

Are We Really Racing to the Top or Leaving Behind the Bottom? Challenging Conventional Wisdom and Dismantling Institutional Repression

Maurice R. Dyson*

TABLE OF CONTENTS

INTRODUCTION	182
I. CHALLENGING THE STATUS QUO OF TEACHER RECRUITMENT IN HIGH-POVERTY SCHOOLS	191
A. <i>What Really Inspires Good Teaching? The Myth of Teacher Salary Incentives</i>	192
II. RE-THINKING THE SCHOOL FINANCE & EDUCATIONAL SUCCESS NEXUS: DOES SCHOOL FUNDING BREED ACADEMIC SUCCESS OR DOES ACADEMIC SUCCESS BREED FUNDING?	195
III. ARE RACIAL DEMOGRAPHICS OUTCOME DETERMINATIVE OF ACADEMIC SUCCESS? WHAT CONVENTIONAL SCHOLARSHIP ON DESEGREGATION & SOCIOECONOMIC INTEGRATION IGNORES	197
A. <i>In Racially Segregated Schools, Teacher Quality & School Culture Doesn't Have to Be Dysfunctional</i>	205
IV. THE PERVERSE FINANCIAL INCENTIVES CONVENTIONAL DESEGREGATION SCHOLARSHIP & EDUCATIONAL REFORM OF HIGH-POVERTY SCHOOLS IGNORE: THE SCHOOL-TO-PRISON PIPELINE & THE PRISON INDUSTRIAL COMPLEX INCENTIVE	211
A. <i>The Thirteenth Amendment & the Systematic Repression of High-Risk Students</i>	214

* Associate Professor of Law, Thomas Jefferson School of Law. Special thanks to Professor Kimberly Jade Norwood for organizing this symposium and allowing me to be a part of this important dialogue and to the Washington University School of Law at St. Louis for hosting this conference and to the editors of the *Journal of Law & Policy* for their dedication and diligence to making this issue a success.

V. HOW EDUCATIONAL REFORMS FOSTER THE INTELLECTUAL, EMOTIONAL & SPIRITUAL ALIENATION OF STUDENTS IN FAILING SCHOOLS	218
<i>A. The Role of Student Wellbeing & Its Conspicuous Absence in Educational Reform</i>	222
<i>B. The Real Harm of Exclusion & Separation</i>	227
<i>C. What Harms Minorities in Public Education Will Ultimately Impact Majority Society: The Miner's Canary Thesis Revisited</i>	231
VI. SUCCESSFUL EDUCATIONAL REFORM SHOULD NO LONGER IGNORE INSTITUTIONAL SCHOOL REPRESSION	237
<i>A. Are We Really Racing to the Top?</i>	238
<i>B. How States are Slow to Use Race to the Top Funds</i>	242
<i>C. What Initial Evidence Reveals About the Relationship Between Race to the Top Funds & Closing the Achievement Gap</i>	243
CONCLUSION	255

INTRODUCTION

The *Liddell* desegregation saga has had a protracted and contentious history to resolve the inequity of access to quality public educational opportunity for all children, and African-American students in particular. This struggle for educational equity has been significantly challenging in light of state-mandated segregation.¹

1. See *Liddell v. Bd. of Educ.*, 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd sub nom.* *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980); *Liddell v. Bd. of Educ.*, 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd*, *Liddell v. Bd. of Educ.*, 667 F.2d 643 (8th Cir. 1981); *Caldwell v. Missouri*, 454 U.S. 1081 (1981); *Caldwell v. Missouri*, 455 U.S. 929 (1982); *Liddell v. Bd. of Educ.*, 667 F.2d 643 (8th Cir. 1981); *Missouri v. Liddell*, 454 U.S. 1091 (1981); *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980); *Adams v. United States*, 449 U.S. 826 (1980); *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976); *Liddell v. Caldwell*, 553 F.2d 557 (8th Cir. 1977); *St. Louis Bd. of Educ. v. Caldwell*, 429 U.S. 1086 (1977); *St. Louis Bd. of Educ. v. Caldwell*, 433 U.S. 914 (1977); *Liddell v. Bd. of Educ.*, 505 F. Supp. 654 (E.D. Mo. 1980); *Liddell v. Bd. of Educ.*, 508 F. Supp. 101 (E.D. Mo. 1980); *Liddell v. Bd. of Educ.*, 693 F.2d 721 (8th Cir. 1981); *Liddell v. Bd. of Educ.*, 677 F.2d 626 (8th Cir. 1982); *Missouri v. Liddell*, 459 U.S. 877 (1982); *Liddell v. Bd. of Educ.*, 567 F. Supp. 1037 (E.D. Mo. 1983); *Liddell v. Missouri*, 717 F.2d 1180 (8th Cir. 1983); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984); *Leggett v. Liddell*, 469 U.S. 816 (1984); *Missouri v. Liddell*, 469 U.S. 816 (1984); *N. St. Louis*

