

Pathways into the Criminal System: How Harsh School Disciplinary Policies Disproportionately Affect LGBTQ+ Youth

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I. INTRODUCTION

The United States' prison-industrial complex is overflowing.¹ There are almost two million people held in various U.S. carceral institutions.² The country has the highest incarceration rate in the world.³ One does not need advanced research or statistics to understand that involvement with the criminal legal system can wreak havoc on a person and their loved

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1. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html#:~:text=Together%2C%20these%20systems%20hold%20almost,centers%2C%20state%20psychiatric%20hospitals%2C%20and>.

2. *Id.*

3. See *id.*; Emily Widra & Tiana Herring, *State of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

ones.⁴ There is a vast array of negative consequences associated with incarceration and other forms of engagement with the criminal system.⁵ Foremost among those consequences is the deprivation of liberty.⁶ Although the denial of liberty is an incredibly profound consequence of involvement with the criminal system, entering this system impacts people's lives in countless other ways.⁷

One of the most significant ways in which the criminal system continues to haunt its participants is through collateral consequences.⁸ Collateral consequences burden people long after their involvement with the justice system is over, oftentimes for the rest of their lives.⁹ Formal collateral consequences faced by incarcerated and formerly incarcerated individuals include ineligibility for welfare benefits, housing assistance, jury service, employment licenses, military service, sex offender registration, and voting disenfranchisement.¹⁰ The list does not stop there though—criminal legal system participants face countless informal collateral consequences as well.¹¹ Informal collateral consequences of involvement with the justice system include poor physical and mental health, declining employment prospects, breaking up of families, reduction in civic engagement, rising legal debts, housing instability, and poor educational outcomes for the children of incarcerated parents, to name a few.¹²

Tens of thousands of American youths and their families are plagued by these consequences as well; over 48,000 youth are in confinement as a result of criminal system involvement on any given day.¹³ Studies show this involvement has more severe effects on juveniles than on adults.¹⁴

4. See David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. CRIMINOLOGY 171, 175-76 (2018).

5. *Id.*

6. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1105-06 (2013).

7. See generally *id.*

8. See generally *id.*

9. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214-15 (2010).

10. *Id.* at 1214.

11. See Logan, *supra* note 6, at 1103-04, 1105-09.

12. Kirk & Wakefield, *supra* note 4, at 175.

13. See Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html> (stating that youth are confined in facilities such as adult prisons and jails, long-term secure facilities, detention centers, group homes, and residential treatment facilities).

14. See generally Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINICAL PSYCH. REV. 448 (2013).

Human brains do not fully develop anatomically and functionally until early adulthood—therefore, youth struggle more than adults with regulating their moods, impulses, and behavior.¹⁵ Due to these struggles, juveniles have more trouble perceiving risk, balancing impulsivity, resisting peer influences, and anticipating future consequences.¹⁶ These factors combine such that youth get caught up in heightened situations, which may lead to involvement with the justice system without fully processing or realizing the implications at the time.¹⁷

The “school-to-prison” pipeline is a particularly prevalent way in which youth become engaged with the criminal system.¹⁸ The Center for American Progress (CAP) defines the school-to-prison pipeline as “[t]he cycle of pushing youth out of schools and into the juvenile and criminal justice system.”¹⁹ This cycle has been widely criticized for perpetuating excessive school disciplinary policies that oftentimes lead to extreme punishments—such as suspension, expulsion, and sometimes, arrest or detainment by law enforcement.²⁰ Although far less data has been collected about LGBTQ+ youth’s experience with the school-to-prison pipeline compared to the general youth population, the research that has been done reveals LGBTQ+ youth account for a disproportionate share of the so-called “pipeline population.”²¹

This Comment discusses how certain variables—focusing on harsh school disciplinary policies—increase the likelihood that LGBTQ+ youth will enter the criminal legal system, and how these variables disproportionately affect LGBTQ+ youth.²² Part II examines how school disciplinary sanctions operate. Part III analyzes how LGBTQ+ youth experience these practices as a pathway to the criminal legal system. Part IV discusses the consequences of LGBTQ+ youth’s increased exposure to the criminal justice system and its long-term effects on the lives of the youth and their communities. Finally, Part V reviews solutions to this societal problem, discusses alternatives to engaging LGBTQ+ with the

15. *Id.* at 450.

16. *Id.*

17. *See id.*

18. PRESTON MITCHUM & AISHA C. MOODIE-MILLS, BEYOND BULLYING: HOW HOSTILE SCHOOL CLIMATE PERPETUATES THE SCHOOL-TO-PRISON PIPELINE FOR LGBT YOUTH 3 (2014), <https://www.americanprogress.org/wp-content/uploads/sites/2/2014/02/BeyondBullying.pdf>.

19. *Id.*

20. *Id.*

21. Shannon D. Snapp et al., *Messy, Butch, and Queer: LGBTQ Youth and the School-to-Prison Pipeline*, 30 J. ADOLESCENT RSCH. 57, 58 (2015) (defining the “pipeline population” as marginalized youth who “are pushed out of school and into the criminal justice system”).

22. *See id.*

criminal legal system, and provides recommendations for further research.

