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Another Collateral Consequence: Kicking the Victim When She's Down

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Abstract

Every state has a victim compensation fund that provides financial relief to victims of crime who have no other way to pay for medical expenses, funeral costs, crime scene cleanup, or other costs associated with the crime. States impose their own eligibility requirements to determine which victims can receive funding. Six states prohibit victims with certain criminal histories from obtaining compensation. This means that innocent victims of crime are left with nowhere to turn because of something that they already "paid" for. This leaves victims, who are likely already in a financially precarious situation due to their felon status, with no way to pay for their bills. To make matters worse, the bans disproportionately affect Black victims who are overrepresented in the criminal justice system. Despite this negative impact, the Supreme Court has made it clear that the victims will not find any redress in the law. In fact, Congress has enacted legislation that negatively affects individuals with a criminal history, despite the disproportionate negative impact on Black individuals.

This Note suggests that Congress enact legislation prohibiting states receiving federal funding for their

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compensation funds from disqualifying victims based on their criminal history. Additionally, this Note encourages the six states with a criminal history ban to change their legislation and redefine "victim."

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I. Introduction

In 2015, Antonio Mason's life changed forever. At the time, Mason was studying to be a gym teacher at Cuyahoga Community College in Cleveland, Ohio.[1] In addition to his studies, Mason was the cocaptain and starting point guard of his college basketball team.[2] In a tragic turn of events, Mason was hit from behind by a drunk driver who was driving at one hundred miles per hour in a stolen sports car.[3] Mason's car flipped and he was ejected from the vehicle after striking two telephone poles.[4] He fractured his vertebrae in two places, his neck was severely fractured, he had five screws placed in his back, two screws placed in his neck, broken ribs, a concussion, and was paralyzed from the chest down.[5] After months spent between the hospital and a nursing home, Mason was finally released.[6] In order to return home, however, Mason needed a wheelchair ramp installed at the house his mother was renting.[7] Unable to afford such a costly installation in addition to his medical bills, Mason applied to Ohio's victim compensation fund.[8] Every state has a compensation fund that victims of crime can apply to for financial assistance with bills resulting

1. Alysia Santo, *The Victims Who Don't Count*, MARSHALL PROJECT (Sept. 13, 2018, 7:00 AM), perma.cc/MZ7G-JCX6 [hereinafter Santo I].

2. Tim Warsinskey, *Paralyzed Tri-C Basketball Player Antonio Mason Dreams of Hoops, Hopes to Walk Again*, CLEV. (Jan. 22, 2015), perma.cc/P9F6-2RE5 (last updated Jan. 12, 2019).

3. *Id.*

4. *Id.*

5. P.J. Ziegler, *'I Can See Myself Out There Playing Again': Tri-C Basketball Player Paralyzed in Crash Hopes to Play Again*, FOX 8 NEWS: CLEV. (Jan. 24, 2015, 9:00 AM), perma.cc/VN7E-YLBQ.

6. Tim Warsinskey, *Paralyzed Tri-C Basketball Player Antonio Mason Finally Goes Home*, CLEV. (Apr. 02, 2015), perma.cc/26ZX-H686 (last updated Jan. 11, 2019).

7. *Id.*

8. Santo I, *supra* note 1.

from the incident.[9] Unfortunately, Ohio denies compensation to victims who were previously convicted of certain crimes.[10] Mason was rejected because ten years earlier, when he was just sixteen years old, he was found guilty of drug trafficking in juvenile court.[11] Despite his complete innocence in the accident, Mason was left without any way to pay for the ramp that is necessary for his return home.[12]

Similarly, Anthony Campbell was denied victim compensation after his father was murdered in Sarasota, Florida.[13] Campbell, an Alabama State University football coach, emptied most of his savings to pay for his father's funeral and burial.[14] When he still came up short and was in need of financial help, police urged him to apply to Florida's crime victim compensation fund.[15] Regrettably, Florida denied Campbell because, thirty-two years earlier, his father had been convicted of a burglary.[16] Like Ohio, Florida refuses to allocate victim compensation funds if the victim or the family member being compensated was convicted of certain crimes at any point in his or her life.[17] It did not matter that by the end of his life people considered Campbell's father a "prominent citizen"[18] or

9. *See Crime Victim Compensation: An Overview*, NAT'L ASS'N CRIME VICTIM COMPENSATION BOARDS, https://perma.cc/U9UR-ZLNH ("[E]very state has a crime victim compensation program that can provide substantial financial assistance to crime victims and their families.").

10. *See* OHIO REV. CODE ANN. § 2743.60 (LexisNexis 2019) (refusing funds if a "preponderance of the evidence" shows the victim engaged in "criminally injurious conduct" within ten years prior to the injury).

11. Santo I, *supra* note 1.

12. *Id; see Warsinskey*, *supra* note 6 (stating that news of Mason's tragedy spread and numerous companies donated and installed a ramp, allowing Mason to return home).

13. *Id; see* Michael S. Davidson, *Update: Brief Argument Preceded Fatal Shooting*, HERALD-TRIB. (June 15, 2015), perma.cc/T52S-5PGV (last updated June 16, 2015) (reporting the murder).

14. Santo I, *supra* note 1.

15. *Id.*

16. *Id.*

17. *See* FLA. STAT. § 960.065 (LexisNexis 2020) (denying funds to victims who have been convicted of forcible felonies at any point in their lives).

18. Santo I, *supra* note 1.

that he was completely innocent in his own death.[19] It did not even matter that Campbell himself had never committed a crime or that he was the one struggling financially.[20] Consequently, Campbell, still struggling to pay medical bills and unable to afford a headstone, buried his father in an unmarked grave.[21] Ohio and Florida are two of six states that deny compensation funds to victims and their family members previously convicted of certain crimes.[22]

This Note addresses the lack of remedies for victims who are denied compensation by their state's victim compensation program. Following the introduction, Part II provides an overview and explores the history of victim compensation funds. Part III examines the criminal history ban. Part IV discusses the Supreme Court and Congress' treatment of collateral consequences. This section considers Congress' decision not to redress discrimination based on an individual's criminal history. Part V presents evidence that the criminal history bans have a disparate impact on Black victims. Part VI analyzes the Supreme Court and Congress' treatment of disparate impact challenges. Ultimately, this section will show that there is no remedy for the victims denied compensation despite the discriminatory effects of the bans. Part V explains why a solution is necessary. This Note concludes by suggesting that state legislatures redefine what it means to be an innocent victim.

II. Victim Compensation Funds

A. Overview

As a result of crime, victims and their families may endure financial stress "as devastating as their physical injuries and emotional trauma."[23] Victims may have to pay for medical bills,

19. Davidson, *supra* note 13.

20. Santo I, *supra* note 1.

21. *Florida Should Ease Restrictions on State Aid for Crime Victims: Our View*, TCPALM (Sept. 19, 2018), perma.cc/X4YH-V6WN.

22. *See* Santo I, *supra* note 1 (including Ohio and Florida in the list of states that deny compensation based on the victim's past).

23. *Crime Victim Compensation: An Overview*, *supra* note 9.

crime scene cleanup, funeral costs, physical therapy, mental health counseling, and many other expenses resulting from the crime.[24] Although the court may order the perpetrator to compensate the victim for pecuniary losses,[25] often the perpetrator cannot afford to pay the victim, and—if she is ever able to—it will not be until she is released from prison and able to find a job.[26] To ensure the victim does not suffer further, legislatures have taken action and created victim compensation programs, offering crucial financial assistance to victims and their families.[27] The legislature chooses which victims are reimbursed, what expenses are reimbursed, and how much to reimburse.[28] Victim compensation programs most often help victims of physical and sexual assault—commonly including children.[29] While money alone cannot make the victim whole again, this aid can be critical for recovery in the aftermath of crime.[30]

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24. *See id.* (listing various expenses that victim compensation programs cover).

25. *See In Brief: Victim Compensation Programs and Restitution*, COUNCIL ST. GOV'T., perma.cc/33QK-WE8H ("Courts order restitution as part of a person's sentence when the victim can demonstrate that he or she sustained pecuniary losses . . . as a result of the crime.").

26. *See id.* ("The person ordered to pay restitution is expected to pay the full amount of restitution owed over the course of his or her sentence. Court-ordered restitution does not guarantee that the person ordered to pay it will do so . . . ."); *Restitution*, NAT'L CTR. FOR VICTIMS CRIME, perma.cc/H4PH-PPAV ("Collection of restitution is often limited by the offender's ability to pay. As a result, many victims wait years before they receive any restitution, and they may never receive the full amount of restitution ordered.").

27. *See Crime Victim Compensation: An Overview*, *supra* note 9 ("Crime victim compensation programs across the country offer crucial financial assistance to victims of violence.").

28. *See* DOUGLAS N. EVANS, COMPENSATING VICTIMS OF CRIME 1 (John Jay Coll. of Criminal Justice, 2014), perma.cc/7LV7-5B3E (PDF) (giving an overview of victim compensation programs).

29. *See* U.S. DEP'T JUSTICE, OFFICE FOR VICTIMS OF CRIME REPORTS ON 2015–2016 PROGRAMS AND SERVICES 1 (2017), https://perma.cc/422Z-NVQA (PDF) ("Victims were most often compensated for claims related to assault, child abuse (including sexual and physical abuse), and sexual assault.").

30. *Crime Victim Compensation: An Overview*, *supra* note 9 ("Recovering from violence or abuse is difficult enough without having to worry about how to pay for the costs of medical care or counseling, or about how to replace lost income due to disability or death.").

B. History

Government compensation for crime victims dates back to the Babylonian Code of Hammurabi (ca. 1775 B.C.).[31] However, during the Middle Ages, government compensation for crime victims ceased.[32] Courts instead ordered those who committed the crime to compensate their victims.[33] Jeremy Bentham and Margery Fry revived interest in victim compensation in the 19th and 20th centuries.[34] Fry became enraged in the 1950s when a court ordered two criminals to indemnify the victim of their crime and she calculated that the criminals would be able pay the full amount only if they lived another 442 years.[35] Fry thought this was an injustice and started a movement for government-funded victim compensation when she expressed her outrage in a letter to the *London Observer*.[36] She, and many

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31. *See* G. R. DRIVER & JOHN C. MILES, THE BABYLONIAN LAWS 21 (Oxford: Clarendon Press, 1955) (ordering the mayor of the territory where an unsolved robbery occurred to pay the victim whatever she had lost); LeRoy L. Lamborn, *Propriety of Governmental Compensation of Victims of Crime*, 41 GEO. WASH. L. REV. 446, 447–48 (1973) (discussing the Code of Hammurabi's requirement for the government to compensate victims of crime).

32. *See* Christopher Bright, *Tutorial: Introduction to Restorative Justice: Victim Compensation Fund*, CTR. FOR JUST. & RECONCILIATION, perma.cc/4YQ9-6KVV (claiming that the rise of the nation-state was the reason for the diminishment of victim compensation).

33. *See* Lamborn, *supra* note 31, at 450 ("Traditional remedies in common law countries include different forms of restitution from the criminal—recovery through a civil action, by self-help, and as a prerequisite to leniency in the criminal process . . . .").

34. *See* Bright, *supra* note 32 (specifying Jeremey Bentham and Margery Frys' role in the revival of victim compensation); Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167, 181 (2004) ("British social reformer Margery Fry is widely credited for bringing public attention to victims' needs for adequate compensation."); Lamborn, *supra* note 31, at 448 (stating that Margery Fry is responsible for the current focus on the government to compensate victims).

35. *See* Lamborn, *supra* note 31, at 448 (describing why Fry became "incensed" with the way victim's compensation was ordered).

36. *See id.* (describing how Fry's letter prompted a study of worldwide restitution systems and extensive debate in the British Parliament); Goldscheid, *supra* note 34, at 181 ("Fry's articles were the impetus for public analysis and debate, which gave rise to a noted public symposium on compensation, a British government-sponsored study of worldwide restitution

others, believed that when the government "fails" to protect the victim, the government has a duty to make the victim "whole" again.[37] Bentham observed:

> [T]hose who have suffered by [crime], either in their person or their fortune, are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them, however, an indemnity, when its protection has not been effectual.[38]

Consequently, thanks to Bentham and Fry, government compensation programs were "revived" in the 20th century.[39] In 1964, New Zealand instituted the "first comprehensive program for governmental compensation of victims of crime."[40] The program was publicly funded and authorized compensation for expenses, pecuniary loss, and pain and suffering resulting from certain enumerated crimes.[41] Britain followed suit the very next year.[42]

Similarly, the interest in America grew out of "the liberal political philosophy of the early 1960s that government should provide security and protection for society's vulnerable elements."[43] Concern for victims grew as the crime rate increased and the media publicized incidents of violence more frequently.[44] Considering most violent crime victims were of a

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systems, and, subsequently, a British government White paper on victim compensation, which recommended enactment of a public program.").

