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Stephen Robert Catanzaro

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The Home Taken Into the Takings Clause:

An Exploration of the Takings Clause and the Moral Obligation of the
Government to Provide Just Compensation

Stephen Catanzaro

Seton Hall University School of Law

Property, Law & Society

Professor Poirier

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The Home Taken Into the Takings Clause: An Exploration of the Takings Clause and the Moral Obligation of the Government to Provide Just Compensation

“Property shall not ‘be taken for public use, without just compensation¹”

Twelve 5th Avenue, Ortley Beach, New Jersey. After two decades of saving, the purchase of this gorgeous property situated “down the shore” is finally attainable. It’s a dream come true. As time has passed on you have raised your children, living in your beautifully located beach-block home three months out of the year. Your daughter met her first boyfriend in the boardwalk gazebo up the street. You surprised your son with his first car on his 17th birthday morning, parking it along the home’s pebbled driveway. During the autumn, winter and spring months the home has been occupied by your parents, your children’s grandparents, so that they no longer have to trek the exhaustive stairs of their prior home. In your living will, you have already devised this home, full of memories, to your children, to ensure that it will be enjoyed for the generations that follow. Then, on October 29, 2012, everything changes. The catastrophic storm, Hurricane Sandy, ravaged the New Jersey Coast, destroying everything in its path. Amazingly, your home survived, its post-storm state being slightly dislodged off of its foundation. The State of Emergency restricted access to your home until two weeks later. Upon arrival, your eyes well up as you drop to your knees at the state of your property. Your house is gone. Did the storm destroy your home? No. The New Jersey Department of Transportation deemed your home to be “unsafe,” claiming that it was “blocking the roadway.” You possess photographic evidence proving the contrary. Insurance may not cover the cost of your home, which, in addition to the property value, had over \$50,000 worth of valuables inside, along with invaluable memories. You can’t afford to rebuild your home without just compensation. You need answers.

¹ U.S. Const. amend. V.

I. Introduction

The Takings Clause of the Fifth Amendment to the United States Constitution appears, facially, simple in theory and straightforward in application. The reality is that the application of the Takings Clause and the “just compensation” owed under it could not be more arbitrary, inconsistent and unjust. The real-life circumstances in the tragic story above conveniently provide the platform for this paper to systematically address the various components of the Takings Clause and governmental entity liability (or lack thereof), applying their framework to the situation above. Does the family above have a method of redress? This paper will conclude that while a skilled attorney will most assuredly be capable of making arguments under the numerous causes of actions that will be discussed, the result is simply too unpredictable, and answer more than likely “no.” This harsh reality, that an entire home can be negligently destroyed with no measure of remedy, sets the stage for this paper’s primary argument: while there may be no legal right for compensation in the circumstances detailed above, there is a moral duty owed by the government to provide compensatory funding in the unique and narrow situation where governmental action is negligent in the wake of a natural disaster.

In order to properly apply the legal framework that will be discussed below, a detailed understanding of the unfortunate circumstances addressed above is required. The Marias, a family of five, have owned their Ortley Beach home for twenty years. For purposes of brevity, I will list the timeline of destruction of their home:

October 29, 2012: Hurricane Sandy ravages the New Jersey Coastline, including Ortley Beach, located in Ocean County.²

November 1, 2012: Aerial imaging shows the Marias house dislodged from its foundation, but still assembled and within its property boundaries.³

² Hurricane Sandy, Federal Emergency Management Agency (FEMA), <<http://www.fema.gov/hurricane-sandy>>.

November 10, 2012: Marias given permission to report to the Toms River Bridge to be transported to their home to assess its condition and retrieve any valuables located inside. Upon arrival, Nick Maria Sr. discovers the property empty, his home missing.

November 12 – November 30, 2012: Marias seek answers, contacting the New Jersey Department of Transportation (NJDOT) and Governor Chris Christie’s Office.

December 5, 2012: Fox News runs an investigative news story detailing the disappearance of the Marias home.⁴

December 6, 2012: NJDOT issues its first statement: “The DOT did not remove any structure that was not on the roadway...our objective...was to open the roadways.”⁵

December 7, 2012: Fox News Investigation Unit confronts NJDOT with visual evidence that the Maria home was not blocking the roadway, but rather, was dislodged from its foundation and had extended out onto the sidewalk, resting against a utility pole.⁶

December 8, 2012: NJDOT issues a second statement that directly contradicts its first statement:

“The structure in question...was pushed off its foundation and jammed against another house that had come to rest in the middle of the street. The two houses had sandwiched a utility pole. Our crews did not take down any structure unless it was deemed to be unsafe...”⁷

In the months since the disappearance of their home, the Marias story has garnered national attention; yet several glaring questions remain at the forefront: should the Marias have been given notice and granted the opportunity to remove the valuables, estimated at \$50,000, from their home? Will they be made whole for their significant loss? To date, it appears the Marias homeowner’s insurance company may be willing to cover the structure itself. However, they are refusing to cover the loss of the valuables inside the structure, premising its denial on an

³ Hurricane Sandy Response Imagery Viewer, National Oceanic and Atmospheric Administration (NOAA), <<http://storms.ngs.noaa.gov/storms/sandy/>>.

⁴ NJ Man’s Home Disappears After Sandy, FoxNews.com, Dec. 5, 2012, <<http://wjbk.membercenter.worldnow.com/story/20272784/nj-mans-home-dissappears-after-sandy>>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

intervening cause argument. Specifically, the insurance company has taken the position that it was not the storm that destroyed the valuables, but the intervening action of the NJDOT after the storm subsided. Under this theory, the insurance company argues the Maria family would have had the opportunity to salvage their valuables if it were not for the destructive action taken by the NJDOT. As a result, the insurance company is asserting that the Marias method of recovery is not through them, but through the state. As such, the Maria family is left with an arduous path to recovery.

Part II of this paper will discuss the Takings Clause generally. It will provide a foundational understanding of the Clause; its history, purpose, theoretical function and actual application. This section will address the doctrine of sovereign immunity that is an underpinning to the Takings Clause and directly applicable to the case at bar. Lastly, this part will briefly introduce the statutory and policy issues that will be discussed in the sections that follow; namely eminent domain, necessity destruction in emergent circumstances, the discretionary function under the New Jersey Tort Claims Act, and inverse condemnation proceedings and its measure of compensability.

Part III will discuss eminent domain. While not directly involved in the case at bar, a brief introduction to eminent domain proceedings will allow the reader to attain a thorough understanding of the procedures involved in formal condemnation and regulatory proceedings.

Part IV will tackle inverse condemnation proceedings. Inverse condemnation is the other side of a Takings Clause claim, as it does not involve regulatory, notice driven formal condemnation proceedings. Directly related to the case at bar, an inverse condemnation claim is likely the best remedial option available to the Maria family. This section will discuss the history of the claim and the elements required to be proven in order to recover. Lastly, it will convert the

Marias situation into an inverse condemnation claim and forecast the outcome in the Superior Court of New Jersey.

Part V will address the necessity destruction exception to the Takings Clause. Prevalent in emergent circumstances such as Hurricane Sandy, the application of the necessity exception is potentially damning to the Marias recovery efforts. This section will discuss the exception and the broad latitude in decision making that it affords public entities.

