

THE COLOR OF COLLATERAL DAMAGE: THE MUTILATING IMPACT OF COLLATERAL CONSEQUENCES ON THE BLACK COMMUNITY AND THE MYTH OF INFORMED CONSENT

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I. INTRODUCTION

Many people believe that after criminals pay their debts and serve their time, they are free to enjoy their lives as normal citizens.¹ Unfortunately, this is a common misconception.² Due to the imposition of collateral consequences, the post-convicted, and

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¹ *Infra* Part II.A.4 (discussing the impact of collateral consequences post-conviction).

² See generally, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

sometimes post-arrested, will never fully readjust.³ Collateral consequences are the civil penalties that attach to criminal convictions.⁴ These consequences are considered separate from direct methods of punishment like prison, fines, or probation.⁵ Although collateral consequences are not categorized as punishment, they are inherently punitive and have devastating effects.⁶ Specifically, collateral consequences of drug convictions are often unrelated to the crime itself and limit the opportunities of convicted persons to turn their lives around.⁷

The terrors of collateral consequences are even more frightening for the Black community.⁸ First, Black communities are over-policed and Black people are over-prosecuted, making them even more

³ See *Infra* Part II.C.2 (discussing specific types of collateral consequences and their effects).

⁴ See *Infra* Part III.A.4 for a background on collateral consequences as civil penalties.

⁵ Chin, *supra* note 2, at 1815.

⁶ *Infra* Part IV.A.1 (discussing the punitive nature of collateral consequences).

⁷ *Infra* Part.II.C.2 (discussing collateral consequences of drug convictions and their impact on convicted and arrested persons).

⁸ *Infra* Part II.C (discussing racial disparities in the criminal justice system).

vulnerable to collateral consequences and their harsh effects.⁹ Second, specific collateral consequences, such as the ineligibility to receive federal financial aid, the loss of welfare benefits, and the loss of public housing, are almost exclusively imposed on the Black community due to the fact that they are more likely to need or rely on the benefits that are being stripped away.¹⁰

Possibly worse than the imposition of collateral consequences is the fact that many defendants unexpectedly will be penalized by them after their debts are paid due to the lack of a notice requirement at the plea stage.¹¹ The controlling argument offered to justify the lack of a notice requirement is that collateral consequences are distinct from direct punishment and are not inherently punitive.¹² This false characterization supposedly leaves collateral consequences outside the scope of the United States

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Infra* Part IV (discussing the lack of a notice requirement at the plea stage and constitutional implications).

¹² Chin, *supra* note 2, at 1815.

Constitution.¹³ The effects of collateral consequences are severe and can last a lifetime, yet they are not considered punishment and are mostly unchecked by the justice system.¹⁴

This Article will discuss the constitutional implications of collateral consequences and the prejudicial effects they have on the Black community.¹⁵ This Article will show that the lack of procedural safeguards and the current standard of judicial review allow the disparate impact of collateral consequences to carry on freely and forcefully.¹⁶ The evidence of the detrimental impact of collateral consequences is too conspicuous to ignore and makes it abundantly clear that the road to redressability is—if it exists—virtually unavailable.¹⁷

¹³ *Id.*

¹⁴ See *Infra* Part II.C (discussing the long-term effects of collateral consequences).

¹⁵ *Infra* Part III (discussing the impact of collateral consequences on the Black community).

¹⁶ *Infra* Parts III–IV (discussing the disparate impact of collateral consequences due to the lack of procedural safeguards).

¹⁷ *Infra* Part III (discussing the difficult route to redemption for convicted persons affected by collateral consequences).

In order to address and repair the evils of collateral consequences, this Article respectfully suggests that (1) the United States Congress employ a legislative overhaul to remove prejudicial collateral consequences, (2) the United States Supreme Court change the standard of judicial review from the rational basis test to strict scrutiny and extend the holding in *Padilla v. Kentucky* to apply to all collateral consequences, and (3) legislation implemented at the federal and state levels require procedural safeguards—like a notice requirement—at the plea stage.¹⁸

Part II of this Article provides an action-packed excursion that begins with the daunting evolution of collateral consequences and ends with a background of Jim Crow. Part II, subpart A discusses the development of collateral consequences from civil death in colonial times to the constitutional nightmare they are today. Part II, subpart B discusses the informed consent requirement for guilty pleas

¹⁸ *Infra* Part III.D and Part IV.A–C; *See also*, *Padilla v. Kentucky*, 130 S. Ct. 1473, 1494 (2010).

and why collateral consequences are currently not covered by this requirement. Part II, subpart C discusses the racial disparities in the criminal justice system. The part ends with Part II, subpart D which provides a background on Jim Crow laws, highlighting their undeniable similarities to collateral consequences.

Parts III and IV implore relief on the merits of two arguments that appear boldly progressive but are based on a solid legal foundation. First, collateral consequences are discriminatory in application. Second, that informed consent is a myth without a proper notice requirement for collateral consequences. This is done by examining the Equal Protection Clause of the Fourteenth Amendment, cruel and unusual punishment under the Eighth Amendment, and the Sixth Amendment.¹⁹ Part III offers proposals to congress and the Supreme Court that, if accepted, would improve rates of successful re-entry, lower the rate of recidivism, and enhance

¹⁹ U.S. Const. Amend XIV, §2; U.S. Const. Amend. VIII; U.S. Const. Amend. VI.

resources by decreasing the number of appeals. Part IV offers potential safeguards that can be used by defense counsel, prosecutors, and judges to ensure that defendants are made aware of the collateral consequences that will be applied.

II. COLLATERAL CONSEQUENCES: AN EVIL HISTORY AND CHILLING EFFECT

Originating during colonial times, collateral consequences have been around for centuries.²⁰ With time, collateral consequences have advanced in theory and application, which has created a menacing effect on the Black community. Not only do collateral consequences have the power to take away civil rights, they have the power to strip away resources that are relied upon and necessary for survival. Most of the time, it is the members of Black communities that rely on these resources. Though it is no secret that Black people are disproportionately affected by the criminal justice system, the problem is largely ignored. Unfortunately, collateral

²⁰ Chin, *supra* note 2.

consequences are only one of the many weapons of mass incarceration in this country. As the prejudicial pattern of immoral treatment of Black Americans in this country continues, it is clear that it is not only collateral consequences that have evolved, it is also Jim Crow.

A. Evolution of Collateral Consequences

Collateral consequences of criminal convictions have been around since colonial times.²¹ Since their initial unveiling, collateral consequences have evolved into a much more vicious monster.²² In America, although moving about with a new moniker, collateral consequences are no less mutilating than they have been since their establishment.²³ Surviving the brink of extinction,²⁴ collateral consequences quickly developed, playing

²¹ MARGARET COLGATE LOVE, JENNY ROBERTS, & WAYNE A. LOGAN, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* §1:3 (NACDL/West, 3d ed. 2018-2019).

²² *Id.*

²³ Chin, *supra* note 2.

²⁴ LOVE, ET AL., *supra* note 21.

a major role in the war on crime.²⁵ This transformation initiated an all-too-familiar attack on collateral consequences.²⁶ Unfortunately, the fight to restore the civil rights of the convicted has proven to be an uphill battle that has only just begun to gain traction.

1. The Institution of Civil Death

At common law, civil death was an institution of punishment that attached to convictions of treason or felony.²⁷ There were three consequences that followed conviction: forfeiture, corruption of blood, and extinction of civil rights.²⁸ Forfeiture would result in the loss of land, chattels, and other assets, which would be given to the king.²⁹ Corruption of blood meant that the blood of the convicted was bad, therefore the person could not pass an estate to

²⁵ Chin, *supra* note 2; Sentencing Reform Act of 1984, Pub. L. 98-473, Title II, Ch. 2, 98 Stat. 1837, 1987–2040 (1984).

²⁶ Chin, *supra* note 2.

²⁷ Chin, *supra* note 2, at 1794.

²⁸ *Id.*

²⁹ *Id.*

heirs.³⁰ Lastly, the convicted person could not bring action, be a witness, or perform any legal function.³¹ The theory of civil death was referred to as such because convicted persons were deemed to be dead in the eyes of the law.³² The ever-so fitting use of the word “death” was also attributed to the permanent change in legal status that followed a conviction.³³ The loss of status was used as a humiliating punishment to separate criminals from the rest of society and expose them to public shame.³⁴ This English model of punishment greatly influenced criminal law and practice in America.³⁵

For the greater portion of the nineteenth century, civil death was viewed as an effective and necessary form of punishment.³⁶ In 1888, the New York Court of Appeals explained that the consequences of a felony would, among other things, result in the

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Chin, *supra* note 2, at 1794.

³⁴ Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. & CRIMINOLOGY 347, 351 (1969).

³⁵ *Id.*

³⁶ Chin, *supra* note 2, at 1794.

extinction of civil rights.³⁷ In the United States, civil death only existed and was only authorized by statute, but not every state had civil death incorporated into their laws.³⁸ As of 1937, only 18 states employed civil death through statute.³⁹ Ironically, America nurtured the value of second chances and new beginnings, but also emphasized the need for abrupt and strict punishment.⁴⁰ Alexander Hamilton believed that the use of pardon power would allow for these two diverging ideas to exist harmoniously.⁴¹ However, as the enforcement of strict and lasting punishment became more prevalent, the use of pardons became less attractive and their remedial value dwindled.⁴²

As the 20th century approached, criticism surrounded the institution of civil death.⁴³ Following

³⁷ *Avery v. Everett*, 18 N.E. 148, 150 (N.Y. 1888).

³⁸ Chin, *supra* note 2, at 1789, 1796.

³⁹ See generally *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, n.1 (1937) (listing civil death statutes from 18 states).

⁴⁰ Chin, *supra* note 2, at 1802.

⁴¹ THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴² Chin, *supra* note 2, at 1802.

⁴³ *Id.* at 1798.

the Civil War, the general concept of civil death was strategically distorted to civil disabilities.⁴⁴ This change was an attempt to modify the legal status of a convicted felon from being dead in the eyes of the law to merely having a “shattered character.”⁴⁵ At this point civil death was used as a tool for the “social exclusion and political disenfranchisement of African-Americans.”⁴⁶ In 1897, Justice White offered an opinion for the Supreme Court stating, “[I]f such power obtained, then the ancient common law doctrine of ‘outlawry,’ and that of the continental systems as to ‘civil death,’ would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.”⁴⁷ In 1907, the Illinois Supreme Court quoted a scholar’s conclusion that civil death “raises a feeling of repulsion, whether

⁴⁴ See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009) (discussing the use of the criminal justice system as a means of racial control).