37. *See* Bright, *supra* note 32 ("[M]any advocates of compensation [programs] argue that since individuals have relinquished their rights to take justice into their own hands, government then is responsible for their protection. Crime represents a failure of that responsibility, for which the government ought to compensate victims.").

38. 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 579 (John Bowring ed., 1838).

39. *See* Bright, *supra* note 32 (analyzing the reintroduction of government compensation).

40. Lamborn, *supra* note 31, at 449.

41. *See* Goldscheid, *supra* note 34, at 181–82 (describing New Zealand's crime victim compensation program).

42. *See* Lamborn, *supra* note 31, at 449 ("The following year the British government, without action by Parliament, promulgated a similar program.").

43. Bright, *supra* note 32.

44. *See id.* (explaining why America's crime victim compensation movement began).

low socioeconomic status, interest in victim compensation also grew as a "welfare and social control approach to dealing with the urban unrest of the 1960s."[45] Between 1965 and 1972, California, New York, Hawaii, Maryland, Massachusetts, and Alaska enacted legislation similar to New Zealand.[46] Today, every state operates a victim compensation program.[47]

C. Allocation and Funding

Each year, victim compensation funds across the country assist more than 200,000 victims and family members, amounting to nearly $500 million awarded annually.[48] In most states, revenue for compensation funds comes from criminal fines, court fees, and forfeitures.[49] Some states have come up with other creative ways to generate additional revenue for their programs. For example, Alaska requires "individuals convicted of felonies or multiple misdemeanors to forfeit their annual checks that all residents receive from the state oil fund."[50] Washington, D.C. funds its program through court revenues.[51] Hawaii, Indiana, Kansas, Minnesota, Nebraska, and New Mexico draw a portion of inmate wages.[52] Most states do not use tax dollars to fund their compensation programs.[53]

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45. *Id.*

46. *See* Lamborn, *supra* note 31 (discussing the recent history of government victim compensation legislation).

47. *See* Goldscheid, *supra* note 34, at 182–83 ("[T]oday, all fifty states, the District of Columbia, and the Virgin Islands operate victim compensation programs.").

48. *See* EVANS, *supra* note 28, at 4 (discussing the amount of assistance victim compensation programs give).

49. *See In Brief: Victim Compensation Programs and Restitution*, *supra* note 25 ("Funding for crime victim compensation programs typically comes from fines and fees collected from people convicted of crimes and people who receive traffic violations.").

50. EVANS, *supra* note 28, at 4.

51. *See id.* (listing certain state's sources of funding).

52. *See id.* (discussing how states generate revenue).

53. *See* OHIO ATTORNEY GEN.'S OFFICE, 2018 CRIME VICTIM SERVICES ANNUAL REPORT 1 (2018), perma.cc/UDW7-5LY5 (PDF) (stating that Ohio's Victim of Crime Compensation fund is made up of "court costs and fees, not tax-payer dollars"); *Crime Victim Compensation: An Overview*, *supra* note 9

In addition, all state programs receive funding through the Federal Crime Victims Fund.[54] This fund was created by the Victim of Crime Act of 1984 (VOCA).[55] VOCA was designed to address the inability of the then-existing state programs to "adequately protect and assist" crime victims.[56] Similar to state compensation funds, the Federal Crime Victims Fund generates revenue through criminal fines, forfeited appearance bonds, special forfeitures, and donations.[57] No taxpayer dollars are used to finance the Fund.[58] As of 2018, the Federal Crime Victims Fund had a balance of over twelve billion dollars.[59] Through the Fund, the federal government reimburses each state for 60 percent of all of the state's eligible compensation payments for the prior year.[60] In fiscal years 2015 and 2016, the Fund made state compensation payments to 468,729 victims throughout the nation for a total of $758,874,588.[61] This amounts to approximately 37 percent of each state's victim compensation fund.[62]

("Fittingly, most of this money comes from offenders rather than tax dollars, since a large majority of states fund their programs entirely through fees and fines charged against those convicted of crime.").

54. Victim of Crime Act § 1402, 34 U.S.C. § 20101 (2018); s*ee Crime Victim Compensation*, RAINN, perma.cc/8668-E9J3 (explaining how the state victim compensation programs are funded).

55. *See* § 20101 (creating a fund to benefit victims of crime).

56. *See* Goldscheid, *supra* note 34, at 186 (discussing VOCA and its legislative history).

57. *See* § 20101 (listing the money to be deposited into the fund).

58. *See Department of Justice Awards Over 2.3 Billion in Grants to Assist Victims Nationwide*, U.S. DEP'T OF JUST. (Oct. 29, 2019), perma.cc/9UCN-6TEM (reviewing the Fund's financing).

59. *See Crime Victims Fund*, OFF. FOR VICTIMS CRIME, perma.cc/J8LM-852Y (reporting the Crime Victim Fund's balance).

60. *See OVC Fact Sheet*, OFF. FOR VICTIMS CRIME, perma.cc/F5RU-EERQ (describing how VOCA funds are allocated).

61. *See 2017 OVC Report to the Nation: Formula Grants: VOCA Compensation and Assistance*, OFF. FOR VICTIMS CRIME, perma.cc/K3GW-42UY (giving VOCA Compensation statistics).

62. *See* EVANS, *supra* note 28, at 4 (enumerating how much support states get from the Fund).

In certain states, funds are "chronically low" and there is barely enough funding to cover eligible claims.[63] In other states, however, there is more than enough money in the fund, resulting in outstanding balances in compensation funds.[64] In fiscal years 2013 and 2014, only eight states published their outstanding balances.[65] Three states listed their leftover fund balances at less than $2 million.[66] This includes Rhode Island, with a balance of $1,936,968 leftover at the start of fiscal year 2013.[67] Three states had balances between $2 million and $10 million.[68] Florida and Ohio had balances of over $10 million.[69] Similarly, in 2017 Florida's compensation fund had an unused balance of $12 million and Ohio had $15 million.[70]

To preserve this money and assist as many victims as possible, almost every state has a cap on the amount of compensation that can be awarded.[71] New York and Iowa are the only states that have no limit on how much assistance victims can receive.[72] California has the highest cap at $63,000.[73] The national average maximum award is $26,000.[74] Although it varies from state to state, the average compensation

63. *See* Alysia Santo, *For Black Crime Victims with Criminal Records, State Help is Hard to Come by*, USA TODAY (Sept. 13, 2018, 7:00 AM), perma.cc/67RJ-DFMW [hereinafter Santo II] (discussing Louisiana's fund which is "chronically short of money").

64. *See* EVANS, *supra* note 28, at 4 (cataloguing the states that reported their outstanding balances).

65. *See id.* (listing the outstanding victim compensation fund balances in Alabama, Arizona, Connecticut, Florida, Illinois, Michigan, Ohio, and Rhode Island).

66. *See id.* (detailing each state's outstanding balance).

67. *See id.* at 4 tbl.2 (enumerating Rhode Island's outstanding balance).

68. *See id.* at 4 (specifying the balances in Arizona, Michigan, and Alabama).

69. *See id.* (noting that two states had balances of over $10 million).

70. *See* Santo II, *supra* note 63 ("But the funds in Florida and Ohio routinely close out the year with lots of leftover cash. Florida ended 2017 with a balance of $12 million and Ohio with $15 million.").

71. *See* EVANS, *supra* note 28, at 5 (discussing the maximum amount of funding victims can receive in each state).

72. *See id.* (specifying New York and Iowa as the only states without a cap).

73. *See id.* (stating California's victim compensation cap).

74. *See id.* (reporting the national maximum average).

per claim for the fiscal years of 2015 and 2016 was approximately $1,619.[75]

The award may cover a wide variety of expenses. In general, states can choose which expenses to cover.[76] However, to receive VOCA funding, federal law requires state programs to cover medical expenses resulting from physical injuries, mental health counseling, loss of wages, and funeral expenses.[77] In addition, many states cover crime scene cleanup, moving expenses, attorneys fees, and rehabilitation.[78] Hawaii and Tennessee also reimburse for the cost of pain and suffering.[79] New Jersey compensates victims for domestic services, including housecleaning, laundry, cooking, and other day-to-day support for the victim.[80] New York and Washington reimburse victims for forensic exams needed after sexual assaults.[81] Thus, if a victim needs help with one of these expenses, she can apply to the compensation fund. However, the claimant must first meet all of the state's strict eligibility requirements.[82]

D. Eligibility

Just as states are able to decide what expenses to compensate, states can also decide who to compensate.[83] This decision is generally made by the state legislature through eligibility requirements listed in the state's victim

75. *See 2017 Report to the Nation*, *supra* note 61 (announcing the average compensation per claim as $1,619, with homicide payouts averaging the most, at $3,217 per claim).

76. *See* Santo, *supra* note 1 ("States set their own eligibility rules."); EVANS, *supra* note 28, at 4 tbl.2 (showing the differing compensable costs among various states).

77. *See* 34 U.S.C. § 20102 (2018) (listing the state program eligibility requirements).

78. *See* EVANS, *supra* note 28, at 7 (presenting the different expenses states will compensate).

79. *See id.* (showing that most states cover these costs).

80. *See id.* (demonstrating that only one state covers domestic services).

81. *See id.* (recording that only two states cover "forensic exams in sexual assaults").

82. *See infra* Part II.D.

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

compensation statute.[84] The statute generally provides for the establishment of a board or agency to administer the program, review recommendations for awards, and determine the award in each particular case.[85] The board or agency allocates funding based on whether or not the victim meets the state's eligibility requirements.[86] Although states differ in their exact eligibility requirements, most states have the same general criteria.[87] For example, in order to receive VOCA funding—and all states do—states must follow certain eligibility requirements.[88] Requirements include mandated compensation for out-of-state victims, victims of federal crimes, and victims of criminal violence, including drunk driving and domestic violence.[89]

Outside of the federally mandated requirements, common conditions consist of prompt reporting of the crime by the victim,[90] filing of the claim in a specified period,[91] and cooperation with the police and prosecutors in the investigation

84. *See* EVANS, *supra* note 28, app. at 25 (detailing common eligibility requirements).

85. *See* Andrea G. Nadel, Annotation, *Statutes Providing for Governmental Compensation for Victims of Crime*, 20 A.L.R. 4th 63 (1983) (describing how states generally set up their victim compensation programs).

86. *See id.* (discussing victim compensation programs); Santo I, *supra* note 1 ("Administrators of funds do not set out to discriminate. They must follow state law directing who can receive compensation.").

87. *See* Nadel, *supra* note 85 (listing the typical requirements enumerated in state victim compensation statutes); Bright, *supra* note 32 ("Certain basic features characterize most compensation funds . . . .").

88. *See* 34 U.S.C. § 20102 (2018) (stating that grants are only awarded to "eligible" compensation programs).

89. *See id.* (listing compensable program requirements).

90. *See* Nadel, *supra* note 85 (including prompt reporting as a common requirement of state victim compensation statutes); *see also* N.C. GEN. STAT. § 15B-11 (2019) (denying compensation if the criminally injurious conduct was not reported to law enforcement within seventy-two hours of its occurrence); MISS. CODE ANN. § 99-41-17 (2018) (same).

91. *See* Goldscheid, *supra* note 34, at 189 ("Applicants must . . . timely submit an application to the compensation program."); *see also* ARK. CODE ANN. § 16-90-712 (2018) ("Reparations shall not be awarded [u]nless the claim has been filed with the Crime Victim Reparations Board within one year after the injury or death upon which the claim is based . . . ."); MISS. CODE ANN. § 99-41-17 (2018) (requiring the claim to have been filed within thirty-six months after the crime occurred).

and prosecution of the crime.[92] Additionally, many states require that the victim be "largely innocent," meaning that she did not "precipitate the violent attack,"[93] and was not perpetrating her own crime at the time of the incident.[94] These basic requirements ensure that claimants were actually victims of the crime and did not have any involvement in the criminal wrongdoing that led to the injury.[95]

Notably, victim compensation funds are a fund of "last resort."[96] Victims or their family members applying, therefore, must first exhaust *all* other sources of compensation, including insurance, workers compensation, and restitution, before the state will award them any money.[97] If the claimant is receiving

92. *See* Goldscheid, *supra* note 34, at 189 (discussing the common requirements for victim compensation eligibility); ARK. CODE ANN. § 16-90-712 (2018) (denying or reducing award of reparations if the victim has not fully cooperated with "appropriate law enforcement agencies"). This requirement can also have a disparate impact on minority communities who are hesitant to approach the police. *See* L. Strong Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 84–88 (2017) (explaining the Black community's mistrust of the police).