Part VI will address the discretionary function of the NJDOT under the New Jersey Tort Claims Act (NJTCA). The statement given by the NJDOT was specifically tailored to show that the Maria house was in a condition that warranted discretionary decision-making by the NJDOT. This section will discuss the discretion afforded to public entities and apply it to the case at bar. Part VI will conclude that while this author believes notice should have been given to the Marias, it is simply not feasible to create a sweeping notice requirement in situations of natural disaster.

Part VII will assert this paper's primary argument. Specifically, while it is understood by this author that the governmental entity did not have a legal requirement to give notice before destroying the home and the government does not have a legal obligation to compensate the Marias, a moral obligation is owed to the Marias and other similarly situated families. The unique circumstances here; a natural disaster that does not destroy a home, but is destroyed by the discretionary, necessitated action by the government in emergent circumstances, warrants compensatory funding for the valuables lost inside the home. This section will address the narrow scope and application of this compensatory policy argument as well as forecasted issues that may arise.

This paper will conclude that while the Marias potentially have a remedy available under an inverse condemnation or negligent destruction cause of action, the real issue remains that their

prospects of recovery are simply too unreliable and costly. The legal expenditures that will go into asserting their claim, with the prospect of zero recovery, shocks the conscience. In order to prevent this injustice, a governmental compensatory fund must be created in order to redress those affected by natural disasters like Hurricane Sandy.

II. The Takings Clause

The Takings Clause of the Fifth Amendment to the United States Constitution, coextensive with the New Jersey Constitution, provides protections against governmental takings of private property without just compensation.⁸ The Takings Clause was adopted to offer protection and security to the rights of individuals as against the government.⁹ It allows any taking “for public use” and requires “just compensation.”¹⁰ Essentially, the government is forbidden from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.¹¹ The Supreme Court has held that both the permanent physical occupation of property and denial of all economically beneficial use of property are compensable takings.¹²

A constitutional taking may occur in one of two ways: 1) via physical taking, in which the government takes title to private property or authorizes a physical occupation or appropriation of property; or 2) via regulatory taking, through which a government regulation deprives the property owner of all economically viable use of their land.¹³ Regardless of the

⁸ Klumpp v. Borough of Avalon, 997 A.2d 967, 978 (2010).

⁹ Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).

¹⁰ Derek T. Muller, *As Much Upon Tradition As Upon Principle: A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 500 (2006).

¹¹ Armstrong v. United States, 364 U.S. 40, 49 (1960).

¹² Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

¹³ Klumpp, 997 A.2d at 975. (citing the “Eminent Domain Act,” N.J.S.A. §20:3-1 to 20:3-50).

exact method employed, where a taking occurs, the Takings Clause requires the government to compensate the property owner.¹⁴

To accomplish a physical taking, the government may either enter the land without authorization or exercise its power of eminent domain through a condemnation proceeding.¹⁵ The circumstances surrounding the removal and destruction of the Maria home was undoubtedly a situation where the government entered their land without authorization in the absence of any formal condemnation proceedings. Despite the absence of legal application to the case at bar, it is important to understand the underlying procedures of Takings Clause proceedings. Specifically, when the government engages in formal condemnation proceedings, they are exercising their power under eminent domain. New Jersey's Eminent Domain Act¹⁶ authorizes government seizure of property under certain circumstances requiring a condemnation proceeding.¹⁷ The procedural process involved with eminent domain proceedings will be discussed further in the section that follows.

Alternatively, and readily prevalent in the case at bar, if the government seizes property without first bringing a condemnation proceeding, the burden shifts to the individual to bring an action to compel compensation, known as inverse condemnation.¹⁸ The concept of inverse condemnation recognizes that the landowner may initiate the action to compel compensation from the government; one need not wait in vain for government compensation.¹⁹ Inverse condemnation will be discussed at length in Part IV of this paper as it is the cause of action most likely to produce a favorable result for the Maria family.

¹⁴ *Yee v. Escondido*, 503 U.S. 519, 522 (1992).

¹⁵ Klumpp, 997 A.2d at 975-76. (citing the "Eminent Domain Act," *N.J.S.A.* §20:3-1 to 20:3-50).

¹⁶ *N.J.S.A.* §20:3-1 to 20:3-50.

¹⁷ Klumpp, 997 A.2d at 976.

¹⁸ *Id.*

¹⁹ *Id.*

At first glance, the language of the Takings Clause is remarkably straightforward. However, as with all constitutional and statutory practice, its application is alarmingly inconsistent and convoluted. Indeed, courts and scholars have been famously unsuccessful in developing a coherent framework for application of the brief passage of the Takings Clause.²⁰ Nonetheless, there are recurring themes. One common theme is that the Takings Clause of the Fifth Amendment should protect settled expectations.²¹ Such protection is said to be desirable because unstable distribution of wealth would (1) undermine the democratic system by, among other things, raising the stakes underlying political factionalism; and (2) discourage productive investment.²² In a similar vein, the Takings Clause is sometimes said to reduce insecurity among property owners by serving as a form of insurance and imposing fiscal discipline upon the government.²³ Another theme that has remained consistently prevalent is that of “reciprocity of advantage.” The theory, simply stated, is that if an individual suffers as a result of a policy designed to benefit the public, the policy is fair if it provides “reciprocity of advantage,” that is, if the individual benefits in some way from the policy.²⁴ As can be expected with varying themes surrounding the Takings Clause, case law has created a plethora of rules, producing an *ad hoc* case by case approach, creating an inconsistent framework for Takings Clause adjudication.

Until 1922 when the landmark decision in *Pennsylvania Coal Co. v. Mahon*²⁵ was delivered, the United States Supreme Court confronted only a handful of cases in which owners claimed to have suffered takings in the absence of actual appropriation of their property by the

²⁰ Charles E. Cohen, *Takings Analysis of Police Destruction of Innocent Owners' Property in the Course of Law Enforcement: The View from Five State Superior Courts*, 34 MCGEORGE L. REV. 1, 10 (2002).

²¹ *Id.* at 15.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

government.²⁶ The Court's decisions during this time generally held that governmental acts did not require compensation absent outright appropriation; this was so even if the acts diminished property values or otherwise imposed costs on landowners.²⁷ The most significant case to deviate from this line of reasoning was *Pumpelly v. Green Bay Co.*²⁸, which held that the complete flooding of the plaintiff's land due to the construction of a government-authorized dam constituted a taking despite the fact that there had been no outright appropriation.²⁹ In the decades that followed, the courts enumerated a new rule designation: the exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way is very different from taking property for public use.³⁰ For many years, under this doctrine, the Court would inquire whether the challenged regulation sought to prevent harms caused by the proscribed property use, in which case no taking occurred, or whether the regulation sought to obtain a benefit for the general public at the expense of the property owner, in which case a taking occurred.³¹ It wasn't until 1978, in *Penn Central Transportation Co. v. New York City*, that the Court specifically rejected this approach.³² In that case the Supreme Court made the first explicit declaration that the Takings Clause was intended to protect the *value* of property, rather than just *possession*.³³

The recent case law that has followed has continued to announce new rules pertaining to the value of property and different levels of governmental intrusion. Three general doctrines

²⁶ Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993).

²⁷ *Cohen*, *supra* note 20, at 13.

²⁸ *Pumpelly*, 80 U.S. 166.

²⁹ *Cohen*, *supra* note 20, at 13. Importantly, the Supreme Court limited the reach of *Pumpelly* to cases involving actual invasion of property, rather than any acts resulting in diminution of value. See *Cohen*, *supra* note 20, at 14.

