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A Second Chance: Rebiography as Just Compensation

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A SECOND CHANCE: REBIOGRAPHY AS “JUST COMPENSATION”

Jamila Jefferson-Jones^{*†}

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I. INTRODUCTION

*There's no fresh start in today's world. Any twelve-year-old with a cell phone could find out what you did. Everything we do is collated and quantified. Everything sticks. We are the sum of our mistakes.*¹

Once upon a time, reinvention was an integral part of the myth of the American Dream: as the story went, one could leave the old country or old neighborhood, without looking back—fashioning one's own second chance by stepping into a newer, better identity, crafting a redesigned life story out of whole cloth if necessary.² As one legal historian noted, "American culture and law put enormous emphasis on second chances."³ For most of the 20th century, this notion of the second chance was also alive and well in the American criminal justice system,⁴ as rehabilitation was considered its primary goal.⁵

¹ THE DARK KNIGHT RISES (Warner Bros. Pictures 2012). In an early scene of *The Dark Knight Rises*, Selina Kyle—a.k.a. Catwoman—laments that her life choices are severely restricted by her criminal past, noting further that, "Once you've done what you had to, they'll never let you do what you want to." *Id.*

² See Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1112 (2002) ("American society is and has been a society of extreme mobility. . . . People often moved from place to place; they shed an old life like a snake molting its skin. They took on new lives and new identities.").

³ *Id.* at 1112.

⁴ Early American state legislatures promulgated laws in line with earlier European ideas that certain of the rights and privileges of citizenship should be denied to those convicted of criminal offenses. However, by the middle of the twentieth century "indirect forms of punishment were

The 1980s advent of the War on Drugs⁶ and the "tough-on-crime"⁷ policies that it spawned effectively ended second chances for those with criminal records.⁸ For the past four decades, not only have prison populations exploded,⁹ and sentence lengths increased dramatically,¹⁰ but also the number of collateral consequences of conviction faced by the formerly incarcerated¹¹

strongly criticized by legal reformers and restricted by state legislatures." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 17–18 (Marc Maurer & Meda Chesney-Lind, eds., 2002).

⁵ See *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

⁶ The War on Drugs is a comprehensive policy aimed at the reduction of the illegal drug trade. See generally ALEXANDER COCKBURN & JEFFREY ST. CLAIR, *WHITEOUT: THE CIA, DRUGS AND THE PRESS* (1999). It consists of the prohibition of drugs, the provision of military aid to and intervention in drug-producing countries, and the adoption of stringent enforcement policies. *Id.*

⁷ In many cases, prison populations soared as a result both of "sustained crackdown[s] on drugs and quality of life crimes." THE PEW CENTER ON THE STATES, *TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS* 23 (2012) (emphasis added), available at http://bridgemi.com/wp-content/uploads/2012/06/PSPP_Time-Served-Report_embargoed_June_6_2012.pdf. A Pew Center study revealed that a number of "tough-on-crime" measures added to the length of average prison stays and the number of incarcerated individuals. For instance, the Violent Crime Control and Law Enforcement Act of 1994 provided to states federal Violent-Offender Incarceration and Truth-In-Sentencing grants, provided that those classified as "violent offenders" served 85% of their original sentences. *Id.* at 24. This prompted some states to accelerate prison expansion in order to comply. *Id.* "Moreover, many states [enacted] habitual offender laws with sentence enhancements that . . . greatly boost[ed] time served in prison." *Id.*

⁸ President Ronald Regan officially declared the War on Drugs in 1982. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 5 (2010). However, Gerald López notes that this shift actually began in the 1970s. Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 *HASTINGS RACE & POVERTY* L.J. 1, 4–5 (2014).

⁹ See López, *supra* note 8, at 4–5 ("Beginning in the 1970s, the criminal justice system (federal and states) transformed its laws, its institutions, its policies, and its practices in ways that caused the rate of imprisonment to multiply in unprecedented terms over the next four decades."); see also Jelani Jefferson Exum, *Sentencing, Drugs, and Prisons: A Lesson From Ohio*, 42 *U. TOL. L. REV.* 881 (2011). But see Nicole D. Porter, *The Sentencing Project, On the Chopping Block 2013: State Prison Closures*, http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%202013.pdf (last visited Oct. 11, 2014) (documenting a modest 1.7% decline in the U.S. prison population from 2011–2012).

¹⁰ THE PEW CENTER ON THE STATES, *supra* note 7, at 2 (noting that prisoners released in 2009 served 36% longer terms than those released in 1990).

¹¹ I recognize the term "ex-offender" as pejorative and, therefore, throughout this Article use terms such as "previously-convicted" and "formerly incarcerated" to refer to those who bear "ex-offender status." I use the term "ex-offender status" to refer to the negative status of having been

upon release have proliferated.¹² Collateral consequence of incarceration or “invisible punishments,” as one scholar coined them “are those that, rather than having been imposed upon the convicted individual by a sentencing judge, ‘take effect outside of the traditional sentencing framework . . . by operation of law [and are, therefore] not considered part of the practice or jurisprudence of sentencing.’”¹³ They have functioned to “internally exile” previously-convicted individuals, cutting them off from mainstream society and thwarting reentry and reintegration.¹⁴

In his 2004 State of the Union Address, President George W. Bush signaled renewed hope for the availability of second chances for those with criminal records by announcing the Prisoner Reentry Initiative.¹⁵ This initiative was eventually codified into the Second Chance Act of 2007.¹⁶ Among the Second Chance Act’s listed purposes were “to assist offenders reentering the community from incarceration to establish a self-sustaining and law-abiding life by providing sufficient transitional services”¹⁷ and “to provide offenders in prisons, jails or juvenile facilities with educational, literacy, vocational, and job placement services to facilitate re-entry into the community.”¹⁸ The goals of the Second Chance Act, though laudable, are lacking. Approximately 650,000

convicted of or having pleaded guilty to a criminal offense, but will avoid using “ex-offender” when referring to actual people or classes of people. This decision is in keeping with the practice established in my previous article and with that of a growing number of scholars, lawyers, activists, and previously-convicted persons themselves of de-emphasizing the term “ex-offender” as pejorative and recognizing the harmful effects of such labeling. See Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 499 n.8 (2013).

¹² For example, in the ten-year period from 1986-1996, the number of states disenfranchising those convicted of felonies, terminating their parental rights, making felony conviction a ground for divorce, restricting the rights of the previously convicted to hold public office and/or restricting their right to own or possess firearms increased in each of the aforementioned categories. Travis, *supra* note 4, at 22.

¹³ Jefferson-Jones, *supra* note 11 (quoting Travis, *supra* note 4, at 16).

¹⁴ Travis, *supra* note 4, at 19.

¹⁵ George W. Bush, U.S. President, Report on the State of the Union Delivered to a Joint Session of Congress, 150 Cong. Rec. S33 (daily ed. Jan 20, 2004), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040120-7.html> (“Tonight I ask you to consider another group of Americans in need of help. This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can’t find work, or a home, or help, they are much more likely to commit crime and return to prison. So tonight, I propose a four-year, \$300 million prisoner re-entry initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. America is the land of second chance [sic], and when the gates of the prison open, the path ahead should lead to a better life.”).

