (citing Conn. Agencies Regs. § 18-85(a)1-4), available at <http://cga.state.ct.us/2002/olrdata/jud/rpt/2002-R0906.htm>. The method of collection also varies depending on the type of fee: telephone charges are billed to the caller, while fees for room and board are deducted from a prison account. See *infra* notes 12-26 and accompanying text.

3. *Fees Paid*, *supra* note 1, at 2. Per diem fees cover the general cost of prison administration, including housing and food costs, and most prisons require that inmates pay a co-pay to cover costs of medical services. *Id.* at 2. Non-program fees cover costs for the use of prison services, such as telephones and barbers, while program fees are collected to defray the cost of prison programs such as work release, parole, and education services. *Id.*

4. See discussion *infra* Part II.A 1, 2.

5. See, e.g., Sam Walker, *Inmates Pay Debt to Society and Taxpayers—With Cash*, *Christian Sci. Monitor*, Feb. 26, 1996, at 1 (noting that “advocates complain that forcing ex-inmates to pay incarceration fees amounts to double jeopardy,” but others think the fees promote responsibility among inmates); Angela Coulombis, *Quietly, Camden County Collects \$500,000 from Inmates*, *Phila. Inquirer*, July 29, 1998, at B1 (noting that a New Jersey prison has “quietly” collected over \$500,000 from prisoners, despite criticism of the program).

6. Work release is a program that permits eligible prisoners to secure employment outside of the prison and leave the facility to work, most frequently, on a daily basis. N.Y. Correct. Law § 150 (McKinney 2003). For a more detailed description of work release, see discussion *infra* Part I.C.

7. *Fees Paid*, *supra* note 1, at 13-14 tbl.10. These states include New Hampshire, Rhode Island and Indiana. *Id.*

8. Pursuant to New York regulations:

Once an inmate becomes employed, he will be required to pay a work release participation charge of 20 percent of net earnings. However, no such charge shall be collected until all prior advances have been repaid by the inmate. The work release participation charge will help to defray administrative, room and board costs.

N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(f)(3)(i)(b) (2003). The regulation draws

seems fair, when twenty percent of an inmate's salary exceeds what is necessary to cover the "appropriate and reasonable costs related to the inmate's participation in the program,"⁹ the percent of wages ceases to be a reasonable reflection of the costs of the program.¹⁰ This Note argues that correctional directors violate the Takings Clause of the Fifth Amendment when they offer no benefit in return for these excessively garnished wages.¹¹ While work release participation fees authorized by statute have yet to be challenged on the basis of the Takings Clause, this Note argues that an uncapped fee based on salary would fail to withstand that challenge.

Part I of this Note discusses the typical reimbursement fees implemented across the country. Part II discusses the most frequent social and legal challenges to reimbursement fees and why they have failed. Part III suggests a novel challenge to New York's work release participation fee, based on the Takings Clause. Finally, Part III proposes a statutory amendment to the current problematic

upon sections 112, 852 and 860 of New York's Correction Law for its general authority for the promulgation of this regulation. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903 (2003). Section 112 grants the commissioner of the Department of Corrections ("DOCS") general authority over "all matters relating to the government, discipline, policing, contracts and fiscal concerns" of correctional facilities and inmates. Section 852 provides for the establishment and management of the temporary release programs. Section 860 authorizes the "disposition of earnings" as follows:

The earnings of an inmate participating in a work release program, less any payroll deductions required or authorized by law, shall be turned over to the warden who shall deposit such receipts as inmates' funds pursuant to section one hundred sixteen of this chapter. Such receipts shall not be subject to attachment or garnishment in the hands of the warden. The commissioner of correction may authorize the warden to make disbursements of such receipts, and such receipts may be disbursed, for any or all of the following purposes:

1. Appropriate and reasonable costs related to the inmate's participation in the work release program;
 2. Support of the inmate's dependents;
 3. Payment of fines imposed by any court;
 4. Payment of any court ordered restitution or reparation to the victim of the inmate's crime.
 5. Purchases by the inmate from the commissary of the institution.
- The balance of such receipts, if any, after disbursements for the foregoing purposes shall be paid to the inmate upon termination of his imprisonment.

N.Y. Correct. Law § 860 (McKinney 2001).

9. *Id.* The work release program costs \$7,500 per work release participant, per year. Dep't of Corr. Servs., Temporary Release Program, 2001 Annual Report 10 (2001) [hereinafter *DOCS 2001 Report*]. Any work release participant who earns a net salary above \$37,500 would be paying more than \$7,500 in reimbursement fees. See *infra* note 287 and accompanying text; discussion Part III.A.

10. Prisoners who earn more than \$37,500 per year in net salary pay more than the actual cost of their room and board, but there is no stipulation that they should get extra benefits for the excess fees they pay.

11. The Takings Clause prohibits the taking of private property for public use without just compensation. See U.S. Const. amend. V. A much more in-depth discussion of the Takings Clause follows. See *infra* discussion Part I.D.

provisions in place, suggesting that capping the twenty percent fee would be a simple solution to the constitutional challenge.

I. PAYING FOR THE CRIME AND THE TIME: THE RISE OF REIMBURSEMENT FEES

A. *Reimbursement Fees in General*

Some states charge prisoners for use of non-program prison services, calling the fees collected “user fees.”¹² Typically these services include haircuts, drug testing, and, most frequently, telephone use.¹³ User fees generate substantial revenue for the respective prisons and thus help defray costs away from the taxpayers.¹⁴ In 1997, San Bernardino County Jail in California generated \$2,330,176 simply by charging prisoners for their telephone calls.¹⁵ Starting in the early 1990s, many prisons instituted a second type of fee, charging a co-payment for medical services.¹⁶ The widespread adoption of co-payments was motivated by more than just a desire to lower taxes; the fee was implemented in an attempt to deter frivolous medical visits.¹⁷

12. *Fees Paid*, *supra* note 1, at 9. In most states, the authority to charge prisoners user fees is determined locally. *Id.*

13. *Id.* at 9-12. At least ten states charge fees for telephone use, generating an average total of over \$500,000 in revenues per year. *Id.* at 11. Prince George’s County Jail in Maryland is one of nine prisons in nine states to charge a fee for haircuts. *Id.* The six dollar fee generates \$23,600 annually. *Id.*

14. *Id.* at 12. According to the report a portion of the fees collected are directed to the county general fund. *Id.* The prison telephone system is also highly lucrative for the telephone companies. In California, MCI installed payphones in all of the prisons at no charge to the state. Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 Fed. Comm. L.J. 391, 392 (2002). In exchange, MCI gives the California Department of Corrections thirty-two percent of the revenue, which can reach up to \$15,000 annually—*per payphone*. *Id.* These prison payphones generate up to five times more revenue than regular payphones, as MCI imposes a three dollar surcharge on every call. *Id.* This type of arrangement “is by no means unique [to California]; it is the rule, rather than the exception.” *Id.* at 392-93.

Generally states use the revenue from the phones to benefit the prisoners directly, either by funding programs organized by DOCS, or health care for prisoners. *Id.* at 400. These phone contracts can be problematic if the revenue is not used appropriately. In Florida, one prison was cited for having “failed to establish ‘controls to safeguard, reliably account for, or efficiently use the telephone commission monies and was using inmate funds for staffing positions not directly related to the Trust Fund.’” *Id.* at 400 (citation omitted). For an overview on problematic prison telephone contracts, see *id.* at 391-404.

Ironically, the surcharges for telephone use are almost always imposed on the person being called rather than the inmate. *Fees Paid*, *supra* note 1, at 12. Rather than defer the costs of incarceration away from the taxpayer, this system redirects the costs of incarceration to the taxpaying families of the prisoners.

15. *Id.* at 11.

16. *Id.* at 4. According to the survey, all but 15 states require inmates to pay for medical services in some form. *Id.*

17. See *id.* at 4.

Although not in force in as many states as the medical fee, a third source of revenue is the “per diem” fee.¹⁸ Sixteen states have laws authorizing jails to charge each prisoner a per diem fee reflecting the “county’s actual costs of room and board and other basic services.”¹⁹ In some states the fee is the actual cost of services.²⁰ In other states the fee is capped at a maximum, such as in Michigan, where the fee is sixty dollars a day.²¹

In addition to per diem fees, user fees, and medical services, many prisons also impose fees on inmates who participate in programs implemented by the prison, including “weekender” incarceration, electronic monitoring, rehabilitation programs, education or substance abuse treatment, and work release.²² This Note focuses on the work release program, which permits inmates to work outside of the prison.²³ Work release participation fees may be calculated as a percentage of the salary earned, a sliding scale proportional to the participant’s salary or, most frequently, a flat fee per week.²⁴ In 1996, work release programs across the country generated average revenues of \$230,500 per prison.²⁵ In 2001, work release participants in New York earned \$7,066,489 and paid \$2,125,858 in taxes.²⁶

B. Authority

Generally, prisons glean authority for reimbursement fees from state statutes.²⁷ As of 1997, at least forty-one states have enacted statutes authorizing some form of reimbursement fees.²⁸ The statutes run the gamut from very general to highly specific; some directly dictate how the costs will be calculated while others give broad authority to the sheriff or a committee to decide how the fee will be implemented and collected. Kentucky’s statute authorizes the sentencing court to determine the “amount of incarceration costs” to be paid by the person who is sentenced, based on “(a) [t]he actual per

18. *Id.* at 6-9.

19. *Id.* at 6. California, Florida, Illinois, Iowa, Michigan, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Wisconsin and Wyoming all charge inmates per diem fees. *Id.* at 3.

20. *Id.* at 6.

21. *Id.*

22. *Id.* at 13-16.

23. For a detailed description of work release programs, see discussion *infra* Part I.C.

24. *Fees Paid*, *supra* note 1, at 13.

25. *Id.* at 15.

26. *DOCS 2001 Report*, *supra* note 9, at 10.

27. *Fees Paid*, *supra* note 1, at 2. The amount of fees charged for medical care and per diem fees are usually determined by state legislative action, while local policy makers typically impose user fees, either by the sheriff or approval by the county supervising board or commission. *Id.* at 9. Authority for program participation fees comes from both local decisions and state legislation. *Id.* at 13.

28. *Id.* at 2.

diem, per person cost of incarceration; (b) [t]he cost of medical services provided to a prisoner less any copayment paid by the prisoner; and (c) [t]he prisoner's ability to pay all or part of his incarceration costs."²⁹ Ohio is more specific as to the "per diem" cost. There, the "costs of confinement may include, but are not limited to . . . a per diem fee for room and board."³⁰ The prisoner is given an itemized bill at the end of his confinement and works out a payment schedule upon his release.³¹

Without the authority from a statute, prison reimbursement fees could be deemed unconstitutional.³² In *Turner v. Nevada Board of State Prison Commissioners*, the U.S. District Court for the District of Nevada held that the statute authorizing the program director to "deduct from the wages of any offender such amounts as the director deems reasonable to meet any existing obligation of the offender for the support of his family or restitution to any victim of his crime" did not give the director the authority to take an additional fee for room and board.³³ The court further held that after subtracting the costs of obligatory family support and victim restitution, the remainder of the wages belonged to the prisoners.³⁴ Because the prisoners had a "property interest"³⁵ in the remainder of their wages, the director was not authorized to make any additional deductions to cover costs not authorized by statute, including room and board.³⁶ Despite the fact that the director had misappropriated the funds for room and board, the court could not grant injunctive relief for the inmates.³⁷ The Nevada legislature subsequently amended the statute authorizing the prison to deduct the cost of maintenance.³⁸

29. Ky. Rev. Stat. Ann. § 532.352 (Michie 2001).

30. Ohio Rev. Code Ann. § 2929.37 (Anderson 2001).

31. *Id.*

32. *See, e.g., Turner v. Nev. Bd. of State Prison Comm'rs*, 624 F. Supp. 318, 321 (D. Nev. 1985) ("[B]ecause we find that no statutory authority for maintenance deductions prior to the new amendment existed and that Nevada statutes established the plaintiffs' right to compensation for work performed, defendants could not deny that right to plaintiffs without affording them due process of law.").

Without a statute permitting the collection, public criticism rises. In 1996 Camden County, New Jersey, began to collect five dollars a day from prisoners housed in the county jail, ultimately raising \$500,000. After noting that "New Jersey is not one of those states" authorized to collect fees, the report then moves on to state that "[t]he movement has elicited criticism from the American Civil Liberties Union." *See Coulumbis, supra* note 5.

33. *Turner*, 624 F. Supp. at 320-21.

34. *Id.*

35. Finding that a prisoner has a property interest in his wages is the first step in proving that the statute or fee is a violation of due process or the Takings Clause. For a more in-depth discussion of property interests, due process and the Takings Clause, see discussion *infra* Parts I.D, II.A.3.

36. *Turner*, 624 F. Supp. at 320-21.

37. *Id.* at 322.

38. *Id.* at 321. The revision to the statute came in April 1985, just a few months before the trial. *Id.*

Although a statute is a necessary requisite, it does not guarantee protection from the court. In one instance, the Ninth Circuit held that the failure to pay inmates interest on prison accounts could be a violation of the Takings Clause, despite the existence of a statute authorizing the appropriation of the interest.³⁹ In *Schneider v. California Department of Corrections*, the court pointed out that “as the Supreme Court’s decisions . . . demonstrate, constitutionally protected property rights can—and often do—exist *despite* statutes . . . that appear to deny their existence.”⁴⁰ Ultimately, on remand, the court held that the statute was not a violation of the Takings Clause.⁴¹ Although not absolutely necessary, the source of authority, namely the statute, is still crucial to the analysis of the constitutionality of reimbursement programs.

C. Work Release Participation Fee

1. Work Release Background

In an attempt to relieve prison overcrowding and to curtail the rising costs of incarceration, over forty states authorize prison work release programs.⁴² The early work release programs, which were initiated in the 1920s and rapidly expanded in the 1970s, authorized prisoners nearing the end of their sentences to work in the community during the day and return to the prison or to residential facilities during non-working hours.⁴³ Work release has proven to be cost-effective. A study done in Washington state, where there was a jump of seventy-one percent in incarceration from 1980 to 1996, showed that incarcerating a prisoner with a four to six month work release costs nearly \$4,000 less than incarcerating a prisoner without work release.⁴⁴ Work release has also been successful in helping participants adapt to the community.⁴⁵

39. *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1200-01 (9th Cir. 1998). See *infra* notes 246-66 and accompanying text.

