EXTENDING "DIGNITY T AKINGS": RE -CONCEPTUALIZING THE DAMAGE CAUSED BY CRI MINAL HISTORY AND EX- OFFENDER STATUS

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OTH DIRECTLY AND INDIRECTLY DESTROYED THE STATUS PROPERTY OF PREVIOUSLY-CONVICTED PERSONS"0 . c 0 f f e n d

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.[5]

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 "debilitatt8 ty.057 Tw 2.(.in)-5 ( )0.5 (a)0.9 (ge)3 (tt8 t (s)2.6 on (t)5.3 (he)0.8 p(r)3.5 (

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.[43] 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."[44] This is particularly true in the context of the taking of intangible property,[45] 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.[46] 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."[47] 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.[48] 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.[49] 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 [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.[50] 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,"[51] and "can be both analogized to conventional forms of property and literally converted to those forms."[52] Moreover, like other forms of property, reputation can have "kga"

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 . . .

is the social context in which the owner operates.[72] 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.[73] 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~~ha~~ve made. "[74] In this manner, reputation is a form of social currency~~a m~~edium of exchange between and amon g members of society.

In the social context, ex-offender status has followed an evolutionary trajectory "from legal status to an aspect of identity."[75] In fact, ex-offender status can be classified as a "master status"~~an~~ attribute that eclipses all other attributes, positive and negative, ofhe sona585 Tm ( )4(s)1.7 8 10.9 44on (y)o92 (t)4(ci71y)o92 (t375

business affairs."[81] 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."[82] Thus, "spoiled"[83] or stigmatized reputation functions as a "negative credential."[84] 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.[85] "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."[86] This aspect of governmental creation is part of what makes continued

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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 —

the job applicant.[99] 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."[100] Thus, the person with ex-offender status has no opportunity to beneficially use his reputational status property and is, thus, de-propertied.

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.[101] 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."[102] 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."[103] 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."[104] Therefore, he concludes that it is necessary to determine when such criminal sanctions are actual dignity takings.[105] Acevedo finds that the dignity taking line is breached "when a punishment crosses from humiliation to dehumanization or infantilization of the criminal."[106] He concludes that actually destroying parts of the body, such as when maiming occurs, crosses the line as an instance of dehumanization.[107] Likewise, punishments such as whippings infantilize the punished individual and, thus, also cross the line into dignity takings.[108] 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.[109]

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

percent of the world's population and twenty-five percent of the world's

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."[121] 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").[122] 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."[123] 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.[124] 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.[125]

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.[126] As of May 2018, this number had increased to 48,229.[127] Employment restrictions account for 54.3% of those restrictions.[128] Business license restrictions account for 32.9%.[129] Government contracting and program participation accounts for 3.9%.[130] Occupational and professional license and certification restrictions comprise 34.8%.[131] Once overlap and double-counting are accounted for, employment-related restrictions comprise 74.9% of codified collateral consequences.[132] 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,[133] to automatic denials of plumbing licenses to those with felony convictions.[134]

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.[135]

environment.[137] 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 dehuma

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