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## Extending “Dignity Takings”: Re-Conceptualizing the Damage Caused by Criminal History and Ex-Offender Status

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**EXTENDING “DIGNITY TAKINGS”: RE-CONCEPTUALIZING THE  
DAMAGE CAUSED BY CRIMINAL HISTORY AND EX-OFFENDER  
STATUS**

JAMILA JEFFERSON-JONES\*

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## INTRODUCTION

*Without dignity, identity is erased. In its absence, men are defined not by themselves, but by . . . the circumstances in which they are forced to live.*<sup>1</sup>

The lasting consequences of a criminal conviction can be “life-restricting . . . varied, and often bewildering. [Moreover], they can impact the most fundamental necessities of life—like a job, a place to live, and education.”<sup>2</sup> The effect of these “collateral consequences of incarceration”—those that “take effect outside of the traditional sentencing framework”<sup>3</sup>—whether restrictions from holding certain job positions or employment-related licenses; bars from public housing; disqualification from student loan eligibility; or other restrictions—is to promote the notion that the previously-convicted<sup>4</sup> individual,

1. LAUREN HILLENBRAND, UNBROKEN: A WORLD WAR II STORY OF SURVIVAL, RESILIENCE, AND REDEMPTION 183 (2010).

2. Ram Subramanian, Rebecca Moore & Sophia Gebreselassie, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014*, VERA INST. OF JUSTICE, CENTER ON SENTENCING AND CORRECTIONS 2 (2014), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy\\_downloads/states-rethink-collateral-consequences-report-v4.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy_downloads/states-rethink-collateral-consequences-report-v4.pdf) [<https://perma.cc/VA77-H2JY>].

3. Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 502 (2013) [hereinafter Jefferson-Jones, *A Good Name*] (“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.’”) (quoting 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)).

4. I consider the term “ex-offender” to be pejorative and take heed the words of one formerly-incarcerated activist:

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.

Eddie Ellis, *An Open Letter to Our Friends on the Question of Language*, CTR. FOR NU LEADERSHIP ON URB. SOLUTIONS (Mar. 13, 2012), <https://static1.squarespace.com/static/58eb0522e6f2e1dfce591dee/t/596e3ef9bf629a2270909252/1500397309561/Open+Letter+On+The+Question+of+Language.pdf> [<https://perma.cc/B5ZC-5HWV>]. Therefore, throughout this Article I use terms such as “previously-convicted” and “formerly-incarcerated” to refer to those who bear “ex-offender status” (I avoid the term “formerly-convicted” because I find it to be inaccurate). I 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 the term “ex-offender” when referring to persons or classes of persons.

even after having served his sentence, is not, nor ever will be, equal to other citizens. Thus, he will never be worthy of full participation in society or to receive the benefits of its largess. This message often results in isolation, anti-social behavior, and increased recidivism.<sup>5</sup>

Individuals with criminal records bear the stigma of their ex-offender status — a stigma that attaches to, damages and often destroys their reputations in both the social and civic realms. This ex-offender stigma itself can be classed as a collateral consequence of incarceration in that, like other collateral consequences, it has “debilitating effects on the previously convicted person’s ability to gain the necessities for daily living and to reintegrate himself into the fabric of society.”<sup>6</sup>

In earlier work, I argued (1) that one’s reputation is a form of “status property”<sup>7</sup>—property that is linked to identity; and (2) that the continued attachment of stigma to ex-offender status, and the resultant damage to reputation constitutes a regulatory taking of that “status property.”<sup>8</sup> Conventional constitutional takings claims—including regulatory takings claims<sup>9</sup>—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.”<sup>10</sup> This Article, however, posits that the type of reputational damage suffered by those bearing ex-offender status can be conceptualized as other than an unconstitutional regulatory taking of this status property. Rather, this continued damage and stigmatization is also a taking of those individuals’ dignity. Thus, it can also be theorized as a “dignity taking.” This Article, therefore, considers how the dignity takings analysis can be applied to reputational damage caused by criminal history and ex-offender status.

Bernadette Atuahene originally developed the idea of the “dignity taking” in the context of real property—specifically in the context of the systematic taking of the land of Black South Africans by the apartheid regime.<sup>11</sup> Atuahene

5. See generally SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (2001); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2009).

6. Jefferson-Jones, *A Good Name*, *supra* note 3, at 502.

7. *Id.* at 510–12; see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (noting that “whiteness”—legal recognition as being racially “white”—is a form of status property).

8. See generally Jefferson-Jones, *A Good Name*, *supra* note 3, at 502–25.

9. “Regulatory takings,” as first recognized by the United States Supreme Court in *Pennsylvania Coal Co. v. Mahon*, occur when the government regulates the use of property in a manner so as to constitute a constructive taking of that property. See 260 U.S. 393, 415 (1922).

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

11. BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM (2014) [hereinafter ATUAHENE, WE WANT WHAT’S OURS].

demonstrated that a dignity taking can be distinguished from a constitutional taking with respect to the identity and status of the persons from whom the property is taken.<sup>12</sup> She originally defined dignity takings as having five elements: when (1) a state directly or indirectly (2) destroys or confiscates property (3) from owners or occupiers (4) whom it deems to be sub-persons (5) without paying just compensation or without a legitimate public purpose.<sup>13</sup> It is the fourth of these five elements that distinguishes the dignity taking from the constitutional taking.

The term “taking” has been used by legal scholars synonymously with the term “constitutional taking.”<sup>14</sup> However, a “taking” actually occurs any time “a person, entity or state confiscates, destroys, or diminishes rights to property without the informed consent of the rights holders.”<sup>15</sup> This more expansive view of takings allows for analyses that examine more than just the economic value of the property taken, but rather extend to its emotional, social, political, and cultural value.<sup>16</sup> Additionally, this broader definition of the term “taking” invites a sociolegal approach to these analyses that embraces the methodologies of diverse fields such as psychology, anthropology, political science, and geography, as well as traditionally-related fields such as law and economics.<sup>17</sup> Atuahene describes the involuntary loss of property resulting from state action as residing on a “takings spectrum,” with constitutional takings and dignity takings on opposite ends and those instances of involuntary property loss that do not quite fit within either definition at various points in the middle.<sup>18</sup> This Article explores the end of Atuahene’s takings spectrum on which dignity takings reside.

Scholars have recently applied Atuahene’s analysis to find dignity takings in varied circumstances, including the theft of Jewish and Gypsy property in France and the Netherlands during World War II,<sup>19</sup> Israel’s dispossession of the

12. *Id.* at 11, 40–56.

13. *Id.*

14. Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 173 (2016) [hereinafter Atuahene, *Takings as a Sociolegal Concept*] (citing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)).

15. *Id.*

16. *Id.* at 171–74.

17. *Id.* at 174.

18. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 L. AND SOC. INQUIRY 796, 799, Figure 1.1 [hereinafter Atuahene, *Dignity Takings and Dignity Restoration*].

19. Wouter Veraart, *Two Rounds of Postwar Restitution and Dignity Restoration in the Netherlands and France*, 41 L. & SOC. INQUIRY 956, 956–59 (2016).

