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A GOOD NAME: APPLYING REGULATORY TAKINGS ANALYSIS TO REPUTATIONAL DAMAGE CAUSED BY CRIMINAL HISTORY

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I. INTRODUCTION

In *The Dark Knight Rises*, the final installment of the Batman *Dark Knight Trilogy*, Selina Kyle—aka Catwoman—strikes a deal with the devil: she agrees to aid the terrorist Bane in defeating Batman in exchange for receiving access to technology that, purportedly, will eliminate not just her criminal record, but all record of her existence, in every database worldwide.[1] As one film critic wrote, "[s]he's motivated not just by self-interest, but a more visceral disgust at a world where people have no chance to redefine themselves, whether they're teenagers who've posted something dumb on social media, depressive billionaires [like Bruce Wayne], or talented criminals trapped by

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[1] THE DARK KNIGHT RISES (Warner Bros. Pictures 2012). In an interesting example of art imitating life, Warner Bros. was sued by Fortres Grand Corporation who alleged that the film's reference to the "clean slate" product sought by Catwoman constituted trademark infringement with regard to Fortres's actual software program called "Clean Slate." *See* Fortres Grand Corp. v. Warner Bros. Entm't, Inc., No. 3:12-CV-535, 2013 WL 2156318 (N.D. Ind. May 16, 2013). Fortres Grand's Clean Slate software was designed to "protect[] the security of computer networks by erasing all evidence of user activity so that subsequent users see no evidence of a previous user's activity, meaning that each new user starts his or her computer activity with a 'clean slate.'" *Id.* at *1. The district court disagreed with Fortres Grand's trademark infringement allegation, holding instead that there was no infringement because Warner Bros.'s product was a film, not software. In other words, when faced with the question, "is it trademark infringement if a fictional company or product in a movie . . . bears the same name . . . as a real . . . product?," the court answered in the negative. *See id.* (citing 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:149 (4th ed. 1996)).

past misdeeds."[2] Catwoman's choosing to work with Bane illustrates how highly she prized the chance to regain control over her identity. In other words, her choice evinces the notion that a person's "good name" or reputation[3] has value beyond measure, as a reflection of the community's opinion of her character.[4]

Like the fictional Selina Kyle, real individuals with criminal records face daily life with destroyed or diminished reputations. As a result of this damage, those who carry the stigma of criminal conviction suffer, not just socially,[5] but also economically,[6] and even psychologically.[7] Their degraded reputations are a collateral consequence of their convictions that consigns them to forever live with the stigma of "ex-offender status,"[8] without the hope of restored reputation.[9]

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2 Alyssa Rosenberg, *Why Ann Hathaway is the Best Catwoman Yet*, SLATE (July 24, 2012, 12:21 PM), http://www.slate.com/blogs/xx_factor/2012/07/24/why_anne_hathaway_is_the_best_catwoman_yet_in_the_dark_knight_rises.html (last visited Sep. 25, 2013).

3 *See* OXFORD DICTIONARIES (2d ed. 2010), *available at* http://oxforddictionaries.com/us/definition/american_english/reputation ("Reputation" is defined as "[1] the beliefs or opinions that are generally held about someone or something: [e.g.,] his reputation was tarnished by allegations that he had taken bribes; [2] a widespread belief that someone . . . has a particular . . . characteristic.").

4 *See id.*

5 David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277, 1312 (noting the detrimental change to social status that results from criminal conviction).

6 *See* 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, 535–39 (2006) (discussing, among other impediments, the myriad limits to legitimate employment options for individuals with criminal records). *See generally* THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY (2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf (last visited Sept. 25, 2013).

7 ROBERT M. PAGE, CONCEPTS IN SOCIAL POLICY TWO: STIGMA 13–18 (Vic George & Paul Wilding eds., 1986).

8 Increasingly, scholars, lawyers, activists, and previously convicted persons themselves find the term "ex-offender" to be pejorative. *See, e.g.*, Victoria Pynchon, *Shame by Any Other Name: Lessons for Restorative Justice from the Principles, Traditions and Practices of Alcoholics Anonymous*, 5 PEPP. DISP. RESOL. L.J. 299, 312 n.85 (2005) ("One is not, of course, an 'offender,' or an 'ex-offender' but an individual who has been convicted of committing a crime. Nevertheless, society stigmatizes such individuals as being ex-offenders, which often leads those individuals to incorporate offending into their own self-conception."); *see also* McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 479 n.1 (2005) (noting that "out of respect for . . . [the previously convicted] client communities and recognizing the power of language, [his] article will "endeavor to avoid the use of labels such as 'ex-offender,' 'ex-prisoner,' and 'felon'"); Wolitz, *supra* note 5, at 1312 ("We have words such as criminal, convict, ex-con, offender, etc., each of which suggests the negative social status resulting from conviction."); Eddie Ellis, Founder, Ctr. for Nu Leadership on Urban Solutions, An Open Letter

In the United States, there is currently neither the right to nor the expectation of restored reputation for those who have been adjudicated guilty of a criminal offense.[10] The British legal system has sanctioned a form of "rebiography" in that it provides for one's criminal record to "expire" over time and with continued good behavior, thus allowing the previously convicted person to disavow her criminal history.[11] One scholar notes that "[w]ithout this right [of rebiography], ex-offenders will always be ex-offenders, hence outsiders, or the Other."[12]

Most current discussions of collateral consequences[13] of criminal conviction, reentry barriers and discrimination against those with criminal records center on one of two notions: (1) the fairness (or the lack thereof) of continued, unforeseen, or disproportional punishment;[14] or (2) the role of

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to Our Friends on the Question of Language, *available at* http://www.centerfornuleadership.org/CNUS-background.pdf (Mar. 13, 2012) ("In an effort to assist our transition from prison to our communities as responsible citizens and to create a more positive human image of ourselves, we are asking everyone to stop using these negative terms [such as "inmates, convicts, prisoners and felons"] and to simply refer to us as PEOPLE. People currently or formerly incarcerated, PEOPLE on parole, PEOPLE recently released from prison, PEOPLE in prison, PEOPLE with criminal convictions, but PEOPLE.").

The author also recognizes the term "ex-offender" as pejorative and, therefore, throughout this Article uses terms such as "previously convicted" and "formerly incarcerated" to refer to those who bear "ex-offender status" (the author avoids the term "formerly convicted" because she finds it to be inaccurate). This Article will use the term "ex-offender status" to refer to the negative status of having been convicted of or having pleaded guilty to a criminal offense, but will avoid using "ex-offender" when referring to persons or classes of persons.

9 *See infra* Part II.

10 JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 215–16, 219 (2009). Even the wrongly accused have little hope of a full restoration of their former reputations, as former U.S. Secretary of Labor Ray Donovan noted when, upon acquittal of fraud and larceny charges, he famously asked, "Which office do I go to to get my reputation back?" Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES, May 26, 1987, http://www.nytimes.com/1987/05/26/nyregion/donovan-cleared-of-fraud-charges-by-jury-in-bronx.html?pagewanted=all&src=pm (last visited Sept. 25, 2013). *See also* James B. Jacobs & Daniel P. Curtin, *Remedying Defamation by Law Enforcement: Fall Out from the Wen Ho Lee, Steven Hatfill and Brandon Mayfield Settlements*, 46 CRIM. L. BULL. 223 (2010) (noting that since 1976, "there seemed to be no possibility that individuals wrongly accused . . . would be able to recover damages against the government . . . via constitutional tort litigation").

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

12 *Id.* at 165.

13 As explained in Part II, collateral consequences are the legal penalties that attach to convictions, such as ineligibility for public benefits, government-assisted housing and employment. *See* Jenny Roberts, *Why Misdemeanors Matter: Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 288–89 (2011) (listing various collateral consequences and noting their impact even in misdemeanor cases).

14 *See, e.g.*, Archer & Williams, *supra* note 6 at 535–39 (examining the various socioeconomic collateral consequences of ex-offender status); Nora V. Demleitner, *Preventing*

legislatures and the executive (in the guise of administrative agencies) usurping the sentencing function of the judiciary through the imposition of collateral consequences.[15] This Article posits that there is an even more powerful argument to be made against the many collateral consequences. It focuses on the idea of reputation as property and reconceptualizes the damage to reputation suffered by the previously convicted as a government taking of private property for which just compensation is due. Thus, it seeks to tie this idea of rebiography to an actual substantive "rebiography right," stemming from the inherent value of reputation as property and, thus, the taking of it as constitutionally cognizable. It further argues that such a focus renders it necessary to examine the powerful role that stigma plays in criminal punishment and the potential of destigmatization to restore reputation as "status property"[16] to the previously convicted in order to remedy this government taking.

In an early scene of *The Dark Knight Rises*, Selina Kyle laments that, "There's no fresh start in today's world," and that her life choices are, therefore, severely restricted by her criminal past.[17] It is this restriction that is the essence of the "status property" taking. A legally recognized rebiography right would prove this notion wrong by promoting the removal of stigma, revival of character, restoration of reputation and, ultimately, the reclamation and resurrection of self. In this manner, rather than merely being released into the mainstream population, the formerly incarcerated person will have the

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Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("[c]ollateral sentencing consequences have contributed to exiling ex-offenders within their country, even after expiration of their maximum sentences"); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006) (exploring reentry issues and urging the application of holistic lawyering principles to issues relating to reentry); 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 (2006) (chronicling housing, employment and voting rights barriers faced by ex-offenders); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255 (2004).

[15] *See generally* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

[16] Most simply put, "status property" is that property which is linked to identity. It is "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." Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2154, 2159 (2013) (citing Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1734–37 (1993)). See *infra* Part II.A for an additional discussion of the definition and evolution of "status property."

[17] THE DARK KNIGHT RISES, *supra* note 1 ("Once you've done what you had to, they'll never let you do what you want to.").

opportunity to become a part of mainstream society by being properly compensated for the taking.