40. *Schnieder*, 151 F.3d at 1199 (citations omitted).

41. The Fourth Circuit was faced with a similar issue in *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), and refused to apply *Schneider*’s property interest ruling. *Id.* at 186. Instead, the court held that in Virginia, prisoners had no property interest in their wages and thus had no right to the interest on their accounts. See *id.* at 185-86, see also *infra* notes 267-78 and accompanying text.

42. Susan Turner & Joan Petersilia, U.S. Dep’t of Justice, *Work Release: Recidivism and Corrections Costs in Washington State 1* (1996).

43. *Id.*

44. *Id.* at 6-7. In Washington, the total cost for incarceration of each prisoner without work release is \$30,790. The total cost with work release is \$26,404. *Id.*

45. See *id.* at 1 (“Nearly a quarter of all prisoners released in Washington made a successful transition to the community through work release.”); see also Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. Tex. L. Rev. 443, 510 (1993) (outlining the problems with incarceration and touting the benefits of alterative programs such as work release).

2. Work Release in New York

The work release program in New York was initiated in 1970 “in order to assist [inmates] towards a more gradual transition from incarceration to parole.”⁴⁶ Work release is a branch of the temporary release program, which includes programs such as furlough,⁴⁷ educational release,⁴⁸ and community services leave.⁴⁹ The program is authorized by section 852 of the New York Corrections Law, with New York Compilation of Codes, Rules and Regulations (“NYCRR”) title 7, sections 1900-52 detailing the specifics of the temporary release program. The work release program allows inmates to leave a facility for up to fourteen hours a day to work in the community.⁵⁰ Of the 5,895 inmates in the temporary release program, 5,670 of them participate in work release.⁵¹ Inmates may be eligible for work release if they are within two years of their parole and receive a qualifying score on their application to a committee overseeing the program.⁵² Applications are scored based on eleven items, with six based on criminal history and five based on behavior while in departmental custody.⁵³ Eleven facilities in New York offer one or more continuous temporary release programs, and many are solely dedicated to housing work release participants.⁵⁴ Although the correctional facility will help an inmate find a job, work release participants are expected to pay for the costs of their own employment.⁵⁵ A parole officer is required to visit the participant’s place of employment to monitor the

46. *DOCS 2001 Report*, *supra* note 9, at 12; *see also* *Ortiz v. Wilson*, 448 N.Y.S.2d 918, 919 (Sup. Ct. 1981) (finding that the purpose of a temporary release program is to reduce recidivism by helping inmates to return to a normal and productive life).

47. Furlough “[a]llows inmates to leave a facility for up to seven days to maintain and strengthen family ties, or for other appropriate purposes.” *DOCS 2001 Report*, *supra* note 9, at 6.

48. Educational release “[a]llows inmates to leave a facility to pursue academic goals for up to 14 hours in a day.” *Id.*

49. Community services leave “[a]llows inmates to leave a facility to do volunteer work or to attend religious or athletic events.” *Id.*

50. *Id.*

51. *Id.* at 7.

52. *See* N.Y. Correct. Law § 851(2) (McKinney 2003); N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4 (2003).

53. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.4(e). The six criminal behavior factors are prior or subsequent incarceration; prior or subsequent felony convictions, prior misdemeanor convictions, outstanding warrants at the time of or subsequent date of commitment; previous arrest and conviction or revocation while on parole or probation in the last ten years. The remaining five factors are based on institutional behavior. An inmate can earn a maximum of sixteen points if he or she participates in a program or work assignments during the two years immediately prior to his application. An inmate can also accumulate up to four points for having a “good disciplinary record” over a certain period of time. If the inmate was on temporary release before, he can also lose points for a bad temporary release record. *Id.* § 1900.4(e)(2).

54. *DOCS 2001 Report*, *supra* note 9, at 7-9.

55. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2 (f)(7)(ii)(a),(b).

participant's behavior and attendance. Some prisoners can qualify for a "5 and 2 status," which allows them to live at home for five days and stay at the prison for two days, or roughly twenty hours.⁵⁶ In 1995, Governor Pataki instituted a program that "precluded those who commit violent acts from participating in temporary release programs."⁵⁷

The temporary release program aims "to reduce recidivism by helping inmates to return to a normal and productive life."⁵⁸ The New York program has proven successful; the most recent study found that only eight percent of work release participants returned to jail compared to a twenty-seven percent rate of return among those inmates who did not participate in work release.⁵⁹ The program is also cost-effective; in 2001 the work release program cost a total of \$7,500 to operate compared to the cost per inmate per year in a "traditional" prison, \$29,700.⁶⁰ In 2001, this savings amounted to over \$44,932,800.⁶¹

3. Work Release Participation Fees in Other States

Not only is work release cheaper to administer than full-time incarceration, but work release also generates revenue through work release participation fees.⁶² The fees differ among state programs; some impose per diem fees, some a percentage of salary, and others a flat fee.⁶³ State statutes authorizing the work release program often authorize directors and administrators to collect fees under broad guidelines. Other statutes are far more specific about what can and cannot be collected. The Massachusetts law governing the work release program is highly specific, authorizing the sheriff to deduct for lodging, clothing, travel and food.⁶⁴ In contrast to this specific laundry list of services, California Penal Code section 4024.3(f) is far more vague, stipulating that "[t]he board of supervisors may prescribe a program administrative fee, not to exceed the pro rata cost of

56. See, e.g., *Friedl v. City of New York*, 210 F.3d 79, 81-82 (2d Cir. 2000) ("[P]laintiff was granted work release pursuant to New York State Correction Law, which allows inmates to 'leav[e] the premises of an institution . . . for the purpose of on-the-job training or employment.' Over time, Friedl was allowed to spend most nights at home, residing in prison only two nights each week." (citations omitted)).

57. *DOCS 2001 Report*, *supra* note 9, at 1.

58. *Ortiz v. Wilson*, 448 N.Y.S.2d 918, 919 (Sup. Ct. 1981) (citations omitted).

59. *DOCS 2001 Report*, *supra* note 9, at 11.

60. *Id.* at 10.

61. *Id.*

62. Annual revenues average \$230,500 per prison. *Fees Paid*, *supra* note 1, at 15.

63. *Id.* at 13. According to the survey, "[n]early twice as many jails charge a flat fee as collect a percentage of work release income." *Id.*

64. Mass. Ann. Laws ch. 127, § 86F (Law. Co-op. 1989 & Supp. 2003). The statute stipulates: "[A]n amount determined by the sheriff for substantial reimbursement to the county for providing food, lodging and clothing for such inmate; [. . .] the actual and necessary food, travel and other expenses of such inmate when released for employment under the program . . ." *Id.*

administration, to be paid by each person according to his or her ability to pay.”⁶⁵ Similarly, in Baltimore County, Maryland, the Administrator of the Baltimore County detention facilities may charge a reasonable fee not to exceed the costs of participating in the program.⁶⁶ This type of provision resembles California’s in that the inmates cannot be charged more than the true value of the costs they incur. Baltimore County also resembles California in that the Administrator is free to choose the method of charging participants—be it a per diem fee, a capped percentage of earnings, or a flat fee—as long as the fee charged does not exceed the costs.

Not all state statutes explicitly stipulate a fee cap. In Virginia, wages can be distributed to “defray the cost of [a work release participant’s] keep,” and for expenses related to work release employment.⁶⁷ The statute does not require that the amount exacted be at or below the actual cost.⁶⁸ The prison facility in Arlington County, Virginia charges inmates a fee of twenty-five percent of their gross wages.⁶⁹ Fairfax County, Virginia also charges a twenty-five percent fee, but that fee is capped at forty-two dollars a day.⁷⁰ In Norfolk, Virginia, work release participants are only charged six dollars a day, regardless of their gross wages.⁷¹ Florida, like New York, imposes an uncapped fee based on a percentage of the prisoner’s wages. The Florida Department of Corrections requires the inmate to pay the state forty-five percent of their net wages towards room and board.⁷²

In Kentucky, the fee is also based on a percentage of the prisoner’s wages and not the exact cost of the room and board, but that total fee is capped.⁷³ Every prisoner who is “gainfully employed” is liable for “the cost of his board in the jail, for an amount up to twenty-five percent (25%) of the prisoner’s gross daily wages, not to exceed forty dollars (\$40) per day, but not less than twelve dollars (\$12) per day.”⁷⁴ According to the survey done by the National Institute of Corrections (“NIC”), Jefferson County prison, in Kentucky, charges its work

65. Cal. Penal Code § 4024.3(f) (West 2000).

66. “The Administrator may charge a participant a reasonable fee in an amount not to exceed the actual costs incurred by the county for food, travel, and other expenses related to the participant’s participation in the work release program.” Md. Code Ann., Correct. § 11-705(j) (1999 & Supp. 2002).

67. Va. Code Ann. §§ 53.1-131(A)(1),(2) (Michie 2002). “Distribution of such wages shall be made for the following purposes: 1. To pay an amount to defray the cost of his keep; 2. To pay travel and other such expenses made necessary by his work release employment” *Id.*

68. *Id.*

69. *Fees Paid*, *supra* note 1, at 14 tbl.10.

70. *Id.*

71. *Id.*

72. Florida Department of Corrections, Frequently Asked Questions Regarding Work Release, at <http://www.dc.state.fl.us/oth/inmates/wr.html> (last visited July 27, 2003).

73. Ky. Rev. Stat. Ann. § 439.179(4) (Michie 1999 & Supp. 2002).

74. *Id.*

release participants twenty-five percent of their gross wages without a maximum or minimum cap.⁷⁵

4. Work Release Participation Fees In New York

Following the practice of other states, New York prisons receive a benefit from the work release participants in the form of “[r]egular allowances.”⁷⁶ NYCRR title 7, section 1903.2(f)(3) provides for a method of collecting the “reasonable costs” as established in section 860 of the New York Corrections Law.⁷⁷ The regulation requires that “[o]nce an inmate becomes employed, he will be required to pay a work release participation charge of 20 percent net earnings” for the purposes of helping to “defray administrative, room and board costs.”⁷⁸ Inmates are also expected to “assume all expenses related to their participation in [the] program,” and “all costs related to their travel to and from work.”⁷⁹ According to the New York Department of Corrections (“DOCS”), in 2001, work release participants earned a total of \$7,066,489, which means that twenty percent, or \$1,413,298 in program fees, could have been collected by DOCS.⁸⁰ In addition, participants paid \$2,125,857 in federal, state and local taxes.⁸¹

The current twenty percent fee was instituted in 1999.⁸² Prior to 1999, the participants paid a fee based on a sliding scale, a system where the fee was contingent upon salary but capped at a maximum charge.⁸³ Depending on the net pay, the weekly payment to the institution was a fixed rate ranging from \$10 for those making \$99 a week or less, to \$45 for those making over \$200.⁸⁴ Since 1997,

75. *Fees Paid*, *supra* note 1, at 14 tbl.10.

76. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(f)(3) (2003). New York Corrections Law section 860 stipulates that

[t]he earnings of an inmate participating in a work release program, less any payroll deductions required or authorized by law, shall be turned over to the warden who shall deposit such receipts as inmates' funds pursuant to section one hundred sixteen of this chapter. Such receipts shall not be subject to attachment or garnishment in the hands of the warden. The commissioner of correction may authorize the warden to make disbursements of such receipts, and such receipts may be disbursed, for any or all of the following purposes: 1. Appropriate and reasonable costs related to the inmate's participation in the work release program.

N.Y. Correct. Law § 860 (McKinney 2001).

77. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(f).

78. *Id.* § 1903.2(f)(3)(i)(b).

79. *Id.* § 1903.2(f)(3)(i)(a),(ii)(a).

80. *DOCS 2001 Report*, *supra* note 9, at 10.

81. *Id.*

82. N.Y. Comp. Codes R. & Regs. tit. 7, § 1903.2(f)(iii)(b) (1996).

83. *Id.*

84. *Id.*

Assemblyman McLaughlin has tried to change the fee by proposing an amendment to sections 860 and 872 in the New York State Assembly Committee on Corrections.⁸⁵ With this year no different than the last six, McLaughlin proposed the bill again in January of 2003, calling for the addition of a provision stipulating a deduction of “monies from the salaries of inmates working in work release programs for reasonable costs not to exceed 10% of earnings in excess of \$100 and expenses” related to inmates’ participation in work release programs.⁸⁶ According to the Sponsor’s Memorandum, the new bill “acknowledges the importance of an inmate’s incentive towards saving and is sensitive to the fact that many inmates earn low wages.”⁸⁷ This objective is consistent with the overall rehabilitative goal of the work release program: If inmates can learn to save money, they will be ready for life outside of prison.

Further, the proposed amendment would do more than lower and cap the fee. As proposed, the bill would make it easier for prisons to collect information on the actual costs incurred, facilitating administration overall.⁸⁸ The bill seems to suggest that currently the administrators are collecting fees without “comprehensive information” regarding the actual costs of the work release program.⁸⁹ Indeed, the current versions of sections 860 and 872 only offer a vague, moderate standard for calculating the fee: “[a]ppropriate and

<i>Net Pay</i>	<i>Weekly Payment</i>
Under \$99	\$10
\$100-\$149	\$25
\$150-199	\$35
Over \$200	\$45

See id.

85. A. 2528, 2003 State Assem., Reg. Sess. (N.Y. 2003-2004). The six other bills died in the committee on corrections. *Id.* Section 872 provides for the disposition of inmate earnings:

- (2) a sum determined by the sheriff to be the cost to the county of providing food, lodging and clothing for such prisoner subject, however, to approval by the state commission of correction;
- (3) a sum determined by the sheriff to be the cost to the county of the actual and necessary food, travel and other expenses of such prisoner when released from confinement for the purpose of participating in the work release program.

N.Y. Correct. Law § 872 (McKinney 2001).

86. A. 2528, 2003 State Assem., Reg. Sess. (N.Y. 2003-2004).

87. *Id.*

88. According to the proposal:

[T]here is a lack of comprehensive information in inmate earnings, program costs and actual disbursements to cover these costs. This bill guarantees the collection of these funds, provides for the establishment of rules to determine how much an inmate can be charged to be housed and fed in a work release facility, and initiate the maintenance of records to aid in effective program administration.

Id.