II. LGBTQ+ YOUTH DISPROPORTIONATELY EXPERIENCE HARSH SCHOOL DISCIPLINARY POLICIES

For students experiencing difficulties at home, school often serves as a safe space.²³ Sometimes school is the only place a child or teenager can count on getting a meal that day, the only place they will find an adult who has the time and capability to listen to them and give advice, and the only place they are able to relax and spend time with friends.²⁴ But for LGBTQ+ students, this is not always the case.²⁵ The impact of school environments on youth has been studied more frequently in recent years.²⁶ The U.S. Department of Education has identified that school disciplinary policies in particular have a disparate impact on students of color.²⁷ Data has increasingly shown that exclusionary punishments, such as suspensions and expulsions, serve as touchpoints for students to enter the criminal legal system—especially for students of color and students with disabilities.²⁸

Although recent research has generated important insights in understanding why students belonging to certain protected classes enter the criminal system at disproportionate rates and offered solutions, the experiences of LGBTQ+ students have not been documented and examined as frequently.²⁹ Most of the media attention that focuses on the effect that hostile school climates have on LGBTQ+ students is centered around the issue of harassment and discrimination experienced through bullying.³⁰ While this is a profoundly important issue, discrimination that LGBTQ+ students experience at school unfortunately takes on more forms than bullying by their peers.³¹

Harsh school disciplinary policies stand out as a particularly influential factor, which when imposed disproportionately on LGBTQ+

23. See MITCHUM & MOODIE-MILLS, *supra* note 18, at 9.

24. See *id.*

25. *Id.* at 9-10.

26. See *id.* at 1-2.

27. *Id.* at 1 (citing Amanda Peterson Beadle, *Report: Minority Students Face More Disciplinary Action in Public Schools*, THINKPROGRESS (Mar. 6, 2012, 4:30PM), <https://archive.thinkprogress.org/report-minority-students-face-more-disciplinary-actions-in-public-schools-1ed0994cbb68/>).

28. *Id.* (citing Beadle, *supra* note 27).

29. See *id.*

30. *Id.*

31. *Id.*

students, result in LGBTQ+ youth entering the juvenile justice system at a much higher rate than indicated by their representation in the overall youth population.³² A growing body of research suggests that school disciplinary policies are imposed more harshly on LGBTQ+ students and that these policies serve as pathways that lead LGBTQ+ youth into the criminal legal system.³³ This Part discusses these policies, specifically examining the different forms they come in, the immediate disciplinary measures they impose, and how they affect LGBTQ+ students in particular.

First, it is necessary to contextualize the use and effects of school disciplinary policies. There are three broad categories of policies that this Comment examines: (1) policies that punish youth for expressions and manifestations of their identity as LGBTQ+ (e.g., targeting public displays of affection and youth's clothing choices); (2) policies that punish youth for attempting to protect themselves from bullying and harassment; and (3) the absence of supportive policies and the decision not to enforce existing policies in favor of LGBTQ+ students.³⁴

There are several types of disciplinary actions that may be used to enforce these policies.³⁵ Studies have shown that teachers may use disciplinary tactics that while not facially punitive, nevertheless hold the potential to affect LGBTQ+ students' immediate experiences at school and other factors not yet extensively examined (such as emotional well-being and increased likelihood of involvement with the criminal system).³⁶ An example of this "lesser" form of discipline would be regularly sending an LGBTQ+ student out of class for a display of self-expression when other heterosexual or gender conforming students are not sent out of class for the same behavior.³⁷

While this form of punishment is, at best, embarrassing and, at worst, emotionally damaging and capable of inflicting immense harm down the

32. *See id.* at 1-2.

33. *Id.*

34. *See generally* Snapp et al., *supra* note 21, at 65-73 (categorizing an examination of school disciplinary policies by discussing youth who are punished for public displays of affection and self-expression and youth who are punished for protecting themselves); JOSEPH G. KOSCIW ET AL., GLSEN, THE 2021 NATIONAL SCHOOL CLIMATE SURVEY 32-33 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf> (discussing a variety of discriminatory school policies and practices).

35. *See* Snapp et al., *supra* note 21, at 77.

36. *Id.*

37. *See id.* at 68, 77.

road, other disciplinary actions are more immediately severe.³⁸ An article in the *Journal of Adolescent Research*, discussing LGBTQ+ youth and the school-to-prison pipeline, explains that many of the more severe sanctions used by schools are forms of “exclusionary discipline”—a category that includes punishments like detention, suspension, and expulsion.³⁹ Such exclusionary discipline is often enforced through “zero-tolerance policies.”⁴⁰ Essentially, zero-tolerance policies are exactly what they sound like: policies that do not take into account the context of the alleged act or actor and, instead, assign mandatory, almost always harsh, punishments regardless of any potentially extenuating circumstances.⁴¹ Mandatory minimum sentencing requirements, passed during President Ronald Reagan’s War on Drugs in the 1980s, is a well-known example of a zero-tolerance policy.⁴²

These policies, which are rooted in the criminal system, are also commonplace in America’s schools.⁴³ Zero-tolerance policies in schools originated with federal legislation passed in the 1990s, mandating punishments and the “three strikes and you’re out” approach.⁴⁴ The most notable example is the Gun-Free Schools Act of 1994.⁴⁵ With this legislation, the federal government required every state receiving federal funds to implement a law mandating its educational agencies to expel, for at least one year, any student bringing a weapon to school.⁴⁶ Thus, many school districts enacted zero-tolerance policies against students who brought guns to school in the wake of nationwide grievance and backlash over highly publicized school shootings.⁴⁷ Initially, the purpose of

38. See *id.* at 77 (discussing the levels of severity and implications of various forms of school disciplinary policies).

39. *Id.*

40. See MITCHUM & MOODIE-MILLS, *supra* note 18, at 17-18.

41. See *id.*; Henry A. Giroux, *Racial Injustice and Disposable Youth in the Age of Zero Tolerance*, 16 INT’L J. QUALITATIVE STUD. EDUC. 553, 557 (2003) (explaining that the “three strikes and you’re out” policy of some zero-tolerance laws puts repeat offenders in jail for life, irrespective of the seriousness of the crime); MITCHUM & MOODIE-MILLS, *supra* note 18, at 18 (discussing the use of zero-tolerance policies in schools).