Bedouins,<sup>20</sup> the looting and burning of African-American property during and after the Tulsa race riot of 1921,<sup>21</sup> the separation of the Hopi people from their sacred lands,<sup>22</sup> and the forced evictions of Chinese peasants to make room for rapidly expanding urban centers.<sup>23</sup> In each of these contexts, the dignity takings analysis was applied to circumstances in which real property (and some personal property) was taken from the targeted groups.

After analyzing these other scholars’ applications of her dignity takings framework in the aforementioned contexts, Atuahene revised her definition of “dignity taking” as follows: “A dignity taking occurs when a state directly or indirectly destroys or confiscates property rights from owners or occupiers and the intentional or unintentional outcome is dehumanization or infantilization.”<sup>24</sup> Thus, a taking rises to the level of a “dignity taking” “when the state confiscates property from groups that have been dehumanized or infantilized.”<sup>25</sup> This revised “dignity taking” definition has opened the door for scholars to demonstrate that this framework can also be applied in instances where the property taken is other than tangible property.<sup>26</sup> Therefore, in considering how the dignity takings analysis can be applied to reputational damage caused by criminal history and ex-offender status, this Article argues that: (1) through the continued attachment of stigma as ex-offender status and the myriad collateral consequences attendant to that status, the state both directly and indirectly destroys the reputation – a form of “status property” – of the previously convicted; and (2) the intentional or unintentional outcome is dehumanization or infantilization. Thus, a “dignity taking” has occurred.

This Article’s analysis of dignity takings in the ex-offender context is part of a trend toward the expansion of Atuahene’s paradigm. The first wave of

20. Alexandre (Sandy) Kedar, *Dignity Taking and Dispossession in Israel*, 41 L. & SOC. INQUIRY 866, 866–67, 870–882 (2016).

21. Alfred L. Brophy, *When More Than Property is Lost: The Dignitary Losses and Gains in the Tulsa Riot of 1921*, 41 L. & SOC. INQUIRY 824, 824, 826–31 (2016).

22. Justin B. Richland, *Dignity as (Self-) Determination: Hopi Sovereignty in the Face of US Dispossession*, 41 L. & SOC. INQUIRY 917, 922–34 (2016).

23. Eva Pils, *Resisting Dignity Takings in China*, 41 L. & SOC. INQUIRY 888, 889–94 (2016).

24. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 18, at 817.

25. *Id.*

26. Particularly relevant to this discussion is the work of scholars who have applied Atuahene’s dignity takings analysis to criminal punishment. Their works, which will be discussed in Part II of this Article, include: John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOW. L.J. 621, 622, 625–31 (2016) [hereinafter Acevedo, *Restoring Community Dignity*]; John Felipe Acevedo, *Dignity Takings in the Criminal Law of 17th Century England and the Massachusetts Bay Colony*, 92 CHI.-KENT L. REV. 743, 765–67 (2018) [hereinafter Acevedo, *Dignity Takings in the Criminal Law*]; Andrew S. Baer, *Dignity Restoration and the Chicago Police Torture Reparations Ordinance*, 92 CHI.-KENT L. REV. 769, 776–92 (2018); Lua Kamal Yuille, *Dignity Takings in Gangland’s Suburban Frontier*, 92 CHI.-KENT L. REV. 793, 810–16 (2018).

scholars to apply Atuahene's dignity taking analysis did so in contexts wherein tangible property (both real and personal) was taken from the targeted groups.<sup>27</sup> A second wave of dignity takings scholars have looked outside of the real and personal property contexts to find dignity takings in situations where tangible property was not present, but state action caused dehumanizing and/or infantilizing outcomes.

The most relevant of this second-wave scholarship to the analysis of continued reputational damage caused by criminal history as a dignity taking is that which focuses upon dignity takings in the criminal justice context.<sup>28</sup> This work represents a significant expansion of the dignity taking paradigm. These scholars examine gang injunctions as dignity takings<sup>29</sup> and the destruction of the body in both the context of criminal punishment and police misconduct as a dignity taking.<sup>30</sup> As such, these scholars set the stage for conceptualizing other forms of criminal punishment as dignity takings. Although these scholars have expanded the dignity takings inquiry into the criminal justice space, they have not explored the particular spaces of reentry or of reputational damage in the ex-offender context. The continued reputational damage, stigmatization, and collateral consequences suffered by the previously-convicted rises to the level of a dignity taking because these individuals are both dehumanized and/or infantilized. With this in mind, this Article further expands the dignity taking concept into this area of criminal punishment.

Reconceptualizing the continued reputational damage caused by criminal history and ex-offender status as a "dignity taking" mitigates some of the difficulties posed by the constitutional taking analysis. In particular, the dignity taking analysis allows one to focus on the social and psychological harms of the taking rather than just the economic harms. Such a focus is, arguably, more suited to the analysis of a "status property" taking since the economic value of such property is not easily quantifiable. Thus, this focus on dignity-based harms opens the door for "dignity restoration," which though somewhat analogous to "just compensation" in the constitutional taking context, may be other than economic-based.<sup>31</sup>

This Article is the third in a series in which I explore the collateral consequences of incarceration by applying takings analyses to the reputational damage caused by criminal history. As such, it builds upon the foundation of two earlier articles, *A Good Name: Applying Regulatory Takings Analysis to*

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27. See *supra* notes 19–23.

28. Acevedo, *Restoring Community Dignity*, *supra* note 26; Acevedo, *Dignity Takings in the Criminal Law*, *supra* note 26; Baer, *supra* note 26; Yuille, *supra* note 26.

29. Yuille, *supra* note 26.

30. Acevedo, *Restoring Community Dignity*, *supra* note 26; Acevedo, *Dignity Takings in the Criminal Law*, *supra* note 26; Baer, *supra* note 26.

31. See ATUAHENE, *WE WANT WHAT'S OURS*, *supra* note 11, at 10–11 (noting that "dignity restoration" may include other than economic remedies).

*Reputational Damage Caused by Criminal History*<sup>32</sup> and *A Second Chance: Rebiography as “Just Compensation,”*<sup>33</sup> both of which apply a constitutional takings analysis.