89. *Id.*

reasonable costs related to the inmate's participation"⁹⁰ simply "to be determined by the sheriff."⁹¹ According to the proposal, this system does not ensure accurate and efficient disbursement. There are no guidelines mapping out how these costs should be calculated, nor are there any requirements that the warden keep a log of the daily costs. Under the current standard, wardens of New York prisons are hardly held accountable for the accuracy of the fee collected; as long as the fees are appropriate they will be within the guidelines of the statute.

Without anyone to guide the calculation of costs or to monitor the disbursement of fees, the twenty percent payments fall subject to abuse and misappropriation. There seems to be no way to ensure that the participants are paying fees that accurately reflect the cost of room, board and administration fees. The prison is effectively taking the prisoners' salary without conferring a benefit back to them. Under these circumstances, the work release participation fee lies vulnerable to a challenge based on the Takings Clause of the Fifth Amendment.

D. Takings

The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation."⁹² The Fifth Amendment's prohibition applies to the states through the Fourteenth Amendment.⁹³ Typically, property owners invoke the Takings Clause to protect them from the government's physical occupation of real property.⁹⁴ In the past hundred years, the Supreme Court has held that regulatory takings occur when governmental regulations deny land owners the full economic benefit of their property.⁹⁵ The Supreme Court has also found that economic regulations involving the appropriation of money can effectuate a violation of the Takings Clause.⁹⁶ Although these scenarios do not present what the Supreme Court has called the "classic taking," when "the government directly appropriates private property for its own

90. N.Y. Correct. Law § 860 (1)(McKinney 2001).

91. *Id.* § 872 (2), (3).

92. U.S. Const. amend. V.

93. *Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994) ("The Takings Clause of the Fifth Amendment of the United States Constitution [is] made applicable to the States through the Fourteenth Amendment . . .").

94. See generally William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995); see also Note, *The Principle of Equality in Takings Clause Jurisprudence*, 109 Harv. L. Rev. 1030 (1996) (noting that prior to the twentieth century, the Takings Clause was applied to physical takings of actual property).

95. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), was the watershed regulatory takings case. The Court held that economic regulations that went "too far" in interfering with property rights would be a taking. *Id.*

96. See *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

use . . . economic regulation . . . may nonetheless effect a taking."⁹⁷ On a number of occasions the Supreme Court has found that "money . . . constitutes 'property' for purposes of applying the Takings Clause."⁹⁸

There is no "set formula"⁹⁹ for determining when a seizure or regulation has gone too far, and thus the body of law surrounding the Takings Clause has been described as a "mess."¹⁰⁰ The current standard for determining when a regulation curtailing the value of property is a taking is a three-factor test drawn from the Supreme Court's decision in *Penn Central Transportation Company v. New York City*.¹⁰¹ The test measures the economic impact, investment-backed expectations, and fairness of the legislation on a case-by-case basis.¹⁰² This ad hoc review has led to muddled case law and a wide body of exacting scholarship.

Further adding to the mix is the case law surrounding the economic regulations involving the appropriation of money, which is the focus of this Note.¹⁰³ In earlier cases, represented below by *Webb's Fabulous Pharmacies v. Beckwith*,¹⁰⁴ the Supreme Court did not seem to have an operating standard to determine a takings violation; rather, the court simply looked to see if the regulation was reasonable on an ad hoc basis.¹⁰⁵ Almost twenty years later, in *Eastern Enterprises v. Apfel* the Supreme Court applied the three-factor test to determine if an appropriation of money violated the Takings Clause.¹⁰⁶ Although over the years the Court recognized that challenges to appropriation of money should be evaluated by a different test than physical appropriations of real property,¹⁰⁷ it was not until *Eastern* that the

97. *Id.* at 522-23 (holding that the Coal Act requiring Eastern Enterprises to fund retired miner's health care was a violation of Takings Clause).

98. Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. Rev. 713, 725 (2002); see also, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998); *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

99. *E. Enters.*, 524 U.S. at 523 (noting that the "process for evaluating a regulation's constitutionality . . . by its nature, does not lend itself to any set formula").

100. Treanor, *supra* note 94, at 782; see also Krotoszynski, *supra* note 98, at 713 ("Recent regulatory takings cases, however, utilize a hodgepodge of factors to determine the essential nature of the government's action.").

101. 438 U.S. 104 (1978).

102. *Id.* at 124.

103. As Ronald Krotoszynski sums up, "the ad hoc nature of the Supreme Court's current regulatory takings doctrine is profoundly embarrassing." Krotoszynski, *supra* note 98, at 738.

104. 449 U.S. 155 (1980).

105. *Id.*

106. 524 U.S. 498, 523-24 (1998).

107. See *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (charging that deduction of two percent of an award from the Iran-United State Claims Tribunal was a violation of the Takings Clause, but because "money is fungible" it is not subject to

court had actually implemented the three-factor test to strike down an economic regulation appropriating money.¹⁰⁸ The Court came closer to articulating a rule, but at the same time sparked a heated debate questioning the authority to evaluate economic regulations through the Takings Clause.¹⁰⁹

In *Webb's Fabulous Pharmacies*,¹¹⁰ one early Takings Clause challenge to an economic regulation, the Supreme Court reached a verdict with little equivocation. *Webb's Fabulous Pharmacies*, operating in Florida, was involved in litigation and placed \$1,812,145.77 in the county interpleader fund;¹¹¹ this amount generated \$100,000 in interest.¹¹² According to section 28.33 of the Laws of Florida, chapter 73-282, section 1, interest accruing on the fund was deemed "income of the office of the clerk of the circuit court."¹¹³ In addition to the interest, the clerk was also paid a fee of \$9,228.74 for "services rendered," in accordance with Florida Annotated Statutes, section 28.24(14).¹¹⁴ The pharmacy challenged the statute authorizing the county court to take the interest on the grounds that the appropriation violated the Takings Clause.¹¹⁵

Writing for the majority, Justice Blackmun focused the analysis on whether the interpleader fund was public or private property.¹¹⁶ After determining that "[i]t was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county," Blackmun then moved on to the status of the interest.¹¹⁷ Reasoning that interest follows principal, the Court refused to accept the argument that the interest was public property, and instead held that the interest belonged to Webb's until the prior litigation was over.¹¹⁸ Further, the county already exacted a standard fee covering the costs of services, rendering the collection of interest "not reasonably related to the costs of using the courts."¹¹⁹ As such, the Court held that the statute "appropriat[ed] for the county the value of the use of the fund" and therefore was "a taking violative of

the same analysis as real or personal property); *See, e.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 176 (1998) (Souter, J., dissenting).

108. 524 U.S. 498 (1998).

109. Some scholars have argued that the plurality ruling is *Lochner*-esque in its interference with economic legislation. *See generally* Krotoszynski, *supra* note 98; Note, *supra* note 94.

110. 449 U.S. 155 (1980).

111. *Id.* at 156-57.

112. *Id.* at 158.

113. *Id.* at 160 (quoting Fla. Stat. Ann. § 28.24(14) (West 1977)).

114. *Id.* The statute prescribed that the county clerk is to be paid "for services rendered" for "receiving money into the registry of the court," calculated as follows: one percent of the first \$500, and then one-half percent of the remainder. *Id.*

115. *Id.* at 155-56.

116. *Id.*

117. *Id.* at 161-62.

118. *Id.* at 162-63.

119. *Id.* at 163.

the Fifth and Fourteenth Amendments.”¹²⁰ The takings analysis in this opinion is short and relatively uncomplicated, and unanimous in the method of inquiry.

When the Supreme Court was faced with another economic regulation takings claim in *Eastern Enterprises v. Apfel*, almost twenty years later, the resulting analysis was complicated and controversial.¹²¹ In *Eastern*, a company formerly in the coal industry successfully challenged the Coal Act, a regulation requiring coal companies to retroactively pay retired miners’ healthcare, on the grounds that its retroactive funding plan violated the Takings Clause.¹²² Under the Act, Eastern was required to pay \$50 to \$100 million in healthcare benefits for 1,000 retired miners.¹²³ The Court was divided 4-1-4, with the plurality holding that the regulation did in fact violate the Takings Clause.¹²⁴ In the plurality opinion, Justice O’Connor used a three-factor test to determine whether the Act crossed the takings line. The economic impact, the “extent to which the regulation interferes with . . . investment-backed expectations,” and the character of the governmental action were all factored in to determine whether the economic regulation was a violation of the Takings Clause.¹²⁵ Ultimately, Justice O’Connor found that the Act was a “severe, disproportionate, and [an] extremely retroactive burden on Eastern,” sufficient to fall under the protection of the Takings Clause.¹²⁶ Central to the ruling was the notion that the legislation “single[d] out certain employers to bear a burden that is substantial in amount . . . implicat[ing] fundamental principles of fairness underlying the Takings Clause.”¹²⁷ The Court struck down the Act as unconstitutional.

The remaining Justices believed that the case did not fit the proper profile for relief under the Takings Clause; instead, they thought the case should be analyzed under the Due Process Clause.¹²⁸ Justice Kennedy concurred that the Act was unconstitutional, but he dissented in part with the plurality’s reliance on the Takings Clause, reasoning that the retroactive Act of great severity was traditionally

120. *Id.* at 164-65.

121. *E. Enters. v. Apfel*, 524 U.S. 498 (1998). Unlike the unanimous decision in *Webb’s*, the justices were divided over *Eastern*. See Krotoszynski, *supra* note 98, at 723-24.

122. *E. Enters.*, 524 U.S. at 499.

123. *Id.* at 499-500.

124. *Id.* at 503-04.

125. *Id.* at 518-19.

126. *Id.* at 538.

127. *Id.* at 537.

128. The plurality did not find it necessary to analyze the due process claim. “Because we have determined that the third tier of the Coal Act’s allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern’s due process claim.” *Id.* at 538-39.

protected by the Due Process Clause.¹²⁹ The remaining four dissenters, led by Justice Breyer, felt “there is no need to torture the Takings Clause to fit this case,” but that even under the proper due process analysis, the Act was sound.¹³⁰

The plurality opinion has been criticized for further blurring the lines between substantive due process and the Takings Clause. It employed language traditionally used in due process inquiries—“arbitrary and irrational”—and proposed a due process remedy rather than just compensation, yet it labeled the violation a taking.¹³¹ In addition, some scholars have argued that through *Eastern*, the Takings Clause has been used to accomplish the foregone goals of *Lochner v. New York*.¹³² By separating the three-factor test “from its real property moorings and recharacterizing it as a generalized inquiry into the fundamental fairness of the government action in question,” the opinion in *Eastern* “easily could serve as the basis for a rejuvenation of *Lochner*-like review of economic and social legislation.”¹³³ The wary response to *Eastern*, like the general unrest with the lack of a “set formula” for regulatory takings jurisprudence,¹³⁴ demonstrates the need for a set standard for economic, regulatory takings.

Ronald Krotoszynski is just one scholar who criticizes the Supreme Court for blurring the lines between Due Process and takings in its

129. *Id.* at 539-40 (Kennedy, J., dissenting in part).

130. *Id.* at 556 (Breyer, J., dissenting).

131. See Krotoszynski, *supra* note 98, at 725-40.

[I]nstead of ordering ‘just compensation,’ the plurality simply strikes down the offending statute as unfair or irrational. The Takings Clause is thus transformed from a specific requirement to compensate persons when government expropriates property for a public purpose into a generalized guarantee against the enactment of fundamentally unfair or unjust laws.

Id. at 725.

Perhaps this remedy is not as misguided as suggested. Although normally a violation of the Takings Clause would require just compensation, such a remedy seems unreasonable when the property appropriated is money. Krotoszynski does note that, “[u]nder the logic of Justice O’Connor’s approach, the private property at issue, money or federal reserve notes, having been taken for a ‘public use,’ triggers an obligation on the part of the government to provide ‘just compensation,’ presumably federal reserve notes of a sort fungible with those taken,” but he does not consider this when questioning the remedy Justice O’Connor proposed. *Id.* at 732. The compensation would essentially be the same money that the government appropriated in the first place, rendering the initial appropriation obsolete. Therefore, it makes sense to remedy the taking by striking down the statute rather than by requiring a superfluous just compensation.

132. See *id.* at 725 (citing 198 U.S. 45, 53-56 (1905) (striking down a statute regulating the number of hours a baker could work on the grounds that the regulation unconstitutionally interfered with the right to contract between employers and employees)); see generally Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 Ala. L. Rev. 1261, 1262-69 (2000) (arguing that the Takings Clause has been used to accomplish the goals of *Lochner*—to strike down economic regulations).

133. Krotoszynski, *supra* note 98, at 727.

134. See *supra* note 100 and accompanying text.

analysis of *Eastern*.¹³⁵ He argues that a more restrictive test is necessary to weed out the true takings from those complaints that sound in due process.¹³⁶ As a remedy, Krotoszynski proposes an alternative standard—a single inquiry into whether there was “expropriatory intent,” in effect examining whether the government is regulating the activity solely for the purpose of expropriating the property without “advanc[ing] a legitimate health, safety, or welfare objective.”¹³⁷ Although this single inquiry would tame what could be considered the three-headed monster, Krotoszynski’s proposal would prohibit all claims of the misappropriation of money from seeking relief under the Takings Clause, as all regulations requiring citizens to give the government money in some sense operate with a welfare objective.

In fact, Krotoszynski explicitly states that regulations requiring the payment of money should necessarily be excluded from the takings regime.¹³⁸ The language of the Takings Clause suggests some form of exchange—as in property for cash—but when the government takes citizens’ cash, it would be “quite silly” for the government to then turn around and justly compensate these deprived citizens with cash in return.¹³⁹ Further, unlike an eminent domain proceeding that “intends to take and possess a particular thing in order to accomplish a specific goal,” when the government enacts regulations calling for revenue, the “government is indifferent as to how a taxpayer obtains the funds to satisfy the obligation In these circumstances, the requisite expropriatory intent is utterly absent.”¹⁴⁰ Under this inquiry, because the citizen can pay the obligated amount with cash, a loan, or “even [by] sell[ing] the Matisse,” the regulation would not be expropriating specific property, failing to trigger the protection of the Takings Clause.¹⁴¹

Other scholars do not close out expropriations of money so generally. While attempting to wade through the mire created by the muddled case law, several scholars urge a return to the original intent of the clause.¹⁴² One well-regarded historical account by Dean William Michael Treanor argues that the original intent of the

135. See *supra* notes 98, 100 and accompanying text.

136. See Krotoszynski, *supra* note 98, at 717-19.

137. *Id.* at 718.

