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Criminalized Students, Reparations, and the Limits of Prospective Reform

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CRIMINALIZED STUDENTS, REPARATIONS, AND THE LIMITS OF PROSPECTIVE REFORM

AMBER BAYLOR*

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INTRODUCTION

Criminalization of students occurs when schools refer children to criminal law enforcement for everyday disciplinary infractions—infractions that school administrators and counselors could appropriately manage.¹ The states bring criminal charges against students for school-specific crimes, like “disrupting class,” and general order-related crimes like “disorderly conduct.”² Criminal court judges and prosecutors substitute in for school administrators to adjudicate and punish students charged with disturbing school order.³

As a result of criminalization, hundreds of thousands of students enter adulthood with open criminal cases, records, court debt, and warrants.⁴ These are notable technical barriers from the criminal court. Yet there are deeper impacts on criminalized students, including the psychological toll of policing and criminal courts and, resultantly, alienation from public institutions necessary for advancement.⁵ All of these harms may reverberate community-wide and generationally.⁶ This Article addresses an area overlooked by school discipline reform: redress to criminalized former students. In response to this gap, the Article offers models for retroactive decriminalization and reparations.

There is growing public resistance to criminalizing students.⁷ Nearly all states and the federal government have considered prospective reforms to criminalizing discipline policies.⁸ States are reforming their policies, making it more difficult to charge students with order-related crimes in

1. See generally Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013).

2. Amanda Ripley, *How America Outlawed Adolescence*, ATLANTIC (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/> [https://perma.cc/2LC2-TDYG].

3. Andrea L. Dennis, *Decriminalizing Childhood*, 45 FORDHAM URB. L.J. 1, 9 (2017); see Deborah Fowler, Morgan Craven, Yamanda Wright, Lauren Rose & Kelli Johnson, *Dangerous Discipline*, TEX. APPLESEED (2016), <http://report.texasappleseed.org/dangerous-discipline> [https://perma.cc/KQ32-CHY6]; Eric Holder, U.S. Att’y Gen., Remarks at the Department of Justice and Department of Education School Discipline Guidance Rollout at Frederick Douglass High School (Jan. 8, 2014), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-department-justice-and-department-education> [https://perma.cc/5MV2-JPYZ].

4. See Dennis, *supra* note 3, at 29, 31–36, 39–41.

5. See *infra* Part II.

6. See *infra* Part II.

7. See, e.g., Grace Chen, *School to Prison Pipeline Persists, Despite Local, State and National Efforts*, PUB. SCH. REV. (May 11, 2020), <https://www.publicschoolreview.com/blog/school-to-prison-pipeline-persists-despite-local-state-and-national-efforts> [https://perma.cc/4879-4SQ3].

8. Matthew P. Steinberg & Joanna Lacoce, *What Do We Know About School Discipline Reform?*, EDUC. NEXT (Oct. 4, 2016), <https://www.educationnext.org/what-do-we-know-about-school-discipline-reform-suspensions-expulsions/> [https://perma.cc/VLE6-2XM3].

school.⁹ They are often influenced by model reforms developed by organizations that replace referrals to law enforcement with additional support staff, counseling, and restorative justice practices.¹⁰ They engage in discussions of bias.¹¹ As studies of student experiences and quantitative data indicate, the criminalization of students is felt most acutely among students of color, especially Black students.¹² The models reduce or remove police officers from schools desperately in need resources for of counselors and other social work support.¹³ These proposed reforms reduce the impact of criminal law on future schoolchildren.¹⁴

But prospective reform to decriminalize discipline is not enough to curb the ongoing harm to former students. Reformers' social equity goals require retroactive policies and reparations work. The vision for more equitable communities must address decades of damage inflicted by processing students through criminal legal systems.

A brief example of criminalizing policies in action demonstrates the acute and lasting harm that follows. One example is the high school student in Orange County, Florida, who said to a school police officer, "Get your hands off me."¹⁵ In response, the officer arrested the student; handcuffed him in his school; walked him through the school to a patrol car; and charged the student with "disturbing the peace," "resisting an officer without violence," and "assault on a law enforcement officer."¹⁶ Though the student's parents pulled together enough money to hire a defense attorney, helping their child avoid a criminal conviction, the student will have an adult criminal record from this arrest and prosecution for the rest of his life.¹⁷

In Albuquerque, New Mexico, a seventh grader tried to amuse his classmates with fake burps throughout gym class.¹⁸ In a school less reliant

9. *Id.*; Chen, *supra* note 7.

10. DIGNITY IN SCHS. CAMPAIGN, MODEL CODE ON EDUCATION AND DIGNITY: PRESENTING A HUMAN RIGHTS FRAMEWORK FOR SCHOOLS (2013).

11. *Id.*

12. Evie Blad & Alex Harwin, *Black Students More Likely to Be Arrested at School*, EDUCATIONWEEK (Jan. 24, 2017), <https://www.edweek.org/leadership/black-students-more-likely-to-be-arrested-at-school/2017/01> [<https://perma.cc/T7FL-Q9DF>].

13. *See* DIGNITY IN SCHS. CAMPAIGN, *supra* note 10.

14. *See, e.g.*, HIGH HOPES CAMPAIGN, FROM POLICY TO STANDARD PRACTICE: RESTORATIVE JUSTICE IN CHICAGO PUBLIC SCHOOLS 5 (2012) <https://www.suspensionstories.com/wp-content/uploads/2012/03/FromPolicyToStandardPractice.pdf> [<https://perma.cc/964H-PHWV>].

15. Cristóbal Reyes & Adelaide Chen, 'Little Criminals': In Florida, Whether Kids are Arrested for Acting Out Depends on Where they Live, ORLANDO SENTINEL (Apr. 17, 2020, 5:30 AM), <https://www.orlandosentinel.com/news/crime/os-ne-juvenile-arrests-central-florida-20200417-xfccikicyfhsSobu76xi7omcb4-htmlstory.html> [<https://perma.cc/JTF2-WNCK>].

16. *Id.*

17. *Id.*

18. Elaine D. Briseño, *School Sued After Boy's Burp Led to Trouble*, ALBUQUERQUE J. (Jan. 3, 2012, 9:09 AM), <https://www.abqjournal.com/72486/school-sued-after-boys-burp-led-to-trouble.html>

on criminal law, his class disturbance would have been laughed off or his teacher would send him to the principal's office. Instead, school police restrained and handcuffed the thirteen-year-old at school, arrested him for "disturbance of class," and brought him to the juvenile detention center until a parent came to claim him.¹⁹ Years after the incident, the middle school student reported experiencing severe depression and lasting anxiety.²⁰

Criminalized students must navigate criminal records, exclusion from school, the toll of psychological injury, and mistrust of educational institutions.

To many, an argument to redress former students' injuries may seem premature. By no means is school discipline reform universal nor has it resulted in a completely just educational experience for vulnerable students.²¹ Schools continue to funnel students into the criminal legal system for school discipline matters.²² Teachers' unions are split in their responses to restorative justice programming and its impact on effective teaching.²³ The U.S. Department of Education's investigations of school discipline expand and retract depending on the administration.²⁴ Still, a pivotal federal report on school discipline showed that the federal government had entered into a number of consent decrees to implement reforms decriminalizing school discipline.²⁵ The summer of 2020, filled with protests surrounding police killings and spurring renewed discussion on over-criminalization of vulnerable groups, resulted in further scrutiny of police officers in schools.²⁶ Some school systems responded to the calls for reform, reducing criminal legal interventions in schools.²⁷ These systems on the verge of reform are poised to include retroactive policies.

[<https://perma.cc/Q463-PSVN>].

19. *Id.*

20. *Id.*

21. *See* Chen, *supra* note 7.

22. *See, e.g.*, Jodi S. Cohen, *Thousands Demand That Michigan #FreeGrace After Teenager Was Incarcerated for Not Doing Her Homework*, PROPUBLICA (July 15, 2020, 8:25 PM), <https://www.propublica.org/article/thousands-demand-that-michigan-freegrace-after-the-teenager-was-incarcerated-for-not-doing-her-schoolwork> [<https://perma.cc/RQB4-AKTM>].

23. *See* U.S. DEP'T OF EDUC., FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY (Dec. 18, 2018), <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf> [<https://perma.cc/R6HB-NKGK>].

24. *See, e.g., id.*

25. *See Case Summaries*, U.S. DEP'T OF JUST., C.R. DIV., <https://www.justice.gov/crt/case-summaries> [<https://perma.cc/6PBU-ML3U>].

26. Kara Harris, *There's a Movement to Defund School Police, Too*, BLOOMBERG (Aug. 24, 2020, 8:52 AM), <https://www.bloomberg.com/news/articles/2020-08-24/minneapolis-denver-and-oakland-defund-school-police> [<https://perma.cc/5UFM-5TGC>]; Nicole Chavez, *A Movement to Push Police out of Schools is Growing Nationwide. Here is Why*, CNN (June 28, 2020, 1:52 PM), <https://www.cnn.com/2020/06/28/us/police-out-of-schools-movement/index.html> [<https://perma.cc/7975-4SGZ>].

27. Harris, *supra* note 26.

Retroactive decriminalization and reparations move closer to transforming education and criminal law than piecemeal, prospective reforms.²⁸ These approaches confront and demand equity from the systems that have enabled harm. Retroactive decriminalizing measures such as record expungement may correct the technical barriers former students face. A reparations project can address impacts such as psychological harm, disruption of trust and estrangement from schools and other public institutions, and losses experienced by entire communities. A reparations framework offers expansive possibilities for considering these harms. The framework incorporates acknowledgement of harm, exploration of its lasting impacts on the individual and broader society, and a communal effort to recognize and attempt to redress the harm. For the majority of criminalized students, reparations models provide the most comprehensive form of redress for continuing injuries. Reparations models reposition moral norms, shifting the burden of overcoming criminalization from students to the state. Much of school discipline reform is discussed through the lens of education law, but the criminalization of students is another byproduct of our ever-expanding criminal legal system. This Article builds on scholarship on the hidden costs of misdemeanor criminal legal regulation, decriminalization of misdemeanors, and extensive literature on juvenile criminal debt. In its examination of backward-looking reforms, the argument contributes a new paradigm of retroactive legalization and decriminalization to address criminalized students.

Part I of the Article grounds the argument for redress to criminalized students in a reparations framework. The framework comes with a built-in stigma, one that proliferates through efforts to address racially discriminatory state policies.²⁹ It offers moral justifications and a staged process for reparations. This Part describes how policymakers expanded the purview of criminal law into regulation of school order and, later, attempted to curb harm through prospective reform. Part II emphasizes the limits of prospective-only reform through dissection of ongoing consequences to

28. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 422, 427 (2018) (citing to Black Youth Project 100 and Movement for Black Lives reparations demands, categorizing calls to decriminalize and pay reparations as transformational agenda items); *2020 Candidates are Finally Talking About Reparations. It's Time to Deepen the Debate*, BLACK YOUTH PROJECT (Apr. 17, 2019), <http://blackyouthproject.com/2020-candidates-are-finally-talking-about-reparations-its-time-to-deepen-the-debate/> [<https://perma.cc/GHE5-AKMZ>]; see also Manning Marable, *In Defense of Black Reparations*, Z COMMENTS (Nov. 11, 2002) <https://zcomm.org/zcommentary/in-defense-of-black-reparations-by-manning-marable/> [<https://perma.cc/TG9A-GNDQ>]; Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 386 (2020).

29. Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 609–10 (1993).

criminalized students. Criminal records and psychological, economic, and social long-term harms have already resulted in losses to students and communities. Part III proposes two frameworks to redress criminalized students: retroactive decriminalization and reparations.

I. A REPARATIONS FRAMEWORK: OUTLINING INJURY TO CRIMINALIZED STUDENTS

Around the world, governments utilize reparations programs to address past harms against groups and communities. Reparations may take a variety of forms, from acknowledgements of harm, tribunals and hearings, public education, community investment, and programs to individual compensation.³⁰ Based on his survey of international scholarship on reparations, Alfred Brophy offered a list of the key goals of reparations: programs should “(1) acknowledge past contributions and harms, (2) change the public understanding about the present impact of past injustice, and (3) effect justice and freedom through community empowerment.”³¹ In examining the potential of reparations frameworks to address criminalized former students, these components might be considered separately. The project of redress for criminalized former students takes on a transformative quality when applied with these goals in mind.

Families and advocates for students have long demanded public acknowledgment of the ongoing impact of criminal referrals in schools.³² This advocacy has had a meaningful impact in the form of prospective reforms. While reformers have done a tremendous amount of work in outlining the harm of criminalization of students, it does not necessarily follow that a change in harmful policies explicitly acknowledges past and

30. Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 836 (2006); see generally Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, MICH. ST. L. REV. 643 (2004); Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1 (2007).

31. Brophy, *supra* note 30, at 835. Brown University’s Steering Committee on Slavery and Justice found:

the most successful [initiatives] generally combine three elements: formal acknowledgement of an offense; a commitment to truth telling, to ensure that the relevant facts are uncovered, discussed, and properly memorialized; and the making of some form of amends in the present to give material substance to expressions of regret and responsibility.

BROWN UNIV. STEERING COMM. ON SLAVERY AND JUST., REPORT OF THE BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE (2006), <https://digitalpublications.brown.edu/read/first-readings-2020/section/65e2bb7a-2d8f-4340-a2d8-f9b69e1903c7> [<https://perma.cc/KC5Q-NZUL>].

32. PENDA D. HAIR, LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE 153–59 (2001), https://advancementproject.org/wp-content/uploads/2017/11/3c05747f6d2c6cb749_mbrgfwlo.pdf [<https://perma.cc/6RXS-T3LD>]; Damien M. Sojoyner, *Black Radicals Make for Bad Citizens: Undoing the Myth of the School to Prison Pipeline*, 4 BERKELEY REV. EDUC. 241 (2013).

continuing harm to former students. Reparations frameworks, in contrast, put particular emphasis on ongoing harm, and not just as justification for prospective reform. The layered goals of reparations programs, acknowledgement, public investigation, and redress help distinguish it as a framework from other types of reforms. Reparations acknowledge that without confronting past harm, the aims of reforms can only be partially achieved for communities. Where whole sectors of the community are still impacted, prospective changes are limited in their ability to restore a community.

In the U.S., controversial political baggage accompanies discussions of reparations programs.³³ The mere mention of reparations can raise passions, stirring up resistance before the merits of the claim are even broached.³⁴ Most work critiquing reparations attempts to delegitimize reparations for slavery.³⁵ That sentiment has, at times, expanded to resistance to reparations for other systemic harm against specific racial and ethnic groups, such as for wages stolen from Mexican American workers, the taking of Native Hawaiian land, and the deprivation under Jim Crow laws.³⁶

The political repercussions of reparations efforts in the U.S. might result in local governments shying away from adopting reparations projects.³⁷ Some reparations advocates have suggested adopting the frameworks or theories of reparations but using different terminology, focusing on various restorative frameworks.³⁸ As I describe later in this Article, initiatives based on reparations frameworks may be described as reconciliation or restitution. Exploratory inquiries may take the form of reports, commissions, hearings, and public education campaigns. Redress might manifest as apology, awareness, social programs, priority in obtaining government services, or

33. Daren L. Hutchinson, *Reparations: A Remedies Law Perspective*, 56 AM. U. L. REV. 1375, 1404 (2007) (“[T]he U.S. electorate tends to disfavor economic redistribution generally.”); see generally *supra* note 30.

34. One example is gubernatorial candidate Cynthia Nixon’s use of the term during her campaign to describe a model for addressing the War on Drugs. Adjoa Aiyetoro, a leader in the National Coalition of Blacks for Reparations in America, attests to the political consequences of mention of reparations. See Adjoa Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N’COBRA) and its Antecedents*, 16 TEX. WESLEYAN L. REV. 687 (2010).

35. See, e.g., Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

36. See Yamamoto et al., *supra* note 30; see, e.g., Aloha ‘Āina: Native Hawaiian Land Restitution, 133 HARV. L. REV. 2148 (2020).

37. See, e.g., Eric Zorn, *How the Term “Reparations” Is Getting in the Way of Historical Justice*, CHICAGO TRIB. (June 25, 2019, 4:37 PM), <https://www.chicagotribune.com/columns/eric-zorn/ct-column-reparations-ta-nehisi-coates-slavery-zorn--20190625-3nw4sgg3dnempjzckvqkz3kdcy-story.html> [<https://perma.cc/JP9N-J8W5>].

38. See, e.g., Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5 (2009).

other forms of recompense. Certainly, each jurisdiction and the people seeking redress are in the best position to determine what benefits the reparations framework have to offer.

Reparations for educational harms in the U.S. exist. For instance, in Prince Edward County, Virginia the state passed legislation redressing past policies denying education to Black students.³⁹ The county shut down its public schools rather than integrate after *Brown v. Board of Education*.⁴⁰ Funding was redirected towards private, segregationist schools, which white children were able to attend.⁴¹ Black children were deprived of schooling in the county, sitting home for five years waiting for the schools to reopen while white neighbors were learning at school.⁴² Families were fractured as some Black families sent children to other parts of the country so that they could attend school.⁴³ The action of the county left students with deep psychological scars.⁴⁴ The Black illiteracy rate increased from three percent to twenty-three percent.⁴⁵ The reparations legislation provides some recompense to individuals who were not able to attend school at the time, specifically a scholarship fund for residents unable to attend school during that period.⁴⁶

As the reparations project in Prince Edward County demonstrates, the U.S. has a long history of exclusion of Black students in schools. Regarding Black children, community advocates have outlined the ways that problems labeled as “zero tolerance” and “school-to-prison pipeline” have been modern iterations of old trends.⁴⁷ This legacy has included prohibitions on literacy,⁴⁸ exclusion from better-resourced schools,⁴⁹ and silencing of student protest.⁵⁰

39. Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as a Matter of Justice*, 11 MICH. J. RACE & L. 419, 421–24, 438–42 (2006).

40. *Id.* at 437.

41. *Id.* at 437–38.

42. *Id.* at 438.

43. *Id.* at 438–39.

44. *Id.* at 441–43.

45. *Id.*

46. *Id.* at 421.

47. Sojoyner, *supra* note 33, at 243–46 (arguing that the lexicon of the school-to-prison pipeline obscures the history of schools working against Black liberation).

48. *See, e.g.*, SOLOMON NORTHRUP, TWELVE YEARS A SLAVE 229–30 (1853); MARGARET DOUGLASS, EDUCATIONAL LAWS OF VIRGINIA: THE PERSONAL NARRATIVE OF MRS. MARGARET DOUGLASS, A SOUTHERN WOMAN WHO WAS IMPRISONED FOR ONE MONTH IN THE COMMON JAIL OF NORFOLK, UNDER THE LAWS OF VIRGINIA, FOR THE CRIME OF TEACHING FREE COLORED CHILDREN TO READ 4 (1854).

49. *See, e.g.*, David J. Leonard, *No Way Out: Mother Jailed for ‘Stealing’ Child’s Education*, EBONY (Mar. 2, 2012), <https://www.ebony.com/news/no-way-out-mother-jailed-for-stealing-childs-education/> [https://perma.cc/46TA-5SBP].

50. Communities have countered these forms of educational disenfranchisement. Leon Theodore, *From “Disadvantaged” to “Undervalued”: The Empowering of Black Youth in the Business of Education*, TEX. CRIM. JUST. COAL. 2 (2020).

The current political moment, which has provided a platform for public dialogue about Black liberation, has shifted some of the benefits and detriments of explicitly considering reparations. In many places, governments have established commissions to explore reparations for state-sponsored racist policies and systemic injuries to harmed communities.⁵¹ Reparations theory is an increasingly familiar framework. The harms of criminalization of students are essential to any discussion of broader systemic racism against communities of color. Discussion of reparations has expanded beyond slavery to include state-sponsored terrorism, destruction of Black communities, redlining, Jim Crow laws, and the aggressions of the “War on Drugs.”⁵² Where cities and states attempt to make amends to harmed communities, connecting local equity projects to reparations may be a tactical advantage, giving the projects more traction.⁵³

I expand the application for reparations frameworks to address students criminalized and excluded in our schools. Centering conversations about criminalized former students on reparations frameworks is an effort imbued with hope. Those that take it on believe that but for criminalization, many individuals and communities would be healthier and autonomously successful.⁵⁴ Some school districts have explicitly embraced a reparations

51. For example, the city of Chicago passed a resolution for a commission on reparations for slavery, and then it reversed in favor of subcommittee on the issue. See Heather Cherone, *Chicago Will Not Create Reparations Commission After Lightfoot Objects*, WTTW NEWS (June 12, 2020, 5:46 PM), <https://news.wttw.com/2020/06/12/chicago-will-not-create-reparations-commission-after-lightfoot-objects> [<https://perma.cc/4R7N-4NWR>].