42. See Giroux, *supra* note 41 (discussing the extent to which zero-tolerance laws passed in the 1980s have enforced the criminalization of social issues in the United States).

43. See *id.* at 561; see also MITCHUM & MOODIE-MILLS, *supra* note 18, at 17.

44. Giroux, *supra* note 41, at 557.

45. See *id.* at 561; 20 U.S.C. § 8921.

46. The act also required local educational agencies to refer those youth coming to school with weapons to the criminal justice or juvenile delinquency system. Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 163 (1999) (citing 20 U.S.C. § 8921(b)(1)).

47. See Giroux, *supra* note 41, at 561; MITCHUM & MOODIE-MILLS, *supra* note 18, at 17 (identifying school shootings at Columbine High School, Virginia Tech, and Sandy Hook

scholastic zero-tolerance policies was obvious: making schools safer.⁴⁸ However, as these policies have become more robust, their purpose has become less apparent.⁴⁹ Zero-tolerance policies are increasingly synonymous with greater police presence in schools.⁵⁰ This creates environments where school police officers—sometimes referred to as “school resource officers”—play an increasing role in handling issues previously under the purview of school administrators.⁵¹

In Henry Giroux’s article connecting zero-tolerance policies to racial injustice experienced by youth, he states, “over time the [zero-tolerance] policy was broadened, and now includes a range of behavioral infractions that include everything from possessing drugs to harboring a weapon to *threatening* other students.”⁵² In a 2014 report examining the disparate impact of harsh school discipline policies and school policing, the Center for American Progress (CAP) found that increased police presence at schools, resulting from overly broad zero-tolerance policies, has led to myriad consequences for LGBTQ+ youth and students of color.⁵³ More police in schools can change the school environment, making the space feel unwelcoming and increasingly punitive—a shift that especially affects students who already feel unsafe or unsupported at school (often due to bullying or a lack of support from teachers).⁵⁴

Additionally, more police in schools often means more than just an increased presence of officers.⁵⁵ The CAP report calls the resulting developments an “outsourcing of school discipline” and states that “law enforcement is increasingly enlisted to manage issues that were once handled by school administrators.”⁵⁶ One major concern resulting from this “outsourcing” is that it gives police more control over discipline and

Elementary School as particularly high-profile incidents leading to increased zero-tolerance policies and police presence in schools).

48. See MITCHUM & MOODIE-MILLS, *supra* note 18, at 17.

49. See Giroux, *supra* note 41, at 561 (stating that zero-tolerance policies against guns in schools have broadened over time).

50. See *id.*

51. See MITCHUM & MOODIE-MILLS, *supra* note 18, at 17.

52. Giroux, *supra* note 41, at 561.

53. MITCHUM & MOODIE-MILLS, *supra* note 18, at 2, 17.

54. See *id.* at 17-18 (explaining that because zero-tolerance policies do not take context into account, LGBTQ+ students are sometimes caught in situations where they are punished due to actions they took defending themselves from harassment).

55. *Id.* at 17 (expanding upon the increased role that police officers have played in schools).

56. *Id.* (citing NATHAN JAMES & GAIL MCCALLION, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS (June 26, 2013), <https://www.fas.org/sgp/crs/misc/R43126.pdf>).

can create situations where officers are charged with enforcing policies or imposing punishments they have not been properly trained to enforce or impose.⁵⁷ Unsurprisingly, the burden of this uninformed enforcement falls disproportionately on the shoulders of LGBTQ+ students, with police criminalizing normal adolescent behavior and reacting punitively to youth grappling with emotional issues that should be addressed with counseling, not punishment.⁵⁸

It is not just law enforcement officers imposing biased and disproportionate punishments on LGBTQ+ students, though.⁵⁹ Studies have shown school administrators and educators are also responsible for overly penalizing LGBTQ+ students—especially LGBTQ+ students of color—for minor infractions.⁶⁰ LGBTQ+ youth are often punished (and punished with harsher sanctions) for minor violations, such as dress code violations, truancy, tardiness, cell phone usage, loitering, and willful defiance.⁶¹ With exclusionary discipline and zero-tolerance policies in place, punishment for these violations frequently results in suspension or expulsion.⁶² Substantially more research has been done on the implementation and effects of these harsh disciplinary policies on students of color rather than on LGBTQ+ students.⁶³ Such research has consistently found that Black youths are expelled at rates disproportionate to the percentage of the student body they account for, and this overrepresentation is not due to more frequent violations of school

57. *See id.* at 18.

58. *Id.*

59. *See id.* (asserting that bias by school administrators plays a role in zero-tolerance policies); Giroux, *supra* note 41, at 561 (explaining that extreme zero-tolerance laws relieve educators of exercising critical judgment and discretion in discipline).

60. *See* MITCHUM & MOODIE-MILLS, *supra* note 18, at 19 (“The research . . . consistently suggest[s] that students of color and LGBT youth face harsher sanctions by school personnel when committing similar offenses.” (citing Jerome Hunt & Aisha C. Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experiences of LGBT Youth in the Juvenile Justice System*, AM. PROGRESS (June 29, 2012), <http://www.americanprogress.org/issues/lgbt/report/2012/06/29/11730/the-unfair-criminalization-of-gay-and-transgender-youth/>)); Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 55 (2011) (“Our findings indicate that nonheterosexual adolescents suffer disproportionate punishments by schools. . .”).

61. MITCHUM & MOODIE-MILLS, *supra* note 18, at 19 (citing DANIEL J. LOSEN & TIA ELENA MARTINEZ, *OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS* (Apr. 8, 2013), <https://files.eric.ed.gov/fulltext/ED541735.pdf>); *see also* KOSCIW ET AL., *supra* note 34, at 31-32, 40.