138. *Id.* at 733. Specifically, Krotoszynski explains:

Although it is true that money, whether in the form of Federal Reserve notes, bank credits, gold ingots, or Euros, constitutes ‘property,’ it is quite silly to consider a general financial obligation to government, such as the income tax, as a government ‘taking’ of the funds or credits used to satisfy the obligation.

Id.

139. *Id.* at 732-33.

140. *Id.* at 733.

141. *Id.*

142. See generally Treanor, *supra* note 94.

Takings Clause was to compensate “only in those classes of cases in which process failure is particularly likely today—when there has been singling out or in environmental racism cases, where there has been discrimination against discrete and insular minorities.”¹⁴³ In his “political process theory of the Takings Clause,”¹⁴⁴ Treanor argues that the Takings Clause was originally enacted to protect those unprotected by the political process.¹⁴⁵ The current victims of process failure today include those on the fringe of the political process who are underrepresented, categorized as “discrete and insular minorities.”¹⁴⁶ But the Takings Clause is not meant to protect every seizure or regulation disadvantaging minorities. Rather, according to Treanor, the Takings Clause should “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁴⁷ Although Treanor’s theory narrows the scope of the Takings Clause, it opens the interpretation of the Takings Clause to include appropriations of money.

In contrast to the narrow scope posited by Treanor, Richard Epstein uses history as a springboard for a much more expansive view of the Takings Clause.¹⁴⁸ In his book *Takings*, Epstein invokes the general philosophical sentiment pervading the time when the Constitution was adopted—Locke’s liberal theory of property—to evaluate what the Takings Clause should protect.¹⁴⁹ Believing that the framers were all Lockean who were against the redistribution of wealth, Epstein posits that “[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state.”¹⁵⁰ If the action is a prima facie taking, Epstein imposes limitations in the form of three questions: “[I]s this state action justified as an exercise of police power?”¹⁵¹ If so,

143. Treanor, *supra* note 94, at 784.

144. *Id.*

145. *Id.* at 829. In 1776, the unprotected included the members of the new State of Vermont, who included a prototypical version of the Takings Clause in their state constitution. Because Vermont was far from the capital where decisions were made, “its claims could not be fairly considered,” and their Takings Clause was created to “provide security against the type of process failure to which majoritarian decision-making processes were peculiarly prone.” *Id.* at 829, 830. For a much more detailed description of the history of the Takings Clause, see generally *id.*

146. *Id.* at 872-74.

147. *Id.* at 877 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

148. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). This Note presents only a summary of an exceptionally detailed, well-presented theory espoused in *Takings*. For an overview of Epstein’s theories and the opposition in response, see Symposium, *Richard Epstein’s Takings: Private Property and the Power of Eminent Domain*, 41 U. Miami L. Rev. 1 (1986).

149. See generally Epstein, *supra* note 148 at 3-18; see also Treanor, *supra* note 94, at 815.

150. Epstein, *supra* note 148, at 95 (emphasis in original).

151. Thomas C. Grey, *The Malthusian Constitution*, 41 U. Miami L. Rev. 21, 29

then the taking is constitutional. If not, is the taking for a legitimate public use?¹⁵² The final question to address is whether there has been just compensation.¹⁵³

Under the first question, if the state action is necessary to control fraud or the private use of force, then, according to Epstein, the taking is permitted.¹⁵⁴ Actions to reduce private harm or fraud are legitimate uses of police power, including the disarming of a thief or the need to limit pollution of an industrial plant.¹⁵⁵ Epstein argues that most zoning laws do not justify the use of police power because they are not a means to end actual harm.¹⁵⁶ In the event an action is not a legitimate exercise of police power, then it must satisfy the final two requirements or else it will be deemed a taking.

The public use and just compensation limitations go hand in hand.¹⁵⁷ Epstein contends that public use is “[a]t a minimum” necessary to enforce “a strict limitation upon the power of government to take private property.”¹⁵⁸ Under this analysis, to satisfy the public use requirement, the government must distribute any surplus it receives from an appropriation, pro rata, among the population.¹⁵⁹ Rather than allow all appropriations to satisfy the public use requirement if they benefit even a small population, “[t]he public use limitation helps curb those abuses, for by controlling the disposition of the surplus it

(1986). For example, “the police power applies when a large group of neighbors disarm a thief in the neighborhood or limit pollution by an industrial plant.” Richard A. Epstein, *An Outline of Takings*, 41 U. Miami L. Rev. 3, 11 (1986).

152. See Grey, *supra* note 151. Epstein is frustrated by the modern approach to this limitation, which all but assumes there is a public use inherent in any governmental appropriation. Epstein, *supra* note 148, at 161-62. Despite the growing trend, the body of law “which trivializes the public use limitation, is incorrect.” *Id.* at 162. Epstein urges a more serious look into the question of when the property is put to public use because even though “[o]ne could argue that some member of the public gets some marginal benefit from the activity . . . then there is the question why an ounce of public concern justifies a pound of private taking.” Epstein, *supra* note 151, at 13.

153. See Grey, *supra* note 151; see also generally Epstein, *supra* note 148, at 182-215. Just compensation is not sufficient if the surplus of a takings action benefits only a small part of the contributing population. *Id.*

154. See Epstein, *supra* note 151, at 11.

155. *Id.*

156. *Id.* “Building an ordinary home does not become a nuisance against many neighbors when it is not a nuisance against any of them individually.” *Id.* That said, Epstein recognizes that zoning laws enforced to prevent or reduce pollution are legitimate uses of police power. *Id.*

157. Epstein first laments the disappearance of the “public use” limitation from the takings equation, noting how the courts have broadened the scope of public welfare to include even those activities which benefit a small number of people.” Epstein, *supra* note 151, at 12-15.

158. Epstein, *supra* note 148, at 162.

159. *Id.* at 163. “The sovereign is allowed to take from the citizens only those funds that are necessary to operate the state. The rest of the surplus subject to that tax lien should be divided among all citizens, pro rata in accordance with their private holdings.” *Id.* If it is not distributed pro rata, a taking should be barred.

limits the scope of partisan activities.”¹⁶⁰ Distributing surplus property pro rata satisfies both the public use and the just compensation requirement.

With these questions as his guide, Epstein challenges the constitutionality of taxation,¹⁶¹ transfer payments,¹⁶² and welfare payments¹⁶³ on the ground that, for the most part, these governmental programs do not provide equal benefits to those surrendering their property rights (namely the rich).¹⁶⁴ Epstein does not call for the outright elimination of these programs, but instead offers alternatives that, if implemented, could overcome the constitutional challenges to some degree.¹⁶⁵ As this liberal theory conveniently eliminated the gray areas of what constitutes a taking, it came under fire as being too expansive.¹⁶⁶

With multiple theories of the scope of the Takings Clause, it is difficult to predict with certainty when an appropriation merits the protection of the clause. Despite this uncertainty, this Note moves on to explain how the work release participation fee falls squarely within the scope of the Takings Clause as interpreted by courts and scholars.

II. THE PROBLEM WITH THE WORK RELEASE PARTICIPATION FEE

Without the threat of accountability, and without a cap, the twenty percent fee curtails the rights of work release participants in New

160. *Id.* at 165.

161. *See id.* at 99-100, 283-305. “With a tax, the government takes property in the narrowest sense of the term, ending up with ownership and possession of that which was once in private hands.” *Id.* at 100. There is clearly no means of calculating whether a taxpayer receives an equal benefit in return for his taxes. *Id.* at 297-98. Put another way, even if one were to say that a taxpayer receives the benefit of democracy in return for his taxes, how does one quantify the value of democracy to evaluate whether the taxpayer is justly compensated?

162. *See id.* at 306-14.

163. *See id.* at 314-29.

164. *See id.* at 314-15. “Welfare transfers, whether in cash or in kind, aid the poor at the expense of the rich.” *Id.* at 314. Epstein highlights the possible benefits that the rich get in exchange for their contribution to welfare. For example, protection against “the violence of *others* who will act in antisocial fashion when these benefits are not provided” could possibly justify welfare. *Id.* at 315-16. For a detailed description of arguments for and against welfare, *see id.* 314-29.

165. To overcome the problems of taxation, Epstein recommends a “flat tax,” which will minimize the “expected mismatch of taxes and benefits.” *Id.* at 298. As for welfare, which provides a private benefit at public expense, Epstein posits the possibility of “get[ting] out of the welfare business entirely,” and instead opts for a private welfare system driven by charitable contributions. *Id.* at 322. But no system is perfect. *Id.* at 314-29. Overall, Epstein recognizes that “[i]t is not possible to design a stable set of institutional arrangements for transfer payments to satisfy the just-compensation requirement of the eminent domain clause.” *Id.* at 324.

166. *See, e.g.,* Grey, *supra* note 151, at 24 (calling *Takings* “a travesty of constitutional scholarship”). Treanor argues that the framers “were not committed to absolute, liberal protection of property rights.” Treanor, *supra* note 94, at 818.

York.¹⁶⁷ The fee is supposed to be a reasonable reflection of a specific inmate's participation in the program, yet it is calculated solely on the basis of the inmate's wages. Unless the amount of money a work release participant earns is an appropriate and reasonable determination of the costs that the inmate incurs, it is unreasonable to calculate the fee based on wages. Inmates who earn more in salary will pay more than inmates who are similarly situated and use the same facilities but make less money. Even if on average the costs are reasonably related to twenty percent of a participant's salary, is it fair to force work release participants with professional jobs and large salaries to pay higher fees without receiving increased benefits? Challenges to work release programs abound, but victories are few.

A. *When Crime Won't Pay: Challenging Reimbursement Fees*

1. Excessive Fines and Double Jeopardy

While reimbursement programs yield significant returns purporting to ease the burden on taxpayers, they raise several legal and social concerns. The early objections to the reimbursement fees rested in the Eighth Amendment "Excessive Fines" Clause and the Fifth Amendment Double Jeopardy Clause.¹⁶⁸ Courts have consistently upheld the validity of reimbursement fees in the face of an Excessive Fine or Double Jeopardy challenge, mainly because reimbursement fees are not deemed to be fines.¹⁶⁹ In *Tillman v. Lebanon County*

167. Although this Note focuses on the constitutionality of the statute in New York, the analysis can be applied to the other states with a similar statutory model. For example, South Carolina requires "[i]f there are no child support obligations, then twenty-five percent [of the work release participant's wages] must be used by the Department of Corrections to defray the cost of the prisoner's room and board." S.C. Code Ann. § 24-3-40(A)(3) (Law. Co-op. 2000).

168. Under the Eight Amendment "[e]xcessive bail shall not be required, nor excessive fines imposed." U.S. Const. amend. VIII. The Fifth Amendment prohibits any person from being "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. For an example of how these clauses have been applied to reimbursement fees, see *Auditor Gen. v. Hall*, 1 N.W.2d 516, 518 (Mich. 1942) (holding that "the statutory obligation of a prisoner to pay for his keep and maintenance, if he has a sufficient estate, [is] civil rather than criminal" and thus does not create double jeopardy).

A reimbursement fee will be considered an "excessive fine" if it is (1) deemed to be a fine and not a civil payment and (2) the "the particular sanction in question is so large as to be 'excessive.'" *Grove v. Kadlic*, 968 F. Supp. 510, 516 (D. Nev. 1997) (citations omitted). The "threshold issue in determining whether a payment is 'punishment' for Double Jeopardy purposes is whether it is 'disproportionate to the damages caused to the government.'" *Id.* at 518 (citing *United States v. Walker*, 940 F.2d 442, 443 (9th Cir. 1991)).

169. See, e.g., *Tillman v. Lebanon County Corr. Facility* 221 F.3d 410 (3d Cir. 2000). *But see Grove*, 968 F. Supp. at 520 (holding that the thirty dollar per day fee for room and board in a Nevada prison was considered a fine but not excessive and thus valid).

Correctional Facility,¹⁷⁰ the Third Circuit refused to consider the reimbursement fees as fines for several reasons: (1) if the prisoner failed to pay the fee, his term of incarceration would not be extended; (2) the fee is not tied to the gravity of the offense but is fixed for each prisoner; (3) the fee was implemented to teach financial responsibility, not to punish; (4) the fee offset maintenance, room, and board—costs that the prisoner would have had to pay even if he had not been incarcerated.¹⁷¹ Further, even if the fee were deemed a fine, given that the fee offset only a fraction of the costs incurred by the prison, the “fine” would hardly be considered excessive.¹⁷²

2. Social Concern

The next issue concerns the social impact of imposing fees on inmates for services, such as medical care, which have “traditionally been seen as a public responsibility.”¹⁷³ The NIC responds to this

170. 221 F.3d 410 (2000).

171. *Id.* at 420.

172. *Id.*

173. *Fees Paid*, *supra* note 1, at 4. Even if prisons do not charge inmates a co-payment for medical services, prisons must furnish medical care to its prisoners. In 1976, the Supreme Court decided that prisoners have a constitutional right to receive medical services while they are incarcerated, as denying them medical attention is considered a “cruel and unusual punishment” in violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976). The debate over whether the public should have to pay for inmate medical care reached new heights when a prisoner in Clinton Correctional Facility in New York, Mark L. Brooks a/k/a Jessica M. Lewis brought an action against the Assistant Deputy Superintendent at Clinton and others, alleging they were deliberately indifferent to his medical needs as a transsexual, in violation of the Eighth Amendment. *Brooks v. Berg*, No. 00-CV-1433, 2003 WL 21649735 (N.D.N.Y. July 15, 2003). Brooks claimed to have gender identity disorder (“GID”), which requires treatment including hormonal replacement, electrolysis, and sex reassignment surgery. *Id.* at *2. The administrators at Clinton refused to provide Brooks with the treatment s/he requested, justifying their actions by referencing the prison policy that GID treatment is only provided to those inmates who were diagnosed with GID before they were incarcerated. *Id.* Judge Kahn stated that “[p]rison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy which makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration.” *Id.* at *9. Noting “the numerous cases which hold that prison officials may not deny transsexual inmates all medical attention, especially when this denial is not based on sound medical judgment,” Kahn refused to grant summary judgment on the issue. *Id.* Although Kahn did not order the state to pay for a sex change, the ruling is still a strong step in a controversial direction.