³⁰ See *Reinman v. Little Rock*, 237 U.S. 171 (1915) (holding that a law prohibiting operation of livery stables within city limits was not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (holding that prohibition of a brickyard in a residential area was not a taking).

³¹ *Cohen*, *supra* note 20, at 14.

³² See generally *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

³³ *Cohen*, *supra* note 20, at 15. (emphasis added).

have evolved over the last century; the “permanent physical invasion” rule; “serious public harm” doctrine; and “diminution in value/economic viability doctrine.”³⁴ The permanent physical invasion rule, announced in *Loretto v. Telprompter Mangattan CATV Corp.*,³⁵ holds that a permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve.³⁶ *Loretto* involved a minor, but permanent physical occupation.³⁷ The issue that the Court announced critical to its determination was “whether an otherwise valid regulation so frustrates property rights that compensation must be paid.”³⁸

The second doctrine, “serious public harm” or “noxious use” doctrine, originated in *Mugler v. Kansas*.³⁹ The Court in *Mugler* held that no taking had occurred because the law in question was “fairly adapted to the end of protecting the community against the evils which result from the excessive use of ardent spirits.”⁴⁰ Essentially, the Court found that regulations prohibiting use by individuals of their property that will be prejudicial to the health, morals or safety of the public is not and, consistent with the existence and safety of organized society, cannot-be burdened with the condition that the state must compensate such individual for pecuniary losses they may sustain.⁴¹

The third doctrine, “diminution in value” or “economic viability” doctrine was originated in *Pennsylvania Coal Co.*, where the Court held that the regulation in question so utterly impaired the rights possessed that it had “very nearly the same effect for constitutional purposes

³⁴ Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L. J. 663, 671 (1996).

³⁵ *Loretto v. Telprompter Mangattan CATV Corp.*, 458 U.S. 419 (1982).

³⁶ *Id* at 426.

³⁷ *Lisker, supra* note 34, at 672.

³⁸ *Loretto*, 458 U.S. at 425.

³⁹ See generally *Mugler v. Kansas*, 123 U.S. 623 (1887). *Lisker, supra* note 33, at 675.

⁴⁰ The statute in question in *Mugler* was a state law prohibiting the manufacture and sale of intoxicating liquors, which the owner challenged as a taking. *Id* at 662.

⁴¹ *Lisker, supra* note 34, at 676.

as appropriating or destroying the right.”⁴² It was in this decision that Justice Holmes made his oft-quoted statement 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.”⁴³ He continued by noting that this question was one of degree, “and therefore cannot be disposed of by general propositions.”⁴⁴

While appearing as three distinct doctrines, recent case law has blurred their scope. For example, in *Lucas v. South Carolina Coastal Council*, the Court set forth two discrete types of government regulation which the Court had previously declared “compensable without case-specific inquiry into the public interest advanced in support of the restraint.”⁴⁵ These included cases of government-imposed physical invasion.⁴⁶ It is important to note that the Court acknowledged that its categorical rule applied “at least with regard to permanent invasions,” conceding that such a rule may not apply to a temporary invasion like the one at bar.⁴⁷ The second category applied “where regulation denies all economically beneficial or productive use of land.”⁴⁸ Essentially, a government-imposed temporary physical invasion, like the one in the situation at bar, would be compensatory under one doctrine, but not under another. While it is understood that these doctrines are primarily associated with regulatory takings, it is important to stress the ambiguities involved in the application of the Takings Clause, both from a regulatory and non-regulatory standpoint.

⁴² *Pennsylvania Coal Co.*, 260 U.S. at 415. See generally *Lisker*, *supra* note 33, at 677-678. The case involved a Pennsylvania statute that effectively barred the coal company from mining under the Mahon’s land despite the coal company having an exclusive right to do so.

⁴³ *Pennsylvania Coal Co.*, 260 U.S. at 415. See generally *Lisker*, *supra* note 33, at 678.

⁴⁴ *Id.*

⁴⁵ *Lucas*, 505 U.S. at 1017-18.

⁴⁶ *Cohen*, *supra* note 20, at 16.

⁴⁷ *Lucas*, 505 U.S. at 1015.

⁴⁸ *Id.*

A final relevant and consistent theme has been a fixture in Takings Clause application: public authorities owe no compensation when they destroy property to protect the general welfare of the public in times of emergency.⁴⁹ As will be discussed in Part V, this Takings Clause exception is especially problematic for the Maria family, as it bars compensation for the destruction of their home under a theory of necessitated action.

While it is not this paper's goal to harp on the unpredictable application of the Takings Clause and the compensation allegedly owed therein, it is critical to be cognizant that any claim made by the Maria family under the causes of action addressed in the sections that follow will likely produce a result that is unfavorable or unjust. Even if the Maria family does succeed under one of the potentially available causes of action, it is this paper's contention that the compensatory funding being argued for is still a necessity given the volatile nature of Takings Clause "just compensation" adjudication. As the United States Supreme Court has itself acknowledged, its approach to takings cases has been "essentially ad hoc."⁵⁰

III. Eminent Domain

Throughout the history of Fifth Amendment proceedings, one power has remained consistent and unfettered: government's eminent domain power; its power to take private property for public use. Eminent domain is the inherent power of a governmental entity to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking.⁵¹ The concept of eminent domain has existed for centuries; the first formal declaration of the related "just compensation" principle occurred in France's 1789

⁴⁹ George C. Christie, *The Defense of Necessity Considered From the Legal and Moral Points of View*, 48 DUKE L.J. 975, 995-96 (1999).

⁵⁰ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

⁵¹ *Muller*, *supra* note 10, at 486.

Declaration of the Rights of Man and of the Citizen.⁵² Though “eminent domain” does not appear in the Constitution, the Supreme Court has determined that it is “an incident of federal sovereignty and an offspring of political necessity.”⁵³ The “eminent domain clause” contemplates that the legislature may authorize both public and private entities to acquire property by condemnation, provided that the acquisition is for a public purpose.⁵⁴

Today, the most straightforward and uncontroversial application of the right to “just compensation” occurs when the government physically takes real property through the exercise of its eminent domain power.⁵⁵ This paper will briefly discuss the procedurally formalized and structured governmental taking of private property through eminent domain. The government acts under its eminent domain power when it appropriates privately-owned property by ousting the owner and transferring legal title to itself in order to use the property for some public purpose.⁵⁶ The right of eminent domain is a public right; it arises from the laws of society, and is vested in the state or its grantee, acting under the right and power of the state, and is the right to take or destroy private property for the use or benefit of the state, or of those acting under and for it.⁵⁷

The New Jersey Eminent Domain Act⁵⁸ authorizes government seizure of property under certain circumstances. In order to achieve an authorized seizure, the government must commence a formal condemnation proceeding.⁵⁹ The importance of the concept of “eminent domain” is in its formalized nature. This governmental right, when asserted, is presenting the condemnee with

⁵² Ricky J. Nelson, *Inverse Condemnation Actions Present Unique Problems When Determining “Just Compensation,”* 2010 B.Y.U.L. REV. 2315, 2315 (2010).

⁵³ *Loretto*, 458 U.S. at 441.

⁵⁴ *Patzau v. New Jersey Dept. of Transp.*, 271 N.J. Super. 294, 310 (1994).

⁵⁵ *Cohen*, *supra* note 20, at 13

⁵⁶ *Id.*

⁵⁷ *American Print Works v. Lawrence*, 23 N.J.L. 590, 615 (1851).

⁵⁸ N.J.S.A. § 20:3-1 to 20:3-50.