¹⁶ Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified at 42 U.S.C. §§ 17501–17555 (2013)).

¹⁷ 42 U.S.C. § 17501(a)(5) (2013).

¹⁸ *Id.* § 17501(a)(6).

people are released from state and federal prisons each year.¹⁹ Additionally, 20% of the United States population has a criminal past.²⁰ The civil disabilities resulting from the various collateral consequences of incarceration that they face—including the collateral consequence of damaged reputations—are nothing short of debilitating. Given this reality, the Second Chance Act's goals cannot be fully realized without the added measure of "rebiography," which in the reentry context is the ability of one with a criminal record to "rewrite his or her history to make it more in line with his or her present, reformed identity."²¹

A measure of rebiography already exists in other areas of the American legal system. Rebiography, for instance, is institutionalized in the sealing of juvenile records and the expiration of negative credit histories for those who have filed bankruptcy.²² However, as criminologist Shadd Maruna notes, this "autobiographical creativity" is not currently extended to the "[c]ommon criminal."²³ Rather, it is reserved for "people we believe in—a juvenile [or] a debtor . . ."²⁴ Yet, "[w]ithout this [same] right [of rebiography], ex-offenders will always be ex-offenders, hence outsiders, or the Other."²⁵ Thus, the goals and purposes of reentry efforts, like those supported by the Second Chance Act, will remain frustrated.²⁶

In *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*,²⁷ I couched the need for rebiography upon reentry in terms of the ongoing reputational damage suffered by the previously convicted. I then applied a regulatory takings analysis to that reputational damage. In doing so, I analyzed the critical property-like characteristics of reputation, concluding that reputation is a form of "status

¹⁹ *Prisoners and Prisoner Re-Entry*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/archive/fbci/progmnu_reentry.html (last visited Oct. 11, 2014).

²⁰ Ben Geiger, Note, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1193 (2006).

²¹ SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 164 (2001).

²² *See id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 165. Maruna goes on to warn that "[t]his selective application of the 'forgive and forget' doctrine can recreate the supposed dichotomy between Us and Them." *Id.* at 164.

²⁶ *See, e.g., id.* at 9–10 (citing "rebiographing" as integral to a previously-convicted person's efforts to "make good," which is defined as "find[ing] reason and purpose in the bleakest of life histories"); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 219 (2003) ("[W]iping the slate clean or allowing a 'legal rebiographing' is critical to offenders who have made the decision to desist from crime.").

²⁷ Jefferson-Jones, *supra* note 11.

property”²⁸ and that such continued stigma attachment and reputational damage constitutes a “taking” without just compensation.²⁹ I then argued that rebiography can serve as “just compensation” for this type of taking.³⁰

Rebiography as “just compensation” for the reputational taking suffered by the previously convicted leaves open two questions: First, does the takings analysis have the same outcome regardless of the offender? In other words, does an offender have to try to use her reputation in a positive manner and be prevented from doing so in order to have a takings claim, or is it enough to say that requiring disclosure of criminal history is a taking across the board that always requires just compensation? Secondly, what is the relationship between “rebiography” and “privacy”?

With regard to the former question, it appears a stronger argument may be made that only one who has taken steps to rehabilitate or who cannot find employment because of discrimination based upon her past criminal convictions has experienced a taking, rather than a blanket rule that any required disclosure of criminal history yields a takings claim. As far as privacy is concerned, one must weigh the size of the transgression against the need for public accountability. In the case of those who have criminal records, the general question is when privacy should be restored and, more particularly, when or whether a certain individual has met the criteria for restored reputation through the restoration of privacy—rebiography being the tool of that restoration.

In *A Good Name*, I established continued stigma attachment as a governmental taking. I now seek to show that “just compensation” is owed to the previously convicted and that the way to provide it is through establishing a “rebiography right,” stemming from the taking of a constitutionally cognizable property right. In Part II of this Article, I review the application of the Takings Clause to the reputational damage suffered by the previously convicted and apply this analysis to actual cases. In Part III, I explain why rebiography is necessary given statistics on the previously convicted’s employment prospects and recidivism. I go on to examine legislative and judicial options for rebiography.

²⁸ See *id.* at 501 n.16 (“Most simply put, ‘status property’ is that property which is linked to identity.”); see also Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2154, 2159 (2013) (defining “status property” as “a reputational interest that endows the owners with certain privileges flowing from a public conception of their identity and personhood,” and “that can be both analogized to conventional forms of property and literally converted to those forms”).

²⁹ Jefferson-Jones, *supra* note 11, at 508–25.

³⁰ *Id.* at 525–27.

II. A REVIEW OF THE APPLICATION OF THE TAKINGS CLAUSE TO THE REPUTATIONAL DAMAGE SUFFERED BY THE PREVIOUSLY CONVICTED

A previously-convicted individual who is seeking to establish a claim pursuant to the Takings Clause³¹ must identify (1) the property taken; (2) the governmental conduct that resulted in the taking; and (3) the just compensation that would remedy the taking.³² In *A Good Name*, I argued that the property taken was the previously-convicted person’s reputation—a type of “status property.”³³ Next, I contended that the damage to reputation suffered by those with criminal records—even after their terms of incarceration or other criminal punishment have been completed—is the governmental conduct that results in a taking.³⁴

In this Article, I argue that rebiography is the just compensation due for the taking suffered by the previously convicted. Section A of this Part serves as a review of the regulatory takings analysis in *A Good Name* and introduces the concept of examining these takings under the Unconstitutional Conditions Doctrine. Part B applies these analyses to actual cases.

A. *The Regulation of the Reputations of the Previously Convicted “Goes Too Far”*

The damage to reputation suffered by those with criminal records results in a “regulatory taking”—one in which the government has regulated the property in question to such a great extent as to constitute a constructive taking of that property.³⁵ In the reentry context, the government conduct resulting in this regulatory taking is the unfettered imposition of collateral

³¹ The Takings Clause of the Fifth Amendment provides, “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of . . . property, without due process of law . . .”).

³² See John Martinez, *Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property,”* 59 HASTINGS L.J. 515, 547 (2008).

³³ Jefferson-Jones, *supra* note 11, at 509 (“A takings analysis that analogizes the collateral consequence of stigma attachment and continued reputational damage to an impermissible taking must first establish reputation as cognizable private property under the Takings Clause of the Fifth Amendment.”). See *id.* at 510–19 for an in-depth discussion of the property-like characteristics of reputation.

³⁴ *Id.* at 508, 519–25.

³⁵ The idea of the “regulatory taking” was first introduced by the Supreme Court in *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

consequences of conviction, generally, and, specifically, the collateral consequence of ongoing reputational damage.³⁶

In *Pennsylvania Coal Co. v. Mahon*,³⁷ Justice Oliver Wendell Holmes, Jr., writing for the Court, famously concluded that, with regard to government regulation of property rights, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³⁸ Justice Holmes did not give specific guidance regarding what "go[ing] too far" might consist of short of the per se taking that results when the regulation can be categorized as "appropriating or destroying" the property in question.³⁹ In *A Good Name*, however, I concluded that in the reentry context, "[o]nce reputation is established as property, then the government conduct can be identified, not only as the attachment of stigma,⁴⁰ but as the continued assault on reputation by the ongoing attachment of stigma, even after one's sentence has been served"⁴¹

1. Per Se Takings

The Supreme Court has formulated three specific per se takings rules: (1) the permanent physical occupation rule; (2) the harm exception defense;⁴² and (3) total wipeout or complete deprivation of all economic value.⁴³

³⁶ See Jefferson-Jones, *supra* note 11, at 502–04 (discussing the expansion of the definition of "collateral consequences" to include "informal, non-legal and social consequences of incarceration").