Another controversial issue to surface is organ transplants and donations to inmates. In January 2002, a thirty-two year old California prisoner received a heart transplant that purportedly cost taxpayers one million dollars. Ed Fletcher, *Bill Aims to Limit Organs to Prisoners: The Debate over a Heart Transplant Spurs the Effort to let Donors Choose*, *The Sacramento Bee* (Jan. 24, 2003), available at <http://www.sacbee.com/content/politics/ca/story/5974001p-6932524c.html>. A spokeswoman for the Department of Corrections justified the transplant to angry constituents by explaining that inmates have a constitutional right to “community-level health care” and had they refused the transplant the inmate or his estate could

concern by emphasizing that prisoners should not be absolved from paying for medical care simply because their criminal behavior put them in jail.¹⁷⁴ The California Medical Association Committee on Corrections and Detention Health Care responded to this dichotomy by developing guidelines for implementing the inmate medical co-payment program.¹⁷⁵ These guidelines request that the “local decision makers . . . [k]eep fees low; [i]nstitute a single fee (or entry fee) for requested services; [w]aive fees for services required or initiated by correctional staff . . . and statute; emergency services; and pregnancy-related services [and] [p]rovide equal care for indigent inmates.”¹⁷⁶ California also recommended that local jails evaluate the fee system to determine whether the fees are preventing inmates from seeking medical care.¹⁷⁷ To minimize the impact of the co-pay, most states have enacted co-payment schemes only for non-necessary treatments.¹⁷⁸ The justification behind the co-payments, especially those for non-necessary treatment, is that a small fee will help deter frivolous medical visits.¹⁷⁹ As one court noted, this is the objective behind all medical insurance co-payments, not just those implemented in prisons.¹⁸⁰ With co-pays typically imposed on non-emergency and prisoner-initiated treatment, and even then only ranging from three to

have sued the prison. *Id.* In response, a California state senator has proposed legislation that would allow donors to “check a box indicating their desire to prohibit their donation from going to a person incarcerated in a state prison or a county jail.” *Id.* Allowing donors to determine the fate of their organs is unprecedented in donor history. Typically donor agencies do not look at the social status of the patient when allocating organs. Jessica Wright, Note, *Medically Necessary Organ Transplants for Prisoners: Who is Responsible for Payment?* 39 B.C. L. Rev. 1251, 1255-57 (1998) (“Every transplant program, organ procurement organization and tissue-typing laboratory in the United States is a member of UNOS [United Network for Organ Sharing] The UNOS ethics committee believes, . . . that being accused or convicted of a crime is irrelevant to the selection of transplant recipients.”). For a general overview of the ethical dilemmas of prison organ transplants, see generally *id.*

174. *Fees Paid*, *supra* note 1, at 4.

175. *Id.*

176. *Id.*

177. *Id.* This constant review is prudent in light of *Estelle*, 429 U.S. at 97. If the co-payments are preventing indigent prisoners from seeking medical care, the prison could be violating inmates’ constitutional right to medical treatment. See *supra* note 173 and accompanying text.

178. *Johnson v. Dep’t of Pub. Safety & Corr. Servs.*, 885 F. Supp. 817, 818 (D. Md. 1995) (noting that the Maryland statute authorizing prison co-payments “also provides numerous exceptions to this ‘co-pay’ policy. For example, no fees may be assessed for ‘necessary treatment’”).

179. *Fees Paid*, *supra* note 1, at 4; see also *Johnson*, 885 F. Supp. at 820.

180. *Johnson*, 885 F. Supp. at 821 (“[T]he co-pay system is a prominent feature of most health insurance policies for precisely the same reasons that it was adopted in this case—it applies negative reinforcement to the human tendency to overuse those health care services for which someone else is paying—*i.e.*, the moral hazard problem.”).

ten dollars per visit,¹⁸¹ prisoners have rarely challenged the fees with success.¹⁸²

Another concern arising from the widespread adoption of prison fees is the plight of the indigent prisoner.¹⁸³ Most states absolve the indigent prisoner of medical co-payment fees.¹⁸⁴ Again, in California the committee addressed this concern by requiring “equal care” for those who cannot afford the fee.¹⁸⁵ Georgia law absolves prisoners from the medical fee if they have less than ten dollars in their prison account.¹⁸⁶ Minnesota qualifies its medical co-payment fee “to the extent the inmate has available funds.”¹⁸⁷ This kind of exemption extends beyond medical co-payments; many state statutes also consider an inmate’s ability to pay when dictating the per diem costs.¹⁸⁸

Not all prisons exempt indigent inmates from reimbursement, as seen in a recent Pennsylvania case. In *Tillman*,¹⁸⁹ an inmate

181. See *Fees Paid*, *supra* note 1, at 4-5. Prisons in California charge three dollars per visit, while those in Colorado charge up to ten. *Id.*

182. See, e.g., *Silo v. Ridge*, 728 A.2d 394, 401 (Pa. Commw. Ct. 1999) (ruling that a two dollar co-payment was not a violation of prisoner’s due process); *Bailey v. Carter*, No. 99-4282, 2001 WL 845446 (6th Cir. July 20, 2001) (holding that a three dollar medical co-pay was not a violation of due process, Eighth Amendment, or the Takings Clause). *But see*, e.g., *Haskell County v. Sullivan*, 9 P.3d 588 (Kan. Ct. App. 2000) (holding that an indigent prisoner is entitled to medical services solely at the expense of the government). The court in *Haskell* emphasized the legislative policy in Kansas, where “the liability for care and maintenance of a prisoner, including medical expenses, should be the responsibility of the governmental entity whose criminal statutes the prisoner allegedly violated.” *Id.* at 589 (citations omitted).

183. Prisoners who have no means of income while in prison would then be denied haircuts and telephone use and would be in debt to the prison for room and board.

The 1995 Prison Litigation Reform Act requires indigent prisoners to pay significant filing fees if they want to bring an action against the prison in court. 28 U.S.C. § 1914 (a) (2000). *But see* § 1915 (a),(b) (allowing prisoners to file an affidavit to qualify for exemption). Although these fees are outside the scope of this Note, it is worth mentioning that the success of such actions will be even further curtailed now that prisoners will be responsible for the costs of litigation. For a detailed discussion of the Prison Litigation Reform Act and its effects on the indigent prison population, see Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 Duke L.J. 117 (1997); see also Joshua D. Franklin, *Three Strikes and You’re Out of Constitutional Rights? The Prison Litigation Reform Act’s “Three Strikes” Provision and its Effect on Indigents*, 71 U. Colo. L. Rev. 191 (2000). *But see* Kevin W. King, *Prison Litigation Reform: Impose Court Costs on Prisoners Who File Lawsuits; Authorize Courts to Order Payment of Defendant’s Attorney Fees Incurred in Defending Frivolous Lawsuits*, 13 Ga. St. U. L. Rev. 280 (1996).

184. This is most likely because indigent prisoners can claim that making medical co-payments prevents them from seeking medical treatment, denying them their constitutional rights. See *supra* notes 173, 177 and accompanying text.

185. *Fees Paid*, *supra* note 1, at 4.

186. *Id.* at 5.

187. *Id.*

188. See *id.* at 9. In Florida, Texas and California, the economic standing of the inmates is considered when determining incarceration costs. *Id.*

189. *Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410 (3d Cir. 2000).

incarcerated in the Lebanon County Correctional Facility in Pennsylvania was charged ten dollars a day for housing costs under the Cost Recovery Program; however, he could not pay because he had no funds.¹⁹⁰ Rather than waive the fee because the inmate was indigent, the program instead created a negative account balance, to be transferred to a collection agency if left unpaid after the prisoner is released.¹⁹¹ Tillman left the prison over \$4,000 in debt.¹⁹² Overall, as seen above, most facilities across the country make some adjustments to shelter indigent prisoners from harsh reimbursement fees.

3. Due Process Challenges

Inmates who are not indigent have little hope of relief from unfair fees.¹⁹³ A number of prisoners have tried to challenge harsh reimbursement fees on the ground that the fees violate substantive due process rights, but these challenges are typically unsuccessful because often prisoners cannot satisfy the elements of a due process claim.¹⁹⁴ To show a deprivation of substantive due process, prisoners must prove that they have a property interest in the item appropriated and that the statute does not bear “a reasonable relationship to a permissive legislative objective” and is “discriminatory, arbitrary or oppressive.”¹⁹⁵

Because courts have refused to recognize that prisoners have a constitutionally protected property interest in their wages,¹⁹⁶

190. *Id.* at 414. Tillman was incarcerated from January 30, 1997 until August 21, 1997 and again between October 24, 1997 until finally discharged in July 1998. *Id.* at 413-14.

191. *Id.* at 414.

192. *Id.* As reimbursement programs work towards easing inmates back into society, some might question the goals of a Cost Recovery Program that purports to assist inmates but releases them \$4,000 in debt. Some might say that inmates like Tillman get out of jail but are still left in the hole.

193. *See, e.g.,* Solomos v. Jenne, 776 So. 2d 953 (Fla. Dist. Ct. App. 2000) (challenging the constitutionality of the one-time \$10 fee for uniforms and daily \$2 processing fee imposed on Florida state prisoners). *But see* Starr v. Governor, 802 A.2d 1227 (N.H. 2002); *supra* notes 124-27 and accompanying text.

194. *See, e.g.,* Ervin v. Blackwell, 733 F.2d 1282 (8th Cir. 1984). *But see* Schneider v. Cal. Dep't of Corr., 151 F.3d 1194 (9th Cir. 1998) (holding that prisoners did have a property interest in their wages; ultimately on remand the prisoners were denied their due process claim). *See infra* notes 246-66 and accompanying text.

195. Ilkanic v. City of Fort Lauderdale, 705 So. 2d 1371, 1372 (Fla. 1998). The Florida Supreme Court upheld the constitutionality of a \$50 per day per diem charge on prison inmates after finding that “imposing a per diem charge on convicted offenders clearly relates to a permissive legislative objective of reimbursing public bodies for the costs expended in incarcerating these persons . . . [and] that the flat charge of \$50 per day is reasonably related to the costs of incarceration.” *Id.* at 1372-73. *See also* Ervin, 733 F.2d at 1285 (“The issue therefore is whether Ervin possessed a protectable property interest—‘a legitimate claim of entitlement’—to the full amount of the salary he earned while enrolled in the program.” (citation omitted)).

196. *But see* Rudolph v. Cuomo, 916 F. Supp. 1308 (S.D.N.Y. 1996). In *Rudolph*, the court recognized that prisoners have a property interest in the wages they earned

prisoners' attempts to challenge the constitutionality of the expropriation of prison wages have been largely unsuccessful.¹⁹⁷ Absent a state statute creating property rights, prisoners have no basis for claiming deprivation of property.¹⁹⁸ As most states have statutes creating the programs and authorizing the fees, thus denying a property right, working prisoners have little or no chance of showing they are entitled to their wages.¹⁹⁹

In general, prisoners cannot prove that the fees imposed are "arbitrary and irrational."²⁰⁰ Per diem fees, medical co-pays, user fees and program fees all have a legitimate penological interest—they are implemented to defray costs, defer frivolous medical visits and instill a sense of responsibility in inmates.²⁰¹ Courts have rarely, if ever,

for work performed in the prison. The property interest stemmed from section 187 of New York's Corrections Law, which stipulates "[t]he department of correctional services shall adopt rules" that "shall provide for the payment of compensation to each inmate . . . based upon the work performed by such inmates." *Id.* at 1315 (emphasis omitted). This statute, "coupled with the longstanding policy of paying inmates and the acknowledgement that inmates were owed the wages in question vest the plaintiffs with some property interest in their wages for work already performed." *Id.* at 1316 (citation omitted). Other states and circuits dance around the notion that prisoners have a property interest in at least *some* of their wages, but none express the concept more explicitly than *Rudolph*. See, e.g., *Ervin*, 733 F.2d at 1286 ("[R]egulations clearly establish that Ervin can assert no legitimate claim of entitlement to the full amount of his salary.").

197. See *Washlefske v. Winston*, 234 F.3d 179, 185 (4th Cir. 2000) ("Indeed, at common law a convicted felon not only did not have a property right in the product of his work in prison, but he also forfeited all rights to personal property.").

One understandable reaction to such challenges is that prisoners do not have a right to work outside of prison, so they should not have a right to even a portion of their salary. This rationale was rejected in *Ervin*, 733 F.2d at 1282. Although the trial court had ruled that the prisoner had no liberty interest in a work release program, thus no property interest in the wages earned from the program, the Court of Appeals rejected that analysis. *Id.* at 1284-85. The court noted a strong difference between a challenge "denying [the prisoner] entrance or continued participation in the program" and one that contests "the conditions of the program as they affected his salary. The issue therefore is whether Ervin possessed a protectable property interest . . . to the full amount of the salary he earned while enrolled in the program." *Id.* at 1285. The *Ervin* court solidified the method of analysis; rather than looking to the statute authorizing the work release program, courts would need to look to the statute authorizing the appropriation of the fee. *Id.* at 1285-86.

198. See, e.g., *Christiansen v. Clarke*, 147 F.3d 655 (8th Cir. 1998); *Ervin*, 733 F.2d at 1286.

199. *But see Turner v. Nev. Bd. of State Prison Comm'rs*, 624 F. Supp. 318 (D. Nev. 1985). Even when there was no statute authorizing the collection of a fee for room and board, the court could not award damages to the prisoner because during the trial the legislature amended the statute. *Id.* at 321-22.

200. *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998).