93. Bright, *supra* note 32; s*ee* MISS. CODE ANN. § 99-41-17 (2018) (reducing compensation to the degree the victim was responsible for the injury or death); FLA. STAT. § 960.065 (2019) (denying funding from victims who committed or aided in the commission of the crime upon which the claim is based).

94. *See* FLA. STAT. § 960.065 (2019) (stating that victims who were engaged in unlawful activity at the time of the crime they were the victim of are ineligible to receive funding); OHIO REV. CODE ANN. § 2743.60 (LexisNexis 2019) (specifying that victims who committed a felony or were engaged in any similar conduct that would constitute a felony are ineligible to receive funding); *see also* Jill Web, *Oklahoma Victim Compensation Program Disproportionately Denies Funds for Black Victims*, ACLU (July 31, 2019, 4:30 PM), perma.cc/9KCM-CWHP (discussing how this requirement has negatively affected Black victims and their ability to receive compensation due to alleged membership in a gang).

95. *See Crime Victim Compensation: An Overview*, *supra* note 9 ("Generally the victim must . . . not have committed a criminal act or some substantially wrongful act that contributed to the crime (the eligibility of the family members generally depends on the behavior of the victim when programs assess this requirement).").

96. Goldscheid, *supra* note 34, at 190.

97. *See id.* ("Every state regards its victim compensation program as the 'payer[] of last resort,' so that the program will only pay expenses that are not covered by other sources.").

money that will cover these expenses in any other way, she cannot receive state compensation.[98] In addition, some programs have "means tests" which "prohibit recovery to those who will still be financially secure in the absence of compensation."[99] The programs, thus, truly are in place to compensate those who need the money the most.

III. The Criminal History Ban: Defining the "Innocent Victim"

A. Overview of the Ban

Despite the importance of the victim compensation programs and the true need of the victims involved, some states choose to impose an additional requirement to receive compensation. Arkansas, Florida, Mississippi, North Carolina, Ohio, and Rhode Island all deny compensation to victims who have been convicted of certain felonies.[100] Each state varies as to what exactly it bans.[101] For example, Florida denies compensation to anyone who has been convicted of a forcible felony or adjudicated as a habitual felony offender, a habitual violent offender, or a violent career criminal.[102] Forcible felonies include treason, car-jacking, robbery, burglary, and "any other felony which involves the use or threat of physical force or violence against any individual."[103] Low-level burglary is among the most common reasons Florida denies individuals with a

98. *See* Nadel, *supra* note 90 ("Many of the compensation statutes prohibit making any award unless the victim would otherwise suffer 'financial hardship' . . . .").

99. Bright, *supra* note 32.

100. *See* Santo I, *supra* note 1 (stating that Arkansas, Florida, Louisiana, Mississippi, Ohio, North Carolina, and Rhode Island are the only states to ban compensation based on a victim's criminal history). *But see* Alysia Santo, *More Families of Murder Victims in Louisiana Will Qualify for Financial Help*, MARSHALL PROJECT (June 10, 2019, 6:01 AM), perma.cc/H2CG-DS3Z [hereinafter Santo III] ("Louisiana lawmakers unanimously passed legislation that prohibits the state's Crime Victim Reparations Board from denying an application for financial assistance because of a victim's criminal history.").

101. *See* Santo I, *supra* note 1 (detailing each state's specific ban).

102. *See* FLA. STAT. § 960.065 (2019) (listing the state's eligibility requirements).

103. *Id.* § 776.08.

criminal history.[104] In addition, Florida will not compensate anyone who was in custody at the time of the crime upon which compensation is based "regardless of conviction."[105] This means that if someone was wrongfully arrested and became a victim of a crime while in custody, she could not receive compensation. Arkansas denies claimants if the victim was injured or killed while confined in a correctional facility "as a result of [a] conviction of any crime."[106] Arkansas also will not compensate claimants who have been convicted of any felony "involving criminally injurious conduct."[107] Mississippi takes it one step further and denies compensation to "any claimant or victim who has been under the actual or constructive supervision of a department of corrections for a felony conviction."[108] Moreover, Mississippi bans victims or claimants who, "subsequent to the injury for which the application is made, [are] convicted of *any* felony."[109]

Additionally, the states vary as to how long their ban lasts.[110] For example, Arkansas and Florida have lifetime bans.[111] This means that someone, like Antonio Mason, who makes a mistake as a teenager will continue to be punished for that mistake if he is victimized at ninety.[112] Or, someone like Anthony Campbell, who needed to pay for his father's funeral, will be punished for a crime his father committed thirty-two years earlier, despite turning his life around.[113] Other states, however, have dramatically shorter bans. For example, the bans

104. *See* Santo I, *supra* note 1 (discussing Florida's refusal to remove low-level burglaries from the list of disqualifying felonies).

105. FLA. STAT. § 960.065.

106. ARK. CODE ANN. § 16-90-712 (2019).

107. *Id.*

108. MISS. CODE ANN. § 99-41-17 (2019).

109. *Id.* (emphasis added).

110. *See* Santo I, *supra* note 1 (listing how long each state's ban lasts).

111. *See* ARK. CODE ANN. § 16-90-712 (giving no time limit to how long the felony can be considered); FLA. STAT. § 960.065 (same).

112. *See supra* notes 1–12 and accompanying text.

113. *See supra* notes 13–21 and accompanying text.

in Mississippi and Rhode Island last five years.[114] North Carolina's ban lasts three years.[115]

In contrast, several other states and the federal government have put *limited* bans on people previously convicted of certain crimes.[116] For example, VOCA denies funds to victims who have been convicted of any federal crime and have not paid their fines, other monetary penalties, or restitution imposed for the offense.[117] In addition, Illinois will not compensate a person convicted of a felony "until that person is discharged from probation or is released from a correctional institution and has been discharged from parole or mandatory supervised released, if any."[118] The victim can apply for compensation, but she will not receive her reward until she meets the requirements stated above.[119] Although not ideal requirements, the states with limited bans allow the victim to receive funding eventually.[120] States with the full criminal history ban, on the other hand, do not.[121] If the victim is disqualified in Ohio, Florida, Arkansas,

114. *See* MISS. CODE ANN. § 99-41-17 (considering felonies that occurred within five years prior to the injury or death for which application has been made); 12 R.I. GEN. LAWS § 12-25-19 (2019) (same).

115. *See* N.C. GEN. STAT. § 15B-11 (2019) (stating claimants who have been convicted of certain felonies within three years of when the victim's injury occurred will be denied).

116. *See* EVANS, *supra* note 28, app. B at 25 (demonstrating that thirteen states have some sort of limit on individuals convicted of felonies).

117. *See* 34 U.S.C. § 20102 (2018) (prohibiting state programs that receive funding from the Crime Victims Funds from compensating victims who have been convicted of federal crimes and are delinquent on their monetary penalties).

118. 740 ILL. COMP. STAT. 45/2.5 (2019).

119. *See id.* ("A victim who has been convicted of a felony may apply for assistance under this Act at any time but no award of compensation may be considered until the applicant meets the requirements of this Section.").

120. *See id.* (stating the victim can receive funding once she is discharged from probation or mandatory supervised release); 34 U.S.C. § 20102 (prohibiting compensation to victims who have been convicted of a crime only when they are delinquent in paying their fines); *see also* EVANS, *supra* note 28, at 25 app. B (distinguishing between states that have criminal history bans "for a specified time" and those that ban only during probation or parole).

121. *See* ARK. CODE ANN. § 16-90-712 (2019) (denying claimants previously convicted of certain felonies with no way to cure the denial); FLA. STAT. § 960.065 (2019) (same).

Mississippi, Rhode Island, or North Carolina, she will never receive state victim compensation for her current injuries.[122]

B. Ohio's Victim Compensation Fund

Similar to the criminal history bans discussed above, Ohio's victim compensation board will distribute funds neither to a victim nor a claimant who has been "convicted of a felony within ten years prior to the criminally injurious conduct that gave rise to the claim or is convicted of a felony during the pendency of the claim."[123] Ohio, however, also takes its ban one step further. Ohio prohibits a claimant from receiving victim compensation if it is

> proved by a *preponderance of the evidence* that the victim or the claimant engaged, within ten years prior to the criminally injurious conduct that gave rise to the claim or during the pendency of the claim, in an offense of violence, a violation of [Ohio's drug trafficking laws], or any substantially similar offense that also would constitute a felony under the laws of [Ohio], another state, or the United States.[124]

This means that people who were acquitted of or suspected but not charged of certain felonies are likewise prohibited from receiving compensation in Ohio.[125] Simply put, Ohio's ban may be punishing victims that have no criminal record at all. This standard also means that juvenile records, which are technically not convictions, disqualify victims.[126]

Ohio was not always this exclusive when it came to victim compensation. These requirements were "fueled by outrage over

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122. *See* N.C. GEN. STAT. § 15B-11 (2019) (denying the claimant for felonies committed within three years of the injury).

123. OHIO REV. CODE ANN. § 2743.60 (LexisNexis 2019).

124. *Id.* (emphasis added).

125. *See* Santo I, *supra* note 1 ("[Ohio's] ban would apply not just to people with convictions but also to people whose records show a 'preponderance of the evidence' that they may have committed a felony in cases involving violence or drug trafficking.").

126. *See In re* Miller, 698 N.E.2d 124, 136 (Ohio Ct. Cl. 1996) (upholding the denial of an applicant to victims compensation due to his juvenile record because even though a juvenile cannot be convicted of a felony, "his *conduct* could be considered felonious" (emphasis in original)).

a reputed mobster."[127] In 1977, John Nardi, an alleged associate of the Cleveland crime family, was killed by a car bomb.[128] Despite his notorious reputation, Nardi had never been convicted of a crime.[129] His widow applied to the crime victim compensation fund and collected $50,000 in victim compensation.[130] "The backlash was fierce. Lawmakers unsuccessfully sued the attorney general to block the payment and, by 1982, the first version of Ohio's felony restriction law sailed through the legislature."[131]

However, Ohio's legislation fails to consider that not every person who may have committed or did commit certain felonies is a notorious mobster.[132] This ban is not harming the "John Nardis" of the world, but is actually affecting people like Antonio Mason who have turned their lives around and have now fallen victim to crime.[133] In fact, drug possession is among the most common reasons people with a criminal history are denied funds in Ohio.[134] Further, regardless of what the bans were intended to prevent, their current effect is indisputable: the bans place an additional sentence on individuals who have already paid for their crime, disproportionately impacting Black victims.[135]

IV. The Constitution, Congress, and Collateral Consequences

A criminal conviction can carry with it a wide range of "collateral consequences" that disqualify individuals from various aspects of society even after they have served their

127. Santo I, *supra* note 1.

128. *See id.* (discussing John Nardi's accident).

129. *See id.* (detailing John Nardi's impact on Ohio's criminal history ban).

130. *See id.* (explaining Ohio's decision to ban certain victims from receiving compensation).

131. *Id.*

132. *See supra* Part I.

133. *See supra* notes 1–12 and accompanying text.

134. *See* Santo I, *supra* note 1 (stating that drug possession accounts for twenty percent of disqualifications).

135. *See infra* Parts IV, V.

sentence.[136] Examples of collateral consequences include felony disenfranchisement, restricted access to employment and, at issue here, criminal history bans.[137] The criminal history ban allows states to continue to punish previously incarcerated victims by prohibiting them from receiving aid in their most crucial time of need.[138] Despite this harsh effect, neither the Constitution nor Congress protects victims from the discrimination that stems from a criminal conviction.[139]

A. Collateral Consequences and the Fourteenth Amendment

The Fourteenth Amendment guarantees that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."[140] Thus, the Constitution requires that the government treat all citizens equally.[141] Some distinctions, however, are necessary for a functional society.[142] For example, a regulation prohibiting children under five from flying an airplane is

136. *See* Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 252 (2015) ("A criminal conviction carries with it a wide variety of statutory and regulatory penalties and restrictions in addition to the sentence imposed by the court. These so-called 'collateral consequences' of conviction are frequently more punitive and long lasting than court-imposed sanctions like a prison term or fine.").

137. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156–57 (1999) (discussing collateral consequences that impact political, economic, and social spheres of life).

138. *See* Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 539 (2006) (explaining how denying public assistance to previously incarcerated individuals can be detrimental).

139. *See infra* Part IV.A–B.

140. U.S. CONST. amend. XIV, § 1.

141. *See* Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination . . . .").