52. See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014) <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/H4V9-3TY3>]; see also Bryan Smith, *Evanston's Road to Reparations*, CHI. MAG. (June 2, 2020, 10:19 AM), <http://www.chicagomag.com/Chicago-Magazine/June-July-2020/Evanstons-Road-to-Reparations/> [<https://perma.cc/YXF9-RB4J>].

53. The call to redistribute local budgets away from policing also find useful applications of reparations theory as justification for reinvestment in communities affected by overcriminalization. See Jordie Davies, *Movement for Black Lives Releases Demands, Calls for Reparations*, BLACK YOUTH PROJECT (Aug. 2, 2016), <http://blackyouthproject.com/movement-for-black-lives-releases-demands-calls-for-reparations/> [<https://perma.cc/6RMJ-DJ5A>]. The criminalization of Black people through order-based misdemeanors has a legacy that dates back to Black Codes, connecting it directly with early atrocities against Black people. See Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1193 (2017).

54. There are growing discussions of education reparations. See, e.g., Maureen Kelleher, *The Case for Education Reparations*, EDUC. POST (Mar. 12, 2019), <https://educationpost.org/the-case-for-education-reparations/> [<https://perma.cc/ZSL4-6F2N>]; see also Khalilah M. Harris, Opinion, *A Roadmap for Reparations in Education*, EDUCATIONWEEK (Oct. 16, 2020), <https://www.edweek.org/ew/articles/2020/10/16/a-roadmap-for-reparations-in-education.html> [<https://perma.cc/2XHR-VEVM>]; see also Nayzak Wali-Ali, *How Reparations Can Address Educational Inequities for Black American Students*, BERKELEY POL. REV. (Dec. 3, 2019), <https://bpr.berkeley.edu/2019/12/03/how-reparations-can-address-educational-inequities-for-black-american-students/> [<https://perma.cc/RDB2-J9FS>].

framework to advance the needs of Black students.⁵⁵ The application of a reparations framework to the criminalization of students leads to the following inquiries: 1) Is there unacceptable damage that the state has done to these students? 2) If so, what components of the ongoing harm that occurred as a result of these policies should be considered by the public? 3) How can we repair damage to students through retroactive policies? 4) Are there reparative forms of redress to students and broader society for the complex harms of criminalization?

In applying a reparations framework, I begin with the harmful, ongoing consequences of criminalizing students.

A. The History and Harm of Criminalizing Students

Reparations requires moral justification for engaging the state in the project of addressing past abuses.⁵⁶ An essential component of the justification is a clear articulation of the harm that has occurred.⁵⁷ This articulation identifies those who were injured, the extent of injury, and who harmed or benefited.⁵⁸ Examining the way the state implemented or enabled harmful policies already does work towards addressing criminalization. It upsets the accepted paradigm, of affected students as deviants or at-risk, and repositions criminalized students as individuals who have experienced losses and ongoing injury unjustly.

Brophy describes reparations as “remedies for sustained past or present injustice towards a particular group. The essence of reparations is remediation for collective harms.”⁵⁹ Some people may not view the criminalization of former students as a communal harm significant enough to warrant reparations. The harm of criminalizing students may pale in comparison to grand atrocities in the U.S., such as the enslavement of African people, massacre and removal of indigenous peoples, and medical experimentation on vulnerable groups. One might wonder if it is worth the cost and effort—and if the reparations framework offers some universal benefit that would warrant redress. Reparations theory does not require that the state’s offense rise to the level of genocide.⁶⁰ Scholars offer instead these questions: “Was the injustice perpetuated against groups? Was the injustice

55. For instance, the Oakland Unified School District recently approved a reparations resolution, establishing a Black Student and Families Thriving Task Force and Equity Fund. The resolution cites to recent reforms to eliminate school police, and the demonstrated harms of systemic racism in schools.

56. Yamamoto et al., *supra* note 30, at 17.

57. See Brophy, *supra* note 30, at 824; Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 309 (2003).

58. Yamamoto et al., *supra* note 30, at 35.

59. See Brophy, *supra* note 30, at 1402.

60. See Coates, *supra* note 52.

imposed by governmental action or neglect[,] and is it having an impact on people currently?”⁶¹

The harm of criminalizing student disruptions to school order through the state’s school discipline policies is an identifiable harm, one perpetrated upon an identifiable group of students and communities. Despite extensive scholarship establishing the detriments to student wellbeing caused by criminalization, many districts continue their harmful reliance on criminal law in school discipline.⁶² The criminalization of youth has been one of the most striking contrasts to the ideal of school as a space that promotes safety, growth, and equal opportunity in society.⁶³ These romanticized attributes of schools have long been denied to students in many of our schools. Instead of serving as a haven from harm, a student may find that resource-deprived schools replicate discrimination or injustices students face outside of school. The harm of criminalization in school does not just disadvantage that student but serves as a form of disinvestment in that community. The depth of the harm on students and communities makes it impossible to remediate solely through prospective reforms. Instead, the detriments to students and communities that underwent these disciplinary policies constitute sustained past and present injustice.

This Article focuses on policies that allowed children to be prosecuted in the criminal justice system. This specific set of policies permitted actual criminal justice interactions on school grounds. These policies include: assigning school order to school police officers; creating, within criminal codes, crimes for typical school order issues; and charging children with existing crimes for normal adolescent behavior.

Some argue that these pathways for criminalizing students are a manifestation of “zero tolerance” disciplinary policies and the “school-to-prison” pipeline.⁶⁴ “Zero tolerance” describes a harsh policy regime against students who allegedly disrupt school order, which included serious and exclusionary forms of punishment.⁶⁵ Reform advocates focused on these policies blame them for exacerbating structural inequities in school

61. Brophy, *supra* note 31, at 847.

62. Christine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 889–92 (2012); AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 853–57 (2008); *No Police in Schools: A Vision for Safe and Supportive Schools in California*, ACLU S. CAL. (Aug. 24, 2021), <https://www.aclusocal.org/no-police-in-schools> [<https://perma.cc/J38W-WH6U>].

63. See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 7 (Mar. 2010), <https://www.justice4all.org/wp-content/uploads/2016/04/Test-Punish-Push-Out.pdf> [<https://perma.cc/347N-Y95Y>].

64. *Id.* at 3.

65. AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 852–53.

discipline.⁶⁶ Students under these polices received suspensions, expulsions, and criminal citations that required students to face charges in court. As justification, school districts argued that allowing the chaos caused by these minor infractions created unsafe schools and reduced classroom learning. Increased pressure to perform adequately on standardized tests also incentivized schools to remove students with complex needs.⁶⁷ Schools were simultaneously hit with budget cuts, resulting in less mental health support.⁶⁸ They began to rely on draconian discipline measures to maintain safety and quality instruction in schools.⁶⁹ These punishments, suspension, expulsion, and criminal prosecution, were levied against students who were not accused of felonies or violence.⁷⁰ Students were subject to zero tolerance policies for offenses like “[t]hrowing a paper airplane.”⁷¹

According to some reform advocates, overly punitive, zero tolerance disciplinary practices led to a “school-to-prison-pipeline.”⁷² The disciplinary policies leave children at increased risk of extensive criminal legal entanglements. The concept includes many ill-conceived interventions, from heavy reliance on out-of-school suspension to the referral of children to the criminal justice system.⁷³ Each carry consequences for children impacted.⁷⁴ Suspensions are correlated with student drop-out rates.⁷⁵ Transfers to alternative schools are linked to criminal law enforcement.⁷⁶ Like juvenile justice and criminal court referrals, each has tremendous impacts on future student success.⁷⁷

The zero tolerance policies disproportionately affected students of color. For example, researchers have found that teachers are more likely to find suspension is appropriate with a Black student and that a Black student is a

66. See *id.* at 855.

67. See *School to Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline?redirect=racial-justice/what-school-prison-pipeline> [https://perma.cc/9SRD-PTSU] (citing David N. Figlio, *Testing, Crime and Punishment*, 90 J. PUB. ECON. 837 (2006)).

68. Am. Acad. of Pediatrics, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (Nov. 2003); see also Johanna Wald & Dan J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 11, 12 (2003).

69. See Wald & Losen, *supra* note 69, at 10. Increases also followed the Columbine school shooting. See AMIR WHITAKER ET AL., ACLU, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 6–8 (Mar. 2019), https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf [https://perma.cc/T9B9-8XPW].

70. See Wald & Losen, *supra* note 69, at 10.

71. See WHITAKER ET AL., *supra* note 69, app. d.

72. ADVANCEMENT PROJECT, *supra* note 63, at 3.

73. *Id.* at 10.

74. *Id.*

75. *Id.* at 5.

76. *Id.* at 10.

77. *Id.* at 12.

troublemaker.⁷⁸ The youth who experienced zero tolerance policies often consequently faced additional barriers to learning. Specifically, studies found that when schools suspended students rather than addressing their behavior through other mechanisms, it resulted in higher drop-out rates and an increased likelihood of future criminal legal interactions.⁷⁹ Some scholars have challenged narratives of zero tolerance and the school to prison pipeline as isolated phenomena in the exclusion and criminalization of students of color. Some consider criminal legal interventions to be more properly historicized as the latest effort in centuries of attacks on Black culture, autonomy, and liberty in U.S. education.⁸⁰ Black youth have long been deemed disorderly and subject to the social controls of criminal law.⁸¹ This reliance on criminal law interventions in school order coincided with the beginnings of the “War on Drugs.”⁸²

Similarities between the zero tolerance, school to prison pipeline, and war on drugs policies are evident.⁸³ Both expanded criminal law enforcement to maintain safety and order, divesting from health and social services.⁸⁴ The rationale for zero tolerance disciplinary policies echoes much of the rationale for mandatory minimums in drug sentencing: that the policies reassert the gravity of violations, strengthen deterrence, and maintain consistency in punishment.⁸⁵ Similar to “broken windows”

78. Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 618 (2015) (stating that teachers given similar fact patterns were more likely to find that a hypothetical student with a “Black” name was a troublemaker and refer to suspension than a student with a “white” name).

79. See WHITAKER ET AL., *supra* note 69, at 24.

80. See Henning, *supra* note 1, at 407; *How Teachers Talk About Educational Disparities (Data)*, EDUCATIONWEEK (Dec. 5, 2019), <https://www.edweek.org/ew/section/multimedia/how-teachers-talk-about-educational-disparities-data.html> [<https://perma.cc/F39H-JCJS>] (citing to study that four out of ten teachers think genetics play a role in student performance).

81. See, e.g., Sadiya Hartman, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS 222–25 (2019); Francis L. Huang & Dewey G. Cornell, *Student Attitudes and Behaviors and Explanations for the Black-White Suspension Gap*, 73 CHILD. & YOUTH SERVS. REV. 298, 301 (2017) (finding cultural difference in expression and communication styles may contribute to disparities in discretionary referral to law enforcement).

82. Some argue that the Gun-Free Schools Act of 1994 led to zero tolerance policies. See Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1376 (2011). Scholars point to some forms of oppressive discipline of students of color that date to the days following school integration. See Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289, 298 (2005). *But see* Sojoyner, *supra* note 32, at 243–46.

83. See Dennis, *supra* note 3.

84. See ACLU S. CAL., *supra* note 62 (stating that the number of officers in schools grew from 100 in the 1970s to over 40,000 in 2021).

85. See U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 7–9 (1991), <https://www.ncjrs.gov/pdffiles1/Digitization/137910NCJRS.pdf>; AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 854 (“There is no evidence, however, that zero tolerance has increased the consistency of school discipline.”).

policing theories, proponents of zero tolerance policies argued that criminally charging students with minor infractions was necessary to maintain order in urban communities.⁸⁶ As with the “War on Drugs,” people of color, especially Black children, were disproportionately targeted with harsh punishments.

Andrea Dennis’s research on the criminalization of children focuses on the late 1980s and 1990s and the proliferation of laws allowing for children to be charged and adjudicated in adult criminal courts. Violence by children, especially children of color, was aggrandized by national media during this time. The idea of children as uniquely vulnerable and capable of rehabilitation began to recede from the national imagination.⁸⁷ Children adjudicated in the adult courts could be subject to the same penalties as any adult prosecuted for similar charges.⁸⁸ Simultaneously, state and local criminal codes ballooned and expanded to create crimes that could technically be charged in instance of typical child behavior. Dennis provides examples of students charged with crimes for “throwing pebbles across a train track at each other” or a teenager refusing an officer’s demand to comply with a local code prohibiting people from wearing a hoodie.⁸⁹ This expansion of criminal codes into minor infractions leaves children who are likely to be the subject of policing vulnerable to potential charges for low-level misbehavior-based charges.

B. Law Enforcement in Schools

One response to concerns about safety and order in schools during the 1990s was an increase in the presence of police officers.⁹⁰ The school safety officers, as they are most often known, are police, or police analogous, and they maintain a presence in the school.⁹¹ Often this includes officers stationed daily at one school, with their own designated work areas.⁹² Schools with fewer financial resources, whose students need school to be a support system the most, rely on policing the most.⁹³ A 2019 report found

86. See Ofer, *supra* note 82.

87. Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, at 154–56 (2014); Dennis, *supra* note 3, at 110–116.

88. See Dennis, *supra* note 3.

89. See *id.*

90. Increased amount of school safety officers also followed mass shootings at schools. WHITAKER ET AL., *supra* note 69, at 39.

91. Michael Heise & Jason P. Nance, “Defund the (School) Police”?: Bringing Data to Key School-to-Prison Pipeline Hypothesis Claims, 111 J. CRIM. L. & CRIMINOLOGY 717 (2021).

92. *Id.*

93. Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 285–86 (2009) (showing a correlation between school financial resources and numbers of arrests).

that 1.7 million students were in schools with police but no counselors.⁹⁴ Expectedly, research has shown that students without access to school-based mental health providers fare worse.⁹⁵ The lack of mental health resources furthers reliance on police to manage student conduct.⁹⁶ And when police officers are tasked with managing student infractions, discipline is increasingly outsourced to criminal courts.⁹⁷ Within the U.S., law enforcement is presented as a cure-all to an array of disruptions to order. But officers cannot monitor, treat, or mediate in the same manner as school counselors. Unlike school counselors, their job is not to provide alternative resources for students and teachers in need of emotional support. Police officers are trained to use the traditional aims of policing—interrogations and compiling evidence for prosecution, which are different than what is often appropriate to manage infractions in school settings. The decision to allow school order infractions to be captured in the lasso of law enforcement is not a problem of policing, but an indictment of societal priorities, prioritizing the perception of safety over nurturing healthy adolescent development and investments.⁹⁸

Schools are meant to be nurturing.⁹⁹ This is particularly important for students who have traumatic experiences.¹⁰⁰ The assumption that law enforcement ensures safety presumes a life experience free from police harassment or antagonistic police-community relations. Police officers' presence in school is one manifestation of intense surveillance children also experience in their neighborhoods to overpolicing with school—eliminating the sense of safety and security necessary for children to thrive.¹⁰¹ Police in schools can result in heightened tension and psychological stress. The American Psychological Association reports stressors associated with police officers in schools, particularly for students of color.¹⁰² Rather than feeling safer, many students feel at risk of a negative interaction.¹⁰³ In a

94. The addition of school-based mental health providers results in less disciplinary measures and fewer suspensions and expulsions. WHITAKER ET AL., *supra* note 69, at 4.

95. Without adequate support, students with existing mental health concerns are four times more likely to drop out of school. *Id.* at 6.

96. WHITAKER ET AL., *supra* note 70.

97. Theriot, *supra* note 93, at 281.

98. Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527 (2006).

99. See H.R. 3465, 123rd Sess., Gen. Assemb. Preamble (S.C. 2019), https://www.scstatehouse.gov/sess123_2019-2020/bills/3465.htm

100. Dr. Marilyn Wedge, *Why Schools Should Be More Nurturing: Stressful Experiences Change Children's Brains*, PSYCH. TODAY (Dec. 1, 2013), <https://www.psychologytoday.com/us/blog/suffer-the-children/201312/why-schools-should-be-more-nurturing> [<https://perma.cc/ZD6R-VXHG>].

101. Studies have indicated that Black boys report higher stress and worse performance outcomes in schools with police officers. AM. PSYCH. ASS'N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 889.

102. AM. PSYCH. ASS'N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 890.

103. *Id.* at 872.

testimony before the US Commission on Civil Rights in 2012, Edward Ward, a youth leader in Chicago, described the presence of police in his school. “I felt constantly in a state of alert, afraid to make even the smallest mistake I felt like I could not go to them for general security issues because I would first be interrogated before anything would get done.”¹⁰⁴

Officers in schools often default to the training they have received for law enforcement among unknown adults on the street.¹⁰⁵ Some are contracted through independent police agencies for schools.¹⁰⁶ Others are contracted through security firms.¹⁰⁷ They may also be contracted officers from the city police agencies.¹⁰⁸ Even the independent policing agencies draw from a pool of people trained as police, not student health workers.¹⁰⁹ Officers are allowed to investigate accusations against students and initiate criminal charges against students, including nonviolent, misdemeanor offenses.¹¹⁰ Studies show that school officers underuse de-escalation tools, even when trained to do so, in regular street encounters.¹¹¹

The presence of officers escalates typical misbehavior into criminal offenses. In schools, many continue to employ blunt, street encounter tactics against children.¹¹² These uses of force are not race-neutral. As in the outside world, students of color, particularly Black students, are targeted by more invasive forms of school policing, such as the use of restraints, in school arrests and criminal charges. Black girls across the country were four times as likely to be arrested in school.¹¹³ Studies demonstrate that the presence of school resource officers (SROs) is correlated with enhanced referrals to the legal system.¹¹⁴ Where officers are handling reports of misbehavior, they often view them through the lens of potential violations of the law—even minor violations of the law.¹¹⁵ Even after changes, law enforcement has critiqued reforms that do not rely on law enforcement, since many of the adolescent behaviors addressed outside of the police

104. *Ending the School-to-Prison Pipeline: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 25–26 (2012) (Testimony of Mr. Edward Ward).

105. Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 950–51 (2016).

106. *Id.*

107. *Id.*

108. *Id.*

109. Heise & Nance, *supra* note 91, at 725.

110. See Nance, *supra* note 106, at 993–96; Dennis, *supra* note 3, at 11.

111. Nance, *supra* note 106, at 951.

112. See Henning, *supra* note 1, at 441.

113. The number increases to eight times more likely in North Carolina, Iowa, and Michigan. WHITAKER ET AL., *supra* note 69, at 5.

114. Heise & Nance, *supra* note 91.

115. *Texas’ School-to-Prison Pipeline: Ticketing, Arrest & Use of Force in Schools: How the Myth of the “Blackboard Jungle” Reshaped School Disciplinary Policy*, TEX. APPLESEED 68 (Dec. 2010). Bexar County found that half of juveniles in the juvenile justice system had been referred by school safety officers. *Id.*

“constitute crimes.”¹¹⁶ Issues with behavioral codes are not viewed as a health crisis, developmental frustration unique to an age group, or the effect of a disability.¹¹⁷ Infractions are viewed as crimes. Where officers engage in an investigation, their findings can lead to actual criminal prosecution. Their role is to enforce the law and initiate proceedings against those that violate it.

Students who are in schools with officers and are involved in a prosecution are at a distinct disadvantage. Being charged with a misdemeanor in school puts one in a relatively worse position procedurally than an adult on the street. Educational files, information about their entire lives, are within reach of the prosecuting officers. Safety officers may be privy to student records, enhancing bias and allowing for deep and invasive prosecutorial discovery. Officers who work in the school have close and continued contact with potential witnesses, such as teachers, administrators, or other students. Police may gather unfavorable statements from students under investigation and demand the surrender of physical evidence. They also have continued access to accused students and may surveil students with pending cases. Their privilege as someone in between a school staff member and street-level police officers works to the advantage of the prosecution.

The roles of school police involve conflicting goals between school staff charged with protecting students and, on the other side, agents of the state, witnesses, and investigators for prosecutions in criminal courts. Students in school are prosecuted for crimes that would be unlikely to draw the attention of law enforcement outside of school. As a result of prosecutions, they may be excluded from schools, prosecuted with the assistance of staff at their schools, tagged with stigmatizing labels, and face lifelong consequences.¹¹⁸ All of these factors permanently disrupt the sense of safety and trust students need to learn and succeed.¹¹⁹

116. Terri Langford, *After Reforms, Student “Tickets” Decline*, TEX. TRIB. (June 3, 2014, 6:00 AM), <https://www.texastribune.org/2014/06/03/texas-students-see-fewer-tickets-issued/> [https://perma.cc/Z2EY-XLR4] (outlining a police chief’s reform description, which required procedural additions before referral, as a problem, because if a student pushes another, and they fight, it’s a Class C misdemeanor).

