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THE CRIMINALIZATION OF SCHOOL CHOICE: PUNISHING THE POOR FOR THE INEQUITIES OF GEOGRAPHIC SCHOOL DISTRICTING

La Darien Harris[†]

I. INTRODUCTION

The traditional mechanism for assigning students to a given public school relies heavily on place of residence.¹ As a result, America's public schools vary widely in racial and socioeconomic diversity. We find that inner-city schools are densely populated with minorities and low-income students, whereas schools located in suburban districts are mostly populated with white and middle-class students.² The subsequent inequalities that necessarily arise have been well documented.³

State legislators and policy makers have nonetheless struggled to rectify the disparity of quality found in America's public schools. As we will see, school choice initiatives face budgetary and practical challenges and are often met with considerable sociopolitical opposition.⁴ Faced with dire options, many minority and low-income parents take matters into their own hands by enrolling their children into public schools that they feel offer a more promising education. Unfortunately, this

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1. *Henry v. Godsell*, 165 F. Supp. 87, 91 (E.D. Mich. 1958) (holding that “[P]laintiff ha[d] no constitutionally guaranteed right to attend a public school outside of the attendance area in which she resides. The utter chaos that would prevail if each child were permitted to choose the school that he or she desired to attend without regard to the attendance area in which the child resides is readily apparent.”).

2. *See generally* John R. Logan et al., *The Geography of Inequality: Why Separate Means Unequal in American Public Schools*, 85 SOC. EDUC. 287 (2012) (discussing and comparing the inequalities of public schools densely populated with non-Asian minority students as opposed to school predominately populated with Asian and non-Hispanic white students).

3. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L. J. 2043, 2085–86 (2002) (noting the advantages enjoyed by schools in higher-income and racially homogenous districts).

4. *See generally id.* (an analysis of the negative political pressure state legislators face from suburban voters against school-choice programs).

is often done outside the bounds of state law. Prohibitions against falsifying residency⁵ for enrollment purposes often come with criminal and civil penalties.⁶

This Note analyzes how different states punish illegal enrollment and argues for leniency in penalizing this behavior. Specifically, it argues that states should prohibit incarceration for school enrollment fraud because incarceration for such an offense is draconian and would indirectly punish disadvantaged children.

II. BACKGROUND

It is unintuitive, yet unsurprising, that a discussion of the history of school choice in America can appropriately begin with the abolishment of slavery. By 1865, approximately 3.9 million African-Americans were freed from bondage and granted citizenship under the Thirteenth Amendment and Civil Rights Act of 1866, respectively.⁷ Ratified in 1868, the Fourteenth Amendment extended the right of equal protection and due process to African-Americans. Disgruntled by the implications of the Civil War, southern states enacted a series of legislation that prohibited racial integration. The characteristic statutory and policy frameworks addressing race during this era were known as Jim Crow laws, and serve as infamous examples of institutionalized racism. From Jim Crow arose litigation concerning the constitutionality of segregation as practiced.

A. *Plessy v. Ferguson: The “Separate but Equal” Doctrine*

In 1892, a mixed-raced man by the name Homer Plessy purchased a first-class passage on the East Louisiana Railway. Though seven-eighths Caucasian and only one-eighth African-American, Plessy was considered colored by the railway’s conductor.⁸ The conductor specified that the seating on the railroad carrier was apportioned according to race, and thus, Plessy could not sit in the area designated for whites.⁹ Plessy was then forcibly removed from the carrier and imprisoned.¹⁰ In 1896, the United States Supreme Court in *Plessy v. Ferguson* held that racially separated accommodations did not violate the Equal Protection Clause of the Fourteenth Amendment so long as such accommodations were tangibly equal.¹¹ For nearly sixty years, the ‘separate but equal’ doctrine was used as justification for the

5. This Note employs various terms and phrases describing the crime by which parents enroll their child into a school through some form of deception. In this regard, the phrases “falsifying residency,” “residency fraud,” “fraudulent enrollment,” “boundary hopping,” and “school enrollment fraud” are interchangeable and colloquially refer to an offense that the States, Federal Government, and the media characterize in various ways.

6. See ARK. CODE ANN. § 6-18-202(f) (West 2017); TEX. EDUC. CODE ANN. § 25.002(d) (West 2017); 24 PA. CONS. STAT. § 13-1302(c) (2017) (state statutes from Arkansas, Texas, and Pennsylvania respectively pronouncing punishment for the falsification of residence for school enrollment purposes).

7. *Slave Census*, SON OF THE SOUTH, <http://www.sonofthesouth.net/slavery/slave-maps/slave-census.htm> (last visited Feb. 23, 2018).

8. *Plessy v. Ferguson*, 163 U.S. 537, 541–42 (1896).

9. *Id.*

10. *Id.* at 542.

11. *Id.* at 550–51 (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.”).

legality of racial segregation of public facilities, including of course, public schools. It was not until 1954 that *Plessy* was overturned by the landmark decision in *Brown v. Board of Education of Topeka County*.

B. Brown v. Board of Education

In *Brown*, the Supreme Court wrestled with the question of whether “segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive[d] the children of the minority group of equal education opportunities[.]”¹² The Court answered in the affirmative, holding that race-based separation in public schools was inherently unequal.¹³ Chief Justice Earl Warren delivered the opinion, eloquently noting that:

Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁴

Here, the presiding principle was that a child’s education comprises intangible benefits that complement the black letter curricula she learns. In other words, a child’s schooling is more than the sum of its material parts; it serves as socialization training that prepares her for success in adapting to the structures of our society. It is apparent that *Brown* addressed the inequities of racial discrimination in the public-school system, an observation which may seem astray from the ambitions of this Note.

However, in *Brown II*, the Court held that in compliance with their holding in *Brown*, schools were required to desegregate “with all deliberate speed.”¹⁵ Recognizing the massive administrative challenges that would arise from the decision, the Court invited the United States Attorney General and the states’ Attorneys General to submit plans for the desegregation of public schools.¹⁶

This ushered in the first prominent issue pertaining to modern day school choice. Many African-Americans lived in proximity to the all-black schools they attended, and vice versa for White-Americans. The geographic nature of school districting posed puzzling questions regarding African-Americans’ school choice in implementing the desegregation ordered in *Brown*.

12. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

13. *Id.* at 495.

14. *Id.* at 493.

15. *Brown v. Bd. of Educ. Topeka, Kan.* 349 U.S. 294, 301 (1955).

16. *Id.* at 298–99.

While *Brown* illustrated that students are subtly handicapped by the very nature of racial segregation, research has shown that this handicap extends to socioeconomic segregation as well. This suggests that the reasoning underlying low-income parents' motivation to illegally enroll their children into schools with higher-income students is parallel to that of the Chief Justice's in *Brown*.

The following section explores what followed after *Brown* and the various challenges presented in implementing the integration *Brown* commanded. It examines a string of Supreme Court cases that further articulated the practical demands of integration as well as account for the sociopolitical turmoil that laid the foundation for contemporary challenges facing public school choice.

III. INTEGRATION AND SCHOOL CHOICE

Despite the bold constitutional pronouncement expounded in *Brown*, desegregation proved sluggish. Many schools effectively refused to racially integrate and in some cases, affirmatively resisted the Supreme Court's orders.¹⁷ Still, other schools made modest attempts at developing and implementing an integration plan, giving rise to further litigation that made its way to the Supreme Court.

In *Green v. County School Board of New Kent County*, the Supreme Court held that a "freedom of choice" plan did not constitute adequate compliance with a school board's responsibility to achieve an admission system to public schools on a nonracial basis.¹⁸ New Kent was a rural county in Eastern Virginia.¹⁹ Within it resided two schools with overlapping bus routes—New Kent School and George W. Watkins.²⁰ Under Virginia law, the two schools were racially segregated with New Kent admitting white students and Watkins admitting African-Americans.²¹

In 1965, ten years after *Brown II*, the School Board developed a "freedom of choice" plan where parents were permitted to choose which of the two schools their children would attend.²² Despite being in place for three years, none of the white students in the county elected to attend the Watkins school, while eighty-five percent of the African-American students remained at Watkins.²³ The Court ordered the Board to create a new plan, stating bluntly, "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."²⁴

The Supreme Court's orders were simple in that they were not difficult to comprehend, yet school districts and their corresponding district courts were left to their own devices in forming an integration method that was practical, affordable,

17. See *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

18. *Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430, 441 (1968) ("The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system.").

19. *Id.* at 432.

20. *Id.*

21. *Id.*

22. *Id.* at 433–34.

23. *Id.* at 441.

24. *Green v. Cty. Sch. Bd. of New Kent Cty, Va.*, 391 U.S. 430, 439 (1968).

and expedient. Traditionally—and even today—schools were strategically located and sized according to the supply of students within the surrounding residential area. The result was that a school’s racial composition was naturally representative of the area the school was located. While sensible, this is what made swift integration particularly challenging. The residential patterns initially implemented from federal, state, and local government prior to *Brown* were racially motivated. Notwithstanding state-endorsed segregation, schools were bound to be racially segregated by virtue of the racially segregated residences that fed into them. Hence, the vestiges of past segregation made a more aggressive agenda necessary; merely permitting integration was insufficient.

In response to court orders to come up with plans for desegregation, school districts adopted drastic and complex measures to balance the racial divide of their schools. Some schools were shut down and their students reassigned. Other school boards restructured their school zoning boundaries to shepherd African-Americans and whites toward shared campuses. Many schools used a combination of similar tactics. In *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court ruled that the use of expanded bus routes was an appropriate component of plans to racially integrate schools, given that the routes were not so long that they negatively impacted the students’ education.²⁵ This holding would later be limited in *Milliken v. Bradley* when the Court held that busing could not be used to integrate between districts where the constitutional violation only occurred in one district and did not cause segregation in another district.²⁶

This decision had been criticized as stifling the desegregation of schools between urban and suburban residential areas.²⁷ The holding in *Milliken* is considered by some to be indicative of the political unrest surrounding the use of mandatory busing in implementing desegregation.²⁸ In 1972, President Nixon responded to two district court orders from Detroit and Richmond, which ordered suburban districts to participate in metropolitan-wide desegregation plans. President Nixon openly criticized busing in a televised appearance stating “[t]he great majority of Americans—white and black—feel strongly that the busing of school children away from their own neighborhoods for the purpose of achieving racial balance is wrong.”²⁹ As an alternative, President Nixon proposed legislation to increase federal funding to inner-city schools so that “the schools in the central cities are upgraded so that the children who go there will have just as good a chance to get quality education as do the children who go to school in the suburbs.”³⁰

Backed by pressure from their suburban constituents, Congress scrambled to pass measures to limit busing.³¹ The legislation was designed to prohibit courts from ordering the busing of any student beyond her neighborhood school, declaring that

25. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30–31 (1971).

