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Race Decriminalization and Criminal Legal System Reform

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RACE DECRIMINALIZATION AND CRIMINAL LEGAL SYSTEM REFORM

MICHAEL PINARD*

There is emerging consensus that various components of the criminal legal system have gone too far in capturing and punishing masses of Black men, women, and children. This evolving recognition has helped propel important and pathbreaking criminal legal reforms in recent years, with significant bipartisan support. These reforms have targeted the criminal legal system itself. They strive to address the pain inflicted by the system. However, by concerning themselves solely with the criminal legal system, these reforms do not confront the reality that Black men, women, and children will continue to be devastatingly overrepresented in each stitch of the system. As a result, these reforms do not reach deeply enough. They do not address or confront the reality that simply being Black has been and will continue to be criminalized.

This Article asserts that measures beyond these reforms—measures that reach the root of racial criminalization—are necessary for true criminal legal system transformation.

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INTRODUCTION

The scope of the criminal legal system in the United States is expansive beyond measure. It captures, dominates, and dictates the lives of individuals and families throughout the country. It does so through all types of cases, from the violent and nonviolent felony offenses that often lead to years and decades of incarceration, to the vast, all-encompassing, and seemingly limitless misdemeanor offenses that choke dockets in lower criminal courts

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every day.¹ And the deep reach of the criminal legal system is not limited to well-known forms of punishment, such as incarceration, probation, and community service. It also weaves an intricate web of financial costs upon defendants and those convicted of crimes, including fines and a buffet of fees to access resources (such as public defenders and drug treatment), to avoid pretrial detention and jail (such as electronic monitoring), or to otherwise complete their punishment successfully (such as probation fees).

While the criminal legal system particularly infiltrates the lives of poor people, it is singularly relentless and merciless on Black men, women, and children. It is common knowledge that Black communities have borne the brunt of mass incarceration, mass convictions, and every other aspect of the criminal legal system. As many have articulated, the criminal legal system and the policing culture that funnels Blacks into it are forms of racialized social control.²

The last several years have brought a reckoning to mass incarceration and mass criminalization.³ Reflecting back on decades of ravaging punishment and the destruction of individuals, families, and communities wrought by “tough on crime” strategies such as the War on Drugs, mandatory minimum sentences, and zero-tolerance policing, elected officials and thought leaders of all stripes have called for and legislated various criminal legal system reforms.⁴

These various reforms and the heightened attention to injustice are important—indeed urgent—steps forward, but they are not enough. In the end, they are small because they largely focus on process- and system-rooted reforms.⁵ Specifically, these reforms seek to ease the pains inflicted by an

¹ See, e.g., William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), <https://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html> (describing the elusiveness of a trial for misdemeanor defendants in the Bronx where the criminal courts are flooded with 50,000 misdemeanor filings each year); John R. Emshwiller & Gary Fields, *Justice Is Swift as Petty Crimes Clog Courts*, WALL ST. J. (Nov. 30, 2014), <https://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782> (noting that misdemeanor charges “account for about 70% to 80% of criminal cases annually,” with some district judges handling over one hundred misdemeanor cases on their dockets on an average day—or one every four minutes).

² See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 17 (2017) (“American criminal justice today is premised on controlling African American men.”).

³ See Priscilla A. Ocen, *Awakening to a Mass-Supervision Crisis*, ATLANTIC (Dec. 26, 2019), <https://www.theatlantic.com/politics/archive/2019/12/parole-mass-supervision-crisis/604108> (“The enormous and well-documented scale of mass incarceration in the United States has recently influenced criminal-justice reformers on both the left and the right to pursue a correction.”).

⁴ See *infra* Section II.A (describing these efforts).

⁵ They are also small because they largely focus on individuals convicted of nonviolent offenses. See RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 12 (2019) (“At most, the existing political process is capable of producing only modest changes, focused predominantly on the harshest punishments for nonviolent drug and property offenders who do not have much in the way of a criminal record.”).

overbearing and omnipresent criminal legal system.

By focusing squarely on the criminal legal system, these reforms do not reach the root of the problem. The reforms do not get at *why* Black men, women, and children continue to be overrepresented in the criminal legal system. As a result, these reforms are incomplete. They do not address or even confront the ugly truth that being Black, in and of itself, has been and continues to be criminalized.

This Article briefly canvasses some ways in which Black men, women, and children are criminalized for the duration of their lives. As a result, the various criminal legal system reforms that have been advanced in recent years, although necessary, are not enough. Stated simply, any reforms that focus on “tweaking,” “fixing,” or “reforming” any aspect of the criminal legal system do not address the harsh fact that even if (and after) these measures are realized, Black men, women, and children will continue to be disproportionately introduced to, punished by, and devastated by the criminal legal system. Thus, much deeper measures—those that reach the root of racial criminalization—are necessary for true transformation.

I

CRIMINALIZED: BORN AND RAISED

The masses of individuals who travel through the criminal legal system and are convicted of crimes are ascribed the label “criminal.” The label, in and of itself, is stigmatizing. It marginalizes, isolates, and excludes the person as the “other.” All sorts of institutions, systems, and people use this label to define and confine the individual with a conviction record. While the label is sharpest when connected to convictions for serious, violent offenses, it is branded onto individuals convicted of all types of crimes, regardless of how minor and harmless.