117. See Joint “Dear Colleague” Letter, U.S. Dep’t of Educ. & U.S. Dep’t of Just. (Jan. 8, 2014) (formally rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> [https://perma.cc/HZE2-SQR5]. Further, the letter stated:

[S]tudents served by IDEA represent 12% of students in the country, they make up 19% of students suspended in school, 20% of students receiving out-of-school suspension once, 25% of students receiving multiple out-of-school suspensions, 19% of students expelled, 23% of students referred to law enforcement, and 23% of students receiving a school-related arrest.”

Id.

118. Students who are charged often face harsher school discipline as well. See *Kenny v. Wilson*, 885 F.3d 280, 284, 286, 289 (4th Cir. 2018).

119. Jason Amos, *A Real Crime: The Human Cost of the School-to-Prison Pipeline*, *High School*

C. School Order Misdemeanors

Despite violent, serious crimes serving as the justification for police officers in schools, it is not accusations of these sorts that make up the crux of student referrals to the criminal legal system.¹²⁰ The majority of children charged with crimes at underresourced schools are not accused of dangerous offenses.¹²¹ Students are charged with crimes related to standard school discipline and low-level misdemeanors.¹²² The increased use of order-related criminal statutes in school discipline has drastically increased the number of students who are subjected to the criminal legal system.

Misdemeanors related to school order can be divided into two categories. First are school order crimes—also known as “school disturbance laws”—which have been specifically crafted for students.¹²³ In 2015, “school disturbance” laws were the number one reason children in South Carolina entered the criminal justice system.¹²⁴ As of 2016, twenty-two states had penal code provisions specifically targeting school order.¹²⁵ An example of this is the charge of “disruption of school” or “disruption of class.”¹²⁶ Reports indicate that these charges are levied against 10,000 students a year in the U.S.¹²⁷ Order-related misdemeanor charges often present First Amendment freedom of speech and freedom of assembly concerns.¹²⁸ The school disturbance laws may also be unconstitutionally vague, failing to make clear which order-related behavior is or is not a crime.¹²⁹

The second category of order-related crimes are not legislated with schools specifically in mind. Students are commonly charged with order-related misdemeanors applicable to the public. Regularly, students face misdemeanor charges for disturbances of the peace.¹³⁰ Examples of these offenses include disorderly conduct, simple assault, and petit larceny.¹³¹

Soup, ALL FOR EXCELLENT EDUC. (May 7, 2018, 2:36 PM), <https://all4ed.org/a-real-crime-the-human-cost-of-the-school-to-prison-pipeline/> [<https://perma.cc/8XZN-Y3QP>]; Monique Tate, *Investigating How Families Experience School Criminalization* (Aug. 2016) (Ph.D. dissertation, Walden University) (on file with Walden Dissertations and Doctoral Studies Collection).

120. Henning, *supra* note 1, at 441.

121. WHITAKER ET AL., *supra* note 69.

122. *Id.*

123. Ripley, *supra* note 2.

124. *Id.*

125. Susan Ferriss, *An Epidemic of Questionable Arrests by School Police*, CTR. FOR PUBLIC INTEGRITY (Feb. 5, 2016, 3:02 PM), <https://www.publicintegrity.org/2015/12/10/18944/epidemic-questionable-arrests-school-police> [<https://perma.cc/KY5U-D5LL>].

126. WHITAKER ET AL., *supra* note 69.

127. Ripley, *supra* note 2.

128. *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018).

129. *Id.* at 291.

130. Christine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 879 (2012).

131. See Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CAL. L. REV. 1637, 1642 (2021) (arguing disorderly conduct is an order-maintenance offense historically employed to preserve

Often these charges appear more severe than or as a distortion of the underlying allegations. Objecting to a school officer's treatment of another student or filming an encounter with a school officer may result in a disorderly conduct charge.¹³² Picking up a 65-cent milk carton, for instance, may result in a theft allegation and juvenile court summons.¹³³ Throwing skittles yields an assault charge.¹³⁴ These are the infractions that, in previous generations, would have been handled internally by administrators. Instead, due to the presence of officers in schools and reliance on administrators on police, children are charged with crimes.

More subjective, order-related misdemeanors involve the most police discretion and show the most disparate impacts.¹³⁵ Much scholarship has centered on the disproportionate impact of discipline on different demographics of students. In fact, empirical studies have shown that racial disparities in reporting students to law enforcement are at their highest for subjective, rather than mandatory, reporting.¹³⁶ Children of color are met with responses at the higher end of the discipline spectrum, including criminal charges.¹³⁷ LGBTQ youth also disproportionately receive severe disciplinary consequences.¹³⁸ Referrals to law enforcement have been aligned with income.¹³⁹ As a study of IDEA regulations indicates, despite federal ADA requirements, students with disabilities are most likely to face serious school discipline.¹⁴⁰ Criminal legal interventions in schools replicate the vulnerabilities to criminal law enforcement that exist on the street.

Often, students prosecuted in schools are less likely to realize that a real criminal charge is being initiated, investigated, or pursued. The students may be arrested at school, or, more commonly, issued tickets ordering their

racist social hierarchies).

132. Henning, *supra* note 1, at 444.

133. See Kirby Farineau, *Bill Seeks to Disrupt 'School to Prison Pipeline'*, DELMARVA NOW (Jan. 17, 2018, 12:28 PM), <https://www.delmarvanow.com/story/news/2018/01/17/bills-see-disrupt-school-prison-pipeline/1038971001/> [<https://perma.cc/A83J-4TAU>]; WHITAKER ET AL., *supra* note 69.

134. Desire Thompson, *Black 8th Grader Allegedly Detained for 6 Days for Throwing Skittles on School Bus*, NEWSONE (May 13, 2015), <https://newsone.com/3114175/black-8th-grader-detained-for-throwing-skittles-on-school-bus/> [<https://perma.cc/59XZ-4ZWN>].

135. Russell J. Skiba et al., *Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85, 95–101 (2011); Henning, *supra* note 1, at 439.

136. Heise & Nance, *supra* note 91, at 730–31.

137. Further, over 50% of students who were involved in school-related arrests or referred to law enforcement are Hispanic or African-American. *Id.*

138. WHITAKER ET AL., *supra* note 69, at 47–48; Jason P. Nance & Sarah E. Redfield, Opinion, *ABA Task Force Wants to Help Disrupt School-to-Prison Pipeline*, JUV. JUST. INFO. EXCH. (Feb. 12, 2016), <https://jjie.org/2016/02/12/aba-task-force-wants-to-help-disrupt-school-to-prison-pipeline/> [<https://perma.cc/MPJ5-MDHS>].

139. LINNEA NELSON, VICTOR LEUNG & JESSICA COBB, ACLU CAL., *THE RIGHT TO REMAIN A STUDENT* 3 (2016), https://www.aclunc.org/docs/20161019-the_right_to_remain_a_student-aclu_california_0.pdf [<https://perma.cc/X4WQ-T4RX>].

140. WHITAKER ET AL., *supra* note 69, at 5.

appearance in court to face charges.¹⁴¹ Their daily proximity to law enforcement results in the collection of evidence against them. The power dynamics that exist within the school easily transfer to the criminal prosecution. Police and administrators—members of the prosecution team—are the very authorities that students have learned to obey. In fact, students are legally obligated to submit to their authority every day of the week.¹⁴² The inversion of trust relationship in a prosecution against a student leads not only to convictions, but also internalized psychological harm.

To understand the danger of criminal legal interventions into school order, we can use the example of Student *A*.¹⁴³ *A*, a high school student, was accused of snapping another student in the back with her pencil. The teacher sends *A* out of the classroom to the administrator. If there is a police officer present in the school, the administrator may opt to directly refer *A* to the officer to manage the infraction.¹⁴⁴ That delegation of discipline then exposes *A* to criminal law interventions. The presence of police in school managing discipline means administrators no longer have to deeply consider referring these infractions to outside law enforcement.¹⁴⁵ Where, prior to zero tolerance policies and police in schools, an infraction like *A*'s would warrant a warning or school-based discipline, she could be charged with a crime.

The school police officer might be biased if they are familiar with *A* as a student known for emotional outbursts, disruptions, mischievousness, or poor grades. School police are affected by biases based on a student's identity. Those internal judgements could affect the police officer's discretion in deciding to charge *A* with a crime. In a jurisdiction with school-specific order offenses, *A* might have faced a "disruption of class" charge. Alternatively, *A* might have faced a charge for disorderly conduct or a misdemeanor assault. The investigating officer has daily access to *A*, without an attorney or parent present. As a school safety officer, they may call *A* into their office and ask questions that they mold into a damning statement.¹⁴⁶ School police are a daily authoritative presence for other students, including the students they call upon as witnesses. They have

141. Fowler et al., *supra* note 3; see Dennis, *supra* note 3, at 11.

142. *J.D.B. v. North Carolina*, 564 U.S. 261, 264–65 (2011).

143. This composite is based on individual we have worked with and represented in the Law School Clinic.

144. School based responses may include additional work time (detention), mediation, self-reflection, family conference, counseling, or restorative justice practices. Kate Cagle, *Educators Attempt to Halt "School to Prison Pipeline,"* SPECTRUM NEWS (Aug. 19, 2019, 4:18 PM), <https://spectrumnews1.com/ca/la-west/news/2019/08/19/educators-attempt-to-halt--school-to-prison-pipeline-> [<https://perma.cc/4RPN-FQHN>].

145. See generally Briseño, *supra* note 18.

146. E.g., *J.D.B.*, 546 U.S. at 261.

access to student performance files. As *A* faces charges, the most damning evidence against her is potentially collected in her school.¹⁴⁷

D. Students in Criminal Courts

Charging a student with a crime can have an immediate traumatizing impact on a student's life. School police, like all police, are not prohibited by the federal constitution from arresting a student in school, even if the ultimate charge does not include jail as a penalty.¹⁴⁸ Police officers have discretion to arrest a student in school for a school order misdemeanor.¹⁴⁹ Studies have demonstrated that police use that ability to a disproportionate disadvantage of Black and Latinx students.

If arrested, the student will be detained by an officer, restricting their ability to move freely. At this moment, the student loses control of what will happen to them next. The student may not have the chance to make a phone call home to update guardians or ensure someone from home is monitoring their safety.¹⁵⁰ The officer will search the student's clothing. They may have already done a search of the student's lockers and belongings.¹⁵¹

That student will then face a long walk, handcuffed, through the hallways of the school, past classroom windows, and out to a patrol car.¹⁵² The student will likely be seen by their teachers, administrators, and other students—all people whose input and opinion are likely to hold an outsized impact on the student's confidence and comfort in school.¹⁵³ After leaving school, a student may be completely isolated, cut off from family and the teachers and administrators who have been entrusted with their care.¹⁵⁴ The student who is arrested will be transported to a police station or detention center.¹⁵⁵ Locked in a cell at a precinct or center, the student will have little sense of what process will follow.¹⁵⁶ The student may be held with other people accused of crimes, including, depending on the student's age, more mature adults.¹⁵⁷ Jails may flag Immigrations and Customs Enforcement if the

147. See Joint "Dear Colleague" Letter, *supra* note 117 (recommending that student files remain private).

148. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

149. *Id.*

150. See Briseño, *supra* note 18.

151. Fourth Amendment protections are significantly reduced for students in school. Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1067–70 (2003).

152. See Ripley, *supra* note 2.

153. *See id.*

154. See Briseño, *supra* note 18.

155. *Id.*

156. *Id.*

157. Some students are not minors, as some are over eighteen.

student is not a U.S. citizen, potentially leading to proceedings as severe as deportation and removal.¹⁵⁸

As with any criminal charge, the student could be held until a judge or magistrate decides to release or lock up the student while their case is litigated.¹⁵⁹ Many students will not be brought before the judge for some time, resulting in overnight stays imprisoned in holding cells.¹⁶⁰ Isolated, without the opportunity to speak to family, or, in many instances, an attorney, the student is likely to be intimidated by their appearance before a judge.¹⁶¹ If the judge decides to hold a student unless a bail or bond is set, the student may remain imprisoned in jail as the case is adjudicated.¹⁶² This makes it a coercive environment for students to take a guilty plea their first time in front of the judge.

Police officers may issue citations in lieu of making arrests as an initiation to criminal charges. For a student lucky enough to avoid arrest, the first time in front of a judge will be the date set for a criminal court appearance on the citation. Citations, also known as summons or tickets, are deceptive. Tickets to appear in court on low-level charges appear to be fairly innocuous, no more serious than a traffic offense, which originate in the same courtrooms. Students can easily misgauge the significance of the ticket. Because the charge appears in the form of a ticket, the student may not recognize what is at risk should they not attend court. A student who remembers the date and wants to make a court appearance will still be dependent on adults to get there: guardians to help them get to court and expressed permission of school authorities to miss school for court.¹⁶³ For those who miss, courts will issue warrants. These warrants emerging from citations can become additional reasons for an arrest. In some instances, students have been arrested in school, for missing court dates . . . because they were in school.

Young litigants are most in need of counsel and assistance in navigating court. The misdemeanor legal system, in particular, often lacks protections for people charged with crime. Misdemeanor litigants are commonly denied the right to counsel and are encouraged to quickly resolve charges, yet the charges still result in detriments to students charged with order-related

158. Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes & Annie Lai, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1721–33 (2018).

159. See, e.g., *Ending the School-to-Prison Pipeline*, *supra* note 104.

160. *Id.* at 23.

161. See Briseño, *supra* note 18; M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 501–05 (2021).

162. NAT'L JUV. DEF. CTR., A RIGHT TO LIBERTY: REFORMING JUVENILE MONEY BAIL 7 (2019), https://njdc.info/wp-content/uploads/2019/NJDC_Right_to_Liberty.pdf [<https://perma.cc/K8WV-7JPD>].

163. Many public defenders can attest to drafting excuse letters for clients who were high school students to take back to school after criminal court.

infractions. Students of color are even more likely to be treated as adults or not have benefits from concession related to their young age.¹⁶⁴ The consequences may be acute and immediate, such as detention on bail, or appear later in life, such as dealing with debilitating criminal records.

Depending on the jurisdiction, students may be charged in adult or juvenile courts. Jurisdictions differ in how children are adjudicated in adult court with criminal convictions. Ultimately, the jurisdiction's age of adult misdemeanor liability determines where accusations against a child will be heard. The age for adult liability for misdemeanor offenses varies across states. Many states permit children to be prosecuted in courts of local jurisdiction, such as municipal and justice courts.¹⁶⁵ In nearly every state in the country, the age for adult liability is eighteen or younger.¹⁶⁶ That means that almost everywhere, high school students older than eighteen will automatically be processed in an adult criminal legal system for order-related crimes.

The implications of adjudication in juvenile court are not necessarily better. The laws that bring a child into the juvenile courts are more expansive and include many family law or juvenile codes as well as penal code provisions. Courts are not bound by the same procedural protections as adult criminal courts. It is also true that many of the adverse consequences students face in adult court proceedings, such as warrants, arrests, and records, may be present in juvenile court proceedings.¹⁶⁷ Often, juvenile courts aggrandize charges that may appear minor in adult criminal courts.¹⁶⁸ Juvenile court determinations that a child has engaged in a crime result in delinquency findings rather than convictions. The determinations may not be formal convictions, but can have similar adverse consequences. These determinations should also be considered for their harmful impacts.

In adult misdemeanor court, a plea or finding of guilt will be deemed a conviction. A conviction on a misdemeanor charge can result in a permanent criminal record. Despite the lifelong consequences of a conviction, defending oneself against misdemeanor charge in court is difficult. This

164. See Henning, *supra* note 1, at 416, 425–26.

165. The training materials for municipal court judges in Texas includes a special subsection entitled “Passing the Paddle.” This section covers adjudication of youth referred by school to the local criminal courts for low-level misdemeanors, most commonly school disciplinary infractions like disorderly conduct, disruption of class, and assaults based on touch of another. The “paddle” analogy signals the misalignment but is insufficient in describing the insidious impact on criminal court referrals for youth. See NOLAN ANDERSON, RANDY KREIDER & KRISTEN SCHNELL, *INJUSTICE IN THE LOWER COURTS: HOW MUNICIPAL COURTS ROB AMERICA’S YOUTH* (2019); Cathy Riedel, *Civil Jurisdiction in the Municipal Court: Evolving or Mutating?*, 21 J. TEX. MUN. CTS. 1 (2012).

166. Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. ST. LEGISLATURES (Apr. 8, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> [<https://perma.cc/VH5J-DSMW>].

167. See Henning, *supra* note 1, at 439.

168. *Id.* at 444.

difficulty magnifies the impact on students from financially limited backgrounds. Most court-involved children do not have lawyers.¹⁶⁹ Without money to hire an attorney, many students will be left in court alone to defend themselves against state or local charges.¹⁷⁰ The mother of a child in Texas, accused of pushing another student during a mutual, brief confrontation and charged with assault, wrote to the state representatives: “We go to court Thursday, March 16, 2006 at which time we will plead not guilty. We cannot afford a lawyer and will pursue this as best we can.”¹⁷¹

State and local misdemeanor courts are also the courts where it’s most likely that young people will have no attorney to assist them. Many students facing order-related misdemeanor charges are not assigned attorneys. Often states view their obligation to provide counsel as limited to people facing or sentenced to jail time—which is not necessarily the case for many order-related misdemeanors.¹⁷² Even where counsel is required by law, reports show in many states and localities, judges do not provide attorneys to defendants in misdemeanor cases. A related problem is that in many places, public defenders, as well as private attorneys, are expected to maintain high caseloads of misdemeanor cases, leaving them limited time to invest scarce resources in clients facing less serious charges.¹⁷³

Criminal court is very difficult to successfully navigate alone. Many people without attorneys bend to the demands of the prosecution or the implied pressures of the court.¹⁷⁴ Younger litigants are more likely to be vulnerable to these pressures and less likely to fully understand the implications of decisions before the court.¹⁷⁵ They may experience pressure to resolve the case quickly, rather than return to fight charges at future court dates.¹⁷⁶ School disturbance laws may present constitutional issues, but arguing the unconstitutionality of charges requires a party to submit pretrial

169. Dennis, *supra* note 3, at 16.

170. This does not mean that the consequences in this Article do not apply to students who are able to hire an attorney for their case. Some damage is done though the criminal legal intervention or initiation of charges. *See, e.g.*, Dennis, *supra* note 3, at 23–25.

171. FRED HINK, SUPPLEMENT TO TESTIMONY BEFORE THE TEXAS SENATE COMMITTEE ON EDUCATION 8 (2006), <https://senate.texas.gov/cmtes/79/c530/092006.c530.HinkF.pdf> [<https://perma.cc/H727-XU3K>].

172. *See* *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (Sixth Amendment violation occurs where person imprisoned after they were not provided counsel at trial); TEX. APPLESEED, PAY OR STAY: THE HIGH COST OF JAILING TEXANS FOR FINES AND FEES 2 (2017), https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf [<https://perma.cc/8FDX-WMCW>].

173. Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 750 (2017).

174. Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 183 (2018).

175. *Id.*

176. John D. King, *The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence*, 54 GA. L. REV. 927, 944–945 (2020).

motions before the court.¹⁷⁷ The pro se student would have to request all discoverable evidence from the prosecutor. Going all the way to trial pro se is even more daunting, requiring knowledge of obscure rules of evidence and procedure that would not be evident to nonlitigators.¹⁷⁸ A pro se litigant at trial would have to be prepared to select a jury, file motions *in limine*, provide testimony, appropriately call witnesses, and cross-examine witnesses, including police officers.¹⁷⁹ They would have to know how to appropriately give an opening and closing argument.¹⁸⁰ They would need to preserve issues for appeal.¹⁸¹ It is outrageous that any pro se nonlegal professional can carry this workload. It is unthinkable that a student might be required to do this in order to obtain an acquittal on charges.

Going to trial is not the only path that requires professional assistance. Taking a plea or making a decision on whether to go to trial requires some information on how the conviction might affect the student.¹⁸² The consequences that follow an adjudication are hard to absorb. Legal jargon is not easy to understand. Some active judges may go out of their way to use more accessible terminology for young litigants, but even that has its limitations.¹⁸³ Criminal court can be an intimidating atmosphere; its language, power structures, and symbolism can make it hard to process.¹⁸⁴ Students may be unaware of obligations or underestimate the consequences of failing to meet the court orders.¹⁸⁵ Disproportionate numbers of students with disabilities are subjected to this process, which means that some students will have significant communication and comprehension barriers to comprehending the system and their position in the process.¹⁸⁶ A host of factors that may already complicate life for students can be critical in how students will manage court orders and the consequences of criminal court processing.

A student may be unaware that a plea of guilty will create a criminal record. They have little context for understanding the obstacles created by

177. *Kenny v. Wilson*, 885 F.3d 280, 284 (4th Cir. 2018).