⁵⁹ *Id.*

formal notice of the potential condemnation of its private property. The condemnation is being conducted for a specific, announced public purpose. This is directly at odds with the type of condemnation that occurred with the Maria home. To the contrary, no notice was given before their home was destroyed. Therein lays the significance of eminent domain: formal proceedings essentially guarantee “just compensation.” In fact, there appears never to have been any serious question that the Takings Clause required compensation in the eminent domain arena.⁶⁰ Had the Maria family been given notice that their home needed to be removed because it was allegedly “blocking a roadway” or “it had been deemed unsafe,” they may have had the opportunity to remove items of substantial value from the household. Admittedly, the potentially exigent circumstances of Hurricane Sandy aftermath significantly impacted the ability for notice to be given. This argument is merely being asserted to illustrate the simplistic and straight-forward approach of formal eminent domain proceedings and the “just compensation” that it provides for aggrieved condemnees. Luckily for the Marias, formal proceedings are not a prerequisite for a taking.⁶¹

IV. Inverse Condemnation

Perhaps the most logical argument that can be made for recovery for the destruction of the Maria home is under a claim for inverse condemnation. Eminent domain is not the sole procedure available for the government to take property. Physical occupation or appropriation of property is usually an obvious demonstration of a taking and qualitatively more severe than a less apparent regulatory taking.⁶² In fact, it has been said that inverse condemnation and eminent

⁶⁰ *Cohen*, *supra* note 20, at 13.

⁶¹ *Muller*, *supra* note 10, at 486.

⁶² *Loretto*, 458 U.S. at 436.

domain suits are "opposite sides of the same legal coin."⁶³ An inverse condemnation proceeding is one through which a land-owner seeks compensation for a *de facto* taking of their property.⁶⁴ It is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.⁶⁵ There are three different types of inverse condemnation proceedings. The first type is when a condemnor physically invades or trespasses on private property without bringing condemnation proceedings, and the property owner is forced to bring the condemnation action.⁶⁶ The second type happens when the landowner's land has been taken and that action is brought to recover damages to the land not taken that the property owner alleges to have not been compensated for in the original, formal eminent domain proceedings.⁶⁷ The third type occurs when no land has been formally and physically taken by the condemning authority, but the property owner alleges that he has suffered compensable damages resulting from the taking of certain of the bundle of property rights comprising his ownership.⁶⁸ Clearly, the first type is directly applicable to the case at bar and requires an in-depth discussion into establishing a claim.

The history of inverse condemnation proceedings is extensive. To sustain a claim of inverse condemnation, plaintiff is required to show that the governmental agency failed to pay compensation for an "otherwise proper interference amounting to a taking."⁶⁹ An unconstitutional taking occurs not only when the state actually physically occupies private property for public use, but also when the government's excessive use of police powers results in

⁶³ *Rieder v. State*, 535 A.2d 512, 515 (1987).

⁶⁴ *Pinkowski v. Alfred J. Clark, Inc.*, 691 A.2d 837, 846 (1997).

⁶⁵ *Tempesta v. City of Jersey City*, 2006 N.J. Super. Unpub. LEXIS 1633, 11 (2006) (quoting *Rieder*, 535 A.2d 512).

⁶⁶ *Nelson*, *supra* note 52, at 2317.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Pheasant Bridge Corp. v. Twp. of Warren*, 777 A.2d 334, 344 (2002).

a denial of all economically beneficial use of the property.⁷⁰ Unfortunately, New Jersey's Constitution places a significant burden on an aggrieved landowner whose property has been inversely condemned. Specifically, it bars a property owner from making any claim to a right to inverse condemnation unless deprived of "all or substantially all of the beneficial use" of the totality of his property as the result of excessive police power regulation."⁷¹ This requirement is at odds with more than twenty other state constitutions, which state that a property shall not be "taken or *damaged*" without just compensation.⁷² This "damage" provision that other states recognize, afford a level of recovery for takings that do not amount to restricting all or substantially all of the beneficial use of the individuals private property.

Despite the frustrating discrepancy between state laws, specifically in this instance where New Jersey's standard places a substantial burden on the Maria family, there is an elemental approach to seeking recovery. The basic elements of an action for inverse condemnation are (1) a taking; (2) of private property; (3) for public use⁷³; (4) without just compensation being paid; and (5) by a governmental entity that has not instituted formal proceedings.⁷⁴ Facially, it appears the destruction of the Maria home is the poster-case for an inverse condemnation claim. Even

⁷⁰ *Tempesta*, 2006 N.J. Super. Unpub. at 11

⁷¹ *Pinkowski v. Alfred J. Clark, Inc.*, 691 A.2d 837, 846 (1997).

⁷² See generally *Schnack v. State*, 389 A.2d 1006, 1010 (1978). For example, the California Constitution, *Cal. Const.*, art. I, § 14, contains this "damage" provision.

⁷³ It's important to note that this paper will not focus on whether the destruction of the Maria home was for a "public use." For sake of argument, this paper will assume that the destruction was for a public use. The purported public uses by the NJDOT were to (1) clear the roadway in the aftermath of Hurricane Sandy; and (2) the condition was unsafe, thus protecting the health and safety of the public. While this concession may facially appear to defeat an inverse condemnation claim, prospectively conceding that there was an emergent circumstance, I argue it does not. I assert that the argument can still be made that the emergent circumstance timetable had elapsed and therefore the necessity exception would not apply, leaving open a claim for inverse condemnation.

⁷⁴ Marci A. Reddick, *SURVEY: XVII. PROPERTY LAW: Recent Developments in Real Property Law: October 1, 2009 – September 30, 2010*, 44 IND. L. REV. 1429 (2011). (citing *Murray v. City of Lawrenceburg*, 925 N.E.2d 728 (2010)). In *Murray*, the first element was "a taking or *damaging*" as it was a state that recognizes damage alone as a measure of recovery.

cognizant that “virtual destruction of property is a necessary prerequisite to compensation,”⁷⁵ the Marias situation still appears to be recoverable in an inverse condemnation proceeding. In applying factual scenarios to the inverse condemnation elements, three balancing factors have typically been considered: (1) the intensity of governmental regulation; (2) the nature and extent of the impairment upon the landowners’ beneficial use of the property; and (3) the time period within which the owner is so deprived.⁷⁶ The courts recognize that the doctrine of inverse condemnation has a somewhat inconsistent history.⁷⁷ In fact, inverse condemnation represents no more than a value judgment upon a factual complex rather than an evident application of a precise rule of law.⁷⁸ Therein lays the problem. While the destruction of the Maria home facially appears to be a slam dunk method of recovery, the ambiguous approach to Takings Clause adjudication opens the door to the possibility of costly proceedings with no recovery at all.

The NJDOT will likely argue that the destruction of the Maria home does not amount to the loss of “all or substantially all beneficial” use of property within the framework of New Jersey’s inverse condemnation proceedings. While it is true that the Marias have not lost the ability to use their property in a general sense, I can think of nothing more destructive to property use than the demolition of a home with no compensation afforded. Of course, these arguments raise an underlying denominator issue; that is, what amounts to the “whole” property? Is the plot of land and everything that lays on top of it the “whole” property? Or is the home its own distinct piece of property, separate from the actual plot of land? While this denominator issue is the not subject of this paper, it certainly demonstrates how complex and unreliable the determinative issues of compensation are. Under the first example, the Maria home would be considered a part

⁷⁵ See generally *Schnack*, 389 A.2d 1006 at 1010 (citing *Morristown Bd. of Ed. v. Palmer*, 88 N.J. Super. 378 (App. Div. 1965)).