Part II of this Article reasons that stigma functions as a collateral consequence of conviction that attaches to "offender status" and describes the negative effects of stigma attachment that are suffered by those with criminal records. Part III applies a regulatory takings analysis to the reputational damage suffered by the previously convicted and concludes that reputation is a form of "status property." Part III further argues that continued stigma attachment and damage to reputation constitutes a "taking" without just compensation. Finally, Part III articulates the idea of affording a "rebiography right" as just compensation to the previously convicted. Part IV explores "rebiography" through the lens of the personality theory of property, examines the issues inherent in defining the parameters of such a property right, and briefly examines the limits of process in actually affording a rebiography right to reentering individuals with criminal records. This Article concludes by arguing that including the restoration of reputation in reentry efforts will serve to remove a barrier to reentry—namely degraded reputation—thereby increasing public safety by reducing the chances of recidivism.

II. STIGMA AS A COLLATERAL CONSEQUENCE OF INCARCERATION

In order to elucidate the idea of reputation as property in the reentry context, one must examine the damage to reputation that is caused by criminal conviction at the outset. One must also examine the ongoing nature of that damage, even after one's sentence has been served. This Part defines stigma as a collateral consequence of conviction that is similar to traditional collateral consequences in its debilitating effects on the previously convicted person's ability to gain the necessities for daily living and to reintegrate herself into the fabric of society.

A. The Expansion of the Definition of "Collateral Consequences"

The "collateral consequences" of criminal convictions 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."[18] Traditionally, collateral consequences have been defined as civil disabilities imposed by non-judicial actors such as legislatures and administrative agencies.[19] They include, for example, limitations and prohibitions on the franchise, and exclusions from public

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[18] Travis, *supra* note 15, at 16.

[19] JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 63–64 (2005).

benefits, public housing, loans and grants for higher education, occupational and professional licenses and certain employment.[20] Judicial actors may be involved, however, because collateral consequences include both "collateral sanctions"—those "legal penalt[ies] . . . imposed on a person automatically upon that person's conviction"[21]—and "discretionary disqualifications"—"penalt[ies] . . . that a civil court, administrative agency, or official is authorized, but not required to impose on a person convicted of an offense."[22] The notion that collateral consequences are civil in nature and administrative in their promulgation has been reinforced by the Supreme Court of the United States, which has consistently treated collateral consequences as regulatory and, thus, civil, rather than punitive and, therefore, criminal in nature.[23]

The Supreme Court classifying collateral consequences as nonpunitive survives despite its decision in *Padilla v. Kentucky*.[24] The *Padilla* Court held that criminal defense counsel's failure to inform her client of whether a guilty plea carried the risk of deportation amounted to ineffective assistance of counsel under the Sixth Amendment.[25] One scholar has argued that this holding signals the Court's recognition of deportation as more akin to direct, and thus punitive, consequences than collateral consequences.[26] The view of this

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20 *See generally* Pinard & Thompson, *supra* note 14, at 586–87.

21 ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS § 19-1.1(a) (3d ed. 2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary.authcheckdam.pdf. "Collateral sanctions" include, among other sanctions, deprivation of the right to vote, to serve on a jury, to inherit property, and to participate in governmental programs or receive governmental benefits. *See id.* § 19-2.6.

22 *Id.* § 19-1.1(b). "Discretionary disqualifications" include disqualifications from "benefits or opportunities, including housing, employment, insurance, and occupational and professional licenses, permits and certifications." *Id.* § 19-3.1.

23 *See, e.g.*, Smith v. Doe, 538 U.S. 84, 104–06 (2003) (required registration under the Alaska Sex Offender Registration Act (ASORA) did not violate the Ex Post Facto Clause because such registration did not constitute punishment); Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (Criminal alien removal proceedings "are civil, not criminal, and . . . nonpunitive."). *But see* Doe v. State, 189 P.3d 999, 1015, 1012, 1019 (Alaska 2008) (determining that the registration required under the ASORA is punishment and therefore violative of the state constitution's ex post facto clause, and holding that the provision allowing dissemination of a registered person's criminal history "resembles the punishment of shaming").

24 559 U.S. 356 (2010).

25 *Id.* at 374.

26 *See* Anita Ortiz Maddalia, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U.L. REV. 1, 5 ("While the Court refrained from classifying deportation as a direct or collateral consequence of a plea, its description of deportation seemed to suggest that deportation is a direct consequence of a plea and, therefore, part of the criminal punishment imposed."); *id.* at 24 ("[T]he Court's dictum suggests that deportation more closely resembles a direct consequence rather than a collateral consequence.").

particular consequence as punitive, or at least as quasi-criminal, arguably opens the door to classifying other traditional collateral consequences as punitive. The Court, however, adhered to precedent, noting that deportation, including that resulting from an adjudication of guilt in a criminal proceeding, though "intimately related to the criminal process," is "not, in a strict sense, a [direct] criminal sanction," but rather "civil in nature."[27]

The civil-criminal distinction notwithstanding, scholars have been gradually expanding the definition of what constitutes a collateral consequence of conviction to include virtually any negative effect that takes place outside of the traditional sentencing framework.[28] This expansion has resulted in the term being applied to informal, non-legal and social consequences of incarceration, which necessarily include stigma.[29] Moreover, the Supreme Court has long taken notice of the stigma of criminal conviction.[30] It is, therefore, not surprising that Justice Samuel Alito, in his concurrence in *Padilla*, after listing the "wide variety of [collateral] consequences"[31] of a criminal conviction, went on to note that "[a] criminal conviction may also severely damage a defendant's reputation."[32] Given this broader focus on the social impacts of collateral consequences, damage to reputation and the attachment of stigma, though not directly imposed by any court or administrative agency, must also be classified as collateral consequences of conviction. Arguably, "ex-offender status" acts as a "master status"—an attribute that eclipses all other attributes, positive and negative, of the carrier[33]—and may morph into what could be termed a "master

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27 559 U.S. at 357, 365.

28 Wolitz, *supra* note 5, at 1312 (arguing that "[i]n addition to the formal civil disabilities affecting . . . a convicted person . . . , we must also consider the non-legal collateral consequences of conviction [e.g., stigma] . . . [because] a conviction has social meaning and [negatively] changes a person's social status").

29 *Id.*

30 Lawrence v. Texas, 539 U.S. 558, 560 (2003) (noting that even the conviction of a misdemeanor imposes stigma, as such a crime "remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms"); Reno v. ACLU, 521 U.S. 844, 872 (1997) (noting the "opprobrium and stigma of a criminal conviction"); Rutledge v. United States, 517 U.S. 292, 302 (1996) (referring to the "societal stigma accompanying any criminal conviction").

31 559 U.S. at 376 (Alito, J., concurring) ("This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.").

32 *Id.*

33 "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*

collateral consequence" in that stigma attachment is, at least in part, the rationale and result of many of the other traditionally recognized collateral consequences.[34]

B. Stigma, Its Attachment and Its Effect on the Previously Convicted

A stigma is a "socially inferior attribute" that marks the carrier as one who deviates from prevailing social norms, notwithstanding whether such deviation is intentional.[35] In his groundbreaking writing on stigma, sociologist Erving Goffman wrote that society "believe[s] the person with a stigma is not quite human [and that] [o]n this assumption we exercise varieties of discrimination, through which we effectively . . . reduce his life chances."[36] This has never been more true than with regard to those stigmatized by ex-offender status.[37]

Scholars classify the stigma carried by those with ex-offender status as "conduct" or "moral" stigma, which taints the carrier as one possessing weak character.[38] Such stigma is distinguishable from the two other types of stigma,

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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 (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."). The concept of "ex-offender status" as a "master status" is explored further in Part II.A.1.

[34] Scholars argue that the continued attachment of stigma to ex-offender status does not serve any sound theory of punishment. *See, e.g.*, Demleitner, *supra* note 14, at 154. Most collateral consequences operate automatically, discretionary disqualifications notwithstanding. This automatic, non-individualized operation may apply equally to violent and non-violent offenders, thus any deterrent or preventative effect is thwarted. Moreover, the near universally automatic nature of collateral consequences works counter to rehabilitative norms. Further, theories of proportionality and thus retributive justice are also offended by the broad application of collateral consequences, even social consequences such as stigma. Finally, these collateral consequences themselves result in stigma (i.e., not being able to vote, etc. is stigmatizing in and of itself).

[35] PAGE, *supra* note 7, at 2–6; *see also* Mark C. Stafford & Richard R. Scott, *Stigma, Deviance, and Social Control: Some Conceptual Issues*, *in* THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA 77, 80 (Steven C. Ainlay et al. eds, 1986) [hereinafter THE DILEMMA OF DIFFERENCE] ("Stigma is a characteristic of persons that is contrary to a norm of a social unit.").

[36] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963).

[37] Michelle Alexander notes that "[o]nce a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and the privileges of citizenship . . . are off-limits . . . . It is the badge of inferiority . . . that relegates people for their entire lives, to second-class status." MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 92 (2010).

[38] GOFFMAN, *supra* note 36, at 4; PAGE, *supra* note 7, at 4–5, Table 1.1. As such, the definition of "conduct stigma" has historically been identical to that of "deviance"—a norm violation which can be "conceptualized more or less exclusively as behavior." Stafford & Scott, *supra* note 35, at 81.

namely "physical" stigma related to physical deformity or disability and, so-called "tribal" stigma resulting from racial or ethnic difference, in that those who carry physical or tribal stigmas are not generally accorded blame for their stigma.[39] Unlike carriers of conduct stigmas, they are usually afforded, or may come to be afforded over time, a measure of social acceptance despite their stigmatizing (or formerly stigmatizing) attribute.[40] By contrast, those with conduct stigmas are adjudged blameworthy and thus less deserving of social acceptability, because the stigma that they carry serves as proof of their rejection of socially acceptable behavior.[41]

In addition to examining the nature of a specific stigma and the process of stigmatization or "attachment" of stigma, one must also examine the manner in which a particular stigma is "carried" because the manner in which a stigma is carried either renders the bearer "discredited" or "discreditable."[42] Those whose stigmas render them "discredited" are those whose stigmatizing attribute is already known or whose stigma is "immediately obvious to others."[43] The stigma of conviction attaches with a very public event—a plea of guilty in open court or a finding of guilt at the conclusion of a criminal trial.[44] Despite its having been attached in a public forum, ex-offender status, like most conduct stigmas, is usually "discreditable"—meaning that its attachment to a particular individual is either unknown by others or is not "immediately perceivable" by them.[45] It is at the moment of the revelation of the stigma that the individual carrying the stigma becomes "discredited."[46] In order to avoid the resulting exclusion and shame, the previously convicted person must, therefore,

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39 *See* GOFFMAN, *supra* note 36, at 4 (defining the three categories of stigma); PAGE, *supra* note 7, at 5–7 (discussing the three types of stigma and research regarding the blameless-blameworthy dimension of stigma).