178. *Roberts*, *supra* note 174, at 204; Amber Baylor, *Design Justice and Municipal Criminal Regulation*, 51 N.M. L. REV. 163, 166–170 (2021).

179. *Baylor*, *supra* note 178.

180. *Id.*

181. *Roberts*, *supra* note 174, at 204–06.

182. *Id.* at 204–06.

183. Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 670 (2018).

184. *See, e.g.*, RAPHAEL POPE-SUSSMAN, CTR. FOR CT. INNOVATION, IMPROVING COURTHOUSE SIGNAGE: PROCEDURAL JUSTICE THROUGH DESIGN 2–3 (2015).

185. *Fowler et al.*, *supra* note 3 (“Youth charged with Class C misdemeanors are sometimes instructed to understand legal instructions and defend themselves without any assistance.”).

186. *See id.*; *see generally* NAT’L COUNCIL ON DISABILITY, BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES 11 (2015), <https://ncd.gov/publications/2015/06182015> [<https://perma.cc/7NMQ-6R3W>] (students with disabilities more likely to be subjected to school arrest).

a record. The consequences may stretch beyond criminal court, into immigration proceedings.¹⁸⁷ The difficulties may present as soon as the student applies for an after-school job or to college. The record may even affect the family's current housing.¹⁸⁸ Fines and fees will also keep the student within the criminal court system until they have paid or completed alternative terms.¹⁸⁹ If a student does not pay, the debt can affect the student's access to credit and a driver's license; it can also result in warrants and possibly lead to additional charges for failure to appear or pay.¹⁹⁰ The complexity of these consequences throws into suspicion an uncounseled student's guilty plea.

E. Reforms Reducing the Criminalization of Students

Reformers working to change today's school systems understand that criminalization results in injuries to students. As a result of decades of work by organizers, federal agencies, and school districts, legislative bodies and courts better understand the implications of criminalizing students. Many jurisdictions have started to reform their discipline policies to address the "school-to-prison-pipeline." Some jurisdictions are examining police in schools, examining in-school arrests, and outsourcing discipline to the criminal legal system. Major reforms have taken place at state and citywide levels to decriminalize, legalize, and critique misdemeanor criminal regulation.¹⁹¹ Legislators and courts are increasingly attentive to the harms of criminal legal interventions at a young age.¹⁹² Many are interested in reforms that reduce the number of youth in the adult legal system, offer diversion from criminal court, and address consequences of youthful convictions.¹⁹³

These reforms are not a panacea—but rather demonstrate the intersections of systems involved in the criminalization of students. This section seeks to demonstrate how increasing awareness of related harms have led to reforms in these systems.

187. Lasch et al., *supra* note 158, at 1724–27 (describing mechanisms for state criminal law enforcement and federal immigration enforcement collaborations which include identification and detention of non-U.S. citizens in local jails).

188. See generally Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019).

189. Fowler et al., *supra* note 3.

190. *Id.*; JESSICA FEIERMAN, NAOMI GOLDSTEIN, EMILY HANEY-CARON & JAYMES FAIRFAX COLUMBO, JUV. L. CTR., DEBTORS' PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 23–24 (2016), <https://www.courts.ca.gov/documents/BTB24-2A-2.pdf> [<https://perma.cc/SZ5D-MMAW>].

191. See generally Ahrens, *supra* note 28.

192. See *Reform Trends: Community-Based Alternatives*, JUV. JUST. INFO. EXCH., <https://jjie.org/hub/community-based-alternatives/reform-trends/> [<https://perma.cc/UWD8-C3AP>].

193. *Id.*

1. School Discipline Reform

Huge disparities in school discipline reform exist throughout the country. In some states, school order crimes still exist in the codes.¹⁹⁴ Many other states still prosecute students under typical order-related criminal codes for charges like disorderly conduct.¹⁹⁵ Many localities have reconsidered criminal legal interventions in school discipline.¹⁹⁶ The changes take many forms, including reducing police presence and enhancing mental health resources and conflict resolution programs.¹⁹⁷ Important to this Article are changes that eliminated or modified existing criminal codes and the addition of procedural protections before charging students. These two types of reforms are reflective of changing norms around order-crimes and criminal legal referrals.

Decades of advocacy work on zero tolerance discipline provided the evidence of impact needed to push reform.¹⁹⁸ A number of policy centers, civil rights organizations, teacher organizations, and foundations around the U.S. have advocated for change to these policies. Policy centers, including Applesseed Network and Advancement Project, have emphasized the costs and trauma of criminal law involvement as a schoolchild. Civil rights organizations, such as NAACP-LDF and ACLU, spelled out disparities in application.¹⁹⁹ American Federation of Teachers has issued statements on the interference of criminal law with educational and safety goals.²⁰⁰ Organizations comprised of families and students affected by the zero tolerance policies, such as the Dignity in Schools Campaign, compiled advocacy guides and participatory research for people to use locally.²⁰¹ The groups and affected people made the case for school discipline reform.

In 2014, the Obama administration issued guidance on school discipline. The guidance explicitly addressed, among other topics, charging students in

194. Briseño, *supra* note 18.

195. *Id.*

196. See, e.g., *Florida Punctures 'School-to-Prison Pipeline,'* CHRISTIAN SCI. MONITOR (Nov. 5, 2013), <https://www.csmonitor.com/USA/Latest-News-Wires/2013/1105/Florida-punctures-school-to-prison-pipeline.-A-national-model> [<https://perma.cc/3P3C-HWLR>].

197. WHITAKER ET AL., *supra* note 69.

198. *Id.* at 8.

199. *LDF Submits Testimony for U.S. Commission on Civil Rights Hearing on the School to Prison Pipeline*, NAACP LDF (Dec. 8, 2017), <https://www.naacpldf.org/press-release/ldf-submits-testimony-for-u-s-commission-on-civil-rights-hearing-on-the-school-to-prison-pipeline/> [<https://perma.cc/86LN-NUGT>].

200. See, e.g., *Partners and Allies in School Discipline Reform*, AFT, <https://www.aft.org/position/school-discipline/partners-and-allies-school-discipline-reform> [<https://perma.cc/Q5YW-CXEB>].

201. See DIGNITY IN SCHS. CAMPAIGN, *A MODEL CODE ON EDUCATION AND DIGNITY* (2019), https://dignityinschools.org/toolkit_resources/full-version-of-model-code-on-education-and-dignity/?toolkits=model-code [<https://perma.cc/CF9X-QHBS>].

school with order-related misdemeanors.²⁰² Attorney General Eric Holder summarized the administration's position that "routine school discipline infraction[s] should land a student in a principal's office—not in a police precinct."²⁰³ The guidance warned local school districts that they could be accountable for impacts of needless referrals of disciplinary matters to school police.²⁰⁴

Investigations demonstrated that zero tolerance policies, from suspension and alternative school placement to criminal law referrals, disproportionately affected minority students.²⁰⁵ Longitudinal studies showed that zero tolerance policies have devastating lifelong impacts. The 2014 DOE guidance drew from work across sectors of stakeholders in education.²⁰⁶ Among their key findings, federal agencies found that schools' reliance on police rather than mental health service providers expanded the number of children in the criminal legal system. As a legislator swayed by these studies noted, misdemeanor charges "result in denied employment, college applications and scholarships."

Reforms have had a number of impacts. Recommended reforms related to criminalization of students include: training school staff on appropriate uses of law enforcement referrals, reserving referrals for "major threats," and maintaining privacy for student educational records and law enforcement access to them.²⁰⁷ Some states have removed or reduced police presence in schools.²⁰⁸ Importantly, localities have also modified the criminal code.²⁰⁹ Local reforms also include procedural protections, like implementing procedural requirements before students can be referred to criminal law agencies. For instance, in Clayton County, Georgia, an agreement among stakeholders outlined a mandatory process, starting with

202. Joint "Dear Colleague" Letter, *supra* note 117. (The guidance discusses schools' obligations to avoid and *redress* racial discrimination, though it focuses on redress through prospective reforms and Title IV and Title VI based claims).

203. Holder, *supra* note 3.

204. The policies under scrutiny allowed for children to be charged with misdemeanor crimes for offenses. *Id.*

Schools cannot divest themselves of responsibility for the nondiscriminatory administration of school safety measures and student discipline by relying on school resource officers, school district police officers, contract or private security companies, security guards or other contractors, or law enforcement personnel. To the contrary, the Departments may hold schools accountable for discriminatory actions taken by such parties.

Joint "Dear Colleague" Letter, *supra* note 117.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Ripley, *supra* note 2; see, e.g., Haley Holik & Deborah Fowler, Opinion, *Kids No Longer Get Arrested for Truancy and Guess What? They Still Go to Class*, DALL. MORNING NEWS (Mar. 23, 2017), <https://www.dallasnews.com/opinion/commentary/2017/03/23/kids-no-longer-get-arrested-for-truancy-and-guess-what-they-still-go-to-class/> [<https://perma.cc/QF2R-3CZK>].

a warning, then mediation or conflict resolution before a criminal referral is made.²¹⁰ The reforms have resulted in greater oversight of referral decisions and dramatically fewer children in court for school fights.²¹¹

Federal oversight of discipline reform stalled during the DOE's efforts to overturn the Obama-era guidance under Trump's Secretary of Education, Betsy DeVos. A 2019 report on school safety issued by the DOE argued that students were not targeted for exclusionary discipline in racially biased ways.²¹² It offered instead an argument that certain students were most likely to receive harsher discipline because they were problem students, and had been referred to discipline in the past.²¹³ In contrast to the study conducted by the American Psychological Association, the DOE determined that more exclusionary policies resulted in better classrooms for students of color.²¹⁴

Despite this reversal of course by the federal agency, demand for reform has pushed beyond Obama-era guidance. Calls for decriminalizing school discipline have been renewed as a result of protests against police violence. St. Paul, Denver, Milwaukee, and Minneapolis are among cities that have voted to remove police from their schools.²¹⁵ Many more are reconsidering their school district's relationship with police. Among lead advocates for change are some teachers' unions that would like to see school police funding dedicated to other programming. They make the argument that they cannot ensure student health and safety in schools that rely on police or policing to manage discipline.²¹⁶

210. This resulted in an 87% decrease in students referred for fighting. JUST. POL'Y INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 29 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf [<https://perma.cc/NVM4-3KRJ>].

211. Another example is Texas, where procedural changes require the school to submit a complaint rather than issue a ticket. The complaint must include an offense report, witness statements, special education status, and graduated sanctions, where they apply. TEX. CODE CRIM. PROC. ANN. art. 42.15 (West 2013), <https://capitol.texas.gov/tlodocs/83R/billtext/html/SB00393F.htm> [<https://perma.cc/2M4U-23WD>].

212. FED. COMM'N ON SCH. SAFETY, FINAL REPORT (2018), <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf> [<https://perma.cc/ATU6-QYS6>].

213. *Id.*

214. *See id.* at 69.

215. *Race and Justice News: School Districts Defund the Police*, SENT'G PROJECT (July 9, 2020), <https://www.sentencingproject.org/news/race-justice-news-school-districts-defund-police/> [<https://perma.cc/G4C8-BY4Y>].

216. Sarah Jones, *Protests Are Galvanizing Demands to Take Cops Out of Schools*, N.Y. MAG. (June 12, 2020), <https://nymag.com/intelligencer/2020/06/the-movement-to-take-cops-out-of-school-is-picking-up-steam.html> [<https://perma.cc/XWP4-3JDL>]; *see also* FEIERMAN ET AL., *supra* note 190.

2. Misdemeanor Reform

Overcriminalization—the proliferation of criminal statutes and reliance on criminal law for public health and safety—has resulted in a multitude of social ills. The public, across the political spectrum, has identified overcriminalization as a contributor to mass incarceration, racial wealth disparities, reduced individual liberties, public health crises, legal consequences of convictions, and unnecessary police interventions.²¹⁷ While the era of the “War on drugs” and “broken windows policing” ramped up the number of criminal offenses, current reforms focus on decriminalization—or shrinking criminal legal interventions in society.²¹⁸

“Decriminalization,” as a reform effort, is occurring in many cities and states around the country.²¹⁹ As a narrow definition, decriminalization reduces the criminal legal impacts of specified crimes. “Decriminalization” in this sense refers to policies to de-penalize—or protect people from incarceration based on a charge.²²⁰ Decriminalization does not necessarily protect people from being charged with a crime or potential penalties like fees, fines, or community service. Prohibited acts are not made legal, but enforcement, prosecution, or the consequences of convictions are reduced.

Decriminalization certainly affects how students are processed for school order offenses. Where misdemeanors could subject students to jail time, decisions not to incarcerate violators potentially reduced the number of children in city jails. Some localities may encourage policies of citing people for order-related misdemeanors rather than making arrests.²²¹ Policies to issue citations rather than arrests reduces trauma for students. Decriminalization could reduce the psychological and financial toll of in-school arrests and pretrial detention.

“Legalization,” in contrast to “decriminalization,” involves removing laws from penal codes.²²² It makes specified acts no longer subject to criminal law interventions. Legalization, where it occurs, likely has a more noticeable impact on schools. Many of the order-related misdemeanor charges commonly applied to students already carry little, if any, jail time. Due to the relatively low-level severity of the charges, many schools already defer to citations. Legalization, rather than decriminalization, is necessary to reduce the number of students in court and with convictions.

217. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1058 (2015).

218. See Ferriss, *supra* note 125.

219. Nicole D. Porter, *Top Trends in State Criminal Justice Reform*, SENT’G PROJECT (Jan. 17, 2020), <https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2019/> [https://perma.cc/2TJD-LUDW].

220. BLACK YOUTH PROJECT, *supra* note 28.

221. See generally Natapoff, *supra* note 217, at 1058.

222. *Id.*

Low-level misdemeanors are the most likely laws considered for legalization or removal from the penal code.²²³ A few states have removed school order offenses, such as “disruption of class” from the penal code. Then there are legislatures that overhauled school discipline through modification of the criminal code.²²⁴ The modifications affected who qualified for prosecution. For instance, in Massachusetts one could no longer be charged with “Disruption of class” in one’s own home school.²²⁵ This dramatically reduced the number of students in criminal court, though it did not eliminate referral to court for low-level misdemeanor charges.²²⁶

States and cities have also implemented reforms related to minors. This is reflected in “raise the age” legislation, court-based diversion programs for students, and clearing records for minors. “Raise the age” laws focus on the age for adult criminal liability and increase the age required for processing.²²⁷ In the last four years, five states have passed laws to raise the age for processing in adult criminal court.²²⁸ Nationwide efforts to address the age of criminal liability potentially redirect students from adult criminal courts. For students who are still sent to adult criminal court, many courts operate optional youth courts and diversion programs tailored to students.²²⁹ These diversion courts are idealized as reducing potential consequences from prosecution as students.²³⁰ Finally, many states and localities have recently enacted provisions that allow people to clear from their records

223. See Natapoff, *supra* note 217, at 1057; see, e.g., Kathy A. Bolten, *Should Public Drunkenness Be a Crime?*, DES MOINES REG. (Feb. 12, 2016, 2:03 PM), <https://www.desmoinesregister.com/story/news/local/government/2016/02/11/public-intoxication-iowa-legislature/80205668/> [<https://perma.cc/EY7C-YR5E>]; Sydney Brownstone, *Seattle City Council Votes to Repeal Loitering Laws, But Groups Say Much More Is Needed, Project Homeless*, SEATTLE TIMES (June 23, 2020, 1:04 PM), <https://www.seattletimes.com/seattle-news/homeless/seattle-city-council-votes-to-repeal-loitering-laws-but-groups-say-much-more-is-needed/> [<https://perma.cc/V97T-8JDB>]. The Council for State Legislatures reports twenty-eight states have considered legalization of marijuana, repealing possession laws from the penal codes. See Michael Hartman, *Cannabis Overview: Legalization*, NAT’L CONF. STATE LEGISLATURES (July 6, 2021) <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/E3F7-788E>].

224. MASS. GEN. LAWS ch. 272, § 40.

225. Truancy charges could be brought against parents, but could no longer be applied to students. See JUST. POL’Y INST., *supra* note 210.

226. Fowler et al., *supra* note 3; ADVANCEMENT PROJECT, *supra* note 63.

227. See Julia Vitale, *A Look at Why Almost All States Have “Raise the Age” Laws*, INTERROGATING JUST. (July 22, 2022), <https://interrogatingjustice.org/https-interrogatingjustice-org-governmental-accountability/a-look-at-why-almost-all-states-have-raise-the-age-laws/> [<https://perma.cc/7BT2-UL7J>]; NAT’L JUV. JUST. NETWORK, POLICY PLATFORM: RAISE THE MINIMUM AGE FOR TRYING CHILDREN IN JUVENILE COURT (2020), https://www.njjn.org/uploads/digital-library/updated%20March%2021%20NJJN%20Policy%20Platform_RaiseTheMinimumAge.pdf [<https://perma.cc/H3DR-FFMG>]; see also, e.g., Off. for Just. Initiatives, *Raise the Age*, NYCOURTS.GOV, <https://www2.nycourts.gov/ip/oji/raisetheage.shtml> [<https://perma.cc/X983-HNJS>].

228. See Kate Dodds, *Why All States Should Embrace Vermont’s Raise the Age Initiative*, COAL. FOR JUV. JUST. (Jul. 2020), <https://www.juvjustice.org/blog/1174> [<https://perma.cc/GER6-W4EF>].

229. See Dennis, *supra* note 3, at 19–23.

230. *Id.*

charges they accrued as minors.²³¹

II. LASTING IMPLICATIONS OF HARM: THE RESULTS OF CRIMINALIZATION

Modern articulations of reparations theory focus less on debt owed from a particular harm and more on repairing within society the lasting harm of injustice.²³² Charles Ogletree describes lasting harm as the site where the injury has been most severe, where gaping tears still exist in the nation's social fabric.²³³

The harms from criminalization of students are not singular, but rather continuing and multiplicative. Former students around the country, many now adults, are still burdened by the warrants, convictions, and barriers wrought by decades of criminalization practices. Criminalized former students are affected by legal-technical barriers, but also psychological harms and the culmination of lost opportunities. This section distinguishes between types of harms so that they may be correlated to different forms of redress, retroactivity, and reparations.

Young people charged with misdemeanors as students are more likely to be deeply impacted by them. They are most likely to seek and need opportunities in the future that could be hampered by a misdemeanor record.²³⁴ People who were charged with crimes as students enter adulthood with a disadvantage.²³⁵ Among these, as adults they are more likely to have criminal justice contacts; to face higher severity of punishment if they do; to incur debt from fees and fines; and to experience warrants and limitations on accessing employment, licenses, and potentially even housing.²³⁶ I categorize the unaddressed results of criminalization of students in three categories: First, former students may face the trailing effects of open cases, warrants, debts, and other court obligations owed—I call this “lingering cases.” Second, there are consequences that follow convictions and create higher penalties in future incidental criminal law interactions, which I refer to as “stigma of a criminalization.” Finally, I consider “past losses.” In part, this contemplates losses from traumatic moments of criminalization and the inability to progress at a similar rate to noncriminalized peers. Past losses include the psychological and emotional impacts of criminalization on the

231. Anne Teigen, *Automatically Sealing or Expunging Juvenile Records*, NCSL (July 2016), <https://www.ncsl.org/research/civil-and-criminal-justice/automatically-sealing-or-expunging-juvenile-records.aspx> [<https://perma.cc/72W4-55CW>].

232. *E.g.*, Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13 (2004).

233. *Id.* at 26–29.

234. *See generally* Dennis, *supra* note 3, at 23–35.

235. *Id.*

236. *Id.*; *see* Henning, *supra* note 1, at 455–56.

person, loss of access to justice, and loss of access to institutions based on referrals from school to the criminal legal system.

A. *Lingering Cases*

Criminal charges brought against students do not automatically dissipate as soon as the child becomes an adult or graduates from school.²³⁷ The charges, warrants, or court obligations may linger on after the student has left school. It is common for students to receive summons for school charges and fail to show up to an initial or subsequent court date.²³⁸ They may move, switch schools, graduate, or be expelled all without following up with their school-based citation. Years later, upon applying for a driver's license, or a job, they find that the matter—though seemingly related to a problem in school—did not end as soon as they left school. The open case has resulted in a warrant. In some districts, students cannot have a warrant issued for their arrest—but may face some other civil barrier for open cases.²³⁹ Students who pled guilty to charges may be on the hook to complete hours of labor as community service.²⁴⁰ Alternatively, they may be burdened with outstanding fees and fines related to the case.²⁴¹

Formerly criminalized students face a number of difficulties in addressing these old cases. Punitive education policies result in greater distrust of authority, future criminal legal interactions, reduced income, and less vocational success—factors relevant to successful completion of old criminal court issues. Due to the barriers of criminalization, many former students will not have economic resources to hire legal counsel to resolve these matters. Similarly, former students may be hampered in their ability to address fees and fines that attach to criminal charges. People with mistrustful relationships with criminal justice may be fearful of re-engaging with courts. Finally, because they were charged as children—people may be unaware of the nature of the charges brought against them, the process, or the resulting court orders.