26. *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974).

27. Ryan & Heise, *supra* note 3, at 2052.

28. *Id.* at 2056.

29. President Richard Nixon, Presidential Statement to Congress (Mar. 17, 1972), available at <https://www.nytimes.com/1972/03/17/archives/transcript-of-nixons-statement-on-school-busing.html>.

30. *Id.*

31. Ryan & Heise, *supra* note 3, at 2053–54.

“the neighborhood is the appropriate basis for determining public school assignments.”³²

The prohibition of transporting inter-district students via busing created a socioeconomic segregation that largely coincided with the racial segregation of years prior. Thus, a tradition of racial oppression and the series of court decisions and legislative action that occurred during the 1970s laid the foundation for the perplexing disparity of today’s public schools.

The following section examines the shortcomings of impoverished schools and the subsequent reasons why many low-income parents seek to enroll their children into more affluent schools. It contextualizes what these parents are avoiding and how the schools available to them might differ from those they seek.

IV. TODAY’S PUBLIC SCHOOLS: WHAT ARE PARENTS RUNNING FROM?

Some parents try to work around school inequality by committing residency fraud to enroll their children into better schools, most often characterized as schools attended by higher-income students. This issue of “boundary hopping” is not novel, though it has been noted as a growing phenomenon throughout the country, with many school districts investing considerable effort in investigating and penalizing those caught in the act.³³ The issue of how to punish this behavior has raised questions of ethics, with many commentators remarking on the consequences faced by parents who are convicted.

Statistics on the prevalence of enrollment fraud are scant at best. The nature of boundary hopping is necessarily secretive and, traditionally, it was rare for school districts to seek criminal charges against parents,³⁴ opting for disenrollment of the student instead. The prevailing trend is that parents engaging in this behavior enroll their child into a school that enjoys greater resources and is populated with wealthier students.³⁵ This suggests that mere convenience of proximity is not the primary motivation for residency fraud. This Note later analyzes how different states have characterized this sort of crime, but first it addresses why some parents are motivated to violate districting laws at the risk of their financial stability and, in some cases, their freedom. In the following section, this Note considers how high and low-income schools differ.

A. *Differences Between High and Low-Income Schools*

In evaluating this question, it is worth specifying the meaning and relevance of a school’s financial composition. Here, emphasis is placed on the socioeconomic status of the parents of the student body; not necessarily the financial resources the school pools from government aid or other funding. This distinction is paramount,

32. Equal Education Opportunities Act, 20 U.S.C. § 1701 (2012).

33. Eddy Ramirez, *Schools Crack Down on Boundary Hopping*, U.S. NEWS & WORLD REP. (Mar. 2, 2009), <https://www.usnews.com/education/articles/2009/03/02/schools-crack-down-on-boundary-hopping>.

34. *Id.*

35. *Poor Parents Go to Prison For Sending Their Kids to a Wealthy School*, POLITICUSUSA (Oct. 20, 2011), <http://archives.politicususa.com/2011/10/20/rich-poor-schools.html>.

as studies have suggested that simply throwing money at the problem of school inequality is largely ineffectual.³⁶ Further, because the resources of a given school are heavily tied to the property taxes paid by the district's residents³⁷—and property taxes reflect the value of the residence itself—the economic status of the parents serves as a more reliable indication of the school's socioeconomic standing. The key differences between schools of varied income levels are its racial composition, academic performance, and the future prospects of the students.

1. Race

It is commonly acknowledged that schools show consistent racial segregation along varying strata of economic standing. Minority children are far more likely to attend high-poverty schools than their white counterparts.³⁸ Specifically, African-American and Hispanic students show a much higher percentage of attendance in high-poverty schools than Asian-American and white students.³⁹ As previously intimated, the juxtaposition of high and low-income schools is virtually synonymous with that of suburban versus urban locale. Consequently, African-American and Hispanic students are much more likely to attend inner-city (i.e. urban districted) schools.⁴⁰

In contrast to *Brown*, here, the relevance of racial composition pertains to the socioeconomic division that flows from racial segregation and the consequences that arise for convictions of residency fraud; not the value of racial integration itself. Hence, one can infer that a parent living in an urban, low-income district who commits residency fraud to enroll their child in a suburban or otherwise high-income school is likely a person of color. It then follows that statutes punishing enrollment fraud will primarily affect minorities.

36. In an attempt to improve the education of African-American students and encourage desegregation, the Kansas City, Missouri, School District raised their per pupil expenses to the highest found in the nation on a cost of living adjusted basis. Test scores did not improve, nor did desegregation subside. See generally PAUL CIOTTI, POLICY ANALYSIS: MONEY AND SCHOOL PERFORMANCE: LESSONS FROM THE KANSAS CITY DESEGREGATION EXPERIMENT, NO. 298 (1998).

37. NAT'L CTR. FOR EDUC. STATS., PUBLIC SCHOOL REVENUE SOURCES (2017), https://nces.ed.gov/programs/coe/pdf/coe_cma.pdf.

38. *School Poverty*, NAT'L EQUITY ATLAS, http://nationalequityatlas.org/indicators/School_poverty (last visited Apr. 16, 2018) (data from the National Center of Statistics indicating that in 2014, across all American public schools, nearly forty-three percent of students of color attended high-poverty schools as opposed to less than eight percent of white students).

39. *Id.* at [http://nationalequityatlas.org/indicators/School_poverty/By_race~ethnicity:35576/United_States/false/Year\(s\):2014/School_tyFNpe:All_public_schools/](http://nationalequityatlas.org/indicators/School_poverty/By_race~ethnicity:35576/United_States/false/Year(s):2014/School_tyFNpe:All_public_schools/) (last visited Apr. 16, 2018) (showing that in 2014, 47.5% and 48.1% of African-American and Hispanic students respectively attended high-poverty schools. By contrast, only 17.6% of Asian-American and 7.6% white students attended high-poverty schools. "High-poverty" is defined herein as schools in which greater than 75% of the student body are eligible for free or reduced-price lunch).

40. Logan, et al., *supra* note 2, at 2. (showing that the twenty-four largest central cities are populated with more than seventy percent African-American and Hispanic students).

2. Academics

In the last fifty years, the gap of academic performance between high and low-income schools K-12 has widened.⁴¹ Academic performance is generally measured by test scores, class grades, dropout rates, and the percentage of students who enroll in college after graduation. When considering the percentile ranking of a school's students as compared to other schools within their state,⁴² it is clear that schools with a majority of low-income or disadvantaged students consistently perform below the level of schools mostly populated with more-affluent students regardless of race.⁴³ Interestingly, low-income students attending high-income schools perform better academically than low-income students attending low-income schools.⁴⁴ This suggests that the economic status of the student population has a comparable impact on academic performance as the economic status of the individual student.⁴⁵

Students hailing from more-affluent families often have parents who are more educated than those found in low-income households, and have more resources to invest into their children's educational development.⁴⁶ Importantly, schools populated with a more-affluent student body may also see more parental involvement. Parental involvement is generally defined as volunteering at school, parent-teacher communication, involvement in academic-related activities at home, and stronger parent-teacher relationships. Parental involvement has been linked to greater academic achievement, higher career aspirations, and less disruptive behavior from students.⁴⁷ This attracts and retains more experienced teachers.⁴⁸

Teacher-to-student ratios are generally more favorable in high-income schools, and minority students who often come from low-income families are more sensitive to the expectations and relationships formed with their teachers.⁴⁹ Moreover, more

41. See Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 100–11 (Greg J. Duncan & Richard J. Murnane eds., 2011).

42. Because academic standards differ among states, comparing grades, test scores and the like is problematic. Instead, it is fairer to use the percentile ranking of a school as measured against other schools within their state. This allows academic performance among the sister states to be equitably compared. See Logan et al., *supra* note 2, at 4.

43. *Id.* at 5–6.

44. Robert Crosnoe, *Low-Income Students and the Socioeconomic Composition of Public High Schools*, 74 *AM. SOC. REV.* 709, 722 (2009).

45. See generally Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 *TEACHERS C. REC.* 1999 (2005). See also, COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* 325 (1966) ("The social composition of the student body is more highly related to student achievement, independent of the student's own social background, than any school factor.").

46. See Reardon, *supra* note 41, at 11–12.

47. Nancy E. Hill et al., *Parent Academic Involvement as Related to School Behavior, Achievement, and Aspirations: Demographic Variations Across Adolescence*, 75 *CHILD DEV.* 1491 (2004).

48. Gail D. Hughes, *Teacher Retention: Teacher Characteristics, School Characteristics, Organizational Characteristics, and Teacher Efficacy*, 105 *J. EDUC. RES.* 245, 247 (2012) (citing authority indicating that, similar to schools with higher-achieving students, schools with above average parental involvement tend to retain more teachers; also citing authority showing that the lack of parental involvement at inner-city schools is a commonly cited barrier for attracting teachers).

49. Diamond et al., *Teachers' Expectations and Sense of Responsibility for Student Learning: The Importance of Race, Class, and Organizational Habitus*, 35 *ANTHROPOLOGY & EDUC. Q.*, 75, 77 (2004).

affluent students generally have higher aspirations for academic and career success than low-income students.⁵⁰ Arguably, the collegial exposure to such ambition creates a sort of peer pressure that elevates a student's own academic achievement.⁵¹ Hence, research suggests that the extent of academic success increases when parents falsify residency for their children to attend high-income schools. In sum, low-income parents are risking their livelihood for the sake of providing their children the academic advantages enjoyed by students from more affluent families.