³⁷ 260 U.S. 393 (1922). The issue in *Pennsylvania Coal* was whether the effect of the Kohler Act—which prohibited the mining of anthracite coal in a manner that, among other things, would cause subsidence to any residential structure—amounted to a taking. The Court held that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414.

³⁸ *Id.* at 415.

³⁹ *Id.* at 414–15.

⁴⁰ A stigma is a "socially inferior attribute," which is "attached to" or "marks" the carrier as one who deviates from prevailing social norms. Scholars classify the stigma carried by those with ex-offender status as "conduct" or "moral" stigma. Conduct stigma is distinguishable from the other two categories of stigma—(1) "physical" stigma related to physical deformity or disability and (2) "tribal" stigma resulting from racial or ethnic difference—in that the carriers of these stigmas are not accorded blame for their attachment. Conduct stigma, on the other hand, taints the carrier as one possessing weak character. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 4–5 (1963).

⁴¹ Jefferson-Jones, *supra* note 11, at 509–10.

⁴² *Penn Cent. Transp. Co. v. City of N. Y.*, 438 U.S. 104, 124 (1978).

⁴³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

i. *Permanent Physical Occupation*

Justice Thurgood Marshall, writing for the majority in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁴⁴ advised that "a physical intrusion by government [is] a property restriction of an unusually serious character for purposes of the Takings Clause . . . [and] that when the physical intrusion reaches the extreme form of a *permanent* physical occupation, a taking has occurred."⁴⁵ Although reputational damage does not constitute physical invasion, the character of regulation and permanent damage through stigma attachment and collateral consequences is, nonetheless, akin to this type of per se taking. *Loretto* speaks to the *permanence* of the invasion of property rights, not just to the physical nature of such an invasion. "Thus, if one considers the permanence of damaged reputation, then the government's regulation of the reputations of the previously convicted can, at least conceptually, be akin to such a per se taking."⁴⁶

ii. *The Harm Exception Defense*

"Public safety" is the oft-identified "public use" or "public purpose"⁴⁷ of collateral consequences of conviction and the continued attachment of ex-offender status to the previously convicted.⁴⁸ Historically, this exercise of the state's police power has provided the state with a per se harm exception defense, the result of which was that the exercise of such power was deemed to not be a taking for which just compensation is due.⁴⁹ The modern view of the Takings Clause, however, is that its public use requirement is "coterminous with the scope of a sovereign's police powers."⁵⁰ Such a view clears the way

⁴⁴ 458 U.S. 419 (1982).

⁴⁵ *Id.* at 426 (emphasis added).

⁴⁶ Jefferson-Jones, *supra* note 11, at 522.

⁴⁷ The "public use" language of the Takings Clause has been interpreted to mean "public purpose," rather than actual use by the public. See *Kelo v. City of New London, Conn.*, 545 U.S. 469, 479–80 (2005).

⁴⁸ See, e.g., FLA. STAT. ANN. § 112.0111(1) (West 2014) ("The Legislature declares that a goal of this state is to clearly identify the occupations from which ex-offenders are disqualified based on the nature of their offenses . . . in a manner that serves to preserve and protect the . . . safety . . . of the general public.").

⁴⁹ See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 668 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking."); see also Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70 (1986) ("[T]he outer limit of the police power has traditionally marked the line between *noncompensable* regulation and compensable takings of property Legitimately exercised, the police power requires no compensation." (emphasis in original)).

⁵⁰ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

for the application of the factors that the Supreme Court identified in *Penn Central Transportation Co. v. City of New York*⁵¹ to the regulation of and subsequent damage to reputation suffered by the previously convicted. Thus, the question to be answered in analyzing whether a taking has happened to a previously-convicted person is not whether the harm exception defense applies because of a valid exercise of the police power, but rather, whether the police power so exercised “goes too far” under a *Penn Central* analysis.

Ex-offender status represents the merger of both identity and status⁵² to create a “master status”⁵³ that constrains liberty through the all-encompassing imposition of collateral consequences of conviction. “This is because damage to reputation as a collateral consequence of conviction is the result of government regulation that restricts property rights in a manner that significantly diminishes their value and causes substantial, but, arguably, compensable harm to the affected individual.”⁵⁴ In doing so, this regulation of property rights in reputation through collateral consequences, in effect, “goes too far.”⁵⁵

⁵¹ 438 U.S. 104 (1978). In *Penn Central*, the owner of Grand Central Terminal in New York City alleged that, by denying it a permit to build a skyscraper atop the terminal, the City had affected a regulatory taking of its air rights. The Court disagreed with the owner. In doing so, it noted that, in order to make such a determination, it is necessary to balance the three factors, each of which is discussed in depth in Part II.A.2. of this Article.

⁵² In her celebrated law review article *Whiteness as Property*, Cheryl Harris argues that “whiteness” is “status property” and, as such, functions as “identity, status, and property, sometimes singularly, sometimes in tandem.” Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1725 (1993). In *A Good Name*, I argue that ex-offender status evolves from a mere legal status into an aspect of identity. Jefferson-Jones, *supra* note 11, at 510.

⁵³ “The master status of an individual is one which, in most or all social situations, will overpower or dominate all other statuses Master status influences every other aspect of life, including personal identity. Since status is a social label and not a personal choice, the individual has little control over his or her master status in any given social interaction.” JOHN SCOTT & GORDON MARSHALL, A DICTIONARY OF SOCIOLOGY (3d ed. 2009), available at <http://www.oxfordreference.com/view/10.1093/acref/9780199533008.001.0001/acref-9780199533008-e-1365> (defining “master status”); see also TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 125 (2007) (“It is clear that being convicted of a crime and sent to prison carries a stigma, and being a criminal can become a person’s master status.”).

⁵⁴ Jefferson-Jones, *supra* note 11, at 508.

⁵⁵ In *Pennsylvania Coal*, Justice Oliver Wendell Holmes, Jr. noted that “if [government] regulation [of property rights] goes too far it will be recognized as a taking.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (emphasis added). The notion of government regulation “go[ing] too far” is explored in more detail herein.

iii. *Complete Deprivation of All Economically Beneficial or Productive Use*

In *Pennsylvania Coal*, Justice Holmes alluded to a regulation that “appropriates or destroys” property as a per se taking.⁵⁶ This per se rule was clarified by the Court in *Lucas v. South Carolina Coastal Council*.⁵⁷ Here, the Court held that a taking occurs “where regulation denies all economically beneficial or productive use” of the regulated property.⁵⁸ Thus, in the extreme case, where a total wipeout of reputation has been exacted upon a previously convicted person, a per se taking shall have occurred.⁵⁹ Such a 100% diminution in value must be calculated in the same manner as lesser diminutions.