142. *See* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (upholding a mandatory retirement provision because it is rational to conclude some mental deterioration occurs at age seventy).

necessary for the safety of our society and should be upheld.[143] Distinctions based on race, sex, or national origin, on the other hand, should be struck down unless pressing public necessity requires it.[144] The Supreme Court, therefore, must distinguish between classifications that are necessary to society and constitutional, and those classifications that are discriminatory and unconstitutional.[145] The Court does this by applying different standards of review for different classifications.[146]

If a statute makes a distinction based on a protected class, the Court will apply strict scrutiny to determine whether or not the statute violates the Equal Protection Clause.[147] To survive judicial review under strict scrutiny, the state must prove that the racial classification is "narrowly tailored" to serve a "compelling government interest."[148] This standard necessitates a rigorous review that makes it very difficult for legislation to survive.[149]

> The purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this

143. *See* 14 C.F.R. § 61.305 (2020) (requiring pilots to be at least seventeen years old).

144. *See* Korematsu v. United States, 323 U.S. 214, 216 (concluding that classifications based on a suspect class must be reviewed with rigid scrutiny but can be upheld if necessary to national security).

145. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (applying rational basis review because neither a protected class nor a fundamental right was involved).

146. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting that statutes that make distinctions affecting religious, national, or racial minorities may call for a "more searching judicial inquiry").

147. *See Murgia*, 427 U.S. at 312. ("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification . . . operates to the peculiar disadvantage of a suspect class.").

148. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (citation omitted).

149. *See id.* at 720 ("[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." (citation omitted)); Fisher v. Univ. of Tex., 570 U.S. 297, 309 (2013) ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] *clearly* identified and *unquestionably* legitimate.'" (alteration in original) (emphasis added) (citation omitted)).

> compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[150]

Thus, if a plaintiff can show that a statute or policy makes a distinction based on a protected class, her chances of success are high.[151]

Unfortunately, the Supreme Court has determined that felons are not a protected class.[152] If a statute or government action makes a distinction based on an unprotected or non-suspect class, rational basis review applies.[153] A statute or government action is upheld under rational basis if it has a "rational relation to some legitimate end."[154] Although courts must consider the means and the ends of the statute or policy, the rational basis standard has been described as "meaningless,"[155] "almost empty,"[156] and "enormously deferential."[157] In fact, under rational basis review, courts do not

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150. Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

151. *See* Stylianos-Ioannis G. Koutnatzis, *Affirmative Action in Education: The Trust and Honesty Perspective*, 7 TEX. F. ON C.L. & C.R. 187, 211 n.106 (2002) ("In short, as long as strict scrutiny applies, results are overwhelmingly fatal.").

152. *See* Crook v. El Paso Indep. Sch. Dist., 277 F. App'x 477, 480 (5th Cir. 2008) (concluding that felons are not a suspect class); *see also* Kay Kohler, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HASTINGS L.J. 1403, 1420 (1975) (arguing that convicted felons should be considered a suspect class due to their history of unequal treatment, the disabilities they face at reentry, and their political powerlessness).

153. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (stating that legislative classifications that do not target a protected class will receive rational basis review).

154. *Id.*

155. Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 426 (1995).

156. Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 410 (2016).

157. *Id.* at 402; *see* Turner v. Glickman, 207 F.3d 419, 424 (7th Cir. 2000) ("Rational basis review 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Rather, we must uphold the challenged classification if 'there is a rational relationship between the disparity of treatment and some legitimate government purpose.'" (internal citations omitted)); FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993) (concluding that

even require that the legislature give a reason for enacting the statute.[158] A statute "must be upheld against equal protection challenge if there is *any reasonably conceivable* state of facts that could provide a rational basis for the classification."[159] Challenging the criminal history bans because they treat felons differently from non-felons, therefore, is unlikely to be successful.[160]

Another way that a statute can receive strict scrutiny is if a fundamental right is involved.[161] To be considered a fundamental right, the right at issue must be deeply rooted in tradition and history.[162] Fundamental rights include the right to marriage,[163] the right to the custody of your children,[164] and the right to control the education of your children.[165] Regrettably, the Supreme Court concluded that access to welfare is not a fundamental right.[166] Further, the Court has

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under rational basis review, a statutory classification must be upheld if there is "*any* reasonably conceivable state of facts that could provide a rational basis for the classification" (emphasis added)); *Romer*, 517 U.S. at 632 ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.").

158. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955) (upholding a statute under rational basis review even though the state legislature did not give a reason for its enactment).

159. *Beach Commc'ns*, 508 U.S. at 313.

160. *See infra* notes 170–174 and accompanying text.

161. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (requiring heightened protection against government interference with "certain fundamental rights" (internal citation omitted)).

162. *See id.* at 65–66 (analyzing the history of the right before concluding it is fundamental); Loving v. Virginia, 388 U.S. 1, 12 (1967) (same); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (same).

163. *See Loving*, 388 U.S. at 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (internal citation omitted)).

164. *See Troxel*, 530 U.S. at 66 (recognizing the fundamental right of parents to make decisions concerning the "care, custody, and control" of their children).

165. *See Meyer*, 262 U.S. at 400 (concluding that parents have a Constitutional right to control the education of their children).

166. *See* Lavine v. Milne, 424 U.S. 577, 584 n.9 (1976) (stating that the government is not Constitutionally obligated to provide minimum levels of support).

granted a "strong presumption of constitutionality" when legislatures are conferring monetary benefits because it believes that legislatures should have "discretion in deciding how to expend necessarily limited resources."[167] Applying these principles, courts have upheld the denial of food stamps for individuals convicted of drug felonies[168] and the suspension of Social Security benefits for incarcerated individuals.[169]

Under these lenient standards, it is unlikely that a court will strike down a state law that considers criminal history when allocating monetary benefits such as victim compensation.[170] In fact, the criminal history ban in Ohio has been challenged as a violation of the Equal Protection Clause multiple times to no avail.[171] The challengers alleged that the ban violated equal protection of the law because it treated felons differently than non-felons.[172] The Ohio Supreme Court concluded that the "rationale to conserve governmental resources by generally excluding persons associated with crime is apparent on the face of the law."[173] The court stated that "conserving scarce resources is a legitimate purpose, and excluding persons convicted or otherwise shown to have committed felonies promotes that purpose."[174] Accordingly, if

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167. Schweiker v. Wilson, 450 U.S. 221, 238 (1981).

168. *See* Turner v. Glickman, 207 F.3d 419, 425 (7th Cir. 2000) (upholding a law that disqualified drug felons from receiving food stamps because there was a rational connection between the disqualification and the government's interest in deterring drug use).

169. *See* Butler v. Apfel, 144 F.3d 622, 625 (9th Cir. 1998) (holding that suspending Social Security benefits is rationally related to the state's desire to conserve scarce resources).

170. *See* Houston v. Williams, 547 F.3d 1357, 1353 (11th Cir. 2008) ("This court, among others, has held that denying convicted felons certain entitlements does not violate the Equal Protection Clause.").

171. *See* State *ex rel.* Matz v. Brown, 525 N.E.2d 805, 807 (Ohio 1988) (concluding that prohibiting felons from receiving funding under Ohio's Victims Crime Act did not violate the Equal Protections Clause of the Ohio or the United States Constitution); *In re* Crowan, 499 N.E.2d 937, 943 (Ohio Ct. Cl. 1986) (same); State *ex rel.* Madden v. Brown, 519 N.E.2d 865 (Ohio Ct. App. 1987) (same).

172. *State ex rel. Matz*, 525 N.E.2d at 806.

173. *Id.* at 807.

174. *Id.*

individuals previously convicted of felonies are to receive redress, it must come from the legislature.

B. Congress's Acceptance of Collateral Consequences

Congress does not protect individuals convicted of felonies from being discriminated against as a result of their criminal history. In fact, Congress actively prohibits individuals convicted of certain felonies from benefitting from welfare programs.[175] For example, federal law bans any person convicted of a drug felony from receiving food stamps.[176] Individuals convicted of drug trafficking can be ineligible for all federal benefits for five years.[177] After two convictions, the individual can be made ineligible for all federal benefits for ten years.[178] After three convictions, the individual is permanently ineligible for all federal benefits.[179] Additionally, people convicted of drug offenses are excluded from the receipt of grants, contracts, licenses, and loans, including federal education and small business loans.[180] These policy decisions are defended as a way to deter drug abuse and reduce welfare fraud.[181] For example, Congress prohibits individuals convicted of drug offenses from receiving food stamps because Congress believes they are likely to sell their food stamps in exchange for drugs or cash to buy drugs.[182]

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175. *See* Demleitner, *supra* note 137, at 158 ("A number of welfare support programs explicitly exclude certain types of offenders from their coverage.").

176. 21 U.S.C. § 862 (2018). However, states may opt out of this ban through their own legislation. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *See* Demleitner, *supra* note 137, at 158 (describing the various ways individuals with a criminal history are excluded from social and welfare rights).

181. *See* Turner v. Glickman, 207 F.3d 419, 425–26 (7th Cir. 2000) (discussing the constitutionality of exempting felons from the Food Stamps Act).

182. *See id.* ("The legislative record in this case contains testimony that food stamps were being traded for drugs." (citing H.R. REP. NO. 104-651, at 68 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2202)).

These defenses do not apply to victim compensation benefits and Congress recognized this by treating victim compensation programs differently than other welfare programs. Congress specifically denied individuals convicted of drug felonies eligibility in both federal and state food stamp programs.[183] In contrast, Congress provided federal funding both directly to victims with a criminal history and to states that compensate victims with a criminal history.[184] By doing so, Congress defined "victim" to include those with a criminal record, consistent with its mission to "enhanc[e] the Nation's capacity to assist crime victims and to provid[e] leadership in changing attitudes, policies, and practices to promote justice and healing for *all* victims of crime."[185] Banning victims because of their criminal history would run contrary to that mission.[186] Nonetheless, despite not actively banning individuals because of their criminal history, Congress does not protect victims from states that choose to do so.[187] Congress allocates funds to the states that deny victims based on their criminal history and has not enacted legislation prohibiting this discrimination.[188] The many victims affected by the criminal history bans, therefore, are left with nowhere to turn.

183. *See* 21 U.S.C. § 862a (stating that individuals with drug felonies are not eligible to receive assistance from federal or state food stamp programs).

184. *See* 34 U.S.C. § 20102 (allowing compensation for individuals with a criminal record).

185. U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME REPORTS ON 2015–2016 PROGRAMS AND SERVICES 1 (2017), perma.cc/8489-9APB (PDF) (emphasis added).

186. *See* Santo I, *supra* note 1 (advocating for states to expand their definition of victim).

187. *See* § 20102 (failing to prohibit states from denying compensation from victims based on their criminal history).

188. *See supra* notes 54–62 and accompanying text.

V. The Disparate Impact of the Criminal History Ban on Black Victims

To make matters worse, the criminal history bans disproportionately affect Black victims.[189] The Marshall Project, Reveal from the Center for Investigative Reporting, and *USA TODAY* analyzed the criminal history ban in Ohio and Florida.[190] The study demonstrated that in Florida only 30 percent of people who listed their race when applying for victim compensation in 2015 and 2016 were Black.[191] However, Black applicants made up for 61 percent of people denied aid for having a criminal record.[192] The analysis revealed similar results in Ohio. In 2016, 42 percent of applicants who listed their race were Black.[193] Yet, 61 percent of victims denied because of their criminal history were Black.[194] The results are clear. The criminal history ban disproportionately affects Black victims.

Although the research only examined two of the six states with the ban, considering the "racial disparity that pervades the U.S. criminal justice system,"[195] it is likely that the results would be similar in any state that bans victims based on their criminal history.[196]

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189. It is possible that this ban disproportionately affects other minority victims, including Latinx individuals. *See* THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 1 (2018), perma.cc/VT2E-RGSU (PDF) (stating that Hispanics are 3.1 times more likely to be incarcerated than Whites). However, detailed reports have only discussed the ban's effect on Black victims. *See* Santo I, *supra* note 1 (reporting only how the ban affects Black victims).

190. *See* Santo I, *supra* note 1 (presenting the racial disparity revealed in the study).

191. *See id.* (relating the results of the study).

192. *See id.* (explaining that Black applicants make up over half of the those denied because of the criminal history ban, despite being less than one-third of applicants).

193. *See id.* (discussing the "similar racial disparity" in Ohio).

194. *See id.* (recounting Ohio's victim compensation statistics).

195. THE SENTENCING PROJECT, *supra* note 189, at 1.

196. *See id.* at 9 ("African Americans—particularly [B]lack men—are most exposed to the collateral consequences associated with a criminal record.").