Parents & Citizens for Quality Educ. v. Liddell, 469 U.S. 816 (1984); Liddell v. Bd. of Educ., 758 F.2d 290 (8th Cir. 1985); Liddell v. Bd. of Educ., 801 F.2d 278 (8th Cir. 1986); Liddell v. Bd. of Educ., 804 F.2d 500 (8th Cir. 1986); Liddell v. Bd. of Educ., 696 F. Supp. 444 (E.D. Mo. 1988); Liddell v. Bd. of Educ., 907 F.2d 823 (8th Cir. 1990); Liddell v. Bd. of Educ., 654 F. Supp. 334 (E.D. Mo. 1987); Liddell v. Bd. of Educ., 822 F.2d 1446 (8th Cir. 1987); Liddell v. Bd. of Educ., 654 F. Supp. 345 (E.D. Mo. 1987); Liddell v. Bd. of Educ., 823 F.2d 1252 (8th Cir. 1987); Liddell v. Bd. of Educ., 674 F. Supp. 687 (E.D. Mo. 1987); Liddell v. Bd. of Educ., 830 F.2d 823 (8th Cir. 1987); Liddell v. Bd. of Educ., 839 F.2d 400 (8th Cir. 1988); Missouri v. Rockwood Sch. Dist., 488 U.S. 825 (1988); Liddell v. Bd. of Educ., 686 F. Supp. 235 (E.D. Mo. 1988); Liddell v. Bd. of Educ., 873 F.2d 191 (8th Cir. 1989); Liddell v. Bd. of Educ., 882 F.2d 298 (8th Cir. 1989); Liddell v. Bd. of Educ., 687 F. Supp. 1368 (E.D. Mo. 1988); Liddell v. Bd. of Educ., 867 F.2d 1153 (8th Cir. 1989); Liddell v. Bd. of Educ., 696 F. Supp. 442 (E.D. Mo. 1988); Liddell v. Bd. of Educ., 867 F.2d 1153 (8th Cir. 1989); Liddell v. Bd. of Educ., 851 F.2d 1104 (8th Cir. 1988); Liddell v. Bd. of Educ., 718 F. Supp. 1434 (E.D. Mo. 1989); Liddell v. Bd. of Educ., 733 F. Supp. 1324 (E.D. Mo. 1990); Liddell v. Bd. of Educ., No. 72-100 C 5, 1990 WL 58060 (E.D. Mo. Mar. 2, 1990); Liddell v. Bd. of Educ., No. 72-100 C 5, 1990 WL 93562 (E.D. Mo. May 3, 1990); Liddell v. Bd. of Educ., 758 F. Supp. 499 (E.D. Mo. 1991); Bd. of Educ. v. Missouri, 936 F.2d 993 (8th Cir. 1991); Liddell v. Bd. of Educ., 771 F. Supp. 1493 (E.D. Mo. 1991); Liddell by Liddell v. Bd. of Educ., 967 F.2d 1241 (8th Cir. 1992); Liddell v. Bd. of Educ., 771 F. Supp. 1496 (E.D. Mo. 1991); Liddell v. Bd. of Educ., 771 F. Supp. 1503 (E.D. Mo. 1991); Liddell by Liddell v. Bd. of Educ., 988 F.2d 844 (8th Cir. 1993); Liddell v. Bd. of Educ., No. 72-100 C 5, 1991 WL 177702 (E.D. Mo. Sept. 4, 1991); Liddell by Liddell v. Bd. of Educ., 988 F.2d 844 (8th Cir. 1993); Liddell v. Bd. of Educ., 795 F. Supp. 930 (E.D. Mo. 1992); Liddell by Liddell v. Bd. of Educ., 988 F.2d 844 (8th Cir. 1993); Liddell v. Bd. of Educ., 795 F. Supp. 927 (E.D. Mo. 1992); Liddell by Liddell v. Bd. of Educ., 20 F.3d 326 (8th Cir. 1994); Liddell by Liddell v. Bd. of Educ., No. 91-2941, 1992 WL 113513 (8th Cir. June 1, 1992); Liddell v. Bd. of Educ., 814 F. Supp. 788 (E.D. Mo. 1993); Liddell by Liddell v. Bd. of Educ., 20 F.3d 324 (8th Cir. 1994); Liddell by Liddell v. Bd. of Educ., 26 F.3d 815 (8th Cir. 1994); Liddell by Liddell v. Bd. of Educ., 73 F.3d 819 (8th Cir. 1996); Liddell by Liddell v. Bd. of Educ., 96 F.3d 1091 (8th Cir. 1996); Liddell by Liddell v. Bd. of Educ., 105 F.3d 1208 (8th Cir. 1997); Liddell by Liddell v. Bd. of Educ., 121 F.3d 1201 (8th Cir. 1997); Liddell v. Special Sch. Dist., 149 F.3d 862 (8th Cir. 1998); Liddell by Liddell v. Bd. of Educ., 122 F.3d 1092 (8th Cir. 1997); Liddell by Liddell v. Bd. of Educ., 126 F.3d 1049 (8th Cir. 1997); Missouri v. Liddell, 522 U.S. 1147 (1998); Liddell by Liddell v. Bd. of Educ., 142 F.3d 1096 (8th Cir. 1998); Liddell by Liddell v. Bd. of Educ., 142 F.3d 1100 (8th Cir. 1998); Liddell v. Bd. of Educ., 142 F.3d 1103 (8th Cir. 1998); Liddell by Liddell v. Bd. of Educ., 142 F.3d 1106 (8th Cir. 1998); Liddell by Liddell v. Bd. of Educ., 142 F.3d 1109 (8th Cir. 1998); Liddell v. Bd. of Educ., 142 F.3d 1111 (8th Cir. 1998); Liddell v. Bd. of Educ., No. 4:72CV100 SNL, 1999 WL 33314210 (E.D. Mo. Mar. 12, 1999); *see also* MO. CONST. art. IX, § 1(a) (1945) (repealed 1954) (providing for separate schools for black and white children); MO. REV. STAT. § 161.020 (1945, repealed 1955) (providing for separate distribution of educational funds for black and white schools); MO. REV. STAT. §§ 163.130, 164.030, 165.117, 165.297 (1945, repealed 1957) (providing for interdistrict transfers of black students to ensure segregation from white students). *But see* Liddell v. Bd. of Educ., 469 F. Supp. 1304, 1314 (E.D. Mo. 1979) (Missouri legislature's prompt action to repeal racially discriminatory education laws removed all state-promulgated obstacles to desegregation in Missouri schools), *rev'd en banc*, Adams v. United States, 620 F.2d 1277 (8th Cir. 1980), *cert. denied*, 449 U.S. 826 (1980); *see also* Comment, *St. Louis Desegregation Plan Found Inadequate*: Adams v. United States, 14 CREIGHTON L. REV. 1048, 1952-55 (1981). To be sure, racial segregation in St. Louis is the result of a complex array of housing and demographic problems. *See generally* Comment, *Federal Housing and*