Conviction records dictate and decimate lives. Commentators have long detailed the myriad legal obstacles that a conviction record often ensures, such as exclusion from government-assisted housing, employment, public benefits, voting booths, and jury boxes.⁶ For noncitizens, these records can

⁶ See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1799–1800 (2012) (“For citizens, a prominent collateral consequence [of a criminal conviction] is the loss of civil rights[.]”); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459 (2010) (noting that collateral consequences of conviction records include “ineligibility for federal welfare benefits, public housing, student loans, and employment opportunities, as well as various forms of civil exclusion, such as ineligibility for jury service and felon disenfranchisement”); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 119–20 (2009) (“In addition to deportation, courts categorize many other severe consequences as collateral, including involuntary civil commitment, sex-offender registration, and the loss of the right to vote, to obtain professional licenses, and to receive public housing and benefits.”).

lead to banishment from the United States.⁷ In addition, these records bring a host of nonlegal obstacles, which are, quite simply, *everything* else that comes with the conviction: the policies, practices, restrictions, beliefs, feelings, prejudices, and attitudes that live outside of law but also isolate, exclude, and stigmatize. They include the employers who, by internal policy, practice, habit, reflex, or otherwise, refuse to hire individuals because of their conviction records, as well as the landlords who refuse to rent apartments to these same individuals. Too many individuals live with, and are burdened by, the impossibility of moving past this label.⁸ There is always someone who will continue to define them as “criminal,” despite the years and decades that pass, and often despite all they have done and tried to do to move past their interaction(s) with the criminal legal system.

By extension, conviction records have also devastated Black families and communities. Black families have long suffered the brunt of secondary punishment. When an individual cannot find stable employment or housing because of their conviction record, the family unit is impacted. As a result, the emotional and physical toll of these obstacles extend to families. Because Black communities disproportionately absorb individuals who have been through the criminal legal system and are stifled by conviction records, these communities, as a whole, suffer.⁹

However, while the “criminal” label has been ascribed to those who have been convicted of criminal offenses, the masses of Black men, women, and children in the United States live with, and are burdened by, a different and much broader label—one that continues to be applied to marginalize, isolate, suspect, surveil, and even to kill, regardless of whether they have travelled through the criminal legal system. Blacks in the United States, as a whole, have always been and continue to be “criminalized.”

Stated plainly, no one is born “criminal.” However, Black babies are either born “criminalized” or have this badge placed upon them at a young age. Nearly one half of Black male babies will be arrested by the time they

⁷ See Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301–02 (2011) (“Lawful immigrants can face life sentences of banishment from their homes, families, and livelihoods in the United States and can potentially be sent to countries they have not visited since childhood, where they: have no family, do not speak the language, and can face serious persecution or death.”).

⁸ The author has observed the hardships inflicted by the label of “criminal” firsthand through his clients.

⁹ See, e.g., Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. (forthcoming June 2020) (manuscript at 3) (on file with the *New York University Law Review*) (highlighting the co-constitutive relationship between racially-segregated residential areas and unjust policing practices); Elizabeth E. Joh, *Automated Seizures: Police Stops of Self-Driving Cars*, 94 N.Y.U. L. REV. ONLINE 292, 308 (2019) (“The disproportionate racial impacts of pretextual policing are well known.”).

reach twenty-three years of age.¹⁰ As Professor Kristin Henning has pronounced somberly, “Black boys are policed like no one else, not even black men.”¹¹ In prekindergarten and beyond, Black children are disproportionately suspended and expelled from school, arrested by school police officers, and referred to the juvenile justice system for the same behaviors as White children.¹² Black girls are punished especially for subjectively interpreted expressive behaviors such as “willful defiance,”¹³ talking back to teachers,¹⁴ and “being ‘loud.’”¹⁵

Black children are seen differently than other children. A well-known study found that beginning at ten years old, Black children are perceived as older and “less innocent” than non-Black children of the same age.¹⁶ Twelve-

¹⁰ Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

¹¹ Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys*, in POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 58 (Angela J. Davis ed. 2017). Black males in particular are perceived and stereotyped as violent. See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (“The mere presence of a Black man . . . can trigger thoughts that he is violent and criminal.”).

¹² See, e.g., ADVANCEMENT PROJECT & HARVARD UNIV. CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (2000), <https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf>; OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., 2015-16 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY 13 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>; U.S. GOV’T ACCOUNTABILITY OFFICE, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (2018), <https://www.gao.gov/assets/700/690828.pdf>; see also THURGOOD MARSHALL INST., NAACP LEGAL DEF. AND EDUC. FUND, INC., OUR GIRLS, OUR FUTURE: INVESTING IN OPPORTUNITY & REDUCING RELIANCE ON THE CRIMINAL JUSTICE SYSTEM IN BALTIMORE (2018), https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf (examining the overrepresentation of Black girls in Baltimore’s school disciplinary processes and juvenile justice system).

¹³ MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 70 (2016) (defining willful defiance as “a widely used, subjective, and arbitrary category for student misbehavior”).

¹⁴ *Id.* at 84–85.

¹⁵ *Id.* According to Monique Morris, “Black girls tell stories of being pushed out of school and criminalized for falling asleep, standing up for themselves, asking questions, wearing natural hair, wearing revealing clothing, and in some cases [being unruly in school]—mostly because what constitutes a threat to safety is dangerously subjective when Black children are involved.” *Id.* at 57.