*A Good Name* establishes the reputations of previously-convicted persons as “status property” which can be taken through government regulation and, thus, is compensable.<sup>34</sup> It reasons that the stigma of a criminal record 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<sup>35</sup>—negative effects that, in the aggregate amount to the “dehumanization or infantilization” contemplated by *Atuahene*.<sup>36</sup> It then applies a regulatory takings analysis to the reputational damage suffered by the previously convicted and articulates the idea of affording a “rebiography right”—the right of one to “rewrite his or her history to make it more in line with his or her present, reformed identity”<sup>37</sup>—as “just compensation” to the previously convicted.<sup>38</sup> Finally, it concludes by briefly examining the limits of process in actually affording a rebiography right to reentering individuals and weighing formal process (through courts and administrative agencies, for example) against nonprocess (i.e., policies that prevent inquiries regarding an individual’s criminal history).<sup>39</sup>

*A Second Chance: Rebiography as “Just Compensation”* seeks to further demonstrate “that ‘just compensation’ is owed to the previously convicted and that the way to provide it is through establishing a ‘rebiography right,’ stemming from the taking of a constitutionally cognizable property right.”<sup>40</sup> *A Second Chance* applies the regulatory takings analysis used in *A Good Name* to actual cases and uses statistics on the employment prospects and recidivism rates of previously-convicted persons to argue that rebiography is necessary.<sup>41</sup> Further, it examines legislative and judicial options for rebiography.<sup>42</sup>

Part I of this Article revisits the concept of reputation as status property. In doing so, it considers reputation as a resource that can be deployed to the benefit of its owner and the impact of reputational damage upon individuals with ex-offender status. Part II applies the first element of *Atuahene*’s revised dignity

32. Jefferson-Jones, *A Good Name*, *supra* note 3.

33. Jamila Jefferson-Jones, *A Second Chance: Rebiography as “Just Compensation,”* 117 W. VA. L. REV. 203, 204–30 (2014) [hereinafter Jefferson-Jones, *A Second Chance*].

34. Jefferson-Jones, *A Good Name*, *supra* note 3, at 501, 510–19, 526.

35. *Id.* at 502–07.

36. See *Atuahene*, *Takings as a Sociolegal Concept*, *supra* note 14, at 178.

37. MARUNA, *supra* note 5, at 164.

38. Jefferson-Jones, *A Good Name*, *supra* note 3, at 508–27.

39. *Id.* at 527–32.

40. Jefferson-Jones, *A Second Chance*, *supra* note 33, at 208.

41. *Id.* at 217–28.

42. *Id.* at 228–29.



takings analysis to demonstrate that the State both directly and indirectly destroys the reputational status property of those with ex-offender status. The second element of the dignity taking analysis is applied in Part III by examining the dehumanizing and/or infantilizing effects of collateral consequences and post-release supervision.

Dignity takings and dignity restoration scholarship is a new area of inquiry and is, therefore, still developing.<sup>43</sup> Prior to Atuahene's introducing the dignity taking, "sociolegal scholars [had] not treated the intersecting deprivation of property and dignity as an area worthy of systematic examination and analysis."<sup>44</sup> This is particularly true in the context of the taking of intangible property,<sup>45</sup> especially where that taking intersects with the criminal justice system. Thus, by extending the dignity taking analysis to the damage caused by criminal history and ex-offender status, this Article adds to this new sociolegal field.

#### I. REPUTATION AS STATUS PROPERTY/ REPUTATION AS RESOURCE

One's reputation consists of the beliefs that others hold about him.<sup>46</sup> Thus, when individual beliefs about a person are considered collectively, reputation functions as "a reflection of the community's opinion of [an individual's] character."<sup>47</sup> Certain statuses can function as proxies for character, and thus impact reputation. This is true with regard to ex-offender status. For instance, even where the conviction in question is more than a decade old, ex-offender status can be used as a proxy for character and reputation.<sup>48</sup> Thus, the reputation of one with ex-offender status can be permanently damaged by that status.

Classifying reputation as "status property" is consistent with the traditional theoretical conceptions of property, from both the classical liberal perspective of property as intertwined with liberty, and from modern views of property as defining social relations.<sup>49</sup> Reputation also bears the characteristics of property with regard to expectations and functions, including the rights of, use and

43. Atuahene, *Takings as a Sociolegal Concept*, *supra* note 14, at 191.

44. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 18, at 797.

45. See Atuahene, *Takings as a Sociolegal Concept*, *supra* note 14, at 191 ("... further investigation [of dignity takings] is necessary, especially in the areas of ... intangible property ...").

46. See OXFORD DICTIONARIES (2d ed. 2010), [http://oxforddictionaries.com/us/definition/american\\_english/reputation](http://oxforddictionaries.com/us/definition/american_english/reputation) [<https://perma.cc/8DZ7-S8FG>] ("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.").

47. Jefferson-Jones, *A Good Name*, *supra* note 3, at 499.

48. See *A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi.*, 962 F.Supp. 1056, 1064 (N.D. Ill. 1997) (upholding defendant bank's denial of loan to plaintiff under Small Business Administration loan program).

49. Jefferson-Jones, *A Good Name*, *supra* note 3, at 510–16.

enjoyment and the right to exclude.<sup>50</sup> Because status property is linked to identity, it functions as "a reputational interest that endows the owners with certain privileges flowing from a public conception of their identity and personhood,"<sup>51</sup> and "can be both analogized to conventional forms of property and literally converted to those forms."<sup>52</sup> Moreover, like other forms of property, reputation can have "economic value as well as social, emotional, political and cultural value."<sup>53</sup>

This Part briefly revisits concepts regarding the property-like characteristics of reputation. Most particularly, it focuses on (1) one's right to use one's reputational status property; (2) reputation and expectations; and (3) reputational status property as defining social relations and admitting the owner to civic and societal privileges.

#### A. *One's Right to Use Reputational Status Property*

As status property, reputation can be "experienced and deployed as a resource."<sup>54</sup> Thus, like other forms of property, the right to use one's reputation encompasses the three incidents of "use" identified by A.M. Honore, one of the architects of the prevailing Hohfeld-Honore "bundle of rights analysis"<sup>55</sup> that dominates the traditional liberal view of property: (1) the right to use and enjoy the thing owned; (2) the right to manage the manner in which it is used and by whom it is used (including the right to exclude others from using the thing owned); and (3) the right to benefit from the income of that use.<sup>56</sup> The value of the beneficial use of reputation has routinely been recognized by the law. One of the more prevalent areas of this recognition is in the area of "goodwill." In addition to recognizing corporate goodwill generally, the law also recognizes the value of "personal" goodwill where an individual's reputation contributes to the value of a business.<sup>57</sup> This is akin to treating goodwill and its individual reputational component as property.<sup>58</sup>

50. *Id.* at 514–19.

51. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2159 (2013) (citing Harris, *supra* note 7, at 1734–37).

52. *Id.* at 2154 (2013).

53. Atuahene, *Takings as a Sociolegal Concept*, *supra* note 14, at 172.

54. Harris, *supra* note 7, at 1734.

55. See J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712–13 (1996) (describing the conflation of Wesley N. Hohfeld's analysis of rights and A. M. Honore's incidents of ownership).

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

57. See Darian M. Ibrahim, *The Unique Benefits of Treating Personal Goodwill as Property in Corporate Acquisitions*, 30 DEL. J. CORP. L. 1, 9–10 (2005) ("Personal goodwill . . . is present when the unique expertise, reputation or relationships of an individual give a business its intrinsic value.").