40 PAGE, *supra* note 7, at 5–7; *see also* Gaylene Becker & Regina Arnold, *Stigma as a Social and Cultural Construct*, *in* THE DILEMMA OF DIFFERENCE 39, 53–55 (Steven C. Ainlay et al. eds., 1986) (discussing how tribal stigma, particularly that carried by African-Americans can and has been affected by social movements and the resulting sociocultural shifts).

41 PAGE, *supra* note 7, at 6–7.

42 *Id.* at 5; GOFFMAN, *supra* note 36, at 4.

43 GOFFMAN, *supra* note 36, at 4; PAGE, *supra* note 7, at 5.

44 *But see* Regina Austin, *"The Shame of it All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 175–76 (2004). Professor Austin argues that the process of stigmatization begins with arrest, which is also a public event. I have not included arrest, though public and potentially stigmatizing, for the simple fact that not all arrests lead to an eventual determination of guilt and, thus, the attachment of ex-offender status.

45 GOFFMAN, *supra* note 36, at 4; PAGE, *supra* note 7, at 5–6.

46 GOFFMAN, *supra* note 36, at 4; PAGE, *supra* note 7, at 5–6.

continually strive to remain discreditable rather than discredited in her social interactions.[47]

Many traditional collateral consequences affect the previously convicted person for a lifetime.[48] Damage to reputation is, likewise, long-lasting. Courts have reinforced this idea that those with criminal records suffer from irreparable damage to their reputations. For instance, one federal district court, in interpreting a Small Business Administration ("SBA") loan regulation requiring a lending institution's examination of a prospective borrower's "character" and "reputation," held that ex-offender status is an appropriate proxy for character (or more precisely, the lack of character) and, thus, creditworthiness.[49] The court upheld the defendant bank's refusal to lend to the plaintiff despite the fact that his sole conviction had occurred a little more than a decade before he applied for the loan and that he had been successfully running his business without incident during that period.[50]

Any notion that the reputation of one bearing ex-offender status cannot be rehabilitated results in ongoing punishment. Like other collateral consequences, this type of ongoing punishment extends beyond the limit of any period of incarceration or other sentence imposed by the court. In fact, in light of the formal, judicial nature of ex-offender status attachment, such status attachment bears the same official stamp as the traditional collateral consequences imposed by non-judicial bodies. It is this official stamp—this governmental conduct—that makes stigma attachment and the resulting reputational damage ripe for takings analysis.

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[47] Discreditable individuals are often able to remain discreditable rather than become discredited according to their ability to control the dissemination of information about their stigmatizing attribute. PAGE, *supra* note 7, at 20–21. This is often accomplished through attempting to "pass" as an unstigmatized person. *See* ALEXANDER, *supra* note 37, at 162–64 (describing the passing efforts of those bearing ex-offender status and their families). However, the ability to remain discreditable rather than discredited has been whittled away by the advent of the information age.

[48] *See* discussion of collateral consequences *supra* Part II.A.

[49] A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi., 962 F. Supp. 1056, 1064 (N.D. Ill. 1997).

[50] In response to the questions on SBA Form 912 Statement of Personal History, which asks whether an applicant has been arrested for, charged with, or convicted of any criminal offense other than minor traffic offenses, plaintiff responded that he had been charged with crimes on five occasions, but had not been convicted of any of those crimes. *Id.* at 1058 (citing Def.'s 12(m) Statement ¶ 12). The five arrests that plaintiff listed were (1) "domestic matters (husband/wife)" at some point between 1982 and 1984; (2) possession of a controlled substance in 1985; (3) disorderly conduct sometime between 1985 and 1990; (4) possession of a controlled substance in 1990; and (5) possession of a stolen car in 1994. *Id.* (citing Def.'s 12(m) Statement ¶ 12). Plaintiff was convicted of aggravated battery for stabbing a man who plaintiff maintained assaulted him and his wife.

III. APPLYING A REGULATORY TAKINGS ANALYSIS TO THE REPUTATIONAL DAMAGE SUFFERED BY THE PREVIOUSLY CONVICTED

Conventional takings claims require that the claimant identify three elements: (1) the property involved; (2) the governmental conduct that has resulted in a taking of the property identified; and (3) the just compensation to which the claimant is entitled.[51] These requirements apply equally to cases of physical as well as regulatory takings. The government's regulation of the previously convicted person's reputation can be likened to a regulatory taking by "inverse condemnation." In traditional real estate-related physical takings claims, a landowner may cite "inverse condemnation" where the government has taken property or impacted property rights without utilizing the condemnation process and, therefore, without providing just compensation for the taking.[52] Inverse condemnation, however, applies both to physical invasions of private property and to so-called "regulatory takings"—those instances in which the government has regulated the use of property in a manner so as to constitute a constructive taking thereof. Although physical takings jurisprudence may be instructive, the regulatory takings schema is more useful in establishing the damage to reputation suffered by the previously convicted as a violation of the Takings Clause. 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.

The genesis of the idea of the "regulatory taking" can be found in *Pennsylvania Coal Co. v. Mahon*.[53] 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.[54] The original action was brought by homeowners who were seeking to prevent the Pennsylvania Coal

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[51] *See* John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property,"* 59 HASTINGS L.J. 515, 547 (2008).

[52] Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 317 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the doctrine of inverse condemnation is predicated on the proposition that the taking may occur without such formal proceedings."). If the government would like to acquire private property for public use, it must usually commence by attempting to negotiate a purchase agreement with the owner. If its attempts at negotiation fail, it will begin the condemnation process via the courts. At trial the government has to establish authority to condemn, which may require it show that the proposed taking is 'necessary,'" thus establishing its authority to condemn the property. If successful, the government will be required to pay just compensation to the owner for the taking. *See* JESSIE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 1081 (2010) (7th ed. 2010).

[53] 260 U.S. 393, 415 (1922).

[54] *Id.* at 412–13, 416–17.

Company from mining under their property.[55] The homeowners had purchased the surface rights of the land in question from the Coal Company in 1878 via deeds that expressly reserved to the Coal Company the right to remove coal from the land.[56] Moreover, under the deeds, the plaintiffs had waived the right to claim damages arising from the Coal Company's mining activities.[57] The Court noted that, "[a]s applied . . . , the [Kohler Act] is admitted to destroy previously existing rights of property and contract"[58] and queried "whether police power can be stretched so far."[59]

Justice Oliver Wendell Holmes, Jr., writing for the Court, reasoned that, on the one hand, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[60] However, on the other hand, he found that the effect of the Kohler Act—abolishing the mineral rights for which the Coal Company had contracted—was no small taking.[61] Although the Act did not actually take the Coal Company's ownership of the coal, it made it impermissible to mine it.[62] This, Justice Holmes wrote, had "very nearly the same effect for constitutional purposes as appropriating or destroying [the coal]."[63] Thus, he famously concluded that, "The 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."[64] The question left for future court decisions was, "How far is too far?"

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.[65] Once reputation is established as property, then the government conduct can be identified, not only as the attachment of

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55 *Id.* at 412.

56 *Id.*

57 *Id.*

58 *Id.* at 413.

59 *Id.*

60 *Id.*

61 *Id.* at 414 ("On the other hand the extent of the taking is great.").

62 *Id.* at 412.

63 *Id.* at 414; *cf. id.* at 417 (arguing that the coal had not in fact been destroyed because "[c]oal in place is land" and further reasoning that "the right of the owner to use his land is not absolute") (Brandeis, J., dissenting).

64 *Id.* at 415.

65 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. *Id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of . . . property, without due process of law . . . .").

stigma,[66] but as the continued assault on reputation by the ongoing attachment of stigma, even after one's sentence has been served (as expressed, for example, by the assumption of unredeemable character).[67] When this manner of government regulation "goes too far,"[68] then the resulting limits on liberty amount to an impermissible regulatory taking for which just compensation is due.[69]

A. Critical Characteristics of Property and Reputation[70]

In her seminal Article *Whiteness As Property*, Cheryl Harris charts the evolution of "whiteness"[71] from racial identity, to legal status, to property interest.[72] Harris notes that whiteness—which she terms as a form of "status property"[73]—functions variously as "identity, status, and property, sometimes singularly, sometimes in tandem."[74] By contrast, ex-offender status is, by definition, a legal status. Rather than evolving from identity into legal status, the evolutionary trajectory that it follows is from legal status to an aspect of identity.[75] It is this ex-offender identity, functioning "sometimes singularly, sometimes in tandem," with ex-offender legal status that impacts the previously convicted person's property interest in her reputation.

In her analysis of the critical characteristics of whiteness as property, part of Harris's argument is that "[t]he reputation of being white was treated as a species of property, or something in which a property interest could be

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66 *See* discussion of stigma attachment *supra* Part II.B.

67 *See* discussion of A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi., 962 F. Supp. 1056 (N.D. Ill. 1997) *supra* Part II.B.

68 As noted in the previous paragraph, Justice Holmes did not give specific guidance regarding what going "too far" might consist of short of "appropriating or destroying" the property in question. A preliminary discussion of what may constitute the government's going "too far" in the context of regulating the use and rehabilitation of the reputations of those bearing ex-offender status is contained in Part III.B. A more detailed exploration is reserved for a later article.

69 260 U.S. at 415.

70 Part III.A. of this Article tracks the analysis employed by Harris in Part II.C. of her Article establishing whiteness as property. For that reason, I have employed identical headings, where appropriate, and slightly modified others where necessary. *See* Harris, *supra* note 16 at 1724–37.

71 Harris defines "whiteness" as "the right to white identity as embraced by the law." *Id.* at 1726.

72 *Id.* at 1709, 1714.

73 *Id.* at 1714 ("Following the period of slavery and conquest [of Native Americans], white identity became the basis of racialized privilege [a type of status in which white racial identity provided the bases for allocating societal benefits] that was ratified and legitimated in law as a type of *status property*.") (emphasis added).