¹⁶ Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 529 (2014). A more recent study focused on girls, finding that the participants “viewed Black girls collectively as more adult than white girls[.]” particularly from the ages of five to fourteen. REBECCA EPSTEIN ET AL., GEORGETOWN LAW CTR. ON POVERTY AND INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 8 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>. As a result, the researchers concluded

year-old Tamir Rice lived and died with this burden. Shot and killed by a Cleveland police officer while he was playing with a toy gun in a park, Tamir was described by an officer who called 911 as a “Black male” who looked to be “maybe 20.”¹⁷ The study also found that Black male children, again beginning at ten years old, are perceived by police officers and others as older than they are and more criminally culpable for their behavior, as compared to White males and Latino males.¹⁸ This study speaks volumes about how Black boys are perceived and interpreted by police officers, school administrators, courts, and society at large. They are seen as older than they are, their behaviors are interpreted differently, and their normal adolescent rule breaking is interpreted differently.¹⁹ They are given fewer breaks because they are criminalized.

Black children and adults are also criminalized for where they live and visit. For example, public housing residents in New York City have long been arrested and charged with trespassing for occupying the very spaces where they live.²⁰ The same has been true for their visitors. Police departments also place Black (as well as Latinx) youth on gang databases disproportionately, often without any connections to gang activity.²¹ Also,

that Black girls bear the burden of “adultification,” which they describe as “a form of dehumanization, robbing Black children of the very essence of what makes childhood distinct from all other developmental periods: innocence.” *Id.* at 6.

¹⁷ German Lopez, *Police Thought 12-Year-Old Tamir Rice Was 20 When They Shot Him. This Isn't Uncommon*, VOX (Nov. 26, 2014, 6:10 PM), <https://www.vox.com/2014/11/26/7297265/tamir-rice-age-police>.

¹⁸ Goff, *supra* note 16, at 532, 535.

¹⁹ See Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 387 (2013) (“[T]he juvenile justice system treats youth of color more harshly than their white peers in part because decision makers throughout the system are less inclined to recognize their developmental immaturity.”).

²⁰ In 2010, New York City public housing residents and their guests filed a class action lawsuit against the City of New York and the New York City Housing Authority (NYCHA), challenging the New York City Police Department’s (NYPD) practice of stopping and questioning them “without sufficient legal basis, seiz[ing] persons without reasonable suspicion, and unlawfully arrest[ing] individuals for trespass without probable cause.” Amended Complaint ¶ 169, at 32, *Davis v. City of New York*, 10 Civ. 0669 (SAS) (S.D.N.Y. May 27, 2011). The litigation was settled in 2015. As part of the settlement, the parties agreed that “NYPD officers must have at least an ‘objective credible reason’ in order to approach any person in or around a NYCHA residence, and that simply entering, being in, or exiting a NYCHA residence does not constitute an ‘objective credible reason.’” Stipulation of Settlement and Order ¶ 6(a), at 7, *Davis v. City of New York*, 10 Civ. 0669 (SAS) (S.D.N.Y. Jan. 7, 2015).

²¹ See, e.g., Hannah Dreier, *How a Crackdown on MS-13 Caught Up Innocent High School Students*, N.Y. TIMES MAG. (Dec. 27, 2018), <https://www.nytimes.com/2018/12/27/magazine/ms13-deportation-ice.html> (describing law enforcement efforts to obtain information on gangs from teenagers in schools); Alice Spieri, *New York Gang Database Expanded by 70 Percent Under Mayor Bill De Blasio*, THE INTERCEPT (June 11, 2018, 10:49 AM), <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio>.

living in a “high crime” neighborhood makes residents more criminally suspect than residents of other neighborhoods, according to the United States Supreme Court’s holding in *Illinois v. Wardlow* that a person’s “unprovoked flight” from police officers in a “high crime area” constitutes reasonable suspicion, which allows officers to chase and seize.²² Freddie Gray, who died one week after Baltimore police officers arrested him for knife possession, dragged him to a police van, drove him around while he was handcuffed and unsecured without a seat belt, and ultimately brought him to the University of Maryland Medical Center’s Shock Trauma Unit unconscious and with a severed spine, tragically personifies *Wardlow*. The arrest report merely alleged that he “fled unprovoked upon noticing police presence.”²³ He was not suspected of any wrongdoing. No one reported that he was engaged in any criminal activity. The officers who chased him did not see him doing anything illegal or acting suspiciously. To them, though, his running was the criminal activity; it allowed them to chase and detain him, which led to everything else that followed, including his death. At its core, *Wardlow* allows police officers to criminalize race, place, and space.

In addition, Blacks are criminalized when applying for jobs. Several studies have reinforced that during the job application process, Blacks are more harmed by criminal records than Whites with the same records, work experiences, and qualifications.²⁴ However, Black job applicants are also harmed when the prospective employer *does not* conduct the background check and therefore does not know whether a criminal record even exists. Without background checks, employers are left to guess the criminal histories of all applicants. Unsurprisingly, employers speculate, and they do so in ways that harm Black job applicants. As researchers have found, employers resort to stereotypes and biases to assume that Black applicants have criminal records, or at least that they are more likely to have records than White applicants.²⁵ These assumptions even have a name: “potentially

²² *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (“[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”).