⁴⁵ *Chaunt v. United States*, 364 U.S. 350, 358 (1960) (Clark, J., dissenting).

⁴⁶ *LOVE, ET AL.*, *supra* note 21, at §1:3.

⁴⁷ *Hovey v. Elliott*, 167 U.S. 409, 444 (1897).

the incapacity is presented singly or as a consequence of another punishment. It is a barbarism condemned by justice, by reason and by morality.”⁴⁸

In the aftermath of these cases and other vastly growing legal opinions, doubts continued to rise about the value and efficacy of civil death.⁴⁹ As the class of felonies evolved, the policy behind civil death as a transitional piece connecting the period between the capital sentence and its execution began to lose its grip.⁵⁰ “Civil death contradicted the idea that offenders could pay their debt to society and the reality that the prison experience, for many, would be a temporary if significant interruption of their lives.”⁵¹

⁴⁸ *Collins v. Metro. Life Ins. Co.*, 83 N.E. 542, 545 (Ill. 1907) (quoting 1 Francis Wharton, A TREATISE ON THE CONFLICT OF LAWS §107, at 252 (3d. 1905).

⁴⁹ Chin, *supra* note 2, at 1797.

⁵⁰ *Id.*

⁵¹ *Id.*

2. False Hope: 20th Century Law Reform Movement

The mid-to-late 20th century initiated the exposure of the excessive nature of collateral consequences.⁵² A potential groundbreaking movement, which produced the Model Penal Code,⁵³ began in the mid-20th century and had collateral consequences in its crosshairs.⁵⁴ The use of executive pardon power was not an efficient tool to provide proper relief, so the courts were called upon to administer forgiveness and lessen the stigma of conviction.⁵⁵ In 1962, “the Model Penal Code called for removal of ‘disqualifications and disabilities’ through a two-step judicial process designed to ‘accomplish the maximum by way of legal and social restoration for rehabilitated ex-offenders.’”⁵⁶

⁵² *Id.* at 1797–98.

⁵³ MODEL PENAL CODE (AM. L. INST., 1962).

⁵⁴ Chin, *supra* note 2, at 1798.

⁵⁵ See, *Annulment of a Conviction of Crime: A Model Act*, 8 NAT’L COUNCIL ON CRIME & DELINQ. 97, 99–101 (1962).

⁵⁶ LOVE, ET AL., *supra* note 21, at §1:4 (quoting Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1712 (2003)).

By the end of the 1970s, a majority of states warmed-up to the idea of restoring the right to vote and other civil rights after a sentence was completed.⁵⁷ In 1983, the American Bar Association asserted that collateral sanctions were well on their way to extinction.⁵⁸ In the early-1980s, a congressional report noted a “consensus that arbitrary restrictions on the rights of former offenders should be eliminated.”⁵⁹ In 1984, the House Committee on the Judiciary reported a sentencing reform bill that included a chapter entitled, “Restriction on Imposition of Civil Disabilities.”⁶⁰ The Bill prohibited unreasonable restrictions on the eligibility for federal benefits and programs and state or federal employment as consequences of a federal conviction.⁶¹

As it appeared, mainstream legal opinion began to recognize that civil death and collateral sanctions

⁵⁷ LOVE, ET AL., *supra* note 21, at §1:4.

⁵⁸ *ABA Standards for Criminal Justice: Legal Status of Prisoners*, Standard 23-8.2 cmt (1983).

⁵⁹ H.R. Rep. No. 98-1017, at 134 (1984) (Conf. Rep.).

⁶⁰ *Id.*; H.R. Rep. 6012, 98th Cong. §§ 4391–4392.

⁶¹ H.R. Rep. No. 98-1017 at 26–27.

were a morbid attack on civil rights and should be done away with.⁶² However, as the institution of civil death traveled towards its alleged doom, the movement would be swiftly squandered by a new reformation in sentencing laws.⁶³ Thus, a supposedly new theory lingered in the background and would soon take civil death's place under a new name, collateral consequences.

3. The Revamp: Sentencing Reform Act of 1984

In an abysmal turn of events, the Sentencing Reform Act of 1984 saved collateral consequences from the brink of extinction.⁶⁴ The Act was an action in the furtherance of the war on crime and sought to encourage more punitive laws and emphasize deterrence and incapacitation.⁶⁵ This war on crime induced hardened public attitudes toward convicted

⁶² See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705, 1707–17.

⁶³ Sentencing Reform Act of 1984.

⁶⁴ *Id.*

⁶⁵ *Id.*

felons, which opened the gates for legislatures and regulatory agencies to enact harsh categorical disqualifications and restrictions.⁶⁶ The new mandatory prison terms significantly expanded the felony category.⁶⁷ Also, collateral consequences were now applied to both misdemeanors and felonies.⁶⁸ By 1996, there was an increase in the number of mandatory status-generated collateral penalties, indicating a reversal in the trend of less restrictive laws and policies.⁶⁹ This strategic obstruction of the attack on civil death has proven to be a constitutional nightmare.⁷⁰ The Act encouraged states to join the federal government in a vicious war, not on crime, but on civil rights.⁷¹ The result was a civil death more destructive than ever before.

⁶⁶ LOVE, ET AL., *supra* note 21, at §1:5.

⁶⁷ *Id.*

⁶⁸ Hopper v. State, 957 N.E.2d 613 (Ind. 2011).

⁶⁹ Kathleen M. Olivares, Velmer S. Burton, Jr., & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION J., 10–17 (1996).

⁷⁰ *Infra* Part III (discussing the constitutional implications of collateral consequences and their effects).

⁷¹ *See generally*, U.S. COMM’N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES (2019).

4. Civil Death in Disguise: Collateral Consequences Today

At common law, the institution of civil death was a form of punishment implemented for the purpose of stripping the convicted of their civil rights, effectively separating them from the rest of society.⁷² As their legal status was stripped away, so was their respect from society due to the humiliating infliction of public shame.⁷³ Though the term “civil death” has been distorted to “civil disabilities,” and from there “collateral sanctions,” and now to “collateral consequences,” scholars argue that though the name has changed, the underlying theory has remained intact.⁷⁴ Parallel to civil death at common law, collateral consequences impose a legal status that makes convicted persons “subject to restrictions on freedom, benefits, and rights.”⁷⁵ Only now, these restrictions are not limited to felonies.⁷⁶

⁷² Chin, *supra* note 2, at 1789, 1794.

⁷³ Damaska, *supra* note 34.

⁷⁴ See DOUGLAS A. BLACKMON, *supra* note 44; See also Chin, *supra* note 2, at 1789.

⁷⁵ Chin, *supra* note 2, at 1799.

⁷⁶ Hopper v. State, 957 N.E.2d 613, 625 (Ind. 2011).

Collateral consequences often result in disenfranchisement as a convicted person could lose the right to vote, be barred from entering certain professions and holding certain licenses, and be impeached when testifying as a witness.⁷⁷ Convicted persons could also lose the ability to adopt children or retain custody of their own children.⁷⁸ The convicted could also lose their right to obtain a driver's license, even if their conviction is not a moving or traffic violation.⁷⁹ Other consequences include the loss of eligibility to receive food stamps, welfare, federal financial aid, and the loss of public housing, which typically ends with the convicted and their families being evicted.⁸⁰

Collateral consequences are harsher than the common law civil death in a number of ways.⁸¹ For example, the negative impact of the change in legal status is much greater because there is a significantly

⁷⁷ North Carolina v. Rice, 404 U.S. 244, 247 n.1 (1971).

⁷⁸ See McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 825 (2011).

⁷⁹ 23 U.S.C. § 159 (2021).

⁸⁰ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71.

⁸¹ Chin, *supra* note 2, at 1802.

larger number of interests affected.⁸² Further, pardon power is a lot less reliable than it was in the past, so there is less of a chance for redressability and redemption.⁸³

Modern collateral consequences are fearfully similar to common law civil death, yet the differences are even more disturbing.⁸⁴ Due to the constant increase of mass conviction in this country, collateral consequences pose an even greater threat than common law civil death.⁸⁵ This is a concerning issue because the convicted persons that are incarcerated are not the only ones being impacted.⁸⁶ Ironically, collateral consequences will have the most significant impact on those with lesser crime convictions who do little or no jail time.⁸⁷ This is the case because a convicted person who gets a longer sentence will not be as affected by the loss of civil

⁸² *Id.*

⁸³ *Id.*; See also, Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1181–82 (2010).

⁸⁴ See Chin, *supra* note 2, at 1801–03.

⁸⁵ *Id.* at 1803

⁸⁶ *Id.* at 1804.

⁸⁷ *Id.* at 1805.

rights.⁸⁸ Conversely, a convicted person who only gets probation or lesser will have to face the collateral consequences almost immediately.⁸⁹ In many cases, the most significant part of the conviction lies in the collateral consequences.⁹⁰

Since collateral consequences are considered nonpunitive, they are subject to very few limitations and “are not evaluated for overall proportionality, nor is there significant scrutiny for reasonableness.”⁹¹ In addition, existing collateral consequences may be imposed without warning and new ones may be created and imposed after a sentence has been fully served.⁹² Therefore, not only are they essentially boundless, they can also be applied retroactively.⁹³

⁸⁸ *Id.* at 1806.

⁸⁹ *Id.*

⁹⁰ Chin, *supra* note 2, at 1806.

⁹¹ *Id.* at 1807.

⁹² *Id.*

⁹³ *Id.* at 1811.