201. *Ilkanic v. City of Fort Lauderdale*, 705 So. 2d 1371, 1373 (Fla. 1998) (holding that a fifty dollar flat per diem charge to prisoners is not a violation of the prisoner's substantive due process rights because "the flat charge of \$50 per day is reasonably related to the costs of incarceration"). See also *Auge v. N.J. Dep't of Corr.*, 743 A.2d 315 (N.J. Super. Ct. App. Div. 2000) (holding that defendant's act of imposing surcharge on inmate's purchases from the commissary does not violate substantive due process, relying on the holdings in *Christiansen* and *Ervin*); *Reynolds v. Wagner*,

invalidated a prison reimbursement fee on the grounds that it violated a prisoner's substantive due process rights.²⁰²

The one time a court did grant that a surcharge fee was unconstitutional, it was not on the grounds that it violated due process, but rather because the fee was a disproportionate tax.²⁰³ In *Starr v. Governor*,²⁰⁴ the New Hampshire Supreme Court ruled that a five percent surcharge on items purchased in the prison commissary was unconstitutional because it was a tax applied only to prisoners for the purpose of benefiting a third party—the victim's compensation fund.²⁰⁵ What was remarkable about the court's approach was its recognition that, "[a]s laudable as victim compensation may be, it is not appropriate for us to give that purpose any weight in deciding whether the surcharge is a tax."²⁰⁶ Although the plaintiffs in New Hampshire challenged the constitutionality of the surcharge on the basis that it was a disproportionate tax and not on the theory that it violated substantive due process, the ruling still stands out as one of

936 F. Supp. 1216 (E.D. Pa. 1996) (noting institution of medical co-payments does not violate due process).

202. See *Joseph v. Henderson*, 834 So. 2d 373 (Fla. Dist. App. 2003) (stating statute authorizing twenty dollar booking fee upon prisoner's return from appearing at a habeas corpus hearing violated the prisoner's substantive due process because it was arbitrary and irrational). Cf. *Allen v. Leis*, 213 F. Supp. 2d 819 (S.D. Ohio 2002). *Allen* is another example of a court using creative reasoning to shield prisoners from harsh fees. When an Ohio prison required a pre-trial detainee to pay a thirty-dollar "reimbursement fee"—at the time he was brought to prison—the court held that this fee was a violation of the detainee's substantive due process right. The court's rationale hinged on the timing:

According to *Black's Law Dictionary* "to reimburse" means "[t]o pay back, to make restoration, to repay that expended. . . . It is undisputed that any funds exacted from detainees pursuant to the Pay-For-Stay Program is collected immediately upon the detainee's arrival at the [facility]. It is also undisputed that the detainee's "obligation" to pay for the cost of being booked-in cannot be finally determined until after that detainee's conviction.

Id. at 830.

The court noted emphatically that a program requiring reimbursement for the costs of each individual inmate's incarceration cannot possibly justify collecting these fees before the inmate is even incarcerated; there would be no way to know what costs the inmate incurred. Simple logic, juxtaposed with a close statutory reading, yielded a favorable victory for the pre-trial detainee.

203. *Starr v. Governor*, 802 A.2d 1227 (N.H. 2002). In New Hampshire, all taxes must be distributed equally, so that the burden of the tax is "'proportionate and reasonable . . . equal in valuation and uniform in rate, and just . . . ' Taxes must be in 'due proportion, so that each individual's share, and no more, shall fall upon him.'" *Id.* at 1230 (citations omitted). Although the legislature may impose taxes on different classes of property, if the classification is "unreasonable or if its purpose is to discriminate," the tax will be invalidated. *Id.* A surcharge will be deemed a tax if it is an "enforced contribution to raise revenue and not to reimburse the state for special services rendered to a given party." Because the money raised from the surcharge went to the victim's compensation fund, it was deemed a tax. *Id.* at 1229.

204. 802 A.2d at 1227.

205. *Id.*

206. *Id.* at 1229.

the few where prisoners were protected from a harsh surcharge on the grounds that the surcharge was discriminatory and thus impermissible.²⁰⁷

However, even the *Starr* court's narrow understanding of the surcharge offers little hope for a scrutinizing look into prison fees. Not only is the ruling limited to the state of New Hampshire, but even within the state, the ruling would not apply to those surcharges that directly benefit the prisoners.²⁰⁸ Had the state deposited the money in a "general fund" that would have directly benefited the prisoners, the surcharge would have been legitimate.²⁰⁹ The rationale of a "direct benefit" has fueled numerous court decisions, particularly when various reimbursement fees were challenged on the basis of the Takings Clause, which requires just compensation for any personal property appropriated.²¹⁰ Courts have qualified benefits, or "just compensation," in a number of ways, from the existence of a general fund which offsets costs to the state to direct benefits of services and prison improvements.²¹¹ In *Washlefske v. Winston*,²¹² the Fourth Circuit held that the appropriation of the interest on inmates' prison accounts did not violate the Takings Clause because, among other things, the director could use the interest for the "benefit of the prisoners under his care."²¹³ At the prison where Washlefske was

207. *Id.* The tax was only imposed on items sold in prison commissaries; the same goods sold outside of prisons were not subject to the tax. Reasoning that there is nothing special about the goods sold in the prison to warrant a surcharge, and "[n]o legitimate reason has been presented to create this distinction . . . such a classification is impermissible." *Id.* at 1230.

The novelty of the *Starr* decision is apparent when compared to cases involving similar fees. In *Auge v. N.J. Dep't of Corr.*, 743 A.2d 315 (N.J. Super. Ct. App. Div. 2000), the New Jersey Superior Court ruled that a similar ten percent surcharge on items purchased in the prison commissary was constitutional on the grounds that it did not violate substantive due process. Even though the revenue from the surcharge was given to the victim's compensation fund, and the court itself characterized the surcharge as a "special sales tax," they nevertheless held that the surcharge was constitutional. *Id.* at 319. Later, in *Myrie v. Commissioner*, 267 F.3d 251 (3d Cir. 2001), the court held that a ten percent surcharge on commissary purchases was constitutional. It seems that the recent *Starr* decision is either going to usher in a new era or is an anomaly. Given the tendency for courts to rule in favor of DOCS and not the prisoners, *Starr* certainly stands out. This Note encourages courts to take a closer look into work release participation fees to ensure that they are constitutional. *Starr* approached this question from the perspective of a disproportionate tax prohibited by the New Hampshire state constitution. This Note seeks to address the problem under the auspices of the Takings Clause.

208. *Id.* at 1227. The court reasoned that, "a reimbursement measure for the services performed," where the "parties responsible for paying the [surcharge] benefited directly from those services," categorically was not a tax and was perfectly valid. *Id.* at 1230.

209. *Id.*

210. *See, e.g.*, *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000).

211. *Id.*

212. *Id.*

213. *Id.* at 181 (quoting Virginia's statute).

incarcerated, that interest was used specifically to “purchase library books, newspaper and magazine subscriptions, exercise equipment, items for family visiting day, and other ‘extras.’”²¹⁴ Because the prisoners ultimately benefited from the interest collected, the appropriation was not a violation of the Takings Clause.²¹⁵

But what would happen if the fees exacted were substantial and did not directly benefit the prisoners? If prisoners have a property interest in these fees and they were not justly compensated for any appropriations by the prison, then the prison violated the Takings Clause of the Fifth Amendment.²¹⁶ Prisoners who have challenged state prison reimbursement programs on the grounds that these fees violate the Takings Clause have not yet succeeded,²¹⁷ despite the fact that many prisons do not deposit the funds from the programs in a manner that directly benefits the prisoners.²¹⁸ Even more, the work release participation fee has yet to come under the scrutiny of the Takings Clause.²¹⁹

B. Work Release Challenges

As the work release participation fees gained in popularity, cases challenging their constitutionality grew in number. A few prisoners have attempted to challenge the fees on the grounds that they violated their substantive due process rights, but every court has thus far upheld the validity of participation fees.

214. *Id.*

215. *See generally id.*

216. The Takings Clause states that “private property [shall not] be taken for public use without just compensation.” U.S. Const. amend. V.

217. *See, e.g., Washlefske*, 234 F.3d at 179; *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194 (9th Cir. 1998); *Dean v. Lehman*, 18 P.3d 523 (Wash. 2001). *Schneider* was the closest to come to some recognition of a right. There, the Ninth Circuit held that despite an unambiguous statute in the California Penal Code, authorizing the state to “deposit the interest or increment accruing on [prisoners’ account from wages earned in prison] in the Inmate Welfare Fund,” a prisoner has a property interest in his wages and thus the following interest, which could sustain a takings claim. *Schneider*, 151 F.3d at 1196. On remand, the District Court failed to find a sufficient loss in the interest to sustain a takings claim. *Schneider v. Cal. Dep’t of Corr.*, 91 F. Supp. 2d 1316 (N.D. Cal. 2000). The Fourth Circuit failed to apply this ruling in *Washlefske*, and the trend of denying the takings challenge continues. *See infra* notes 246-78 and accompanying text.

218. *Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996). Funds collected from the surcharge imposed are deposited in the state general fund and not specifically allocated to the DOCS budget. *Id.* at 260.

219. Although the prisoners in *Turner* did challenge the employment fee, there was no statutory authority for it whatsoever. *Turner v. Nev. Bd. of State Prison Commr’s*, 624 F. Supp. 318 (D. Nev. 1985). Once the Nevada legislature amended the statute, the court did not find the need to further examine the merits of the takings claim. *See supra* notes 33-38 and accompanying text.

1. Due Process Challenges

One of the earliest cases to examine the constitutionality of the work release participation fee, *Ervin v. Blackwell*,²²⁰ established that a prisoner only has a property interest in his prison salary in so far as it is authorized by statute.²²¹ Ervin was an inmate under the control of the Missouri Division of Corrections (“MDOCS”) from 1969 to 1979. From 1976 until his release, he participated in the work release program and was employed as a computer operator.²²² After five months in the program the MDOCS began to deduct “maintenance costs” from his salary.²²³ By the time Ervin was released, the state had deducted \$7,983.63 from his total salary of \$33,857.58.²²⁴ Ervin challenged the deduction, claiming that it deprived him of his property without due process of law.²²⁵ The Eighth Circuit upheld the ruling that the deductions did not violate due process on the grounds that the Director of MDOCS was granted broad authority under Missouri Revised Statute section 216.115(3) to “make such rules and regulations, not in conflict with the laws of this state, as he may deem proper for the government and management of the institutions under the jurisdiction of the division.”²²⁶ This statute authorizes the work release program, and also establishes the right for the prison to condition participation in the program on a payment of a fee determined by a sliding scale.²²⁷ The court held that because the statute authorized the payment of maintenance costs, “[t]hese regulations clearly establish that Ervin can assert no legitimate claim of entitlement to the full amount of his salary” and, as such, “[t]here is

220. 733 F.2d 1282 (8th Cir. 1984).

221. *Id.* at 1286.

222. *Id.* at 1284.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 1285 (citing Mo. Rev. Stat. § 216.115(3) (1978) (repealed in 1982)).

227. Mo. Rev. Stat. § 216.115(3) (1978). The old statute provided that, “the inmate is willing to pay all or part of his maintenance costs if his income from working is sufficient, as determined by the slide scale attached to this policy.” *Ervin*, 733 F.2d at 1285. The current statute requires that

“[e]ach offender on work release shall pay a percentage of his wages, established by department rules, to a maximum of the per capita cost of offender support per month, to the department as maintenance. The money received from the inmate shall be deposited in the inmate fund and shall be expended pursuant to section 217.430.”

Mo. Rev. Stat. § 217.435(2) (2001). Section 217.430 provides, in part, that the fee exacted be “to a maximum amount not to exceed the average daily per capita costs for maintenance of all persons committed to the department during the previous fiscal year.” The money is deposited in an “Inmate Fund,” which is then used, “to support offenders in education programs, drug treatment programs, residential treatment facilities, other community-based sanctions, electronic monitoring, or in work or educational release programs.” *Id.*

simply 'no interest . . . for process to protect.'"²²⁸ Without a property interest in his salary, Ervin could not claim the state took his property without due process.²²⁹

Although the Eighth Circuit was correct in looking to the statute to find an authority for a property interest, its analysis was not thorough enough, rendering its holding flawed. The court ambiguously noted that Ervin did not have a "legitimate claim of entitlement to the *full amount of his salary*," never denying or asserting whether Ervin had a property interest in a portion of his salary that may mistakenly have been appropriated by the prison.²³⁰ The statute only authorized the payment of maintenance costs, "as determined by the slide scale."²³¹ According to the slide scale, the more money a participant earns, the more he must pay in maintenance costs. While the court asserted that "carrying out [the payment of maintenance costs] is hardly an 'arbitrary action of government' demanding of due process protection," it never weighed the arbitrary action of charging some prisoners—those who earn more money—a higher fee for what is essentially equal service.²³² A more thorough opinion would have included an inquiry into the constitutionality of the slide scale system when calculating the fee under the statute.

The Eighth Circuit had an opportunity to revisit the question of the work release participation fee in *Christiansen v. Clarke*.²³³ Christiansen, a former inmate in the Community Corrections Center in Lincoln, Nebraska, participated in the work release program for nine months, and upon his release, the prison withdrew \$2,790 from his account to cover the costs of his room and board.²³⁴ Like Ervin, Christiansen also challenged the deductions on the grounds that the prison deprived him of his property without due process. The Eighth Circuit upheld the opinion of the district court, affirming that the

228. *Ervin*, 733 F.2d at 1286 (citation omitted).

229. *Id.* Although Ervin lost, the court did give prisoners one small victory by rejecting the harsh analysis of the lower court. The court maintained that they "cannot agree with the district court that the issue presented is whether Ervin possessed a liberty interest in the work release program;" rather, the proper analysis is to question whether the prisoner had a property interest in the wages he earned. *Id.* at 1284. The former inquiry narrowed the possibility of a successful challenge, as it is almost impossible for a prisoner to show he has a "constitutional right to work release," as the test necessitates. *Ervin v. Blackwell*, 585 F. Supp. 680, 683 (W.D. Mo. 1983) ("Plaintiff's constitutional rights were not violated when his participation in the program was conditioned upon a maintenance payment because he had no constitutional right entitling him to participate in the program."). In choosing the latter inquiry, the court effectively widened the opportunity for recovery. Proving that a prisoner has a property interest in at least some of his wages is more probable than proving a prisoner has a constitutional right to work release.

230. *Ervin*, 733 F.2d at 1286 (emphasis added).

231. *Id.* at 1285.

232. *Id.* at 1286 (citation omitted).

233. 147 F.3d 655 (8th Cir. 1998).

234. *Id.* at 657.

former inmate “had no property interest in the wages that he earned while on work-release.”²³⁵ Again, the court relied on the authorization gleaned from a state statute; Nebraska Annotated Statutes sections 83-184(3) “gives the director of correctional services the authority to collect from work release inmates ‘such costs incident to the person’s confinement as the Director of Correctional Services deems appropriate and reasonable.’”²³⁶ Coupled with the statute, the fact that the inmate’s participation in the work release program was “voluntary, and because he exchanged a portion of his otherwise protected salary for participation in that program,” the court was convinced that Christiansen did not have a property right to the full amount of his salary.²³⁷

Although the *Christiansen* court stood by its ruling in *Ervin* and maintained that Christiansen did not have a property interest in the full amount of his wages, the court seemed reluctant to rule that the inmate had no recourse available.²³⁸ The court posited, “[i]f the prison violated state law by deducting funds for unauthorized expenses, then Mr. Christiansen may file a suit for conversion.”²³⁹ By drawing attention to the deductions from an inmate’s salary that perhaps do not fall into the category of “appropriate and reasonable,” the Eighth Circuit offered the inmates more hope of protection than the earlier *Ervin* court. Although the court did not further analyze the possibilities of bringing a due process claim alleging that the director deducted funds for unauthorized expenses, the *Christiansen* opinion is more thorough in its analysis than the *Ervin* opinion.