Students may face new compliance-related charges like “contempt of (court)” and “failure to appear.”²⁴² These are charges that states bring against individuals who have not appeared on an arranged court dates or who have not satisfied the court's orders, including orders related to fees, fines, or community service.²⁴³ Former students who have not resolved their

237. Fowler et al., *supra* note 3; see Dennis, *supra* note 3, at 5.

238. Fowler et al., *supra* note 3.

239. For instance, in Texas, a DIC 81 may drop, issuing a hold at the driving agency.

240. TEX. CODE CRIM. PROC. ANN. art. 45.045 (2021).

241. FEIERMAN ET AL., *supra* note 190, at 4.

242. Fowler et al., *supra* note 3.

243. *Id.*

cases may find, years down the line, that they have additional charges. Often, the fees and fines associated with additional cases continue to accrue if unresolved, adding up to a near-insurmountable mountain of debt.²⁴⁴ Those fees can also translate to warrants, difficulties with obtaining a license, obstacles for employment, or obtaining the credit.²⁴⁵

Even in jurisdictions that have undergone school discipline reform, old cases linger.²⁴⁶ Students with open cases are still expected to address charges that could not be brought against them today. Despite reforms, former students face consequences as though the crimes or disciplinary practices were still good policy. Hard-fought reforms may have prevented further expansion of criminal legal interventions in schools, but the “school-to prison pipeline” lives on in open criminal court cases against former students.

B. Stigma and Legal-Technical Harm of Criminalization

The purpose of designating a behavior as a crime is to apply the stigma of criminal law to the person who has committed the infraction. The deep impacts of stigma on criminalized former students has often been ignored. Technical legal barriers based on a past conviction create hurdles to attaining basic necessity for individual security: employment, housing, security in parenting rights, and citizenship. Former students who have experienced criminal legal interventions have criminal labels attached to them.²⁴⁷ As long as a record of a criminal legal intervention exists, consequences follow solely due to the stigma of conviction. It is well-documented the extensive ways criminal legal stigma create obstacles for people in attempting to attain stability and security.²⁴⁸

Where cities and states have implemented reforms, school order-related charges on records are a reflection of past norms and practices. An employer who reviews a former student’s criminal records has very little information about the problems of zero tolerance discipline. The employer is often left with an outsized impression of the offense charged, particularly because the name of the crime charged may be misaligned with the actual act. One might not expect, for instance, that the student charged with assault had been charged as a result of throwing skittles. Or, in another example, that a disorderly conduct conviction was a result of arguing with a school police officer. Former students face not just the stigma of a record created in

244. FEIERMAN ET AL., *supra* note 190, at 23.

245. *Id.*

246. MASS. GEN. LAWS ANN. ch. 272, § 40.

247. See Dennis, *supra* note 3, at 23–35; Henning, *supra* note 1, at 455–456.

248. See generally Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–94 (2010).

schools, but also a record that exaggerates the seriousness of the infraction.²⁴⁹

The consequences that follow a criminal legal intervention are significant. Even cursory interactions with the criminal legal system have lasting repercussions.²⁵⁰ “Criminal legal interventions” may include arrest or citation, which create a criminal record even without a resulting conviction. Dropped prosecutions, dismissals, and acquittals may all appear on a former student’s criminal record. Even students who have fought their cases and are acquitted maintain records.²⁵¹ Students who cannot be lawfully prosecuted, and have charges dropped, face the impacts of a record.²⁵² The reality is that many students are unable to fully litigate their charges and opt for a plea.²⁵³ Convictions for order-related misdemeanors are the most easily discoverable and impactful outcome of cases against students. An abundance of scholarship documents the ways that convictions, even conviction for misdemeanors, can create series of barriers for people.

Records are easily searchable on the internet; even when they are meant to be sealed, they often remain accessible on outdated websites. The use of records pervades multiple aspects of people’s lives, creating technical legal barriers. Scholars have outlined the string of potential consequences that can follow a conviction.²⁵⁴ The basic necessities for human security can be affected by a criminal conviction. A person with a record may have difficulty finding housing. In fact, a family’s current housing can be at risk if a child in the family is convicted of a crime.²⁵⁵ Employers are likely to enter job applicant names into a record search and may see any visible records. Even a misdemeanor record can make finding gainful employment difficult. A lack of employment can be detrimental to health in a society that requires employment to meet needs like quality health care.²⁵⁶ People with school order charges on their records may have to explain them adequately to pass licensing boards. Past criminal legal interactions are used against individuals in custody determinations.²⁵⁷ Banks and lenders may find people

249. Fowler et al., *supra* note 3.

250. Natapoff, *supra* note 217, at 1058.

251. Fowler et al., *supra* note 3.

252. *Id.*

253. *Id.*

254. Roberts, *supra* note 174, at 183; Joe, *supra* note 173, at 756–770; *see, e.g.*, Archer & Williams, *supra* note 98.

255. Roberts, *supra* note 174, at 205.

256. April D. Fernandes, *How Far up the River?: Criminal Justice Contact and Health Outcomes*, 7 SOC. CURRENTS 29, 33 (2020); Philip Young P. Hong, Dara Lewis & Sangmi Choi, *Employment Hope as an Empowerment Pathway to Self-Sufficiency Among Exoffenders*, 53 J. OFFENDER REHAB. 317, 14–15 (2014) (describing studies showing that people with convictions secure fewer benefits in employment).

257. Sarah Berson, *Beyond the Sentence—Understanding Collateral Consequences*, NAT’L INST.

ineligible for loans, including based on records.²⁵⁸ Even visiting your child in school may be affected by the existence of a record.²⁵⁹

Convictions also cause barriers for accessing higher education. Applications to college may be complicated by misdemeanor convictions. Convictions may affect whether a student is eligible for financial assistance. For first-generation students, loans are critical for post-secondary opportunities. Students may be barred from participating in sports, another potential pathway for many students to fund education.²⁶⁰

Crucially, the impact of a record can have devastating consequences on individual liberty. If a former student is accused with a crime later in life, the misdemeanor conviction from school can make them eligible for an enhancement to more severe charges or a more serious sentence. For students with immigration concerns, a misdemeanor allegation alone may result in denial of citizenship, removal, or deportation.

C. Past Losses

There are lasting losses to former students that are distinct from technical legal barriers and consequences. Arrest in school and criminal charges resulting in a criminal record, let alone a record that includes seemingly concerning charges, can create serious difficulties. The presentation of these obstacles as distinct barriers to manage can overlook the unified experience and damage to society broadly.

Connecting consequences of criminal legal interactions to deeper losses for a generation of former students is an important precursor to thinking about redress. Positioning harm as legal technical harms results in only legal technical solutions. For instance, if convictions bar someone from obtaining housing, a technical solution includes removing the conviction or prohibiting housing discrimination due to criminal convictions. Disparate legal technical solutions cannot fully encompass the harms to individuals and communities from accumulation of legal technical harms and other forms of loss.²⁶¹

JUST. (Feb. 26, 2013), <https://nij.ojp.gov/topics/articles/beyond-sentence-understanding-collateral-consequences#a-tool-for-practice-a-resource-for-research-and-policy> [<https://perma.cc/6TRC-HR5F>].

258. *Id.*

259. *Id.*

260. JASON LANGBERG, BARBARA FEDDERS & DREW KUKOROWSKI, ADVOCS. FOR CHILDREN'S SERVS., LAW ENFORCEMENT OFFICERS IN WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS (2011), <https://static.prisonpolicy.org/scans/SROreport.pdf> [<https://perma.cc/S4WK-4F54>].

261. See, e.g., Marissa Parra, "If We Don't Fight, Who Will?": Activists Demand Reparations for Ex-Cons Convicted of Marijuana Charges in Illinois, CBS CHI. (July 11, 2021, 5:56 PM), <https://chicago.cbslocal.com/2021/07/11/illinois-marijuana-convict-reparations/>; Omar G. Encarnación, *The U.S. Can't Move Forward on LGBTQ Rights Without Reparations*, TIME (June 26, 2021, 7:00 AM), <https://time.com/6076090/u-s-lgbtq-rights-reparations/> [<https://perma.cc/VT6C-YNNT>].

For decades students have been affected by policies criminalizing school discipline. Many communities have been disproportionately impacted by these policies. Non-technical forms of harm include: psychological losses, loss of access to advancement through educational institutions, loss of access to justice through legal institutions, and generational and community-wide loss.

1. Health Impacts

There is no singular, essentialized experience of criminalization as a student. However, many former students report long-term psychological harm from criminalization.²⁶² The impacts are related to the experience of criminalization as a student or the difficulties of living with barriers due to a criminal record. These types of impacts are harder to document, though social science studies have correlated criminalization and psychological harm.

Criminal legal interactions have a negative psychological impact on students.²⁶³ Studies demonstrate that low-level interactions can result in experiences of powerlessness and alienation, depression and anxiety, causing people to experience “an emotional tailspin.”²⁶⁴ Students are even more “developmentally susceptible” to the effects of criminalization.²⁶⁵ Criminalized students may face in-school arrest, use of force, referral to criminal courts, imprisonment, and judgement.²⁶⁶ Among the impacts that the APA reports for criminalized students are “alienation, anxiety, rejection, and breaking of healthy adult bonds.”²⁶⁷ These impacts could result in emotional impacts that can plague an individual for life.²⁶⁸

Social scientists and advocates have traced some of these impacts to what they call “identity threat.”²⁶⁹ According to these sociologists, identity threat

262. AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 856, 859; Tate, *supra* note 120, at 56.

263. Naomi F. Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 AM. SOCIO. REV. 719, 737 (2017).

264. *Id.* at 719–43; *see also* Fernandes, *supra* note 256, at 38.

265. AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 855.

266. *See generally* Dennis, *supra* note 3; AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62. *See also* Jennifer Carreon & John Kreager, TEX. CRIM. JUST. COAL., EQUIP OFFICERS WORKING IN SCHOOL SETTINGS WITH THE NECESSARY TRAINING TO PROPERLY INTERACT WITH ADOLESCENTS (2015), <https://www.texascjc.org/system/files/publications/TCJC%20Fact%20Sheet%20HB%202279%20%28Sch.ool%20Law%20Enforcement%20Training%29.pdf> [<https://perma.cc/PPN9-Y3NJ>] (describing instances of use of force against students in Texas).

267. AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 854.

268. Studies indicate adolescent brains are malleable rather than fixed, offering youth some degree of resilience. Instances of criminal legal interventions while in school may provide space to manage trauma. *See* Taylor-Thompson, *supra* note 87, at 180.

269. GEOFFREY L. COHEN, VALERIE PURDIE-VAUGHNS & JULIO GARCIA, STEREOTYPE THREAT 280–81 (Michael Inzlicht & Toni Schmader eds., 2012).

is the stress that emerges from the expectation that one will have to confront negative stereotypes.²⁷⁰ Labeling Black culture as dangerous, some education theorists note, is one manifestation of the systematic oppression of Black people and the working class.²⁷¹ Several former students have described stress from being identified as problem or at-risk students.²⁷² The theory of identity threat posits that in addition to stress, those under threat manifest a vigilance in experiences of the threat—a strong awareness of when and by whom the label may attach.²⁷³ Students in this situation may experience diminished trust and enhanced insecurity. For students experiencing labeling as a criminal through zero tolerance discipline, it can “depress cognitive functioning and emotional well-being,” “enhancing the sense of not belonging.”²⁷⁴ This may have a recursive impact on the negative label, in that students under threat may manifest the stress in a way that may be uncritically interpreted by the school as justifying the label. Another qualitative study of families of criminalized students found that the students’ families also expressed psychological distress from their children being routed to criminal courts from school.²⁷⁵ Among impacts, families described psychological distress, including stress, isolation, and fear.²⁷⁶

The stigma of record alone can result in pain and embarrassment. In addition to the harm from criminal justice interactions, there can be psychological consequences to experiencing barriers related to a criminal conviction. Problems criminal records present with finding a job, for example, have been linked to experiences of depression.²⁷⁷ Similarly, debt incurred by insurmountable court fees and fines has been recognized as a source of stress that causes physical as well as psychological manifestations.²⁷⁸ Living fearful of warrants, debt, and accessing major institutions in society result in a lowered quality of life.²⁷⁹ These are continuing forms of harm that former students experience, even after their case has resolved.

270. *Id.*

271. *Id.*

272. *Ending the School-to-Prison Pipeline*, *supra* note 104, at 95.

273. COHEN, PURDIE-VAUGHNS & GARCIA, *supra* note 269, at 280–81.

274. *Id.*

275. Tate, *supra* note 119, at 100, 154.

276. *Id.*

277. Amanda Sheely & Shawn M. Kneipp, *The Effects of Collateral Consequences of Criminal Involvement on Employment, Use of Temporary Assistance for Needy Families, and Health*, 55 *WOMEN HEALTH* 548, 550, 554 (Apr. 23, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5763494/> [<https://perma.cc/XAP8-6MXF>]; AMANDA WOODRUM & BEN STEIN, *POL’Y MATTERS OHIO*, HEALTH NOTE: DRUG SENTENCING REFORM 7–8, <https://www.policymattersohio.org/files/research/drugsentencinghealthnote.pdf> [<https://perma.cc/GK2A-HPZW>].

278. WOODRUM & STEIN, *supra* note 277.

279. TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 159, at [pincite].

Psychological harm is more than ephemeral. For example, emotional harm can impact economic and social advancement. A study of people with criminal records seeking employment found that barriers to employment affect emotional well-being.²⁸⁰ Importantly, those emotional effects can have recursive impacts, reducing likelihood of successfully securing work further.²⁸¹ For many, the harm of criminalization first levied by schools can impact the trajectory of their economic well-being in life.

Stress related to criminal law interactions also impacts the body. Public health researchers have shown that communities that experience invasive policing report lower self-esteem and higher levels of stress, contributing to the allosteric load on the body, which increases organ deterioration and causes disease.²⁸² In some instances, the types of stress caused by these interactions leads to life-threatening disease.²⁸³ A criminal conviction potentially further negatively affects health. In a recent study of young people with criminal justice interactions, many people self-reported negative physical health impacts of the conviction alone. This included low-level convictions that did not result in incarceration.²⁸⁴ Criminalization as a student may be a needless cause of strain on the body that impacts lifelong health.

The consistent barriers presented by a conviction may also have lasting negative psychological impacts on the lives of former students. The difficulties of living with a criminal record may result in physical ailments. Criminalized students may have been doubly traumatized: by betrayals of trust within school and consequences of the criminal legal system. This intersection of trauma is worth further examining in contemplating as a unique type of loss criminalized students experience.²⁸⁵

2. *Loss of Access to Advancement through Educational Systems*

280. Hong et al., *supra* note 256, at 15.

281. *Id.*

282. Abigail A. Sewell, Kevin A. Jefferson & Hedwig Lee, *Living Under Surveillance: Gender, Psychological Distress, and Stop-Question-and-Frisk Policing in New York City*, 159 SOC. SCI. & MED. 1, 9–10 (Apr. 22, 2016), <https://reader.elsevier.com/reader/sd/pii/S0277953616301988?token=AC23E169FB182F820E41CCF5CC8B74EA3802A1621F2A65ACED9E8575D5780B2BFA2A7DBB7942D545742022CE306B9637&originRegion=us-east-1&originCreation=20220109221044> [https://perma.cc/WYA8-7GLU] (describing feelings of “worthlessness” and psychological distress); Arline T. Geronimus, Margaret Hicken, Danya Keene & John Bound, “*Weathering*” and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States, 96 AM. J. PUB. HEALTH 826, 826 (2006); O. Kenrick Duru, Nina T. Harawa, Dulcie Kermah & Keith C. Norris, *Allostatic Load Burden and Racial Disparities in Mortality*, 104 J. NAT’L MED. ASS’N 89, 89 (2012).

283. Sewell et al., *supra* note 282, at 9–10; Geronimus et al., *supra* note 282, at 828–32.

284. Fernandes, *supra* note 256, at 29–45.

285. AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62 (describing dearth of longitudinal studies on this point); *see also* *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018).

According to the APA, the psychological impacts of criminalization as a student can result in lack of trust of authorities. This aversion to state agencies and institutions is rational, especially when authorities who students rely upon work as agents in charging and prosecuting them with crimes. School, for criminalized students, is an adversarial environment.²⁸⁶ Mistreatment can result in a phobic reaction towards school.²⁸⁷ While mistrust is warranted, the inability to access public institutions is a detriment. Criminalization deters former students from utilizing state agencies and institutions. Access and familiarity with public institutions is necessary for individual advancement. For students who no longer trust public institutions, criminalization, and the mistrust that follows, can create a barrier to developing free, autonomous, and sustainable lives.

At the outset, criminalization disrupts student relationships with educators.²⁸⁸ School teachers and administrators provide access to many forms of advancement. Students rely on educators for a host of inroads into post-secondary life. Some of this is the logistical support letter of recommendation or providing school records. School staff also have valuable information on college, training, funding, accommodations, and careers. Educators provide a window into functional adulthood. Students who experience criminalization are less likely to remain in school or seek out this information from educators who want to support them in life beyond school.²⁸⁹

Generally, discouraging people from relying on public institutions directly limits their life options. Former students may also be discouraged from seeking out public services that should be available to them. Disenfranchisement can create barriers to licensing and small business support, health services, or housing.²⁹⁰ Convictions may leave people uncertain as to whether public services and benefits will apply to them.²⁹¹ Reduced trust in these institutions and agencies correlates with a reduced likelihood of expecting, and at times, requesting adequate treatment. Relationships with public institutions affected by these criminalizing policies result in cognizable loss of opportunity for criminalized former

286. LANGBERG ET AL., *supra* note 260.

287. Adriana G. McEachern, Oyaziwo Aluede & Maureen C. Kenny, *Emotional Abuse in the Classroom: Implications and Interventions for Counselors*, 86 J. COUNSELING & DEV. 3, 5–6 (2008).

288. *Id.*

289. AM. PSYCH. ASS'N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 854, 858; Fowler et al., *supra* note 3.

290. Priya Baskaran, *Respect the Hustle: Necessity Entrepreneurship, Returning Citizens, and Social Enterprise Strategies*, 78 MD. L. REV. 323, 323–326, 336–341 (2019).

291. Marc Mauer & Virginia McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Recipients*, SENT'G PROJECT (Nov. 14, 2013) <https://www.sentencingproject.org/publications/a-lifetime-of-punishment-the-impact-of-the-felony-drug-ban-on-welfare-benefits/> [<https://perma.cc/9E3Y-ZA5V>].

students.

3. *Loss of Access to Justice*

Criminalized former students similarly are discouraged from relying on justice systems for protection, relief, or defense on their behalf. The experience of unjust criminalization as a student creates its own barriers. Litigants who lack trust in the criminal legal system are less likely to successfully navigate legal systems in life. This is the basis for many reforms focused on “procedural justice.”

Procedural justice reforms center on transparency in legal systems. Proponents of procedural justice correlate transparency, trust, increased compliance, and better outcomes for litigants. Studies of procedural justice reforms have demonstrated that litigants have enhanced trust in the institution and face less severe consequences as a result. Critics of procedural justice may point out that the actual trustworthiness of the court for students is at issue rather than misperceived danger. While the arguments of this Article are aligned with the latter view, procedural justice research demonstrates that lack of trust results in lack of access to justice.

The continued lack of access and trust means that existing avenues for overcoming barriers are less accessible to former students who do not engage with courts.²⁹² People who want to clear their criminal records, for instance, inevitably have to rely on a court for their remedy. Those who seek orders prohibiting discrimination based on a record, similarly, may have to make their case in courts. The losses experienced individually by former students diminish their ability to repair the harm of criminalization.

4. *Generational and Community-Wide Losses*

Former students are members of larger family and community organisms. The impact of criminalization in school is not limited to individual students. The barriers imposed on students and losses experienced from criminalization impact their networks. The loss of access to mistrusted institutions can result in reduced provision of services within a family or a community.

Individual limitations caused by criminalization filter into the community’s ability to advance and support itself in communal health.²⁹³

292. Tina L. Rasnow, *Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities*, 29 FORDHAM URB. L.J. 1281, 1281–82 (2002) (showing surveys demonstrating a lack of public confidence in the court system, and thus a lack of equal access).

293. “The harms of injustice are ‘stored not only in individual memories but also in family stories and group recollections’ over time.” Yamamoto et al., *supra* note 30, at 40 (quoting JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 16 (1994)).