5. Collateral Attack: Efforts to Restore Rights in the 21st Century

As expected, the imposition of collateral consequences has made successful reentry extremely difficult, and in some cases, impossible.⁹⁴ Legal barriers to reentry increase the possibility of reoffending and in turn, the possibility of recidivism.⁹⁵ The logical inference is simple, collateral consequences, which are barriers to reentry, implicitly promote crime, which is a threat to public safety.⁹⁶

In 2004, President George W. Bush touched on the issue of collateral consequences in his State of the Union Address in which he referred to America as a “land of second chances” that should offer a “better life” to convicted persons.⁹⁷ Courts and practitioners

⁹⁴ See, e.g., Amy E. Hirsch, et al., *Every Door Closed: Barriers Facing Parents with Criminal Records*, Ctr. L. & Soc. Po’y & Cmty. Legal Servs. (2002).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ George W. Bush, President of the U.S., State of the Union Address (Jan. 20, 2004), available at http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html. (“America is the land of second chance[s], and when the gates of the prison open, the path ahead should lead to a better life.”) *id.*

have also been called-on to consider the effects of collateral consequences in criminal cases.⁹⁸ In 2011, the Attorney General of the United States addressed the attorneys general of every state insisting that they “determine whether [collateral consequences] that impose burdens on individuals convicted of crimes without increasing public safety should be eliminated.”⁹⁹ The Equal Employment Opportunity Commission and the National Association of Criminal Defense Lawyers have both offered guidance on steps that can be taken to mitigate the effects of collateral consequences and possibly avoid them altogether.¹⁰⁰ Further, almost every state

⁹⁸ See *ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (3d ed. 2004); Uniform Collateral Consequences of Conviction Act § 2 (2010); MODEL PENAL CODE: Sentencing §§ 7.01 et seq. (2017).

⁹⁹ See Letter from Eric H. Holder, Jr., U.S. Att’y Gen., to Attorneys General (Apr. 18, 2011), http://csgjusticecenter.org/documents/0000/1088/Reentry_Council_A_G_Letter.pdf.

¹⁰⁰ United States Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 2000e et seq., No. 915.002 (April 25, 2012); National Association of Criminal Defense Lawyers & Jenny M. Roberts, *Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime: An Action Plan to Restore Rights and Status to People with a Criminal Record* (2014).

legislature has made an attempt to lessen the blow of collateral consequences.¹⁰¹

Although state legislatures and law reform organizations have joined the fight, the proper solution is federal legislation. Federal legislation is significant because many states are required to impose certain collateral consequences in order to receive federal funding.¹⁰² This requirement significantly limits the state legislatures' freedom to correct the adverse impact of collateral consequences on their citizens. Supreme Court guidance is also very important. In *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment requires that defendants be informed about the likelihood of deportation when deciding whether to plead guilty.¹⁰³ Although this was a very important and necessary decision, the Supreme Court has not addressed the Sixth Amendment implications of

¹⁰¹ See Collateral Consequences Resource Center (CCRC), *Second Chance Reforms in 2017: Roundup of New Expungement and Restoration Laws* (Dec. 2017), <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf>.

¹⁰² See generally 23 U.S.C. § 159.

¹⁰³ *Padilla v. Kentucky*, 559 U.S. 356; 130 S. Ct. 1473, 1494 (2010).

other collateral consequences. The collateral attack on the new civil death continues to develop, but without the support of federal legislation and Supreme Court action, the road to restoration and redressability is foreclosed.

B. The Requirement of Informed Consent in Plea Bargains

In *Brady v. United States*, the Supreme Court held that in order to be constitutional, plea deals must be made voluntarily and knowingly.¹⁰⁴ The Court emphasized the importance of informed consent when a person is waiving their constitutional right to a jury trial.¹⁰⁵ As it stands, there is virtually no notice requirement regarding collateral consequences.¹⁰⁶ Therefore, many defendants will plead guilty without knowing the collateral consequences that lay ahead.¹⁰⁷ The lack of a notice requirement regarding collateral consequences appears to be a contradiction

¹⁰⁴ *Brady v. U.S.*, 397 U.S. 742, 743 (1970).

¹⁰⁵ *Id.*

¹⁰⁶ Chin, *supra* note 2, at 1814.

¹⁰⁷ *Id.*

to the Supreme Court's holding in *Brady*, posing a critical constitutional problem.

1. *Brady v. United States*

In *Brady*, the defendant was indicted for kidnapping and faced the death penalty.¹⁰⁸ Brady originally plead not guilty, but later found out that the trial judge was unwilling to try the case without a jury trial and that his codefendant would testify against him.¹⁰⁹ Brady then changed his plea to guilty.¹¹⁰ Brady's plea was accepted after the trial judge asked him—twice—to agree that his plea was voluntary.¹¹¹ Brady was sentenced to fifty years in prison, but later had it reduced to thirty.¹¹² Brady then appealed his conviction, arguing that his plea was involuntary as it was made under “impermissible pressure” by his counsel and was induced by a reduction in his sentence and a grant of clemency.¹¹³

¹⁰⁸ *Brady*, 397 U.S. 742.

¹⁰⁹ *Id.* at 743.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 744.

¹¹³ *Id.*

The Supreme Court ultimately held that Brady's guilty plea was made voluntarily and he was not impermissibly influenced or induced.¹¹⁴ The Court also addressed the constitutional importance of informed consent stating, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."¹¹⁵ By pleading guilty, defendants are waiving their Fifth Amendment right to avoid self-incrimination as well as their Sixth Amendment right to a jury trial.¹¹⁶ As Justice White so splendidly said, "a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized."¹¹⁷

¹¹⁴ *Brady*, 397 U.S. 742, 745.

¹¹⁵ *Id.* at 748.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

2. No Consent Requirement for Collateral Consequences

Collateral consequences are considered nonpunitive and are placed in a different category than direct consequences.¹¹⁸ The so-called nonpunitive and civil nature of collateral consequences is what keeps them immune from a notice requirement in plea deal negotiations.¹¹⁹ The collateral consequence of deportation is the only exception. In *Padilla*, the Supreme Court held that there was a constitutional requirement under the Sixth Amendment to provide notice to a client who could possibly be deported following a guilty plea.¹²⁰ Although lower courts have applied this same constitutional requirement to other collateral consequences, the Supreme Court has not yet expanded its holding.¹²¹

¹¹⁸ Chin, *supra* note 2, at 1815.

¹¹⁹ *Id.*

¹²⁰ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1494 (2010).

¹²¹ See, Margaret Colgate Love, *Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 105-11 (2011).

For many, the imposition of collateral consequences will have a more debilitating effect than the traditional modes of punishment, like probation or incarceration.¹²² The reality is that those who receive probation will be more severely punished by their collateral consequence than their direct punishment.¹²³ This would hold true even if their probation term was, for example, ten years as collateral consequences often hold lifetime implications.¹²⁴ Yet, there is no requirement to tell convicted persons that their lives will likely be changed forever if they plead guilty.

C. Racial Disparities in the Criminal Justice System

Black people have habitually been targeted, over-policed, over-prosecuted, and torn down by the criminal justice system. The prevalence of bias at all stages of the criminal justice system has a devastating impact on Black people. From the arrest

¹²² See, U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71.

¹²³ Chin, *supra* note 2, at 1806.

¹²⁴ See, U.S. COMM’N ON CIVIL RIGHTS *supra* note 71.

to the conviction and the punishment that follows, Black people are in a one-sided, unjust battle. The irony is that the battle can only be won with the support of the same biased decision makers who have engaged in this conduct for over a century. Unfortunately, collateral consequences are only one of the many weapons the system has used to control the Black people of this country. These weapons have an arresting effect on the Black community, leaving people essentially powerless in a country that parades itself to promote freedom and equality.

1. Over-policing and Over-prosecuting

Police are routinely sent to monitor Black neighborhoods, while the inhabitants of White neighborhoods go about freely; which explains why there is a disproportionate level of police contact with Black Americans.¹²⁵ This is not even the most terrifying part. Black people are more likely to be stopped, searched, and arrested even when they are

¹²⁵ The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (2018).

not in their own neighborhoods.¹²⁶ Further, there is evidence that suggests that “police bias toward Black Americans, coupled with strategic decisions to deploy certain law enforcement practices—like hot spots policing—more heavily in Black communities, increases the likelihood of encounters with the police and negative outcomes like stops, searches, use of force, and arrest.”¹²⁷ A Police Accountability Task Force in Chicago found that police searched Black drivers four times more than they did White people despite the fact that police found contraband on White drivers twice as often as they did Black drivers.¹²⁸ This data indicates that Black people are not only over-policed in their own neighborhoods,

¹²⁶ Elizabeth Hinton, LeShae Henderson, & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice (May 2018), <https://vawnet.org/material/unjust-burden-disparate-treatment-black-americans-criminal-justice-system>.

¹²⁷ *Id.* at 7; *See generally*, Paul Butler, CHOKEHOLD: POLICING BLACK MEN (2017) (discussing unfair police practices affecting Black people).

¹²⁸ Police Accountability Task Force, *Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities They Serve* (2016), <https://perma.cc/QNC8-HY5E>.

but they are over-policed everywhere due to the racially motivated bias in the policing system.¹²⁹

In a report by the American Civil Liberties Union they stated that “In every single state, Black people were more likely to be arrested for marijuana possession, and in some states, Black people were up to six, eight, or almost ten times more likely to be arrested.”¹³⁰ In 31 states, racial disparities were actually larger in 2018 than they were in 2010.¹³¹ Surprisingly, the racial disparities are still prevalent in states that have legalized and decriminalized marijuana.¹³² If one were to assume that usage rates are virtually the same across races, then the logical conclusion would be that racial bias is the sole cause of the racial disparities in arrests and convictions.

Over-policing leads to more Black people being arrested leading to the over-prosecution of Black people, despite the unconstitutional bias that brought

¹²⁹ *Id.*

¹³⁰ American Civil Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020), <https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform/>.

¹³¹ *Id.*

¹³² *Id.*

them there in the first place. Elizabeth Hinton discussed the integral role that prosecutorial discretion plays in the criminal justice system stating, “[P]rosecutors hold a particularly outsized role in the criminal justice process, with discretionary decision-making power over charging and plea bargains.”¹³³ Studies have also shown that Black people are more likely to be prosecuted and given harsher punishments.¹³⁴ For example, minor offenses, like marijuana possession, are aggressively enforced in Black communities while identical offenses are rarely enforced in affluent, predominately White communities.¹³⁵ The aggressive punishments enforced against these minor offenses often affect young people of color, who will be even more affected by lifelong implications like collateral consequences.¹³⁶

¹³³ Hinton, et al., *supra* note 126, at 8.

¹³⁴ Besiki Kutateladze, Vanessa Lynn, & Edward Liang, *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies* Vera Institute of Justice (2012), <https://perma.cc/A3SY-GTE3>.

¹³⁵ American Civil Liberties Union, *supra* note 130.