These are two of the very few cases challenging the work release participation fee on the grounds that it is a violation of due process; both have proven unsuccessful. Inmates need another means of protecting their rights, and perhaps that alternative method can be found in the Takings Clause. Work release participants have yet to challenge excessive participation fees using the Takings Clause, but that may be all the more reason to try.

2. Takings

The confused body of takings law intersects with work release in the area of the interest earned on prison accounts funded by prison wages. In *Schneider v. California Department of Corrections*²⁴⁰ and *Washlefske v. Winston*,²⁴¹ two courts, using opposite analyses,

235. *Id.*

236. *Id.* (quoting Neb. Rev. Stat. Ann. § 83-184(3) (1998)).

237. *Id.*

238. *Christiansen*, 147 F.3d at 657.

239. *Id.*

240. 91 F. Supp. 2d 1316 (N.D. Cal. 2000), *on remand from Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194 (9th Cir. 1998).

241. 234 F.3d 179 (4th Cir. 2000).

concluded that prisoners are not entitled to the interest earned on their accounts. In *Schneider*, the Ninth Circuit held that interest on prison accounts belonged to the prisoners, but on remand the U.S. District Court for the Northern District of California held that nevertheless the inmates were not entitled to the amount accrued. In *Washlefske*, the Fourth Circuit held that the interest belongs to the state.²⁴² Not surprisingly, neither opinion developed a concrete test for takings as applied to prison accounts.²⁴³

Following on the heels of *Eastern Enterprises v. Apfel*,²⁴⁴ *Schneider*, on remand from the Ninth Circuit, applied the three-factor test to uphold a California statute that denied inmates the interest accruing on their prison accounts.²⁴⁵ Inmates of Pelican Bay State Prison in California brought an action against the California Department of Corrections (“CDOCS”), alleging that the defendant violated the Takings Clause when it failed to pay the inmates the interest on their Inmate Trust Accounts (“ITAs”).²⁴⁶ The first issue, whether there was a private property interest in the interest accrued, was resolved by the Ninth Circuit.²⁴⁷ Using the reasoning that “interest . . . follows principal,” the Ninth Circuit found that the inmates did have a property interest in the amount accrued on their accounts because they had a property interest in their principal accounts.²⁴⁸ This property right existed despite the existence of a state statute²⁴⁹ explicitly granting the director of CDOCS permission to take the interest and deposit it in an Inmate’s Welfare Fund.²⁵⁰ Unsettled by

242. For a full discussion of these two cases, see *infra* notes 245-78 and accompanying text.

243. Given the muddled and sparse case law, this Note uses the scholarly work of William M. Treanor to show that applying the Takings Clause to a work release participation fee would be consistent with the original intent of the framers. See *supra* note 94 and accompanying text.

244. 524 U.S. 498 (1998). Notably, *Schneider* never mentions *Eastern* in the decision.

245. *Schneider*, 91 F. Supp. 2d at 1323-25.

246. Inmates had the option to place their earnings in either an Inmate Trust Account or a Passbook Savings Account. The former did not earn interest for the prisoners and the latter did. The inmates were not charged a fee for the maintenance of the account. *Id.* at 1319.

247. *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998).

248. *Id.* at 1199 (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998)). This holding created a circuit split between the Fourth and the Ninth Circuits. The Fourth Circuit held that interest earned on prison accounts was *not* deemed to be the property of the inmates because they had no property interest in the principal—which was comprised of the wages earned from work done in prison. *Washlefske v. Winston*, 234 F.3d 179, 185-86 (4th Cir. 2000). See *infra* notes 267-80 and accompanying text.

249. *Schneider*, 151 F.3d at 1195. California’s Penal Code stipulates that, “[t]he director shall deposit the interest or increment accruing on such funds in the Inmate Welfare Fund.” Cal. Penal Code § 5008 (West 2003). The Inmate Welfare fund “is used to improve prison conditions and provide prisoner programs, such as movies and library materials.” *Schneider*, 91 F. Supp. at 1319.

250. *Schneider*, 151 F.3d at 1199 (“Although an explicit statutory provision may

the possibility that a state could transform private property into public property through a properly crafted statute, the court was firm in its decision that the prisoners possessed a property right to their interest.²⁵¹ The Ninth Circuit remanded the case to the district court to determine whether “interest actually accrues on the prisoners’ ITA funds,” and if so, whether they could proceed with their Takings Clause claims.²⁵²

On remand, the district court ruled that the appropriation was not a violation of the Takings Clause.²⁵³ The court used the three-factor test, looking at the economic impact, the interference with the plaintiff’s investment-backed expectations and the character of the governmental action.²⁵⁴ The district court found that in withholding the interest, the statute did not have a significant economic impact on the inmates. First, CDOCS estimated that the interest earned on the accounts would come out to an average of four dollars owed to each prisoner, but that amount would be subsumed by the expense of running such a program.²⁵⁵ “[R]ough” estimates of the costs of operating the ITAs, estimated at around one million dollars annually, evidenced that the costs “clearly exceed the amount of interest which individual prisoners would receive if interest” were paid to them.²⁵⁶ Because CDOCS offered a valuable service to the prisoners free of charge, the inmates could not prove that “the lack of interest income operate[d] to prisoners’ overall economic detriment.”²⁵⁷ According to the court, the economic impact of the regulation actually helped the inmates rather than hurt them.²⁵⁸

In analyzing the investment-backed expectations of the prisoners, the district court reasoned that the inmates had a choice to place their money either in an interest bearing account (“Passbook Savings Accounts”) or a non-interest bearing account (“ITA”).²⁵⁹ Because the prisoners freely chose the latter account, they could not now argue that they “expected to earn interest on the money deposited in their

indeed be a *sufficient* condition to the creation of a constitutionally cognizable property interest . . . it assuredly is not a *necessary* one.” (citations omitted)).

251. *Id.* at 1200-01.

252. *Id.* at 1201.

253. *Schneider*, 91 F. Supp. 2d at 1316.

254. *Id.* at 1321-26.

255. *Id.* at 1321.

256. *Id.* at 1323 n.6.

257. *Id.* at 1324. The prisoners argued that the defendant’s estimates were “speculative and unreliable” but they were unable to offer estimates of their own. Their only argument was the Oregon Department of Corrections (“ODOCS”) had a similar program, but it did administer the interest to prisoners. Unable to provide the data for the ODOCS program either, the prisoners had no basis upon which to argue economic detriment. *Id.* at 1323-24.

258. *Id.* at 1325 (“Therefore, the Court concludes that application of the interest earned on excess ITA funds to the use of the Inmate Welfare Fund provided plaintiffs with a benefit rather than an unwarranted burden.”).

259. *Id.* at 1324.

ITAs.”²⁶⁰ Furthering the analysis, the district court also returned to the issue of subsumed costs. “[A]ny investment expectations plaintiffs may have would not be met by the institution of an interest-bearing ITA system,” because the costs of running the system would so outweigh the interest generated.²⁶¹ Because the inmates were aware that their accounts would not generate enough interest to cover the costs of running such a system, they could not claim that they expected any money in return.²⁶²

On the final issue, the character and benefit of the governmental action, the court again focused on the minimal return.²⁶³ Reasoning that this benefit would be swallowed by the cost of the program itself, the court had trouble qualifying the regulation as a detriment to the prisoners.²⁶⁴ Additionally, the fact that the prisoners themselves benefited from the pooled interest, “rather than transferring the benefits to a population outside of the prison” was enough evidence for the court to conclude that the application of the interest to the Inmate Welfare Fund provides the plaintiffs with a benefit and not a burden.²⁶⁵ As such, the statute was not deemed to be a violation of the Takings Clause.²⁶⁶

Immediately following the lower court’s ruling in *Schneider*, the Fourth Circuit faced a similar question in *Washlefske v. Winston* concerning an inmate who was in the custody of the Virginia Department of Corrections (“VDOCS”).²⁶⁷ In 1992, Washlefske earned an average of \$108.76 per month for his work in prison and had that income credited to a prison “spend account” run by the State Board of Corrections.²⁶⁸ Under the regulations that govern the maintenance of this bank account, the Director of the VDOCS was authorized to use, at his discretion, funds that were “not needed to meet the immediate requests of the prisoners . . . for the benefit of the prisoners under his care.”²⁶⁹ Washlefske argued that the State used the interest from these accounts without giving him just compensation in violation of the Takings Clause.²⁷⁰ The U.S. District Court for the

260. *Id.* at 1325. Although the Passbook Savings Account earns interest, there are certain limitations placed on the use of the account. Prisoners do not have access to the Canteen with the passbook, while they do with their ITAs. *Id.* at 1324-25.

261. *Id.* at 1325.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000).

268. *Id.* at 181.

269. *Id.* (quotation omitted).

270. *Id.* at 182. Although *Washlefske* does not concern the question of work release, its analysis of an inmate’s property interest in his prison salary, coupled with the analysis of the Takings Clause and monetary appropriations is especially relevant to the argument that the work release fee is a violation of the Takings Clause. For a

Eastern District of Virginia ultimately used the three-factor test to conclude that the appropriation of the interest did not violate the Takings Clause.²⁷¹ Because Washlefske and the other prisoners ultimately benefited directly from the interest taken, the court rejected the contention that there was an appropriation for public use that had an adverse effect on the prisoners.²⁷² At the prison where Washlefske was incarcerated, the interest on the pooled incomes was used specifically to “purchase items such as library books, newspaper and magazine subscriptions, exercise equipment, items for family visiting day, and other collectively used ‘extras.’”²⁷³ The court found this to be sufficient evidence of “just compensation.”²⁷⁴

On appeal, the Fourth Circuit revisited the question of whether Washlefske had a property interest in the wages he earned while in prison.²⁷⁵ Because under traditional rules of property law in Virginia, “an inmate has no property interest in any ‘wages’ from his work in prison except insofar as the State might elect, through statute, to give him rights,” the court turned to a statute.²⁷⁶ The court found that the applicable statute, Virginia Code section 53.1-44, “create[d] limited rights to funds given to prisoners for work performed while serving their prison terms.”²⁷⁷ This limited right did “not give him full rights . . . over the amounts ‘earned’ and credited to his accounts.”²⁷⁸ Without a property right to the full amount, Washlefske could not satisfy the requisite foundation for a takings claim: the need for a property interest.²⁷⁹ *Washlefske* patently rejected the Ninth Circuit’s contention that prisoners have a property right to their accounts funded by their wages, further constricting any available recourse for prisoners.²⁸⁰ Part III attempts to expand on an available recourse for prisoners using the Takings Clause as a means of relief.

III. A NOVEL CHALLENGE TO THE WORK RELEASE PARTICIPATION FEE

In the cases above, the inmates ultimately received the benefit of the contested property, whether it was in the form of a library for their prison, magazine subscriptions or a free accounting system.²⁸¹

more detailed discussion of the recent treatment of the Takings Clause and monetary appropriations, see *supra* notes 104-34 and accompanying text.

271. *Washlefske v. Winston*, 60 F. Supp. 2d 534, 541-43 (E.D. Va. 1999).

272. *Id.* at 542-43.

273. *Id.* at 536.

274. *Id.* at 542.

275. *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000).

276. *Id.* at 185.

277. *Id.*

278. *Id.* (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998)).

279. *Id.* at 185-86.

280. *Id.* at 186.

281. See *supra* notes 241-78 and accompanying text.

Like *Starr*,²⁸² *Schneider* suggested that, had the money not directly benefited the prisoners, the appropriations might have met a different fate.²⁸³ This speculation leaves open the possibility that if inmates can provide data as to the expenses and returns of prison programs to prove that the expenses do not match their fees, courts could be compelled to find a violation of the Takings Clause.²⁸⁴

In both *Schneider* and the district court opinion in *Washlefske*, the courts focus their takings analysis on the quality of the property itself.²⁸⁵ The source of the money, the amount of money appropriated, and its ultimate end were all crucial to the final rulings. Although *Schneider* and *Washlefske* employed the three-factor test in their respective takings analysis, the same point was used to avert each factor: The interest was a paltry sum and seemingly did not outweigh the costs of managing the program.²⁸⁶ In the event that a prison regulation appropriates a significant sum—one that outweighs cost and does not return the benefit to the prisoners in some alternate form—perhaps the courts would recognize a takings claim. Such a scenario exists under New York's work release participation fee.

A. Looking at New York's Fee Under the Three-Factor Test

If New York Correction Law section 860 and NYCRR section 1903.2(f)(3) were challenged under the Takings Clause, the statute and regulation would not survive the scrutiny of the three-factor test. Using a work release participant prisoner who earns \$50,000 a year as a model,²⁸⁷ this section examines the fee under each factor, ultimately concluding that the statute would fail to survive this test.

282. 802 A.2d 1227 (N.H. 2002). See *supra* notes 205-10 and accompanying text.

283. *Schneider v. Cal. Dep't of Corr.*, 91 F. Supp. 2d 1316, 1326 (N.D. Cal. 2000). Even more so than *Starr*, the court in *Schneider* hinged its decision on the existence of a "benefit" to the prisoners. *Id.* at 1320, 1324-26. The opinion is rife with references to the individual and collective benefit: "[The] system provides plaintiffs with a valuable service at no charge," then later, "the pooling of interest earned in the IWF offered plaintiffs benefits that each individual prisoner's interest—were it distributed—would not be able to provide." *Id.* at 1323-25. As the cost-benefit analysis constitutes most of the takings analysis, if such a benefit did not exist the court would have had no reason to deny the takings claim.

284. One theme reverberating throughout the *Schneider* opinion is the lack of cost estimates of the ITA program. *Id.* at 1323 ("Plaintiffs have not presented evidence countering or challenging defendant's cost estimates or showing that the cost to defendants in accounting for the funds in each inmates' [sic] ITA is not substantial, or that the offering of this service is not useful and valuable to plaintiffs.").