²³ Application for Statement of Charges, State of Maryland v. Grey [sic], Freddie Carlos Jr., No. 6B02294074 (D. Md. Apr. 12, 2015), <https://www.baltimoresun.com/news/crime/bal-charging-documents-for-freddie-gray-20150420-htmlstory.html>.

²⁴ See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 59 (2007) (detailing how Black applicants are more harmed by criminal records than White applicants with the same record, even though all other qualifications were the same); Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009) (showing that criminal records reduced callback interviews for Black applicants twice as much as White applicants).

²⁵ See Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276, 288 (2004) (“[A] policy that denies employers access to criminal history records could also lead to equally troubling statistical discrimination against all members of particularly vulnerable demographic groups (i.e., Black men).”).

unobserved criminal histories.”²⁶ Employers rely on these assumed or imagined records to deny interviews and jobs to Black applicants.

Black men, women, and children are also criminalized by going through the criminal legal system, even when they are not ultimately convicted. This is particularly true for those who cannot afford bail. Defendants who are poor and Black have higher bails set on them than Whites accused of similar crimes.²⁷

Those who are not incarcerated pretrial are also criminalized. The process of attending court appearances over and over again, particularly in jurisdictions with clogged dockets that stretch cases for months and sometimes longer, criminalizes defendants. How do they explain to employers the need for various days off to attend court? How do they absorb losing a day’s pay to attend court, which jeopardizes their ability to pay bills and hold on to the job? How do they explain to their children the looming criminal matter that can alter all of their lives? How do they live with the stress of the criminal charge, as well as an adjudication process that cares very little, if at all, about their stories and circumstances?

And then there is the impact of a criminal case once it ends. Many lower-level cases are not resolved by conviction, but rather by an array of non-conviction dispositions.²⁸ In many of these instances, the dispositions and underlying charges remain fixed on criminal records, unless individuals take the affirmative steps to remove the charges from their records through expungement or other means. These charges and dispositions are available to the public. Employers, in turn, use these records to exclude applicants from jobs.²⁹ Public and private landlords use the same records to exclude applicants from public and private housing.³⁰ Thus, the use of charges and disposition records (again, for non-convictions) exacerbates the stigma that

²⁶ Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 786 (2009).

²⁷ See, e.g., David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1886, 1929 (2018) (detailing a study of Miami and Philadelphia judges that finds “substantial bias against black defendants” at bail assessment).

²⁸ See Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1589 n.170 (2012) (citing sources that “suggest far higher non-conviction rates for misdemeanor arrests”); see also Gabriel J. Chin & John Ormonde, *Infamous Misdemeanors and the Grand Jury Clause*, 102 MINN. L. REV. 1911, 1949 (2018) (“[T]he federal nonconviction rate for misdemeanors is approximately five times higher than it is for felonies.”).

²⁹ See Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 992 n.138 (2013) (describing how employers often deny jobs to applicants based on non-convictions “either because they refuse to employ . . . individuals with any criminal record, or they simply misread or misunderstand criminal records and thus may not know the difference between conviction and non-conviction dispositions”).

³⁰ For a thorough examination of “crime-free ordinances” that are used to exclude individuals allegedly involved in criminal activity from private housing, see Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019).

attaches to *simply being Black*. These records are stigma-multipliers. They serve to deepen the criminalization that attaches to individuals because of their race.

As many commentators have detailed, the criminal legal system thrives and survives on mass guilty pleas.³¹ The system needs bulk pleas—desperately—to churn through cases furiously and sustain itself. As a result, it does everything possible to force individuals to plead guilty, including those who are factually innocent.³² They often plead guilty because they have no money or other resources to defend themselves.³³ In the worst circumstances, they are represented by court-appointed counsel who are under-resourced and overburdened.³⁴ They are mired in the reality that they are fighting their cases from behind. Given these constraints—all within a system that is focused on forcing them to plead guilty—they have no belief or faith that moving their case further along will serve them well. So they end the case by pleading guilty. In a technical sense, the criminal legal system and various decisionmakers define them as “criminal” because they have been “convicted” of the crime. More broadly, however, they are

³¹ See, e.g., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 6 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> (“[N]either the government nor the public have exhibited any significant resistance to its rise to dominance. This is not altogether surprising . . . [T]he pressures defendants face in the plea bargaining process are so strong even innocent people can be convinced to plead guilty to crimes they did not commit.”); Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1432 (2017) (“In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%. . . . The net result is that prosecutors, rather than judges, now effectively determine the sentences to be imposed in most cases.”); Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> (“The system of mass incarceration depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.”); John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR.: FACTTANK (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty> (“The share of federal criminal defendants who entered guilty pleas rose from 82% in 1998 to 90% two decades later.”).

³² See ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 5 (2018) (“[I]nnocent people arrested for low-level offenses routinely plead guilty to crimes they did not commit.”).

³³ *Id.* (“Innocent people might also plead because they are too poor to pay bail . . . meaning they will remain in jail for weeks or even months before their cases are over. Pleading guilty . . . typically lets them go home.”).

³⁴ *Id.* (“[Defendants] still might not get proper representation. Many public defenders are burdened with hundreds and sometimes thousands of cases and therefore cannot give time or attention to any one of them. . . . Such overburdened attorneys may simply inform their clients about the deal . . . and get them to sign.”).

criminalized.