¹³⁶ *Id.*

2. Collateral Consequences of Drug Convictions and the Black Community

There is a horde of collateral consequences that plague this country, but the consequences in the realm of drug convictions have an exceptional impact on the Black community.¹³⁷ Black men are the most exposed to collateral consequences related to a criminal record.¹³⁸ In relation to drug offenses, the rates of drug use are similar among racial groups, yet Black people are arrested and sentenced on drug charges at a much higher rate than White people.¹³⁹

As a result of the disproportionate number of drug convictions, Black people are affected by collateral consequences of drug convictions at a much higher rate.¹⁴⁰ These effects are compounded due to the fact that the resources that are stripped-away by collateral consequences are ones that Black people are more likely to need and rely on.¹⁴¹ As

¹³⁷ *Id.*

¹³⁸ The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (2018).

¹³⁹ *See generally*, Elizabeth Hinton, et al., *supra* note 126.

¹⁴⁰ U.S. COMM'N ON CIVIL RIGHTS *supra* note 71.

¹⁴¹ *Id.*

Elizabeth Hinton eloquently noted, “[a]t the community level, disproportionately incarcerating people from poor communities removes economic resources and drives cycles of poverty and justice system involvement, making criminal justice contact the norm in the lives of a growing number of Black Americans.”¹⁴² The collateral consequences of drug convictions discussed below have an exceptional impact on the Black community and will be the main focus of the constitutional argument against collateral consequences moving forward.

a. Loss of Welfare Benefits

The Welfare Act of 1996 imposed a lifetime ban on cash assistance and food stamps for people who have felony drug convictions.¹⁴³ These collateral consequences almost exclusively impact Black people, not only because they are disproportionately convicted and incarcerated, but also because they are

¹⁴²*Id.*

¹⁴³ Welfare Reform Act (1996).

more likely to need public benefits.¹⁴⁴ Individuals reentering society often rely on public assistance until they are able to find a job to provide for themselves.¹⁴⁵ This consequence has a disparate impact on Black people because they are “disproportionately denied public assistance due to the racially biased enforcement of drug policies, which disproportionately penalizes people of color compared to [W]hite people.”¹⁴⁶ The fact that these consequences have a disparate impact on those who experience overlapping or intersecting social identities makes Black people more prone to oppression and discrimination.¹⁴⁷ The rationale in supporting this consequence is that public assistance should be reserved for those who are “worthy” of it.¹⁴⁸ Under this rationale, applicants are discriminated based on class and character.¹⁴⁹

¹⁴⁴ Hinton, et al., *supra* note 126, at 1.

¹⁴⁵ U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71, at 77.

¹⁴⁶ *Id.* at 76.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 78.

¹⁴⁹ *Id.*

Public assistance programs like the Supplemental Nutrition Assistance Program (SNAP) and the Temporary Assistance for Needy Families (TANF) are designed to provide people with the bare minimum that they need to survive.¹⁵⁰ Women and people of color are disparately impacted by the loss of public benefits with Black women being incarcerated almost twice as much as White women.¹⁵¹ This impact is extended to the children of the parents who are affected by the ban.¹⁵² With no access to public assistance, these children will not be fed by their parents and will be susceptible to major health risks.¹⁵³ There is no logical argument that can justify the harmful effects this consequence has on children of convicted persons. Oddly, these benefits can be denied based on felony drug convictions but not any other crime, even sex crimes and other crimes of violence.¹⁵⁴ This undermines the logic behind the consequence, public safety, and provides

¹⁵⁰ *Id.* at 76.

¹⁵¹ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71, at 81.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 142.

even more evidence that these consequences are tailored towards a specific group of people.

b. Loss of Public Housing

Loss of public housing is arguably the most devastating collateral consequence. Without a stable home, convicted persons are more likely to become homeless and resort back to crime.¹⁵⁵ The disproportionate imposition of this consequence leads to a large number of Black families becoming homeless.¹⁵⁶ The main justifications for policies surrounding this consequence are to promote public safety and reduce the visibility of homelessness.¹⁵⁷ However, many scholars argue that the policies are unduly punitive and create a vicious cycle.¹⁵⁸

¹⁵⁵ *Id.* at 60–65.

¹⁵⁶ *Id.*

¹⁵⁷ U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71, at 60–65.

¹⁵⁸ *Id.*; See also, Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, Center for American Progress (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

Further, individuals that cannot find housing after release are twice as likely to recidivate.¹⁵⁹

The main public housing agency employees are given the most discretion in regard to imposing this collateral consequence.¹⁶⁰ Convicted persons do not even need to have a criminal record or be arrested to be evicted from their home, and many applicants are denied due to vague policies and broad categories of prohibited criminal activity.¹⁶¹ The employees are allowed to, without a mandated burden of proof, make a determination that a member of the household has engaged in “drug-related activity.”¹⁶² The Black community is not only more likely to be targeted for drug-related activity, but it is more likely to meet the poverty line and live in public housing.¹⁶³ Even if the rest of the family has nothing to do with the activity, they too must receive the blow from

¹⁵⁹ U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 71, at 62.

¹⁶⁰ *Id.*

¹⁶¹ Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, Sargent Shriver Nat’l Center Poverty L. (2011).

¹⁶² Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the “War on Drugs,”* 5 UC IRVINE L. REV. 783 (2015).

¹⁶³ U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 71, at 25.

these consequences.¹⁶⁴ Federal law grants too much power and discretion to public housing agency employees. This could be corrected by adding a statutorily mandated burden of proof prior to terminating assistance and evicting families.

In 2015, the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act and a plaintiff does not have to show discriminatory intent when challenging a policy that has an adverse impact on people of color.¹⁶⁵ However, the plaintiff must show that public housing authorities could have applied a less restrictive policy.¹⁶⁶ The effects of this consequence substantially outweigh any policy argument in favor of its imposition, and the burden placed on plaintiffs is inequitable and not in the interest of justice.

¹⁶⁴ *Id.*

¹⁶⁵ Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519; 135 S. Ct. 2507, 2513, 2525 (2015).

¹⁶⁶ *Id.*

c. Ineligibility to Receive Federal
Financial Aid

Drug convictions can and often do lead to the revocation of the privilege to receive financial aid.¹⁶⁷ Not only does this disproportionately affect Black people due to over-policing and over-prosecution, but also because they are more likely to need federal aid to go to college.¹⁶⁸ The ill effects of income inequality and unfair treatment in the justice system are direct attacks on Black people's ability to attend college.¹⁶⁹ This opportunity becomes less and less obtainable as the cost of tuition increases and the availability of financial aid decreases.¹⁷⁰ Similar to other collateral consequences, this consequence specifically applies to drug convictions.¹⁷¹ A public safety argument does not appear convincing when there is a refusal to lend a hand to struggling addicts, but instead will aid violent criminals. The government is apparently under the assumption that

¹⁶⁷ U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 71.

¹⁶⁸ *Id.* at 84.

¹⁶⁹ *Id.* at 85.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

society is more scared of a teenager, who smokes marijuana than a person with a history of physical endangerment.

Not only do postsecondary institutions use criminal history to review ability to receive financial assistance, they also use it as a factor to determine admission, creating another barrier to receiving postsecondary education.¹⁷² In 2016, the Department of Education provided guidance on strategies postsecondary institutions could take in order to remove, or at least limit, these barriers.¹⁷³ The department warned postsecondary institutions of the dangers of intentionally discriminating on the basis of race, as well as implementing facially neutral laws that have a disparate adverse impact on racial groups, pursuant to Title VI of the Civil Rights Act of 1964.¹⁷⁴

As the Black community continues to be disproportionately affected by the criminal justice

¹⁷² U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 71, at 85.

¹⁷³ U.S. Dep't of Education, *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals* (2016).

¹⁷⁴ *Id.*; See also, Title VI of the Civil Rights Act of 1964, 42 U.S.C. (1964).

system and collateral consequences, it appears that the only purpose this consequence serves is to prohibit Black people from enjoying higher education.

d. Adverse Treatment in the Employment Realm

Employment discrimination is another detrimental consequence that people with criminal convictions will face.¹⁷⁵ Employment gatekeepers not only give preferential treatment to White applicants with criminal records over Black applicants with similar records, but they also give preferential treatment to White applicants with criminal records over Black applicants without criminal records.¹⁷⁶ Although it is not illegal or unconstitutional to discriminate based on criminal record, it is illegal and unconstitutional to

¹⁷⁵ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71, at 35.

¹⁷⁶ Devah Pager, Bruce Western, & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Ann. Am. Acad. Pol. Soc. Sci. 195 (2009).

discriminate based on race.¹⁷⁷ If two people of different races—one White, one Black—have the same criminal record and are applying for the same job and the White applicant is given preferential treatment, the discrimination is no longer based on the record, it is based on the color of skin.

The ability to discriminate based on criminal record allows employers to discriminate based on race openly and freely.¹⁷⁸ To reiterate, if the criminal records are the common denominator between the two applicants and everything else is virtually the same, apart from race, it is clear to see where the discrimination lies. This type of deceptive discrimination is not only unconstitutional, but is an illegal business practice, yet it goes unchecked.¹⁷⁹

The stigma attached to a criminal conviction makes it difficult for people who have been convicted of crimes to find employment after their release and lowers their chances of successful

¹⁷⁷ Title VI of the Civil Rights Act of 1964, 42 U.S.C.

¹⁷⁸ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71, at 35.

¹⁷⁹ *Id.*

reentry.¹⁸⁰ The effects of this stigma are even more pervasive for Black people and in turn feed the vicious beast of poverty and mass incarceration that plague Black communities.¹⁸¹

e. Denial of the Right to Vote

The denial of civic participation as a collateral consequence of criminal convictions is not a new concept in United States history.¹⁸² In colonial times, the denial of civic participation was a form of punishment under the institution of civil death.¹⁸³ Denial of civic participation has not only been used as a collateral consequence, but also as a way to discriminate against Black people in the United States.¹⁸⁴ Jim Crow laws effectively denied to Black people the right to vote.¹⁸⁵ The persistent desire to “preserve the racial purity of the ballot box” drove

¹⁸⁰ *Id.* at 36.

¹⁸¹ *Id.*

¹⁸² Brian Pinaire, Milton Heumann, & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 *FORDHAM URB. L.J.* 1519, 1524 (2002).