74 *Id.* at 1725.

75 *See* discussion of ex-offender status as a "master status" *supra* Part II.A.

asserted."[76] She, therefore, concludes that this reputational interest in whiteness is one of the reasons that it is a form of "status property."[77] In so arguing, Harris takes note of the debate regarding whether reputation is more properly cast as property or liberty, but decides that "[r]eputation is a 'melange' lending itself to different descriptions over time."[78] This Article follows the analysis that Harris employed in exploring the property-like characteristics of whiteness, but concludes that, rather than a "melange," reputation bears the *same* characteristics as whiteness and, therefore, also qualifies as "status property."

For the layperson, the term "property" conjures up notions of land or other tangible objects owned by natural persons.[79] This, despite the longstanding agreement by property theorists that "property" consists of rights in things, rather than in the actual things themselves[80] and the fact that, today, most property rights are claimed with respect to intangible holdings.[81] This rights-oriented view of property makes it possible to conceive of property as anything—tangible or intangible—"'to which a man may attach a value and have a right.'"[82]

From this rights-oriented standpoint, reputation displays the same characteristics as other recognized intangible property, particularly other forms of status property. Not surprisingly, the concept of reputation as immensely valuable has been widely recognized across cultures and throughout time.[83]

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76 Harris, *supra* note 16, at 1734.

77 *Id.*

78 *Id.* at 1735 n.116 (citing Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 740 (1986)).

79 *See* MARGARET JANE RADIN, REINTERPRETING PROPERTY 12 (1993) ("In spite of the fact that most holdings in today's society are intangible and the largest proportion of holdings are owned by . . . entities other than persons, the standard ideology of property stubbornly pictures property as a tangible object . . . owned by a natural person."); Harris, *supra* note 16, at 1724–25 ("[B]y popular usage property describes 'things' owned by persons . . . .").

80 Harris, *supra* note 16, at 1724–25 (citations omitted). *See also* RESTATEMENT (FIRST) OF PROPERTY ch. 1, intro. note (1936) ("The word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing."); STEPHEN R. MUNZER, A THEORY OF PROPERTY 16 (1990) ("[The legal conception] understands property as *relations*. More precisely, property consists in certain relations, usually legal relations, among persons or other entities with respect to things."); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996) ("The currently prevailing understanding of property . . . is that property is best understood as a 'bundle of rights.'" (citations omitted)).

81 RADIN, *supra* note 79, at 12.

82 Harris, *supra* note 16, at 1726 (quoting 6 JAMES MADISON, THE WRITINGS OF JAMES MADISON 101 (Gallard Hunt ed., 1906) (citing the classical Madisonian view of property)).

83 In both the Hebrew Bible and the Christian Biblical cannon, the Book of Proverbs puts it this way: "A good name is more desirable than great riches; to be esteemed is better than silver or gold." *Proverbs* 22:1 (New International Version). Likewise, the Book of Ecclesiastes touts reputation's great worth: "A good name is better than fine perfume . . . ." *Ecclesiastes* 7:1 (New International Version). Even outside of this religious context, the world's proverbs reflect the

Thus, in order to make the next step, thereby firmly situating reputation in the realm of property, it is necessary to address status as property (thus, "status property"). Establishing reputation as "status property," then, allows one to view it as consistent with the various theoretical conceptions of property.

1. Reputation as a Traditional Form of Property

The classical liberal view of property is that property ownership, individuality and freedom are necessarily connected.[84] This idea is reflected in the personhood theory of property.[85] In describing the personhood theory or "property for personhood," Margaret Radin identifies two definitions of property: (1) "object property" —that which "refers to an owned object . . . or to rights and duties of persons with respect to control of owned objects"; and (2) "attribute-property"—"an attribute . . . of a thing, concept, argument, person, etc."[86] Thus, as she so aptly puts it:

> In the traditional liberal ideology of property, the two meanings of the word property are also sometimes linked. If

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value of reputation. For example, a Bengali proverb reads, "Better to die than to live on with a bad reputation." THE MEDITATING CAT: BENGALI PROVERBS AND THEIR ECHOES IN OTHER CULTURES 255 (Mondira Sinha-Ray, ed. 2011), *available at* http://books.google.com/books?id=tP7FX4OP9-IC&pg=PA255&dq=Better+to+die+than+to+live+on+with+a+bad+reputation&hl=en&sa=X&ei=9Or1Ucr5IorS9gS3n4CADA&ved=0CDUQ6AEwAQ#v=onepage&q=Better%20to%20die%20than%20to%20live%20on%20with%20a%20bad%20reputation&f=false. Likewise, Publilius Syrus states, "A good reputation is more valuable than money." Publilius Syrus, *Maxim 108*, *in* FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 708 (9th ed. 1907), *available at* http://babel.hathitrust.org/cgi/pt?id=uva.x001038207;view=1up; seq=730#view=1up;seq=730. An Arabian proverb read, "When a door opens not to your knock, consider your reputation." THE ROUTLEDGE BOOK OF WORLD PROVERBS 359 (Jon R. Stone ed. 2006), *available at* http://books.google.com/books?id=9b8LYmyjc-gC&pg=PA359&dq=When+a+door+opens+not+to+your+knock,+consider+your+reputation&hl=en&sa=X&ei=eOv1UeGtJ4jY8gTRv4GoDA&ved=0CC8Q6AEwAA#v=onepage&q=When%20a%20door%20opens%20not%20to%20your%20knock%2C%20consider%20your%20reputation&f=false. Lastly, a Swahili proverb reads, "The stream may dry up, but retains the name." *Swahili Proverbs: Methali za Kiswahili*, CENTER FOR AFRICAN STUDIES, UNIV. ILL. URBANA-CHAMPAIGN, http://swahiliproverbs.afrst.illinois.edu/reputation.html (last visited Oct. 30, 2013).

[84] RADIN, *supra* note 79, at 6–7 ("The history of liberal property theory . . . contributes to the entrenched understanding that ownership is connected to individuality and freedom.").

[85] The personhood theory of property and its relevance in justifying a measure of "just compensation" in the form of "rebiography" for the previously convicted is examined in Part III of this Article. Radin also notes that property as integral to liberty is also reflected in economic theories of property: "This branch of liberal theory [economic theory] supports the law and economics movement. In the economic view, private property is justified because it is necessary to create . . . incentives to productive activity" and "connects with a common understating that freedom involves free markets." *Id.* at 7.

[86] *Id.* at 191–92.

> private property is necessary for autonomy or liberty, and autonomy or liberty is a necessary attribute of persons, then property (object-aspect) is a property (attribute aspect) of persons. . . . When property is a property of persons, my liberty is my property.[87]

Reputation as property fits within this conception. As status and identity merge, as has been the case with regard to ex-offender status, to create the "master status"[88] of the "ex-offender,"[89] liberty is constrained as that status impacts all aspects of life through the imposition of collateral consequences. Ex-offender status, as a master status, also serves as a "negative credential" that is officially bestowed upon its bearer (or carrier) by the criminal justice system.[90] Rather than "enabling access and upward mobility," as is the case with positive credentials (such as college degrees and professional licenses and certifications), "[n]egative credentials are those official markers that restrict access and opportunity"[91]—thus, they restrict personal liberty.[92] Moreover, because reputation itself can be classed as "status property," and ex-offender status can be characterized as a "negative credential," ongoing attachment of reputation marred by this negative credential represents one's having been "de-propertied"[93] of beneficial reputation or the ability to rehabilitate poor reputation post-incarceration.

Just as "[o]wning white identity as property affirmed the self-identity and liberty of whites and, conversely, denied the self-identity and liberty of Blacks,"[94] "owning" the negative credential of reputation sullied by ex-offender status denies the self-identity and liberty of the formerly incarcerated. Moreover, as with whiteness, reputation as status property has the power to grant "access to a whole set of public and private privileges that materially and permanently guarantee[] basic subsistence needs and, therefore, survival[,]" thus "increase[ing] the possibility of controlling critical aspects of one's life rather than being the object of others' domination."[95] Thus, reputation—as both

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87 *Id.* at 194.

88 *See* definition of "master status" *supra* Part II.A. and note 33.

89 *See supra* note 8 discussing the pejorative nature of the term "ex-offender."

90 DEVAH PAGER, MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION 32 (2007).

91 *Id.*

92 *Id.* at 4 ("The 'credential' of the criminal record . . . can be used to regulate access and opportunity across numerous social, economic, and political domains.").

93 *See* Harris, *supra* note 16, at n.121 (discussing the effect of being "de-propertied" of whiteness).

94 *Id.* at 1743; *see also* Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 64–65 (2005).

95 Harris, *supra* note 16, at 1713. This idea is reflected in the very notion of collateral consequences.

"object property" and "attribute-property"—is intimately intertwined with liberty.

2. Modern Views of Property as Defining Social Relations

In contrast to classical property theory, which defines property as that to which value has been ascribed, modern property theory focuses on the function of property and the social context surrounding that function.[96] As such, many modern theorists see property rights ultimately as contingent, rather than natural.[97] As Harris notes, "[t]his construction directs attention toward issues of relative power and social relations inherent in any definition of property."[98] This notion is powerful in the context of the continued attachment of ex-offender stigma through status, and in positioning reputation as property. Property does not have meaning outside of society.[99] Therefore, as a master status governed by collateral consequences, ex-offender status and its attendant degraded reputation loses its meaning when removed from its social context and when divorced from the function that such reputation performs in the daily life of the person bearing ex-offender status.[100] In its current social context, however, ex-offender status functions as a stigmatizing "attribute-property," that proscribes the carrier's social, economic, and civic relations. Because it is not naturally ascribed, but rather attached through negative credentialing, it fits squarely within modern descriptions of property as a contingent creation of government entities and of society.

3. Property and Expectations

Stephen Munzer notes that "[p]roperty . . . makes possible legal expectations with respect to things."[101] Harris opines that this theory "does not suggest that all value or all expectations give rise to property, but those expectations in tangible or intangible things that are valued and protected by the law are property."[102] Thus, the law's current recognition of the value of reputation provides a strong case for the legal treatment of reputation as

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96 *Id.* at 1728.

97 *Id.*

98 *Id.* at 1729.