⁷⁶ *Rieder v. State*, 535 A.2d 512, 514 (1987).

⁷⁷ *Id.*

⁷⁸ *Id.*

of the property as a whole. Thus, when the home was destroyed, the argument can be made that the Marias were not deprived of all or substantially all beneficial use of the property because the plot of land was still in their possession, affording them the ability to rebuild or sell the entire piece. However, in the second example, the Marias would likely be able to establish an inverse condemnation claim as they have been deprived of all beneficial use of the property; in this case, the home itself “whole” piece of property, separate from than that of the plot of land. Given the inconsistent nature of inverse condemnation adjudication, it is simply too difficult to predict the outcome of the Marias claim under this cause of action.

The fact remains that the Marias largest hurdle is the doctrine of governmental action in times of necessity. This entire narrative on inverse condemnation is moot if it is deemed that the actions taken by the NJDOT were done in the wake of an emergency circumstance, the immediate disaster relief efforts of Hurricane Sandy. The necessity exception will trump an inverse condemnation claim and leave the Marias with little hope of recovery. As such, an extensive look at the public necessity doctrine is essential in order to inform the reader of the alarmingly broad latitude afforded to public entities in times of crises and the resulting absence of compensation for the aggrieved private individual.

V. Necessity Exception

This section will discuss the historical doctrine of necessity and the destructive actions against individual property it allows public entities to undertake. The doctrine emerged at common law, where everyone had the right to destroy real and personal property in cases of actual necessity.⁷⁹ The exception arises in emergent circumstances. The action consists of

⁷⁹ *Cohen, supra* note 20, at 17.

destroying or appropriating another's property.⁸⁰ Public necessity contemplates a situation where there is an imminent public calamity, and in order to avert this danger it is necessary to destroy or damage property.⁸¹ The principle behind public necessity is that the law regards the welfare of the public as superior to the interests of individuals and, when there is a conflict between them, the latter must give way.⁸² *The Restatement (Second) of Torts* endorses the necessity exception, stating: "One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster."⁸³ This privilege is to protect the public from "an impending public disaster such as a conflagration, flood, earthquake, or pestilence."⁸⁴

While the privilege applies to private individuals as well, this paper is only concerned with its application to public entities and officials. A major issue associated with public necessity is whether compensation is owed to the aggrieved party whose property is damaged, appropriated or destroyed.⁸⁵ While the question of compensation is complex, the majority view is that there is no duty to pay compensation to the owner of any property when the action is taken based on a public necessity.⁸⁶ Essentially, the theme of the necessity exception is that public authorities owe no compensation when they destroy property to protect the general welfare in times of emergency.⁸⁷ Public necessity is one that involves the public interest and thus completely excuses the defendant's liability.⁸⁸

⁸⁰ *Id.*

⁸¹ Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N. DAK. L. REV. 651 , 690 (2007).

⁸² *Id.*

⁸³ *Id.* (quoting *Restatement (Second) of Torts* §196).

⁸⁴ Cohan, *supra* note 81, at 690.

⁸⁵ *Id.* at 655.

⁸⁶ *Id.* at 691.

⁸⁷ Cohan, *supra* note 20, at 17.

⁸⁸ Muller, *supra* note 10, at 487.

Centuries-old case law has assisted in the formation of the exception. The first prominent American case to address the privilege of necessity was *Sparhawk*, a 1788 Supreme Court case decided well before the idea of compensation for destruction had swept many constitutions.⁸⁹ In that case, 227 barrels of flour had been moved by the government to a depot in anticipation of the invasion of British troops.⁹⁰ While the facts did not ostensibly implicate the privilege of public necessity, the court held that “. . . it is better to suffer a private mischief than a public inconvenience; and the rights of necessity, form a part of our law.”⁹¹ *Sparhawk* brought the privilege of public necessity into the American legal corpus.

The Court has been presented with the issue on numerous occasions over the course of the last two centuries, and with each holding the public necessity doctrine has become more pronounced and firm. In *Miller v. Shoene*, the Supreme Court made pronouncements about property destruction. The Court held that a Virginia law, allowing officials to order the destruction of ornamental cedar trees that were infected with cedar rust in order to preserve nearby apple orchards, did not effect a “taking” of the cedar tree owners’ property.⁹² The Court stated that when a state is forced to make a choice between the preservation of one kind of property and another, it does not act unconstitutionally in doing so.⁹³ Moreover, the Court noted, preferring the public interest “over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.”⁹⁴

⁸⁹ *Id.* at 491.

⁹⁰ *Id.*

⁹¹ *Id.* (citing *Respublica v. Sparhawk*, 1 U.S. 357 (1778)).

⁹² *Cohen*, *supra* note 20, at 18 (citing *Miller v. Schoene*, 276 U.S. 272 (1928)).

⁹³ *Id.*

⁹⁴ *Id.*

The last and perhaps most significant case to question necessity destruction takings was *Bowditch*, in which the Supreme Court upheld the privilege.⁹⁵ In *Bowditch*, the aggrieved individual lost his building when firemen successfully exploded it to prevent the approaching fire from spreading, and he sought recovery for the destroyed goods that he could have removed from the building before the fire reached it.⁹⁶ The United States Supreme Court, for the first time, clearly enunciated the doctrine of necessity, reasoning that, “At the common law everyone had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner.”⁹⁷ The Court denied *Bowditch* compensation for a destruction that had benefited the community, and the Fifth Amendment would be forever interpreted through this holding.⁹⁸

While it’s apparent that the general rule is that no compensation is owed, there are a number of exceptions.⁹⁹ In situations of public necessity where there is no legal obligation to pay compensation for the destruction of property, there is an exception if the entry and the action taken were unreasonable under the circumstances.¹⁰⁰ The exception also applies if the actor failed to use reasonable care to avoid doing unnecessary harm to persons or things, “although the exigencies of the occasion must be taken into account in judging his conduct.”¹⁰¹ There is, of course, a limitation to this exception. If the property would have been destroyed in any event, the plaintiff is not entitled to compensation.¹⁰² This limitation brings to light a critical question: if

⁹⁵ *Muller*, *supra* note 10, at 495.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* In *Bowditch*, the Court was interpreting state law and not the federal Constitution, but the Court’s articulation of this doctrine would implicate future necessity jurisprudence that did not relate to the Fifth Amendment. *Id.*

⁹⁹ *Cohan*, *supra* note 81, at 656. For purposes of this paper, the only exception that will be discussed is the exception that applies if the entry and the action taken were unreasonable under the circumstances. While there are other exceptions, they don’t directly apply to the factual scenario at bar and, as such, do not warrant discussion.

¹⁰⁰ *Cohan*, *supra* note 81, at 693.

¹⁰¹ *Id.*

¹⁰² *Id.* at 722.

notice had been given to the plaintiff, could they have salvaged valuables from the destroyed structure, and if so, should compensation be provided for those lost valuables?

There can be no question of the right of the state, or of its right to delegate the power to a municipality, to exercise its police power to take or destroy private property in a summary manner when necessary for the safety of the public.¹⁰³ But the necessity for such action must be caused by an emergency which requires prompt action for public protection.¹⁰⁴ While the question of whether notice should have been provided to the Marias is one of sufficient significance to warrant its own article, this paper will only discuss the general arguments for each side and attempt to answer the broader question: was the destruction of the Maria home a valid exercise of the public necessity doctrine?