¹⁸³ Chin, *supra* note 2, at 1794.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

discrimination against Black people and denied them equal rights.¹⁸⁶ Although Jim Crow laws are allegedly extinct, an extraordinary amount of Black men are not allowed to vote due to their legal status.¹⁸⁷ African Americans of voting age are four times more disenfranchised than non-African Americans.¹⁸⁸ Thus, Black people are not allowed to vote in favor of candidates, who are trying to pick up the pieces of the broken system that has polluted their communities. More importantly, they are not allowed to vote against the candidates, who are actively protecting the racial caste system that is so prevalent in this country.

Policymakers in favor of felony disenfranchisement frequently argue that the convicted have disregarded the law, broken a social contract, and pose a threat to the political

¹⁸⁶ Behrens, et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOCIO. 559, 563 (2003).

¹⁸⁷ Christopher Uggen, Ryan Larson, & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, The Sentencing Project (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

¹⁸⁸ *Id.*

community.¹⁸⁹ Policymakers also argue that convicted persons exude poor moral judgment and should not be allowed to provide input on public policy, assuming that they will cast votes in a “corrupt manner.”¹⁹⁰ Despite the reasoning of policymakers, there is no policy concern strong enough to justify stripping a person, criminal or not, of such a fundamental right.

The overwhelming support of the government in favor of these collateral consequences is not surprising. The truth is Black people have been in a constant war against discrimination. The victory in the battle to end slavery only led to the battle to end Jim Crow laws and that victory led to the current battle against mass incarceration and collateral consequences. As the fight against collateral consequences gains traction, members of the Black community are still left to wonder, what is next?

¹⁸⁹ U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71, at 96.

¹⁹⁰ Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L. J. 259, 312 (2004).

D. The Racist Road to Jim Crow

In 1863, the Emancipation Proclamation freed African American slaves and ended slavery in rebel states.¹⁹¹ Following the Civil War, the Thirteenth Amendment emancipated all slaves in the United States.¹⁹² Although the slaves were freed, they were hurled into a pit filled with hostile Whites.¹⁹³ As Houston Hartsfield Holloway put it, “For we colored people did not know how to be free and the white people did not know how to have a free colored person about them.” The nation was left disoriented, pushing congress to implement the Reconstruction in 1866.¹⁹⁴ The purpose of the Reconstruction was to reorganize the South by providing a guide to a harmonious lifestyle between Blacks and Whites post-slavery.¹⁹⁵ Unfortunately, the South saw the Reconstruction as a threat to its livelihood.¹⁹⁶ After

¹⁹¹ *The African American Odyssey: A Quest for Full Citizenship*, The Library of Congress, <https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution and the Civil Rights Act of 1866 was enacted, Black people were allowed access to civic participation, were able to purchase land, obtain employment, and more.¹⁹⁷ However, the slew of White people that opposed this period of Black enjoyment waged a war against Black lives, putting an end to the Reconstruction in 1877.¹⁹⁸ Following the short-lived Reconstruction era, the federal government disregarded the Black community, leaving it defenseless against a relentless foe, the White man.

As the post-Civil War era went on, White people found more and more ways to dehumanize Black people. Very popular was the portrayal of Blackface in minstrel shows, in which White performers would paint themselves Black and exaggerate negative African American stereotypes like being lazy, hypersexual, criminal, and ignorant.¹⁹⁹ Thomas

¹⁹⁷ *The African American Odyssey: A Quest for Full Citizenship*, The Library of Congress, <https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html>; U.S. Const. Amend. XIII, XIV, XV.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

Dartmouth Rice, considered to be the Father of Minstrelsy, developed the Blackface character called “Jim Crow.”²⁰⁰ As Blackface became increasingly popular, minstrel shows eventually entered theaters and the film industry amplifying the demeaning portrayal of African Americans as rapists and criminals.²⁰¹ Further, the Ku Klux Klan began using minstrel shows as a recruiting tool.²⁰² During this same period, southern states began enacting Black codes to hamper Black rights.²⁰³ These codes became “Jim Crow” laws, named after the infamous Blackface character.²⁰⁴

Jim Crow laws were a collection of laws that legalized segregation.²⁰⁵ Jim Crow began in the post-Civil War era and were imposed on Black people for nearly a century.²⁰⁶ As a rigid attack on equal rights,

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *The African American Odyssey: A Quest for Full Citizenship*, The Library of Congress, <https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html>.

²⁰⁴ *Id.*

²⁰⁵ *Jim Crow Laws*, HISTORY, <https://www.history.com/topics/early-20th-century-us/jim-crow-laws>.

²⁰⁶ *Id.*

Jim Crow laws denied Black people the right to vote, hold jobs, get an education, and more.²⁰⁷ Not only were Black people killed and imprisoned for defying Jim Crow laws, former Confederate soldiers worked as police and judges making it impossible for them to fight the system.²⁰⁸ Further, the incarcerated were treated as slaves in labor camps, in which Black people were given longer sentences.²⁰⁹ The Ku Klux Klan, which had members ranging from high ranking government officials to low-life criminals, terrorized Black people in continuance of the White agenda to obliterate their existence at all costs.²¹⁰

Jim Crow laws quickly expanded making it illegal for Black people to enter public parks and live in White neighborhoods.²¹¹ Additionally, segregation was enforced for water fountains, elevators, cemeteries, theaters, restaurants, schools, pools, hospitals, jails, and more.²¹² As the laws

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Jim Crow Laws*, HISTORY, <https://www.history.com/topics/early-20th-century-us/jim-crow-laws>.

²¹² *Id.*

hardened, lynchings increased ensuing race riots that ended with Black people being charged for “conspiring to conquer [W]hite America.”²¹³ One common misconception is that Jim Crow laws only existed in the South, but the North had very similar laws. For example, certain states required Black people to own property before they could vote, and segregation was also very prevalent.²¹⁴

At the peak of Jim Crow, Black people were lucky if they were able to breathe the same air as White people without being murdered or sent to prison.²¹⁵ However, after nearly a century of torture, the Civil Rights Movement brought on an onslaught of civil activities aimed at acquiring equal rights for Black people.²¹⁶ In 1964, president Lyndon B. Johnson signed the Civil Rights Act, which legally ended segregation created by Jim Crow laws.²¹⁷ In 1965, the Voting Rights Act was passed making it

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Jim Crow Laws*, HISTORY, <https://www.history.com/topics/early-20th-century-us/jim-crow-laws>.; Civil Rights Act of 1964, 42 U.S.C.

easier for minorities to vote, and in 1986, the Fair Housing Act was passed ending discrimination within the housing market.²¹⁸

Although Jim Crow laws are no longer constitutional, discriminatory laws still exist under a facially neutral veil, preventing full integration and equality. Moving forward, Americans may ponder the implicit maxim of “separate but equal” that is still so prevalent in this country, specifically the criminal justice system.²¹⁹ The moment one notices that this maxim continues to linger is the moment one will realize that the racial disparities and mutilating effects are too disturbing to ignore.

III. COLLATERAL CONSEQUENCES ARE DISCRIMINATORY IN APPLICATION

For many, it is inconceivable that Jim Crow laws ever existed. For many others, Jim Crow seems to have happened ages ago. Yet, these same individuals

²¹⁸ *Jim Crow Laws*, HISTORY, <https://www.history.com/topics/early-20th-century-us/jim-crow-laws>.

²¹⁹ See *Plessy v. Ferguson*, 163 U.S. 537, 553 (1896), *overruled by* *Brown v. Bd. of Ed. of Topeka*, 348 U.S. 886 (1954).

are unaware that the discrimination has not ended. Collateral consequences strip away the same privileges and opportunities that Jim Crow did.²²⁰ Equal protection rights are still threatened. Civil rights are destroyed with no remedy. Cruel and unusual punishment is excused. The difference is that collateral consequences do not facially target Black people. Instead, they target those labeled as criminals. The loophole is labeling Black people as criminals and savages, just as they were when the infamous character of Jim Crow and the laws named after him were fashioned.

A. Collateral Consequences are the Modern-Day Jim Crow

Today, it is legal to discriminate against criminals in the realms of voting rights, employment practices, educational opportunities and funding, denial of food stamps and other public benefits,

²²⁰ Michelle Alexander & Cornel West, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) (excerpt from Introduction).

denial of public housing, etc.²²¹ Throughout most of American history, race-based discrimination was legal and constitutional in these same categories. Once a person is labeled a criminal, the difference between their rights and level of respect are nearly identical to that of a southern Black man during the peak of Jim Crow.²²²

The frightening reality is that Black people are more likely to obtain this criminal status and are therefore discriminated against at a disturbingly higher rate than any other race.²²³ Mass incarceration and collateral consequences are nothing more than systems of racialized social control that operate in a manner disturbingly similar to Jim Crow.²²⁴ The racially based system in America has not ended, it has evolved.²²⁵

²²¹ See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71.

²²² Alexander & West, *supra* note 220.

²²³ The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>.

²²⁴ See Alexander & West, *supra* note 220.

²²⁵ *Id.*

Collateral consequences strip Black people of the opportunities necessary for successful reintegration.²²⁶ Following a drug conviction, many will not be able to receive federal aid for college, and with the struggle to get a job, they will likely not be able to work themselves through college or even save-up the money to make it there.²²⁷ Further, the inability to receive public benefits will make it difficult for them to survive.²²⁸ The loss of public housing will make it more likely that they will become homeless.²²⁹ With no home, job, or future, they will take away the right to vote and eligibility for a driver's license as well.²³⁰

These collateral consequences are Jim Crow reimaged. Jim Crow also kept Black people out of college, kept them from getting housing, kept them from voting, kept them from getting certain jobs and obtaining certain licenses, and above all, kept them from progress. The labor camps in the prisons during

²²⁶ See generally, U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

Jim Crow, in which Black people were given longer sentences and harder work, are strikingly similar to the over-prosecution, disproportionate sentencing, and mass incarceration that is so prevalent today.²³¹ If it discriminates like Jim Crow and destroys like Jim Crow, it must be Jim Crow.

The legal authority behind most of these collateral consequences is public safety and general welfare, but the irony is that these consequences implicitly facilitate crime, which threatens public safety.²³² The issue is that the disparate imposition of collateral consequences lacks an operative balance between public safety and successful reentry.²³³ For one, the public safety argument hardly makes sense considering the collateral consequences, like losing public housing, welfare, and federal aid, only apply to drug convictions.²³⁴ One would think that if these consequences applied to drug-doers and their

²³¹ See *supra* note 205; See also Alexander & West, *supra* note 220.