99 *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 54 (2003) ("Property is under *any* conception, quintessentially and absolutely a social institution. Every conception of property reflects . . . those choices that we—as a society—have made.").

100 *See supra* Part II.A discussing the collateral consequences faced by those with ex-offender status.

101 MUNZER, *supra* note 80, at 29.

102 Harris, *supra* note 16, at 1729 (citations omitted).

valuable status property. For example, in the area of torts, there is an interest in reputation that is recognized in the cause of action for defamation.

A defamatory communication is one that "tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[103] Justice Lewis F. Powell, Jr., writing for the majority in the landmark libel case of *Gertz v. Robert Welch, Inc.*[104] remarked that "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'"[105] Moreover, injury to reputation has been deemed a cognizable injury for standing purposes, thus satisfying the injury-in-fact requirement.[106]

Certain defamatory statements are deemed actionable *per se*, thus without proof of special harm.[107] These include slanderous statements that one is a carrier of a "loathsome disease,"[108] that one has engaged in certain sexual misconduct,[109] or that one has committed a criminal offense.[110] Certainly, the defense to a claim of defamation remains that one's communication concerning the complaining party is true.[111] Some, therefore, may argue that only the wrongly accused or wrongly convicted should be able to avail themselves of restored reputation.[112] However, for those actually convicted of a crime, although they do not bear stigma in error, they nonetheless suffer from ongoing reputational harm of the type routinely recognized by the law. The legal treatment of reputation in one context, thus, creates a bridge of expectations of property rights in reputation in other contexts. Therefore, even though property

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103 RESTATEMENT (SECOND) OF TORTS § 559 (1977).

104 418 U.S. 323 (1974).

105 *Id.* at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)). *Gertz v. Robert Welch, Inc.* was a libel action brought by plaintiff against a magazine publisher in response to an article describing plaintiff as a communist.

106 *See* Meese v. Keene, 481 U.S. 465, 472–73 (1987) (potential injury to plaintiff's reputation was "distinct and palpable," and thus cognizable).

107 RESTATEMENT (SECOND) OF TORTS, §§ 569–574 (1977).

108 *Id.* § 572.

109 *Id.* § 574.

110 *Id.* § 571.

111 *See id.* § 581A ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.").

112 *See, e.g.*, Wolitz, *supra* note 5, at 1310 ("The courts do not have a freestanding obligation to help out every ex-offender in vindicating his or her reputation . . . ."). *See generally* Martinez, *supra* note 51 (arguing that takings jurisprudence should be used to justify compensating the wrongly convicted).

and expectations may not be fully equivalent, "expectations are part of the psychological dimension of property."[113]

4. Property Functions of Reputation

The liberal view of property is represented by the prevailing Hohfeld-Honore "bundle of rights analysis."[114] In this view, property "includes the exclusive rights of possession, use, and disposition"[115] or alienability. When one compares each of these "sticks" in the bundle of rights to the functions of reputation, it becomes apparent that reputation is, in fact, property.

a. Rights of Disposition

Personal rights, such as rights in one's reputation, have usually been considered inalienable.[116] In this context, all of the recognized meanings of the term "inalienable" apply: nontransferable, nonsaleable, nonrelinquishable, etc.[117] Thus, in examining the property functions of reputation, alienability—or more precisely the inalienability of reputation—seemingly poses a problem. The law, however, already recognizes certain inalienable property, such as entitlements, licenses, and degrees.[118] The foundation for the recognition of status property as property, therefore, already exists despite the issue of inalienability. Harris notes that in the case of whiteness, "its inalienability may be more indicative of its perceived enhanced value, rather than its

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[113] Harris, *supra* note 16, at 1729 n.87 (citing MUNZER, *supra* note 80, at 30). The reasonableness of these expectations—particularly the reasonableness of investment-backed expectations based on a previously convicted person's investment in his or her own rehabilitation—is discussed in depth in subsection B of this Part.

[114] *See* Penner, *supra* note 80, at 712–13. Penner uses this term to describe the conflation of Wesley N. Hohfeld's analysis of rights and the incidents of ownership delineated by A.M. Honore.

[115] Harris, *supra* note 16, at 1731 (citing JOHN S. MILL, PRINCIPLES OF POLITICAL ECONOMY bk. II, ch. ii, at 218 (W. Ashley ed., 1909)).

[116] *See, e.g.*, Harris, *supra* note 16, at 1731 ("Because fundamental personal rights are commonly understood to be inalienable, it is problematic to view them as property interests.").

[117] *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849–50 (1987) ("Sometimes inalienable means nontransferable; sometimes only nonsaleable. Sometimes inalienable means nonrelinquishable by a rightholder; sometimes it refers to rights that cannot be lost at all." (citations omitted)).

[118] *See* Harris, *supra* note 16 at 1732 ("[E]ntitlements of the regulatory and welfare states, such as transfer payments and government licenses, are inalienable; yet they have been conceptualized and treated as property by law . . . . In the context of divorce, courts have held that professional degrees and licenses held by one party and financed by the labor of the other is marital property." (citations omitted)).

disqualification as property."[119] Arguably, this is true of all inalienable "status property," including reputation.

b. *Right to Use and Enjoyment*

In the context of establishing the property functions of reputation, the narrow definition of "use"—"refer[ring] to the owner's personal use and enjoyment of the thing owned"—applies, as well as the other two incidents of use identified by Honore: (1) the right to manage the manner in which the thing owned is used and by whom it is used; and (2) the right to income as expressed by reaping the benefit of said use.[120] The importance of rights in the use and enjoyment of one's reputation are reflected in the legal principles surrounding goodwill, as well as some privacy-related claims. For example, although "goodwill" commonly applies to that of a business or commercial enterprise itself, it may also apply to "personal" or "professional" goodwill—that which "is present when the unique expertise, reputation or relationships of an individual give a business its intrinsic value."[121] In either case, whether classified as "business/enterprise" or "personal/professional," goodwill—which is constituted in part by reputation—is commonly ascribed value. This valuing of goodwill is essentially treating it (and its attendant reputational component) as property.[122]

According to the Restatement (Second) of Torts, "One who invades the right of privacy of another is subject to liability for the resulting harm" in cases where there is (1) an "appropriation of the other's name or likeness"; or (2) "publicity that unreasonably places the other in a false light before the public."[123] The latter instance—invasion of privacy by giving publicity placing

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[119] *Id.* at 1734.

[120] A.M. Honore, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 116–17 (A.G. Guest ed., 1961).

[121] Darian M. Ibrahim, *The Unique Benefits of Treating Personal Goodwill as Property in Corporate Acquisitions*, 30 DEL. J. CORP. L. 1, 9 (2005).

[122] *See, e.g.*, *id.* at 5–6 (arguing that business goodwill is already treated as property and that personal goodwill is worthy of the same treatment). This treatment is operative in the context of corporate mergers and acquisitions, as well as for other accounting and tax purposes. *See generally id.*

[123] RESTATEMENT (SECOND) OF TORTS § 652A (1977); *see also id.* § 652C ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy."); § 652E ("One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."). According to the Restatement, one's right of privacy is also invaded by: (1) "unreasonable intrusion upon the seclusion of another" and (2) "unreasonable publicity given to

a person in false light—is related to defamation. As discussed earlier, the relationship between the legal recognition of the value of reputation and the expectation of rights in property is evidenced by the tort of defamation by libel or slander.[124] In many false light claims, the invasion of privacy action is an alternative grounds for recovery because the publicity given to the plaintiff is itself defamatory and, therefore is actionable in libel or slander.[125]

In the former instance—invasion of property by appropriation of another's name or likeness—the recognition of this form of tortious invasion of privacy "confer[s] something analogous to a property right upon the individual" whose likeness is appropriated.[126] Although tortious appropriation of another's likeness usually takes place in the context of one's appropriating the name or likeness of another commercially for pecuniary gain, it does not always take place in this context. That courts and legislatures have consistently provided protection against such appropriation, even in instances where the benefit derived is not monetary, indicates the value that is placed upon the use of reputation as represented by one's persona.[127]

As "attribute-property," reputation, like other types of status property (e.g., whiteness), can both be "experienced and deployed as a resource."[128] Those bearing ex-offender status do experience their status daily through the imposition of the myriad collateral consequences effecting most meaningful aspects of their lives. They are barred, however, from rehabilitating their reputations in a manner that would allow them to deploy them as a beneficial resource. Thus, once again, the potential value of this status property is subverted in the ex-offender context.

c. The Absolute Right to Exclude

Harris notes that a "conceptual nucleus" of property is the right to exclude, calling it a "critical characteristic of property."[129] She explains that "[t]he possessors of whiteness were granted the legal right to exclude others

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the other's private life." *Id.* § 652A. Invasion of privacy by these means is less impactful of reputation.

124 *See supra* Part III.D.

125 RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1977).

126 *Id.* § 652A cmt. b; *see also id.* § 652C cmt. a ("[T]he right created by it is in the nature of a property right.").

127 *See id.* § 652C cmt. c ("In order that there may be liability under the rule stated in this Section, the defendant must have appropriated to his own use or benefit the *reputation*, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness." (emphasis added)).

128 Harris, *supra* note 16, at 1734.

129 *Id.* at 1714.

from the privileges inhering in whiteness."[130] The use and possession of reputation, as earlier explained, adheres to this same principle of exclusion. However, as a negative credential, ex-offender status and the attendant damaged reputation represent a perversion of this concept: where one is able to exclude others from appropriating or otherwise damaging one's good reputation, in the context of ex-offender stigmatization, it is the possessor of the negative credential who is being excluded from the possibility of acquiring good or better reputation. In either case, it is clear that reputation, as status property, presents opportunities for its possessor to avail herself of the absolute right to exclude or to experience being excluded absolutely from its benefits.

B. *Do the Regulation of the Reputations of the Previously Convicted, Continued Attachment of Ex-Offender Stigma, and Ongoing Reputational Damage "Go Too Far?"*

As previously noted, establishing reputation as property is just the first step in the regulatory takings analysis of the reputational damaged suffered by those bearing ex-offender status.[131] One must also identify the public use involved and determine whether the targeted regulation is in fact a taking. This Section seeks to accomplish those goals by first identifying the public use involved in this putative taking. Once the public use is identified, this Section examines reputational damage in light of the *Pennsylvania Central Transportation Co. v. City of New York*[132] multi-factor balancing test. Alternatively, it endeavors to determine whether a *per se* taking has occurred.