58. Jefferson-Jones, *A Good Name*, *supra* note 3, at 517.

The right of beneficial use of one's reputation is severely damaged in the ex-offender context:

Those bearing ex-offender status . . . experience their status daily through the imposition of the myriad collateral consequences effecting [the] 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 . . . the potential value of this status property is subverted in the ex-offender context.<sup>59</sup>

The collateral consequences of criminal conviction include, but are not limited to "limitations and prohibitions on the franchise, and exclusions from public benefits, public housing, loans and grants for higher education, occupational and professional licenses and certain employment."<sup>60</sup> The dehumanizing and infantilizing effects of these punishments, which take effect outside of the traditional judicial sentencing function, are discussed more fully in Part III. In addition to the collateral consequences imposed by legislatures and administrative agencies, the stigma attached to ex-offender status functions as a collateral consequence in that, like traditional collateral consequences of criminal convictions, such stigma causes "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."<sup>61</sup> This subversion of the potential value of reputational status property is not just the subversion of the ability to use it in a beneficial manner, but also an undermining of the expectations bound up with that use. Thus, one must examine the expectations that those with ex-offender status have vis-à-vis their reputational status property.

#### B. Reputation and Expectations

Cheryl Harris has noted that "expectations are part of the psychological dimension of property."<sup>62</sup> In the context of regulatory constitutional takings, one of the factors that the U.S. Supreme Court balances in determining whether a taking has occurred is the "investment-backed expectations" of the owner.<sup>63</sup> Although this Article examines reputational damage as a dignity taking rather than as a constitutional taking, the example of "investment-backed expectations" in this context is nonetheless instructive because it highlights the psychological dimension of a property taking.

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59. *Id.* at 518.

60. *Id.* at 502–03 (citing Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 586–87 (2006)).

61. Jefferson-Jones, *A Good Name*, *supra* note 3, at 502.

62. Harris, *supra* note 7, at 1729 n.87 (citing STEPHEN R. MUNZER, A THEORY OF PROPERTY 30 (1990)).

63. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978).

In *Penn Central Transportation Co. v. City of New York*, the owner of Grand Central Terminal in Manhattan argued that the City of New York’s denial of a permit allowing the owner to build a skyscraper atop the terminal was a regulatory taking of its air rights.<sup>64</sup> A regulatory taking occurs when “the government has regulated the use of property in a manner so as to constitute a constructive taking thereof.”<sup>65</sup> Thus, as Justice Oliver Wendell Holmes wrote in *Pennsylvania Coal Co. v. Mahon*, “The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>66</sup> The *Penn Central* Court, in an attempt to clarify what constitutes the government’s “go[ing] too far,” determined that such an analysis should 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.<sup>67</sup> The Court’s reasoning reflected agreement with Frank Michelman’s notion that an owner’s investment-backed expectations must be “distinctly perceived [and] sharply crystallized.”<sup>68</sup> Those with ex-offender status fit this criterion, as they have made various investments in their own rehabilitation – whether through serving their sentences<sup>69</sup> or through also completing substance abuse, anger management, or educational or vocational training while serving their sentences. Thus, their “actual investment-backed expectations of [their] ability to reintegrate [into society] upon reentry are certainly ‘distinctly perceived [and] sharply crystallized.’”<sup>70</sup> However, collateral consequences and the ongoing damage to reputation suffered by those with ex-offender status frustrate these expectations.<sup>71</sup>

In addition to use and expectations, the property-like characteristics of reputation are colored by social context and societal constructs. The milieu in which reputation is used and in which expectations of use and benefit are formed

64. *Id.* at 115–22.

65. Jefferson-Jones *A Good Name*, *supra* note 3, at 508.

66. 260 U.S. 393, 415 (1922).

67. 438 U.S. at 124.

68. Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1233 (1967); *see also Penn Cent. Transp. Co. v. New York*, 438 U.S. at 130 (finding no taking where owner merely believed it would have the future ability to exploit its property interest, but had made no investment in or affirmative step toward doing so).

69. This, of course, is if one agrees that criminal punishment is, in fact, rehabilitative. *See* Jelani Jefferson Exum, *Forget Sentencing Equality: Moving from the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 122–30 (2014) (conducting a comprehensive examination of the purpose of criminal punishment, specifically drug sentencing laws).

70. Jefferson-Jones, *A Second Chance*, *supra* note 33, at 214.

71. Jefferson-Jones, *A Good Name*, *supra* note 3, at 522–23.

is the social context in which the owner operates.<sup>72</sup> This is so for those with ex-offender status. Thus, one must also examine the context in which reputation is used and how this context particularly affects those with ex-offender status.

*C. Reputational Status Property as Defining Social Relations and Admitting the Owner to Societal Privileges*

Evaluating reputational status property with regard to its social function is in line with modern property theory.<sup>73</sup> As Laura Underkuffler has noted, “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.”<sup>74</sup> In this manner, reputation is a form of social currency—a medium of exchange between and among members of society.

In the social context, ex-offender status has followed an evolutionary trajectory “from legal status to an aspect of identity.”<sup>75</sup> In fact, ex-offender status can be classified as a “master status”—an attribute that eclipses all other attributes, positive and negative, of the carrier.<sup>76</sup> Because of the myriad collateral consequences imposed upon those with ex-offender status, that status “influences every other aspect of life, including personal identity.”<sup>77</sup>

Historically, information about one’s ex-offender status has been readily available to those outside of the criminal justice system, including “prospective employers, landlords and creditors.”<sup>78</sup> This information is supplied via public records searches and it has often been incumbent upon persons with ex-offender status to disclose their criminal histories.<sup>79</sup> Moreover, with the advent of the Internet, curious private citizens have the ability to discover their neighbors’ criminal histories.<sup>80</sup> This widely-available information results in “extending the reach of the criminal justice system into the wider arenas of domestic and

72. LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 62–63 (2003).

73. *See* Harris, *supra* note 7, at 1728.

74. UNDERKUFFLER, *supra* note 72, at 54.

75. Jefferson-Jones, *A Good Name*, *supra* note 3, at 510.

76. JOHN SCOTT & GORDON MARSHALL, *A DICTIONARY OF SOCIOLOGY* 455 (3d. ed. 2009) (“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.”); *see also* TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 125 (2007) (“It is clear that being convicted of a crime and sent to prison carries a stigma, and being a criminal can become a person’s master status.”).

77. Scott & Marshall, *supra* note 76, at 455.

78. DEVAH PAGER, *MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 58 (2007) [hereinafter PAGER, *MARKED*].

79. *Id.* at 34, 155.

80. *Id.* at 156.

business affairs.”<sup>81</sup> In this manner “[t]he status of ‘ex-offender’ is formalized and legitimated by the imposition and dissemination of criminal records, which are in turn used by employers and other gate keepers [such as landlords, loan officers, and university admissions officers] in ways that restrict access to valuable social resources.”<sup>82</sup> Thus, “spoiled”<sup>83</sup> or stigmatized reputation functions as a “negative credential.”<sup>84</sup> Indeed, as previously noted, reputation itself is a resource—one that can be used to access other valuable social resources or one that, when damaged, can be used by others to block that same access.<sup>85</sup> “In [the] . . . social context . . . ex-offender status . . . proscribes the carrier’s social, economic, and civic relations. Because it is not naturally ascribed, but rather attached through negative credentialing [through the courts and through administrative processes], it fits squarely within modern descriptions of property as a contingent creation of government entities and of society.”<sup>86</sup> This aspect of governmental creation is part of what makes continued reputational damage caused by criminal history ripe for Atuahene’s dignity taking analysis.