62. MITCHUM & MOODIE-MILLS, *supra* note 18, at 19.

63. *See id.* at 1 (citing Beadle, *supra* note 27).

policies.⁶⁴ While such a robust body of statistical evidence does not exist for LGBTQ+ students, the CAP report concludes, “we can safely assume that LGBT[Q+] youth of color are also disparately affected.”⁶⁵

III. HARSH SCHOOL DISCIPLINARY POLICIES CAN LEAD TO LGBTQ+ YOUTH’S INVOLVEMENT WITH THE CRIMINAL LEGAL SYSTEM AT DISPROPORTIONATE RATES THAN THAT OF THEIR PEERS

The studies and research discussed above clarify that LGBTQ+ students are disproportionately subject to discipline in schools⁶⁶ and that this overrepresentation is likely *not* due to more violations of school rules.⁶⁷ What has not been discussed in detail yet is the impact that these disparate sanctions have on LGBTQ+ youth. As stated, research into the role school disciplinary policies play in facilitating youths’ entrance into the criminal system has grown in recent years.⁶⁸ Accordingly, the phrase “school-to-prison pipeline” has increasingly been used to describe the phenomenon of punitive discipline policies resulting in students entering the juvenile justice system.⁶⁹ Although, as previously mentioned, the body of research suggesting that this school-to-prison pipeline disproportionately affects students of color is much more robust than similar research studying its effects on LGBTQ+ students; recent studies consistently indicate that LGBTQ+ youth are similarly affected by school disciplinary policies.⁷⁰

The following subpart analyzes this research and draws connections between the effects of disciplinary policies and LGBTQ+ youths’ interactions with the criminal system. Sometimes, the connection is

64. *Id.* at 19 (citing Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES (Mar. 6, 2012), http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html?_r=2&ref=education&) (finding that during the 2009-10 school year, 39% of all expulsions were of black students, while black students represented only 18 percent of the student body at schools sampled).

65. *Id.* at 19. Research has shown that both students of color and LGBTQ+ students face harsher punishments than their peers for committing similar offenses (even when the offenses were committed as acts of self-defense). *See id.*

66. Discipline imposed on LGBTQ+ students often takes the form of harsh exclusionary discipline and zero tolerance policies. *See generally* MITCHUM & MOODIE-MILLS, *supra* note 18, at 1-2, 3; Himmelstein & Brückner, *supra* note 60; KOSCIW ET AL., *supra* note 34.

67. *See generally* MITCHUM & MOODIE-MILLS, *supra* note 18; Himmelstein & Brückner, *supra* note 60; KOSCIW ET AL., *supra* note 34.

68. *See* Snapp et al., *supra* note 21 (“A solid and growing body of research . . . has provided substantial evidence regarding how the school-to-prison pipeline disproportionately affects youth of color. . .”).

69. *Id.*; MITCHUM & MOODIE-MILLS, *supra* note 18, at 3.

70. Snapp et al., *supra* note 21.

immediate—a student gets arrested at school.⁷¹ Sometimes, the connection is more attenuated—school administrators “out” a student to their family in connection with a policy violation, the family kicks the student out of the home, and the student becomes significantly more vulnerable to arrest as a result of their homelessness.⁷² Although there are numerous ways in which hostile school environments and harsh disciplinary policies negatively impact LGBTQ+ students and serve as pathways to the criminal legal system, this Comment focuses on two broad categories.⁷³ First, this subpart discusses how the combination of unsupportive school environments and a distrust of school officials operates as a pathway to the criminal system for LGBTQ+ youth.⁷⁴ Then, it reviews the role official administrative responses to LGBTQ+ bullying and harassment at school play in the school-to-prison pipeline.⁷⁵

A. *Unsupportive School Environments and Distrust of School Officials*

Many LGBTQ+ youth do not have supportive home lives, so going to school offers the promise of reprieve from families who do not understand them, the chance to spend time with like-minded peers, and the presence of school officials to keep them safe.⁷⁶ Even though this may be true for some students, research indicates this promise is not always kept for LGBTQ+ youth.⁷⁷ A 2021 survey of the experiences of LGBTQ+ youth in America’s schools found 58.9% of students surveyed “had experienced LGBTQ+-related discriminatory policies or practices at

71. See *id.* at 70-71 (relaying the story of an LGBTQ+ student who was arrested at school for bringing a butter knife to defend herself against bullies).

72. See *id.* at 75 (explaining this cycle and how homelessness is considered “the number one indicator of whether a young person will get connected to the juvenile justice system”).

73. See *id.* at 63 (defining “pathway” as “any factor or experience that challenges or limits youths’ opportunities to remain engaged in school”).

74. See MITCHUM & MOODIE-MILLS, *supra* note 18, at 9 (citing Angela Irvine, *We’ve Had Three of Them: Addressing the Invisibility of Lesbian, Gay, Bisexual, and Gender Nonconforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675 (2010)) (referencing research finding that LGBTQ+ students report distrust of school administrators); KOSCIW ET AL., *supra* note 34 (finding that discriminatory school policies and practices make LGBTQ+ students feel like they are not valued or allowed in their school communities).

75. See Snapp et al., *supra* note 21, at 69 (explaining that youth who respond to bullying by fighting back are often blamed and punished, which can be a pathway toward school push-out).

76. See KOSCIW ET AL., *supra* note 34, at 3 (citing Jessica N Fish et al., “I’m Kinda Stuck at Home With Unsupportive Parents Right Now”: LGBTQ Youths’ Experiences With COVID-19 and the Importance of Online Support, 67 J. ADOLESCENT HEALTH 450, 450-52 (2020)) (discussing how remote learning during the COVID-19 pandemic left some LGBTQ+ youth concerned about having to spend too much time at home with unsupportive parents).