1. Identifying the Public Use

The state's police power is exercised to protect the community's health, safety, and morals.[133] The Supreme Court has held that the Takings Clause's public use requirement is "coterminous with the scope of the sovereign's police powers."[134] Viewing "public use" and "police power" as coterminous "do[es] away with serious judicial scrutiny of the public use question."[135] This "public use" language has been interpreted to mean "public

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130 *Id.* at 1736.

131 *See supra* Part III.

132 438 U.S. 104 (1978).

133 Berman v. Parker, 348 U.S. 26, 32 (1954); *see* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 862–63 (2004) (determining that just compensation would still be due if the wording of the Takings Clause were, "nor shall private property be taken pursuant to the police power, without just compensation").

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

135 Krier & Serkin, *supra* note 133, at 862–63.

purpose," rather than actual use by the public.[136] The public purpose of the various collateral consequences of incarceration, and likewise of the continued attachment of ex-offender status, is usually identified as "public safety" and is, thus, an exercise of the government's police power.[137]

Historically, the state's exercise of its police power—including the power to regulate public safety—provided it with a *per se* harm exception defense, the result of which was that such exercise was not deemed a taking for which just compensation is due.[138] However, the modern view of the Takings Clause's public use requirement as coterminous with the state's police power instead allows for the application of a *Penn Central* analysis in such cases. Thus, whether one agrees with their use, the imposition of collateral consequences, generally, and the stigmatization and reputational damage visited upon the previously convicted, in particular, satisfy the public use/public purpose requirement because they are instances of the government exercising its police power with regard to public safety. Therefore, in this analysis, what remains is the determination of whether such regulation "goes too far."

An alternative view of the exercise of police power in the case of the state's regulation of those bearing ex-offender status is that public safety is not being protected, but rather is harmed by such regulation. Stigma literature reveals that the continued labeling of individuals as "ex-offenders" contributes to isolation and a failure to reintegrate, which is itself a public safety hazard in that it contributes to recidivism.[139] Shame is a by-product or result of such stigmatization.[140] It is the feeling of shame that causes the stigmatized person to withdraw from full participation in civil society. Stigmatized individuals must continually craft coping strategies to combat the wider population's reaction to

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136 Kelo v. City of New London, 545 U.S. 469, 479–80 (2005).

137 *See, e.g.*, FLA. STAT. ANN. § 112.0111(1) (West 2013) ("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.").

138 *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 668–69 (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)).

139 *See infra* notes 140-144.

140 *See also* GOFFMAN, *supra* note 36, at 7 (noting that shame results from the stigmatized person's acceptance of the prevailing social attitudes regarding her stigmatizing attribute); *but see* PAGE, *supra* note 7, at 17–18 (describing shame as an intermediate feeling between embarrassment and stigma, but noting that the distinctions that he makes between the three are "highly speculative").

their stigma.[141] These shame-driven strategies include silence, withdrawal from social interaction, and often increased anti-social behavior. The shame-ridden individual's defenses include both self-contempt and rage aimed at the outside world.[142] This sense of rage and isolation is further heightened by the reactions of others who may avoid the shamed individual due to their own discomfort with that person's status.[143] A continued cycle of shame, wherein the shamed individual is given no hope of reconciliation with society creates pathology, which in the penological context is expressed as recidivism.[144]

2. The *Penn Central* Multi-Factor Balancing Test

In an attempt to answer the question of when a regulation goes too far, the Supreme Court in *Penn Central Transportation Co. v. City of New York* offered a three-part balancing test.[145] In *Penn Central*, the owner of Grand Central Terminal in New York City alleged that the city government's denial of a permit allowing the owner to build a skyscraper atop the terminal was a regulatory taking of its air rights.[146] The Court disagreed with the owner, noting that in making such determinations, it is necessary to focus 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.[147] This same multi-factored balancing test can be applied to the regulation of the reputations of those bearing ex-offender status.

a. Character of the Regulation

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."[148] The easy case of physical invasion was further clarified by the Court's opinion in *Loretto v. Teleprompter Manhattan CATV Corp.*[149] In *Loretto*, the Court held that the New York law requiring landlords

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141 *See* Becker & Arnold, *supra* note 40, at 49 (noting that "[s]tigmatized individuals find themselves in a continual struggle with negative attitudes and with the devalued status that accompanies them and must constantly develop strategies for dealing with the stigma").

142 *See* Pynchon, *supra* note 8, at 304.

143 *See id.*

144 *See id.* at 305 (explaining the process of reconciling a shamed individual to society by means of an "interpersonal bridge" by which she is reaccepted after a period of shaming and/or punishment).

145 438 U.S. 104 (1978).

146 *Id.* at 115–22.

147 *Id.* at 124–25.

148 *Id.* at 124.

149 458 U.S. 419 (1982).

to permit a cable television company to install equipment on the roofs of their property and to run small cables down their buildings' exteriors amounted to a taking.[150] In so holding, the Court decided that any permanent physical occupation of property is a *per se* taking, regardless of the public interest served by the occupation.[151] Justice Thurgood Marshall, writing for the majority, noted that the Court had "long considered a physical intrusion by government to be 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."[152] He further contrasted "permanent physical occupation" with "temporary physical invasion," noting that the former is always a taking, while the latter may not always be.[153] Thus, the *Loretto* Court added *permanence* to the clear case of the physical invasion of property cited by the *Penn Central* Court.

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, not just to the physical nature of the invasion, but also to the permanence of the invasion caused by the government regulation. 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.

b. Interference with Distinct Investment-Backed Expectations of the Previously Convicted

An owner's investment-backed expectations as envisioned by the *Penn Central* Court must be "distinct," rather than merely hypothetical.[154] The Court relied heavily upon Frank Michelman's influential work on takings in which he intimated that such investment-backed expectation must be "distinctly perceived [and] sharply crystallized."[155]

Each previously convicted person has distinct investment-backed expectations with regard to her investment in her own rehabilitation. These investment-backed expectations are frustrated by ongoing damage to reputation

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150 *Id.* at 421.

151 *Id.* at 426.

152 *Id.* (emphasis added).

153 *See id.* at n.12 (noting that such temporary invasions "are subject to a more complex balancing process to determine whether they are a taking").

154 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see also id.* at 130 (finding no taking where owner merely believed it would have the future ability to exploit a property interest in its building's airspace).

155 Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967).

and other collateral consequences. The case of Marc La Cloche illustrates this point.

La Cloche served eleven years in prison for armed robbery before being paroled in 2000.[156] While incarcerated, he completed a drug rehabilitation program, earned a high school diploma, and took courses qualifying him for an apprentice barber's license.[157] However, when La Cloche applied for the apprentice license, the State of New York denied his application, citing a lack of the requisite moral character because of his previous conviction.[158] Over the next five years, from 2000 until his death in 2005,[159] La Cloche fought this denial.[160] In his first administrative appeal, he won a short-lived battle and was allowed to practice his trade for five months.[161] However, the State appealed the administrative law judge's decision to the Secretary of State who summarily revoked La Cloche's license.[162]

In the ensuing years, rather than practicing the trade for which he trained in prison, La Cloche attempted to prove his worthiness to do so by amassing additional evidence of his good character and redeemed reputation in the community.[163] Without a doubt, La Cloche's investment-backed expectation of making a living as a barber was frustrated by the imposition of a collateral consequence that directly impugned his character and reputation. As Justice Louis B. York of the Supreme Court, New York County commented, "the State successfully rehabilitated a citizen and then vigorously fought to deny him a right to live a rehabilitated life"[164]—the life that he expected to lead.

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156 La. Cloche v. Daniels, No. 403466/2003, 2006 WL 6861431 (N.Y. Sup. Ct. 2006). La Cloche's original sentence was 9–16 years. *Id.*

157 *Id.*

158 *Id.*

159 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.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *See id.* (noting that in a subsequent administrative hearing in 2003, "La Cloche submitted overwhelming evidence of his good character and fitness for a barbering license," including letters from his former employers at the salons at which he was briefly employed and from his parole officer).

164 *Id.*

c. *Diminution in Value of the Reputational Status Property of the Previously Convicted*

Diminution in value is determined by comparing the value of the subject property prior to the regulation with its post-regulation value.[165] However, the *Penn Central* Court held that diminution in the value of property does not, by itself, constitute a taking.[166] Rather, it must be analyzed in conjunction with the owner's distinct investment-backed expectations.[167]

One may argue that the reputations of those with criminal records are damaged despite the imposition of collateral consequences and civil disabilities that merely refer to that damaged character and reputation as justification for their imposition. However, if such barriers were removed, an individual reentering society after a period of incarceration would be allowed to rely on any and all investment made in the rehabilitation of her reputation while in prison and to add to that investment post-incarceration. Thus, the pre-regulation value of the reputation of a previously convicted person would be limited only by individual prejudice, which itself would be limited by (1) whether knowledge of the conviction is discovered (i.e., whether the previously convicted person becomes "discredited"); and, if discovered, (2) the importance that each individual decision-maker places upon that knowledge. For instance, in the case of Marc La Cloche, he would have, on the one hand, had the option of not disclosing his past conviction to his employers. However, on the other hand, as evidence by their letters in support of his being granted a barber's license, those employers placed no negative importance on their knowledge of his conviction.[168] Consequently, under both scenarios, La Cloche would not have suffered a diminution in the value of his reputation and would have been able to realize his investment-backed expectations regarding his post-prison life.[169]

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[165] *See* Michelman, *supra* note 155, at 1232–33 (describing the "'fraction of value destroyed'" test).

[166] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978).

[167] *See* Michelman, *supra* note 155, at 1233 (arguing that the diminution in value test 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").

[168] *See La Cloche*, 2006 WL 6861431 (reporting that, in his letter in support of the State's licensing La Cloche as a barber, one former employee not only gave La Cloche a glowing reference, but noted that La Cloche "would be his first choice to manage a second barber shop should [he] open one").