Community may be defined in a number of ways, such as race or LGBT status, identities that lead to increased targeting. Community may be geographically conscribed, such as neighborhoods.²⁹⁴ Studies that describe targeting based on identity groups link criminalization to reduced graduation rates and economic advancement.²⁹⁵ Reports examining the impact of criminalization on students in a neighborhood indicate that the costs of zero tolerance and reliance on criminal legal interventions are higher than efforts at prevention.²⁹⁶ Public health reports indicate that neighborhood psychological health is also affected by overpolicing and may manifest as physiological illnesses. As scholars of communal harm acknowledge, “Psychological healing in this sense is far more complicated when it involves group members suffering collectively. Each individual member may experience injustice differently.”²⁹⁷

Only by addressing the needs of former students can we tackle the intergenerational effects of criminalizing school policies. Children in schools today are parented by people affected by the consequences of zero tolerance-era school policies. Current and future students are potentially affected by legacies of over-criminalization of their families. Children are also impacted by their relatives’ and neighbors’ lowered economic opportunities. Succeeding generations of students will be affected by the injuries to their forebears.²⁹⁸ The barriers to advancement caused by criminalization of former students also affects their advancement.

III. RETROACTIVE POLICIES TO ADDRESS CRIMINALIZATION

Retroactivity, in the legal sense, investigates how to apply our current legal norms to previously adjudicated matters. If today a person acting in the same way could no longer be found guilty of a crime, or garner the same punishment, one might argue that people convicted in the past for that crime should not be subject to punishment. Retroactivity is the means for removing the stigma of a conviction or lifting the punishment. In the investigation of criminalized former students, retroactivity is a way of applying the reformed standards that exist today to the old prosecutions and adjudications. This Article contemplates retroactive policies by officials to

294. Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1804 (1992).

295. See AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 855, 858; Fowler et al., *supra* note 3.

296. See AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 62, at 858 (citing to evidence that preventing criminal law involvement is the most cost-effective for states).

297. Yamamoto et al., *supra* note 30, at 44.

298. Yamamoto et al., *supra* note 30, at 44 (“Social psychology nevertheless recognizes the importance of group healing—succeeding generations often bear the unhealed wounds of their ancestors.”).

address criminal records and court costs—the means for undoing the work of the prosecution, the stigma of convictions, the punishment, and the consequences.

Retroactivity is a step beyond decriminalization. “Decriminalization” has been described as an avenue for reducing the scope of the harm of criminal legal systems.²⁹⁹ Many current efforts at decriminalization target misdemeanor laws. Some of the most prominent changes to address criminalization have been reforms to drug laws, specifically laws prohibiting use and distribution of marijuana. Reasons for the reforms include: changing norms about the prohibited activity, a lack of clarity about implementation, more information about the negative consequences of criminal regulation, and changing acceptance of the appropriateness of these consequences.³⁰⁰

The concept of retroactive decriminalization has emerged recently among organizers in cities that have implemented misdemeanor reform.³⁰¹ Retroactive decriminalization attempts to address systemic injuries already in place.³⁰² Those harms are not static, but rather continuing. People continue to face legal technical barriers and losses. Retroactive decriminalization is not just a pathway to address old injuries, but also towards ending continuing harms. Those who call for retroactivity refuse to leave behind people as casualties of the old criminal legal system. Retroactivity for former students does two things at once: it expands existing relief to earlier cohorts of criminalized students and contemplates a completely different form of relief to ease generations of harm.

Proponents of retroactivity argue that the differences of an individual’s position pre- and post-reform can be arbitrary.³⁰³ Nearly all rationale for prospective reforms also applies to retroactive application. Enhanced information about consequences of convictions, changing community norms, and increased visibility of advocates from affected communities all weigh in favor of retroactivity. The person who avoids criminalization after reforms is no different than the person criminalized the day before reforms are enacted. Yet the implications for their lives can be drastically different. If the criminalization is not acceptable for prospective students, then former students should not fester in harms either.

One might argue that retroactive application is more than “reform.”

299. Natapoff, *supra* note 217, at 1058.

300. “Changing norms” may indicate change in the norms of centers of power.

301. *Agenda*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/end-the-war-on-drugs/>. It is often interchangeable with “Retroactive legalization.” See Ahrens, *supra* note 28, at 386–87.

302. See Ahrens, *supra* note 28, at 386–87.

303. See Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77 (1965).

Retroactivity is directed towards the original structures of harm. Imagining reforms for future schoolchildren is often more palatable than focusing on adults. The project of decriminalizing school discipline requires us to provide redress to people who do not fit narrow narrative models of people “deserving” support. Since criminalization as a student enhances future criminal legal interventions, former students may have criminal records. Criminalization leads to diminished employment and reduced housing options. Many former students may be cast as lacking ambition or the desire to advance. Finally, students most likely to receive zero tolerance policies are from communities that experience marginalization and stereotyping as criminally deviant. Attempting retroactivity for former students is a project that forces us towards understanding and confronting systemic barriers. In acknowledging the damage, the retroactive project demands accountability to the human lives affected by the policies. Retroactive decriminalization can be a reckoning project.

Retroactive decriminalization is positioned as something more transformational than traditional criminal legal reform.³⁰⁴ Advocates have asked for retroactive forms of relief to address casualties of criminalization within U.S. communities. These measures are directed at executive and legislative bodies, rather than traditional, judicial torts-based restitution and remedies.³⁰⁵ In the aftermath of marijuana decriminalization and legalization, many communities have asked for more than just a change in laws prospectively.³⁰⁶ Recent social movements have also outlined the importance of retroactive decriminalization. The Movement for Black Lives calls for “retroactive decriminalization” to divert local money from criminal law to community health and safety.³⁰⁷ Retroactive decriminalization is distinguishable from usual reforms in that it confronts history and targets systemic insidiousness of the criminal legal system.³⁰⁸ It deconstructs the work of its institutions as a critical component of building safer and healthier communities.

Informal retroactivity, as described here, contemplates nonjudicial remedies for criminalized former students.³⁰⁹ This Article does not engage traditional judicial doctrines of retroactivity, or torts-based arguments for

304. See Akbar, *supra* note 28, at 413.

305. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 397 (arguing that reparations are not “equivalent to a standard legal judgment,” but instead encompass “formal acknowledgment[s] of historical wrong[s], the recognition of continuing injury, and the commitment to redress”).

306. Ahrens, *supra* note 28, at 414. See Akbar, *supra* note 28, at 413.

307. Davies, *supra* note 53.

308. Ahrens, *supra* note 28, at 394–95.

309. Courts might also determine that change in laws, particularly laws deemed unconstitutional, may result in expungement. See *Kenny v. Wilson*, 885 F.3d 280, 284 (4th Cir. 2018).

redress, though retroactive responses to school criminalization and policy reform have appeared in both types of cases.³¹⁰ Instead of depending on torts or civil rights based lawsuits, informal retroactivity outlines executive and legislative options for addressing harms to former students.

Retroactivity addressing former students enhances the impact of reform by further reducing barriers for all people that have been targets of criminalization. It includes the use of legal technical and nontechnical solutions to help former students get closer to the envisioned potential of current and future students.

A. *Retroactive Decriminalization*

Retroactivity is one way to address harms that follow the criminalization of students. Retroactive decriminalization is not necessarily limited to states and cities that have reformed or altered their school disciplinary policies away from criminalization, but it is better paired with such reforms.³¹¹ Justifications for addressing harms to criminalized former students through retroactivity taps into our evolving understanding of adolescent culpability. Arguments for retroactivity also build upon extensive literature on the impacts of juvenile criminal debt and the hidden consequences of misdemeanor prosecutions. The best way to ensure state and city reforms reach former students is for legislating bodies to explicitly address retroactivity. Cities and states can plan for reforms to have retroactive effect by adding specific language on retroactivity for former students.³¹²

310. For example, in a case before the Massachusetts Supreme Justice Court, *Commonwealth v. Ashe A.*, the state appellate court grappled with retroactively applying reforms in law to former students. 133 N.E.3d 818 (Mass. 2019). In *Ashe A.*, a student accused of a school order misdemeanor appealed their delinquency finding, requesting retroactive application of reforms. The student was charged with “disruption of school assembly” prior to state reform. *Id.* at 1005. As the juvenile case was pending, the state law changed, to explicitly prohibiting students from being charged for disruption of their own schools. The student moved to dismiss the charge once the reform passed. The motion was denied by the trial court. *Id.* at 1006. The appellate court overturned the denial by the lower court, granting the student’s request for retroactive application of the reform and dismissing the delinquency adjudication. Massachusetts’ laws allow for retroactivity application of changes in law when to hold otherwise would be “repugnant to the context of the same statute.” *Id.* at 1008.

Federal jurisprudence does consider the special status of youth in evaluating retroactivity. See *Montgomery v. Louisiana*, 577 U.S. 190 (2016) (protections specific to youth sentenced to life without parole in *Miller v. Alabama* should be applied retroactively). Some of the considerations of courts mirror those of legislatures engaged in reforming school offenses. For instance, the Supreme Court noted evidence that adolescent cognition and decision-making capacity is different from that of adults, they are susceptible to influence, and they are more pliable and open to rehabilitation. See also *Kenny*, 885 F.3d at 284 (student sues state for “school order law” arrest).

311. Ahrens, *supra* note 28, at 204–05; Dennis, *supra* note 3, at 38–39.

312. There have been a few efforts to tie student decriminalization legislation to remedial efforts to assist former students. As an example, in Florida, a bill to decriminalize by allowing citations rather than arrests of minors was joined by a bill to expand expunctions for children. That effort eventually failed. Dennis, *supra* note 3, at 37–39 (arguing that expungement alone is insufficient without decriminalization).

The form of retroactivity depends on the position of the former student. I consider these different cohorts: former students charged with crimes that have since been altered through reforms and former students convicted of crimes in cities and states that have not reformed their charge under the penal code but have otherwise reformed or indicated a desire to decriminalize school discipline. Of these groups, former students convicted of charges that have since been altered through reforms are most likely to find relief through formal retroactivity. Otherwise, students may find retroactive relief in local legislation but are unlikely to have relief individually through formal retroactivity.

Formal legal retroactivity is extremely limited in its scope. In order to receive the benefit of retroactivity, the changes in law have to fit within states' tests for retroactivity. The cohort of former students who can be assisted through judicial retroactivity is narrow. Petitioners have to have the resources to challenge convictions and sentences. Formal legal retroactivity is not an avenue that currently provides benefits to the large swaths of former students that were criminalized by school disciplinary policies.

When advocates call for "retroactive decriminalization" and "retroactive legalization," often they are describing something other than formal legal retroactivity. Informal retroactivity describes methods of addressing criminal records that were created prior to decriminalization or legalization. It attempts to give the reforms retroactive impact, even where courts' retroactivity doctrine would not. As with formal retroactivity, these methods signify that the community's current moral norms are not in accordance with policies that led to criminalization.

Retroactive policies may include mechanisms for dismissing charges and clearing records. As Professor Deborah Ahrens outlines, cities and states may implement ways to dismiss charges, commute sentences, issue pardons, and expunge prior criminal records related to reformed laws. These forms of retroactive redress assist people in avoiding further punishment and removing the stigma of criminal law involvement that lead to barriers to advancement.³¹³ The 2014 guidelines suggest clearing student records for "students who were treated differently regarding the infraction and sanction imposed" as a remedy for criminalized former students in districts sued for civil rights violations.³¹⁴ Courts have considered record clearing to be an appropriate remedy for criminalized former students who have sued for civil rights violations after being charging students with order-related

313. Other examples include retroactive decriminalization through expungement of marijuana convictions, prostitution convictions, and sodomy convictions.

314. If applied, this would affect only the narrow subset of students in districts sued by the federal government.

misdemeanors in school.³¹⁵

Governors and mayors can clear records as retroactive redress for people with state convictions. The executive branch holds the power of clemency.³¹⁶ Clemency powers allow the executive office to reduce or commute sentences and issue pardons.³¹⁷ Typically clemency power for many of these school order-related crimes lies with the Governor.³¹⁸ School order crimes are unique from many other crimes in that they are also largely low-level offenses, offenses that may also derive from municipal government codes. Where the charges are based in municipal codes and prosecutions, the clemency power would reside in the mayor's office.

Commutations reduce the severity of a sentence. Typically, people who are incarcerated seek commutations, requesting freedom. Few former students are likely to be incarcerated solely as a result of a school order conviction.³¹⁹ There may, however, be former students still entangled in some portion of their sentence, such as probation or fees. Commutations can serve to end existing sentences.

Scholars argue pardons are a potentially more effective source of retroactive relief for criminalized former students. Pardons remove the penalties for a conviction.³²⁰ They operate to reverse the impact of a conviction—often a pardon allows an individual to clear the conviction from their record.³²¹ This option has been used as mechanism for retroactive redress of various groups, including conscientious objectors, as norms have changed at various points in our history.³²² Mass pardons for marijuana misdemeanors have been embraced as an option in Michigan.³²³ It is an appealing option for addressing the barriers former student may face from criminalization. Advocates also emphasize the ease of executive office deciding to issue pardons—much more straightforward than crafting and passing legislation.³²⁴

315. *Kenny v. Wilson*, 885 F.3d 280, 284 (4th Cir. 2018).

316. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 813–14 (2015); Ahrens, *supra* note 28, at 425–27.

317. Barkow, *supra* note 316, at 813–14; Ahrens, *supra* note 28, at 425–27.

318. Most school-based misdemeanors are published in the state penal code. Ripley, *supra* note 2. The executive power lies with the governor. Ahrens, *supra* note 28, at 425–27; Barkow, *supra* note 316, at 813–16 (explaining that pardon power lies with the executive).

319. Though some people may face higher sentences if their conviction as a student serves as a reason for enhancement or contributes to their criminal history, thus enhancing the sentence. See Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1157–59 (2003).

320. Barkow, *supra* note 316, at 810; Ahrens, *supra* note 28, at 425–30.

321. Barkow, *supra* note 316, at 810; Ahrens, *supra* note 28, at 425–30.

322. Ahrens, *supra* note 28, at 425–430.

323. *Id.*

324. There are downsides to relying on executive clemency powers. Executives may shy away from retroactive relief because of political intimidation or fear of reprisal. Since clemency currently

Legislators, at the state or city level, can enact legislation to address barriers to former students. The most popular forms of informal retroactive legalization are dismissal of charges and expungement eligibility. Legislation to dismiss charges aids people who have open cases related to school order charges. Expungement, a court order that removes a criminal record, is the next step for closed cases and convictions.

Expungement statutes differ across jurisdictions.³²⁵ The statutes specifically address *what* can be cleared—arrests, records from investigations, convictions, and sentences. There is typically language about *when* it can be cleared or how much time must pass before an individual can apply. *Who*, or individual eligibility based on age or criminal history, is also determined by statute. In many places, the petitioner must also make some equity argument, describing the hardship of the record and reasons for its removal. Typically, people have to apply for record clearing—it does not automatically occur.³²⁶

Traditional expungement statutes have their limitations. In some jurisdictions, a person may not be eligible for expungement if they have a more than one conviction.³²⁷ Statutes that are crafted this way are usually drafted with the goal of “cutting a break” for first-time offenses or people with a minor criminal record.³²⁸ This is a different goal than expungement that serves as retroactive legalization. Retroactive legalization expungements should clear school order charges from criminal records, regardless of other convictions on the individual’s record.

Retroactive decriminalization of former students requires that expungement be expanded to encompass the goals of discipline reform. Affected people should not lose expungement eligibility based on their criminal record. School order-related misdemeanors should be cleared from their records because they were unjust. Finally, expungement should extend

requires seekers to make an application, people would have to be enfranchised enough to apply for the pardon. Pardons may absolve people of the crime but not actually erase the record without further legal action. See *Application for Pardons and Commutations*, KY. GOVERNOR ANDY BESHEAR, <https://governor.ky.gov/services/application-for-pardons-and-commutations> [https://perma.cc/2M56-CXA5]; *Pardons*, OFF. GOVERNOR GAVIN NEWSOM, <https://www.gov.ca.gov/pardons/> [https://perma.cc/DF32-TZZT].

325. Ahrens, *supra* note 28, at 425–30 (referring to Governor Inslee’s proposal).

326. Even where a court is statutorily obligated to remove the record, it often still exists and is not expunged.

327. *Fifty State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION RTS. PROJECT (Oct. 2021) <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/> [https://perma.cc/NX55-J7WN].

328. See, e.g., Angie Jackson, *Lawmakers Approve Expungement of First-Time DUIs, Automatic Record-Clearing for Juveniles*, DET. FREE PRESS (Dec. 16, 2020, 7:51 PM), <https://www.freep.com/story/news/local/michigan/2020/12/16/michigan-dui-expungement-record-clearing/3920011001/> [https://perma.cc/TP7L-Z94R].

to cases that are a consequence of school order prosecutions, such as “failure to appear” charges or enhancements to other charges.

Cities and states engaged in marijuana reform serve as a model of this form of retroactive legalization. California legalized marijuana in 2016, and Proposition 64 made convictions eligible for expungement.³²⁹ The city of Los Angeles, invested further in retroactive legalization. The city formed plans to automatically dismiss existing charges for marijuana possession and clear records.³³⁰ The city’s marijuana reforms offered prospective legalization *and* retroactive relief. City officials worked with an organization to develop an algorithm to find all records of arrests and past convictions for marijuana possession and related charges.³³¹ The legalization measures attempted to equitably address charges and convictions and their impact on formerly criminalized people.³³²

Automatic dismissal and expungement is a critical component of retroactive mechanisms. Criminalization disenfranchises individuals. It leaves people vulnerable to future interactions. People who have been harmed by the criminal legal system are less likely to rely on the system for relief and may want to avoid drawing attention to themselves. Requiring individual applications also excludes people who are not aware of the change in law. Many people, particularly those who have had employment options limited by records, may lack resources to apply for relief.³³³ Instead, when school discipline is decriminalized, it should be accompanied by expungement legislation which makes expungement and removal of the record automatic. Retroactive decriminalization though expungements were included in these efforts, but the important component is that the expungements are automatic. Without automatic expungement, the removal of the record is still a burden carried by the harmed person, rather than the state.³³⁴ By shifting the burden to the states, the project clarifies the direction of harm.

329. Control, Regulate and Tax Adult Use of Marijuana Act, Ca. Prop. 64 (2016); Cameron Jenkins, *California Measure Would Expunge Many Marijuana-Related Crimes*, NPR (Aug. 24, 2018, 2:37 AM), <https://www.npr.org/2018/08/24/641279363/california-law-would-expunge-many-marijuana-related-crimes> [https://perma.cc/DG4G-MABH].

330. E.J. Dickinson, *Los Angeles Set to Reduce or Expunge 50,000 Marijuana Convictions*, ROLLING STONE (Apr. 2, 2019, 4:27 PM), <https://www.rollingstone.com/culture/culture-news/los-angeles-marijuana-convictions-816796/> [https://perma.cc/6S96-3JNP].

331. Lulu Garcia-Navarro & Emma Bowman, *Algorithm Targets Marijuana Convictions Eligible to be Cleared*, NPR (Feb. 23, 2020, 7:19 AM) <https://www.npr.org/2020/02/23/808575012/algorithm-targets-marijuana-convictions-eligible-to-be-cleared> [https://perma.cc/ZS8B-265S].

332. Jordan Culver, *Nearly 66,000 Weed Convictions Dating Back to 1961 to Be Dismissed in Los Angeles County*, USA TODAY (Feb. 13, 2020, 6:07 PM), <https://www.usatoday.com/story/news/nation/2020/02/13/algorithm-helps-los-angles-county-dismiss-66-000-marijuana-convictions/4751906002/> [https://perma.cc/62H2-72CY].

333. Ahrens, *supra* note 28, at 433.

334. *Id.*

Restitution for court costs is a yet unexplored area of retroactive decriminalization. As studies on juvenile fees and fine expose, criminal debt can be debilitating for young adults. A true policy of retroactive decriminalization accounts for the expense of protecting vulnerable children in court. Costs include fees, fines, and expenses of legal representation.³³⁵ If we position referral of students to criminal courts as an unjust harm—then former students and their families cannot continue to carry the burden of this injury by financing its costs. Studies of juvenile criminal debt in California demonstrated that the costs of pursuing debt were higher than eliminating it.³³⁶ The potential savings from enforcement may contribute to funds for clearing and reimbursing court costs.

Commutation of sentences, pardons, dismissal, and expungement of charges addresses the legal-technical harm created by a criminal record. None of these can completely erase the stigma from former students. Widespread internet access to records can undermine the effectiveness of record-clearing. In some cases, automatic dismissals or expungements will not undo the technical legal implication of a record—particularly where other criminal justice interventions resulted from school order charges, or where later cases were enhanced in severity or sentence. Finally, dismissals do not undo potential costs related to fees and fines already paid. It does not address the costs of attorney fees related to the charge.