As mentioned in the introduction, the Marias insurance company is asserting an intervening cause argument; that but for the intervening destructive action by the NJDOT the Marias would have had the opportunity to recover their valuables. There is no doubt that the storm was the cause of the home dislodging and relocating near the street. What will be contested, however, is whether it was necessary to destroy the home without first allowing the Marias to remove their property located inside the home.

All of the examples presented above involve situations where the danger is imminent. Unique to the situation at bar, the danger had subsided, with the destruction of the home taking place after the storm had passed. The Marias argument will follow that line of reasoning. Specifically, the Marias will argue that Hurricane Sandy ended, leaving their home relocated, but intact and within its property lines. All dangers had subsided or, at least, the dangers that the structure posed were no longer imminent. Without the emergent nature of the danger posed by

¹⁰³ *Vanderhoven v. City of Rahway*, 1 A.2d 303, 304 (1938).

¹⁰⁴ *Id.*

the home, the Marias will argue that they should have been afforded the opportunity to retrieve any valuables salvageable from inside the home. By destroying their home, the Marias will contend that even though the destruction of their home may have been necessary, the destruction was untimely and improper given the circumstances. Following this interpretation of the facts, the Marias will argue that the public necessity doctrine doesn't apply, and therefore the destruction of their home amounted to a taking, warranting just compensation.

In countering, The NJDOT will certainly argue the presence of an emergency. Hurricane Sandy was one of the most impactful storms to hit the New Jersey Shoreline in a generation. While the statement issued by the NJDOT labeled the Maria home as one posing a "dangerous condition," that discussion is better suited for the section that follows, which addresses the discretionary function of public entities. For purposes of this paragraph, I will assume the NJDOT's argument will be premised on the "dangerous condition" being imminent. In the wake of the storm power lines were down, gas lines were leaking and sand had flooded the streets of Ortley Beach. In order to restore the most basic utilities to the area, the NJDOT was forced to clear the streets of debris. The NJDOT will likely contend that the Maria home, resting against a telephone pole, created an imminent danger, and the destruction of same was further necessitated by the immediate relief efforts required to stabilize the area.

Even assuming the Marias can establish that the entry and destruction were unreasonable given the circumstances, it merely creates the possibility that they can defeat the NJDOT's public necessity defense rather than form a guaranteed, recoverable cause of action. To the contrary, the NJDOT will assert that even if its actions were not warranted under the public necessity doctrine, the broad latitude in decision making afforded under the discretionary function for public entities applies. As will be discussed in the section that follows, public

entities are granted significant leeway for decisions deemed to be “discretionary” in nature.

VI. Discretionary Function

Under the New Jersey Tort Claims Act (NJTCA), a public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.¹⁰⁵ However, a public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity.¹⁰⁶ The guiding principal of the NJTCA is that immunity from tort liability is the general rule and liability is the exception.¹⁰⁷ The NJDOT is a public entity within the framework of the NJTCA. As such, it is afforded broad discretion in its daily decision making.

As mentioned earlier, the NJDOT issued a statement that the Maria home was deemed a “dangerous condition” and the NJDOT crews “did not take down any structure unless it was deemed to be unsafe.” Clearly, the statement is molded to protect the NJDOT, deeming the destruction of the Maria home as a discretionary activity. The NJTCA defines a “dangerous condition” as a “condition of property that creates a risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used.”¹⁰⁸

Before discussing the applicability of the discretionary function to the Maria case, it is appropriate to briefly discuss the proffered policy rationales in support of the broad latitude afforded to public entities. When faced with the issue of discretionary activities, the Supreme Court noted early on that “Congress exercised care to protect the Government from claims,

¹⁰⁵ *N.J.S.A.* §59:2-2(a).

¹⁰⁶ *N.J.S.A.* §59:2-3(a).

¹⁰⁷ *Coyne v. New Jersey Dept. of Trans.*, 867 A.2d 1159, 1160 (2005).

¹⁰⁸ *N.J.S.A.* §59:4-1(a).

however negligently caused, that affected the governmental functions.”¹⁰⁹ The discretionary function exception served to remove such claims from the purview of Congress’s general consent to suits sounding in tort, leaving them barred under the default rule of sovereign immunity.¹¹⁰ Additionally, sovereign immunity and, in particular, the Tort Claim Act’s discretionary function exception have sometimes been defended on the ground that they protect government coffers and thereby help to preserve resources for public purposes.¹¹¹ Lastly, the discretionary immunity function has been defended as serving to maintain a proper balance among the branches of the government.¹¹² By denying courts the jurisdiction to entertain tort claims arising from government employees’ policy-based decisions, the NJTCA discretionary function exception reflects a proper commitment to a majoritarian rule and protects a sphere of legislative and executive policymaking from judicial intervention.¹¹³

While announced in relation to a governmental action on a federal level, the Supreme Court has adopted a two-prong test in determining when the discretionary function exception applies. First, a court must consider if the governmental action in question involved an element of judgment or choice on the part of a government actor.¹¹⁴ The exception cannot apply if a relevant statute, policy or regulation outlines a specific course of action for the actor to follow.¹¹⁵ Second, if the challenged conduct does involve an element of judgment, that judgment must be

¹⁰⁹ Jonathan R. Bruno, *IMMUNITY FOR “DISCRETIONARY” FUNCTIONS: A PROPOSAL TO AMEND THE FEDERAL TORT CLAIMS ACT*, 49 HARV. J. ON LEGIS. 411, 421 (2012). While this article discusses the Federal Tort Claims Act, the development of the discretionary function on a federal level has undoubtedly accounted for the evolution of the function on state and municipality levels.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 434.

¹¹² See generally *Id.* at 435-36. The sentence discussed the balance of power implications on a federal level.

¹¹³ *Id.*

¹¹⁴ Tarak Anada, *The Perfect Storm, an Imperfect Response, and a Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?*, 35 PEPP. L. REV. 279, 307 (2008). (quoting *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531 (1988)). The *Berkovitz* holding was based on actions taken by a federal entity. However, the announced test is applicable to claims made on a state level.

¹¹⁵ *Id.* at 308.

the type the discretionary function exception was designed to shield.¹¹⁶ In sum, the Court provided that immunity can only attach if (1) the government act was the result of a decision involving an element of judgment, and (2) the judgment was based on consideration of public policy.¹¹⁷ If the government fails to act in accordance with a specific, mandatory directive, the discretionary function exception cannot apply.¹¹⁸

Even when the situation presents itself that a public entity is not immune under the discretionary function, a high burden is placed on a plaintiff to establish a recoverable claim. In New Jersey, courts must determine whether the entities actions were “palpably unreasonable.”¹¹⁹ “Palpably unreasonable” means more than ordinary negligence, imposing a steep burden on a plaintiff. The term implies behavior that is patently unacceptable under any given circumstances and it must be manifest and obvious that no prudent person would approve of its course of action or inaction.¹²⁰ Even if a plaintiff were to establish the prerequisites for negligence liability on a public entity, he could not prevail if the action the public entity took or failed to take was not palpably unreasonable.¹²¹ This element, the action or inaction of the public entity, refers to the public entity’s discretion in determining what action should or should not have been taken.”¹²²

The actions taken by the NJDOT in its removal of the Maria home are likely to be deemed a proper discretionary act. Perhaps in the ordinary course of daily activities the Marias would be able to establish a claim that the NJDOT’s decision was palpably unreasonable. However, when the decision is coupled with extensive aftermath of Hurricane Sandy, the court

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Coyne v. New Jersey Dept. of Trans.*, 867 A.2d 1159, 1166 (2005). The factual scenario in *Coyne* is not relevant to the case at bar, as it involved actions on the actual roadway during the course of employment.