77. See generally *id.*

school” and that these policies negatively impacted their school experience.⁷⁸ The students surveyed reported discriminatory policies—such as, prevention from using their chosen name or pronouns;⁷⁹ disciplinary action for public displays of affection;⁸⁰ prohibition from using the bathroom or locker room aligning with their gender;⁸¹ and restriction from playing on sports teams consistent with their gender.⁸²

It is easy to imagine the effects such policies and practices have on students’ mental and emotional well-being. Having school officials—people that they are told to trust and rely on to guide them and keep them safe—invalidate and undercut their identity through discriminatory disciplinary policies may result in LGBTQ+ students feeling as though “they are not valued, or even allowed, in their school communities.”⁸³ Studies have found when youth experience hostile school conditions, they hold out little hope that education is meaningful or necessary.⁸⁴ This compromised mental health then becomes a contributing factor to LGBTQ+ youth getting pushed out of school.⁸⁵ “Push-out” due to poor mental health can, in turn, lead to involvement with the criminal system.⁸⁶ An adult interviewed for the Journal of Adolescent Research survey encapsulated how this operates as a pathway in the school-to-prison pipeline:

[T]he emotional and mental effect of being . . . criminalized for minor misbehavior . . . makes you fall behind in school. You may either drop out or you may be put on some sort of academic probation . . . where it’s easier for schools to push you out or expel you. Or you may be spending some time at home while you’re expelled or on the streets, which may be getting you into other like illicit activities . . . that end you up in jail.⁸⁷

78. *Id.* at xiv, xviii, 32.

79. 29.2% of LGBTQ+ students surveyed reported being subject to this type of policy. *Id.* at 32.

80. 25.2% of LGBTQ+ students surveyed reported they were disciplined because of this type of policy. *Id.*

81. 27.2% of LGBTQ+ students surveyed reported school policies prohibiting them from using the bathroom aligning with their gender, and 23.8% of LGBTQ+ students reported school policies prohibiting them from using the locker room aligning with their gender. *Id.*

82. 16% of LGBTQ+ students reported being subject to this type of policy. *Id.*

83. *Id.*

84. See Snapp et al., *supra* note 21, at 59 (citing MICHELLE FINE, FRAMING DROPOUTS: NOTES ON THE POLITICS OF AN URBAN HIGH SCHOOL (State Univ. of N.Y. Press 1991)).

85. *Id.* at 73.

86. *Id.*

87. *Id.*

It is important to emphasize that the survey referenced above looked specifically at school policies that targeted students' actual or perceived LGBTQ+ identity and self-expression.⁸⁸ Although, as discussed, policies such as these can be profoundly impactful and detrimental for LGBTQ+ students, they do not tell the whole story of how harsh school disciplinary policies disparately impact LGBTQ+ students. There is also the question of how policies that are not facially discriminatory or gender-based are enforced against LGBTQ+ students. A national longitudinal study of the interaction between criminal justice and school sanctions against non-heterosexual youth⁸⁹ found that "non[-]heterosexual adolescents, particularly girls, suffer punishments by school and criminal-justice authorities that are disproportionate to their rates of transgressive behavior."⁹⁰ This same study discovered non-heterosexual adolescents were 1.25 to 3 times more likely to experience sanctions than their heterosexual peers.⁹¹ Although there is certainly overlap between the gender and identity-based sanctions discussed above and the unequal distribution of school sanctions in general, it is important to note that both are distinct issues that LGBTQ+ youth face in school.⁹²

Additional studies show both of these forms of discriminatory administration of disciplinary policies lead to LGBTQ+ students distrusting and lacking confidence in school administrators.⁹³ Both this distrust in school officials and the biased application of sanctions has become a large part of what makes school environments hostile for LGBTQ+ students.⁹⁴ The feeling that the school environment is hostile and unwelcoming can then contribute to the compromised mental health LGBTQ+ youth experience, which can result in the youth being pushed out of school and encountering the criminal system.⁹⁵

It is also important to note, as discussed above in Part II, the increased police presence in schools plays a role in LGBTQ+ students feeling unwelcome—and sometimes even unsafe—at school.⁹⁶ The number of law enforcement officers in schools (and the power they wield)

88. See generally KOSCIW ET AL., *supra* note 34.

89. This study was the first of its kind. Himmelstein & Brückner, *supra* note 60, at 54.

90. *Id.*

91. *Id.*

92. See *id.* at 54-55; see generally KOSCIW ET AL., *supra* note 34.

93. MITCHUM & MOODIE-MILLS, *supra* note 18, at 11.

94. See *id.*

95. See *id.* at 9 (citing Irvine, *supra* note 74) ("[M]any LGBT youth drop out of school to avoid a hostile school climate, which puts them at heightened risk of coming in contact with the juvenile justice system.").