The lessons of marijuana reparation offer a guide for statutes to effectively decriminalize school discipline. Retroactive measures are best incorporated into the original reform. Below I offer a model based on reform of “disruption of class” laws. The most straightforward route towards legalization would be elimination of the criminal statute entirely. However, I base this model on reform of the laws in “disruption of class laws in many states,” which prohibit charging students for these crimes in their home schools.³³⁷ A few states such as Massachusetts have included retroactive additions, modifying its expungement laws to cover criminal records from school order prosecutions.³³⁸

335. Attorney fees are not negligible, especially for families with constrained resources. However, when considering state restitution for attorney costs, this category of cases in many jurisdictions have lower, set attorney fees than more serious criminal cases.

336. See BERKELEY L., POL’Y ADVOC. CLINIC, MAKING FAMILIES PAY 3 (2017), https://www.law.berkeley.edu/wp-content/uploads/2020/06/State-Juvenile-Fees-Report_revised12-10-19.pdf [<https://perma.cc/VY8T-DAYW>].

337. See, e.g., Deanna Pan, *A Bill Targeting South Carolina’s School-to-Prison-Pipeline, Including the Disturbing-Schools Law, Clears House Subcommittee*, POST & COURIER (Sept. 14, 2020), https://www.postandcourier.com/news/a-bill-targeting-south-carolinas-school-to-prison-pipeline-including-the-disturbing-schools-law-clears/article_b7bb3f44-ff5d-11e6-82c7-77710aaf63ed.html [<https://perma.cc/PTV9-AEHT>].

338. S. 2185, 191 Gen. Ct. (Mass. 2019); *Advocacy for Dismantling School to Prison Pipeline and Ensuring Paid Family Leave*, YW BOSTON (Oct. 28, 2017), <https://www.ywboston.org/news-list/advocacy-committee-announcement/> [<https://perma.cc/6MDK-7SKU>].

Sample Law Addressing “Disruption of Class”

A student may not be charged with this offense if, at the time of the act, the student was in the student’s home school.

All existing charges for this offense at the student’s home school must be dismissed, including those in compliance status.

The state must automatically expunge any criminal record involving this charge at the student’s home school. The state bears the burden of demonstrating that any record for “disruption of class” did not occur at the student’s home school. The student must be notified of the ability to challenge any exception offered by the state.

Attendant charges, such as ‘Failure to Appear’ or ‘Contempt’ must also be expunged.

Students with expunged records may apply for the return of all fees and fines paid in connection to this charge. This includes fees and fines paid for attendant charges.

Students may apply for a return of attorney fees connected with this charge.

Applications for a return of fees and attorney costs shall be made publicly accessible. The state should endeavor to make the application as brief and approachable. Applications should be available in state, county and city courts and court websites.

Legalization and retroactive decriminalizing policies directly open doors of opportunity to affected individuals. These policies allow former students to navigate the world without barriers related to their records.³³⁹

Retroactive decriminalization is critical to clear records and decrease future technical-legal barriers for individuals. At times, this clearing of the record makes way for improved psychological health and may repair some of the damage that occurred through decriminalization. Retroactive decriminalization may be included as one goal of a program to repair past harm. As discussed previously, not all continuing injuries to criminalized former students are legal-technical barriers. Reparations programs also address past injury. They expose and investigate deeper forms of harm that have occurred. The two programs can work in concert, as they have in many decriminalizing cities dedicated to clearing the future and redressing deep and systemic wrongs of the past.

339. Hong et al., *supra* note 256, at 324, 327–28.

B. *The Case for Student Reparations*

Considering the criminalization of former students through the framework of reparations has benefits for understanding and repairing the harm done to many vulnerable students. The benefits include repositioning moral norms through acknowledgement, an expansion of our understanding by examining ongoing harms to individuals and communities, and varied forms of redress to meet the layers of injuries caused by criminalizing policies and take on social healing.

Criminalization stigmatizes people. Even where there is the will to assist former students, retroactivity does not necessarily indict the systems that criminalized students. A city or state may take on retroactive measures like expungement but maintain a narrative of students as excessively punished deviants. Some narratives may cast former students as at-risk or inexplicably susceptible to criminal legal interventions. In contrast, examining the reparations framework provides a counter-narrative to former students as deviants. Reparations are born out of a systemic wrongdoing, misaligned with modern moral norms. Reparation villainizes the administration of harm rather than the student. The student is recast from deviant to survivor of systemic wrongdoing.

Engaging in public dialogue about the ongoing manifestations of harm is critical to destigmatizing criminalized students and their communities. Very often, communities of color and poor communities are accused of fostering a lack of ambition.³⁴⁰ Disparities in advancing economically are explained away in insidious ways, often appearing as arguments that the disparities are due to cultural preferences.³⁴¹ This narrative creates its own harms, resulting in continued disparate treatment and divestment in affected people.³⁴² It imposes psychological harm within affected communities.³⁴³ Reparations projects serve to enhance understandings of continuing harm.³⁴⁴ This understanding of continuing harms that exceed technical barriers is necessary in order to develop programs that address them.

The final goal of enhancing justice and freedom makes reparations both a forward-looking, as well as a backward-looking, endeavor.³⁴⁵ Some

340. See Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 686–89 (2004); Brophy, *supra* note 30, at 834; Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 911 (1993); ALFRED BROPHY, REPARATIONS: PROS AND CONS 80–81 (2006).

341. *Id.*

342. *Id.*

343. *Id.*

344. Brophy, *supra* note 30, at 841–42.

345. Yamamoto et al., *supra* note 30, at 17, 35.

scholars have framed reparations as correcting a rightly owed debt.³⁴⁶ Scholars who are more critical about applications of reparations argue that the legitimacy, or at least viability of reparations frameworks, rests on their ability to result in some collective good.³⁴⁷ That is, a good to those affected that can be construed as a general good to all, including communities that hold more power. Increasing the number of people who are able to attain justice or access freedoms that they were previously systematically deprived of results in a more just, freer society.³⁴⁸ Injury-focused constructs of reparations should construe paying the debt as resulting in some future good: greater equality, autonomy, or healing a spiritual wound, for example. One might frame this as a benefit to that society broadly.

“Justice and freedom” is an apt goal for reparations efforts for criminalized former students. If more former students are able to attain justice or mitigate the injuries of criminalization, they will be able to further actualize the lives they seek. Our society broadly benefits by people living healthy lives free from systemic barriers to personal and communal advancement. Defining justice and freedom will have to be done by the people and communities that have been affected.³⁴⁹

Reparations frameworks require robust moral justifications for redress.³⁵⁰ Theories of reparations may differ in the frameworks offered. In some reparations frameworks, such as that advanced by Randall Robinson, the moral justifications are centered on harm or unjust enrichment. Other scholars, such as Eric Yamamoto and Charles Ogletree, center social healing as justification.³⁵¹ I focus here on harm and social healing as a basis for reparations.

Advocates for former students might face questions about the moral justifications for reparations for students. Similar questions have been used against other reparations efforts in the U.S. Some critics of reparations for slavery and legalized apartheid have argued that in order to justify reparations, the harm must have resulted from an unjust, as in unlawful, act. They argue that reparations should not be demanded from a “payer” that was not committing a crime.³⁵² For instance, they may argue that technically “no crime” was committed against the people formerly enslaved.³⁵³ The

346. *Id.* at 18 n.79.

347. Ogletree, Jr., *supra* note 57, at 292, 317.

348. INTERRUPTING CRIMINALIZATION, *supra* note 302, at 16–17.

349. Matsuda, *supra* note 305, at 324, 346–47.

350. Brophy, *supra* note 30, at 835, 844.

351. Ogletree, Jr., *supra* note 232, at 15–16. Ogletree asserts that Bell’s “interest convergence” theory applies—that unless the reparations goal converges with the interest of white elites, it will not be attained. *See id.*; Yamamoto et al., *supra* note 30, at 15–16.

352. *See In re African-American Slave Descendants Litig.*, 471 F.3d 754, 760 (7th Cir. 2006).

353. *See Alfred Brophy, Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 117–120 (2004).

harms they experienced were lawful at the time. Similar arguments have been offered for legalized apartheid in the centuries following slavery.³⁵⁴

Brophy refutes that the act leading to harm has to be unlawful at the time.³⁵⁵ The unlawful act requirement may be an important qualifier for torts remedies. He shifts the question to considering the harm through the lens of today's norms in evaluating whether it is legitimate. If so, reparations are justified. He dismisses the question of whether the harm was legal at the time that it occurred. Brophy's definition of harm is more expansive. It incorporates the original instance of harm and continuing losses that have followed it.³⁵⁶ Still, in the case for criminalized students, it still may limit reparations to jurisdictions where reforms have prohibited forms of criminalization of students or where one might argue that the policies constitute a constitutional violation.

Reparations critics often point to the difficulty in ascertaining who committed the harm, and thus, should be the proper payer. Reparations frameworks based on harm and unjust compensation struggle with historical accountings—who were past beneficiaries of the injustice and should be recipients of reparations.³⁵⁷ This is particularly an issue when generations have passed since the original harm occurred.³⁵⁸ Many affected former students are alive and identifiable. The communities most affected by criminalization of students is ascertainable. In defining affected geographic communities, one might look at school criminal legal referrals, local court adjudications, or examine zip codes with a large amount of students affected by zero tolerance policies.³⁵⁹ Studies have identified demographics of students most affected by the policies.³⁶⁰ This data can be used in developing community-based reparations within a city or state.

Later generations of reparations theory focus on repairing within society the lasting harm of injustice rather than debt owed from a particular harm.³⁶¹ Eric Yamamoto et al. advocate for discovering what reconciliation means to society rather than thinking of a debt owed. Reparations in this framework justifies reparations as a part of common mission of social healing.³⁶² Some scholars find this justification as unsatisfying as a theory that posits that there is a debt that can be "paid." For some, certain forms of

354. *Id.*

355. *Id.*

356. *Id.*

357. Ogletree, Jr., *supra* note 37, at 306–07.

358. *Id.* at 309.

359. Fowler et al., *supra* note 3.

360. *Id.*

361. *See* Yamamoto et al., *supra* note 30, at 31.

362. *See* Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1358 n.161, 1359 n.166 (2016) (first citing Yamamoto et al., *supra* note 30, at 3; and then citing Brophy, *supra* note 30).

systemic racist harms cannot be fully repaired—reparations and healing, at best, can be justified as a symbolic effort.³⁶³ Symbolic forms of reparations focus on reconciliation as justification.³⁶⁴ The grant of reparations declares, “You exist. Your experience of deprivation is real. You are entitled to compensation for that deprivation. This nation and its laws acknowledge you.”³⁶⁵

C. *Reparations Programs Examined*

Reparations frameworks have been advanced as a way to repair the decimation caused by the War on Drugs and restore affected individuals and communities. In addition to retroactive decriminalizing measures like dismissal of charges and expunging of records, some states are devising vocational and business programs and carving out benefits specific to impacted individuals and communities. Most recently, reparations projects have centered on marijuana legalization. Analogous arguments for post-criminalizing reparations appear in other forms. For example, arguments for gay reparations in the U.S. consider the impact of laws criminalizing consensual, same-sex activities; profiling of LGBTQ people of color; and the general devastation of criminal regulation of the LGBTQ community.³⁶⁶ I focus on post-marijuana legalization reparations frameworks here, as they are a very new iteration of reparations programs currently being adopted in U.S. cities and states.

Campaigns leading to marijuana legalization emphasize disproportionality in the arrests, prosecution, convictions, and sentences for people of color.³⁶⁷ Criminal regulation of marijuana was marked by aggressiveness toward targeted communities and individuals. Decriminalization and legalization of marijuana provide for prospective change in the state’s regulation of marijuana. However, community advocates emphasized that those barriers created by past enforcement would remain even after marijuana was legalized. People and communities that have faced the worst impacts of the War on Drugs are also be less financially

363. Yamamoto et al., *supra* note 30, at 37 (“[R]eparations ‘cannot fully “repair” the damage done by racial . . . violence. Nor can reparations ‘return’ a victim or victimized community to the state it would have been in.” (quoting SHERRILYN A. IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* 241 (2007))).

364. Yamamoto et al., *supra* note 30, at 37.

365. Matsuda, *supra* note 305, at 390.

366. Such a plan might include expungement as well as payment for losses. Several states have modeled projects in other countries, including Canada. Omar G. Encarnación, Opinion, *The Case for Gay Reparation*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/opinion/gay-reparation-stonewall.html> [<https://perma.cc/N96K-TY5U>].

367. Ahrens, *supra* note 28, at 391–92.

able to fully participate in economic development post-legalization.³⁶⁸ This concern has led many jurisdictions to adopt reparations programs for individuals and communities most affected by the War on Drugs.

Examples of post legalization reparations discussion include states like Rhode Island, New York, and Oregon and cities like Evanston, IL; Los Angeles; and Asheville, NC.³⁶⁹ Reparations in each place are formulated differently; their justifications and remedies are varied. Some jurisdictions justify projects based on the external and internal harms levied against the Black community, including the War on Drugs, but also injustices that proceed it: redlining, Jim Crow, lynchings, Black Codes, or enslavement of Black people.³⁷⁰ Others justifications center on wealth drained from the community during the War on Drugs and diverted elsewhere: to private prisons and supervision companies, prison towns, and promotion of prison slave labor.³⁷¹ They focus on reparations as means of recompense, creating, for instance, preferences in developing the weed economy.³⁷² Reparations post legalization serve as an opportunity to advance individuals and communities beyond the disadvantages caused by criminalization. Reparations thus enhances justice and freedom broadly in society, justified as a form of social healing.

After legalizing marijuana in 2016, California embarked on a reparations program focused on addressing the impact of marijuana enforcement.³⁷³ The expressed justifications for reparations were divestment in and losses experienced by highly-policed communities.³⁷⁴ Voters passed a measure to install a social equity program in the city's marijuana licensing agencies.³⁷⁵ The measure directed City Council to address "[h]istorical issues of social

368. See, e.g., *Social Equity Program*, CITY OF L.A. CANNABIS REG., <https://cannabis.lacity.org/social-equity-program/about-program/about-program> [<https://perma.cc/5DUA-B9XP>].

369. Deborah Becker, *Providence Mayor's Executive Order Marks First Steps Towards Reparations in Rhode Island*, WBUR.ORG (July 16, 2020) <https://www.wbur.org/news/2020/07/16/providence-mayor-executive-order-reparations> [<https://perma.cc/C68Q-DJ83>]; Teresa Wiltz, *Talk of Reparations for Slavery Moves to State Capitols*, PEW TRUSTS (Oct. 3, 2019) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/03/talk-of-reparations-for-slavery-moves-to-state-capitols> [<https://perma.cc/67LT-CSAN>].

370. IFILL, *supra* note 363, at 263–66, 272.

371. See, e.g., Janelle Bouie, *The Case for Marijuana Reparations*, SLATE (July 28, 2014, 6:49 PM), <https://slate.com/news-and-politics/2014/07/the-case-for-marijuana-reparations-the-profits-from-drug-legalization-should-be-shared-with-those-affected-by-the-war-on-drugs.html> [<https://perma.cc/MA9X-2LVC>].

372. CITY OF L.A. CANNABIS REG., *supra* note 368.

373. *Id.*

374. *Id.*

375. Sessi Kuwabara Blanchard, *Exclusive: What Happened to the Funding for LA's Cannabis Social Equity Program?*, FILTER (Mar. 29, 2019), <https://filtermag.org/funding-los-angeles-social-equity/> [<https://perma.cc/3Y5K-6Y7F>].

equity and social justice related to the commercialization of cannabis.”³⁷⁶ The goal of the program was to repair the damage to Black and Brown communities targeted by the War on Drugs.³⁷⁷ In addition to the acknowledgement of the harm of marijuana regulation, the city embarked upon an important initial phase of its reparations project.³⁷⁸ The city opened an investigation into the harm of marijuana criminal regulation prior to attempting redress. It later developed a project with the aims of repairing past harm against harmed individuals and affected communities. As I describe later in this Article, those measures have come across significant systemic barriers.³⁷⁹

The initial step, investigation into the historic impact of the city’s cannabis regulation, was the development of a “Social Equity Analysis.” The city received a number of recommendations, including detailed proposals for community investment funds and youth counseling centers.³⁸⁰ After the analysis, the city constructed its Social Equity Program.³⁸¹ The goal of the program is “to promote equitable ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities, and to address the disproportionate impacts of the War on Drugs in those communities.”³⁸²

With reparations as the goal, the program sought to institute individual and community-wide reparations. Los Angeles developed a plan to streamline licenses to people who “were low-income and had cannabis arrests or convictions on their records.”³⁸³ As an alternative, affected people could request vocational support and job placement.³⁸⁴ Priority was also given to residents of affected communities, determined by impacted geographic zones.³⁸⁵ While both programs have faltered, discussed herein, they demonstrated that the locality could, with resources, seek to not just

376. *Id.*

377. *See id.*

378. *See id.*

379. *See id.*

380. *See, e.g.*, ROBERT CHLALA, CAGE-FREE CANNABIS, REPAIRING THE HARMS, CREATING THE FUTURE: CENTERING CANNABIS SOCIAL & HEALTH EQUITY IN LOS ANGELES 4, 6 (2019), http://ufcw770.org/wp-content/uploads/2019/05/Repairing-the-Harms-Creating-the-Future_-FINAL.pdf [<https://perma.cc/K93R-BA8L>] (regulation of Marijuana was also framed as an aspect contribution to the criminalization of youth).

381. Blanchard, *supra* note 375.

382. CITY OF L.A. CANNABIS REG., *supra* note 368.

383. *Id.* One of the critiques of L.A.’s program is that in also offering benefits to members of the broader community, defined by zip codes, some of the beneficiaries included people that were not representative of racial groups affected by the war on drugs. *See id.*

384. *Id.*

385. *Id.*

legalize and retroactively decriminalize, but work towards social healing and repair.

In Evanston, Illinois, a proposed reparations project funded by the legalized marijuana trade expands beyond the harm of aggressive criminal regulation. Illinois legalized personal use amounts of marijuana in 2019.³⁸⁶ The state worked to retroactively decriminalize through expungement of a set of eligible offenses.³⁸⁷ The town of Evanston implemented an Equity and Empowerment Commission. The Evanston city council issued a statement regarding its path towards racial equity in the town, harkening back to the history of redlining in limiting opportunity for Black residents.³⁸⁸ The Commission engaged in a number of public meetings, many of which discussed the history of the town. The goal of the proposed reparations project is to address the wealth gap between the town's Black and white residents.³⁸⁹ The Commission's push for a reparations program to restore historic wrongs has been contentious.³⁹⁰ The city decided to fund reparations measures through marijuana business taxes after discovering that the marijuana arrest rate for African Americans was five times that of white people in the town.³⁹¹ The reparations program that the town envisions incorporates housing assistance grants. These are intentionally community-wide forms of reparations, offered to Black residents who lived in Evanston during 1919 to 1969, and their descendants.³⁹²

Local reparations projects that follow decriminalization often incorporate an official acknowledgement, followed by an in-depth investigation of ongoing harm and before constructing redress. Proposals for redress are directed towards affected individuals and impacted communities. These initial stages of investigation are a model for reparations projects for students. The reparations project must acknowledge, investigate, and then redress the criminalization of students.

386. Robert McCoppin, *Getting Marijuana Convictions Expunged in Illinois: What You Need to Know About the Process*, CHI. TRIB. (Aug. 30, 2019, 6:30 AM), <https://www.chicagotribune.com/marijuana/illinois/ct-cb-weed-conviction-expunged-illinois-20190917-o2jrwf43trefbnb54efohdmwzu-story.html> [<https://perma.cc/V4VR-6TAM>].

387. Bryan Smith, *Evanston's Road to Reparations*, CHI. MAG. (June 2, 2020 10:19 AM), <https://www.chicagomag.com/Chicago-Magazine/June-July-2020/Evanstons-Road-to-Reparations/> [<https://perma.cc/37WR-XK2V>].