3. School to Prison Pipeline

High-poverty schools often regulate student behavior with “zero tolerance” policies that expel or suspend students for minor or subjective infractions⁵² such as disruptive behavior, profanity, insubordination, or dress-code violations. To make matters worse, many schools enlist actual police officers on school grounds to enforce strict compliance with school policies.⁵³ Hence, many schools have effectively outsourced school discipline to the juvenile justice system. For instance, during the 2011–2012 school year, 92,000 students were arrested in school,⁵⁴ the majority of which were minority students.⁵⁵ Students who are suspended, expelled, or arrested under such policies face a substantially higher risk of dropping out or engaging in criminal behavior at an early age.⁵⁶ African-American students are particularly vulnerable, as they are three times more likely to be suspended or expelled than white students.⁵⁷ This alarming phenomenon became known as the “school to prison pipeline” and is a growing epidemic in American public schools. The Obama Administration notably treated the school-to-prison pipeline as a focal point in education reform, introducing guidelines for schools to abandon draconian disciplinary policies in 2014.⁵⁸

50. See JACQUELINE E. KING, *THE DECISION TO GO TO COLLEGE: ATTITUDES AND EXPERIENCES ASSOCIATED WITH COLLEGE ATTENDANCE AMONG LOW-INCOME STUDENTS* (1996) (finding that the outlook students held towards college attendance differed markedly between high and low-income students); see also Chenoweth & Galliher, *Factors Influencing College Aspirations of Rural West Virginia High School Students*, 19 J. RES. RURAL EDUC. 2 (2004) (noting that familial factors such as income, education of parents and older siblings, and knowledge of the value of post-secondary education affects a student's academic aspirations).

51. Helen F. Ladd, *School Vouchers: A Critical View*, 16 J. ECON. PERSP. 3, 7 (2002).

52. AMANDA PETTERUTI, *EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS* 5 (2011).

53. *Id.* at 1 (citing a series of reports from the U.S. Department of Justice which show that between 1997 and 2007, the number of school resources officers increased by thirty-eight percent).

54. INST. OF EDUC. SCI., *CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT (SCHOOL DISCIPLINE)* 6 (2014), available at, <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

55. *Id.* at 6 (showing that fifty-five percent of students involved in school-related arrests or referred to law enforcement are African-American or Hispanic).

56. PETTERUTI *supra* note 52, at 17.

57. INST. OF EDUC. SCI., *supra* note 54, at 1.

58. Evie Blad, *Obama Administration Unveils New Guidelines for School Policing*, CBS NEWS HOUR (Sept. 21, 2016), <https://www.pbs.org/newshour/education/obama-administration-schools-clear-limited-roles-police>.

The institutional factors that comprise the school-to-prison pipeline are disproportionately found in high-poverty schools.⁵⁹ Hence, by enrolling their children into schools that yield a majority white or otherwise more-affluent student body, low-income parents often avoid exposing them to an institutional pathway to incarceration found in the schools they are districted. In other words, parents who commit residency fraud seek to ensure the livelihood of their children.

Thus, we find that there are at least several factors by which parents might be motivated to commit residency fraud. At the heart of this issue is school choice; low-income parents seek greater autonomy in selecting which school their children attend. Geographic districting can impose an arbitrary limitation on a student's academic potential, and subsequently, the prospects of their future as adults. One could argue that this renders America's traditional notions of meritocracy and equal opportunity moot. In light of this, states, local governments, and school boards have taken a myriad of more involved approaches in offering the same educational opportunities to urban or low-income students that suburban or more-affluent students enjoy. The following section provides a brief overview of school choice solutions.

V. SCHOOL CHOICE SOLUTIONS

Generally, there are four variations of school-choice initiatives: intra and interdistrict school choice plans, voucher programs, and charter schools.

A. Intradistrict Enrollment Plans

Intradistrict school choice programs enable students to attend a selection of schools within their school district and are the most prevalent form of public school choice programs.⁶⁰ Many intradistrict enrollment plans allow students to attend a specialized school.⁶¹ These alternative schools often provide an accelerated or theme-based curriculum.⁶²

Falling under the umbrella of intradistrict school choice plans are magnet schools, which offer advanced courses or emphasize certain academic concentrations. However, magnet schools are unique in that they were developed in response to "White Flight", when large numbers of white Americans sought to avoid integration by moving to the suburbs.⁶³ Thus, magnet schools were specifically designed as a voluntary (rather than court-ordered) method of encouraging racial integration.⁶⁴ Today, the magnet school model is seen as a pioneer example of functional public-school choice innovation, recognized by the United States

59. Nancy A. Heitzeg, "Criminalizing Education: Zero Tolerance Policies, Police in the Hallways and the School to Prison Pipeline", *HAMLIN U. 2* (2009), <https://www.hamline.edu/. . /HSE/. . /criminalizing-education-zero-tolerance-police.pdf>.

60. Ryan & Heise, *supra* note 3, at 2064.

61. *Id.*

62. *Id.*

63. Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 *YALE L. & POL'Y REV.* 291, 294 (1987).

64. *Id.*

Department of Education as “a significant part of our Nation’s effort to achieve voluntary desegregation in schools.”⁶⁵

Less common are enrollment plans that allow parents to, quite literally, choose which public school within the district their children will attend. The mechanism generally involves parents submitting several choices within the district and school officials sorting them to achieve racial or socioeconomic balance.⁶⁶ Several states have attempted this form of school selection process with marginal success.⁶⁷ Across states, statutes authorizing intradistrict open enrollment vary between being permissive or mandated.⁶⁸ Under permissive enrollment plans, schools are at their discretion to opt out of district-wide admission.

Some districts allow transfer students from neighborhoods outside their district. Nonresident transfers are accepted to the extent that space is available, with priority given to resident students. The majority of such programs are permissive and can be quite informal in some jurisdictions.⁶⁹ Notwithstanding the low participation rate of transfer admissions, the effectiveness of such programs is unclear since actual school capacity is difficult to ascertain.⁷⁰

B. Interdistrict Enrollment Plans

By and large, interdistrict enrollment mirrors the structure of its intradistrict counterpart. Generally, these programs can be categorized as being state-wide or targeted.⁷¹

State-wide interdistrict enrollment enables students to be admitted at any public school within the state. Again, the vast majority of these programs are permissive rather than mandatory.⁷² Financing the state aid needed to follow incoming students persists as a politically charged issue.⁷³ A general preference for neighborhood schooling creates an incentive for schools to reject transfer students that might consume local tax revenues.⁷⁴

Targeted urban-suburban choice plans are characterized by sophisticated collaboration between districts that foster racial and socioeconomic diversity. An example of such a program is the Urban-Suburban Interdistrict Transfer Program (“USITP”).⁷⁵ Established in 1965 by New York state law, the USITP enables

65. *Magnet Schools Assistance*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/elsec/leg/esea02/pg65.html> (last visited Apr. 16, 2018).

66. Ryan & Heise, *supra* note 3, at 2065.

67. *Id.*

68. Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 256, 266 (1995).

69. Ryan & Heise, *supra* note 3, at 2065.

70. *Id.* at 2067.

71. *Id.* at 2066.

72. See Smith, *supra* note 68, at 273–75.

73. Ryan & Heise, *supra* note 3, at 2067–68.

74. *Id.*

75. Kara S. Finnigan et al., *Regional Educational Policy Analysis: Rochester, Omaha, and Minneapolis’ Inter-District Arrangements*, 29 EDUC. POL’Y 780, 783 (2014), available at <http://epx.sagepub.com/content/early/2014/01/28/0895904813518102>.

students from Rochester City School District to transfer to seven participating suburban districts within Monroe County.⁷⁶ To be eligible, a student must be a resident of Rochester City and an ethnic minority. Competition for admission is fierce, with only ten percent of applicants attaining enrollment.⁷⁷ Student funding is provided by the State on a per-pupil basis, including the transportation costs.⁷⁸ Since the USITP's enactment, similar programs have emerged in Omaha, Nebraska and Minneapolis, Minnesota, though Omaha's program operates pursuant to socioeconomic status rather than race.⁷⁹

Despite their longstanding use and general competence in delivering academic opportunities for students fortunate to gain admission, the shortcomings of such programs are apparent. The selectivity for admission and limited imitation across states does little to offer nation-wide opportunity for school choice in America.

C. Voucher Programs

As of 2016, only fourteen states and the District of Columbia utilize a traditional school voucher program.⁸⁰ School vouchers are state or federally-funded programs that award scholarships to disadvantaged students to attend a private school. These scholarships generally range from \$2,500 to \$7,500 in value.⁸¹ Typically, recipient eligibility is limited to students of certain socioeconomic or otherwise disadvantaged status, such as residence in a troubled, low-performing school district. Because faith-based private schools are not precluded from participating in most voucher programs, it is frequently questioned whether vouchers are a violation of the separation of church and state, and hence, unconstitutional.⁸² Moreover, vouchers are also criticized as a drain on resources that could otherwise be used for public schools, as well as depriving the public-school system of much-needed academic competition.⁸³ Consequently, voucher programs have routinely proven to be a limited and rather controversial solution to school choice.

76. *Id.* at 793.

77. *Id.*

78. *Id.* at 783.

79. *Id.*

80. See *School Voucher Laws: State-by-State Comparison*, NAT'L CONF. STATE LEGISLATURES (2014), <http://www.ncsl.org/research/education/voucher-law-comparison.aspx>.

81. *School Vouchers: The Wrong Choice for Public Education*, ANTI-DEFAMATION LEAGUE (Oct. 13 2001), available at <https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/-school-vouchers-wrong-choice-public-education>.

82. See generally Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151 (2003).

83. See AAUW, INVESTING IN OUR CHILDREN: PUBLIC FUNDS FOR PUBLIC EDUCATION, NOT VOUCHERS 2 (2011), <https://www.aauw.org/files/2013/02/position-on-school-vouchers-112.pdf>.