96. *Id.* at 17-18.

has grown hand-in-hand with the popularity of zero-tolerance policies.⁹⁷ More police in school, a space supposed to be a safe place to learn and grow, can drastically change the climate of a school building.⁹⁸ With more police and more rigid policies, schools start to “have more in common with military boot camps and prisons than they do with other institutions in American society.”⁹⁹ The effect this has on students—particularly students who are already marginalized—can be profound.¹⁰⁰ Giroux writes: “As schools become militarized, they lose their ability to provide students with the skills to cope with human differences [and] uncertainty. . . .”¹⁰¹

For LGBTQ+ students, who often already feel targeted and disconnected from school officials, this semi-militarization of schools can push their experience of the school environment from unwelcome to unsafe.¹⁰² The 2021 national longitudinal study conducted by the Gay, Lesbian and Straight Education Network (GLSEN) found that 81.8% of LGBTQ+ students surveyed “reported feeling unsafe in school because of at least one of their actual or perceived personal characteristics.”¹⁰³ Although numerous factors contribute to this feeling, research indicates an increased police presence is certainly one of them—and this increased presence can have severe consequences beyond students feeling unsafe at school.¹⁰⁴ CAP found an increased number of “school resource officers” (or school police) has “led to more arrests and the overcriminalization of students of color and LGBT youth.”¹⁰⁵

B. Administrative Responses to LGBTQ+ Bullying and Harassment at School

The official responses to bullying and harassment LGBTQ+ students receive is closely related to students’ distrust of school officials due to discriminatory application of disciplinary sanctions.¹⁰⁶ There is a significant amount of overlap and cause-and-effect in the factors that play a role in introducing youth to the criminal system. This subpart focuses

97. *See id.*

98. *See id.*

99. Giroux, *supra* note 41, at 562.

100. *See id.* at 562-63.

101. *Id.* at 563.

102. *See* MITCHUM & MOODIE-MILLS, *supra* note 18, at 17.

103. KOSCIW ET AL., *supra* note 34, at xv.

104. *See* MITCHUM & MOODIE-MILLS, *supra* note 18, at 17 (discussing students feeling unwelcome and unsafe due to more police in schools and the resulting consequences).

105. *Id.*

106. *See id.* at 11.

specifically on how school officials respond to both bullying of LGBTQ+ students and LGBTQ+ students' reporting of bullying, and it describes the effects these responses can have on students entering the school-to-prison pipeline.

The 2021 GLSEN national school climate survey reported sobering statistics on harassment and assault LGBTQ+ students experience at school—83.1% of students surveyed experienced some form of harassment or assault at school based on personal characteristics.¹⁰⁷ Over three-quarters of students surveyed experienced verbal harassment; 31.2% experienced physical harassment; 12.5% were physically assaulted; and over half experienced sexual harassment.¹⁰⁸ Although not surprising, these findings reveal a pervasive problem of bullying and harassment of LGBTQ+ students in our nation's schools.¹⁰⁹ Being bullied and harassed can clearly add to the hostile school environments as well as the mental and emotional struggles LGBTQ+ students experience (discussed in subpart A).¹¹⁰ However, there is another—maybe even more disturbing—aspect of this issue. Studies have revealed teachers and other school officials often fail to intervene when LGBTQ+ students are being bullied or harassed, choose not to enforce disciplinary policies against the bullies, and participate in the bullying and harassment.¹¹¹

GLSEN asked LGBTQ+ students who reported incidents of harassment and assault to school staff to explain how effective the staff responses were.¹¹² Only 26.6% of students felt that staff responded effectively to their reports.¹¹³ Moreover, 60.3% of students said staff either took no action or told the student to ignore the harassment or assault.¹¹⁴ Sixteen percent of students said that the staff member told them to change their behavior (e.g. act less gay).¹¹⁵ Twelve percent of students said they were blamed for reporting, and 7% of students said they were disciplined for reporting.¹¹⁶ Only 14.1% of students reported that the

107. KOSCIW ET AL., *supra* note 34, at xvi.

108. *Id.* at xvi-xvii.

109. *See id.*

110. *See* Snapp et al., *supra* note 21, at 73.

111. MITCHUM & MOODIE-MILLS, *supra* note 18, at 9 (citing ADVOCS. FOR CHILD. OF N.Y., IN HARM'S WAY: A SURVEY OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS WHO SPEAK ABOUT HARASSMENT AND DISCRIMINATION IN NEW YORK CITY SCHOOLS (2005), http://www.advocatesforchildren.org/sites/default/files/library/in_harmes_way_lgbt_report_2005.pdf?pt=1).

112. KOSCIW ET AL., *supra* note 34, at 29.

113. *Id.*

114. *Id.* at 29 tbl.1.2.

115. *Id.*

116. *Id.*

perpetrator of the harassment or assault was disciplined by the school or administrators.¹¹⁷

There are serious consequences to this lack of support from school staff.¹¹⁸ For one, students are significantly less likely to report bullying at all when they believe (often with good reason) nothing will be done about it—or they themselves may face consequences for reporting.¹¹⁹ Over 60% of students surveyed in the GLSEN study said they never reported harassment or assault to school staff, and less than 14.5% said they regularly reported such incidents.¹²⁰ Studies have also shown that LGBTQ+ youth who have experienced harassment are more likely to use drugs and alcohol; are more susceptible to violence, depression, isolation and suicide attempts; and are more likely to skip school than their peers who have not experienced similar harassment.¹²¹

With zero-tolerance policies in place, the pathway from truancy charges to the juvenile justice system can be very short.¹²² As discussed throughout this Comment, exclusionary discipline policies are enforced disproportionately against LGBTQ+ students, so when students skip school because they are being harassed and feel unsafe, they are more likely to be met with harsher punishments than their peers.¹²³ Taken with the fact LGBTQ+ youth are more likely than their peers to be truant for the aforementioned reasons, it becomes clear that the risks truancy charges carry with them are imposed disproportionately on LGBTQ+ students.¹²⁴ When enforced as a zero-tolerance policy, truancy charges can leave students with hundreds of dollars in fines and fees and sanctions to appear in court.¹²⁵ Studies have shown that by involving students in the juvenile justice system in this manner, it makes them more likely to stop going to school altogether—the likelihood of dropping out school quadruples when students are forced to appear in court.¹²⁶ Even if truancy

117. *Id.*

118. *See id.* at 26-28 (explaining findings on the reasons why students did not report harassment or assault).

119. *See id.* at 26-27.

120. *Id.* at 25.