> African Americans are more likely than [W]hite Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted . . . they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than [W]hites . . . . As of 2001, one of every three [B]lack boys born in that year could expect to go to prison in his lifetime . . . compared to one of every seventeen [W]hite boys.[197]

Black Americans account for 40 percent of the current prison population, while making up only 12 percent of the U.S. population.[198] The source of this disparity is "deeper and more systematic than explicit racial discrimination."[199] What might appear to be a linkage between race and crime may actually be the result of institutionalized racism.[200]

The "discriminatory implementation of the police and judicial practices" carried out for the past two decades have greatly contributed to the disparity.[201] For example, although drug offenses are committed at roughly equal rates across races, a Black person is 3.7 times more likely to be arrested for marijuana possession than a White person.[202] This can be attributed to police prioritizing contact with low-income neighborhoods, where African Americans are also disproportionately represented.[203] The fact that the criminal ban in Ohio affects Black victims more often, therefore, is unsurprising, considering that most claimants in Ohio are

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197. *Id.* at 1.

198. *See* Cecil J. Hunt II, *The Jim Crow Effect: Denial, Dignity, Human Rights, and Racialized Mass Incarceration*, 29 J.C.R. & ECON. DEV. 15, 15 (2016) (describing the intersection of race and mass incarceration).

199. THE SENTENCING PROJECT, *supra* note 189, at 1.

200. *See* Hunt II, *supra* note 198, at 29 ("The social turn to racialized mass incarceration has become an institutionalized racial dynamic within our criminal justice system.").

201. *Id.*

202. *See* THE SENTENCING PROJECT, *supra* note 189, at 3–4 (explaining how higher levels of police contact with African Americans has contributed to racial disparity in the criminal justice system).

203. *See id.* at 3 ("Absent meaningful efforts to address societal segregation and disproportionate levels of poverty, U.S. criminal justice policies have cast a dragnet targeting African Americans.").

denied because of simple drug possession.[204] Similarly, it has been shown in recent years that Black drivers are somewhat more likely to be stopped than White drivers and "far more likely" to be searched and arrested.[205] The causes and outcomes of these stops "point[ ] to unchecked racial bias, whether intentional or not, in officer discretion."[206] Thus, any categorical ban on individuals with a criminal history will negatively affect Black victims.[207]

Racial disparity permeates every stage of the criminal justice system and, in the six states that have a criminal history ban, the state legislatures have allowed the racial disparity to pervade their victim compensation programs as well.[208] Despite the government implementing victim compensation programs to protect and assist victims, these state governments have left society's most vulnerable victims unprotected.[209] Unable to turn to their state governments for help, minority victims have to turn to the federal government to strike down the bans. Unfortunately, as discussed in the next section, these victims and their families are left with no redress.[210]

VI. Current Disparate Impact Remedies Offer Victims No Solution

A. Disparate Impact and the Fourteenth Amendment

As discussed in Part IV, the Equal Protection Clause of the Fourteenth Amendment requires the government to make laws impartially, without drawing distinctions based on

204. *See supra* note 134 and accompanying text.

205. *See* THE SENTENCING PROJECT, *supra* note 189, at 3–5 (discussing policies that impose great costs on people of color and bring little gain in crime reduction).

206. *Id*. at 5.

207. *See id.* at 10 (stating that because of the disparate racial effects of the criminal justice system people of color are disproportionately impacted by exclusionary laws).

208. *See supra* notes 190–196 and accompanying text.

209. *See supra* Part IV.

210. *See infra* Part VI.

impermissible characteristics.[211] The "central purpose" of this clause is to prevent state officials from discriminating on the basis of race.[212] Thus, statutes that draw distinctions based on race are reviewed under strict scrutiny.[213]

There are two types of racial classifications that compel strict scrutiny: facially discriminatory classifications and facially neutral classifications.[214] If a statute explicitly draws a distinction based on race, the statute is facially discriminatory.[215] An example of such a statute is one that provides for separate railways carriages for White and colored races.[216] To invoke strict scrutiny, the plaintiff only must prove that the statute, on its face, treats one race differently than another.[217] If a statute does not explicitly make a distinction based on race, but nonetheless has a discriminatory impact, the statute is facially neutral.[218] An example of such a policy was at

211. *See supra* Part IV.A.

212. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017) ("The central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." (citations omitted)).

213. *See* Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) ("[A]ll governmental uses of race are subject to strict scrutiny . . . .").

214. *See* McCleskey v. Kemp, 481 U.S. 279, 297–99 (1986) (reviewing a state policy that was neutral on its face but had a discriminatory effect); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (examining a statute that facially discriminated on the basis of race).

215. *See* Johnson v. California, 543 U.S. 499, 509 (2005) (concluding that the California Department of Correction's policy of using race to determine cell assignments for newly transferred inmates was an "express racial classification"); *Loving*, 388 U.S. at 11 (holding that Virginia's miscegenation statutes rested "solely upon" racial classifications).

216. *See* Plessy v. Ferguson, 163 U.S. 537, 543 (1896) (explaining the legal distinction involved in such "separate but equal" statutes), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

217. *See Johnson*, 543 U.S. at 506 ("We therefore apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." (emphasis in original) (alteration in original) (citation omitted)).

218. *See* Washington v. Davis, 426 U.S. 229, 241 (1976)

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's

issue in *Griggs v. Duke Power Co.*,[219] where a power plant required that all employees either have a high school diploma or pass an intelligence test.[220] The requirement, neutral on its face, had a negative impact on minorities, who were less likely to have graduated high school.[221] To invoke strict scrutiny for a facially neutral statute, the plaintiff must prove that the statute has not only a discriminatory impact, but also a discriminatory purpose.[222] Thus, to invoke strict scrutiny for a statute like the one involved in *Griggs*, minority applicants would have to prove that the factory owners implemented the requirement with the intention of discriminating against minorities.[223]

Discriminatory purpose can be proven by statistics of discriminatory effect or through legislative history. To successfully utilize statistics, the statistics "must present a 'stark' pattern" of discrimination.[224] Statistical evidence has only been accepted in "certain limited contexts."[225] The Supreme Court accepts statistical disparities in the selection of jury venire in a particular district and in the form of "multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964."[226] Discrimination in the allocation of victim compensation funds does not fall into either category.[227]

> disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.

219. 401 U.S. 424 (1971).

220. *Id.* at 430–32.

221. *Id.* at 427–28.

222. *See* Hunt v. Cromartie, 526 U.S. 541, 546 (1999) ("A facially neutral law, on the other hand, warrants strict scrutiny only if it can be proved that the law was 'motivated by racial purpose or object' or if it is 'unexplainable on grounds other than race.'" (citations omitted)).

223. *See Davis,* 426 U.S. at 239 (stating that disproportionate impact alone does not trigger strict scrutiny). However, if the claim was brought under Title VII rather than the Fourteenth Amendment, the claimant could prevail without showing discriminatory intent. *See infra* Part VI.B.2.

224. McCleskey v. Kemp, 481 U.S. 279, 293 (1986).

225. *Id.*

226. *Id.* at 294.

227. *Id.* (citing Bazemore v. Friday, 478 U.S. 385, 400–01 (1986)).

Accordingly, successful claimants will likely need to rely on legislative history to prove intentional discrimination. This is an extremely hard burden to meet,[228] as it is unlikely that a claimant will be able to find legislative history explicitly stating that a statute is intended to impact a racial group.[229] Further, even if a claimant could prove that a legislator had a discriminatory purpose in enacting the legislation, the Court would still be hesitant to find a discriminatory purpose because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . ."[230] Thus, if a claimant cannot prove that the statute is part of a "movement"[231] to discriminate on the basis of race, there is no remedy, no matter how egregious the impact.[232]

Unfortunately, neither facially discriminatory challenges nor facially neutral challenges will afford relief to the victims

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228. *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than the intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or affirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citations omitted)); *Kemp*, 481 U.S. at 298 (concluding that in order to succeed on a facially neutral challenge, the defendant must prove that the state legislature enacted or maintained the discriminatory statute "*because of* an anticipated racially discriminatory effect." (emphasis in original)).

229. *See* David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1661 (2010)

> Judge Easterbrook, for one, has insisted that no such "intent" can be divined: "The meaning of statutes is to be found not in the subjective, multiple mind of Congress," he has argued, for the simple reason that a multimember body such as Congress cannot formulate or act upon a single intent as if it were a unitary entity.

230. United States v. O'Brien, 391 U.S. 367, 384 (1968).

231. *See* Hunter v. Underwood, 471 U.S. 222, 229 (1985) (concluding there was discriminatory purpose where evidence showed the Alabama Constitutional Convention was "part of a movement . . . to disenfranchise Blacks").

232. *See Kemp*, 481 U.S. at 289–99 (refusing to apply strict scrutiny despite statistics indicating that the death penalty was used in 22 percent of cases involving Black defendants and White victims, but only three percent of cases involving White defendants and Black victims because McCleskey did not prove that the legislators acted with "discriminatory purpose").

who are denied compensation because of their criminal history. Despite evidence that a Black person is more likely to have a criminal conviction than a White person,[233] individuals with a criminal history are not considered a suspect class.[234] Additionally, although there is statistical evidence that the criminal history ban has disproportionately affected Black victims, there is no evidence that these provisions were enacted *because of* their adverse effects on Black victims.[235] Consequently, the challengers would not be able to prove a discriminatory intent and the victim compensation statutes would not be reviewed under strict scrutiny. Any equal protection challenge to the bans, therefore, would result in the court applying a rational basis review.[236] Under this review, the states could simply state that the criminal history ban is necessary to preserve funding for the "most worthy" victims and the Court would approve it.[237] Or, the states could say nothing and the Court would uphold it if it could think of a justification for the statute that is rationally related to a legitimate end.[238] Thus, unless the Supreme Court reverses precedent and applies strict scrutiny to facially neutral statutes without requiring discriminatory intent, claimants must look to the legislature for relief.

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233. *See supra* note 197 and accompanying text.

234. *See supra* note 152 and accompanying text.

235. *See* Santo III, *supra* note 100 (stating that Louisiana denied victims based on criminal history so that "true innocent victims of crimes" received the limited funding); Santo I, *supra* note 1 (noting that the ban on payouts to victims with a criminal history were "fueled by outrage" after a reputed mobster was killed and his widow collected compensation).

236. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (highlighting that a law that "neither burdens a fundamental right nor targets a suspect class," is subject to a rational basis review).

237. *See supra* notes 153–159 and accompanying text.

238. *See supra* notes 153–159 and accompanying text.

B. Disparate Impact and the Civil Rights Act

Fortunately, the Constitution provides the floor for basic rights, not the ceiling.[239] While federal and state legislatures cannot take away the rights the Constitution secures for the citizens of the United States, they can certainly give them more.[240] Recognizing the shortcomings of equal protection jurisprudence, Congress enacted the Civil Rights Act of 1964 ("Civil Rights Act")[241] to do exactly that.[242] The Civil Rights Act was designed to put an end to racial discrimination.[243] Within multiple titles, Congress authorized plaintiffs to challenge facially neutral actions that have a discriminatory impact without having to prove a discriminatory purpose.[244] Instead, Congress provided a burden-shifting framework, making it easier for plaintiffs claiming discrimination to prevail.

This is one of the many reasons the Civil Rights Act is regarded as "the greatest legislative achievement of the civil rights movement."[245] Scholars have even argued that it is "the most important domestic legislation of the postwar era."[246] However, even this extraordinary piece of legislation does not prevent the racial discrimination that stems from considering

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239. *See* Bracy v. Gramley, 520 U.S. 899, 904 (1997) (distinguishing the "constitutional floor" from the ceiling set by "common law, statute, or the professional standards of the bench and bar").

240. *See id.* (emphasizing that legislatures can only add on to existing constitutional rights).

241. Civil Rights Act of 1964, Pub. L. No. 87-195, 78 Stat. 241 (codified at 42 U.S.C. § 1981 (2018)).

242. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245–46 (1964) (discussing the history of the Civil Rights Act).

243. *See id.* at 246 ("The Act as finally adopted was most comprehensive, undertaking to prevent . . . discrimination in voting, as well as places of accommodation and public facilities, federally secured programs and in employment.").

244. *See infra* Part VI.B.2–3.