2. The Application of the *Penn Central* Multi-Factor Balancing Test

With the public purpose of collateral consequences of conviction identified as “public safety,” courts may proceed to analyze a previously-convicted individual’s takings claim by applying the *Penn Central* multi-factor balancing test. This multi-factor test focuses on: (1) the character of the regulation; (2) the extent of the law’s interference with distinct investment-backed expectations; and (3) the diminution in value of the property resulting from the regulation.⁶⁰

The character of the regulation of the reputations of the previously convicted results in permanent damage to the “status property” of reputation.⁶¹

⁵⁶ *Id.*

⁵⁷ 505 U.S. 1003 (1992).

⁵⁸ *Id.* at 1015.

⁵⁹ A case of such a total wipeout of reputational value can be found among those labeled as “sex offenders.” The most extreme case is that of the over 100 registered sex offenders who were forced to live in a makeshift camp under the Julia Tuttle Causeway in Miami, Florida from 2006 until 2010 because a local ordinance prohibited them from living within 2,500 feet of schools, parks, bus stops, or daycare centers. See Charles Rabin & Scott Hiaasen, *From Julia Tuttle Bridge to Shorecrest Street Corner: Miami Sex Offenders Again Living on Street*, PALM BEACH POST, Mar. 12, 2012, available at <http://www.palmbeachpost.com/news/news/crime-law/from-julia-tuttle-bridge-to-shorecrest-street-corn/nLhZz/> (last visited Oct. 11, 2014).

⁶⁰ *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124–25 (1978).

⁶¹ The *Penn Central* Court found that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government.” *Id.* at 124. The easy case of physical invasion was further clarified by the Court’s opinion in *Loretto*, in which the Court decided that any permanent physical occupation of property is a per se taking, regardless of the public interest served by the occupation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). As I noted in *A Good Name*, “Because the reputation of the previously convicted person is intangible property, it cannot be physically invaded by the government, like the landlords’ buildings in *Loretto*. However, as noted above, *Loretto* speaks,

An owner's investment-backed expectations, as envisioned by the *Penn Central* Court, must be "distinct," rather than merely hypothetical. Thus, the diminution in value test⁶² queries "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation."⁶³ Consequently, in instances where the previously-convicted person has made an investment in her own rehabilitation—where, for instance, she has participated in drug or alcohol treatment programs or availed herself of educational or vocational training opportunities—her actual investment-backed expectations of her ability to reintegrate upon reentry are certainly "distinctly perceived [and] sharply crystallized." Finally, the diminution in value of the previously-convicted individual's reputation must be analyzed in conjunction with these same investment-backed expectations.⁶⁴

The traditional measure of just compensation in physical takings claims is money damages, which are calculated by determining the market value of the property in question.⁶⁵ However, in regulatory taking claims, just compensation is calculated using the "fraction of value destroyed" test, which compares the value of the subject property prior to the regulation with its post-regulation value.⁶⁶ Because the status property taking suffered by the previously convicted is regulatory in nature and the property taken is incorporeal and market-inalienable, the "fraction of value destroyed" test is more appropriate for evaluating "just compensation" in this context.

In some cases, it may be possible, to some extent, to quantify the lost economic opportunity of a particular previously-convicted person. However, it must be remembered that a calculation of lost earnings does not tell the whole story. Such calculation cannot take into account, for instance, unrealized or forgone opportunities.

not just to the physical nature of the invasion, but also to the permanence of the invasion caused by the government regulation." Jefferson-Jones, *supra* note 11, at 522.

⁶² Courts determine diminution in value by comparing the value of the subject property prior to the regulation with its post-regulation value. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1232-33 (1967) (describing the "fraction of value destroyed" test).

⁶³ *Id.* at 1233.

⁶⁴ See *Penn Cent. Transp. Co.*, 438 U.S. at 127.

⁶⁵ See *United States v. Reynolds*, 397 U.S. 14, 16 (1970) ("'[J]ust compensation' means the full monetary equivalent of the property taken."); see also *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) ("'[J]ust compensation' has been held to be satisfied by payment of market value.").

⁶⁶ See Michelman, *supra* note 62, at 1232-33 ("The 'fraction of value destroyed' test . . . appears to proceed by first trying to isolate some 'thing' owned by the person complaining Once having thus found the denominator of the fraction, the test proceeds to ask what proportion of the value or prerogatives formerly attributed by the claimant to that thing has been destroyed by the measure.").

3. The Unconstitutional Conditions Doctrine

In addition to applying the *Penn Central* multi-factor balancing test in its analysis of a previously-convicted person’s takings claim, a court may also find the unconstitutional conditions doctrine to be instructive. This doctrine was initially introduced in *Nollan v. California Coastal Commission*⁶⁷ and has been applied in the context where the state has placed a condition on the development of property. The doctrine was further refined by the Court in its decision in *Dolan v. City of Tigard*.⁶⁸ The Supreme Court’s analysis of unconstitutional conditions includes (1) whether an “essential nexus” exists between the proposed condition and the legitimate interest of the state⁶⁹ and, if such an “essential nexus” does exist, (2) whether there is a “rough proportionality” between the state’s justification for the condition and the condition itself.⁷⁰ While *Nollan* and *Dolan* each took place in the land-use context, there is a strong argument that the conditions placed on the use and enjoyment of reputational property—especially the rehabilitated reputational property—of the previously convicted lack both the essential nexus and rough proportionality required by the unconstitutional conditions doctrine. In *Nollan*, the Supreme Court confirmed that, when the government places restrictions on the use of private property, such restrictions must substantially further a governmental purpose.⁷¹ In *Dolan*, the Court noted that “[o]ne of the principal purposes of the Takings Clause is to ‘bar Government from forcing some people alone to bear public burden which, in all fairness and justice, should be borne by the public as a whole.’”⁷²

i. Essential Nexus

In *Nollan*, property owners brought an action against the California Coastal Commission because it had conditioned their rebuilding permit on a requirement that the owners provide an easement across their beachfront

⁶⁷ 483 U.S. 825 (1987).

⁶⁸ 512 U.S. 374 (1994). Even more recently, the Court noted that the unconstitutional conditions doctrine applies both when permission to develop property has been denied and when the exaction involved is monetary. *Koontz v. Saint Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). In *Koontz*, the Court discussed the policy behind the unconditional conditions doctrine, which included the prevention of coercion between the state and the individual property owner, as well as a balancing of costs and harm between the public and individual property owners. *Id.* at 2594–95.

⁶⁹ *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 386.

⁷⁰ *Dolan*, 512 U.S. at 386, 391.

⁷¹ See *Nollan*, 483 U.S. at 834–35 (noting that “a broad range of governmental purposes and regulations satisfies [the] requirement[]” that a “legitimate state interest” be “substantially advanced”).