121. MITCHUM & MOODIE-MILLS, *supra* note 18, at 9 (citing CDC, *LGBTQ+ Youth: Addressing Health Disparities with a School-Based Approach*, <http://www.cdc.gov/lgbthealth/youth.htm> (last visited Apr. 8, 2024)).

122. *See id.* at 6 (discussing the repercussions of truancy charges for LGBTQ+ youth).

123. *See id.* at 19 (citing Hunt & Moodie-Mills, *supra* note 60) (referencing research suggesting that LGBT youth face harsher sanctions than their peers when committing similar offenses).

124. *See id.* at 6 (discussing the repercussions of truancy charges for LGBTQ+ youth).

125. *See id.*

126. *Id.*

charges do not land the student in court, it is likely that zero-tolerance policies will impose other harsh sanctions, potentially even suspension or expulsion.¹²⁷ Studies have shown that “once a student violates a school discipline policy and is suspended or expelled, each subsequent violation increases the chance of juvenile and criminal justice involvement.”¹²⁸

Sometimes LGBTQ+ students who are subjected to persistent harassment and have not had success reporting it to school officials take a more offensive approach to stopping the harassment than skipping school.¹²⁹ The Journal of Adolescent Research published a study that indicated some LGBTQ+ youth who have been met with ineffective school enforcement of anti-bullying policies respond with defensive or preemptive violence.¹³⁰ This study tells the story of one transgender student who experienced incessant bullying from a group of students but reported it every time it happened.¹³¹ Although she recorded them, her reports never traveled through the appropriate channels to the social worker who was supposed to see them.¹³² Eventually, the student announced she would bring a knife to school, and still, no action was taken.¹³³ When she did indeed bring a (butter) knife to school, she was arrested.¹³⁴ Upon her release from the juvenile bureau, she was placed in expulsion proceedings.¹³⁵ Due to family rejection and juvenile court proceedings, this student experienced “being bounced around from one house to another.”¹³⁶ The study documents several other accounts of students, like this one who “[d]espite numerous attempts to get help from adults in her school, . . . was left with few options, and although she was the one regularly harassed, she was punished for an act of self-protection.”¹³⁷

127. See *id.* at 6, 17-19 (discussing the high rates of truancy for LGBTQ+ youth and how zero-tolerance policies often result in suspension or expulsion).

128. *Id.* at 20 (citing Rachel Wilf, *Disparities in School Discipline Move Students of Color Toward Prison: New Data Show Youth of Color Disproportionately Suspended and Expelled from School*, AM. PROGRESS (Mar. 13, 2012), <http://www.americanprogress.org/issues/race/news/2012/03/13/11350/disparities-in-school-discipline-move-students-of-color-toward-prison/>).

129. See Snapp et al., *supra* note 21, at 69-73 (discussing how youth attempt to protect themselves from school bullying and the consequences of these actions).

130. *Id.* at 69.

131. *Id.* at 70-71.

132. *Id.* at 71.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

Even when LGBTQ+ youth are not arrested at school, receiving punishment for defending themselves in cases of harassment can still lead to involvement with the criminal system.¹³⁸ When youth are subjected to exclusionary discipline for fighting back or defending themselves against bullies, the likelihood they will be sent to an alternative school, drop out of school, or be suspended or expelled, increases.¹³⁹ As noted above in the context of truancy charges, after a student has been suspended or expelled, each time they are subject to an additional violation, the chance they will become involved in the juvenile justice system increases.¹⁴⁰ The mental and emotional consequences of being punished for defending oneself against harassment can be enormous: “[s]tudies suggest that the actions (or inactions) of adults in schools . . . have the potential to derail youth, particularly LGBT youth, and push them into a cycle of unfair criminalization that has lifelong consequences.”¹⁴¹ A 2017 study found that while LGBTQ+ youth make up only 7-9% of all youth nationwide, they account for 20% of all youth in juvenile justice facilities and a staggering 39.4% of girls in juvenile justice facilities.¹⁴² Even more staggering is the discovery that of all LGBTQ+ and gender non-conforming youth in juvenile justice facilities, 85% were youth of color.¹⁴³

IV. CONCLUSIONS AND RECOMMENDATIONS

This Comment and the sources it examines demonstrates clear findings that LGBTQ+ students experience harsh school disciplinary policies at disproportionate rates compared to their peers. The consequences of this disparate application can be dire. Zero-tolerance policies are a major driver of the school-to-prison pipeline, which “paves the way for youth, particularly students of color and LGBT youth, to spend less time in school, more time on the streets, and have a higher likelihood of entering into the juvenile justice and criminal justice systems.”¹⁴⁴ As previously noted, once one enters the criminal justice

138. *See id.* at 76 (concluding that punitive punishment facilitates entry of LGBTQ+ youth into the school-to-prison pipeline).

139. *See id.*

140. MITCHUM & MOODIE-MILLS, *supra* note 18, at 20 (citing Wilf, *supra* note 128).

141. *Id.* at 2.

142. CTR. AM. PROGRESS ET AL., UNJUST: LGBTQ YOUTH INCARCERATED IN THE JUVENILE JUSTICE SYSTEM 2 (2017), <https://www.lgbtmap.org/file/lgbtq-incarcerated-youth.pdf>.

143. *Id.*

144. MITCHUM & MOODIE-MILLS, *supra* note 18, at 28.

system, they face a whole host of consequences.¹⁴⁵ These consequences include the very real deprivation of liberty as well as formal and informal collateral consequences—like losing the ability to vote and being cut off from friends and family.¹⁴⁶ Studies have shown involvement with the justice system has more severe effects on juveniles than it does on adults.¹⁴⁷ For these reasons, it is imperative that policies are implemented to counteract the effects of these disciplinary policies, which are strong drivers of the school-to-prison pipeline.