²³² *Id.*

²³³ Catherine Forrest, *Collateral Consequences of a Criminal Conviction: Impact on Corrections and Reentry*, CORRECTIONS TODAY, 30 (2016).

²³⁴ See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71, (commissioner report).

dealers, they would also apply to violent criminals. This makes even less sense due according to ever-evolving knowledge of drug addiction.²³⁵ Further, by taking away these privileges, many people are unable to meet the terms of their release because they have no home, cannot get a job, and have no means for basic survival.²³⁶ If collateral consequences are also effectively keeping people in jail, then the argument that they are not forms of direct punishment must also fail. Another obvious counterargument is that collateral consequences are also applied to White people and thus are not discriminatory in application. However, Black people are four times more likely to be arrested for drug possession than their White counterparts.²³⁷ Also, Black people will receive longer and harsher sentences than their White counterparts²³⁸ and will almost certainly be more affected by collateral consequences due to their

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Hinton, et al., *supra* note 126, at 7.

²³⁸ *Id.*

exceptional reliance on public benefits and federal funding.²³⁹

There are strong arguments to support the notion that collateral consequences that apply to sex crimes, violent crimes, and alcohol related offenses are effective in the furtherance of deterrence and public safety, however those specific consequences are outside the scope of this Article. Those arguments do not apply to drug convictions because the collateral of consequences of drug convictions are unique to drug convictions despite the fact that they are often incongruent with the convictions.²⁴⁰ Despite the arguments, policies, and suppositions, the resemblance of collateral consequences of drug convictions and Jim Crow laws cannot be ignored. To ignore it is to accept it.

²³⁹ See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71.

²⁴⁰ *Id.*

B. Equal Protection

Under the Equal Protection Clause, all persons are guaranteed equal protection under the law.²⁴¹ An Equal Protection violation typically occurs when the law targets one or more people belonging to a suspect class for discriminatory treatment.²⁴² Further, if a law is discriminatory against a racial class of people entitled to heightened protection under the Constitution or if the law restricts a fundamental right, then the law is subject to strict scrutiny.²⁴³ Following the eradication of Jim Crow laws, it is uncommon to find laws that are discriminatory on their face. Thus, in an Equal Protection challenge, the law at issue is likely to be facially neutral, but have a disparate impact on a protected class of people.²⁴⁴ Unfortunately, whenever litigants challenge a facially neutral law that has a disparate impact, they have the burden of proving (1) the law has a disparate impact and (2) the disparity was intended by the

²⁴¹ U.S. Const., amend. XIV, § 2: Equal Protection Clause.

²⁴² LOVE, ET AL., *supra* note 21, at §3:16.

²⁴³ *Id.*

²⁴⁴ *Id.*

legislature, which may almost be impossible. Litigant's challenging a law's impingement of Equal Protection, but not claiming to belong to a suspect class, may be reviewed using the rational basis standard, another easy win for the government.²⁴⁵

In regard to collateral consequences, litigants typically argue that a certain fundamental right has been taken away, like the right to vote or to run for public office.²⁴⁶ However, because people with criminal records are not a protected class, the low rational basis standard applies and these challenges are rarely successful.²⁴⁷ Although people with a criminal record are not a protected class, race is a protected class and as the statistics show, Black people are over-policed, over-prosecuted, and over-punished directly and collaterally.²⁴⁸

Many of these collateral consequences are the result of minor drug offenses, yet fundamental rights, like the right to vote, are stripped away due to their

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Hinton, et al., *supra* note 126.

legal status.²⁴⁹ Due to the disparate impact of collateral consequences on the Black community, litigants have repeatedly used other roads to redressability to challenge Equal Protection violations, such as the following: (1) uneven application of otherwise-valid disenfranchisement laws violates Equal Protection; and (2) otherwise-valid laws disenfranchising persons convicted of crimes violate Equal Protection when passed for a racially-discriminatory purpose.²⁵⁰

Unfortunately, despite the strong arguments and strong evidence to back-up the fact that collateral consequences have a disparate impact on the Black community, Black people are left defenseless by low standards of judicial review and high burdens of proof. Although there can be an argument made that the Fourteenth Amendment endorsed felony disenfranchisement, Chin argued that this was “implicitly repealed by the passage of the Fifteenth

²⁴⁹ See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71.

²⁵⁰ LOVE, ET AL., *supra* note 21, at § 3.17.

Amendment.”²⁵¹ The ability to discriminate based on legal status and criminal history allows the government and criminal justice system to racially discriminate with no consequences, as there is no feasible road to redressability.

The issue is not whether there is a disparate impact, that is clear. The question is not whether the legislatures intended for the laws to have a disparate impact or whether the intention was to affect Black people or criminals. The intention is obvious. If these laws were intended to be applied neutrally, Black communities would not be over-policed, despite the near equal rates in drug possession and usage.²⁵² Further, Black people would not be over-prosecuted and over-punished, despite having the same records as their White counterparts. If the laws were intended to be neutral, collateral consequences would take away rights and privileges that are also necessary for White people, the privileged, and the white

²⁵¹ *Id.* (quoting Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?* 92 GEO. L.J. 259, 262 (2004)).

²⁵² See Elizabeth Hinton, et al., *supra* note 126.

privileged and not ones that are exceptionally important to impoverished Black people and other low-income communities. The real concern lies with the courts, congress, and other legislatures that continue to uphold and enforce laws that stymie Black people and their communities, while the privileged remain unscathed by the justice system.

C. Eighth Amendment: Cruel and Unusual Punishment

Under the Eighth Amendment, the government is prohibited from inflicting “cruel and unusual punishment.”²⁵³ To determine whether conduct is “cruel and unusual” courts look to “the evolving standards of decency that mark the progress of a maturing society.”²⁵⁴ Courts also look at whether the punishment is disproportionate to the offense.²⁵⁵ In *Graham v. Florida*, the Court held that “the concept

²⁵³ U.S. Const. amend. VIII.

²⁵⁴ *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958)); U.S. Const. Amend. VIII.

²⁵⁵ *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825 (2010).

of proportionality is central to the Eighth Amendment.”²⁵⁶

In the realm of collateral consequences, cruel and unusual punishment claims are typically asserted by arguing (1) collateral consequences are forms of punishment and not civil regulation; and (2) the criminal consequences that result from failure to comply with collateral consequences are disproportionate.²⁵⁷ In order for the first argument to be successful, the court must be willing to classify civil regulations as punishment.²⁵⁸ The overwhelming majority of courts have found that because collateral consequences are a “legitimate exercise of state regulatory power,” they are outside the scope of the Eighth Amendment.²⁵⁹ The secondary argument focuses on the punishment that follows noncompliance with collateral consequences, which is outside the focus of this

²⁵⁶ *Id.*

²⁵⁷ LOVE, ET AL., *supra* note 21, at § 3.14; *See also*, U.S. Const. Amend. VIII.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

Article. However, it is important to note that these claims are rarely successful.²⁶⁰

Scholars have recently presented new methods of presenting an Eighth Amendment argument. Professor Gabriel Chin proposed the idea of arguing that the Eighth Amendment violation may occur due to the detrimental change in legal status and the collateral consequences that apply to that status.²⁶¹ Using Supreme Court precedent,²⁶² Professor Chin says that well-supported challenges offer support for the argument that destroyed legal status carries constitutional implications.²⁶³

The legal status that attaches with a conviction subjects convicted individuals to long-lasting, devastating collateral consequences.²⁶⁴ These collateral consequences are forms of punishment disguising Jim Crow laws allowing them to make an

²⁶⁰ *Id.*

²⁶¹ Chin, *supra* note 2, at 1816; *See also*, U.S. Const. Amend. VIII.

²⁶² *See* Weems v. U.S., 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910); Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958).

²⁶³ LOVE, ET AL., *supra* note 21, at §3:16.

²⁶⁴ *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71.

unimpeded mockery of justice.²⁶⁵ Further, many of the consequences are unrelated to the offense and have extreme effects.²⁶⁶ For example, the loss of public housing and welfare benefits have nothing to do with a minor drug offense. Yet, a person and their family could end-up homeless and under-served as a result of an arrest or a conviction.²⁶⁷ Further, to lose public assistance, people may not need to be convicted, they could lose benefits just by being arrested despite innocence or guilt.²⁶⁸ When people are arrested, but not charged, their legal status does not change, thus no collateral consequences should be imposed.²⁶⁹ However, in this instance, they are punished even when they are innocent.

The claim that collateral consequences occur due to a change in legal status and are not enforced as punishment as a result of the conviction is simply a loophole for unfair treatment. By definition, collateral consequences may not be “direct

²⁶⁵ See generally Alexander & West, *supra* note 220.

²⁶⁶ See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Chin, *supra* note 2.

punishment,” but they are punishment, nonetheless. The argument that taking away a person’s access to the basic needs to survive and the eligibility to go to college are not forms of punishment is absurd and unconvincing. When privileges and opportunities are being stripped away to teach a lesson, it is punishment. The argument is that collateral consequences are civil penalties that are unrelated to the sentence imposed by the judge.²⁷⁰ However, as one judge proved, the sentence imposed can and will affect the collateral consequences that are imposed.²⁷¹

It is quite the conundrum that collateral consequences rarely, if at all, affect rich White communities.²⁷² What is even more puzzling is that White people committed 70% of all crimes in 2019,

²⁷⁰ Mark Roseman, *Collateral Consequences of Criminal Convictions-Civil Death* (2019), <https://markeroseman.com/shock/collateral-consequences-of-conviction-civil-death/>.

²⁷¹ See *U.S. v. Nesbeth*, 188 F.Supp.3d 179 (E.D.N.Y. 2016) (Judge gave lesser sentence in order to save defendant from certain collateral consequences).

²⁷² The Bloomfirm, *Collateral Consequences: Two Words that Give the Rich, and Only the Rich, a Pass for Their Crimes*, available at <https://thebloomfirm.com/collateral-consequences-two-words-that-give-the-rich-and-only-the-rich-a-pass-for-their-crimes/>.

compared to 26% committed by Black people.²⁷³ In regard to drug related offenses, White people committed 71% compared to the 26% committed by Black people.²⁷⁴ Despite the much higher likelihood of crime by White people, Black people are still disproportionately convicted and affected by collateral consequences.²⁷⁵ The fact that Black people are essentially targeted with these collateral consequences is punishment within itself.