D. Charter Schools

Considered the hybridization of public and private schooling,⁸⁴ charters are tuition-free, state-funded schools that operate under a contract between the school and a chartering agency. Chartering agencies are typically formed by school boards, state agencies, or agencies chosen by the state, but the school itself is treated as an entity independent from the public-school system.⁸⁵ Hence, charter schools are generally exempt from many local and state regulations, but are accountable for meeting or exceeding the academic standards of the district it resides.⁸⁶ Charter schools can even be opened by private institutions, including corporations, and are often operated by a host of teachers and parents.⁸⁷ Some states, however, require a charter school to be opened and operated by a non-profit organization.⁸⁸

The first charter school appeared in 1991, a product of the Minnesota legislature. Throughout the 1990s, charter schools rapidly gained popularity among sister states. Between 2004 and 2015, the percentage of all public schools that were charters increased from four percent to seven percent.⁸⁹ Today, forty-three states and the District of Columbia have enacted charter school laws.⁹⁰

Criticisms of charter schools can be found on both ends of socioeconomic and political spectrums, falling mostly on its financing structure and scope of enrollment.⁹¹ Almost all charter schools preferentially enroll students from their home district, which necessarily excludes some students from participation.⁹² Moreover, few states provide funding for the transportation of non-district residents.⁹³ Hence, charters are not a true solution for interdistrict school choice.

Thus, while the history is rich and advocacy for school choice solutions is strong, a common theme of limited access, sociopolitical opposition, and lack of national uniformity is persistent. It is unsurprising then that residency fraud is commonplace throughout many states.

The following section includes a discussion on the elements common to such schemes and an analysis of several statutes governing this activity. It also explores

84. See generally Bruno V. Manno et al., *Beyond the Schoolhouse Door: How Charter Schools are Transforming U.S. Public Education*, 81 PHI DELTA KAPPAN 736 (2000) (describing the theory and structure of charter schools).

85. Ryan & Heise, *supra* note 3, at 2073–74.

86. *Charter Schools*, NAT'L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=30> (last visited Apr. 16, 2018).

87. Ryan & Heise, *supra* note 3, at 2073–74.

88. *Id.*

89. *Characteristics of Traditional Public Schools and Public Charter Schools*, NAT'L CTR. EDUC. STAT. https://nces.ed.gov/programs/coe/indicator_cla.asp (last visited Apr. 16, 2018).

90. *Choice and Charter Schools*, CTR. EDUC. REFORM, <https://www.edreform.com/issues/choice-charter-schools/laws-legislation/> (last visited Apr. 16, 2018).

91. Ryan & Heise, *supra*, note 3, at 2077–79.

92. *Id.* at 2075.

93. See generally *Charter Schools—Does the State Specify Who Must Provide Transportation to Charter School Students?*, EDUC. COMM'N OF THE UNITED STATES, <http://ecs.force.com/mbdata/mbquestNB2?rep=-CS1424> (last visited Apr. 18, 2018).

how boundary hopping often leads to criminal prosecution and subsequent incarceration.

VI. STATUTORY FRAMEWORK: WHAT IS THIS CRIME?

As previously hinted, boundary hopping is fairly common. In practice, it usually consists of the subject caregiver submitting a document, or series of documents, containing false information regarding his or her place of residence. Among the documents required by school districts to verify residency are notarized affidavits of parent-guardianship, property tax bills, mortgage statements or ownership deeds, current lease or rental agreements signed by the property's landlord, and utility bills. The public school—a government entity—often requires the parent's signature of sworn affirmation that the information provided is an accurate and good-faith representation of her residence. From there, the school permits the child's enrollment under the assumption that the parent lives within the allotted district. As a student, the child enjoys the school's amenities as any other; the teachers, cafeteria, student services, facilities, instructional equipment, administrators and so on.

The nation's annual per-pupil costs varies from state to state but is roughly \$11,800 on average.⁹⁴ Public school funding is derived from federal, state and local sources.⁹⁵ Considering that roughly eighty percent of local revenues for public and elementary secondary schools are derived from local property taxes,⁹⁶ one can quickly see why boundary hopping invokes such controversy.

States' legislative approach to punishing this practice varies. Many of these laws are draconian and only serve to further hinder the future of a disadvantaged class of offenders. An analysis of all fifty states would be unnecessarily exhaustive. This Note focuses on the legislative approaches of Maryland, Oklahoma, the District of Columbia, Pennsylvania, and Ohio. These jurisdictions are representative of the most common approaches to penalizing boundary hopping, including a combination of financial penalties and incarceration.

A. *Maryland: Restitution*

Maryland employs a prevalent theme of restitution in punishing boundary hopping. Under Title 7 Section 101(b)(1) of the Maryland Annotated Code, "each child shall attend a public school in the county where the child is domiciled with the child's parent, guardian, or relative providing informal kinship care[.]" Pursuant to this, subsection (3) holds that

"[i]f a child fraudulently attends a public school in a county where the child is not domiciled with the child's parent or guardian, the child's parent or guardian shall be subject to a penalty payable to the county for the pro rata

94. See NAT'L EDUC. ASSOC., RANKINGS OF THE STATES 2016 AND ESTIMATES OF SCHOOL STATISTICS 2017 (2017), <http://www.nea.org/2017-rankings-and-estimates>.

95. NAT'L CTR. FOR EDUC. STATS, *supra* note 37.

96. *Id.* at 3.

share of tuition for the time the child fraudulently attends a public school in the county.”⁹⁷

Here, if a child somehow “fraudulently” attends a school that is not assigned to her caregiver’s residence, the caregivers must pay the county the exact costs of her attendance. This is unremarkable until one looks at the provisions governing instances where a child attends a school within a county by living with a relative or guardian due to family hardship. In that case, the caregiver must sign an affidavit affirming identification, residence within the county, and the truth of the aforementioned hardship:

(ix) Notice that if fraud or misrepresentation is discovered during an audit, the county superintendent shall remove the child from the public school or county public school system roll; and

(x) Notice that any person who willfully makes a material misrepresentation in the affidavit shall be subject to a penalty payable to the county for *three times the pro rata share of tuition for the time the child fraudulently attends a public school in the county.*⁹⁸

Hence, we see that the discovery of fraud or misrepresentation of an affidavit entails the disenrollment of the child and a massive fine worth 300% of the cost of attendance. The average per pupil costs for Maryland school districts is \$14,917.⁹⁹ This would mean a fine of over \$44,000 for a single year of false enrollment. Though the caregiver is not incarcerated, the enforcement of such a penalty would have devastating effects on most middle-class families, let alone low-income families whom are more likely to commit such offenses.

B. Oklahoma: Incarceration and Financial Penalty

Both Oklahoma and our nation’s capital prescribe incarceration for residency fraud. The Oklahoma statute provides that

[i]f the school district policy allows establishment of residency by affidavit, any person who willfully makes a statement in the affidavit which the person knows to be false shall, upon conviction, be guilty of a misdemeanor *punishable by imprisonment in the county jail for not more than one (1) year or a fine of not more than Five Hundred Dollars (\$500.00) or both such fine and imprisonment.* Each school district shall

97. See MD. CODE ANN., EDUC. LAW, § 7-101(b)(3) (West 2018).

98. *Id.* at § 7-101(c)(ix), (x) (emphasis added).

99. *Maryland at a Glance: Elementary & Secondary Education*, MARYLAND.GOV <http://msa.maryland.gov/msa/mdmanual/01glance/html/edelem.html> (last visited Feb. 16, 2018) (showing Maryland’s average cost of attendance for the 2016 fiscal year).

include in its policy on residency any documentation necessary for the administration of the policy[.]¹⁰⁰

The Oklahoma statute artfully employs the use of the word “or”—thus, incarceration is not mandatory; one may only be subject to a fine not exceeding \$500. However, “or” proves to be a double-edged sword; its return opens the possibility that the defendant is sentenced to both imprisonment and a \$500 fine. Peculiar is the wide discrepancy between these penalties. A \$500 fine is a slap on the wrist compared to losing one’s freedom for up to a year. Notably, the Oklahoma statute does not demand restitution of tuition expenses as we saw in Maryland.

C. District of Columbia: Restitution and Incarceration or Financial Penalty

In contrast to Oklahoma, D.C.’s statute does offer the school district remedy in the repayment of tuition fees. It provides:

“Any person . . . who knowingly supplies false information to a public official in connection with student residency verification shall be subject to charges of tuition retroactively, *and* payment of a fine of not more than \$2,000 *or* imprisonment for not more than 90 days, but not both a fine and imprisonment. The case of a person who knowing supplies false information may be referred by the Office of the State Superintendent of Education to the Office of the Attorney General for consideration for prosecution.”¹⁰¹

Notably, D.C. punishes offenders with tuition repayment and a fine up to \$2,000 *or* a maximum of ninety day’s imprisonment. The D.C. statute explicitly protects one from being fined *and* imprisoned (is America not merciful?). Interestingly, this protection is juxtaposed by D.C.’s rather aggressive persecution of boundary hopping. Within the D.C. Code, one can find guidance in reporting incidences of residency fraud by calling a public hotline.¹⁰² However, one’s interest should be piqued by the last sentence of D.C.’s excerpt; it leaves open the possibility that an offender might be subjected to prosecution by the Attorney General.

As we have seen, some states have laws that penalize fraud as it specifically pertains to school enrollment. However, the criminalization of boundary hopping outside the corners of specific enrollment statutes presents the most troubling opportunity for incarcerating offenders. In recent years, there has been a multitude of high-profile cases where minority parents committing enrollment fraud were charged with felonious crimes akin to grand theft.

The following section analyzes several of these stories arising from Pennsylvania, Ohio, and Connecticut, beginning with Hamlet Garcia from Pennsylvania.

100. School district residency, OKLA. STAT. ANN. tit. 70, § 1-113(A)(1) (West 2017) (emphasis added).

101. False information; penalty, D.C. CODE § 38-312 (West 2018) (emphasis added).

102. *See id.* at § 38-312.01.

D. Pennsylvania: Theft of Services

“To achieve success you must always make sacrifice, and I think you all understand the sacrifice that I have done.”