[169] These two scenarios may cause one to ask whether a previously convicted person who is unable to garner the support that La Cloche was able to amass would not be able to claim a taking because she had never rehabilitated her reputation in the eyes of the community. This issue of the minimally rehabilitated person is addressed in Part III.B.3.

3. Per Se Takings: Complete Deprivation of All Economically Beneficial or Productive Use

The Supreme Court has supplemented the *Penn Central* multi-factor balancing test with three specific *per se* takings rules. The first two: (1) the permanent physical occupation rule as articulated in *Loretto* and (2) the harm exception defense are discussed above.[170] The remaining *per se* rule is that regarding total wipeouts or a complete deprivation of all economic value.

The *per se* rule with regard to complete deprivation of all economically valuable uses of property originates in *Lucas v. South Carolina Coastal Council*.[171] The petitioner in *Lucas* purchased two beachfront lots in a residential development on a barrier island situated off of the South Carolina coast.[172] His intention was to build homes on the lots.[173] Prior to his doing so, the South Carolina legislature, citing beach erosion and loss of wildlife habitat, enacted legislation that prohibited additional beachfront development.[174] Writing for the majority, Justice Antonin Scalia held that a taking occurs "where regulation denies all economically beneficial or productive use" of the property in question.[175] Therefore, if a total wipeout has occurred (i.e., 100% diminution in value), then the other elements of the *Penn Central* test need not be considered.[176] Importantly, for the class of previously convicted persons who have made no more investment in their rehabilitation than serving their sentences, investment-backed expectations need not be considered. Rather, if the status degradation suffered by their perpetually damaged reputations is measured as a total wipeout, then it is a *per se* taking.[177]

C. *Just Compensation for Damage to Reputation*

Over the past decade, reentry scholars have come to recognize the value of "rebiography" in prisoner reentry.[178] From a philosophical standpoint,

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170 *See supra* Parts III.B.2.a., III.B.1, respectively.

171 505 U.S. 1003 (1992).

172 *Id.* at 1006–08.

173 *Id.* at 1006–07.

174 *Id.* at 1007–08.

175 *Id.* at 1015.

176 *Id.*

177 This argument will be most persuasive in jurisdictions that impose more far-reaching collateral consequences than do others. Also, it must be noted that certain offenses (sex offenses, for example) result in greater collateral consequences and, thus, the reputational damage suffered by those with records of such offenses may be more likely to be measured as deprivations of all productive use and value.

178 *See, e.g.*, MARUNA, *supra* note 11, 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

rebiography allows the previously convicted person "to rewrite his or her history to make it more in line with his or her present, reformed identity."[179] These scholars often quantify the value of rebiography in relation to its usefulness in reducing recidivism.[180] However, given the previously convicted person's reputational property interest, rebiography is also valuable in providing a means of just compensation for the taking of that property. Just compensation for a taking is measured in relationship to the economic damages suffered by the complaining party.[181] Economic damages exist in this context;[182] however, actual payment may be inappropriate or at least difficult to measure.[183] After all, in the context of a taking of fungible property, receiving money damages affords the complaining party the opportunity to purchase like property—thus making him whole.[184] One, however, cannot simply purchase reputation, which is better characterized as personal or constitutive property. Therefore, in the case of those not convicted in error, their ongoing reputational damage is, therefore, better compensated by the proposed "rebiography right"—an equitable remedy that would end the continuing injury. Thus, in the context of reentry, the recognition of the previously convicted person's reputation as valuable status property should trigger such a "rebiography right." This right would, in essence, be a right to protect one's damaged reputation and to reinvent one's post-incarceration self. Recognition of the value of reputation leads one to the conclusion that the remedy for continued stigma attachment for the previously convicted is restored reputation. This realization, however, leads

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purpose in the bleakest of life histories"); PETERSILIA, *supra* note 10, at 219 ("[W]iping the slate clean or allowing a 'legal rebiographing' is critical to offenders who have made the decision to desist from crime.").

179 MARUNA, *supra* note 11, at 164.

180 *See* PETERSILIA, *supra* note 10, at 219; Nancy Leong, Felon Reenfranchisement: Political Implications and Potential for Individual Rehabilitative Benefits 1, 25 (unpublished manuscript) (cited with permission), *available at* https://www.law.stanford.edu/sites/default/files/child-page/266901/doc/slspublic/NLeong_06.pdf (arguing that "[b]y providing a means of civic involvement, voting would allow felons to *rebiography* themselves and help create a vision of a lawful life" (emphasis added)).

181 *See* United States v. Miller, 317 U.S. 369, 373 (1943) ("The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." (internal footnote omitted)); Olson v. United States, 292 U.S. 246, 254 (1934) (holding that "no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner" (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893))); *see also* discussion of assessment of required compensation in traditional condemnation cases *supra* Part III.

182 *See generally* THE PEW CHARITABLE TRUSTS, *supra* note 6.

183 *But see* MARTINEZ, *supra* note 51, at 544, 549–54 (discussing payment for taking of the "liberty-property" of the wrongly accused).

184 *See* RADIN, *supra* note 79, at 48.

one to ask of what does a process of restored reputation consist? Moreover, must the criminal justice system participate in such restoration and, if so, to what extent should it participate?

IV. ESTABLISHING A "REBIOGRAPHY RIGHT" FOR THE PREVIOUSLY CONVICTED AS JUST COMPENSATION FOR REGULATORY TAKING

In describing the personality theory or personhood perspective of property, Margaret Radin noted that one's exerting control over property through ownership is necessary for self-constitution or personhood.[185] Although Radin was referring to the external environment from which tangible property is traditionally derived, the principles of the personhood perspective can be applied to intangible property such as reputation.[186] For instance, Radin identifies the body as "the clearest case of property for personhood."[187] Just as the body is the clearest tangible case of property for personhood, reputation is the clearest intangible case. The body is the tangible representation of the person in the world. Likewise, reputation is the intangible representation through which one is perceived by others.[188]

Radin identifies two types of property relationships that constitute the "personhood dichotomy": (1) relationships regarding "personal" or "constitutive" property and (2) relationships regarding "fungible" property.[189] She notes, however, that property relationships are not perfectly dichotomous.[190] Rather, they exist along a continuum ranging from wholly "personal" to wholly "fungible." Thus, wholly personal property consists of "a thing indispensable to someone's being,"[191] while fully fungible property is "a thing wholly interchangeable with money."[192] Reputation, which has evolved to function as both identity and property,[193] necessarily resides on the "personal" or "constitutive" end of the spectrum. This being so, it may even be said to exist at the same point on the continuum as personal property—or at least at a

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185 *See id.* at 35 ("The premise underlying the personhood perspective is that . . . to be a *person* . . . an individual needs some control over resources in the external environment" and that "[t]he necessary assurances of control take the form of property rights.").

186 *See id.* at 35 ("[T]he personhood perspective is often implicit in the connections that courts and commentators find between property and privacy or between property and liberty.").

187 *Id.* at 48. Despite this pronouncement, Radin notes that "bodily integrity . . . can be too personal even to be thought of as 'property' without arousing great discomfort." *Id.* at 13.

188 *See supra* note 4 and accompanying text (defining "reputation").

189 RADIN, *supra* note 79, at 2, 53–55.

190 *Id.* at 53 ("Many relationships between persons and things will fall somewhere in the middle of this continuum.").

191 *Id.*

192 *Id.*

193 *See* discussion of the evolution of status from identity to property *supra* Part III.A.

point that is markedly nearer to constitutive, personal property than to fungible property. "Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement."[194] It then stands to reason that, per the personhood perspective, reputation is worthy of greater protection than the public's interest in information about the crimes committed by the reentering individual. Like the lost tangible object of personal property that is deemed "closely related to one's personhood,"[195] good reputation is also invaluable to its possessor. Thus, a great measure of control over the shaping of one's reputation—embodied in a "rebiography right"—should be afforded the reentering individual.[196] Such a right would serve as just compensation for the taking that results from identifiable government conduct: the continued attachment of stigma resulting in the collateral consequence of ongoing reputational damage to those bearing ex-offender status.

A. The "Rebiography Right": Judicial Process vs. Legislative Remedies

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. The large number of reentering individuals,[197] all of whom suffer reputational damage as a collateral consequence of their convictions, would glut the courts with their takings claims. Takings jurisprudence, then, should function as a lens through which to focus needed legislation. Additionally, rebiography should not take place via the courts because, rather than achieving the desired result of the mitigation of stigma, appearance in yet another public forum may amount to more of the same for the previously convicted person. These concerns make the courts inadequate vehicles for the purpose of compensating those bearing ex-offender status.[198]

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194 RADIN, *supra* note 79, at 53.

195 *Id.* at 37. Radin cites the example of a wedding ring that is fungible property when in the possession of a jeweler, but personal when in the possession of a "loving wearer." *Id.*

196 *See id.* (arguing that, in the context of tangible things, the constitutive connection between person and thing accord to the person "broad liberty with respect to control over that 'thing'").

197 During 2011, more than 680,000 people were released from state and federal prisons. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 1 (Dec. 2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf.

198 One may argue that reentry courts may offer a mechanism by which formal restoration of reputation can be achieved. Some reentry commentators have urged that the criminal justice system adopt therapeutic justice models in the guise of reentry courts and, indeed, some jurisdictions have done so. Such courts are among the various "problem-solving courts"—a subtype of courts that includes drug courts and mental health courts, among others. *See* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 420–24 (2004)

Scholars, particularly criminologists writing in the field of restorative justice, have discussed the need for formalized recognition of rehabilitation (or at least of one having paid one's debt to society and completed one's term of punishment).[199] In response, some jurisdictions have begun to issue certificates of rehabilitation.[200] Some criminologists have even advocated for reentry ceremonies, arguing that one is convicted in ceremonial style and should, therefore, be released in the same way.[201] Certificates of rehabilitation, however, pose a similar problem to reentry courts in that the use of them requires one to disclose that she has a criminal history. Nondisclosure and a right that functions automatically are also more desirable because such measures lessen the chance of causing the previously convicted person more discredit.