285. See *supra* notes 252-62, 267-68 and accompanying text.

286. See *supra* notes 256-79 and accompanying text.

287. This scenario is entirely likely; consider the paralegal at the large New York law firm introduced in the opening hypothetical. This Note was inspired by the grievance of a work release participant currently in the custody of a New York correctional facility, who is a paralegal employed by a large law firm in New York. The inmate earned \$37,000 net in the past year and paid almost \$7,500 in fees to DOCS. Next year his salary will increase, leaving him to pay more in fees than costs

1. Economic Impact

The first factor to examine is the economic impact of the twenty percent fee. Losing twenty percent of net salary would have a significant economic impact on the prison wage earner. The work release participant making \$50,000 per year would have to give DOCS \$10,000 to cover the costs of room and board incurred for twenty hours a week, plus administrative costs.

Even though the inmate would pay DOCS \$10,000, the economic loss must be measured by the amount he pays over and above the actual value of the services he receives. In *Schneider*, the court calculated the economic impact by looking at the value of the interest accrued subtracted from the value of the program that generated the interest.²⁸⁸ Because the cost to run the program far outweighed the interest accrued per prisoner, which was four dollars a year, the court held that there was no negative economic impact.²⁸⁹ DOCS reported that it costs \$7,500 per inmate per year to run the work release program.²⁹⁰ This participant, then, is paying \$10,000 for only \$7,500 worth of services. The true economic impact of the twenty percent fee is a negative \$2,500. A loss of over two thousand dollars, even after the inmate covers his cost of the program, is significant enough to withstand the inquiry into economic impact.

2. Investment-backed Expectations

To measure the investment-backed expectations of the inmate, courts such as in *Schneider* have required a look into the expectations of the inmate at the time they entered into the program to see if the inmate was aware of the appropriation.²⁹¹ This factor is difficult to satisfy at the prisoner level, as every potential work release participant must sign a contract requiring him or her to pay the twenty percent fee before they begin the program. The inmate could not have expected to collect more than eighty percent of their wages when they joined the program.

The inmate could argue, however, that he did not have an adequate alternative to signing the contract and giving up his wages.²⁹² Either he would be forced to give the twenty percent fee or he would not be allowed to participate in the program. Given the substantial difference in quality of life that the work release program affords over

that he incurs as a prisoner.

288. See *supra* notes 255-58 and accompanying text.

289. See *supra* note 258 and accompanying text.

290. *DOCS 2001 Report*, *supra* note 9, at 10.

291. See *supra* notes 260-63 and accompanying text.

292. Inmates tried to do the same in *Schneider v. California Department of Corrections*, 91 F. Supp. 2d 1316, 1324-25 (N.D. Cal. 2000), but failed.

prison, it seems unfair to deem the alternative of remaining a full-time prisoner an equal choice.

As another possible argument, the inmate could contend that he expected the full twenty percent of his salary to go towards room, board, and administrative costs. His expectations have not been met because DOCS is only applying seventy five percent of his \$10,000 to the expected program costs. The remaining \$2,500 is thus being used in an unexpected manner. Although this argument has not been tested in court, when coupled with the above contention that the inmate has no alternative, it could be sufficient evidence of an investment-backed expectation.

3. Character and Benefit of the Governmental Action

The twenty percent fee does in some ways benefit the prisoners, calling into question whether this third factor can be satisfied. According to the 2001 report, the 5,960 work release participants in New York paid a total of \$456,366 in “support and maintenance payments.”²⁹³ When the expenses and incomes are averaged together, the participants’ payments fall short of the overall costs of maintaining the program. But those work release participants who earn more than \$50,000 a year, and therefore pay more than \$7,500 in fees, pay above and beyond the actual costs they incur.²⁹⁴ As these inmates pay above and beyond the costs they actually incur, they do seem to carry an “unwarranted burden.”²⁹⁵ This burden is the direct result of a fee based on a percentage of salary, and not a flat fee accurately reflecting the administrative costs.

The fee also fails to “benefit” inmates. Unlike the inmates in *Schneider* or *Washlefske*, the inmates in New York State Prisons do not “directly” benefit from their twenty percent fees. The money is deposited in a state general fund which does not entirely benefit the prisoners.²⁹⁶ This system can “transfer[] the benefits to a population outside of the prison,”²⁹⁷ hardly qualifying as a benefit to the inmates.

B. Possible Opposition

The current takings analysis has been criticized on a number of levels, mainly on the grounds that the application of the clause is far

293. *DOCS 2001 Report*, *supra* note 9, at tbl.1.

294. It does not seem unlikely for a work release participant employed in New York to earn above \$37,500 net salary per year.

295. *Schneider*, 91 F. Supp. 2d at 1325.

296. New York State Department of Correctional Services, *Inmate Fees Collection Nears \$12M in Seven Years*, *DOCS Today* 9 (May 2002) [hereinafter *DOCS Today*] (noting that “the vast majority of [the work release] proceeds being funneled into the state general fund” have resulted “in some big financial benefits . . . for thousands of crime victims and New York state taxpayers”).

297. *Schneider*, 91 F. Supp. 2d at 1325.

too broad.²⁹⁸ Critics may argue that challenging a work release participation fee using the Takings Clause would further broaden the scope of the amendment, but even under the criticisms and proposed revisions to the “takings regime,”²⁹⁹ the work release participation fee would still be suspect under the Takings Clause.

For example, although Krotoszynski seemingly bars most forms of economic regulations from a takings inquiry,³⁰⁰ work release participation fees withstand his revised test. Because the state deducts the fee directly from the participant’s account, which is funded only by work release wages, the state clearly targets “a particular thing in order to accomplish a specific goal.”³⁰¹ There is no indifference here to the method of payment, as there could be with most economic regulations or taxes. The work release participants could not pay the obligated fee with other sources of cash. Clearly the regulation possesses some “expropriatory intent” as defined by Krotoszynski.³⁰²

Further, Krotoszynski’s test is premised on the theory that “‘expropriatory intent’ exists only when a government acts to possess property via conduct that, at the time the Framers drafted and ratified the Bill of Rights, would constitute a taking,” thus imploring a look into the historical intent of the Takings Clause.³⁰³ In looking to the historical underpinnings of the Takings Clause, it seems likely that work release participation fees would fall within its original intent.

Work release participation fees seem to fit inside the framework as proscribed by Treanor.³⁰⁴ It is possible to characterize prisoners as a “discrete and insular” minority requiring the protection of the early Takings Clause.³⁰⁵ Prisoners are certainly underrepresented in the political process.³⁰⁶ For the last six years New York Assemblyman McLaughlin has proposed a bill calling for a more fair percentage fee, and for the last six years the bill has been rejected.³⁰⁷

298. See Treanor, *supra* note 94, at 782 (arguing that the original intent of the framers was of a “limited scope”); see also Krotoszynski, *supra* note 98, at 715 (criticizing the recent case law which has “defined the scope of the Takings Clause in ever-broader terms, effectively transforming a protection against uncompensated eminent domain actions into a general-purpose guarantor of any and all private property rights”).

299. Treanor, *supra* note 94, at 782.

300. See *supra* notes 139-42 and accompanying text.

301. Krotoszynski, *supra* note 98, at 733.

302. See *supra* note 138 and accompanying text.

303. Krotoszynski, *supra* note 98, at 768.

304. See *supra* notes 143-44 and accompanying text.

305. Doretha M. Van Slyke, Note, *Hudson v. McMillian and Prisoners’ Rights: The Court Giveth and the Court Taketh Away*, 42 Am. U. L. Rev. 1727, 1727 (1993) (noting that “[p]risoners have been described as the starkest example of a ‘discrete and insular minority’” (citation omitted)).

306. Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 538 (1993) (“Currently, all but three states deprive incarcerated offenders of the vote . . .”).

307. See *supra* notes 86-88 and accompanying text.

As for Treanor's second factor,³⁰⁸ it may be difficult to argue that the burden of supporting prisoners and maintaining a prison is a public burden that, in all fairness, should be borne by the public and not the prisoners themselves. But on another level, the work release participants who earn a substantial income are forced to support other work release participants who earn less, indigent prisoners or simply non-working prisoners across the state.³⁰⁹ If twenty percent of a participant's salary is more than the cost he incurs as an inmate, then he effectively pays more than his share of the burden. The twenty percent scheme leaves a vulnerable minority open to exploitation. The track record for successful work release fee challenges in general, as outlined above, evidences the courts' reluctance to protect prisoners.³¹⁰

Not surprisingly, the work release participation fee would also be considered a taking under Epstein's construction of the clause.³¹¹ The need to collect money to offset the costs of the prison program is certainly not a legitimate exercise of the police power, as it does not protect against a harm. The next inquiry then, is whether the fee is put towards public use, and if so, whether the payor is justly compensated. Under Epstein's construction of public use and just compensation, the fee would necessarily fail. Although a portion of the fee is used to benefit the prisoners, the "surplus"—the amount above and beyond the actual cost of administration—is not distributed pro rata among the prisoners.³¹² Those prisoners who pay more in fees could be likened to Epstein's taxpayers in a higher bracket who pay more in taxes, but then do not get an increase in services from the government.³¹³ Epstein proposed the use of a flat tax to eliminate the need to equitably divide the surplus among the different taxpayers.³¹⁴ While this solution is improbable for government taxes, it is entirely feasible in the realm of the work release participation fee, as shown below.

C. *Cap Me if You Can*

It may be a while before the fee is challenged in the courtroom. Before the state incurs the time and expense of a lengthy trial, legislators can amend the statute to remedy the violation.³¹⁵ For the

308. See *supra* note 148 and accompanying text.

309. As their administrative fees are dumped into a state general fund, the money is used to offset costs across the state. *DOCS Today*, *supra* note 296, at 9.

310. See *supra* Part II.B.

311. See *supra* notes 148-66 and accompanying text.

312. See *supra* note 293 and accompanying text.

313. See Epstein, *supra* note 148, at 163.

314. See *id.* at 298; see *supra* note 165 and accompanying text.

315. As seen in *Turner*, legislators often amend problematic statutes before a judge can invalidate them. *Turner v. Nev. Bd. of State Prison Comm'rs*, 624 F. Supp 318 (D. Nev. 1985); see *supra* notes 34-38 and accompanying text.

past six years, the same New York State Assemblymen have proposed the same amendments to section 860, calling for some type of reform.³¹⁶ The proposed amendment eliminates most of the problems posed by the current law, mainly because it imposes a fee capped at \$100 per week.³¹⁷ The maximum amount the directors could collect from work release participants would be \$5,200, well below the \$7,500 it costs to run the program.

Because the corrections committee has yet to approve the changes, there is room for improvement on the proposed amendment. The New York Assembly should amend section 860 or NYCRR section 1903.2(f)(3) in either of two ways to avoid potential violations of the Takings Clause. The fee should be calculated (1) on a per diem basis or (2) as a percentage with a maximum capped at \$7,500 for the year—the cost per inmate to run the program. A per diem fee would accurately reflect the administrative, room and board costs that each inmate incurs. A percentage capped at a maximum fee would allow the prison to collect fees that are appropriate and reasonable.

1. Calculating Per Diem

If the administrator of the program were required to calculate the exact costs of room, board and administering the program, there would be little concern that the fee would be unfair for individual prisoners. Given the nature of the program, which allows some participating prisoners to leave the facility for up to five days at a time and requires that the participants pay all of their own expenses, it would not be unreasonable to calculate the per diem costs of each prisoner individually. Although having a committee painstakingly go through the numbers to produce an accurate fee may seem time consuming and costly, other states and counties have implemented this plan. Baltimore County requires that the fee charged not exceed the “actual costs incurred by the [c]ounty for food, travel, and other expenses related to the participant’s participation in the work release program.”³¹⁸ In Ohio the prisoner is given an itemized list of his cost of confinement after his release.³¹⁹ These facilities have worked out a program to accurately calculate the daily expenses of each prisoner, and New York could do the same.

2. Calculating a Fee Cap

If the review required for an itemized bill is too expensive or complicated for DOCS, there is a cheaper way to stay within the bounds of the Takings Clause. If the statute imposed a fee cap on a

316. *See supra* notes 85-91 and accompanying text.

317. *See supra* note 86 and accompanying text.

318. Md. Code Ann., Corr. Servs. § 11-705(j) (2002).

319. Ohio Rev. Code Ann. § 2929.37 (Anderson 2001).

flat or sliding scale, the administrators and directors would not need to worry that participants are paying more than their services demand. If it costs \$7,500 a year per prisoner to run the program, then the total yearly fee can be capped at that maximum. Another alternative is to collect the fees based on a sliding scale as New York once had, but cap the maximum at a level that is within the true costs incurred.

The fee cap is also lucrative. Those prisons that charge inmates per diem fees scaled according to income but capped at a maximum generate the most money in annual revenues.³²⁰ Macomb County and Oakland County charge prisoners between twelve and fifty-six dollars a day and ten and thirty dollars a day, respectively.³²¹ They receive \$575,000 and \$750,000 per year in revenues.³²² Milwaukee County prison in Wisconsin charges prisoners seventeen dollars a day and receives \$1,743,500 in annual revenues.³²³ No other prison on record collects more money than these three.³²⁴ The fee cap offers an efficient, fair, and lucrative alternative.

CONCLUSION

Reimbursement plans, on the whole, are good for everyone. The fees function as a strong incentive to stay out of prison, as criminals will no longer see jail as a place for "three free hots and a cot."³²⁵ They also defer the burden of supporting criminals away from the taxpayers and on to the prisoners. However, although the program is widely beneficial, it is important to monitor the growing legislation in the area to safeguard prisoners' rights. The current work release participation fee in New York is a good example of a program that has slowly evolved into a misappropriation of property. Those work release participants who have secured high-paying jobs now find themselves paying more in "administrative fees" than they expend as temporary inmates. The legislature's failure to reform the statutes authorizing these fees is evidence that work release participants, especially those with high-paying jobs, remain vulnerable to the political process. Honestly, how many people are lobbying for prisoners' rights? If the legislature will not safeguard basic property rights, perhaps the Takings Clause should.

320. *Fees Paid*, *supra* note 1, at 13-14 tbl.10.

321. *Id.* at 14.

322. *Id.*

323. *Id.*

324. *Id.* at 13-14.

325. S.P. Conboy, Note, *Prison Reimbursement Statutes: The Trend Toward Requiring Inmates to Pay Their Own Way*, 44 Drake L. Rev. 325, 349 (1996).



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Notes & Observations