—Hamlet Garcia¹⁰³

In 2014, a black Cuban-American named Hamlet Garcia pled guilty to knowingly providing false information for the purpose of enrolling his seven-year old daughter in the Lower Moreland School District. Garcia fraudulently reported residence at the Huntington Valley home of his father-in-law.¹⁰⁴ Garcia was originally charged with felony theft of services, but these charges were replaced with the summary offense described in the Pennsylvania code and provided in relevant part here:

[A] person who knowingly provides false information in the sworn statement for the purpose of enrolling a child in a school district for which the child is not eligible commits a summary offense and shall, upon conviction for such violation, *be sentenced to pay a fine of no more than three hundred dollars (\$300) for the benefit of the school district in which the person resides or to perform up to two hundred forty (240) hours of community service, or both. In addition, the person shall pay all court costs and shall be liable to the school district for an amount equal to the cost of tuition calculated in accordance with section 2561 during the period of enrollment.*¹⁰⁵

At its core, Pennsylvania’s punishment for enrollment fraud is financial in nature. If found guilty, the defendant is burdened with fines, court costs, tuition restitution, and possibly the time commitment of community service. The school administration informed investigators that it costs the school \$58.97 per day for Garcia’s daughter to attend school in the district.¹⁰⁶ Accordingly, Garcia was ordered to pay the School District \$10,752.81 in restitution for his daughter’s unlawful attendance during the 2011–2012 school year.¹⁰⁷

Enrollment fraud was not unheard of in the Lower Moreland Township. However, some felt that Garcia’s case was unusually criminalized and there was speculation that such pointed framing was racially motivated.¹⁰⁸ Garcia did not serve any time in jail. In exchange for a guilty plea, all charges against his wife, Olesia,

103. *Philadelphia Man Sentenced to Pay More than \$10,000 to Lower Moreland School District*, TIMES HERALD (Jan. 28, 2014, 6:03 PM), <http://www.timesherald.com/article/JR/20140128/NEWS/140129636>.

104. *Philadelphia Couple Charged after Allegedly Falsifying Address, Not Paying Local School Taxes*, CBS PHILLY (Aug. 30, 2012, 6:49 PM), <http://philadelphia.cbslocal.com/2012/08/30/philadelphia-couple-charged-for-falsifying-address-not-paying-local-school-taxes/>.

105. 24 PA. CONS. STAT. § 13-1302(c) (West 2010) (emphasis added).

106. TIMES HERALD, *supra* note 103.

107. *Id.*

108. Bryan Segall, *Philly Couple Enlist High-Powered Attorney in Fight Over Daughter’s School District*, CBS PHILLY (April 9, 2013, 12:26 PM), <http://philadelphia.cbslocal.com/2013/04/09/philly-couple-enlist-high-powered-attorney-in-fight-over-daughters-school-district/>.

were dropped and Garcia was penalized under the summary offense cited above.¹⁰⁹ However, Garcia's case garnered national attention because he and his wife were originally charged with *theft of services* and *conspiracy to commit theft of services*. If using the legal theory of theft of services under Pennsylvania law, three statutes govern the definition, classification, and sentencing for enrollment fraud.

The first statute is Section 3926. Section 3926(a)(1) pertains to the acquisition of services, stating that "[a] person is guilty of theft if he intentionally obtains services for himself or for another which he knows are available only for compensation, *by deception* or threat . . . or *by false token or other trick or artifice* to avoid payment for the service."¹¹⁰ Here, the argument was that because the Garcias did not live within the school district and therefore did not pay taxes for the district, they obtained the educational services without paying for those services.

The second statute is Section 3903. Section 3926(c) references Section 3903 by directing the reader to classify the severity of the theft in instances where the value of services obtained or diverted is \$50 or more.¹¹¹ Under Section 3903(a)1, theft is considered a third-degree felony if the amount involved exceeds \$2,000. Finally, under the third statutory provision, Section 1103(3), third-degree felonies are punishable for up to seven year's imprisonment. Hence, the Garcias could have faced up to seven years in prison had they gone to a jury trial and been found guilty of theft of services. By contrast, the summary offense is a misdemeanor.

What this shows is that, depending on its characterization, boundary hopping can be penalized under multiple legal theories. The severity of the sentence for what some deem "stealing an education" can vary considerably depending on prosecutorial discretion. This should give one pause. Given what we know about the shortcomings of our public schools and options for school choice, should we orphan a seven-year old girl because her parents sought the best for her?

Garcia's initial defense crumbled upon the finding that his daughter did not truly live with her grandfather. Often, as was the case with Garcia, the address used in the misrepresentation is valid and occupied by a sympathizing third-party family member who presumably pays their taxes. Even granting the argument that a student uses the school's resources that are supplied by local taxes, the distinction warranting criminalization becomes rather arbitrary if the true resident of the address does in fact pay local taxes.

In Garcia's case, the crime then boils down to him lying to the district. Considering that the offending parties involved are all family, it seems odd for the school to accuse him of stealing \$10,752.81 of services that are rightfully his father-in-law's, yet are unused because his father-in-law is not the primary caregiver of his daughter. Regardless, it betrays the most basic principles of reason and justice to subject a well-meaning father to nearly a decade of imprisonment for enrolling his daughter into a public school outside their district.

109. TIMES HERALD, *supra* note 103.

110. See 18 PA.CONS. STAT § 3926(a)(1) (West 2018) (emphasis added).

111. See *id.* at § 3926 (c)(2).

E. Ohio: Larceny

“The jury, I think, felt very comfortable that it had reached the right conclusion with the facts. But as evidenced by the judge’s statements and some of the others afterward, I think a lot of them felt like they were nailing somebody who was trying to do the best thing.”

—M.L. Schultze, News Director of WKSU in Akron Ohio¹¹²

In 2012, Kelly Williams-Bolar’s two daughters were geographically assigned a school that met only four out of twenty-six academic standards, yielding a graduation rate of only seventy-six percent.¹¹³ Aware of the inferior schooling options available in her own district, Williams-Bolar falsified her address by representing residence at her father’s home within the suburban Copley Township. Children living within the Copley Township attend school in the Copley-Fairlawn School District, which is distinguished in meeting all twenty-six academic standards and a 97.5% graduation rate.¹¹⁴ Private investigators were hired by the school district to surveil Williams-Bolar. In observing her routine, they of course found that she did not live in the suburbs of Copley Township.¹¹⁵ Rather, she lived in a public housing project in Akron, Ohio.¹¹⁶

Williams-Bolar and her father attested to experiencing break-ins at her true address,¹¹⁷ an unfortunately common reality of public housing projects, which are notorious for being entrenched in criminal activity.¹¹⁸ She was arrested on charges of grand theft and asked to pay \$30,000 of restituted tuition owed to the Copley-Fairlawn School District; Williams-Bolar refused.¹¹⁹ The Summit County Pleas Judge sentenced Williams-Bolar to five years’ imprisonment and eighty hours of community service.¹²⁰ Fortunately, Williams-Bolar’s sentence was reduced to ten days in jail and three years’ probation before ultimately being pardoned by Ohio Governor and Presidential candidate, John Kasich.¹²¹ Kasich remarked that William-

112. *Parents Cross Lines to Get Kids Into Good Schools*, NPR (Jan. 26, 2011, 1:00 PM), <https://www.npr.org/2011/01/26/133246495/Parents-Cross-Lines-To-Get-Kids-Into-Good-Schools> (referencing the sentencing of African-American Ohio resident Kelly Williams-Bolar, who gained national attention when convicted boundary hopping).

113. Jim Kavanagh, *Mom Jailed for Enrolling Kids in Wrong School District*, CNN (Jan. 26, 2011, 12:26 PM), <http://news.blogs.cnn.com/2011/01/26/mom-jailed-for-enrolling-kids-in-wrong-school-district/>.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. See generally Michael C. Lens, *Subsidized Housing and Crime: Theory, Mechanisms, and Evidence*, 28 J. PLAN. LITERATURE 4, 352–63 (2013).

119. Andrea Canning & Leezel Taglao, *Ohio Mom Kelley Williams-Bolar Jailed for Sending Kids to Better School District*, ABC NEWS (Jan. 26, 2011), <http://abcnews.go.com/US/ohio-mom-jailed-sending-kids-school-district/story?id=12763654>.

120. Kavanagh, *supra* note 113.

121. *Id.*

Bolar's penalty "seemed excessive" and would "exclude her from certain economic opportunities for the rest of her life."¹²²

Again, we see enrollment fraud treated as theft of the value of the school attendance, correlated with the cost the school incurred in educating the child. Like the Garcias of Pennsylvania, the address Williams-Bolar used was that of a sympathizing third-party: her father. Her father presumably paid state and local taxes, hence the revenues garnered from the schools were unaffected. Accepting these presumptions, it appears the harm is mostly making false misrepresentations on an official document.

The compartmentalized treatment of this offense contrasts sharply with the spirit of what parents like Williams-Bolar are doing. The actual attendance of Williams-Bolar's children would have had no impact on the financial standing of the school. Had her daughters simply stayed at their grandfather's residence, the financial standing of the school would not be any different than it was under William-Bolar's scheme. Incarcerating an already disadvantaged mother is unwarranted.

F. Connecticut: Larceny

"Who would have thought that wanting a good education for my son would put me in this predicament?"

—Tanya McDowell¹²³

In 2011, Tanya McDowell received national attention when she allegedly stole over \$15,000 from Norwalk Public Schools in unpaid tuition and was charged with first-degree larceny and conspiracy to commit first-degree larceny.¹²⁴ McDowell was allegedly homeless at the time and intentionally misrepresented her address on a residency affidavit to enroll her six-year-old son at a Norwalk Elementary School. She was sentenced to twelve years' imprisonment for a combination of her larceny charges and unrelated drug offenses. The presiding judge suspended the sentence to five years' imprisonment with five years' probation.¹²⁵

We first consider the residency requirements under Connecticut law under Title 10 Section 253(d) of the Connecticut General Statutes Annotated. Therein is a description of residency requirements entitling children to receive free school privileges. Quoted in relevant part:

122. Ed Meyer, *Kasich Reduces Williams-Bolar Felony Conviction to Misdemeanors*, AKRON BEACON J. (Sept. 8, 2011, 6:30 AM), <https://www.ohio.com/akron/news/kasich-reduces-williams-bolar-s-felony-convictions-to-misdemeanors>.