B. A Brief Examination of the British Rehabilitation of Offenders Act of 1974—A Practical Example of Rebiography

The framework for the rebiography right can be modeled after the relief contained in the British 1974 Rehabilitation of Offenders Act ("ROA").[202] Per the ROA, the history of certain criminal offenses is "spent" after a period of a number of years.[203] The ROA, however, only applies to

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(discussing the genesis of drug and reentry courts). The specialized function of the reentry court is to monitor the reentry process, providing support to parolees and other reentering individuals. *See id.* at 417 (describing reentry courts as designed to intervene at the "output-end of the [incarceration] cycle . . . to supervise prisoners on parole or supervised released upon their return to the community"). In their current incarnations, these 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. *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). *See generally* Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007). As a subset of problem-solving courts, reentry courts are not immune to these concerns. And as a subset of courts generally, reentry courts are not immune to the other concerns expressed in this Part IV.A.

[199] *See* MARUNA, *supra* note 11, at 155–58 (documenting previously convicted individual's need to be recognized as successful in their desistance from crime); PETERSILIA, *supra* note 10, at 208 ("[D]esisters . . . desperately need outside validation . . . .").

[200] For example, New York, Illinois, Connecticut, California, Nevada, New Jersey. *See* Margaret Love & April Frazier, Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of: A Survey of State Laws (Oct. 1, 2006) (unpublished manuscript), *available at* http://meetings.abanet.org/webupload/commupload/CR203000/otherlinks_files/convictionsurvey.pdf.

[201] *See, e.g.*, MARUNA, *supra* note 11, at 162–64; PETERSILIA, *supra* note 10, at 206–11; Travis, *supra* note 19, at 268–70.

[202] Rehabilitation of Offenders Act, 1974, c. 53 (Eng.).

[203] *Id.*

minor offenses. The history of a particular offense expires according to its type and the length of the originally imposed sentence.[204]

The practical effect of one's having a "spent" conviction is that, barring certain exceptions, once spent, the conviction need not be disclosed in any context, including on employment and insurance applications or in civil proceedings. In such instances, when asked directly whether he or she has been convicted of a crime, the person with a spent conviction may legally answer in the negative.[205] The ROA does, however, have certain limitations: prison sentences in excess of two and one-half years can never be spent; moreover, those applying for jobs in certain professions must disclose their convictions, even if spent.[206]

A rebiography right that is given as just compensation for the continued taking of reputational status property can take the ROA as a model point of departure. However, while the ROA limits the scope of those able to avail themselves of its provisions, the reach of the rebiography right should extend to cover a broader population of previously convicted persons.

The idea of rebiography is not totally foreign to the American legal system. There are, in fact, parallels between rebiography in the British legal system under the ROA and the rebiography that is institutionalized in certain areas of U.S. law. In particular, the sealing of juvenile justice records and the expiration of negative credit histories in the bankruptcy context incorporate what amounts to rebiography.[207] Why do we do this in these contexts? It is because, for certain classes of people, forgiveness is part of the judicial system. Criminologist Shadd Maruna puts it this way: "[T]he United States permits

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[204] For example, the convictions of adult offenders, those eighteen years of age or older at the time of convictions, sentenced to terms of imprisonment up to six months are spent after seven years; the convictions of those with terms of imprisonment over six months, but less than thirty months, become spent after ten years. The corresponding time periods are five and seven years, respectively, for offenders under age eighteen. *Id.* § 5, Tables A–B.

[205] *See* MARUNA, *supra* note 11, at 164; *see also* Rehabilitation of Offenders Act, 1974, c. 53. (Eng.).

[206] For example, the following professionals are among those who must disclose spent convictions: financial professionals (accountants, actuaries, securities dealers, etc.), medical professionals (doctors, dentists, nurses, midwives, psychologists, etc.), and legal professionals (lawyers, court officers, judicial appointees). Rehabilitation of Offenders Act (Exceptions) Order, 1975, No 1023, Sch. 1 (Eng.), *available at* http://www.legislation.gov.uk/uksi/1975/1023/contents/made. The ROA also has broad exceptions for non-specified occupations involving certain tasks such as the management of nursing homes or working in certain locations such as school or at places that provide care to "vulnerable adults." *Id.* For this reason, the National Council for Civil Liberties (aka "Liberty"), a British civil and human rights organization notes that ROA is often criticized for its many exceptions. Rachel Robinson & Daren Hlaing, Liberty's Response to the Ministry of Justice's Proposals on the Effective Punishment, Rehabilitation and Sentencing of Offenders 6 (Mar. 2011) (unpublished manuscript), *available at* http://www.liberty-human-rights.org.uk/pdfs/policy11/response-to-moj-breaking-the-cycle-consultation-march-2011.pdf.

[207] *See* MARUNA, *supra* note 11, at 164.

more than a little selective amnesia or autobiographical creativity if the individual is a member of a class of people we believe in—a juvenile [or] a debtor . . . ."[208] He notes that this benefit is not extended to "common criminals."[209] 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."[210]

C. *Weighing the Rebiography Right Against Public Safety*

There is an undeniable tension in balancing public safety against "rebiography." On the one hand, the individual seeks to control information in order to avoid being discredited and publically branded with the stigma of ex-offender status. If successful, the individual will ensure a measure of liberty and autonomy by managing the way in which she is portrayed to others—by managing her reputation. This is the crux of the interest involved in a "rebiography right." The State, however, has a public safety interest in identifying those who have committed crimes and, arguably, may commit crimes in the future. Thus, the State, on the other hand, seeks to make the same personal information accessible in order to promote public safety by circumscribing self-governing behavior by those who bear ex-offender status. In other words, the actions of the State are aimed at ensuring that the those bearing ex-offender status become discredited.[211]

Which interest should prevail? Laura Underkuffler opined, "If the right to control personal information is a cognizable property right, it should . . . be afforded strong presumptive power."[212] According to this reasoning, a previously convicted person's interest in the protection of his reputation (status property) should eclipse any collective interest in public safety manifested in the current practice of providing nearly unfettered access to criminal records. By thinking of damage to reputation as a taking, the protection of reputation constitutionally outweighs any public safety concerns, which are merely policy issues. Under this analysis, the person bearing ex-offender status has a constitutional right to have her reputational taking justly compensated.

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208 *Id.*

209 *Id.*

210 *Id.*

211 *See generally* UNDERKUFFLER, *supra* note 99, at 108–09 (discussing the tension between personal liberty and governmental interest and the intersection of personal autonomy and governmental restrain thereof in the context of the use of individual DNA profiles by government agencies).

212 *Id.* at 109.

V. CONCLUSION

Given the seeming permanence of status degradation, restoration is necessary—and must be formalized. In the case of the previously convicted, their stigmatization is officially bestowed upon them by the criminal justice system as punishment for criminally sanctioned conduct. As such, the stigma of ex-offender status is particularly far-reaching, and difficult to overcome given the power of the stigmatizer—the federal, state or local government.[213] When this official stigmatization is coupled with any other stigmatizing attributes that an individual previously convicted person may have, the effect on his ability to successfully reintegrate post-conviction can be devastating.[214] However, despite the current negative and on-going nature of ex-offender stigma, we must be mindful of the fact that stigma is at its root a social construct.[215] It follows then, that because stigma is constructed, a particular stigma, even a conduct stigma, can be dismantled, thereby "destigmatizing" the individual who previously carried that stigma.[216] This is particularly true if the destigmatizing is led by the original stigmatizer—a governmental entity such as a legislative body. For the individual bearing ex-offender status, this necessarily means that the same government that officially stigmatized him must participate in removing the stigma from him. Applying a takings analysis to the problem of the ongoing

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[213] *See* PAGE, *supra* note 7, at 10–11 (noting that "official labeling . . . tends to create more problems for an individual than 'lay' labeling.").

[214] *See* Becker & Arnold, *supra* note 40, at 47 (noting the compounded effect of multiple stigmas, i.e., blackness in a white dominated culture or femaleness in a male-dominated culture). *See generally* Regina Austin, *"The Shame of it All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 174–85 (2004) (discussing "the impact of the stigma of conviction and incarceration as experienced not only by minority offenders, but also by their families and communities, and the relationship of that stigma to political disenfranchisement").

[215] *See generally* Becker & Arnold, *supra* note 40, at 39–57 (arguing that stigma is best understood in the sociohistorical and cultural context in which the individual experiences it); STEVEN C. AINLAY ET AL., *Stigma Reconsidered*, *in* THE DILEMMA OF DIFFERENCE 1, 3–6 (noting the ambiguous nature of stigma and the process of stigmatization as being a function of both culture and time period).

[216] "Destigmatization" must be distinguished from "normalization," which is the process by which "stigmatized individuals adapt themselves to society by attempting to reduce their variance from cultural norms." Becker & Arnold, *supra* note 40, at 50–51. "Passing" (attempting to appear "normal" or unstigmatized) and "covering" (attempting to reduce tension during social interactions) are forms of normalization or stigma management. *See* PAGE, *supra* note 7, at 20–24 (defining the terms "passing" and "covering"); *see also* ALEXANDER, *supra* note 37, at 162–64 (applying the term "passing" to the efforts of the previously convicted and their families to keep their status secret). Whereas destigmatization does not seek to obscure or minimize a population's or individual's stigmatizing attribute, but instead seeks to persuade society and the stigmatizer to redesignate the stigmatizing attribute as non-stigmatizing either as it is carried by the general population or non-stigmatizing as carried by a particular individual.

reputational damage suffered by those with criminal histories provides a framework for such participation.

Destigmatization, though possible, is not effectuated overnight even if the original stigmatizer provides the catalyst for destigmatization.[217] An official process is just the first step in the process and will, hopefully, result in a shift in attitudes and "reactive norms"[218] and thus a gradual reacceptance and reintegration of the stigmatized individual—here the previously convicted person—into society.

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[217] *See* AINLAY, *supra* note 215, at 5 (discussing the gradual nature of the destigmatization process); *see also* Stafford & Scott, *supra* note 35, at 91 ("If stigmas involve norms, then destigmatization would require a major overhaul of our normative system.").

[218] "[R]eactive norm[s]" are the "shared beliefs about how people should react" to a given stigma. Stafford & Scott, *supra* note 35, at 89 (citing Alexander L. Clark & Jack P. Gibbs, *Social Control: A Reformulation*, *in* SOCIAL PROBLEMS 12, 398–415 (1965)).