⁷² *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

property.⁷³ The purpose of the easement was to permit the public to access the two adjacent public beaches on either side of the Nollans' property.⁷⁴ The Commission claimed that the condition was necessary in order to "protect[] the public's ability to see the beach, assist[] the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and prevent[] congestion on the public beaches."⁷⁵ The Supreme Court did not find there to be an essential nexus between the condition and the state's interest. The Court, therefore, held that the Commission could not, without paying just compensation, condition the grant of the permit on such a requirement.⁷⁶ Because the Commission failed to meet the "essential nexus" requirement, the Court did not reach the second question of the unconstitutional conditions analysis.⁷⁷

ii. Rough Proportionality

The second analytical prong of the unconstitutional conditions doctrine was addressed by the Court in *Dolan*. In *Dolan*, the Planning Commission of the City of Tigard, Oregon conditioned the approval of a landowner's application to expand her store and pave her parking lot upon her agreeing to dedicate land for (1) a public greenway along an adjacent creek and (2) a public pedestrian/bicycle pathway.⁷⁸ The Planning Commission claimed that the purpose of the greenway was to minimize flooding associated with the paving and the resulting increase in impervious surfaces and that the public pathway was needed to minimize traffic and congestion.⁷⁹ The Supreme Court found that both dedication requirements constituted an uncompensated taking of property despite the fact that there did exist an essential nexus between the state's interest and the conditions imposed.⁸⁰ Rather, the Court found that the burden imposed on the property owner by the condition was not roughly proportional when balanced against the state's interest, and was unduly cumbersome.

⁷³ *Nollan*, 483 U.S. at 827.

⁷⁴ *Id.* at 827–28.

⁷⁵ *Id.* at 835.

⁷⁶ *Id.* at 841–42.

⁷⁷ *See Dolan*, 512 U.S. at 386 ("We addressed the essential nexus question in *Nollan*.").

⁷⁸ *Id.* at 380–82.

⁷⁹ *Id.*

⁸⁰ *Id.*

B. Applying Penn Central to Actual Cases

The *Penn Central* factors can be applied to actual cases in order to determine whether a previously-convicted person has suffered a regulatory taking of his or her reputation. The following examples are cases brought in the State of New York by three different, previously-convicted individuals. Each case centers specifically on the deprivation of an employment-related opportunity. Although collateral consequences touch many different areas of a previously-convicted person's life,⁸¹ employment, or rather the lack of employment, is a leading indicator of one's reentry success. As one scholar noted, "Without employment, [the previously incarcerated] are three to five times more likely to commit a crime than are those who gain employment after prison."⁸²

Each case detailed below was brought in what is known as an "Article 78 proceeding." Sections 750 to 755 of the New York Correction Law provided limited protection to previously-convicted individuals who claim that they have been subjected to employment discrimination because of their criminal records.⁸³ The Correction Law applies to private and public employers and to public agencies to which one must apply for a professional or vocational license.⁸⁴ Actions brought against public entities pursuant to the Correction Law are governed by Article 78 of the New York civil practice law and rules.⁸⁵ Section 752 of the Correction Law provides:

No application for any license or employment . . . shall be denied . . . by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses.⁸⁶

This provision has two exceptions: (1) if "there is a direct relationship between one or more of the previous criminal offenses and the specific license or

⁸¹ Collateral consequences of conviction include, for example, voting limitations and prohibitions, and exclusions from public benefits, public housing, loans and grants for higher education, occupational and professional licenses and certain employment. See generally Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 586–87 (2006) (chronicling housing, employment, and voting rights barriers faced by the previously convicted).

⁸² Matthew C. Sonfield, *Entrepreneurship and Prisoner Reentry: The Development of a Concept*, 35 SMALL BUS. INST. RES. REV. 193, 193 (2008).

⁸³ See N. Y. CORRECT. LAW §§ 750–755 (McKinney 2007).

⁸⁴ *Id.* § 751.

⁸⁵ *Id.* § 755.

⁸⁶ *Id.* § 752.

employment sought”; and (2) if “the issuance or continuation of the license or granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals of the general public.”⁸⁷

Section 753(1) lists eight factors that must be considered in making a determination pursuant to section 752.⁸⁸ Moreover, under section 753(2) of the Correction Law, “the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant.”⁸⁹ A certificate of relief from disabilities may be granted to a previously-convicted person with any number of misdemeanors and no more than one felony conviction.⁹⁰ One can apply for it immediately upon sentencing.⁹¹ A previously-convicted individual who has more than one felony conviction may be eligible for a certificate of good conduct after completing her sentence and then satisfying a mandatory waiting period.⁹² In employment and licensing determinations, both types of certificates give rise to “a presumption of rehabilitation in regard to the offense specified therein.”⁹³

The first and second *Penn Central* factors—the character of the regulation and the extent of the law’s interference with investment-backed expectations—will be discussed below in conjunction with each case. The third factor—diminution in value—will be analyzed in Part II.

⁸⁷ *Id.*

⁸⁸ The eight factors are: (1) “[t]he public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses”; (2) “[t]he specific duties and responsibilities necessarily related to the license or employment sought or held by the person”; (3) “[t]he bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities”; (4) “[t]he time which has elapsed since the occurrence of the criminal offense or offenses”; (5) “[t]he age of the person at the time of occurrence of the criminal offense or offenses”; (6) “the seriousness of the offense or offenses”; (7) “[a]ny information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct”; and (8) “[t]he legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.” *Id.* §§ 753(1)(a)–(h).

⁸⁹ *Id.* § 753(2).

⁹⁰ *Id.* § 702(2)(a).

⁹¹ *Id.* § 702(1)(b)(i).

⁹² *Id.* § 703-b(3). The waiting period for class C, D and E felonies is three years and for class A and B felonies is five years. *Id.*

⁹³ *Id.* § 753(2).

1. Marc La Cloche

Marc La Cloche served 11 years of a 9-to-16 year sentence for armed robbery.⁹⁴ Upon being paroled in 2000, La Cloche applied for an apprentice barber's license.⁹⁵ His application was denied by the New York State Department of State's Division of Licensing Services on the ground that he lacked the requisite moral character for licensure because of his previous conviction.⁹⁶ La Cloche filed an administrative appeal to this denial and won.⁹⁷ As a result, he was able to gain employment as an apprentice barber.⁹⁸ Unfortunately, his victory was short-lived, as he was only able to work as a barber for five months.⁹⁹ The State appealed the administrative law judge's decision to the Secretary of State who reversed the ALJ's decision and revoked La Cloche's license.¹⁰⁰ La Cloche spent the rest of his life fighting this denial, unsuccessfully attempting to obtain his barber's license.¹⁰¹

i. *The Character of the Regulation*

In the initial administrative appeal, of the State's denial of his license application, the administrative law judge did not find that La Cloche had good character.¹⁰² Rather, he found that "moral character is not a requirement for a barbering license."¹⁰³ Moreover, on further appeal, the New York Supreme Court found that a criminal conviction would not per se render one lacking in good moral character.¹⁰⁴