## II. DIGNITY TAKING ELEMENT 1: “THE STATE HAS BOTH DIRECTLY AND INDIRECTLY DESTROYED THE STATUS PROPERTY OF PREVIOUSLY-CONVICTED PERSONS”

Atuahene’s revised dignity taking definition can be broken down into two constituent elements. Thus, “A dignity taking occurs when [1] a state directly or indirectly destroys or confiscates property rights from owners or occupiers and [2] the intentional or unintentional outcome is dehumanization or infantilization.”<sup>87</sup> This Part, in order to prove the first element, explores the reputation-destroying effect of ex-offender status on reputation. It focuses on two specific effects of damaged reputation in the context of those with ex-offender status: (1) negative credentialing; and (2) one’s being de-propertied of usable reputation as a result of ex-offender status.

81. *Id.* at 58.

82. *Id.* at 145.

83. *See generally*, ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 43–144 (1963).

84. *See* PAGER, MARKED, *supra* note 78, at 32 (“*Negative credentials* are those official markers that restrict access and opportunity rather than enabling them.”) (emphasis in original); *see also* Jefferson-Jones, *A Good Name*, *supra* note 3, at 513.

85. Jefferson-Jones, *A Good Name*, *supra* note 3, at 513; *see also* PAGER, MARKED, *supra* note 78, at 32 (“What the case of the criminal record brings into bold relief . . . is that the credentialing of status positions can also take place in the opposite [negative] direction.”).

86. Jefferson-Jones, *A Good Name*, *supra* note 3, at 514 (citations omitted).

87. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 18, at 817.

A. *Negative Credentialing of Individuals with Ex-Offender Status*

The imposition of criminal sanctions is a function of the State, via the judiciary. In this manner, the triggering of most collateral consequences of conviction—an adjudication of guilt—is the result of direct State action. This is true whether the collateral consequence becomes effective automatically upon conviction, as in the case of most sex offenses, or whether a state agency has the discretion of imposing the consequence, as in the case of most professional license restrictions.<sup>88</sup> In either case, legislative and/or administrative arms of the State directly impose the consequences—thus bestowing negative credentials—outside of the judicial sentencing function.

The direct attachment of collateral consequences by governmental entities engenders a persistent stigma that has the indirect result of encouraging private actors (such as employers and landlords) to act adversely to the interests of those with ex-offender status. These private actors often deny housing,<sup>89</sup> employment,<sup>90</sup> or other beneficial resources to those with ex-offender status, rationalizing their actions as mirroring those of the State. In this way, the ex-offender is de-propertied. As current scholarship has posited, this effect fits the dignity taking paradigm.

Credentialing has become a fact of modern life: in order to get ahead, one must pass muster with formal institutions that certify one's educational attainment or fitness and preparation to practice a profession or trade.<sup>91</sup> By formalizing status, this credentialing has resulted in increased social stratification.<sup>92</sup> While credentials are usually thought of as positively benefitting their possessor, this is not so when the formally-imposed status is that of "ex-offender." In this instance, the credential bestowed is a "negative credential."

88. See, e.g., MO. REV. STAT. § 589.400; MO. REV. STAT. § 314.200.

89. Guidance released in 2016 instructed that automatic denial of housing based on ex-offender status is a violation of the Fair Housing Act. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT OFFICE OF GENERAL COUNSEL, GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016). Despite this guidance, fair housing advocates worry about enforcement of this guidance. Recent lawsuits filed suggest the practice continues unabated. Beatrice Dupuy, *Georgia Police Suspend Program Allowing Landlords to Refuse Tenants with Criminal Records*, NEWSWEEK (Feb. 2, 2018), <http://www.newsweek.com/police-suspend-program-allowing-landlords-refuse-tenants-criminal-records-798784> [https://perma.cc/H88E-GZPZ].

90. See generally Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201 (2013) (showing although EEOC guidelines suggest against blanket policies against hiring ex-offenders, many employers effectively adopt policies banning any such hiring).

91. See generally RANDALL COLLINS, *THE CREDENTIAL SOCIETY: AN HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION* 92–93 (1979).

92. *Id.* at 93.

"Negative credentials are those official markers that restrict access and opportunity."<sup>93</sup> Ex-offender status qualifies as such a credential. The official bestowing of ex-offender status through the criminal justice system functions as a "credentialing of stigma."<sup>94</sup> This stigma permanently attaches to the reputation of the person bearing ex-offender status.<sup>95</sup> 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 [the] negative credential [of ex-offender status] represents one's having been 'de-propertyed'"<sup>96</sup> of beneficial reputation or the ability to rehabilitate poor reputation post-incarceration."<sup>97</sup>

*B. Negative Credentialing and De-Propertied Individuals with Ex-Offender Status*

Individuals who do not bear ex-offender status have reputational status to use beneficially. This is how they actually get their desired job, house, and other benefits. One might argue that the typical person with ex-offender status is unlikely to have been someone who had a positive reputation prior to conviction, so that person has not really lost anything, nor has he been put in a worse position post-conviction and/or post-incarceration. However, if one is never able to rehabilitate his status and therefore is never able to use his reputational status property beneficially, the net result is that of actually taking away that property permanently. Moreover, as previously noted, one of the foci of takings analyses—whether constitutional takings or dignity takings—is the state action involved in the taking. In the case of one with ex-offender status, even if his original reputational status property was not sterling, it is state actors and state action that is preventing its rehabilitation and, thus, its beneficial use.

As noted previously, private actors often take their cues from state actors when determining how to treat those with ex-offender status. These private actors, such as employers, landlords, school admissions officers, and other gatekeepers, often inflate the risk of affording an opportunity to a person with an ex-offender credential.<sup>98</sup> This results in further entrenching the de-propertyed reputational status of those with ex-offender status. For example, one study noted that, when supplied with information of the existence of a potential employee's criminal record, employers are reluctant to discuss that record with

93. PAGER, MARKED, *supra* note 78, at 32 (emphasis omitted).

94. Devah Pager, *Double Jeopardy: Race, Crime and Getting a Job*, 2005 WIS. L. REV. 617, 619–22 (2005).

95. See Jefferson-Jones, *A Good Name*, *supra* note 3, at 514.

96. See Harris, *supra* note 7, at n.121 (discussing the effect of being "de-propertyed" of whiteness).

97. Jefferson-Jones, *A Good Name*, *supra* note 3, at 513.

98. See Hickox & Roehling, *supra* note 90, at 202, 256.



the job applicant.<sup>99</sup> This reluctance—whether due to discomfort, or a misunderstanding of potential legal liability—“reduces opportunities to contextualize a conviction or to demonstrate evidence of successful rehabilitation.”<sup>100</sup> Thus, the person with ex-offender status has no opportunity to beneficially use his reputational status property and is, thus, de-propertyed.