II

THE INTRINSIC LIMITATIONS OF CRIMINAL LEGAL SYSTEM “REFORM”: THE NEED FOR RECLAMATION AND RACE DECRIMINALIZATION

A. *Racial Criminalization: The Main Impediment to Criminal Legal System Reform*

While there have always been reform efforts focused on various aspects of the criminal legal system, collective voices and efforts have seemingly arisen and coalesced over the last several years. Long occupied by policymakers, think tanks, researchers, lawyers, and advocates directly impacted by the criminal legal system, the advocacy spaces for criminal legal system reform have expanded dramatically in recent years. Indeed, we have reached the point where several reform efforts have become enmeshed in popular culture.

Among the many efforts that have galvanized broad coalitions of advocates, lawmakers, and organizations over these last several years are campaigns focused on transforming policing;³⁵ disconnecting law enforcement from public schools;³⁶ decriminalizing certain activities;³⁷ legalizing certain activities;³⁸ electing reform-minded prosecutors;³⁹

³⁵ See, e.g., Jelani Jefferson Exum, *Purpose-Focused Sentencing: How Reforming Punishment Can Transform Policing*, 29 J.C.R. & ECON. DEV. 1 (2016) (examining how sentencing reform can help transform policing practices).

³⁶ See, e.g., AMANDA PETTERUTI, JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf (arguing that police in schools, including school resource officers, hamper student learning and cause long-term harm); *About Us*, POLICING PROJECT, <https://www.policingproject.org/about-landing> (last visited Feb. 26, 2020) (“The goal is to achieve public safety in a manner that is equitable, non-discriminatory, and respectful of public values.”).

³⁷ See, e.g., Louise Arbour et al., *It’s Time for Drug Policy Reform – in America and Across the Globe*, SALON (Oct. 19, 2019, 11:00 AM), <https://www.salon.com/2019/10/19/its-time-for-drug-policy-reform-in-america-and-across-the-globe> (“As a group of U.S. prosecutors learned during a recent trip to Portugal [where personal drug use was decriminalized in 2001], decriminalization worked in large part because it helped reduce the stigma of drug use and replaced a justice system response with a public health starting point.”).

³⁸ See, e.g., David A. Makin et al., *Marijuana Legalization and Crime Clearance Rates: Testing Proponent Assertions in Colorado and Washington State*, 22 POLICE Q. 31 (2018) (examining the impact of marijuana legalization on improving efficiency and effectiveness of policing in Colorado and Washington).

³⁹ See, e.g., Justin Jouvenal & Rachel Weiner, *Prosecutors Won’t Pursue Marijuana Possession Charges in 2 Northern Va. Counties*, WASH. POST (Jan. 2, 2020, 7:30 PM), https://www.washingtonpost.com/local/public-safety/new-fairfax-county-prosecutor-says-office-wont-prosecute-marijuana-possession/2020/01/02/ab0363a4-2d76-11ea-9b60-817cc18cf173_story.html (“Adults possessing small amounts of marijuana for personal use will no

diverting matters away from the criminal legal system;⁴⁰ eliminating cash bail;⁴¹ diversifying juries;⁴² funding public defender offices adequately;⁴³ reversing mass incarceration;⁴⁴ abolishing jails, prisons, probation, and parole;⁴⁵ easing the devastating effects of criminal records, including: expanding expungement and sealing laws, forbidding employers from automatically denying applicants based on their criminal records, and restoring voting rights to individuals immediately upon release from prison—with a now growing chorus of advocates voicing the need to extend

longer be prosecuted in two Northern Virginia counties, new prosecutors in Fairfax and Arlington said Thursday on one of their first days on the job.”)

⁴⁰ See, e.g., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., MUNICIPAL COURTS: AN EFFECTIVE TOOL FOR DIVERTING PEOPLE WITH MENTAL AND SUBSTANCE USE DISORDERS FROM THE CRIMINAL JUSTICE SYSTEM (2015), <https://store.samhsa.gov/system/files/sma15-4929.pdf> (describing use of the Sequential Intercept Model (SIM) to divert individuals with mental and substance use disorders from the criminal legal system).

⁴¹ See, e.g., Tana Ganeva, *The Fight to End Cash Bail*, 2019 STAN. SOC. INNOVATION REV. 18 (describing the Bronx Freedom Fund’s Bail Project aimed at “help[ing] inmates avoid pretrial detention. . . . [While also] aim[ing] to drive reforms that eliminate the very need for such help”); Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html>.

⁴² See, e.g., James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL’Y 1 (2014) (examining the inherent bias rationale for excluding individuals convicted of felony offenses from juries and finding the rationale may be misguided); Margaret Bull Kovera, *Racial Disparities in the Criminal Justice System: Prevalence, Causes, and a Search for Solutions*, 75 J. SOC. ISSUES 1139 (2019) (examining racial disparity in juries and potential strategies to reduce disparity).

⁴³ See, e.g., BRYAN FURST, BRENNAN CTR. FOR JUSTICE, A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY (2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf (examining reasons for public defender resource disparity and recommending solutions, including funding increases); see also EQUAL Defense Act of 2019, S. 1377, 116th Cong. (2019) (proposing a public defense grant program and funding to train public defenders).