Addressing the educational and legal vestiges of desegregation in Missouri and throughout the nation has been similarly saddled with the contentious struggle characterized by mob resistance, white flight, and the tacit complicity of the courts.² Perhaps in light of this recent history, it should come as no surprise that an ever-widening achievement gap between whites and non-whites persists in St. Louis and around the nation today.³ The National Center for Education Statistics reported in 2009 and 2011 that African-American and Hispanic students trailed their white peers by an average of more than twenty test-score points on the national benchmark, the National Assessment of Educational Progress (NAEP) math and reading assessments for fourth and eighth graders, a difference of about two grade levels.⁴ These gaps persisted even though the score differentials

School Desegregation: Interdistrict Remedies Without Busing, 25 ST. LOUIS U. L.J. 575, 577–79 (1981) (discussing nature and causes of segregation in St. Louis).

2. *Milliken v. Bradley*, 433 U.S. 267 (1977); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991); *see also, e.g.*, CARL L. BANKSTON III & STEPHEN J. CALDAS, *A TROUBLED DREAM: THE PROMISE AND FAILURE OF SCHOOL DESEGREGATION IN LOUISIANA* 42 (2002); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM* 492–93 (Peter Labella & Bob Greiner eds., 7th ed. 1994).

3. *See* F. CADELLE HEMPHILL ET AL., *NAT'L ASSESSMENT OF EDUC. PROGRESS, ACHIEVEMENT GAPS: HOW HISPANIC AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS* at iii (2011), *available at* <http://nces.ed.gov/nationsreportcard/pdf/studies/2011459.pdf>; *see generally* RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* (2004); Geoffrey D. Borman, *How Can Title I Improve Achievement?*, 60 *EDUC. LEADERSHIP* 49 (2003); AMY H. RATHBUN ET AL., *THE WORLD AROUND THEM: THE RELATIONSHIP BETWEEN KINDERGARTNERS' SUMMER EXPERIENCES AND THEIR GENERAL KNOWLEDGE* 2 (2003); JAEKYUNG LEE, *CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS* (2006), <http://www.civilrightsproject.ucla.edu/research/>; NAT'L CTR. FOR EDUC. STATISTICS, *NAT'L ASSESSMENT OF EDUC. PROGRESS, THE NATION'S REPORT CARD: MATHEMATICS 2007* (2007), <http://nces.ed.gov/nationsreportcard/pdf/main2007/2007494.pdf>; NAT'L CTR. FOR EDUC. STATISTICS, *NAT'L ASSESSMENT OF EDUC. PROGRESS, THE NATION'S REPORT CARD: READING 2007* (2007), <http://nces.ed.gov/nationsreportcard/pdf/main2007/2007496.pdf>. *See, e.g.*, 147 CONG. REC. S13322, S13324 (daily ed. Dec. 17, 2001) (Sen. Kennedy's comments) ("One of the major goals [of the NCLB] . . . is to lessen . . . the educational achievement gap between . . . minority and nonminority students."); 147 CONG. REC. S4125, S4133 (daily ed. May 2, 2001) (Sen. Frist's comments) ("We have all talked a lot about the achievement gap which has not narrowed but in fact gotten wider over time.").

4. *See generally* HEMPHILL ET AL., *supra* note 3.

between African-American and white students narrowed between 1992 and 2007 in fourth grade math and reading and eighth grade math.⁵ Despite some modest progress made through desegregation efforts⁶—reducing class sizes,⁷ creating charter schools,⁸ founding single sex schools,⁹ reducing poverty concentration in urban schools,¹⁰ expanding early-childhood programs,¹¹ raising academic standards,¹² improving the quality of teachers,¹³ extending the school

5. *Id.*

6. Kathryn M. Borman et al., *Accountability in a Post-desegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 AM. EDUC. RES. J. 605, 622 (2004) (pointing to evidence that segregation is related to lower academic achievement, even after controlling for poverty); see generally Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 AM. ECON. REV. 919 (2004) (observing that desegregation plans of the 1970s reduced high school dropout rates of blacks by two to three percentage points during the decade); Alison Morantz, *Money and Choice in Kansas City: Major Investments with Modest Returns*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 241, 251, 254 (Gary Orfield & Susan E. Eaton eds., 1996).

7. See Jeremy D. Finn & Charles M. Achilles, *Tennessee's Class Size Study: Findings, Implications, Misconceptions*, 21 EDUC. EVALUATION & POL'Y ANALYSIS 97, 98 (1999); Jeremy D. Finn et al., *Small Classes in the Early Grades, Academic Achievement, and Graduating from High School*, 97 J. EDUC. PSYCHOL. 214, 220 (2005).

8. See generally Maurice R. Dyson, *Putting Quality Back Into Equality: The Constitutionality of Charter School Enabling Legislation in a Post-Grutter Era*, 36 RUTGERS L.J. 1 (2004); MARTIN CARNOY ET AL., *THE CHARTER SCHOOL DUST-UP: EXAMINING THE EVIDENCE ON ACHIEVEMENT AND ENROLLMENT* 51 (2005).

9. See, e.g., CORNELIUS RIORDAN, *WHAT DO WE KNOW ABOUT THE EFFECTS OF SINGLE-SEX SCHOOLS IN THE PRIVATE SECTOR?: IMPLICATIONS FOR PUBLIC SCHOOLS, IN GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING* 10, 13 (Amanda Datnow & Lea Hubbard eds., 2002) (finding that single-sex schools offer greater equality and greater achievement, especially for low-income and working-class students, most particularly for African-American and Hispanic-American students).

10. See generally RICHARD D. KAHLBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 50 (2001).

11. *Jenkins v. Missouri*, 639 F. Supp. 19, 23–24 (W.D. Mo. 1985) (discussing early childhood initiatives as a remedial objective in the desegregation plan).

12. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codifying and amending 20 U.S.C.A. §§ 6301–7941); see generally Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1 (2002); Philip T.K. Daniel & Maurice R. Dyson, *Bringing Every Child Forward: Lessons Learned Under No Child Left Behind & A Road Map for Obama's Educational Reform*, 19 TEMP. POL. & CIV. RTS. L. REV. 63 (2009); John B. Diamond & James Spillane, *High-Stakes Accountability in Urban Elementary Schools: Challenging or Reproducing Inequality?*, 106 TEACHER COLLEGE REC. 1145 (2004); Linda McNeil, *Creating New Inequalities: Contradictions of Reform*, 81 PHI DELTA KAPPAN 729 (2000).

13. Randi Weingarten, *The Role of Teachers in School Improvement: Lessons From the Field*, 6 HARV. L. & POL'Y REV. 9, 24–25 (2012); JAY MATHEWS, *WORK HARD. BE NICE.*:

day or year,¹⁴ creating specialized curricula,¹⁵ encouraging home schooling,¹⁶ and increasing funding to minority schools¹⁷—progress in reducing the gap has been slow or nonexistent, and in some cases, the gap is widening.¹⁸

What accounts for this persistent gap despite these various reform efforts and the lip service courts espouse for the importance of public

HOW TWO INSPIRING TEACHERS CREATED THE MOST PROMISING SCHOOLS IN AMERICA 88–91 (2009).

14. Many states have experimented or authorized extended school days or summer instruction through an extended school year. *See, e.g.*, ALASKA ADMIN. CODE tit. 4, § 06.845 (2007); ARIZ. REV. STAT. § 3-7-2-306(F)(4) (2007); ARK. CODE ANN. § 6-15-1602 (2007); CAL. EDUC. CODE § 37252 (West 2007); COLO. REV. STAT. § 22-23-106 (2007); DEL. CODE ANN. tit. 14, § 1049(a)(1) (2007); FLA. STAT. § 1003.413 (3) (2007); GA. CODE ANN. § 20-2-168(d) (2007); 105 ILL. COMP. STAT. 5/10-22.33B (2007); IND. CODE § 20-3.1-13-1 (2007); IOWA CODE § 282.6 (2007); KAN. STAT. ANN. § 72-8237 (2007); 704 KY. ADMIN. REGS. 3:390(2)(3)(c) (2007); LA. REV. STAT. ANN. § 17:24.4(G)(4)(a) (2007); ME. REV. STAT. ANN. tit. 20-A, § 8801 (2006); MD. CODE REGS. 03.02.05 (2007); MASS. GEN. LAWS ch. 71, § 28 (2007); MINN. STAT. § 120A.22(5)(b) (2006); MISS. CODE ANN. § 37-3-59 (2007); MO. CODE REGS. ANN. tit. 5, § 50-340-050 (2006); NEB. REV. STAT. § 79-536 (2006); NEV. REV. STAT. § 392.4655 (2007); N.J. STAT. ANN. § 18A:7C-6.2 (West 2007); N.M. STAT. ANN. § 22-2C-6 (2007); N.Y. EDUC. LAW § 1950 (4)(bb) (McKinney 2007); N.C. GEN. STAT. § 115C-105.41 (2007); N.D. CENT. CODE § 15.1-27-19 (2007); OHIO REV. CODE ANN. § 3317.029(J)(7)(c) (West 2007); OHIO REV. CODE ANN. § 3313.608(B)(2) (West 2007); OKLA. STAT. tit. 70, § 3-153 (2007); OR. REV. STAT. ANN. § 343.830 (2007); S.C. CODE ANN. § 59-18-500 (2006); S.D. CODIFIED LAWS §13-26-2 (2007); TENN. CODE ANN. § 49-6-601 (2007); TEX. EDUC. CODE ANN. § 29.088 (Vernon 2007); VT. STAT. ANN. tit. 16, § 4001 (2007); VA. CODE ANN. § 22.1-253.13.1(C); WASH. REV. CODE § 28A.320.500 (2007); W. VA. CODE R. 18-2E-3c (2007); Wis. STAT. § 118.04 (2007).