¹²⁰ *Id.* at 1166-67. (citing *Kolitch v. Lindedahl*, 100 497 A.2d 183 (1985).

¹²¹ *Id.* at 1167. (citing *Brown v. Brown*, 432 A.2d 493 (1981).

¹²² *Id.*

will likely grant the NJDOT an even greater degree of latitude. There is little doubt that decision of whether or not to knock down the home fell within the purview of a discretionary decision; (1) it involved a level of judgment and (2) the removal of “dangerous conditions” was based on consideration of public policy. Incorporating all of the rules and decisions announced above, it seems highly unlikely that the destruction of the Maria home in the wake of Hurricane Sandy will be deemed an invalid discretionary activity. Even if the Marias can establish that the act did not fall within the scheme of discretionary activities, it is unlikely that a court will find that no prudent person, given the circumstances, would approve of the NJDOT’s course of action.

As mentioned with regularity in this paper, the Marias should be afforded a method of recourse. The extreme latitude afforded to public entities has produced the emergence of arguments for a change in the way tort claims against public entities are dealt with. For instance, it has been argued that the discretionary function should be limited to cases in which a government agent, pursuant to his or her “discretionary authority,” consciously weighs the risks and advantages of a possible course of conduct.¹²³ Noticeably, the exception unjustifiably prevents a set of potentially meritorious claimants from arguing their claims on the merits, and it does so without any offsetting gains, except perhaps saving some litigation costs.¹²⁴ Furthermore, alternative models for approaching government liability have been discussed. Most notably, the idea of creating an administrative agency to adjudicate and compensate tort claims against the federal government has been proffered.¹²⁵ These arguments recognize the fact that aggrieved parties, such as the Marias, in situations where it is undeniably clear that compensation should be provided, that some method of reform or recourse should be provided. It is this

¹²³ *Bruno, supra* note 109, at 444.

¹²⁴ *Id.*

¹²⁵ James R. Levine, *THE FEDERAL TORT CLAIMS ACT: A PROPOSAL FOR INSTITUTIONAL REFORM*, 100 COLUM. L. REV. 1538, 1554 (2000).

realization that leads to this paper's primary argument that the state has a moral obligation to provide compensatory funding for those aggrieved by the destructive decisions made by public entities in the wake of natural disasters.

VII. The State Has a Moral Obligation to Provide Compensatory Funding

The preceding paragraphs illustrate the prospective remedial options available to the Maria family. In addition to outlining the elements required to establish their claim, those sections made readily apparent one harsh truth: there is no certainty that the Maria family will be made whole for their significant loss. This disheartening reality provides a concerning comment on "just compensation" adjudication; whether it is through a claim for inverse condemnation, negligent destruction under the necessity doctrine or the abuse of a public entities discretionary function, the extraordinary latitude granted to governmental entities creates an unstable system of recovery for individuals whose property is destroyed by the government. These ambiguities were succinctly addressed by Carol Rose in her article *Crystals and Mud in Property Law*.¹²⁶ Creatively, Rose uses "crystals" to symbolize the legislature's attempt at composing property law with hard-edged rules.¹²⁷ Her paper is dedicated to discussing the blurring of clear and distinct property rules with the muddy doctrines of "maybe or maybe not," and about the reverse tendency to try to clear up the blur with new crystalline rules.¹²⁸ Rose recognizes that property law seems to substitute fuzzy, ambiguous rules of decision for what seem to be perfectly clear, open and shut demarcations of entitlements.¹²⁹ She refers to this occurrence as the substitution of "mud" rules for "crystal" ones.¹³⁰ This notion of "muddied" rule-making could not be more

¹²⁶ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

¹²⁷ See generally *Id.*

¹²⁸ *Id.* at 581

¹²⁹ *Id.* at 578

¹³⁰ *Id.*

relevant to this paper. It is the muddled application of the “just compensation” language of the Takings Clause that is the underpinning to my argument that the government has a moral obligation to provide compensation to aggrieved parties for actions taken by its entities that exacerbate loss in the wake of natural disaster.

Notions of “fairness” and “reasonableness” have been ideologies used with regularity in courtroom analysis since the founding of our judicial system. These concepts, while used to assess whether a governmental entity’s actions were proper, must be used to address situations where a taking has occurred and the aggrieved party is faced with no method of recourse. Admittedly, the destruction of the Maria home is likely to be deemed an act committed under the public necessity doctrine or falling within the purview of a public entities discretionary function, carried out to protect the public in the aftermath of Hurricane Sandy. The critical point to be made is that the decision was allegedly made for the good of the public. It is that very notion that triggers the moral obligation to compensate the party who sacrificed his property for the public’s benefit. In the wake of destruction of private property for public good, the *Restatement (Second) of Torts* has recognized the existence of a moral obligation to compensate.¹³¹ The *Restatement* admits that although the “moral obligation” to compensate “is obviously very great,” municipal actors have generally been immune.¹³² Furthermore, the Restatement does not address whether municipalities ought to be held liable for the destruction of property.¹³³ I firmly assert that, in the unique situation like the one at bar, public entities should be held morally liable and as such, compensation justly.

The crux of my argument is the recognition that exigent circumstances potentially warrant the destruction of private property for public good. It is that destruction, however, that

¹³¹ *Restatement (Second) of Torts* §196 (1965).

¹³² *Id* at cmt. h (1965).

¹³³ *Id* §262 cmt. d.

triggers the state's moral obligation to compensate. The basis for such compensation is that the government has a moral obligation, albeit not a legal one, to provide compensation in certain instances when private property is destroyed due to public necessity.¹³⁴ I'm not alone in this search for fundamental fairness. Many believe that there is or should be a moral obligation for public authorities to provide compensation to an aggrieved party whose property has been destroyed by public necessity.¹³⁵ Indeed, Section 196 of the *Restatement (Second) of Torts* expresses this view:

Although the moral obligation to compensate the person whose property has been damaged or destroyed for the public good is obviously very great, and is of the kind which should be recognized by the law, the rules as to governmental immunity from suit have stood in the past as a barrier to any effective legal remedy. After major public disasters compensation often has been paid under special legislation enacted for the purpose, and in several jurisdictions general statutes provide for such compensation.¹³⁶

As the Restatement recognizes, some jurisdictions have enacted statutes which provide for compensation in certain situations where property is destroyed on grounds of public necessity.¹³⁷ For instance, in *Mayor of New York v. Lord*,¹³⁸ the court discussed a municipal ordinance in 1806, which directed the mayor to compensate property owners whose property was destroyed at the mayor's direction to prevent the spread of fire.¹³⁹ The foundations of these compensatory statutes are grounded in the sense that the government owes a moral duty to private individuals harmed by their destructive, albeit necessitated, actions. As of the date of the submission of this

¹³⁴ *Mayor, etc., of New York v. Lord*, 17 Wend. 285, 285 (1837).

¹³⁵ *Cohan*, *supra* note 81, at 654.

¹³⁶ *Restatement (Second) of Torts* § 196 cmt. h (1965).

¹³⁷ *Cohan*, *supra* note 81, at 693.