⁴⁴ See, e.g., DENNIS SCHRANTZ, STEPHEN T. DEBOR & MARC MAUER, THE SENTENCING PROJECT, DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS (2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions> (examining the policies and strategies of five states that reduced prison populations and formulating recommendations for other states and stakeholders on reducing mass incarceration); see also Reverse Mass Incarceration Act of 2019, S. 1557, 166th Cong. (2019) (proposing a “grant program to incentivize States to reduce prison populations”).

⁴⁵ See, e.g., Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> (discussing the prison abolition movement); *Statement on the Future of Community Corrections*, COLUM. JUST. LAB (May 17, 2018), <https://justicelab.columbia.edu/statement-future-community-corrections> (“[A]s America’s leading probation and parole officials and other concerned individuals and organizations, we believe it is possible to *both* significantly reduce the footprint of probation and parole *and* improve outcomes and public safety.” (emphasis in original)).

the franchise to the incarcerated population;⁴⁶ and reducing prison sentences for individuals incarcerated for nonviolent offenses.

All of these efforts have been rooted, to a large degree, in racial injustice, specifically to the connections between chattel slavery, Reconstruction, Jim Crow, criminalization, and mass incarceration. For instance, some of the efforts to decriminalize or legalize drugs are rooted in the racially disproportionate enforcement of drug laws and the outsized and devastating punishment these laws have brought to Black families and communities.⁴⁷ The efforts to restore voting rights to individuals exiting prison, or to those who have long been released from prison but still owe criminal justice debt, are in response to states intentionally creating these impediments to dilute Black voices.⁴⁸ The handful of states that require racial

⁴⁶ See, e.g., JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf (examining mass incarceration and proposing solutions, including alternatives to incarcerating individuals for low-level, nonviolent offenses); MORGAN MCLEOD, THE SENTENCING PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORM (2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms> (describing state reforms to voting rights for individuals convicted of felonies and examining the impacts of these reforms); Dana Liebelson, *In Prison, and Fighting to Vote*, ATLANTIC (Sept. 6, 2019), <https://www.theatlantic.com/politics/archive/2019/09/when-prisoners-demand-voting-rights/597190> (describing initiatives to expand the right to vote to incarcerated individuals in states that do not currently allow prisoner voting); *Ban the Box*, NAACP, <https://www.naacp.org/campaigns/ban-the-box> (“Ban the Box promotes employers to not ask about arrest history and to remove the question about criminal history from the initial job application forms and to ask the question about criminal history only in instances where it relates to the job in question.”); *Expand Criminal Record Clearance Policies*, NAT’L REENTRY RES. CTR., CSG JUSTICE CTR., <https://csgjusticecenter.org/nrrc/expand-criminal-record-clearance-policies> (last visited Feb. 3, 2020) (providing guidance for policymakers on how to expand criminal record clearance).

⁴⁷ See HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES 4, 5–6, 43–49, 180–94 (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web.pdf (highlighting racially discriminatory drug enforcement practices and recommending “all states and the federal government . . . decriminalize the use and possession for personal use of all drugs and to focus instead on prevention and harm reduction”); Ojmarh Mitchell & Michael S. Caudy, *Race Differences in Drug Offending and Drug Distribution Arrests*, 63 CRIME & DELINQ. 91, 108 (2017) (“Our findings suggest that the War on Drugs’ emphasis on low-level drug offending combined with unconscious stereotypes linking African Americans to drug distribution and the discretionary nature of drug enforcement practices produce disparities in drug arrests that cannot be explained by race differences in drug offending.”).

⁴⁸ See, e.g., JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 6 (2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer> (“[D]isenfranchisement policies disproportionately impact people of color. . . . Denying the right to vote to an entire class of citizens is deeply problematic to a democratic society and counterproductive to effective reentry.”); ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, RACISM AND FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY 3 (2017),

impact statements, which examine the potentially racially disparate harms of proposed criminal legal system-related legislation *prior* to passage and implementation, have learned the important lesson that reflecting on and reexamining these laws only *after* surveying the racial wreckage they have caused is too late.⁴⁹ These various campaigns for criminal legal system reform are, at their core, focused on racial justice. To a lesser degree, they are geared toward dismantling components of a criminal legal system that has been and continues to be anchored in racialized social control.

Accordingly, these various efforts and advances, individually and combined, are urgent and noble. They help inch the needle towards fairness and humanity. However, they are also limited, narrow, and, in the end, small because they are focused almost exclusively on easing *system-related* obstacles. Generally, they aim to reduce the numbers of individuals entering the criminal legal system, ease the strain on criminal defendants, enhance fairness, soothe the pains of punishment, and lower the hurdles that stand in the way of individuals moving past their records. By focusing largely on “fixing” the system, these efforts do not dig deep enough to get at the *root* cause of these issues. Stated plainly, regardless of whatever enlightened reforms are realized and no matter how these reforms change the look of the criminal legal system, each stage of the system, from policing practices to the impact of criminal records, will *continue* to harm Black men, women, and children disproportionately because the system was designed to do so.