245. David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 9, 9 (Bernard Grofman ed., 2000).

246. *Id. See* Sarah Hinger, *Why Trump's Effort to Eliminate Disparate Impact Rules Is a Terrible Idea*, ACLU (Jan. 9, 2019, 5:15 PM), https://perma.cc/W49H-6SRJ (explaining how important the disparate impact claims have been to civil rights law).

criminal history.[247] In fact, in the context of federally funded programs, Congress allows for legislation that prohibits felons from obtaining certain benefits, despite the disparate impact on minorities.[248]

1. Disparate Impact in the Context of Federally Funded Programs

Title VI of the Civil Rights Act provides "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[249] Federally funded programs include welfare programs designed to assist those in need by providing various forms of financial assistance, including food stamps, college grants, and Medicaid.[250] Ensuring that states cannot discriminate when allocating funds to welfare recipients is of the utmost importance as statistics demonstrate that minorities are the class most likely to be impoverished.[251] Unfortunately, Congress did not codify disparate impact in Title VI as it did in other portions of the 1964 Act[252] and the Supreme Court has not extended Title VI to provide relief for facially neutral challenges.[253]

Consequently, when administering programs that receive federal funding, states are not prohibited from employing

247. *See infra* Part VI.B.1–3.

248. *See supra* Part IV.B.

249. 42 U.S.C. § 2000d.

250. *See Government Benefits*, USA.GOV, https://perma.cc/FPZ9-48EK ("Federal government benefit programs can help people with a low income cover basic expenses like food, housing, and healthcare.").

251. *See People in Poverty by Selected Characteristics: 2017 and 2018*, U.S. CENSUS BUREAU (Sept. 10, 2019), https://perma.cc/CBX3-ZFS5 (reporting that the poverty rate for White people is ten percent, for Hispanics is 17.6 percent, and for Black people is 20.8 percent).

252. *See infra* Part VI.B.2–3.

253. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (concluding that Title VI does not included a private right of action to enforce disparate-impact regulations).

practices that disparately impact racial minorities.[254] As long as states do not make explicit distinctions based on race, they can incorporate policies that have a discriminatory effect on minorities.[255] Accordingly, the disproportionate number of Black victims and their loved ones denied victim compensation funds in Arkansas, Florida, Mississippi, North Carolina, Ohio, and Rhode Island have no way to challenge the criminal history ban.[256] One solution would be for Congress to specifically allow for disparate impact challenges under Title VI and eliminate the discriminatory purpose requirement as it has in other titles of the Civil Rights Act.[257] However, as discussed below, even where Congress has codified disparate impact, challenges of criminal history based discrimination still fail.[258]

2. Disparate Impact in the Context of Employment

Title VII of the Civil Rights Act prohibits racial discrimination in employment.[259] Like challenges under the Equal Protection Clause, claimants can challenge an employment practice if it is facially discriminatory or facially neutral.[260] The difference, however, is that when a claimant

254. *See* Dan McCaughey, *The Death of Disparate Impact Under Title VI:* Alexander v. Sandoval *and Its Effects on Private Challenges to High-Stakes Testing Programs*, 84 B.U. L. REV. 247, 266 (2004) ("After *Sandoval*, an individual plaintiff can only challenge a policy of a federally funded program if she can show intent to discriminate—a rare showing in the post-civil rights era.").

255. *See* 42 U.S.C. § 2000d (2018) (prohibiting only explicit discrimination).

256. *See* Archer & Williams, *supra* note 138, at 538 ("Congress has effectively dismantled the social safety net for ex-offenders and their families.").

257. *See infra* Part VI.B.2–3.

258. *See infra* Part VI.B.2–3.

259. *See* 42 U.S.C. § 2000e-2 ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . .").

260. *See id.* (explaining the burden of proof for both facial and disparate impact challenges); Am. Nurses Ass'n v. Illinois, 783 F.2d 716, 722 (7th Cir.

challenges a facially neutral policy under Title VII, she does not have to prove there was a discriminatory purpose.[261] Instead, the claimant can prove an employment practice has a disparate impact through a burden-shifting framework.[262]

Under this framework, the claimant must first prove the employment policy or practice "causes a disparate impact on the basis of race."[263] Once the plaintiff proves her prima facie case—often by providing statistics of racial discrimination[264]—the burden shifts to the employer to prove the practice is "job related for the position in question and consistent with business necessity."[265] If the employer meets her

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1986) ("[W]hen intentional discrimination is charged under Title VII the inquiry is the same as in an equal protection case. The difference between the statutory and constitutional prohibitions becomes important only when . . . the challenge is based on a theory of 'disparate impact,' as distinct from 'disparate treatment.'").

261. *See* 42 U.S.C. § 2000e-2(k) (stating the burden of proof in disparate impact cases and not including purpose or intent); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."); Washington v. Davis, 426 U.S. 229, 246–47 (1976) ("Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of Blacks are challenged, discriminatory purpose need not be proved . . . .").

262. *See* 42 U.S.C. § 2000e-2(k) (denoting the framework for disparate impact cases); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining that the complainant carries the initial burden of showing a prima facie case of disparate impact and that once the showing is made, the burden shifts to the employer to articulate a nondiscriminatory purpose).

263. 42 U.S.C. § 2000e-2(k); *see Griggs*, 401 U.S. at 430–31 (discussing the discriminatory employment practice first, then moving to the employer's claim of business necessity); Robinson v. Union Carbide Corp., 538 F.2d 652, 661 (5th Cir. 1976) ("After the prima facie case [of discrimination] is established, the burden of persuasion shifts to the corporation . . . .").

264. *See Griggs*, 401 U.S. at 430 (accepting statistics showing White people graduated high school more often than Black people and that White people did better on the company's required tests than Black people as evidence of racial discrimination); *Robinson*, 538 F.2d at 660–61 (finding statistics of Black workers in menial job positions and White workers in high-ranking positions as "sufficient" to establish prima facie case of employment discrimination).

265. 42 U.S.C. § 2000e-2 (2018); *see Griggs*, 401 U.S. at 431 ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.");

burden, the claimant can still prevail if she demonstrates that the employer refused to adopt an "alternative employment practice" that is effective and has a less discriminatory effect.[266] Thus, by not requiring proof of a discriminatory purpose, Congress made it easier to protect employees from racial discrimination.[267] Even under this framework, however, those impacted by discriminatory employment practices resulting from criminal history are left without any redress.[268]

Despite wanting to remove "artificial, arbitrary, and unnecessary barriers to employment,"[269] Congress has not utilized Title VII to address the racial discrimination resulting from having a criminal history.[270] Today, nearly all employers conduct background checks before hiring an individual[271] and many have "adopted broad hiring prohibitions" on individuals

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Connecticut v. Teal, 457 U.S. 440, 446 (1982) ("If an employment practice which operates to exclude [Black people] cannot be shown to be related to job performance, the practice is prohibited." (citation omitted)); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (concluding that the discriminatory tests would be impermissible unless they were "predictive of or significantly correlated with important elements of work behavior . . . which are relevant to the job").

266. 42 U.S.C. § 2000e-2. *See Albemarle Paper Co.*, 422 U.S. at 425 ("If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"); *Teal*, 457 U.S. at 446 (stating that even if the employer were to prove that their discriminatory purpose was a business necessity, the plaintiff could "prevail" if he or she shows the employer was using the practice as mere pretext).

267. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290–91 (1997) (describing the difficulties of proving a discriminatory intent).

268. *See infra* notes 269–291 and accompanying text.

269. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

270. *See* Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 927 (2014) (discussing the limitations that "severely constrain" Title VII's ability to prevent and redress racial discrimination and ensure equal opportunity).

271. *See National Survey: Employers Universally Using Background Checks to Protect Employees, Customers, and the Public*, https://perma.cc/X9GD-Q3X (explaining that the study "demonstrated that nearly all human resources professionals" utilize background screening).

with a criminal record.[272] Recognizing that blanket exclusions can have a disparate impact on minorities due to higher arrest and conviction rates,[273] in 2012 the Equal Employment Opportunity Commission issued enforcement guidance prohibiting employers from automatically barring employment from those with a criminal record.[274] Instead, the guidance allows employers to simply *consider* criminal history when making employment decisions and prohibits using criminal history differently for different applicants based on their race or national origin.[275] While these guidelines clarified the standards employers must follow to comply with Title VII, Title VII has still been "an insufficient means of addressing the race discrimination that stems from the use of criminal history reports in employment."[276]

Although racial disparate impact challenges based on an employer's consideration of criminal history were met with some success in the 1970s and 1980s,[277] since then plaintiffs have been largely unsuccessful.[278] This failure can be attributed to an intense scrutiny of the evidence of disparate impact and strong

272. Paul-Emile, *supra* note 270, at 895–97.

273. *See EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 25, 2012), https://perma.cc/LZ5J-SUGP ("National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.").

274. *Id.*

275. *Id.*

276. Paule-Emile, *supra* note 270, at 924.

277. *See* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975) ("We cannot conceive of any business necessity that would automatically place every individual convicted of any offense . . . in the permanent ranks of the unemployed."); *see also* Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 973–75 (D.D.C. 1980) (invalidating the use of arrest records as "knock-out" criteria).

278. *See* Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 4, 12 (2012) ("Since the late 1980s judgments have been almost uniformly grim for plaintiffs alleging that the consideration of criminal records disparately impacts Black or Hispanic job applicants.").

deference to employers.[279] In the past, courts accepted general population statistics on arrests and convictions as evidence of disparate impact.[280] Today, the general consensus seems to be "that the role discrimination plays in contemporary America has been sharply diminished, and those who take this view are reluctant to find discrimination absent compelling evidence."[281] As a result, courts now expect plaintiffs to produce data that is both "specific and comprehensive."[282] Courts want "more refined statistics on the population qualified to perform and actually seeking the job at issue."[283] This can be extremely difficult. Not only is the standard now more onerous, but because criminal record discrimination occurs almost exclusively during the hiring stage, it is extremely difficult for applicants to "acquire the empirical data necessary to show how the employer has treated similarly situated applicants."[284]

Additionally, while raising the bar for plaintiffs, courts also lowered the bar for the employers by holding them to "radically relaxed standards for business necessity and job relatedness."[285] While it is true that a criminal record is "arguably relevant to employment," employers are not required to give legitimate reasons for refusing to hire applicants with criminal records.[286] For example, one employer's interest in "minimizing the

279. *See id.* at 12–13 (discussing the low rate of applicants' success in recent years).

280. *See* Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (concluding that statistics showing Black people were arrested "substantially more frequently than Whites in proportion to their numbers" was "overwhelmingly and utterly convincing" proof of disparate impact); *Green*, 523 F.2d at 1294–95 (accepting statistics showing that Black people were convicted of crimes at higher rates than White people in the area and records of the number of Black people rejected because of their conviction record as a prima facie case of discrimination).

281. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 563 (2001) [hereinafter Selmi II].

282. Harwin, *supra* note 278, at 16. *See* Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028, 1030 (W.D. Mo. 2008) (denying the claimants challenge because he gave statistics of general felony rates and not his specific felony).

283. Harwin, *supra* note 278, at 16.

284. Paule-Emile, *supra* note 270, at 926.

285. Harwin, *supra* note 278, at 14.

286. Paule-Emile, *supra* note 270, at 925.

perceived risk of employee dishonesty" justified his policy of disqualifying *all* job applicants with a felony record.[287]

However, heightened scrutiny of the claimant's evidence and employer deference are not solely to blame. An apparent "distaste for plaintiffs with criminal records" has seemingly played a role in plaintiffs' decreased success.[288] For example, when a Florida district court considered the disparate impact resulting from a felony bar to employment,[289] the judge "captured the zeitgeist"[290] of courts today when he wrote:

> Obviously a rule refusing honest employment to convicted applicants is going to have a disparate impact upon thieves. That some of these thieves are going to be Hispanic is immaterial. That apparently a higher percentage of Hispanics are convicted of crimes than that of the "White" population may prove a number of things such as: (1) Hispanics are not very good at stealing, (2) Whites are better thieves than Hispanics, (3) none of the above, (4) all of the above. Regardless, the honesty of a prospective employee is certainly a vital consideration in the hiring decision. If Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing. . . . Can an employer refuse to hire persons convicted of a felony even though it has a disparate impact on minority members? This court's answer is a firm "Yes."[291]

As evidenced by the Florida district court, it seems courts are less than willing to strike down discrimination based on criminal history. Accordingly, the racial discrimination resulting from an applicant's criminal history continues to remain prevalent today.[292]

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287. Williams v. Scott, No. 92 C 747, 1992 U.S. Dist. LEXIS 13643, at *7 (N.D. Ill. Sept. 3, 1992) (emphasis added).

288. Harwin, *supra* note 278, at 13.

289. EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734 (S.D. Fla. 1989).

290. Harwin, *supra* note 278, at 13.

291. *Carolina Freight Carriers Corp.*, 723 F. Supp. at 753.