This Part discusses three major recommendations to combat the effects of harsh school disciplinary policies on LGBTQ+ youth: (1) increased restorative justice initiatives; (2) a stronger presence of Gay Straight Alliance (GSA) clubs in schools; and (3) the passage of a federal enumeration standard to protect LGBTQ+ youth in schools. First, implementing restorative justice practices in schools would “enable students to develop a stronger sense of empathy and compassion for each other, as well as their teachers.”¹⁴⁸ Making an effort to understand the reasons behind students’ actions—instead of simply punishing them—is essential to resolving the issues at play and decreasing the chances that students misbehave in the future.¹⁴⁹ This applies to teachers, administrators, and students. For example, in the case of a student-on-student conflict, enabling both students to “talk it out” in a restorative justice setting with a moderator present would likely foster empathy and is more likely to create an understanding of the root of the misbehavior and the conflict.¹⁵⁰ The same would apply in a teacher-student conflict. Perhaps a particular faculty member does not understand one of their LGBTQ+ students—while a restorative justice session may not solve everything, it certainly has a higher likelihood of success than a severe sanction for perceived misbehavior with no opportunity for the two sides to connect and discuss.¹⁵¹ The increased use of restorative justice initiatives on school campuses should naturally bring with it a decreased use of zero tolerance policies.¹⁵²

145. See generally Logan, *supra* note 6 (discussing various consequences of criminal justice system involvement).

146. *Id.*

147. See generally Lambie & Randell, *supra* note 14.

148. MITCHUM & MOODIE-MILLS, *supra* note 18, at 25.

149. See *id.*

150. See *id.*

151. See *id.* at 25, 26 (explaining that restorative justice sessions help get to the root causes of misbehavior, thus increasing the likelihood that students will be brought back into the school community).

152. See *id.*

Additionally, studies show the presence of GSAs and other supportive student groups can have a significant positive effect on LGBTQ+ students' school experiences.¹⁵³ Creating and fostering such groups would not only help LGBTQ+ students feel more acknowledged, supported, and included, but it would also increase access to awareness of the LGBTQ+ community for others.¹⁵⁴ The least schools can do to show their LGBTQ+ students they are welcome and safe is to provide greater access to groups like GSAs that provide support, friendship education, and other resources.

Perhaps most importantly, federal legislation should protect students from bullying by enumerating protected classes of students—including LGBTQ+ students.¹⁵⁵ Currently, there is no federal legislation, and very little state legislation, providing an enumeration standard to protect particularly vulnerable students.¹⁵⁶ Research has shown teachers and administrators are more likely to intervene in instances of peer-on-peer bullying when an enumerated policy is in place protecting certain classes of students based on heightened vulnerability and disparate impact.¹⁵⁷ The Supreme Court has indeed found enumeration to be critical: "Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."¹⁵⁸ There is currently proposed federal legislation that would accomplish these goals.¹⁵⁹ The Safe Schools Improvement Act (SSIA) would require schools districts to adopt codes of conduct prohibiting bullying and harassment on the basis of race, color, national origin, sex, disability, sexual orientation, gender identity, and religion—thus creating a federal enumeration standard.¹⁶⁰ Passage of this bill would be a major victory in the fight to combat harsh school disciplinary policies and the school-to-prison pipeline.¹⁶¹

There are several avenues for further research that would help contextualize and understand the vast issue of LGBTQ+ youth pathways

153. See KOSCIW ET AL., *supra* note 34, at xx-xxi, 133.

154. See MITCHUM & MOODIE-MILLS, *supra* note 18, at 25-26.

155. See *id.* at 24-26.

156. See *id.* 11-13.

157. *Id.* (citing GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *Enumeration: A Tool for Advocates*, <https://www.nclrights.org/wp-content/uploads/2013/07/inclusion.pdf>).

158. *Romer v. Evans*, 517 U.S. 620, 628 (1996).

159. See HUM. RTS. CAMPAIGN, *Safe Schools Improvement Act*, <https://www.hrc.org/resources/safe-schools-improvement-act> (last updated Nov. 21, 2023).

160. Safe Schools Improvement Act, H.R. 6031, 118th Cong. § 3105 (2023); see MITCHUM & MOODIE-MILLS, *supra* note 18, at 24-26.

161. See *id.*; see also T, *supra* note 18, at 25.

into the criminal justice system. Although outside the scope of this Comment, LGBTQ+ youth homelessness and involvement with social service settings are also major pathways.¹⁶² Examining these pathways alongside harsh school disciplinary policies would provide a more comprehensive understanding of how LGBTQ+ youth enter the criminal system. Homelessness is considered the most significant indicator of whether youth will be connected to the juvenile justice system.¹⁶³ Importantly, homelessness is closely connected to issues LGBTQ+ youth experience at school: “When schools ‘out’ youth to unsupportive families, those youth often end up homeless because their families have either kicked them out or it becomes too traumatic to live with rejecting families.”¹⁶⁴ For these reasons, examining the effects of harsh school disciplinary policies on LGBTQ+ youth in conjunction with other aggravating factors such as homelessness and social service system involvement would produce a more comprehensive understanding of how these pathways to the criminal justice system operate and what can be done to prevent such a disparate impact on LGBTQ+ youth.

162. See generally Angela Irvine and Aisha Canfield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population*, 24 J. GENDER SOC. POL’Y & L. 243 (2016); Michelle Page, *Forgotten Youth: Homeless LGBT Youth of Color and the Runaway and Homeless Youth Act*, 12 NW. J. L. & SOC. POL’Y 17 (2017).

163. Snapp et al., *supra* note 21, at 75.

164. *Id.*