The root cause—and thus the broader problem—is racialized criminalization. Black men, women, and children are tracked into the criminal legal system through the countless ways they are perceived, viewed, interpreted, confined, devalued, and dehumanized by institutions, systems, decisionmakers, and individual prejudices and biases. Because criminality is “inextricably” linked to race in the United States,⁵⁰ at all moments of their lives Black men, women, and children live on the cusp of criminal legal

https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf (“Deeper and wider-reaching change is urgently needed. Because they are inseparable from the entrenched racial disparities of our criminal justice system, felony disenfranchisement laws continually reproduce inequity in our democracy.”); Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”*: *Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 599 (2003) (“We conclude that racial threat is reflected in the composition of state prisons and find that such racial disparities in punishment drive voting restrictions on [individuals with felony convictions].”).

⁴⁹ See, e.g., Nicole D. Porter, *Racial Impact Statements*, THE SENT’G PROJECT (Sept. 30, 2019), <https://www.sentencingproject.org/publications/racial-impact-statements> (“[I]t is important to address a policy’s unwarranted effects before it is adopted, as it is more difficult to reverse sentencing policies once they have been implemented.”).

⁵⁰ See Charles M. Blow, *The Rot You Smell Is a Racist Potus*, Opinion, N.Y. TIMES (July 28, 2019), <https://www.nytimes.com/2019/07/28/opinion/trump-racist-baltimore.html> (opining that comments made by President Donald Trump evince his attachment of criminality to “black and brown people and to ‘inner cities’”).

system interaction. They navigate life while travelling in the wide and clear lanes that lead to the criminal legal system.

As a result, race decriminalization must be at the center of all advocacy efforts aimed at criminal legal system reform. These efforts must reach beyond the four corners of the system—indeed, they *must* reach *outside* the system—to grasp and incorporate how Blacks are perceived, interpreted, responded to, devalued, stigmatized, and dehumanized from the moment they are born. These efforts must account for both the history and the present of race criminalization. Precisely, they must focus on *why* Black men, women, and children have been and continue to be *disposable* to all aspects of the criminal legal system, from invasive, unconstitutional, and, at times, criminal policing practices,⁵¹ to overly-exuberant prosecution charging practices, to harsher sentencing outcomes, and to the lifelong devastation wrought by *non-conviction* and conviction records.

B. *The Unfairness of Redemption: Moving Towards Reclamation*

The burdens of “redemption” must also be part of these broader advocacy efforts. At a general level, redemption, in this context, is the process that individuals undergo as they strive to move past their interactions with the criminal legal system. Individuals often spend years, decades, and even the rest of their lives fighting to move past their criminal records. They yearn for the day when they are no longer defined and denied because of these records.

Many, including myself, have described this quest as one of “redemption.”⁵² Redemption connotes a process of saving oneself from sin. Broadly, it is a process of repentance, repair, and reinvention. It is rooted first in guilt and then in transformation. To earn redemption, it is assumed, a person must disavow and perhaps even shed a core part of who they previously were. Thus, the person must prove their rehabilitation and, ultimately, their worthiness.

Many whose travels through the criminal legal system resulted in conviction records have self-defined their quests as redemptive.⁵³ They have

⁵¹ See, e.g., Michael Pinard, *Gun Trace Task Force Preyed on African Americans Because They're 'Disposable' to Baltimore Police*, BALTIMORE SUN (Feb. 22, 2019, 6:00 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0224-gttf-disposable-20190221-story.html> (arguing that criminal investigations of Baltimore police officers must expand beyond those officers to examine the disposability of Baltimore’s Black residents to officers and the criminal legal system).

⁵² See Pinard, *supra* note 29.

⁵³ See, e.g., WILBERT RIDEAU, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE 48 (2010) (“I found hope, a burning need to live to redeem myself, to do something meaningful with my life in partial payment of the debts I owed”); SHAKA SENGHOR, WRITING MY WRONGS: LIFE, DEATH, AND REDEMPTION IN AN AMERICAN PRISON 198 (2013) (“I had

undertaken the long journeys of atoning for their actions. They have moved past the circumstances that led to their interaction(s) with the criminal legal system. They have redirected and even repurposed their lives. Many believe that they have done everything necessary to earn redemption, while others understand that, for themselves, this course is ongoing. For these individuals, redemption is an accurate—and, indeed, the correct—description because it is the process that they have defined in light of their circumstances, perspectives, outlooks, and desired endpoints. It is the path they have set out for themselves to travel.

However, the redemptive process is not—or, more accurately, should not be—for everyone. On a larger scale, the concept of “redemption” is overly broad, inexact, misguided, and, ultimately, unjust. It does not translate to Black criminalization or to the masses of Black men, women, and children who are bruised and battered by their interactions with a racially-punitive criminal legal system. In these contexts, redemption unfairly burdens those who have been criminalized throughout their lives to *prove* their worthiness.

For example, masses of individuals are cycled through the criminal legal system but not ultimately convicted of the charge(s). Prosecutors decide not to move forward with cases, for a variety of reasons. Judges dismiss cases, also for a variety of reasons. Many cases end in any number of other non-conviction dispositions, and many others go to trial and are acquitted.