292. *See Why Do We Need E-Race?,* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, E-RACE INITIATIVE, https://perma.cc/9S8X-N5E2 (discussing the "facially neutral employment criteria" that "significantly" disadvantage applicants and employees on the basis of race).

3. Disparate Impact in the Context of Housing

In 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968, which expanded Civil Rights Act of 1964.[293] Title VIII of the 1968 Act, also known as the Fair Housing Act,[294] prohibits racial discrimination in the sale, rental, and financing of housing.[295] Like Title VII, the Fair Housing Act prohibits both facially discriminatory practices and facially neutral practices that have a disparate impact.[296] Claimants who bring disparate impact challenges under the Fair Housing Act do not have to prove a discriminatory purpose, again making proving discrimination easier than doing so under the Fourteenth Amendment's Equal Protection Clause. [297] However, these additional safeguards do not protect those with a criminal history from housing discrimination.[298] In fact, when the Supreme Court recognized disparate impact as a cognizable claim under the Fair Housing Act, the Court simultaneously concluded that exclusionary practices aimed at individuals with criminal convictions were completely lawful.[299]

Further, like in the federal funding context, Congress makes housing unavailable to certain individuals with criminal

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293. Civil Rights Act of 1968, Pub. L. No. 284, 82 Stat. 73. *See History of Fair Housing,* U.S. DEP'T OF HOUSING & URBAN DEV., https://perma.cc/3QZ5-FG3V (providing a history of the Fair Housing Act).

294. 42 U.S.C. § 3604 (2018).

295. *Id.*

296. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518–21 (2015) (explaining why the Fair Housing Act must be construed to encompass claims of disparate impact).

297. *See id.* at 2513. (distinguishing disparate impact claims as those that have a "disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale" (citations omitted)).

298. *See* Archer & Williams, *supra* note 138, at 541 ("[F]ederal law grants public housing agencies broad discretion to deny housing to virtually anyone with a criminal record.").

299. *See Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2521

> But the amendments do constrain disparate-impact liability. For instance, certain criminal convictions are correlated with sex and race. . . . By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions.

convictions.[300] For example, all federally assisted housing agencies or owners can deny admission to housing if they determine

> that an applicant or any member of an applicant's household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or the public housing agency employees . . . .[301]

Congress and the courts defend these discriminatory practices by stating that "criminal activity threatens the health, safety, [and] right to peaceful enjoyment of the premises" that other tenants of the housing deserve.[302] In reality, these policies tend to "punish, even fracture entire families for the past behavior of one member of the household," while failing to significantly advance the policy's goals.[303] Regardless, Congress has spoken: individuals with a criminal history do not receive protection, despite the negative impact this has on Black individuals.[304] Consequently, even when Congress enacts legislation to allow claims of disparate impact, individuals with a criminal history are left unprotected.

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300. *See* Archer & Williams, *supra* note 138, at 540–43 (discussing legislation that prevents individuals with a criminal conviction from obtaining housing).

301. 42 U.S.C. § 13661.

302. *Id.* § 1437d; *see* Archer & Williams, *supra* note 138, at 542 ("Although purportedly designed to provide for a safer environment for public housing residents, these laws, decisions, and policies do not significantly advance this goal. Instead, they just exacerbate the challenges of reentry.").

303. Archer & Williams, *supra* note 138, at 543.

304. *See* Sharifa Rahmany, *The Dark Cloud of Collateral Consequences: Ex-Offenders Serving Civilly Imposed Sentences Post-Incarceration*, 48 CRIM. L. BULL. 1139, 1146 (2012) ("Federal law allows housing agencies to deny housing based on a person having a criminal record.").

VII. A Proposed Solution: Protecting All Victims

A. Why We Need a Solution

Victim compensation programs were created to assist victims and "promote justice and healing for *all* victims of crime."[305] Our criminal justice system emphasizes reparation to victims as one of its central purposes.[306] Yet, the programs in Arkansas, Florida, Mississippi, North Carolina, Ohio, and Rhode Island deny compensation to victims previously convicted of certain felonies, affecting a disproportionate number of Black victims.[307] A solution to this injustice is necessary for a number of reasons: (1) to stop punishing individuals who have already served their sentences; (2) to ensure that people who are convicted of a crime are given a chance of success at reentry into society; and (3) perhaps most importantly, to stop racial disparity from permeating another aspect of our criminal justice system.

The criminal history ban is another punishment that the state tacks on to previously incarcerated individuals once they are released.[308] The individual has already served her sentence, yet she is forced to continue to pay for her crime.[309] Or, in the case of Ohio, the state can sentence an individual and make her pay for a crime that she was not even convicted of.[310] Despite being an additional sentence, the ban does not serve any

305. U.S. DEP'T OF JUSTICE, *supra* note 185, at 1 (emphasis added); *see* Goldscheid, supra note 34, at 186 ("[T]he [victim's assistance] legislation was premised on the theory that the programs would assist the operation of the criminal justice system and reflected a general social welfare notion of responsibility for the crime victim.").

306. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING § 18-2.1 (3d ed. 1994) (suggesting that legislatures consider reparation to victims of crimes as one of the five societal purposes for sentencing systems).

307. *See supra* Parts III, V.

308. *See* Demleitner, *supra* note 137, at 154 (stating that for some offenders, collateral consequences are "the most persistent punishments" inflicted for their crime).

309. *See* Archer & Williams, *supra* note 138, at 583 ("[Collateral consequences] are often viewed by those who enact them as punitive means to hold ex-offenders further accountable for their actions.").

310. *See supra* Part III.B.

legitimate sentencing purpose.[311] The ban "merely add[s] to the overall severity of the sentence without being grounded in theories of retribution, prevention, deterrence, or rehabilitation."[312] The ban is not retributive because it is not disclosed to her at her sentence, is not specific to her case, and does not affect the majority of individuals convicted of crime.[313] Banning compensation does not prevent or deter individuals from committing crimes.[314] Most offenders are unaware of the criminal history bans and, if they are aware, do not intend to become a victim of a crime.[315] The ban, therefore, cannot deter them from committing crime.[316]

Additionally, the ban does not promote rehabilitation, but "actively thwart[s] attempts at rehabilitation by preventing the ex-offender's integration into society."[317] By banning previously incarcerated individuals from compensation, the six states are making successful reentry into society nearly impossible.[318] Because individuals with felony convictions can be prohibited from obtaining certain employment, housing, and federal welfare benefits,[319] they are likely to already be in financially

311. *See* Demleitner, *supra* note 137, at 154 ("The impact of collateral consequences is especially disturbing since such consequences frequently lack penological justification.").

312. *Id.*

313. *See id.* at 160 (explaining that to be retributive, the punishment needs to be clearly designated as part of the sentence).

314. *See id.* at 161 (discussing the ineffectiveness of collateral consequences as deterrents).

315. *See id.* ("[Collateral consequences as] deterrents often are ineffective, since potential offenders do no usually weigh the costs and benefits of their actions. In addition, the relatively low visibility of collateral consequences makes them unlikely deterrents to crime.").

316. *See* Carla Cesaroni & Nicholas Bala, *Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges*, 34 QUEEN'S L.J. 447, 465 (2008) (explaining that for a sentence to be a deterrent it must prevent others from committing crime).

317. Demleitner, *supra* note 137, at 160.

318. *See* Archer & Williams, *supra* note 138, at 544–46 (analyzing the interplay of collateral consequences and the detrimental effect on previously convicted individuals).

319. *See supra* Part IV.B.

precarious situations.[320] When tragedy strikes, the state's victim compensation program may be the only place for the victim to turn.[321] In fact, compensation will only be distributed if the victim can prove that she cannot receive funding from *any* other source.[322] Without compensation, these victims are left with no way to pay for their medical bills, funeral expenses, or crime scene cleanup.[323] This leaves the individual with few real options outside of crime.[324] If our criminal justice system believes in rehabilitation at all, we must ensure compensation for these individuals.[325] We must give these individuals a chance at success.[326]

To make matters worse, this ban affects Black victims more often than it affects White victims.[327] This is another way Black men and women are treated unfairly within the criminal justice system.[328] Police have higher rates of contact with Black individuals.[329] Black people are arrested more often that White people.[330] They are convicted more frequently.[331] They are sentenced more harshly.[332] Now, as victims, they are also

320. *See* Rahmany, *supra* note 304, at 1145 ("Without employment, an ex-offender is neither able to meet his basic needs, nor financially support himself or his family. In addition, without access to affordable housing, food stamps, and rehabilitative programming, an ex-offender is unlikely to find stability and live a productive life.").

321. *See supra* Part II.D.

322. *See supra* notes 96–99 and accompanying text.

323. *See supra* Part II.C.

324. *See* Archer & Williams, *supra* note 138, at 529 ("Saddled with collateral consequences, ex-offenders often return to the illegal practices that initially led to their convictions.").

325. *See* Demleitner, *supra* note 137, at 160 ("If one subscribes to the notion that ex-offenders should be given a second chance to rehabilitate themselves and become useful and productive members of society, society must also provide the means for such reintegration . . . .").

326. *See* Archer & Williams, *supra* note 138, at 582–83 (explaining the "devastating impact" of collateral consequences).

327. *See supra* Part IV.

328. *See supra* notes 195–207 and accompanying text.

329. *See supra* note 197 and accompanying text.

330. *See supra* note 197 and accompanying text.

331. *See supra* note 197 and accompanying text.

332. *See supra* note 197 and accompanying text.

disproportionately denied compensation.[333] This is not to suggest that racial disparity and mass incarceration are the result of a conscious and deliberate effort of racial suppression because they are more likely a symptom of institutionalized racism.[334] Nevertheless, regardless of the impetus, it is an injustice to allow the racial disparity of the criminal justice system to infiltrate victim compensation as well.[335] States should not be permitted to continue to reject the victims who need compensation the most, especially when based upon unfounded stereotypes of an innocent victim.[336]

Proponents of the criminal history ban defend it as a way to save funding for "the most worthy victims."[337] This argument fails for two reasons. First, victim compensation programs already exclude victims who are complicit in the act that injured them or who committed a crime at the time of the injury.[338] These requirements ensure that only victims that are innocent in bringing about their injury are compensated.[339] States with a criminal history ban, however, define an innocent victim based on their past conduct.[340] Essentially, the state legislators are telling victims that because they have a criminal history, they

333. *See supra* notes 189–196 and accompanying text.

334. *See* Hunt II, *supra* note 198, at 29 ("The problems of racialized mass incarceration: [D]o not stem from explicit and intentional race or class discrimination, but they are problems of inequality nonetheless." (alteration in original) (citation omitted)).

335. *See supra* Part V.

336. *See* Goldscheid, *supra* note 34, at 191–92 ("Although [criminal history bans] undoubtedly originated in an attempt to ensure that only 'law abiding' individuals receive compensation, it can produce a harsh result.").

337. *See* Santo II, *supra* note 63 ("Some compensation funds struggle to cover costs, bolstering one argument in favor of limits: Money should be save for the most worthy victims.").

338. *See supra* notes 93–95 and accompanying text.

339. *See* Goldscheid, *supra* note 34, at 189 (listing common eligibility requirements, such as prompt reporting to the police, as a way to ensure only "innocent" victims are compensated).

340. *See id.* ("[M]any programs' interpretation of "innocent" victims precludes individuals with any criminal record from recovery, rather than limiting the exclusion to those who committed the crime giving rise to the compensation claim.").

are less of a victim.[341] The legislators are telling the victims that they are not deserving of help in their time of need.[342] "Victim" should not be defined by an individual's past, but solely by the fact that they have fallen victim to a crime.

Second, the argument that funding is limited is unfounded. Funding is certainly not an issue in Ohio, Florida, or Rhode Island.[343] Rhode Island's outstanding balance consisted of almost two million dollars in 2013.[344] In 2017, Florida ended the year with a balance of $12 million dollars and Ohio with $15 million.[345] Further, even if states do have issues with scarce funding, there are other ways to limit the amount of money spent each year or increase funds without denying compensation to those who need it the most. For example, states can find creative ways to increase their revenue, like the states that draw a portion of inmate wages to supplement their fund.[346] Or, states can set lower caps and ensure that more people get at least some money in their time of need.[347] Denying certain victims from access to compensation is not the way to conserve funding.

When President Ronald Reagan signed the Executive Order establishing the President's Task Force on Victims of Crime, he stated:

> Our concern for crime victims rests on far more than simple recognition that it could happen to any of us. It's also rooted in the realization that *regardless of who is victimized* or the extent to which any one of us may personally be threatened, all of us have an interest in seeing that justice is done not

341. *See* Santo I, *supra* note 1 (describing those denied as a result of the criminal history ban as "the victims who don't count").