For decades, the government has been using the term “civil regulations” in an attempt to disguise collateral consequences as forms of statutory regulations as opposed to forms of punishment.²⁷⁶ The perfect analogy for this masquerade is a conundrum with which Abraham Lincoln has been long associated: “Suppose you call a sheep’s tail a leg, how many legs does a sheep have?” Those responsible for the legal blunders discussed in this Article would be expected to answer, “five.” Lincoln

²⁷³ Office of Juvenile Justice and Delinquency Prevention, *National Report of Juvenile Offenders* (2019).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

would then respond, “four. You can call a tail a leg, but it is still a tail.” Coining collateral consequences as “civil regulations” is nothing more than calling a tail a leg.

D. Roadblocks to Redressability

Due to the legality of discriminating based on criminal status, it is often difficult for convicted persons to fight the constitutionality of collateral consequences.²⁷⁷ This is true despite the racial disparity. *Habeas corpus* is the typical route chosen, but is usually unsuccessful because (1) most are indigent and must go on pro se; (2) these consequences usually apply after the movant is out of custody; and (3) they do not find out about the consequence until it is too late.²⁷⁸ Another roadblock preventing remedy is the fact that collateral consequences are not considered punitive and are separate from direct consequences. However, the Supreme Court has yet to clarify the difference

²⁷⁷ Chin, *supra* note 2, at 1807–1815.

²⁷⁸ *Id.*

between the two. That is likely because the only clear distinction is that collateral consequences are not handed-down by the court in the sentencing process. Identical in nature to direct consequences, collateral consequences are inherently punitive and should be regarded as such; and therefore, should be subject to the same balancing of considerations regarding the nature of the crime and severity of the punishment.

Further, convicted persons should have the same opportunity to contest the constitutionality of their punishment. Given the disparate impact of collateral consequences, the standard of judicial review should be strict scrutiny as opposed to the rational basis test. Due to the adverse impact of collateral consequences on the Black community, the burden should shift to the government to show a compelling government interest for the challenged consequence. With no clear and effective remedy available, Black people with criminal records are left hopeless, allowing the prejudicial imposition of collateral consequences to carry on unchecked.

1. Congress: Legislative Overhaul

Collateral consequences are mandated by statute and therefore can only be corrected by statute. Congress should employ a legislative review to examine the disparate impact of collateral consequences on the Black community. Truth be told, not much research is needed. It is clear that collateral consequences are disproportionately imposed on Black people, and it is not even close. There is no policy argument to support this disparity. Congress has shown no intention of addressing these concerns, but fortunately, state legislatures have the power to enact their own legislation regarding how collateral consequences are kept and applied. If states collectively elect to take such action, the disparate impact will certainly be reduced. However, although state legislatures play a pivotal role, certain collateral consequences can only be corrected by federal legislation. For example, some federal statutes require states to impose certain collateral

consequences in order to receive funding.²⁷⁹ Therefore, congress is the master key to correcting the issues surrounding collateral consequences.

2. Supreme Court: Stricter Standard of Review

Given the discriminatory nature of these collateral consequences, courts should move from a rational basis test to strict scrutiny. Some courts have taken the position that when disenfranchisement occurs as a result of a minor conviction, the fundamental nature of the right denied, balanced against the minor nature of the conviction, weighs in favor of strict scrutiny.²⁸⁰ This standard should be applied to all of the collateral consequences that disproportionately affect Black people.²⁸¹

A stricter standard of judicial review will result in fewer claims being concealed and will require an

²⁷⁹ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71; *See also* 23 U.S.C. § 159.

²⁸⁰ LOVE, ET AL., *supra* note 21, at §3:17.

in-depth analysis of the constitutional implications of collateral consequences. Furthermore, Black people already face an almost impossible battle at every stage of the legal system from initial contact with a police officer to the court room and should not have the burden of proving disparate impact and legislative intent. The reasoning behind placing the heavy burden on the oppressed to prove that a legislature intended to make a discriminatory law when legislators wrote a law that is facially neutral is beyond comprehension. The easy defense is “that is not what we intended, or we would not have made it neutral on its face.” Convicted persons should not have to overcome such a strong burden to have the court even consider whether their constitutional rights are being violated.

Given the enormous and obvious racial disparity with collateral consequences, the burden should be placed on the government to show a compelling state interest and that the legislation is narrowly tailored. If nothing more, this change in judicial review will shed light on the constitutional implications

surrounding collateral consequences. It is difficult to conceptualize any compelling governmental interest that justifies such a disparate imposition of consequences. Further, assuming the government could show such a compelling interest, it would be difficult to show that these collateral consequence statutes are narrowly tailored for their intended result, as they tend implicitly to provoke crime. The rational basis test is far too relaxed for a set of laws that strut around wearing Jim Crow's garments and destroy the concept of equality and Black rights.

IV. THE MYTH OF INFORMED CONSENT

Informed consent is a critical element to a constitutional waiver of a jury trial, which is done when a person accepts a plea deal. However, apart from the notice requirement provided in *Padilla*, there are no notice requirements regarding other collateral consequences.²⁸² Many of these collateral consequences will be life shattering and will affect

²⁸² See generally *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

more than the convicted person. This type of life altering effect would almost certainly be something a potential convicted person would take into account. Yet, many convicted persons will not find out about collateral consequences unless they violate them or lose their homes and welfare benefits. Given the disparate, debilitating impact of collateral consequences, it is absolutely critical that defendants are made aware of the ones that will be imposed on them and their families following a conviction. Due to the massive amount of people that have been and continue to be affected by consequences based on the failed duty to inform them, informed consent is a blank concept that has yet to be applied in the criminal justice system. Until a notice requirement is instituted, informed consent will remain a myth.

A. No Notice. No Informed Consent. No Justice.

The underlying scheme and nature of collateral consequences is a travesty of justice. What is worse, most defendants are not given notice of the collateral

consequences they will be affected by before considering whether to plead guilty.²⁸³ Well over 90% of cases are plead out, and without a notice requirement regarding the majority of collateral consequences, it can be assumed that most of these plea deals are accepted without informed consent.²⁸⁴ Informed consent is required under *Brady*, where the Supreme Court held that acceptance of plea deals must be done with “sufficient awareness of the relevant circumstances and likely consequences.”²⁸⁵ There is no notice or statutory language suggesting that defendants only need to be made aware of direct consequences or direct forms of punishment.²⁸⁶ Even further, the language is clear that defendants *must* know of the “likely” consequences.²⁸⁷ One can, very reasonably, infer from the use of the word “likely” that it is even more important that defendants are notified of the mandatory consequences. Also, the

²⁸³ See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71.

²⁸⁴ See, The Innocence Project, *Guilty Pleas on the Rise, Criminal Trials on the Decline* (2018); See also U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71.

²⁸⁵ *Brady v. U.S.*, 397 U.S. 742, 748 (1970).

²⁸⁶ *Padilla*, 130 S. Ct. 1473, 1481.

²⁸⁷ *Brady*, 397 U.S. 742, 743.

“relevant circumstances” requirement could logically be read to apply to collateral consequences.²⁸⁸

Due to the change in legal status, a convicted person’s circumstances will drastically change as they will not be allowed to receive public assistance, public housing, federal funding for college, etc. Many of the collateral consequences that strip away fundamental rights and privileges are mandated by federal statute and regulation²⁸⁹ and must be discussed if *Brady* is to be applied correctly.²⁹⁰ The distasteful neglect of failing to require notice for these collateral consequences is a procedural error that must be corrected.

Requiring notice for these collateral consequences is a very important step in the procedural process because it is the first line of defense. Reasonable logic cannot deny the fact that a defendant with a family would consider the fact that their family will be evicted from their home

²⁸⁸ *Id.*; See also Chin, *supra* note 2, at 1828.

²⁸⁹ See generally U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71.

²⁹⁰ See *Brady*, 397 U.S. 742–43.

following a guilty plea. Nor can reasonable logic deny that defendants will consider the fact that they may not be able to go to college or open a business following a guilty plea. Due to the absence of notice for these collateral consequences and many others, guilty pleas are not accepted with sufficient awareness and are therefore unlawful and unconstitutional.

1. Collateral Consequences Are Inherently Punitive

There is no clear definition of direct or collateral consequences.²⁹¹ The main arguments made in attempts to accentuate the divide claim that collateral consequences are not direct because they are not handed-down by the court and are not attached to the sentence, but are mere consequences that stem from the fact of conviction.²⁹² What is the distinction between being attached to the conviction and stemming from the fact of conviction? When a

²⁹¹ See Chin, *supra* note 2, at 1789.

²⁹² *Id.*

person gets convicted, the person typically gets jail or prison time or a fine and sometimes both. Also, the person is almost certainly going to suffer from some sort of mandatory collateral consequence. If a collateral consequence is mandatory based on the conviction, it is direct. Collateral consequences are inherently punitive and are nothing more than direct consequences handed-down by civil courts or administrative agencies.²⁹³

This distinction is a self-fulfilling scheme used to promote a simple plea process and to lessen the chance of a successful postconviction attack based on failure to warn. The fewer consequences the defendants must know about before pleading guilty, the less likely they are to be successful in an appeal or a collateral attack, promoting finality. However, these methods used to accomplish simplicity and finality are only achieved at the expense of defendants waiving their constitutional right to a fair trial without being made aware of the collateral consequences that could potentially ruin their lives.

²⁹³ *Id.*

In regard to informed consent, the type of consequence should not determine whether a defendant has the right to be informed. The collateral consequences will likely have a more detrimental impact than the direct consequence, especially if they are given a shorter sentence or probation.²⁹⁴

Even further, the lack of a notice requirement defeats the argument that collateral consequences deter crime. There is no deterrent effect if a person is unaware that a consequence exists. Also, attorneys and prosecutors have a difficult time keeping-up with the vast array of consequences, so it is not likely that collateral consequences have the deterring effect that the government argues.²⁹⁵ Many convicted individuals will not be aware that they are subject to the confines of collateral consequences until they have violated them.²⁹⁶

One argument against notice is that there are so many collateral consequences that it is improbable

²⁹⁴ *Id.*

²⁹⁵ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 71, (commissioner report).

²⁹⁶ *Id.*

and would cause undue delay to notify a client/defendant of all of them. This is a weak argument. Although there are regulations full of collateral consequences, the only ones that need to be discussed are the ones that will affect the client and could result in a reasonable denial of a plea offer. Also, if there are too many, that may be a problem in itself. Why should a defendant suffer the consequence of the legislature making more laws than they can keep-up with? Gather them, simplify them, organize them. Make a cheat sheet of the ones that apply most often. The fact that there are so many of these consequences reaffirms the notion that they are more than just civil regulations.