⁹⁴ *In re La Cloche*, No. 403466/2003, 2006 WL 6861431 (N.Y. Sup. Ct. 2006).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ *In re La Cloche*, No. 403466/2003, 2006 WL 6861431 (N.Y. Sup. Ct. 2006).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ La Cloche won a posthumous moral victory. Justice Louis B. York of the Supreme Court, New York County, in his opinion dismissing La Cloche's petition as moot due to his death, noted that La Cloche had been rehabilitated and should have been issued a barbering license. *See id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

ii. Interference with Distinct Investment-Backed Expectations

While in prison, in addition to exhibiting good behavior,¹⁰⁵ La Cloche made the following investments in his rehabilitation: (1) he completed a drug rehabilitation program; (2) he earned his high school diploma; and (3) he took barbering courses, which ultimately qualified him to apply for an apprentice barber's license.¹⁰⁶ La Cloche took over 50 barbering classes, obtaining two barbering training certificates and receiving credit for 14 months of training towards his license.¹⁰⁷

As a result of this investment, La Cloche's expectations regarding his ability to lawfully practice as a barber were both distinctly perceived and sharply crystallized. In fact, this expectation was further crystallized by his brief, but successful, experiences as an apprentice barber.¹⁰⁸ Thus, La Cloche's investment-backed expectation of living and working as a barber "was frustrated by the imposition of a collateral consequence that directly impugned his character and reputation."¹⁰⁹ The crystallization of the expectation was aided by the State itself, which trained La Cloche.¹¹⁰

iii. Diminution in Value

La Cloche was not seeking money damages as relief for the denial of his barber's license.¹¹¹ Rather, he merely sought to have the license issued.¹¹² However, it is possible to make some determination of the economic value of the reputational taking that he suffered. This can be done by accounting for the amount that he made as an apprentice barber, when allowed to practice his trade as such, less what he was able to earn when this livelihood was denied him. As Judge Louis B. York of the New York Supreme Court pointed out, "As a result [of the denial of his license,] Mr. La Cloche was forced to go on

¹⁰⁵ *Id.* (citing *La Cloche v. Daniels*, 755 N.Y.S.2d 827, 828 (N.Y. Sup. Ct. 2003)) (noting that La Cloche "received good evaluations on a regular basis during his incarceration").

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (noting that La Cloche's employers found him to be exemplary and that one employer had said that if he opened a second barber shop location, that La Cloche would be his first choice to manage it).

¹⁰⁹ Jefferson-Jones, *supra* note 11, at 523.

¹¹⁰ Justice Louis B. York of the Supreme Court, New York County, commented that "the State successfully rehabilitated a citizen and then vigorously fought to deny him a right to live a rehabilitated life." *In re La Cloche*, 2006 WL 6861431.

¹¹¹ *Id.*

¹¹² *Id.*

welfare—earning a few dollars cleaning in the salons where he'd once cut hair, occasionally cutting friends' hair for a small fee"¹¹³

2. Luis Soto

In 2004, Luis Soto was convicted of criminal possession of a weapon in the fourth degree, for which he was incarcerated for one year.¹¹⁴ In 2008, Soto applied for a school bus driver position with Consolidated Bus Transit (Consolidated), a contractor that provided bus services to the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD).¹¹⁵ When Consolidated applied to OMRDD for approval of Soto's application, OMRDD notified Consolidated that, because of Soto's criminal history, the application would be denied.¹¹⁶ However, prior to this denial, while the matter was still under review with OMRDD, Soto applied for and received a certificate of relief from disabilities for the Supreme Court, Kings County.¹¹⁷ OMRDD was aware of and acknowledged the issuance of the certificate prior to making its final decision. Yet, OMRDD ultimately decided to deny Soto's application, citing his previous criminal conviction.¹¹⁸

i. *The Character of the Regulation*

In the case of Luis Soto, the Supreme Court, Kings County, found that OMRDD's rejection of Soto as a bus driver was "arbitrary, capricious and an abuse of discretion" because OMRDD failed to consider the eight factors listed in section 753(1) of the Correction Law when considering Soto's employment application.¹¹⁹ Additionally, the court held that OMRDD did not properly consider the presumption of rehabilitation created by the court's earlier granting of a certificate of relief from disabilities to Soto.¹²⁰

It is noteworthy that after Soto's application for the bus driver position was denied, Consolidated offered him a position driving a van for children under the care of the New York City Administration for Children Services

¹¹³ *Id.*

¹¹⁴ Soto v. N.Y. State Office of Mental Retardation and Developmental Disabilities, No. 3010/09, slip. op. at 2 (N.Y. Sup. Ct. Jan. 29, 2010).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4, 6.

¹²⁰ *Id.* at 8.

(ACS).¹²¹ Soto passed ACS's criminal background check and began working as an ACS van driver in August 2008.¹²²

ii. Interference with Distinct Investment-Backed Expectations

In the same year that Soto applied for the bus driver position with Consolidated, he first obtained a New York State Commercial Drivers License, Class B, with passenger and school bus endorsements.¹²³ This entailed passing both a written and a school bus road test, in addition to paying the applicable fees.¹²⁴

iii. Diminution in Value

Soto's economic losses are more easily quantifiable. He earned \$11.50 per hour as an ACS van driver, but would have earned \$12.50 per hour as an OMRDD bus driver.¹²⁵ It is however, impossible to know if, once employed by OMRDD, he would have had other, more lucrative opportunities within that organization or if employment with OMRDD may have led to beneficial opportunities outside of OMRDD.

3. Madeline Acosta

Madeline Acosta served nearly four years in prison after having been convicted of four counts of robbery in the first degree in 1993.¹²⁶ The robberies were committed while she was a 17 year-old high school senior.¹²⁷ Acosta was released from prison on parole in 1996.¹²⁸ In 2006, Acosta began a job as a part-time administrative assistant at the Cooke Center for Learning Development, a nonprofit that contracted with the New York City Department of Education.¹²⁹ She worked at the Cooke Center for three months, after which time the Department of Education performed a background check.¹³⁰ Upon

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 2.

¹²⁴ See *Get a CDL "S" Endorsement for School Bus Drivers*, NEW YORK ST. DEPT. OF MOTOR VEHICLES, <http://dmv.ny.gov/commercial-drivers/get-cdl-%E2%80%9Cs%E2%80%9Dendorsement-school-bus-drivers> (last visited Oct. 11, 2014).

¹²⁵ *Soto v. N.Y. State Office of Mental Retardation and Developmental Disabilities*, No. 3010/09, slip. op. at 2 (N.Y. Sup. Ct. Jan. 29, 2010).

¹²⁶ *Acosta v. N.Y.C. Dept. of Educ.*, 62 A.D.3d 455, 456 (N.Y. App. Div. 2009).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Acosta v. N.Y.C. Dep't of Educ.*, 946 N.E.2d 731, 734 (N.Y. 2011).

¹³⁰ *Id.*

learning of her prior conviction (which she had previously voluntarily disclosed to the Cooke Center), the Department of Education denied Acosta's application for permanent employment.¹³¹

i. The Character of the Regulation

Acosta brought an Article 78 proceeding seeking to overturn the Department of Education's denial of her continued employment with the Cook Center.¹³² The Supreme Court, New York County, denied Acosta's petition and dismissed the proceeding.¹³³ However, on appeal, the Supreme Court, Appellate Division, held that the Department of Education's denial of Acosta's application was arbitrary and capricious.¹³⁴

ii. Interference with Distinct Investment-Backed Expectations

Acosta's employment application was rejected by the Department of Education 13 years after her conviction and a decade after she was released from prison.¹³⁵ Between the time that she was released from prison and the time that she began working at the Cooke Center, she earned a college degree, married, and started a family.¹³⁶ During this time period, she also worked at various law firms as a paralegal/administrative assistant.¹³⁷

iii. Diminution in Value

Like La Cloche, Acosta did not initially seek money damages.¹³⁸ Rather she sought reinstatement of her employment with the Cooke Center.¹³⁹ However, as the proceeding progressed, Acosta attempted to recoup monetary damages for her lost employment.¹⁴⁰ Ultimately, this attempt failed because of a procedural misstep: she did not timely submit a notice of claim to the

¹³¹ *Id.*

¹³² *Acosta v. N.Y.C. Dep't of Educ.*, No. 400475/07, 2007 WL 6839460 (N.Y. App. Div. July 6, 2007).