### III. DIGNITY TAKING ELEMENT 2: “THE OUTCOME OF THE DESTRUCTION OF THE STATUS PROPERTY OF PREVIOUSLY-CONVICTED PERSONS IS DEHUMANIZATION AND/OR INFANTILIZATION”

Atuahene describes a “takings spectrum” with constitutional takings on one end and dignity takings on the other.<sup>101</sup> As she notes, “In the middle of the takings spectrum are property confiscations that are not quite dignity takings and also do not qualify as constitutional takings.”<sup>102</sup> Such takings “do not rise to the level of dehumanization or infantilization,” but rather are the result of “humiliation, degradation, radical othering, unequal status, or discriminatory actions.”<sup>103</sup> It is necessary then to explain what makes the reputational status property damage experienced by those with ex-offender status rise to the level of a dignity taking, rather than occurring as a result of one of the actions in the middle of the takings spectrum. As Acevedo has noted, “all punishment conducts some form of dignity harm on the punished individual.”<sup>104</sup> Therefore, he concludes that it is necessary to determine when such criminal sanctions are actual dignity takings.<sup>105</sup> Acevedo finds that the dignity taking line is breached “when a punishment crosses from humiliation to dehumanization or infantilization of the criminal.”<sup>106</sup> He concludes that actually destroying parts of the body, such as when maiming occurs, crosses the line as an instance of dehumanization.<sup>107</sup> Likewise, punishments such as whippings infantilize the punished individual and, thus, also cross the line into dignity takings.<sup>108</sup> By contrast, Acevedo found that shaming punishments, such as the use of “scarlet letters” were mere humiliation and, therefore, occupied the middle of the takings spectrum and did not rise to the level of a dignity taking.<sup>109</sup>

99. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 201–03 (2009).

100. *Id.* at 201.

101. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 18, at 799, Table 1.

102. *Id.* at 799.

103. *Id.*

104. Acevedo, *Dignity Takings in the Criminal Law*, *supra* note 26, at 9.

105. *Id.*

106. *Id.* at 24.

107. *Id.*

108. *Id.* at 20.

109. Acevedo, *Dignity Takings in the Criminal Law*, *supra* note 26, at 19.

The continued reputational damage, stigmatization, and collateral consequences suffered by the previously-convicted rises to the level of a dignity taking because these individuals are dehumanized and infantilized. Dehumanization occurs with the imposition of those collateral consequences that deprive persons with ex-offender status of basic necessities such as shelter and the means to procure it (i.e., lawful employment). Other collateral consequences, such as restrictions on the franchise, along with measures such as post-release supervision, work to infantilize those with ex-offender status. Both legislative history and policy guidelines can be used as evidence of the dehumanizing and/or infantilizing intent of these collateral consequences.

A. *Defining Dignity, Dehumanization, and Infantilization in the Ex-Offender Context*

Atuahene defines *dignity* as, “the notion that people have equal worth, which gives them the right to live as autonomous beings not under the authority of another.”<sup>110</sup> She defines *dehumanization* as “the failure to recognize an individual’s or group’s humanity.”<sup>111</sup> Finally, she distinguishes between “dehumanization” and “infantilization” as follows:

Infantilization is a dignity deprivation distinct from dehumanization because it is predicated on a lack of autonomy rather than on a lack of human worth. *Infantilization* is the restriction of an individual’s or group’s autonomy based on the failure to recognize and respect their full capacity to reason. While the person’s humanness may be acknowledged, his or her capacity for rational self-governance is not. Most commonly, infantilization involves treating adults as if they were minors, and thus placing them under the authority of another, robbing them of their autonomy.<sup>112</sup>

In the United States, the trend of the dehumanization of those with ex-offender status has a nearly 50-year history. Acevedo charts that history noting that:

The dehumanization of people with criminal records arguably started in the 1970s, when the effects of the “War on Drugs” began to be really felt and the militarization of the police (including the development of SWAT teams) took off. President Nixon may have invented the criminal as cultural villain, but President Reagan certainly perfected the image with his rhetoric against . . . criminal “predators.” That rhetoric paid off in 1986 with the passage of the Anti-Drug Abuse Act, which created mandatory minimum sentences for cocaine distribution and even harsher sentences for crack-cocaine. . . . this was the beginning of today’s mass incarceration problem: the United States has five

110. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 18, at 800–01.

111. *Id.* at 801 (emphasis in original).

112. *Id.* (emphasis in original).

percent of the world's population and twenty-five percent of the world's prisoners.<sup>113</sup>

The policies promulgated during the War on Drugs, were reinforced by incessant media emphasis on stories of criminal activity and the rise of "true crime"-based television entertainment.<sup>114</sup> As a result, "Americans [began to] view criminals as wholly without redeeming qualities . . . [and with the rise of] [c]riminal-catching . . . [as] a sport on shows like *Cops* . . . [to view] criminals . . . [as] objects to be hunted" like animals.<sup>115</sup> Thus, as individuals began reentering society after serving predominantly War on Drugs-related sentences, the stage had already been set for their continued dehumanization.

### B. *Instances of Dehumanization and Infantilization of Previously-Convicted Persons*

#### 1. Collateral Consequences

As previously explained, the punishments imposed upon individuals, not as a part of their official judge-mandated sentences, but instead imposed outside of that framework by operation of law or administrative fiat are usually referred to as the "collateral consequences of conviction," or "collateral consequences" for short.<sup>116</sup> The term "collateral consequences" is the predominant nomenclature for such punishment, however, I recognize that it is somewhat a misnomer. Jeremy Travis has termed "collateral consequences" "invisible punishment" instead.<sup>117</sup> This term recognizes that these are not mere additional "consequences" of a criminal record, but rather function as actual "punishment."<sup>118</sup> Joshua Kaiser uses the term "hidden sentences" to describe not just those non-judge-imposed punishments that haunt those with ex-offender status, but also those that attach at arrest and that affect one while serving his sentence.<sup>119</sup> Moreover, Kaiser has argued that to label the civil disabilities and other punishments faced by those with criminal histories as "collateral" is misleading in that it implies that they are "'incidental' or of secondary importance to the 'real' punishments" <sup>120</sup> imposed by the judge. Collateral consequences are, however, far from being merely "incidental."

113. Acevedo, *Restoring Community Dignity*, *supra* note 26, at 630 (citations omitted).

114. *Id.* at 630–31.

115. *Id.* at 631.

116. See generally Pinard & Thompson, *supra* note 60, at 586–93; Travis, *supra* note 3, at 16.

117. See Travis, *supra* note 3, at 15.

118. *Id.* at 16; see also Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy and Purpose to "Collateral" Punishment Policy*, 10 HARV. L. & POL'Y REV. 123, 151–56 (2016).

119. Kaiser, *supra* note 118, at 127.

120. *Id.* at 144 (referencing *Smith v. Doe*, 538 U.S. 84, 85 (2003)).