123. Daniel Tepfer, *Tanya McDowell Sentenced to 5 Years in Prison*, CONN. POST (Mar. 27, 2012, 11:40 PM), <http://www.ctpost.com/news/article/Tanya-McDowell-sentenced-to-5-years-in-prison-3437974.php>.

124. Bob Connors, *Cops Bust Homeless Woman for Sending Child to School*, NBC CONN. (Apr. 17, 2011, 1:42 PM), <https://www.nbcconnecticut.com/news/local/Cops-Bust-Homless-Woman-for-Sending-Child-to-School-120004374.html>.

125. Tepfer, *supra* note 123.

Children residing with relatives or nonrelatives, when it is the intention of such relatives or nonrelatives and of the children or their parents or guardians that such residence is to be permanent, provided without pay and not for the sole purpose of obtaining school accommodations . . . shall be entitled to all free school privileges accorded to resident children of the school district in which they then reside. A local or regional board of education may require documentation from the parent or guardian . . . that the residence is to be permanent, provided without pay and not for the sole purpose of obtaining school accommodations provided by the school district. Such documentation may include affidavits . . . provided that . . . the board of education shall provide . . . a written statement specifying the basis upon which the board has reason to believe that such child . . . is not entitled to school accommodations.¹²⁶

Here, we see the child's caregiver must furnish documentation proving residence provided that the child's residence at the subject address is permanent, provided without pay, and not for the sole purpose of attending school in the area. From the wording of the statute, it is clear that Connecticut legislators were keen on filtering instances where a child's living arrangements are a mere transaction for the sake of attending a certain school. The last portion of the provision states that the school board is to provide a written statement articulating doubt about the child's entitlement to school accommodations. Interestingly, Connecticut law does not enumerate a penalty for submitting false documentation for enrollment purposes, which suggests that it was common practice for the board to simply expel the student with a formal statement explaining why.

The presumption that enrollment fraud is a growing practice in Connecticut may explain why prosecutors decided to charge McDowell with first-degree larceny. Again, we see boundary hopping characterized as a more heinous offense for the sake of imposing incarceration. Connecticut larceny law reads:

A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to:

. . . .

(6) Defrauding of public community. A person is guilty of defrauding a public community who (A) authorizes, certifies, attests or files a claim for benefits or reimbursement from a local, state or federal agency which

126. CONN. GEN. STAT. ANN. § 10-253(d) (West 2017) (school privileges for children in certain placements, nonresident children, children in temporary shelters, homeless children and children in juvenile detention facilities).

he knows is false; or (B) knowingly accepts the benefits from a claim he knows is false[.]¹²⁷

Notably, although Connecticut does not limit larceny to an enumerated list of schemes, it never mentions the misappropriation of education services. This is curious because the statute mentions as larceny the theft of services of hotels, public or private transportation, unauthorized use of motor vehicle equipment, deceptive use of the employee labor of another business, knowingly receiving property stolen by another, shoplifting, library theft, failure to pay prevailing rate of wages, theft of utility services, and even obtaining property through fraudulent use of an automated teller machine!¹²⁸ It is clear that the intentional misrepresentation of residence was never intended to be criminalized as larceny. And with good reason; in Connecticut, first-degree larceny is a Class B felony¹²⁹ punishable with at least one year, but possibly up to twenty years' imprisonment.¹³⁰

The ethical argument against imprisoning parents for enrollment fraud is intuitive. Ultimately, this Note calls for the States or the Federal Government to prohibit incarceration for school enrollment fraud. The following section will show that this argument is founded in research that incarceration for offenses of this sort is poor public policy.

VII. WHY INCARCERATION IS INAPPROPRIATE

Here, this Note will argue that (1) children are negatively and unduly affected by parental incarceration, and (2) incarceration is an ill-conceived response to boundary hopping, as it is a weak deterrent and entirely punitive.

A. *Children and Parental Incarceration*

School choice solutions and advocacy for education reform are properly focused on setting our children on the path to understand, function, and prosper in our society. However, when considering violations of school enrollment statutes, the focus shifts primarily to the parent. Of course, when a law is violated, there is a natural inclination to focus on the punishment that should be visited upon the transgressor and the remedy, if any, that can be offered to the aggrieved. However, the issue of school choice and education inequality cuts deeper. There is a greater sense of duty owed to our children, for they are uniquely dependent on the care of others while simultaneously being the key to the nation's future.

It is unfortunate then, that the prosecution of school enrollment fraud can seem devoid of any consideration of the immediate and long-term future of the children whose parents are jailed upon conviction. Arguably, by incarcerating the parent for committing these sorts of offenses, we are ultimately punishing the most innocent

127. See CONN. GEN. STAT. ANN. § 53a-119 (West 2017).

128. See generally *id.*

129. *Id.* at § 53a-122.

130. *Id.* at § 53a-35a.

and undeserving party: the child. Parental incarceration harms children by causing psychological harm, weakening familial bonds necessary for proper development, and furthering any economic disadvantages already present.

Notwithstanding false enrollment convictions, the number of children with incarcerated parents has grown exponentially.¹³¹ Research indicates that children are adversely affected by traumatic disruptions in the home including changes in economic stability, divorce, relocation, and parental death.¹³² Domestic instability is especially problematic for the children of low-income parents.¹³³ Instability resulting from parental incarceration is no exception, potentially having a profound impact on the academic, behavioral, and emotional development of the child. For instance, research suggests that parental incarceration increases the likelihood of a child developing psychological disorders such as attention deficit disorder, depression, anxiety, and antisocial behavior.¹³⁴ Moreover, the stigma of having an incarcerated parent often diminishes the child's self-esteem and invokes feelings of shame or guilt.¹³⁵

Of course, one may argue that many of these behavioral or psychological issues are also present in children of disadvantaged backgrounds generally, and that perhaps the incarceration of their parents does not in itself create a burden on the child that was not already prevalent when considering her socioeconomic status. To be sure, drawing firm conclusions from mere correlation must be discouraged given that research concerning the psychological and physical health of children with incarcerated parents is in its infancy. However, what is clear is that parental incarceration is an inherently traumatic experience that adversely affects the child as compared to her peers.¹³⁶

Research is inconclusive as to whether parental incarceration has a causal association with a child's academic performance.¹³⁷ However, recall that minority

131. LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2010), available at <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> (last visited March 2010) (showing that there was a seventy-nine percent increase in the number of parents of minor children held in United States' prisons between 1991 and 2007).

132. See generally HEATHER SANDSTROM & SANDRA HUERTA, THE NEGATIVE EFFECTS OF INSTABILITY ON CHILD DEVELOPMENT; A RESEARCH SYNTHESIS (2013).

133. Amanda Geller et al., *Parental Incarceration and Child Well-Being: Implications for Urban Families*, 90 SOC. SCI. Q. 1186, 1187 (2009) (finding that low family income resulting from incarceration can directly and adversely affect children who are subject to unsafe neighborhoods, ineffective schools, poor diets or inadequate healthcare; also finding that residential instability adversely affects communal relationships, particularly in low income families).

134. Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 308, 310 (2014).

135. See generally CREASIE FINNEY HAIRSTON, FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE (2007) (showing that children are traumatized and emotionally drained by the social stigma of having an incarcerated parent).

136. Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCHOL. BULL. 175, 190-93 (2012) (a meta-analysis of forty studies showing that children of incarcerated parents are prone to antisocial behavior).

137. See ANN M. STANTON, WHEN MOTHERS GO TO JAIL 93 (1980) study consisting of two groups of children: one group of twenty-three with incarcerated mothers, the second group of eighteen whose mothers were on probation. Seventy percent of the children with incarcerated mothers were below average or in the

students are more sensitive to the personal relationships built with their teachers.¹³⁸ Upon discovery of false enrollment, the child is, at minimum, ejected from the school. This, in itself, has a negative impact on the child's education, as they must relocate to a different school, adjust to a new academic setting, and likely sever most interpersonal relationships developed at the prior school.¹³⁹ Granted, it is tempting to place blame for these negative consequences onto the shoulders of the child's parents, as this is a necessary consequence of a child impermissibly attending a school. However, jail sentencing may intensify these negative effects.¹⁴⁰

Second, one must acknowledge the effects incarceration might have on any other children the parent might have—specifically, infants. During the first year of an infant's life, maternal incarceration abridges the quality of the child's attachment to their mother.¹⁴¹ If the mother is tried for criminal theft—or in a state such as Oklahoma where a parent can face up to a year in prison even if boundary hopping is characterized as such—an infant is, in turn, deprived of the opportunity to properly bond with her mother. The result is an increased likelihood that the infant will develop behavioral or emotional problems.¹⁴²

Finally, it is well documented that a criminal record is arguably the most crippling credential one can have when seeking future employment. Ex-offenders are notoriously subjected to employer biases and negative stereotypes regarding their professionalism, trustworthiness, and competence. A study of over 3,000 employers in four major cities indicated that employers consciously discriminate against potential applicants that have had brushes with the law.¹⁴³ Similarly, an applicant with a criminal background is about half as likely to receive an interview as a non-offender. Minorities are especially vulnerable to discrimination due to a criminal record. For instance, the impairment on employability from having a criminal record is forty percent greater for African-American ex-offenders than white ex-offenders.¹⁴⁴ Setting aside racial motivations, employers also fear that hiring an ex-offender puts their business at risk of negligent hiring claims. Some states even

bottom third of their class compared to seventeen percent of the children with parents on probation). *But see* Murray, *supra* note 136, at 190–91, 193 (showing that, after adjusting for covariates, parental incarceration is associated with anti-social behavior in children, but at best only weakly associated with poor educational performance; concluding that more research on the causal effects of parental incarceration is needed).

138. Diamond et al., *supra* note 49.

139. Jeffrey Grigg, *School Enrollment Changes and Student Achievement Growth: A Case Study in Educational Disruption and Continuity*, 84 SOC. OF EDUC., 389, 391–92 (2012).