Awareness of the consequences that will be imposed as a result of a guilty plea is a critical and necessary step in the plea process. There is no way to interpret the holding in *Brady* to exclude collateral consequences based on their bogus status as civil regulations.²⁹⁷ Further, many of these consequences are swift and certain and would definitely cause a

²⁹⁷ *Brady*, 397 U.S. 742.

defendant to reconsider taking a plea deal. They must be discussed and failing to do so is unconstitutional. Avoiding this duty violates the Sixth Amendment and also violates the defendant's right to a fair trial due to ineffective waiver.

2. Sixth Amendment: Expanding Padilla

Although the collateral consequence at issue in *Padilla*²⁹⁸ was deportation, the opinion implicitly suggests that defense counsel may have a Sixth Amendment obligation to advise clients of other serious collateral consequences as well.²⁹⁹ The main argument prior to the Supreme Court's holding in *Padilla*³⁰⁰ was that collateral consequences were outside the scope of the Sixth Amendment.³⁰¹ However, the Court stated that it had never made a distinction between direct and collateral

²⁹⁸ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

²⁹⁹ *Id.*

³⁰⁰ *Id.*; Chin, *supra* note 2, at 1823–25.

³⁰¹ Chin, *supra* note 2, at 1828.

consequences to define the scope of the defense counsel's duty.³⁰²

Applying the severity and certainty test, *Padilla*³⁰³ should be expanded to cover all mandatory collateral consequences, which have a severe impact. Whether the consequence be direct or collateral, if it is mandatory and certain to be imposed on defendants, then they should know about it before entering a guilty plea. It is disheartening that this requirement does not already exist given the elementary logic in support of its necessity. The failure to inform clients about certain and impending doom is not only a Sixth Amendment violation, it is also a complete disgrace to justice.

3. Retroactive Imposition

Similar to the inquiry into the “punishment” aspect in Eighth Amendment challenges, in order to successfully challenge the retroactive nature of Ex Post Facto laws, the litigant must show that a

³⁰² *Padilla*, 130 S. Ct. 1473 at 1476.

³⁰³ *See Id.*

particular consequence constitutes punishment.³⁰⁴ One of the main concerns is that collateral consequences that arise as a product of new legislation can be applied retroactively.³⁰⁵ Essentially, even if the collateral consequence did not exist when people were convicted, they can still be affected by it. This retroactivity is the nail in the coffin that seals the death of informed consent, assuming it ever existed in the first place. It is impossible to inform a client of a collateral consequence that does not exist yet. A simple warning stating, “you could be affected by any new consequences that may be codified in the future” is simply not enough. This type of warning is unconstitutionally vague and ambiguous. In order for there to be informed consent, retroactivity must be limited, if not abandoned altogether.

In *Kansas v. Hendricks*, the Supreme Court held that “when assessing whether a retrospective law violates the Ex Post Facto Clause, the first question

³⁰⁴ LOVE, ET AL., *supra* note 21, at §3:14.

³⁰⁵ *Id.*

is whether ‘the legislature meant the statute to establish ‘civil’ proceedings’ or criminal ones.”³⁰⁶ If the inquiry is civil, the question is whether the statutory scheme is so punitive in either purpose or effect that it “negates the [s]tate’s intention to deem it civil.”³⁰⁷ The criminal inquiry was set forth in *Kennedy v. Mendoza-Martinez*.

[W]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.³⁰⁸

In the case of collateral consequences, the civil inquiry is fairly simple, for a reasonable mind. The punitive nature taken with the discriminatory

³⁰⁶ *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

³⁰⁷ *Id.*

³⁰⁸ *Mendoza-Martinez*, 372 U.S. at 168–69.

application should be enough to show that the severe effect of collateral consequences negates any intention to deem them civil regulations. Further, due to the disparate impact of many collateral consequences, the purpose of the collateral consequences is at odds with the alleged intentions.

B. Considerations

Given the harsh effects of collateral consequences and the chilling damage they have already caused, it is imperative that action be taken. Unfortunately, there are no laws in place requiring such action. However, legal professionals can and should take it upon themselves to take steps to ensure defendants are made aware of collateral consequences and how they can impact their lives. It is not difficult. By simply applying Learned Hand's crafty B<PL analysis, it is evident that the burden on the legal community is substantially outweighed by the probability of harm.

1. Defense Counsel

The defense attorney will play the most critical role at the plea stage.³⁰⁹ Defense counsel has a duty under the Sixth Amendment to adequately inform their clients of the implication of a guilty plea.³¹⁰ Although there is no legislation or regulation requiring it, attorneys should be aware of the collateral consequences that are mandatory and possible if their clients plead guilty. Also, if a collateral consequence is based on the sentence and not the underlying crime, counsel can use this to negotiate a plea deal that will allow the client to avoid a collateral consequence. Even further, counsel could possibly use severe and mandatory collateral consequences to negotiate lower sentences.³¹¹

If defense counsel neglects to take these steps, they should be subject to ineffective assistance of counsel liability under the Sixth Amendment. If the

³⁰⁹ See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

³¹⁰ See *Brady v. U.S.*, 397 U.S. 742 (1970).

real purpose of collateral consequences is to deter and ensure public safety, then defendants should be put on notice, and defense counsel is likely the best source for this information because they work closely to with the defendants and have a duty to inform them of the implications of a guilty plea. This type of notice would decrease the amount of ineffective assistance claims, resulting in the finality that the government so desperately craves.

2. Prosecutor

As of now, prosecutors do not have a duty to inform clients of collateral consequences. A potential safeguard could be for prosecutors to list the applicable collateral consequences with the direct forms of punishment when they offer a plea deal. This may require a bit of extra work, but it will save time and resources on the back-end due to a decrease in appeals. With this simple gesture, defendants will be less likely to bring challenges under *habeas corpus* and challenges against the validity of their conviction due to a lack of notice, again promoting

finality and saving resources. In the end, it would be more cost-effective than the method currently employed by the government, not telling them at all.

3. Judges

Judges can also play a major role by considering collateral consequences in the sentencing process. Different factors like age, criminal history, family status, severity of the crime, etc., are essential in determining the detrimental effects of collateral consequences. By taking this into consideration, a judge could save many lives. Judges may also have the ability to grant relief of certain collateral consequences that they deem unfair or discriminatory. Judges should also provide a detailed explanation of the collateral consequences that will or are likely to affect the defendant. By taking this measure, especially in a plea hearing, the judge provides an additional safeguard and gives the defendant another chance to consider the options.

The main counterargument would likely be that judges do not owe a duty to provide this type of

notice. Although this is somewhat true, judges do have a duty to ensure that defendants' constitutional rights are not violated in their courts. These extra safeguards are a great way to ensure plea bargains are run fairly and that defendants are adequately informed.

4. Summary of Considerations

Although these steps can and should be taken without legislation or regulation, this area of law is in need of updated legislation that takes the informed consent issue into account and provides safeguards to protect the constitutional rights of defendants. The Supreme Court should also address the constitutional violations that occur due to the absence of a requirement to inform clients about relevant collateral consequences.

C. Legislation

Due to the wide array of collateral consequences and the range of intensity in their application, it is

almost impossible to provide advice on specific legislation. How and what portions of the collateral consequence system are reformed is up to the legislature to decide. However, it is abundantly clear that the area of collateral consequences of drug convictions needs immediate attention due to the disparate impact on the Black community. Although there are strong arguments that certain collateral consequences serve their purpose, those arguments do not exist for the ones discussed here. A legislative evaluation needs to be performed to eradicate the effects of these collateral consequences. The disproportionate application of these collateral consequences defies any logical or constitutional argument in support of their imposition.

Although collateral consequences are free to impose, making the government fond of them, there are actual costs that are incurred indirectly. For one, by taking away the ability for the convicted to obtain licenses, commerce is directly affected.³¹² Also, due to fact that certain collateral consequences ironically

³¹² LOVE, ET AL., *supra* note 21, at ch.6.

facilitate crime by making reentry nearly impossible, the resources of the criminal justice system are being drained by the vicious cycle of appeals and recidivism. A party in opposition to this argument may use capitalism as a counter, but that argument is self-defeating for reasons outside the scope of this Article.

A few ways to address these concerns include the following: (1) legislatures should be more specific in their terminology of the crimes that trigger certain consequences as opposed to using terms such as “crimes of moral turpitude,” which are unnecessarily vague);³¹³ (2) applying time limits on the imposition of collateral consequences, possibly restoring certain rights and privileges after a successful showing that a convicted person is a law-abiding citizen; (3) legislatures should rely on empirical data when formulating consequences, instead of going-off what they think is best;³¹⁴ (4) adding a list of factors for a decision maker to consider when contemplating

³¹³ Chin, *supra* note 2, at n.25.

³¹⁴ LOVE, ET AL., *supra* note 21 at § 9:11.

whether to impose a collateral consequence, which will add a discretionary aspect; (5) legislatures should require collateral consequences to be included in sentences or probation reports; and (6) legislatures should include some method of relief in legislation. Collateral consequences should not be blanket laws that apply to everyone because people react differently to different forms of punishment, and as the evidence shows, some people are disparately impacted by their imposition. Some need retribution while others need rehabilitation. A person that needs rehabilitation should not be stripped of the opportunities that are necessary to promote recovery.

V. CONCLUSION

Due to the disparate impact of collateral consequences on the Black community, especially those imposed as a result of drug convictions, they should be eradicated. The strikingly similar nature to Jim Crow laws, the lack of a notice requirement, and the lack of realistic relief, all lead to the notion that these consequences do not serve the purpose

allegedly intended. The problem can only be addressed if the collateral consequences that impose a disparate impact are acknowledged, dissected, and corrected.

With regard to the consequences that do further the government's legitimate policy concerns, there should be safeguards put in place to relieve the punitive nature of their imposition. Safeguards need to be put in place to put defendants on notice and their retroactive nature should be corrected. Also, the consequence should have a proportional relationship to the offense it seeks to punish. As it stands, informed consent does not exist in the realm of guilty pleas and should be addressed immediately. Until these blunders are corrected, collateral consequences will continue to run rampant, obliterating everything in their path— including Black communities, Black futures, and Black lives.