388. *Id.*

389. *Id.*

390. The city council received some pushback, and one councilperson declined to support the measure. *Id.*

391. *Id.*

392. Andy Fies, *Evanston, Illinois, Finds Innovative Solution to Funding Reparations: Marijuana Sales Taxes*, ABC NEWS (July 19, 2020, 10:03 AM), <https://abcnews.go.com/US/evanston-illinois-finds-innovative-solution-funding-reparations-marijuana/story?id=71826707> [<https://perma.cc/T6K5-XKB2>].

| Marijuana Legalization | | | School Order Crime Decriminalization |
|---|---|---|--|
| City/State | Los Angeles, California | Evanston, Illinois | |
| Law or Policy Before Recent Reform | Criminal prohibition on non-medical possession and sale of marijuana | Criminal prohibition on non-medical possession and sale of marijuana | a) School Disturbance Laws; b) Lack of student exceptions to specified low-level, order-related, criminal laws; c) Lack of appropriate procedural protections before referral to criminal law officials. |
| Legalization and other Reforms | Proposition 64: Legalizing possession and expanding licensing for sale. Automatic expungements of some records. | HB 1438: Legalizing recreational use and licensing sale of marijuana. Automatic expungement of lower-level records. | a) Elimination or revision of School Disturbance Laws; b) Implementation of procedural protections prior to criminal law referrals. c) Automatic Expungement. |

| | | | |
|--------------------------------------|--|--|---|
| Retroactive Decriminalization | Automatic Expungement. Los Angeles enlists coding consultants to locate eligible records. | Automatic Expungement, State Patrol reviewing and submitting records to board. | Automatic Expungement (<i>see proposed bill, infra p. 1279</i>) |
| Reparations/Public Education | L.A. Cannabis Regulation Social Equity Analysis | Evanston Equity and Empowerment Commission | Hearings and investigation on the impact of criminalization on former students. |
| Reparations/Redress Scheme(s) | L.A. Cannabis Regulation Social Equity Program: 1) Licensing preference or vocational support to affected individuals; and 2) Licensing preference to individuals from highly-affected neighborhoods . | Evanston Community-wide benefit: Preference in housing grants, funded through marijuana tax revenue. | Should include at least: 1) Community-wide benefits to address communal harm, such as community investment programs, training in small business, and community health investment; and 2) Individual benefits to affected former students, such as counseling, educational and vocational opportunities. |

D. Investigation of Redress as Applied to Former Students

The state's criminalization of students has a profound and lifelong impact. The harm wreaked upon individuals by the state might be remedied

through reparations in a form proportionate to the injury.³⁹³ The effort to offer redress to former students requires initial stages of a reparations project. I argue that in order to determine a path towards reparations, two initial stages should be applied to examination of criminalizing school policies. One is official acknowledgement of the damage created by state sanctioned practices.³⁹⁴ The second is that harms experienced by former students must be investigated, each locality must examine the dimensions of ongoing damage, and where it was most destructive.

1. Acknowledgement of Unjust State Practices

Generally, acknowledgement in reparations frameworks serves to legitimize narratives of harm and commit the state to change. An acknowledgement can serve several functions. It provides notice to the public, framing the harmful practice as a societal problem. It recruits us all into the project of addressing the unqualified wrong. It can also ease the stigma created by the harmful practice.

Acknowledging and highlighting injuries to former students is a precursor to establishing the needs for reparations.³⁹⁵ An official acknowledgement and apology can affect the stigma many former students experience as a result of criminal law interactions in school. A recounting of harm and its impact on many vulnerable students may ease the isolation of former student experiences. For some, the acknowledgement may make public institutions more worthy of trust. As former students grapple with old cases, or attempt to move beyond consequences of conviction, acknowledgement may help direct attention to them as uniquely aggrieved members of the community.

Acknowledgement does not require a significant commitment from the state in the form of energy or money. Without additional forms of reparations, it can appear to be “image, no substance.”³⁹⁶ In some instances, reforms eliminating criminal law from school discipline are a form of acknowledgement. In drafting and enacting reforms, legislators often speak of the damaging impacts of criminalization. Those acknowledgements have led to change. There may, however, be a more specific acknowledgement directed towards the many impacts the laws have had on former students.

393. Daarel Burnette II, *Do America's Public Schools Owe Black People Reparations?*, EDUCATIONWEEK (Sept. 23, 2020), <https://www.edweek.org/ew/articles/2020/09/23/do-americas-public-schools-owe-black-people.html> [<https://perma.cc/Y3FX-2SXB>] (arguing for reparations for historic, exclusionary policies).

394. Acknowledgement and investigation of harm are important precursors to assessing community-based reparations. See Brophy, *supra* note 30, at 835.

395. See Yamamoto et al., *supra* note 30, at 14.

396. *Id.*; IFILL, *supra* note 363, at 124.

2. *Investigation of Ongoing Harm*

Investigations and hearings on the losses that former students experience are important components of reparations projects. They assist society in determining the contours of harm and what is needed to redress the damage. Forums for investigation may include truth and reconciliation tribunals, listening sessions, and workshops that are accessible to affected people.³⁹⁷ Investigations educate the public and buttress justifications for reparations.³⁹⁸

Centering the accounts of those affected, as in a tribunal, offers the public the opportunity to consider the depth of the injury. Ogletree refers to this as “knowledge redistribution.”³⁹⁹ Ogletree argues that knowledge distribution is one of the central goals of reparations, ensuring that society’s understanding of the experience, the record, is informed by those who underwent harm.⁴⁰⁰ Under this theory of knowledge redistribution, states and cities might work with affected people to develop investigations. Ultimately, defining what might address the harm rests on the perspectives of those most affected. Reparations frameworks prioritize the perspective of affected parties. This is a constant theme through the frameworks, though they may deal differently with the justifications and methods of reparations.

A secondary effect of a public investigation is that it can inspire change in resistant jurisdictions. States and cities that have not moved towards reform have the ability to contemplate the damage to individual and local communities through these policies. Ultimately, the modeling objective of the hearing is to be explicit enough about the harm that jurisdictions will be encouraged to end the ongoing practices as well as consider retroactive redress.

Certainly, forms of examination of these harms have occurred. In 2012, the U.S. Senate held a special session dedicated to the school to prison pipeline.⁴⁰¹ The United States Commission on Civil Rights also holds updates on the School to Prison Pipeline and reforms in the country.⁴⁰² They

397. See, e.g., Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263 (2003); Mitch Dudek & Fran Spielman, *Evanston Passes First-in-Nation Reparations*, CHI. SUN TIMES (Mar. 23, 2021, 8:02 AM), <https://chicago.suntimes.com/2021/3/22/22345860/evanston-passes-first-in-nation-reparations> [<https://perma.cc/JZ95-WKT6>].

398. See *id.*

399. Ogletree, Jr., *supra* note 232, at 30.

400. *Id.*

401. *Ending the School-to-Prison Pipeline*, *supra* note 104, at 105–10.

402. See, e.g., U.S. COMM’N ON C.R. BRIEFING REP., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES (2019), <https://www.usccr.gov/files/pubs/2019/07-23-Beyond-Suspensions.pdf> [<https://perma.cc/7AVM-UGCL>].

have not, however, focused solely focused on referral of students to criminal law enforcement for order-related crimes nor have they focused on how to remedy harmed students.

3. *Contemplation of Redress: Community and Individual Reparations*

Reparations compensation programs come in many forms. One of the central distinctions between forms is whether the compensation is offered to affected individuals or highly-impacted communities. Individuals are the primary source of injury. One might argue that a program to address individual harms is best tapped into the source of harm and has residual impacts on the community. Community reparations programs have a broader, more concentrated impact. They are generally better received than reparations through individual redress. It's easier to find consensus in using public funds for social support programs, especially where the state controls the use of funds and benefits are available to a whole community.⁴⁰³ Another question is whether formerly criminalized students specifically should be targeted at all, or if it is enough for reparations to increase resources within communities that affected people may access. I suggest that both individual and community reparations are needed and more viable if explicitly linked together in reparations projects.

Individual redress most directly addresses harms to individuals and communicates the goal of reparations for criminalized students. In this framework, former students who were referred to criminal courts are an identifiable group of affected individuals. The practices they were subjected to are easily verifiable, through court and school records. The depth of harm may differ, from arrest, use of force, incarceration, fines, and age at time of occurrence. These could potentially be taken into consideration and used to justify different forms or levels of redress.

Individual reparations are also important to the communicative function of reparations.⁴⁰⁴ They signal that the project is meant to address the specific form of harm that recipients experienced. Often, community reparations projects extend benefits beyond the most directly affected individual. Greater specificity ensures the benefits of reparation are not diluted. The UNHCR warns that collective reparations may not meet the needs of the individually harmed person.⁴⁰⁵ There is, the guidance warns, also a recognition problem. The justification for reparations is the recognition of

403. See Brophy, *supra* note 353, at 117.

404. U.N. OFFICE OF THE HIGH COMM'R FOR HUM. RTS., RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: REPARATIONS PROGRAMMES, at 26, U. N. Doc. HR/PUB/08/1, U.N. Sales No. E.08.XIV.3 (2008), <https://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>.

405. *Id.*

a specific harm to an affected person. That recognition is subsumed in collective programs that can only be justified by a vague, generalizable harm to the larger collective.

There is also the reality that community-wide forms of reparations may not reach the intended recipients.⁴⁰⁶ If offered at a community-wide level, directly affected and unaffected people are granted equal access.⁴⁰⁷ If people no longer live in the community and are not engaged in the proffered services, they received no redress for the harm they have experienced.⁴⁰⁸ Even if they are interested in community-wide services, they have to get in line with people who are not primarily affected, and receive a partitioned form of redress as a result.⁴⁰⁹ Specificity in redress addresses the unique injury to criminalized former students.

A recent example of this is the Social Equity Program run by Los Angeles's marijuana licensing agency. The program has faltered, and was eventually temporarily suspended, as the city's program has been criticized for not reaching its intended beneficiaries.⁴¹⁰ The licensing preferences offered to impacted communities, determined geographically, allows financially resourced newcomers an advantage over residents who lived through the worst of the War on Drugs.⁴¹¹ Well-funded prospective companies are also able to game the program by hiring affected residents to gain priority licensing, while offering the residents little control over the enterprise.⁴¹²

There is also a concerning dilution of the justifications for reparations when a project is so expansively defined. Legal scholar Verna Williams writes about this in her work on Prince Edward County, Virginia's reparations program. The racist policies prevented Black students from attending school for five years, driving up illiteracy and limiting job and college opportunities for young residents.⁴¹³ The reparation program, offered on a colorblind basis to anyone denied education during those years, does not connect to the intentional harm to Black residents.⁴¹⁴ Its non-specificity regarding race of reparations recipients underplayed the explicitly racist nature of the original harm.⁴¹⁵

406. *Id.* at 15–16.

407. *Id.* at 26.

408. *Id.*

409. *Id.*

410. Blanchard, *supra* note 375.

411. *Id.*

412. *Id.*

413. Williams, *supra* note 39, at 437–38.

414. *Id.* at 469–71.

415. *Id.* at 468.

Community reparations programs have a communicative effect. Offering benefits to communities express the harmful practice had ramifications beyond individual. It points to the systemic nature of the harm and its reproduction of inequality. Cities often have divested from many communities, leaving gaps in necessary services. There are many ways that increased funding, access, and initiatives to drive inclusion can help address obstacles and injuries caused by criminalization. Community-wide grants of reparations more easily connect to the goal of greater justice and freedom in society and healing across society.

This equalizing goal is centered in Evanston's reparation project, where some of the tax dollars from its legalized marijuana industry are used to assist Black residents in housing, education, and employment initiatives.⁴¹⁶ Thus the opportunity would be available to the individuals criminalized by marijuana laws and also their Black neighbors, the broader community that suffered from discrimination.⁴¹⁷ If Evanston were to limit reparations to a subset of people denied applications for loans or opportunity to live in the white sections of the town, the group would be smaller. The project would have to be reduced in scope, incorporating fewer partners and narrowing the historic depth of injury that occurred. It would not represent the impact the practices actually had on swaths of people who were constrained by the realities of redlining.

Communities of color and poor districts are the most injured by zero tolerance school discipline policies. Studies have centered on highly impacted zip codes and school districts. Community can be non-geographically defined as well, extending to students of color, LGBTQ students, and others who were the most likely to be targeted through these policies. Some of the harms caused by criminalization are not just individual but filtered into the broader community. A geographic community may face a loss of healthy, sustainable, employed, or formally educated members. A community determined by other identifiers may feel the impact of profiling or stressors related to seeing students with similar backgrounds referred to law enforcement and criminal courts from the perceived safety of school classrooms.

Community-wide reparations alone are unlikely to reach all targeted former students. Together with individual reparations, they can comprise an

416. Eric Lutz, *One City's Reparations Program that Could Offer a Blueprint for the Nation*, GUARDIAN (Jan. 19, 2020, 3:45 PM), <https://www.theguardian.com/us-news/2020/jan/19/reparations-program-evanston-illinois-african-americans-slavery> [https://perma.cc/2PWB-JDC2].

417. Matt Laslo, *Exclusive: Cory Booker Says Weed Legalization Must Include Justice for Victims of War on Drugs*, VICE NEWS (Apr. 9, 2019, 6:45 PM), <https://www.vice.com/en/article/a3xwv8/exclusive-cory-booker-says-weed-legalization-must-include-justice-for-victims-of-war-on-drugs> [https://perma.cc/C4LD-NEYN].

important component of a reparation plan. Indeed, the viability of any project may rest on both components being present.

a. Committing to Recompense

Critics of reparations programs often jump directly to the practicalities of administering compensation. This Article hopes to make clear that neither the form of redress, nor public will and commitment to it, is possible to gauge without initiating early stages of the framework: acknowledgement and investigation. Critics may not yet see the depth of harm or the value of the reparations. Engaging in these early stages may offer transformational pathways towards repairing harm and advancing society through accountability and greater access to opportunity.

Implicit paternalism drives much of the resistance to engaging affected people and impacted communities in discussions of reparations.⁴¹⁸ What might be rooted in those concerns is an implicit belief that potential recipients will not know how to use money responsibly. Some may be concerned that the money will not go towards improving the damage incurred by criminalization. These assumptions are often rooted in classist and racist assumptions about the personal failings of individuals or communities that have not ascended to higher socioeconomic status. Reparations projects should directly address these assumptions. In their restorative function, reparations should tie these moral assumptions to the targeting of students as criminals. The work, then, is to enhance public understanding of the harm as a part of inspiring confidence in the project.

A central goal of reparations to Black communities has been financial, a hope that reparations will economic self-determination.⁴¹⁹ Aiyetoro identifies self-determination as a potential goal of reparation movements, the ability to develop according to one's vision of a sustainable life.⁴²⁰ The provision of funds can allow people to access material items to help them live the life they define as healthy. As the South African Truth and Reconciliation Commission found, without economic justice, "there can be no healing or reconciliation."⁴²¹ Affected individuals and communities may note a number of ways that reparations programs can address harm. Those who have suffered from criminalization as youth may center health reparations: addressing the mental and physical health effects of

418. Maya Moore, *A Professor's Case for African-American Reparations*, CONN. MIRROR (Aug. 23, 2019), <https://ctmirror.org/2019/08/23/a-german-professors-case-for-reparations-in-the-u-s/> [<https://perma.cc/G2RE-7WCG>].

419. Williams, *supra* note 39, at 431–32 (citing Robert Westley).

420. Aiyetoro & Davis, *supra* note 34, at 725 (defining self-determination as Blacks' ability to shape their own political, economic, and cultural future).

421. Yamamoto et al., *supra* note 30, at 68.

criminalization.⁴²² Some may seek to repair economic harm through greater entrepreneurial access or cooperative business development.⁴²³ The realities of unmarked compensation should also be explored.⁴²⁴

Finally, as seen in marijuana reparations programs, the intent to redress harms is often hindered through competing budget priorities. In Los Angeles, for instance, social equity program applicants were told funding was restricted; the city then allocated portions of its reserve to police overtime pay.⁴²⁵ Seeking an independent funding stream, as in Evanston, may help avoid competing costs. Evanston has linked funding for its program to marijuana business tax revenue.⁴²⁶ Places that are reducing numbers of school police might redirect funds towards part of a reparations program. Money might be saved by eliminating the costs of prosecuting students and enforcing compliance with court orders.⁴²⁷ That reserved money might also contribute to a project to redress harmed students. Some scholars suggest that a new or existing administrative agency might be tasked with the project of “producing equity,” acquiring funding, and monitoring reparations grants.⁴²⁸

A real and constant concern is that the state will view the project of reparations as complete once there has been a distribution of funds. As described earlier in this Article, criminalization has produced ongoing harms. Reaching a stage of compensation should not require that conversations about criminalization of students, and the historic injustices and systemic failings that caused it, should cease. Reparations should serve

422. See Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1687 (2019).

423. See, e.g., Baskaran, *supra* note 290.

424. Cash payment is the most controversial form of reparations. As a result, many reconciliation plans focus on investigation, acknowledgement, or programming instead of payments. There are varied critiques of cash payments. Among them: the difficulties of gauging appropriate costs to varyingly affected people, implied concern about the fiscal responsibility of recipients, cash not addressing the obstacles created by the policies, and the fears that individual receipt of cash will be viewed as healing the communal harm. Despite these critiques, there are good reasons why affected people may opt for reparations in the form of cash payments. Cities and states may find ways to assess payment amounts and construe payment as necessary for healing and of benefit to the larger social good. Cash allows people to autonomously apply funds to best redress the loss and build towards their vision of justice. The lack of access to financial resources, is, in many instances, a factor in former students being most vulnerable to criminal legal interventions. See, e.g., Janice Gassam Asare, *Thank You for the Symbolic Gestures But Black People Need Reparations*, FORBES (July 9, 2020, 1:32 AM), <https://www.forbes.com/sites/janicegassam/2020/07/09/thank-you-for-the-symbolic-gestures-but-black-people-need-reparations/#103c300f4912> [<https://perma.cc/5Z7Y-AYR8>].

425. Blanchard, *supra* note 375.

426. Fies, *supra* note 392.

427. See generally FEIERMAN ET AL., *supra* note 190.

428. Ogletree, Jr., *supra* note 57, at 292 (quoting Ewart Guinier, Book Review, 82 YALE L.J. 1719, 1722 (1973) (reviewing BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973))) (quoting Guinier, who argued that “[a]n administrative agency given adequate staff and proper statutory guidance could produce equity for individuals”); Brophy, *supra* note 30.

to work towards healing societal wounds. Compensation based on past harms should not undermine the framework's forward-looking goals. Redress contributes towards greater freedom for affected people, which in turn strengthens society. Exploring the possibilities of redress is an important symbol of atonement and the beginning of social healing.

CONCLUSION

Increasingly, the public has learned of the impact of criminal law enforcement in schools.⁴²⁹ Through testimony from affected students, guidance from community organizations and government agencies, and reports on long-term impacts, we are more aware of the pain and disenfranchisement that begins with criminal law referrals in school. For too long, school systems in the U.S. have referred schoolchildren to criminal courts. School order prosecutions often targeted Black students, and also had disproportionate impacts on Latinx, Native American, LGBTQ, and disabled students. Responsive reforms are happening. A legislator introducing a bill to end mandatory school referrals to criminal law in Virginia named the criminalization of students “the [number one] civil rights issue of our modern time.”⁴³⁰ The changes are long overdue.

Existing damage to individuals and communities cannot be redressed by prospective reform alone. The burden of overcoming unjust criminalization still rests on the former students who underwent the harmful practices.⁴³¹ Retroactive policies and reparations programs must be implemented to redress harm to generations of former students. Barriers from criminal records persist. Psychological harm and mistrust of institutions persist. Communities continue to be under-resourced and underemployed. Retroactive policies must be optimized to resolve as much of the harm of criminal stigma as possible. This Article's recommended retroactive additions to school reforms address criminal records, collateral criminal charges, and costs from improper prosecutions of students.

The project of repairing past harm involves accountability. The reparations framework provided in this Article requires us to examine the ongoing damage of unjust practices and their impact on former students' lives in depth. Through investigation we move towards repair for affected individuals and highly impacted communities. We all benefit from public acknowledgment of how criminalization has blocked opportunity for former

429. See *supra* note 119 and accompanying text.

430. Kirby Farineau, *Va. Legislative Black Caucus Pushes Bipartisan Measures to End School-to-Prison Pipeline*, RICHMOND FREE PRESS (Feb. 1, 2018, 9:11 PM), <http://richmondfreepress.com/news/2018/feb/01/va-legislative-black-caucus-pushes-bipartisan-meas/> [https://perma.cc/EWU3-94MK].

431. Theodore, *supra* note 50, at 1.

students. As a country, we advance by closing the fissures created by criminalization. Reparations for student criminalization are a necessary step in the campaign for a more equitable society.

This Article argues for retroactive policies and reparations for the intrusion of criminal law into school discipline. Order-related prosecutions of students is one of this country's largest, most unjustifiable expansions of criminal law, targeting the youngest members of our society. The reparations framework is more than explication of harm and resultant damage. It requires an understanding of the resilience many former students need to confront harm and advance in adulthood despite the weight of criminal law involvement. Retroactive policies and reparations are hopeful projects. They recognize that we must learn from former students to understand how criminal law stymied the potential of generations of criminalized former students. Transforming systems away from criminalization requires us to face the harm of past policies and restore lost opportunity to targeted students and their communities.