140. Murray, *supra* note 136, at 193 (suggesting that the association with anti-social behavior from children of incarcerated parents may be linked to social biases from their peers, teachers, and other community members who may feel that the child will be predisposed towards crime).

141. ROSS D. PARKE & K. ALISON CLARKE-STEWART, EFFECTS OF PARENTAL INCARCERATION ON YOUNG CHILDREN 4 (2002), available at <https://www.urban.org/research/publication/effects-parental-incarceration-young-children>

142. *Id.*

143. Harry J. Holzer et al., *Will Employers Hire Ex-Offenders? Employment Background Checks, Background Checks, and Their Determinants*, 8 (Inst. For Res. on Poverty, Discussion Paper No. 1243-02, 2002), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf> (1992 survey consisting of 3,000 employers from Atlanta, Boston, Detroit, and Los Angeles whereby employers were asked of the likelihood that they would hire an ex-offender. 42.1% of respondents indicated that they would “probably not” accept an applicant with a criminal record, whereas 19.5% indicated they would “definitely not”).

144. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937, 959 (2003).

prohibit by law the employment of ex-offenders in some occupations, decisively closing off entire industries as a possibility for employment.¹⁴⁵

At first glance, one might think that employers would be more forgiving towards a prior conviction for boundary hopping, which are non-violent and admirably-motivated crimes. Recall, however, that boundary hopping is commonly characterized as grand theft or fraud, and a criminal record of conviction for such offenses is likely to be particularly disabling. In sum, when parents are branded with a criminal record, their chances of finding gainful employment are bleak. This hindrance ultimately falls on the children of such parents. They are further economically disadvantaged and have their opportunities unnecessarily stunted for reasons beyond their control.

B. Incarceration is Misguided

Unsurprisingly, suburban residents generally exhibit a strong preference that the local funding of their schools be appropriated to those who contribute through local taxes. Hence, the sociopolitical pressure to restrict residency fraud and provide school choice solutions is acute. The question then becomes how states should proceed in restricting false enrollment, and, as we have seen, the laws governing these offenses involve a mixture of financial penalties, community service, and imprisonment. The philosophy of western criminal justice widely accepts four goals or reasons for punishment under the law: deterrence, rehabilitation, incapacitation, and retribution. Here, this Note will argue that the nature and underlying motivations for boundary hopping makes incarceration a poor solution for satisfying any of these goals.

1. Deterrence

There are two forms of deterrence: general and specific.¹⁴⁶ General deterrence aims to deter the public from committing crimes by making examples of those facing the consequences of their criminal activity.¹⁴⁷ Specific deterrence, by contrast, focuses on discouraging the individual who committed the crime.¹⁴⁸ The classical theory of deterrence holds that punishment should be “swift, certain, and proportionate” to the crime committed.¹⁴⁹ The criminal justice system within the United States has arguably adopted the view that the severity of the punishment is the most determinative factor in deterring crime.¹⁵⁰ However, the study of modern criminology has crafted a more complex picture of the interrelation of the three

145. See generally Holzer et al., *supra* note 143.

146. Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 8 (2015).

147. *Id.*

148. *Id.* at 6.

149. Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33, 33 (2016).

150. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS (2016), available at <https://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (indicating a 500% increase in incarceration within the United States between 1974 and 2015).

above-mentioned factors as they relate to deterrence. Studies suggest that the certainty of being apprehended for a crime has the greatest predictive value in deterrence, and that increasing the severity of punishment has the most deterrent effect only when it is accompanied by an increase in certainty of punishment.¹⁵¹ It follows then, that in resolving the growing instances of boundary hopping, policy experts and school boards should work towards fostering widespread belief that discovery of misrepresentation of residence is reasonably guaranteed. This will likely call for reforming the mechanism by which residence is verified and continually confirmed; not by sentencing parents to prison to make examples out of them.

2. Incapacitation

The incapacitation theory of punishment advocates placing temporary or permanent limitations on an offender's access to society.¹⁵² The most common form of incapacitation within the context of criminal justice is incarceration, but incapacitation also includes capital punishment.¹⁵³ Incapacitation belongs to the utilitarian school of thought which seeks the benefit of the greatest number of people.¹⁵⁴ As it pertains to imprisonment or capital punishment, the aim is to protect the public from the danger of being in fellowship with an offender of, for example, sexual assault or murder. Thus, because incapacitation is most appropriate for dangerous offenses, it is an inappropriate justification for imprisonment of parents committing residency fraud. From the history of segregation, the factors contributing to school inequality are a result of the separation of disadvantaged communities from privileged America. What should be clear then, is that boundary hopping is an expression of a longing to be part of society; to attain the opportunities of those who enjoy a worthy education provided by the State. Incarceration for this offense is a cruel and unwarranted rejection of that desire.

3. Rehabilitation

Rehabilitation is "the action of restoring someone to health or normal life through training and therapy after imprisonment, addiction, or illness".¹⁵⁵ In common parlance, it refers to the restructure of character and return to acceptable behavior of ex-offenders. The rehabilitative value of incarceration in the United States is weak at best and regularly criticized.¹⁵⁶ Regardless, the rehabilitation theory of

151. Ihekwoaba D. Onwudiwe et al., *Deterrence Theory*, in 1 ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES 233, 236 (Sage Publications ed., 2004), available at, <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (citing Charles R. Tittle, *Crime Rates and Legal Sanctions*, 16 SOC. PROBLEMS 409 (1969)).

152. See Alana Barton, *Incapacitation Theory*, in 1 ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES 463 (Sage Publications ed., 2005), available at <https://marisluste.files.wordpress.com/2010/11/incapacitation-theory.pdf>.

153. *Id.*

154. *Id.*

155. *Rehabilitation*, OXFORD DICTIONARY (2d ed. 1997).

156. See KIM STEVEN HUNT & ROBERT DUMVILLE, *RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW* 5 (2016), available at <https://www.ussc.gov/research/research-reports/recidivism->

punishment suggests that the subject individual has a genuine flaw of character, a tendency towards harmful behavior, or a disposition towards unlawful activity that needs correction. This is an ill-fitted diagnosis of why parents falsify documents for school enrollment. At the heart of this issue is school inequality stemming from a history of racial and socioeconomic segregation in the United States. Further, we have seen that some states treat boundary hopping as more of a civil infraction than a crime. After all, it is unlikely that many would describe parents engaging in boundary hopping as depraved criminals in need of rehabilitation. Again, incarceration is a misguided solution.

4. Retribution

Retribution theory holds that punishment ought to be determined according to an offender's moral blameworthiness.¹⁵⁷ In contrast to the deterrence and incapacitation theories, the retribution theory looks to the past, rather than the future, in justifying the nature of the punishment.¹⁵⁸ Focus is placed on what the offender has done and on what consequences should follow in light of the harm the offender caused.¹⁵⁹ Hence, retributionists endorse what is popularly known as a "just deserts" outlook, believing that criminal and civil sanctions should be dispensed in terms of fairness and proportionality.¹⁶⁰ The retribution theory of punishment has much intuitive appeal, possibly because it can be complementarily asserted in both positive and negative terms. The positive claim holds that it is society's moral obligation to punish wrongdoers.¹⁶¹ The negative counterpart holds that it is a perversion of our moral principles to punish the innocent.¹⁶² The emotional and moral attractiveness of retribution theory plays nicely with its practical strengths—for example, preventing vigilantism, proportionality, or repayment of advantages gained from wrongdoing.¹⁶³

This Note essentially argues from a retributionist perspective. Here, it is not argued that parents committing school enrollment fraud should not be in some way be sanctioned. Rather, this Note argues that incarceration is not a punishment proportionate to the crime committed. This Note encourages the reader to consider any moral blameworthiness of parents convicted of such offenses and to ask oneself whether being locked behind bars is "just deserts" for wanting a better education for their children.

among-federal-offenders-comprehensive-overview (showing that 49.3% of federal offenders are arrested within eight years of release); see also MATTHEW R. DUROSE ET AL, MULTISTATE CRIMINAL HISTORY PATTERNS OF PRISONERS RELEASED IN 30 STATES 4 (2005), available at <https://www.bjs.gov/index.-cfm?ty=dcdetail&iid=270> (showing that in 2005, forty-three percent of prisoners in thirty states were rearrested either within or outside the state of release).

157. Alec Walen, *Retributive Justice*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), available at <https://plato.stanford.edu/archives/win2016/entries/justice-retributive>.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

In this sense, incarceration fails to satisfy the retribution theory of punishment. It is not moral to needlessly disadvantage the disadvantaged. It is not fair to deprive one of their freedom for claiming a relative's address in place of their own. Parental incarceration does not repay the affluent communities that mistakenly admit students seeking refuge from indigent schools. The harm incurred by school districts—even in the order of thousands of tuition dollars—could never warrant depriving a child of the warmth and protection of their mother or father.

In light of this Note's case against incarceration for school enrollment fraud, the final inquiry explores possible solutions for sanctioning this offense. Here, this Note argues in favor of state and federal action to prohibit incarceration for enrollment fraud. Lastly, this Note espouses a restorative jurisprudence, endorsing the adoption of a more equitable and socially accountable approach.

VIII. SOLUTIONS: A PROGRESSIVE APPROACH

This Note has explored the long history of education inequality, evaluated the shortcomings of impoverished schools, assessed school-choice initiatives, and analyzed statutes penalizing enrollment fraud. From high profile cases, we have seen that this offense can entail dire consequences for the unwary parent and that the incarceration they might face is a myopic and draconian response to a growing phenomenon in school districts throughout the country. This invites the question of what should be done to curb enrollment fraud or, more specifically, what punishment should be visited upon parents committing this offense. In response to the broader question; a comprehensive solution for resolving school inequality throughout the nation is, obviously, beyond the ambitions of this Note.¹⁶⁴ However, there are certain steps that should be taken as it relates to the latter issue: (1) aggressive action by the Federal Government to push for sentencing reform in state legislatures; and (2) a nation-wide commitment to restorative justice in addressing convictions for boundary hopping.