As discussed in Part I, because the consequences of ex-offender status touch every aspect of the previously-convicted individual's life, this status can be considered a "master status."<sup>121</sup> The Criminal Justice Section of the American Bar Association and the National Institute of Justice have compiled all of the codified collateral consequences across the United States into the National Inventory of the Collateral Consequences of Conviction ("NICCC").<sup>122</sup> The NICCC database is currently hosted on the website of the Council of State Governments Justice Center. Joshua Kaiser performed the first "systematic analysis of the broad patterns in the NICCC."<sup>123</sup> This Article draws upon both Kaiser's analysis and the current NICCC updates in its discussion of collateral consequences in the dignity takings context.

The NICCC groups collateral consequence laws into fourteen categories: (1) business license and other property rights; (2) education; (3) employment; (4) family/domestic rights; (5) government benefits; (6) government contracting and program participation; (7) government loans and grants; (8) housing; (9) judicial rights; (10) motor vehicle licensure; (11) occupational and professional license and certification; (12) political and civic participation; (13) recreational license, including firearms; and (14) registration, notification, and residency restrictions.<sup>124</sup> This analysis will focus on three broad categories: (1) employment-related; (2) housing-related; and (3) political and civic participation-related. Although these broad categories share ostensibly the same names as those used in the NICCC, this analysis combines some of the original categories. Thus, "employment-related" includes "employment," as well as "business licenses and other property rights," "government contracting and program participation," and "occupational and professional license and certification." Likewise, "housing-related" includes "housing," but also includes "registration, notification, and residency restrictions." These categories have been combined because they are often overlapping with regard to their effect on broad areas of the lives of reentering individuals. For example, restrictions on business and occupational licenses can affect employment opportunities, just as residency restrictions can affect housing options. Moreover, the NICCC "double counts" certain restrictions by placing them in more than one category.<sup>125</sup>

121. See *supra* note 76 and accompanying text.

122. *National Inventory of the Collateral Consequences of Conviction*, COUNCIL STATE GOV'TS JUSTICE CTR., <https://niccc.csgjusticecenter.org/> [<https://perma.cc/FN32-DX8U>] [hereinafter NICCC].

123. Kaiser, *supra* note 118, at 129.

124. See NICCC, *supra* note 122; see also Kaiser, *supra* note 118, at 132–33, Table 1.

125. See Kaiser, *supra* note 118, at 132–33 ("They [the NICCC categories] are not mutually exclusive (e.g., bans from public office are limits on both employment and political participation).").

a. Employment-Related Collateral Consequences

Kaiser notes that, as of July 2014, there were 42,634 collateral consequences catalogued in the NICCC.<sup>126</sup> As of May 2018, this number had increased to 48,229.<sup>127</sup> Employment restrictions account for 54.3% of those restrictions.<sup>128</sup> Business license restrictions account for 32.9%.<sup>129</sup> Government contracting and program participation accounts for 3.9%.<sup>130</sup> Occupational and professional license and certification restrictions comprise 34.8%.<sup>131</sup> Once overlap and double-counting are accounted for, employment-related restrictions comprise 74.9% of codified collateral consequences.<sup>132</sup> These statistics indicate that employment-related restrictions are by far the majority of the collateral consequences imposed on those with ex-offender status. These restrictions range from discretionary denials of medical licenses to both those with felony or misdemeanor convictions,<sup>133</sup> to automatic denials of plumbing licenses to those with felony convictions.<sup>134</sup>

Employment is a gateway to stability: it is the means by which one may obtain the resources to secure housing, which in turn is crucial in rebuilding family cohesion for reentering individuals. Those with criminal convictions are three to five times more likely to reoffend when they are unable to find work.<sup>135</sup> Moreover, those on probation or parole are often required to work in order to maintain their freedom.

Work itself is intrinsically dignity-affirming. Dignity of all work, regardless of whether blue-collar or white-collar, whether paid or unpaid, whether performed outside of the home or in the home, has been recognized by various religious traditions.<sup>136</sup> Moreover, increasing recognition has been given to the psychological importance of not just work itself, but of dignity in the work

126. *Id.* at 133.

127. NICCC, *supra* note 122.

128. *Id.*

129. *Id.* This number may be inflated as it also contains “other property rights” and may, like the other categories, include some overlaps.

130. *Id.*

131. *Id.*

132. NICCC, *supra* note 120.

133. *See, e.g.*, ALA. ADMIN. CODE r. 540-X-3.05 (2008) (denying limited certificate of qualification to practice).

134. *See, e.g.*, 24 DEL. CODE § 1808 (2014) (instructing applicants for plumbing licenses with felony convictions to apply for a waiver with The State Board of Plumbing, Heating, Air Conditioning, Ventilation and Refrigeration Examiners).

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

136. *See, e.g.*, U.S. COUNCIL OF CATHOLIC BISHOPS, *The Dignity of Work and the Rights of Workers*, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/the-dignity-of-work-and-the-rights-of-workers.cfm> [https://perma.cc/AN9T-VFL2].

environment.<sup>137</sup> Thus, given the place that work holds in the psyche and in society, denials of the ability to work, and to avail oneself of the benefits of work, are examples of the dehumanization of those with criminal histories.

#### b. Housing-Related Collateral Consequences

Housing restrictions account for 2.6% of the 48,229 collateral consequences in the NICCC.<sup>138</sup> Registration, notification, and residency restrictions account for an additional 7.5%.<sup>139</sup> Once overlap is accounted for, housing-related restrictions comprise 8.1% of collateral consequences in the NICCC.<sup>140</sup> Housing restrictions range from such measures as discretionary denial of public housing benefits to those with misdemeanor or felony convictions,<sup>141</sup> to ineligibility for protection from discriminatory housing practices.<sup>142</sup>

Although the percentage of housing-related restrictions is relatively small, when compared to employment-related restrictions, for example, the importance of securing adequate housing should not be underestimated. As mentioned above, the ability to garner housing is essential to those seeking to rebuild post-conviction family cohesion, especially in instances where the previously convicted person is seeking to gain or regain custody of his or her children.<sup>143</sup> Moreover, there is an explicit and recognized connection between housing and dignity. For example, the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Political Rights all recognize the right to adequate housing for all people, and thus, that one's human worth and dignity are closely related to one's ability to secure adequate housing.<sup>144</sup>

137. See generally RANDY HODSON, *DIGNITY AT WORK* (2001) (arguing for dignity recognition in the workplace and tasking employers with ending managerial abuse and mismanagement).

138. NICCC, *supra* note 122.

139. *Id.*

140. *Id.*

141. See, e.g., LA. STAT. ANN. § 40:501 (2014) (giving housing authorities ability to find those who have exhibited criminal behavior unsuitable for occupancy).

142. See, e.g., KAN. ADMIN. REGS. § 21-60-15 (2018) (applying to those with controlled substance convictions).

143. Lara Bazelon, *Redemption for Offenders and Victims*, THE AMERICAN PROSPECT (Jan. 17, 2018), <http://prospect.org/article/redemption-offenders-and-victims> [https://perma.cc/7BJY-SA ES].

144. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including . . . housing . . ."); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966), art. 11(1) ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate . . . housing and to the continuous improvement of living conditions."); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 19, 1966), art.