¹³⁸ *Mayor, etc. of New York*, 17 Wend. 285 at 285.

¹³⁹ *Id* at 285.

paper, no statute or local ordinance has been enacted that would provide compensation to the Maria family for the taking of their property.

Legislatively mandated compensation programs are certainly not outside the realm of plausibility. In fact, in the wake of destructive actions taken by governmental entities in recent years, such sources of compensatory funding have been enacted. As Professor Poirier discussed at length in his article on the topic of vagueness in the Takings Doctrine, legislatively mandated compensation and other log-rolling deals that serve the function of compensation occur all the time in response to perceptions of unfair laws and regulations.¹⁴⁰ Under the 1990 Clean Air Act Amendments, large sums of money were allocated to compensate and retrain Appalachian and Midwestern coal miners for the loss of their livelihoods.¹⁴¹ Similarly, compensation in various forms was steered to New England fishermen forced to forbear from fishing the Georges Banks in order to allow fish stocks to regenerate.¹⁴² Lastly, after the Federal Circuit found that the Corps of Engineers' manipulation of the Mississippi River did not take the millions of oyster farm oysters that died because of the change of salinity, Congress steered \$7.5 million as compensation to the injured oyster farmers.¹⁴³

Notably, notions of morality and just compensation in the wake of a disastrous hurricane have been discussed at length recently. Addressing the situation where private property is destroyed for the protection of the entire community, Professor Prosser¹⁴⁴ stated:

“[W]here the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all . . . It would seem that the moral obligation upon the group

¹⁴⁰ Marc. R. Poirier, THE VIRTUE OF VAGUENESS IN TAKINGS DOCTRINE, 24 CARDOZO L. REV. 93, 167 (2002).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (citing *Avenal v. United States*, 100 F.3d 933 (Fed. Cir. 1996)).

¹⁴⁴ *Prosser*, The Law of Torts 24 (4th ed. 1971)).

affected to make compensation in such a case should be recognized by the law, but recovery usually has been denied.”¹⁴⁵

While it is not my goal to engage in an exhaustive discussion of tax burdens and public policy arguments, it is noteworthy to discuss the comparative situations that arose in the wake of Hurricane Katrina.¹⁴⁶ Tarak Anada, in his article arguing for compensatory funding from the federal government for its response negligence, addressed the theories of sovereign immunity and morality:¹⁴⁷

The underlying assumption rooted in the justification for sovereign immunity is that it is better to allow citizens to be injured at the government's hands, than to spread the injury among the whole through taxes. It therefore seems that, in addition to an endless sum of unanswered legal questions, *Hurricane Katrina has left us with a final question of morality as well*. Should the cost of our government's negligence be spread among all Americans, or should the people living in the first and second poorest demographics in America shoulder the entire burden?¹⁴⁸

While the question posited by Anada was on a federal level, the same question of morality remains in the wake of Hurricane Sandy. I contend that there is no time where the sense of community is stronger, perhaps other than war-time, than in the wake of natural disaster. The Maria home was destroyed under the asserted justification of public safety. As a result, the NJDOT *de facto* created a benefit for the community wholly at the expense of the Maria family. As such, morality follows that they should be compensated justly.¹⁴⁹

It is vital to recognize how narrow the scope of my argument is. At first glance, it appears as if this paper argues for sweeping reform in “just compensation” adjudication, calling for

¹⁴⁵ *Id.*

¹⁴⁶ <http://en.wikipedia.org/wiki/Hurricane_katrina>.

¹⁴⁷ See generally *Anada*, *supra* note 114, at 279.

¹⁴⁸ *Id.* at 340-341. (emphasis added).

¹⁴⁹ While the *Anada* article discusses federal funding, the topic of funding is beyond the scope of this paper. Admittedly, tax-driven funding on a federal level, and perhaps even state level, may be too attenuated due to the significant decrease in risk of damage as structures are situated further inland. Perhaps a localized source of funding should be adopted, incorporating those deemed to be in a high-risk damage zones.

general funding for anyone whose property is destroyed in the path of a natural disaster. To the contrary, my argument is narrowly tailored to situations where a public entity encroaches onto a private party's property in the wake of a natural disaster and destroys their home for an alleged public purpose. As of the date of the submission of this paper, the Marias insurance carrier will potentially reimburse for the loss of his home, but will not cover the valuables lost. The fact remains that the NJDOT encroached on the Maria property and destroyed the home. Whether the destruction was done to remove a "dangerous condition" or for the general health and safety of the public, it remains that it was for a communal benefit. Had it not been for the NJDOT's actions, the Marias would have had the opportunity to enter their home and collect their valuables. The government has a moral duty to compensate. Their actions amounted to a "taking" within the framework of the United States Constitution. Public necessity, in times of war and peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.¹⁵⁰ The Maria family was wronged. While methods of recovery are available, they are unreliable and costly. Compensatory government funding must supplant the costly litigation efforts that lie ahead for the Marias. "It would corrode our moral understanding of ourselves as a society if we were to permit gross unfairness to reign simply for the sake of retaining clear rules."¹⁵¹ Fundamental fairness dictates recovery for the Maria family and all those harmed by actions done for public welfare by the government at the expense of a private party's property.

¹⁵⁰ Vincent v. Lake Erie Transp. Co., 109 Minn. 456 (1910)

¹⁵¹ Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 593 (1985); see also Easterbrook, *Method, Result and Authority: A Reply*, 98 HARV. L. REV. 622 (1985) (responding to Tribe). Lawrence Tribe rejects Easterbrook's preference for the ex ante perspective, particularly in the context of constitutional decision-making. According to Tribe, when judges make decisions they not only try to facilitate the rational calculations of the actors and people similarly situated to the actors, they also tell a story about the kind of society we live in. Decisions, as he puts it, are *constitutive*, and it would corrode our moral understanding of ourselves as a society if we were to permit gross unfairness to reign simply for the sake of retaining clear rules and rational ex ante planning, particularly if those rules covertly serve the wealthy and powerful. *Rose*, *supra* note 61, at 593.

VIII. Conclusion

As the preceding sections have discussed, the adjudication of Takings Clause claims are inconsistent, unreliable and downright frustrating.

At first glance, there is little doubt that the destruction of the Maria home should result in compensable taking within the language of the United States Constitution. Hurricane Sandy struck, causing widespread damage and leaving many difficult reformative decisions to be made by the NJDOT. The Maria home was admittedly dislodged, but remained within the boundaries of the Marias plot of land. The home no longer presented an imminent danger to the community. If the Marias had been presented with an opportunity to enter their home, they would have been able to salvage much of the \$50,000 worth of valuables located inside.

Despite the facial validity of a claim against the NJDOT, the reality is that the Marias are unlikely to recover. While an experience lawyer can undoubtedly argue causes of action under inverse condemnation, the inapplicability of the public necessity doctrine or a palpably unreasonable discretionary decision, the broad latitude afforded to governmental entities is likely to supplant any of these arguments.

While procedural, adjudicatory and procedural reform can be argued for regarding the level, or lack thereof, of liability against public entities, the fact remains that the Marias should be compensated for their significant losses and the current prospective sources of compensation are too undependable. The NJDOT destroyed their home when the Marias could have reasonably been afforded an opportunity to remove their belongings. Until Takings Clause application develops a more consistent, reliable approach, the state must step in and compensate those who have been wronged by public entities in the wake of natural disaster. They have a moral obligation to do so.