¹³³ *Id.*

¹³⁴ *Acosta v. N.Y.C. Dep't of Educ.*, 62 A.D.3d 455, 457 (N.Y. App. Div. 2009).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See Acosta v. N.Y.C. Dep't of Educ.*, No. 400475/07, 2012 WL 4461740 (N.Y. App. Div. Jan. 11, 2012).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Department of Education.¹⁴¹ The court noted, however, that but for the failure to timely submit the notice of claim, Acosta's restitution claim would have been compensable.¹⁴²

C. *Applying the Unconstitutional Conditions Doctrine*

1. Essential Nexus

Applying the "essential nexus" requirement of the unconstitutional conditions doctrine to a previously-convicted person's takings claim will yield much the same result as the application of the "character of the regulation" factor of the *Penn Central* multi-factor balancing test. For example, in the case of Marc La Cloche, just as the New York Supreme Court did not find that good character was necessary for the issuance of a barber's license, it could just as well have found that there was no essential nexus between the state's interest in providing the public with properly-trained barbers and any condition that such barbers have good moral character. Likewise, the court's finding that the denial of Luis Soto's and Madeline Acosta's continued state employment was arbitrary and capricious should also support a finding of no essential nexus between the state's interest in protecting children and any condition that would permanently bar Soto or Acosta from using their rehabilitated reputations to gain and retain employment.

2. Rough Proportionality

In the event that a court could overcome the first prong of the unconstitutional conditions analysis, the same reasoning applied by the Supreme Court in *Dolan* can be applied in each of the La Cloche, Soto and Acosta case studies. The burden of unemployment imposed on La Cloche, Acosta, and Soto is not roughly proportional when balanced against the state's interest in public safety. Although it may not be said that the burden of their criminal past "should be borne by the public alone,"¹⁴³ shifting the entire burden to La Cloche, Acosta, Soto, and other previously-convicted individuals in unduly burdensome.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

III. WHY REBIOGRAPHY IS NECESSARY

A. *Statistics on Employment and Recidivism*

One scholar has noted that "as many as one in five individuals in America have a criminal history."¹⁴⁴ This number includes those who have been convicted of a crime, as well as those who have merely been arrested. Moreover, the number of individuals who reenter society annually after having been incarcerated is increasing due to states' efforts to reduce prison populations that exploded as a result of the War on Drugs and "tough-on-crime" policies.¹⁴⁵ This makes more urgent the need to address the reentry challenges faced by the previously convicted, particularly in the critical area of employment.

There is a correlation between employment and recidivism: previously-convicted individuals who are able to find gainful employment are less likely to reoffend. Conversely, when the previously convicted cannot find work, they are three to five times more likely to reoffend than those who are employed after prison.¹⁴⁶ Research by the Bureau of Justice Statistics noted high recidivism rates among former prisoners in the first year after release: 44% are rearrested, 22% reconvicted, and 10% are incarcerated again on a new sentence.¹⁴⁷ These recidivism rates are exacerbated by poor employment prospects.

Despite evidence that previously-convicted persons who gain employment after incarceration are less likely to re-offend, this population continues to face a number of employment barriers. This reality is reflected in post-incarceration employment data. For example, an Urban Institute study found that two months after release, only 31% of men released from prison had found employment.¹⁴⁸ Moreover, the study's author noted that "[m]any respondents had difficulty finding employment, and the majority (70%) felt that their criminal record had affected their job search. For instance, many people felt that background checks inhibited their ability to acquire a job and thought employers did not want to hire someone with a criminal record."¹⁴⁹ When surveyed, employers confirmed this suspicion. As one researcher noted:

Employers remain fearful of hiring those with criminal records and attribute many negative qualities to applicants with

¹⁴⁴ Geiger, *supra* note 20, at 1193.

¹⁴⁵ See discussion of these policies, *supra* notes 6–11.

¹⁴⁶ See Sonfield, *supra* note 82.

¹⁴⁷ CHRISTY VISHER ET. AL, URBAN INSTITUTE JUSTICE POLICY CENTER, EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES 8 (2008), available at http://www.urban.org/uploadedpdf/411778_employment_after_prison.pdf.

¹⁴⁸ *Id.* at 6.

¹⁴⁹ *Id.* at 3.

criminal records, despite the fact that “reasonable efforts to consider a prospective employee’s background will generally eliminate the risk of employer liability and the lack of evidence that persons with criminal records are any more likely to offend on the job than their counterparts.”¹⁵⁰

The phenomenon of unemployment or underemployment is not simply confined to those previously-convicted persons with low skill levels or limited education. As one formerly incarcerated individual with a master’s degree in public administration stated, “Once my felony was detected . . . all offers of employment were rescinded immediately. I found myself joining the ranks of the unemployable.”¹⁵¹

B. *Employment Restrictions*

Employer attitudes have historically been encouraged and reinforced by public policy. The “tough-on-crime” stance adopted by many states in the 1980s resulted in numerous restrictions on the employment opportunities of the previously convicted.¹⁵² For example, many states, counties, and local governments instituted blanket bans on public employment. As recently as 2006, six states permanently denied public employment to those with felony convictions.¹⁵³ The remaining 45 states “permit[ted] public employment of convicted felons in varying degrees.”¹⁵⁴ Although this trend is starting to reverse itself as “ban-the-box” initiatives—those seeking to remove criminal history inquiries from preliminary job applications—are adopted in various states and municipalities, these initiatives have, thus far, not been adopted full-scale, as only ten states have removed criminal history questions from their

¹⁵⁰ JAMIE DOUGHERTY & JOHN KLOFAS, CENTER FOR PUB. SAFETY INITIATIVES ROCHESTER INST. OF TECH., “BANNING THE BOX” TO INCREASE EX-OFFENDER EMPLOYMENT: RELATED ISSUES AND A POLICY RESEARCH PROPOSAL FOR ROCHESTER, NY 3 (2014), available at <http://www.rit.edu/cja/criminaljustice/sites/rit.edu.cja.criminaljustice/files/docs/WorkingPapers/2014/Ban%20the%20Box.pdf>.

¹⁵¹ The Leadership Conference, *Chapter VI: Out of Prison, Out of Work*, CIVILRIGHTS.ORG, <http://www.civilrights.org/publications/reports/a-second-chance/chapter-6-out-of-prison-out.html> (last visited Oct. 11, 2014).

¹⁵² Pinard & Thompson, *supra* note 81, at 596; Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 280–81 (2004).