Housing restrictions have an especially deleterious effect on those with sex-offense convictions. This special category of previously-convicted individuals is so severely restricted regarding where they may reside that entire colonies of these individuals have resorted to living in makeshift camps under causeways<sup>145</sup> and on train tracks.<sup>146</sup> It is not difficult to see how dignity is impacted by such restrictions.

### c. Political and Civic Participation-Related Collateral Consequences

Restrictions on political and civic participation account for 11.7% of the collateral consequences listed in the NICCC database.<sup>147</sup> The most widely-instituted restrictions are those that bar individuals with ex-offender status from voting.<sup>148</sup> However, voting restrictions are not the only civic participation-related collateral consequences: states also bar those with ex-offender status from serving on juries,<sup>149</sup> or holding elected<sup>150</sup> or appointed public offices.<sup>151</sup> These restrictions are clear examples of infantilization. Like minors, these adult members of society are denied the autonomy that comes with participation in the body politic. Instead, other members of society are charged with administering the government and its policies without their input, thus “placing them under the authority of another.”<sup>152</sup>

## 2. Post-Release Supervision

In addition to the collateral consequences of conviction, many reentering individuals are also subject to some form of post-release or community supervision, whether probation or parole. For example, at the end of 2015, one in fifty-three adults in the United States was subject to such supervision.<sup>153</sup>

12(1) (“Everyone lawfully within the territory of a State shall, within that territory, have the right to . . . freedom to choose his residence.”).

145. Isaiah Thompson, *Swept Under the Bridge*, MIAMI NEW TIMES (Mar. 8, 2007), <http://www.miaminewtimes.com/news/swept-under-the-bridge-6334676> [<https://perma.cc/CDB7-RW9H>].

146. Terrence McCoy, *Miami Sex Offenders Live on Train Tracks Thanks to Draconian Restrictions*, MIAMI NEW TIMES (Mar. 13, 2014), <http://www.browardpalmbeach.com/news/miami-sex-offenders-live-on-train-tracks-thanks-to-draconian-restrictions-6353588> [<https://perma.cc/SH8S-GQ9L>].

147. *Id.*

148. *See, e.g.*, W. VA. CONST. art. IV, § 1.

149. *See, e.g.*, ARIZ. R. CIV. P. 47.

150. *See, e.g.*, CAL. GOV’T CODE § 1021.

151. *See, e.g.*, IDAHO CODE § 42-3109 (2018) (those with felony convictions ineligible to serve as flood control district commissioner).

152. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 18, at 801.

153. Danielle Kaebler & Thomas P. Bouczar, *Probation and Parole in the United States, 2015*, BUREAU JUST. STAT. (Feb. 2, 2017), <https://www.bjs.gov/content/pub/pdf/ppus15.pdf> [<https://perma.cc/HWD3-95SD>].

Incarceration is purposeful infantilization: the State is saying, “you broke the social contract and now must be treated like a child” (i.e., loss of autonomy). In other words, one of the punishments for breaking the law, and thus the social contract, is the loss of autonomy. While we may quibble with the appropriateness of this response, the State’s motivation is clear. Post-release supervision is a purposeful extension of this incarcerative infantilization. The infantilization of the reentering person does not appear to recognize the restorative or rehabilitative purposes of criminal punishment, rather it seems to be rooted in retribution and incapacitation. It, therefore, is arguably both infantilizing in its effect, and dehumanizing in its purpose and *raison-d’être*.

#### CONCLUSION: THE NEED FOR FUTURE RESEARCH

This Article has focused on dignity deprivations rooted in dehumanization and infantilization of individuals with ex-offender status, but Atuahene has also noted that “individuals and communities are deprived of dignity when subject to dehumanization, infantilization, *or community destruction*.”<sup>154</sup> Thus, it is likely that a dignity taking can be evidenced by examining the destabilizing and destructive effects that individual reputational degradation has on the communities from which those with ex-offender status come, and to which they often return. Applying the dignity takings analysis in the individual context sets a foundation upon which to examine dignity takings in the community context.

The communities from which those with ex-offender status come and to which they return, along with the individual members of those communities *who do not bear ex-offender status* suffer from “courtesy stigma”<sup>155</sup> – a stigma that attaches to those associated with the person who bears the primary stigma. The latest scholarship regarding dignity takings of collective property bears out the existence and the effect of such “courtesy stigma” in the dignity takings context.<sup>156</sup> This scholarship, however, focuses on the total physical loss and/or physical destruction of neighborhoods or community spaces. Future inquiry must also examine community degradation and destruction in the instance where

154. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 18, at 801 (emphasis added).

155. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 31 (1963).

156. This scholarship includes: Stephen Engel & Timothy Lyle, *Fucking with Dignity: Public Sex, Queer Intimate Kinship, and How the AIDS Epidemic Bathroom Closures Constituted a Dignity Taking*, 92 CHI.-KENT L. REV. 961 (2018); Thomas Joo, *Alien, Land, Law: Urban Renewal and Sacramento’s Lost Japantown*, 92 CHI.-KENT L. REV. 1005 (2018); Shaun Ossei-Owusu, *The Good State Giveth and Taketh Away: Race, Class, and Urban Hospital Closings*, 92 CHI.-KENT L. REV. 1037 (2018); and Matthew P. Shaw, *Creating the Urban Educational Desert Through School Closures and Dignity Taking*, 92 CHI.-KENT L. REV. 1087 (2018).



the community is still there physically, but is nonetheless severely damaged psychologically, economically, or otherwise.<sup>157</sup>

In addition to examining community destruction, future research must examine “dignity restoration” in the ex-offender context. Atuahene has asserted that “a comprehensive remedy for dignity takings entails . . . *dignity restoration*—compensation that addresses both the economic harms and the dignity deprivations involved.”<sup>158</sup> Thus, future research should inquire into the types of restoration that will actually provide proper “dignity restoration” to those with ex-offender status. As such, it should revisit “rebiography” in the context of “dignity restoration” and also explore other modes of restoration, including community reparations. Such inquiry should both apply the theory of dignity takings and utilize qualitative methods, such as semi-structured interviews, to answer the question: What is the best form of “dignity restoration” for the “dignity taking” suffered by those with ex-offender status?

The initial extension of the dignity taking analysis contained in this Article sets the stage for these further modes of inquiry by demonstrating the ways in which the imposition of collateral consequences and continued stigmatization of those with ex-offender status fits the dignity taking rubric. Moreover, it adds to this new field of sociolegal inquiry by further extending it into the realm of State-sponsored intangible property deprivations and their intersection with issues of dignity and human worth.

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157. My forthcoming article addresses these issues of community destruction as a dignity taking in the context of the communities from which those with ex-offender status come and to which they return. See Jamila Jefferson-Jones, “Community Dignity Takings”: *Dehumanization and Infantilization of Communities Resulting from the War on Drugs*, 66 KAN. L. REV. (forthcoming 2018).

158. ATUAHENE, WE WANT WHAT’S OURS, *supra* note 11, at 10–11.