342. *See id.* ("Victims and their families said the rigid policies make it seem like states are separating crime victims into two kinds of people: those who matter, and those who do not.").

343. *See supra* notes 66–70 and accompanying text.

344. *See supra* note 67 and accompanying text.

345. *See supra* note 70 and accompanying text.

346. *See supra* note 52 and accompanying text.

347. *See supra* notes 71–74 and accompanying text.

> only to the criminal but also for those who suffer the consequences of his crime.[348]

Banning an individual because of a past crime flies in the face of former President Reagan's declaration.[349] A solution to the criminal history ban is necessary to ensure justice for all victims, including those with a criminal record.

B. Why Victim Compensation is Different Than Other Welfare Benefits

Congress has actively prohibited individuals with a criminal history from receiving certain welfare benefits.[350] Nonetheless, victim compensation should be treated differently for two reasons: (1) the arguments that apply to other welfare programs do not apply to victim compensation; and (2) considering the government failed to protect the victim from crime, the government has a duty to make the victim whole again. Prohibiting previously incarcerated individuals from welfare benefits is defended as way to deter crime and prevent welfare fraud,[351] but the ban does not deter individuals from committing crime.[352] Individuals are likely unaware of the criminal history ban and, even if they do know about it, they probably do not believe they will fall victim to crime.[353] A person cannot be deterred if they do not believe the consequence will ever apply to them.[354]

Additionally, welfare fraud is not an issue with victim compensation. Congress's reasoning for denying previous drug offenders food stamps is that the recipients will exchange food

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348. *2017 OVC Report to the Nation: Introduction: Implementing Our Vision*, OFF. FOR VICTIMS CRIME, https://perma.cc/YZT4-RNF8 (emphasis added).

349. *See* Santo III, *supra* note 100 (discussing Louisiana's decision to redefine victim).

350. *See supra* Part IV.B.

351. *See supra* Part IV.B.2.

352. *See supra* notes 314–316 and accompanying text.

353. *See supra* notes 314–316 and accompanying text.

354. *See Five Things About Deterrence*, NAT'L INSTITUTION JUST. (June 5, 2016), https://perma.cc/5B3A-2X9E (explaining that increasing the severity of punishment is ineffective as a deterrent because "criminals know little about the sanctions for specific crimes").

stamps for drugs or money.[355] Victims who receive compensation, however, are compensated only for already incurred expenses that they can prove and have not received any other funding for.[356] Therefore, it is extremely unlikely that the victim could spend the money on anything other than her resulting bills.[357] Similarly, unlike in the housing and employment context, there is no "business necessity" or need to protect others when compensating victims.[358] Distributing compensation to the victim cannot harm others.[359] Compensation is allocated to victims and their families to cover already incurred expenses, and that allocation does not affect the general public.[360]

Moreover, compensating all victims comports with the underlying theory of victim compensation.[361] State-sponsored victim compensation began because of the belief that when someone is victimized, the government is at fault for failing to protect her and now must make her whole again.[362] Victim compensation in America was founded on the belief that the government should provide security and protection for society's most vulnerable. Victims with a criminal history in need of compensation are society's most vulnerable and they are in need of assistance.[363]

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355. *See supra* notes 181–182 and accompanying text. See Archer & Williams, supra note 138, at 567–69, for a discussion of why denying food stamps to individuals previously convicted of drug crimes does not work as a deterrent.

356. *See supra* Part II.C–D.

357. *See* Santo I, *supra* note 1 (describing victims who took out loans and maxed credit cards to pay for medical bills before applying to the state's compensation program).

358. *See* supra Part VI.B.1–2.

359. *C.f.* Archer & Williams, *supra* note 138, at 541 (explaining that the denial of housing to individuals wither certain convictions records stems from the desire to protect other residents).

360. *See supra* Part II.C–D.

361. *See supra* Part II.B.

362. *See supra* notes 37–45 and accompanying text.

363. *See supra* notes 37–45 and accompanying text.

C. A Reform Movement

State legislatures throughout the nation have taken a stand against collateral consequences.[364] "In 2019, 43 states, the District of Columbia, and the federal government enacted an extraordinary 152 laws aimed at reducing barriers faced by people with criminal records in the workplace, at the ballot box, and in many other areas of daily life."[365] This "prolific legislative track record . . . reflects a lively national conversation about how best to limit unwarranted record-based discrimination and to promote reintegration."[366] One important example of this reform legislation is Congress's recent passage of the Fair Chance Act.[367] The Act, signed into law on December 20, 2019, prevents federal employers from requesting criminal history information from applicants before the conditional offer stage.[368] This means that employers cannot throw out an application because of an individual's criminal record before they consider the individuals qualifications.[369] This gives previously incarcerated applicants a fair chance at employment opportunities within the federal government.[370] The Fair Chance Act evidences Congress's changing attitude on collateral consequences.[371]

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364. *See* PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019 1 (Collateral Consequences Resource Center 2020), https://perma.cc/N6SE-QCXV (PDF) (explaining the record number of states to reduce reentry barriers in 2019).

365. *Id.*

366. *Id.*

367. 5 U.S.C. § 9202 (2018).

368. *Id.*

369. *See FAQ: Fair Chance to Compete for Jobs Act of 2019*, NAT'L EMP. L. PROJECT (Dec. 17, 2019), https://perma.cc/BE78-HVLG (explaining the effect of the Fair Chance Act).

370. *See id.* ("[T]he FCA . . . will both remove barriers to employment for people with records and promote the public safety in the communities hardest hit by unemployment.").

371. *See* PATHWAYS TO INTEGRATION: CRIMINAL RECORD REFORMS IN 2019, *supra* note 364, at 1 (noting that in the last seven years the federal government has taken steps to chip away at collateral consequences).

Another important and very relevant legislative change occurred in Louisiana in 2019.[372] When the Marshall Project released the results of their study showing the disparate impact of the criminal history ban, Louisiana was one of seven states that barred victims from receiving compensation if they had a criminal record.[373] Louisiana enacted its ban because its compensation program was designed "to assist true innocent victims of crime . . . . Innocent meaning not just at that very moment, but what's the history of the particular person."[374] However, a review of ninety-one claims from 2015 through 2017 revealed that about 80 percent of victims turned down solely because of a felony conviction in Louisiana were Black.[375] The review further demonstrated that most of the victims had been murdered and their grieving family members were the ones actually denied compensation.[376] These findings caused Louisiana district attorneys to question the logic behind the state's definition of "innocent."[377] One district attorney advocating to repeal the ban stated, "[s]o a person who is a victim that has a criminal past can't be an innocent victim? They're not innocent? That's discriminatory."[378] The legislature agreed.[379] Despite the fact that Louisiana's victim compensation fund is "chronically low," the Louisiana legislature unanimously passed legislation that prohibits Louisiana's Crime Victims Reparations Board from denying compensation because of a victim's criminal history.[380]

The Fair Chance Act, Louisiana's new definition of victim, and the unprecedented number of new record reform laws enacted in 2019 exemplify a movement taking place in the

372. *See* Santo III, *supra* note 100 (detailing Louisiana's enactment of legislation that prohibits denying a victim because of her criminal history).

373. *See* Santo I, *supra* note 1 (stating that Louisiana banned applicants with a felony conviction within three years of the current injury from receiving compensation).

374. Santo III, *supra* note 100.

375. *See id.* (discussing the impetus of Louisiana's change).

376. *Id.*

377. *Id.*

378. *Id.*

379. *See id.* (detailing the legislature's change).

380. *Id.*

United States.[381] The purpose of the movement "has been to advance a public policy of promoting reintegration for people with a criminal record."[382] However, not all states are following suit. Arkansas's Crime Victim Reparations Board, for example, recently voted against asking legislators to lift the state's lifetime ban on people with certain felony convictions.[383] The Rhode Island legislature declined to take up a proposal that would allow compensation for any victim's funeral, regardless of their criminal record.[384] Florida rejected a measure in 2017 to remove low-level burglary convictions, the most common reason for rejection in Florida, from the list of disqualifying felonies.[385] It is time for these six states to join the movement.

D. Redefining "Victim"

There is currently no legal remedy for the victims denied critical compensation because of their criminal record.[386] I suggest that the legislatures in Arkansas, Florida, Ohio, Mississippi, North Carolina, and Rhode Island follow Louisiana's lead and amend their victim compensation legislation.[387] The amendments should expand the definition of a victim to include individuals with a criminal history.[388] This change is consistent with the purpose of victim compensation programs and is necessary to end the current racial discrimination plaguing their compensation programs.[389]

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381. *See* PATHWAYS TO INTEGRATION: CRIMINAL RECORD REFORMS IN 2019, *supra* note 364, at 1 (discussing the "law reform movement").

382. *Id.*

383. *See* Santo II, *supra* note 63 (highlighting states that have refused efforts to widen victim compensation fund eligibility).

384. *See id.* (giving examples of states that do not want to widen eligibility).

385. *See id.* (stating that the proposed measure would have had a huge impact considering that burglary was among the most common reasons Florida denied compensation due to victims with a criminal history).

386. *See supra* Parts IV, VI.

387. *See supra* notes 372–380 and accompanying text.

388. *See* Santo III, *supra* note 100 (detailing Louisiana's explanation for redefining "victim" to include individuals with a criminal history).

389. *See supra* Part VII.A.

Additionally, I propose that Congress amend its Crime Victim Compensation legislation and refuse federal funding to programs that deny compensation to victims based on their criminal history. Congress already requires the states to compensate certain victims in order to receive funding. [390] This would only be a modest addition and, considering the states receive a large part of their budget from the federal government, this change could have a real impact.[391] States would have to choose to either continue to deny victims based on the criminal history and lose a significant amount of funding, or expand their definition of "victim" and continue to receive funding. Congress already chose to distinguish victim compensation from other welfare programs by not prohibiting individuals with certain felony convictions from receiving compensation.[392] Congress should take this policy decision one step further and incentivize states to compensate *all* victims. This is more in line with the purpose of VOCA and fundamental justice.[393]

VIII. Conclusion

When tragedy strikes and an individual falls victim to crime, the victim and her family may endure financial stress as devastating as her injuries.[394] With the offender in jail and unable to pay restitution, the victim is forced to pay for medical bills, funeral and burial costs, and mental health counseling.[395] Unable to afford these expenses, the victim must rely on her state's compensation program.[396] Regrettably, victims in Arkansas, Florida, Ohio, Mississippi, North Carolina, and Rhode Island are denied compensation on account of their criminal history.[397] The victim, at her most vulnerable time, is

390. *See supra* notes 88–89 and accompanying text.
391. *See supra* notes 54–62 and accompanying text.
392. *See supra* notes 182–186 and accompanying text.
393. *See supra* note 185 and accompanying text.
394. *See supra* Part II.A.
395. *See supra* Part II.
396. *See supra* Part II.
397. *See supra* Part III.

left with nowhere to turn.[398] To make matters worse, as a result of the racial disparity that flows through our criminal justice system, this ban disproportionately affects Black victims.[399] Consequently, Black victims and their families are left with no way to pay for the bills resulting from a crime they were innocent in.[400] The United States Constitution and Congress have left these victims without a remedy.[401]

A legislative solution is necessary to ensure that punishment for a criminal conviction ends with the completion of the individual's sentence.[402] The individual has already "paid" for her crime and must be allowed to move forward.[403] Additionally, a legislative solution is necessary to give previously incarcerated individuals a real chance of success at reentry into society.[404] The goals of rehabilitation require that previously incarcerated individuals have a genuine opportunity to turn their lives around.[405] Finally, and most importantly, a legislative solution is necessary to put an end to the race discrimination stemming from the victim compensation programs.[406] Black victims are already more likely to be impoverished and to have experienced discrimination within the criminal justice system.[407] The discrimination should not be permitted to seep into victim compensation programs as well.[408] Accordingly, I suggest a solution to this problem: the federal government, and legislatures in Arkansas, Florida, Ohio, Mississippi, North Carolina, and Rhode Island, should join the record reform movement taking place throughout the nation

398. *See supra* Part III.
399. *See supra* Part V.
400. *See supra* Part V.
401. *See supra* Parts IV, VI.
402. *See supra* Part VII.A.
403. *See supra* Part VII.A.
404. *See supra* Part VII.A.
405. *See supra* Part VII.A.
406. *See supra* Part VII.A.
407. *See supra* Part V.
408. *See supra* Part VII.A.

and promote successful reintegration for those with a criminal record.[409] These victims are depending on it.

409. *See supra* Part II.D.