¹⁵³ Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”*: *Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 536 (2006). Those six states were Alabama, Delaware, Iowa, Mississippi, Rhode Island, and South Carolina. *Id.*

¹⁵⁴ *Id.*

employment applications.¹⁵⁵ A more in-depth examination of ban-the-box and its limitations is undertaken in Subsection C.1 of this Part.

In addition to bans on public employment, the previously convicted are also subject to professional and occupational licensing restrictions that decrease their career prospects.¹⁵⁶ These restrictions may be outright bans on hiring or licensing in fields such as law, medicine, dentistry, pharmacy, nursing and education. They may also take the form of character requirements for licensing, with ex-offender status serving as a proxy for unfit character.¹⁵⁷ Such restrictions have a two-fold effect: they (1) prevent previously-convicted individuals who worked in various career fields prior to their convictions from obtaining reemployment in their professions, and (2) prevent previously-convicted individuals from entering new career fields for which they have trained while or after serving their sentences.¹⁵⁸

C. Providing "Just Compensation" via Rebiography

In *La Cloche's* case, Judge York noted the non-economic and perhaps immeasurable damage suffered by *La Cloche*: *La Cloche*, he said, sank "into a depression from which he never recovered."¹⁵⁹ Although we know how much money *Soto* would have made as a bus driver for Consolidated, rather than as an ACS van driver, it is not possible to know the psychological toll that the employment denial may have had on him. The same can be said for *Acosta*. Thus, though economic damages existed in these cases, other types of damages may have also been identifiable. For this reason, actual payment may be inappropriate or at least ultimately impossible to calculate. Money damages are most appropriate in the context of a taking of fungible property.¹⁶⁰ In such cases, receiving money damages affords the complaining party the opportunity to purchase like property—thus making her whole.¹⁶¹ "One, however, cannot simply purchase reputation, which is better characterized as personal or constitutive property."¹⁶²

Since monetary compensation cannot restore reputation, one must explore other vehicles for "just compensation." The ongoing reputational

¹⁵⁵ Dougherty & Klofas, *supra* note 150.

¹⁵⁶ Archer & Williams, *supra* note 153, at 536; Pinard & Thompson, *supra* note 81, at 596; Thompson, *supra* note 152, at 280–81.

¹⁵⁷ See Jefferson-Jones, *supra* note 11, at 506–07 (discussion of ex-offender status as a proxy for character); see also *supra* Part I.B.1 (discussion of character requirement for licensing barbers in the state of New York).

¹⁵⁸ See Archer & Williams, *supra* note 153, at 536.

¹⁵⁹ *In re La Cloche*, No. 403466/2003, 2006 WL 6861431 (N.Y. Sup. Ct. 2006).

¹⁶⁰ See MARGARET JANE RADIN, REINTERPRETING PROPERTY 48 (1993).

¹⁶¹ *Id.*

¹⁶² Jefferson-Jones, *supra* note 11, at 526.

damage suffered by those with ex-offender status can only be repaired by proscribing the mechanisms via which such damages are affected. Rebiography affords such an opportunity. It can be achieved via legislative or judicial efforts, both of which are explored below.

1. Rebiography via Legislation

Some states and local governments have instituted “ban-the-box” laws that prevent employers from inquiring about criminal history on preliminary job applications. These efforts represent a partial rebiography effort in that they allow the previously convicted to defer disclosing their status, but do not ultimately prevent such disclosure. In fact, ban-the-box’s goal is not to prohibit criminal history inquiries; rather, it seeks “to encourage employers to consider applicants based on their qualifications first and their conviction history second.”¹⁶³

Ban-the-box laws vary from state-to-state and from city-to-city. All such provisions bar public-sector employers from asking questions about criminal history in the preliminary hiring process.¹⁶⁴ Some require the same of government contractors.¹⁶⁵ A smaller number impose similar restrictions on private-sector employers.¹⁶⁶

Ban-the-box legislation is limited in its ability to protect the previously convicted from employment discrimination, as it does not completely bar an employer from running a criminal history background check on a potential employee.¹⁶⁷ These laws only affect *when* in the application process the criminal history inquiry can take place.¹⁶⁸ It is then up to the employer to decide how and whether to take into account the information gleaned. There are, however, instances in which criminal history should not be disclosed—namely when the information is not relevant to the job being sought. Rebiography would put disclosure decisions in the hands of the previously convicted.

It may be argued that, in some instances, disclosure must be mandatory (such as in the case where one with a history of child abuse applies for a job working with children). To be sure, certain guidelines must be in place. For specific jobs, questions should be allowed with regard to specific crimes. This practice, however, must be very narrowly confined. The norm should be that

¹⁶³ Dougherty & Klofas, *supra* note 150, at 1.

¹⁶⁴ *Id.* at 2.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.* at 3.

the previously convicted have the right to rebiography, barring a demonstrated need or the disclosure of criminal history.¹⁶⁹

2. Rebiography via the Courts

In *A Good Name*, I argued for a statutory solution to the problem of affording a rebiography right to the previously convicted:

Even though this Article argues that the damaged reputation suffered by the previously convicted amounts to a taking of property without just compensation and thus, in theory should result in a claim at law, a statutory remedy is more suitable for reasons of efficiency and practicality and in order to conserve judicial resources.¹⁷⁰

Despite this pronouncement, it is still worthwhile to consider the use of the courts to affect rebiography. Courts—whether reentry courts, takings courts, or those that hear a traditional criminal docket—may offer a mechanism through which the right to rebiography can be bestowed. Among these, reentry courts may be best suited to affect this solution.

As currently configured, reentry courts monitor the reentry process, providing support to parolees and other reentering individuals.¹⁷¹ These courts intervene at the “output-end of the [incarceration] cycle . . . to supervise prisoners on parole or supervised release upon their return to the community.”¹⁷² Currently, reentry courts, like other therapeutic, problem-solving courts, can be problematic in that they raise concerns regarding both possible due process violations and the appropriate role of the judiciary.¹⁷³ Reentry courts can, however, be repurposed to fully incorporate therapeutic justice goals. In such a posture, reentry courts would embrace “restorative reentry,” which, among other things, would incorporate rebiography and status elevation proportionate to the status degradation currently suffered as a result of ex-offender status.

¹⁶⁹ This manner of rebiography would be similar to that enacted in the British 1974 Rehabilitation of Offenders Act (“ROA”) under which certain offences are “spent” after a certain number of years. Rehabilitation of Offenders Act, 1974, c. 53 (U.K.). Under the ROA, with some exceptions, one does not have to disclose a spent conviction. *Id.* See Jefferson-Jones, *supra* note 11, at 529–31, for a discussion of rebiography under the ROA.

¹⁷⁰ *Id.* at 528.

¹⁷¹ Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 417 (2004).

¹⁷² *Id.*

¹⁷³ See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1494–95, 1517 (2004).

IV. CONCLUSION

The ongoing reputational damage suffered by the previously convicted rises to the level of an unconstitutional government taking of private property. "Just compensation" in the form of a rebiography right due to previously-convicted individuals is necessary to remedy this wrong. In addition to the benefits that would be reaped by the previously convicted, society would benefit by decreased recidivism and, thus, increase public safety.