A. *Federal Action*

Many issues regarding school inequality in the United States are exasperated by the lack of interstate and intrastate uniformity in public policy. Hence, it is tempting to advocate a federal law prohibiting states from incarcerating parents who commit boundary hopping. However, the constitutionality of such prohibition is questionable. The Supremacy Clause of the United States Constitution establishes that the Constitution, and federal law made pursuant to it, takes precedence over state

164. Though one is tempted to advocate for progressive fiscal policies that seek to alleviate income inequality by substantially raising the minimum wage, employing strict regulation on the financial services industry and raising taxes on large corporations. Economic stimulus could help expand the middle-class and afford many minority and low-income families the opportunity to advance socioeconomically. This could serve as the catalyst by which many impoverished schools could be rejuvenated. Moreover, criminal justice reform on a multitude of issues, particularly drug laws, would do well to restore communities stricken with broken families and instability stemming from the mass incarceration seen in the United States in recent decades.

law,¹⁶⁵ and the most prevalent provision the national government looks to in regulating the States is the Commerce Clause.

Under the purview of the Commerce Clause, the Federal Government may enact laws and regulations governing activities which affect interstate commerce.¹⁶⁶ Between 1936 and 1995, the Supreme Court's interpretation of the Commerce Clause experienced a seemingly limitless expansion.¹⁶⁷ Generally, all that is required is that any artifice, activity, product, resource, employee, or service passes through interstate borders. Virtually every public school makes use of materials, supplies, services or personnel that have experienced interstate travel. Thus, it is conceivable for the Federal Government to enact a regulation for public schools under the Commerce Clause. However, a federal statute would regulate a state's right to determine its sentencing as it relates to school enrollment fraud; not the school itself. Further, both education policy and criminal law have traditionally been considered within the police powers reserved for the States to exercise at their discretion.¹⁶⁸

If not an outright ban on harsh residency fraud laws, it may be possible for the Federal Government to apply conditional pressure on states to reform laws sanctioning boundary hopping through the withholding of federal funds. In *South Dakota v. Dole*, the Supreme Court held that under the Spending Power,¹⁶⁹ the receipt of federal funds may be conditional if such spending is for the general welfare, the conditions by which the state receives the funds are unambiguous, the conditions are related to a federal interest in a national program or project and the conditions do not violate other constitutional provisions.¹⁷⁰ In *Dole*, the Supreme Court upheld a condition that the Federal Government would withhold what constituted five percent of South Dakota's federal highway funds if the State did not raise its drinking age to twenty-one. The Court determined that five percent did not constitute a coercive amount in which the States would be forced to comply with the Federal Government's wishes.¹⁷¹

By contrast, in *National Federation of Independent Business v. Sebelius*, the Supreme Court held unconstitutional a provision within the Affordable Care Act that conditioned a state's receipt of Medicaid funding on expansion of the eligibility requirements for their citizens¹⁷² On average, the conditioned funding would account for twenty percent of a state's total federal budget or fifty to eighty-three percent of the cost of Medicaid.¹⁷³ Here, the condition was clearly coercive, as it would greatly handicap the State if they did not adopt the federal policy. On average, federal aid

165. U.S. CONST. art. VI, cl. 2.

166. U.S. CONST. art. I, § 8, cl. 3.

167. See, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 269 (Wolters Kluwer Law & Business 4th ed. 2011) (noting that between 1936 and 1995, the Supreme Court did not find any federal law as exceeding the scope of Congress' commerce power).

168. See, *United States v. Lopez*, 514 U.S. 549, 554 (1995) (noting that, historically, states have been sovereign in matters of criminal law enforcement and education within their borders).

169. U.S. CONST. art. I, § 8, cl. 1.

170. *South Dakota v. Dole*, 483 U.S. 203, 203–04 (1987).

171. *Id.* at 211–12.

172. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 584–85 (2012).

173. *Id.* at 682.

accounts for only nine percent of K-12 public school funding.¹⁷⁴ Hence, it appears that such conditional funding might be a viable option as it falls between *Dole* and *Sebelius*, yet closer to *Dole*'s end of the spectrum.

An argument might be made that the Federal Government proscribing sentencing limitations violates the Tenth Amendment's reservation of police power to the States. However, the proposed prohibition is a limitation on the nature of *sentencing*; not a prohibition in *the codification* of boundary hopping as a crime. In this regard, the States are still given a fair amount of discretion; they are simply prohibited from incarcerating parents for enrollment violations.

A question also arises regarding the consequences of a state rejecting federal funding instead of reforming laws prohibiting incarceration for boundary hopping. In that event, a reduction in nine percent of funding statewide could have considerable effects on schools that already suffer from insufficient funding, thereby exasperating school inequality. One might expect that political pressure on state legislatures would prevent such a decision. After all, what is sought is the revocation of laws that put well-meaning caregivers behind bars for arguably victimless offenses. Further, it might seem irresponsible for a politician to vote against receiving more funding for the education of a state's children, all for the sake of protecting harsh sentencing laws. Nonetheless, such a possibility might be a cornerstone issue.

Hence, this Note urges states to amend school enrollment statutes to exclude incarceration as a sanction and to enact laws prohibiting state prosecutors from characterizing boundary hopping as a more serious offense.

B. Restorative Justice

What the United States needs is a commitment to restorative justice. Restorative justice aims to attend to the needs of the victim, reintegrate offenders into the community, enable offenders to assume responsibility for their actions, and most importantly, avoid the escalation of legal justice and its associated costs.¹⁷⁵ As a nation, the first and most important step is for us to think more creatively, economically and empathetically about criminal justice.

The central perceived harm from enrollment fraud is the expenditure of local tax funds on out-of-district children. This harm is immediately incurred by the school district, which in turn derives much of its funding from local residents. Hence, there are two "victims": the school and the local taxpayer. The harm to the taxpayer is incurred only to the extent that their state and local taxes fund public schools. Thus, the harm done to either the school district or taxpayer is financial. Overlooked is the question of how much one's state taxes are used to fund state prisons. A student may consume a public school's services for seven hours per weekday, but a prison must provide *everything* for inmates on a daily basis. This includes housing, food, recreation, clothing, facilities, healthcare, and operational costs. On average, states

174. NAT'L CTR. FOR EDUC. STATS., *supra* note 37.

175. TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW 6 (1999), available at http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf.

annually spend roughly \$33,274 per inmate, or \$91 per day.¹⁷⁶ Thus, it is important to bear in mind that incarceration is also a financial burden on taxpayers, and as it pertains to enrollment fraud, it only compounds the very harm it seeks to punish.

A more contemplative approach is needed, one that does away with incarceration and takes greater consideration of the overall context of this issue. Pennsylvania's summary offense statute, which was previously analyzed,¹⁷⁷ provides a reasonable template. Some adjustments are needed, however. For example, the requirement that an offender must pay back the full costs a school district spends per student is somewhat unfounded. Rather, the school should only be entitled to an amount equal to the revenue it would have procured from the offender had she actually lived at the misrepresented address during the period of enrollment. This would likely be a function of the percentage of property taxes from that residence that would be allocated to the school. The portion of federal and state funds a school uses for each student should not be included in restitution unless the offender is not domiciled in the state. If the offender lives within the state, then presumably her contribution to the state and federal government is accounted for through the state and federal taxes she pays. Further, the true resident of the misrepresented address likely pays local taxes that serve as revenue for the school as well.

Secondly, the burden of repaying the school district should not fall squarely on the caregiver who falsified the documents; if possible, it should be shared with any third-party that assisted with the scheme. This serves several purposes. First, it is sensible to visit the punishment onto all offending parties, including the true resident of the subject address. Second, if appropriate, it enables the court to equitably apportion the financial burden between the offenders according to their ability to pay. Finally, it gives notice to would-be contributors that the caregiver of the falsely enrolled child will not be the only party to suffer a consequence if the scheme is uncovered.

Lastly, community service should be ordered in place of incarceration. Unlike incarceration, community service delivers value to the harmed community, can help the offender develop useful skills, and shields children from the trauma of parental incarceration.

A reader may object to this suggestion upon notice of the likelihood a school district will not be fully reimbursed for the costs of educating a child for however long she fraudulently attended the school. This observation may hold true; the school district receives restitution equal to expected revenue from a single local taxpayer, but experiences a loss from any costs exceeding that amount. While problematic, it is equally unfair to impose exorbitant fines exceeding the amount any other parent

176. CHRIS MAI & RAM SUBRAMANIAN, *THE PRICE OF PRISONS: PRISON SPENDING IN 2015* (2017), available at <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (showing that among the forty-five states that submitted data, \$33,274 was the average cost per prisoner when understood as a prison's total expenditures divided by the total prison population. States ranged from a low of \$14,780 in Alabama to a high of \$69,355 in New York. While a more accurate analysis would evaluate the state's cost for prisons as a function of incarceration rate and the state's total population; such specificity is unnecessary for the thrust of this section).

177. 24 PA. STAT. & CONST. STAT. ANN. § 13-1302 (West 2017).

pays in taxes under the guise of “restitution.” This is especially so if the offender is of lower economic status.

From a broader perspective, perhaps the school’s loss can be seen as a societal expense. This expense is offset by the societal gain received by the offender’s properly assigned school which enjoyed the offender’s local tax revenues without the costs of educating her child. Any loss from the former that exceeds the gain received by the latter is what we as a society pay for school inequality.

IX. CONCLUSION

The Executive branch brought us the redemption of the Civil War. The Judiciary challenged us to acknowledge the intrinsic value our children enjoy when their diversity is celebrated in fellowship with one another. This Note has endeavored to show an area through which we must ask more from our legislature(s). Economic status should not be a barrier to a quality education, no more than race should be. Hence, school inequality is a cross that we as a nation carry together. Thus far, America has made great strides in remedying the injustices of the past. That same progress is proof that there is still much more that we can do to fix the issues arising from our public school system. We should find solace in the fact that America has the funds, the policy experts, and the ingenuity to provide a more equal education. And until we do so, it is beneath us to deprive well-meaning caregivers of their freedom for seeing opportunity over the horizon and doing what it takes to offer a better life for their children. Because we can do better, we should do better. We owe it to our ideals, to ourselves, to one another, and most importantly, to our children.