Also, many who leave courtrooms with convictions do not believe the end result to be reflective of their action(s) or inaction(s), or who they were or who they are. Again, the criminal court process, as a whole, is a plea mill. The criminal legal system needs and relies on defendants—lots of them—to plead guilty.⁵⁴ The mass plea process is not a quest for truth, but it instead satiates the criminal legal system’s hunger for efficiency. For efficiency’s sake, defendants plead guilty for a variety of reasons: Some are guilty; some are forced to plead guilty to avoid the burdens of returning to court repeatedly over some undefined time period; some are forced to plead guilty to escape the trauma of pretrial detention; and some are forced to plead guilty because they do not have the resources to defend themselves.⁵⁵ Also, there are situations—more than we will ever know—where individuals “confess” to crimes after suffering through coercive and unconstitutional police

acknowledged my guilt years before, but there was a difference between that and accepting responsibility for my actions. My son’s words made me take that final step on my road to redemption.”); KEVIN SHIRD, *LESSONS OF REDEMPTION: MY JOURNEY THROUGH GANGLAND AMERICA* (2015) (recounting the author’s personal story of redemption from being incarcerated for drug crimes to advocating for substance abuse prevention, changes to the criminal legal system, and other social issues).

⁵⁴ See *supra* note 31 and accompanying text.

⁵⁵ See *supra* note 31 and accompanying text.

interrogations.⁵⁶ The end result is that many individuals plead guilty because they lack the resources to afford individualized attention, and their distrust of and lack of faith in the criminal legal system is dispositive.

And then there is the trial process. Many go to trial and lose because they are in fact guilty. They had a fair trial, they were represented by defense counsel who did everything possible and beyond, and they were prosecuted with integrity. However, the opposite is also true and prevalent: There exists a whole other category of individuals—overwhelmingly poor and Black—who lost at trial and experienced the ugliest aspects of the criminal legal system. They were represented by overworked and underpaid defense counsel whose trial preparation lacked everything that our ideals embody, they faced off against a prosecutor who chose to win at any and all costs, they were judged by a jury that was not representative of the community, or they in some other way suffered from a tainted trial process. They were disposable, in every way imaginable.

Last, there is the category of individuals who are in fact guilty, but believe the particular law to be unfair, the application of the law to them to be unjust, or that the violation says nothing about who they really are. Think here of the ravages of low-level drug offenses and a behemoth misdemeanor system on Blacks and communities of color and the continued disproportionate charging, prosecutions, and convictions that remain a stubborn, everyday reality.

The redemptive process does not speak to all of these individuals. It does not describe, reflect, or otherwise relate to those who have been prosecuted because of their race, poverty, and criminalization. The processes of atoning, repairing, and transforming have no application to them. Redemption forces burdens on them—proving their transformation and worth—that are unfair and unjust.

In contrast, *reclamation* more accurately, expansively, and fully describes the process that the masses of Black men, women, and children who have cycled through the criminal legal system must undertake. Quite simply, reclamation is “the act or process of reclaiming.”⁵⁷ It is focused on restoration. Many who have been through the criminal legal system search for ways to reclaim who they were when they lived *without* a record, or at

⁵⁶ See, e.g., Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 *FORDHAM URB. L.J.* 791 (2006) (examining the use of deceptive interrogation techniques in eliciting false confessions); Saul M. Kassir et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW & HUM. BEHAV.* 3 (2010) (examining the structural and psychological reasons innocent individuals confess to crimes and recommending interrogation reforms); Craig J. Trocino, *You Can't Handle the Truth: A Primer on False Confessions*, 6 *U. MIAMI RACE & SOC. JUST. L. REV.* 85 (2016) (examining the impact of false confessions on the criminal legal system).

⁵⁷ *Reclamation*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/reclamation> (last visited Feb. 26, 2020).

least to reach the point where they internalize that the record, while remaining a reality, is no longer an impediment that stands in the way. This is true regardless of whether the individual believes the record to be justified or not.

Thus, reclamation includes redemption. However, it is much more because it speaks to everyone who has been through the criminal legal system. It eases the unfairness of *proving* worth. Unlike redemption, absolution is not the end goal for reclamation. Rather, the goal is for individuals to reclaim who they were, unburdened by the criminal record, through whatever means that are appropriate and fair to the given circumstance. Indeed, some criminal legal system reforms are focused on facilitating reclamation. Expungement and clemency, as examples, aim to allow individuals to reclaim some aspects of their lives, unburdened by the criminal record, the conviction, or the sentence.

Reclamation is one key ingredient to race decriminalization. In the context of moving past interactions with the criminal legal system, it relieves Black men, women, and children from the unjust burdens of *proving* their worthiness and seeking absolution from decisionmakers. Rather than forcing Blacks to prove their transformation to others, reclamation, in its broadest sense, is focused on doing anything necessary to help them move past these interactions and recapture some semblance of their lives. Thus, reclamation changes the narrative from individual to collective responsibility by obligating institutions, systems, and decisionmakers to not only understand the ways in which Black men, women, and children are criminalized in various aspects of their lives, but also to take the affirmative steps necessary to detach them from their interactions with the criminal legal system.

CONCLUSION

The cruel and lasting irony, of course, is that by seeking to restore Black men, women, and children to who they were prior to their interaction(s) with the criminal legal system, reclamation, if achieved, would still leave them racially criminalized. This proves the larger point of this Article, which is that race decriminalization must be at the root of all efforts to “fix,” “reform,” or “transform” the criminal legal system. The ultimate aim of criminal legal system reform cannot be to lessen racial disparities; the endpoint must be to eliminate these disparities altogether.