15. *See generally* NANCY KOBER & DIANE STARK RENTNER, *CTR. ON EDUC. POLICY, STATES' PROGRESS AND CHALLENGES IN IMPLEMENTING COMMON CORE STATE STANDARDS* (2011); NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *COMMON STANDARDS FOR K–12 EDUCATION?: CONSIDERING THE EVIDENCE* (2008); JOHN I. GOODLAD, *A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE* 290 (1984); Landon E. Beyer & Michael W. Apple, *Values and Politics in the Curriculum*, in *THE CURRICULUM: PROBLEMS, POLITICS, AND POSSIBILITIES* 3, 3–11 (Landon E. Beyer & Michael W. Apple eds., 2d ed. 1998).

16. Vanessa E. Jones, *A Homemade Education Unhappy with Traditional Schools, More Families of Color are Teaching Their Children Themselves*, *BOSTON GLOBE*, Jan. 21, 2004, at D1.

17. *See generally* Dyson, *supra* note 12; THE EDUCATION TRUST, *THE FUNDING GAP 2005: LOW-INCOME AND MINORITY STUDENTS SHORT-CHANGED BY MOST STATES*, <http://www2.edtrust.org/NR/rdonlyres/31D276EF-72E1-458A-8C71-E3D262A4C91E/0/FundingGap2005.pdf> (last visited Sept. 14, 2007) (based on analysis by Bruce D. Baker of data from the U.S. Census Bureau's Fiscal Survey of Local Governments, Elementary and Secondary Education Finance, from 1989–90 to 2004–05 with demographic data compiled from the National Center for Education Statistics Common Core of Data, Public School Universe File).

18. *See Achievement Gap*, *EDUC. WK.*, July 7, 2011, available at <http://www.edweek.org/ew/issues/achievement-gap>.

education?¹⁹ What lessons can be learned to improve the future of urban public education? To be sure, racial segregation ensures advantages to whites and perpetuates structural inequality through its unequal allocation of resources whenever racial identifiability exists.²⁰ However, there are successful schools throughout the nation, such as the KIPP schools, the Harlem Village Academies, and the Harlem Children's Zone, that are racially identifiable in their student compositions yet have shown consistently promising progress in providing meaningful educational opportunity.²¹

While there are worthwhile reasons for reducing racial and economic poverty isolation through desegregation, which threaten the democratic foundations of our society, these recent developments should give scholars and policymakers pause to reconsider what the conventional wisdom in desegregation literature suggests: that there is only one solution to the academic achievement gap problem—integration. For instance, in 2003, after receiving a \$1 million Gates Foundation grant, the predominantly minority Harlem Village Academies (HVA) launched its first middle school, and it opened a second in 2005. HVA's eighth graders have hit 100 percent math proficiency during each of the past four years. Attrition across all grades in 2011–12 was just 4 percent. HVA added a high school in 2007, and in the summer of 2012, it graduated its first class of seniors who attended, among other colleges, Yale, Bard, and Occidental.²²

19. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“Providing public schools ranks at the very apex of the function of a State.”); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (“Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.”); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring) (stating that public schools are designed to serve as “perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people”); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted.”).

20. See generally JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2004); Jeannie Oakes & Martin Lipton, “*Schools that Shock the Conscience*”: *Williams v. California and the Struggle for Education on Equal Terms Fifty Years After Brown*, 11 *ASIAN L.J.* 234, 237–46 (2004); Wendy Parker, *Desegregating Teachers*, 86 *WASH. U. L. REV.* 1, 19–28 (2008).

21. PAUL TOUGH, *WHATEVER IT TAKES: GEOFFREY CANADA'S QUEST TO CHANGE HARLEM AND AMERICA* 5–20, 66–67, 93 (2008).

22. Anne VanderMey, *A Former Children's Publisher Goes Back to School*, *CNN MONEY* (May 14, 2012), <http://money.cnn.com/2012/05/11/smallbusiness/deborah-kenny->

Clearly, there is a truth emerging that has yet to be adequately discussed in the scholarly and policy studies literature—racial or socioeconomic integration can no longer be considered the sole basis for closing the racial achievement gap in high-poverty schools.²³

This Article stakes out a claim quite apart from mainstream conventional wisdom in the scholarly literature on desegregation. It is that no educational reform will succeed if it does not address both sides of the issue of racial educational inequality: on one side, systemic racial discrimination in and beyond the classroom (as opposed to solely classroom racial/socioeconomic integration) and on the other, self-empowerment through academic excellence in racially isolated high-poverty schools.

This Article does not dispute that racial integration and socioeconomic integration are valuable tools for promoting equality and democratic values. Indeed, as noted herein, racial and socioeconomic integration are laudable goals that further promote civic democracy, racial acceptance, and a sense of interrelatedness necessary to combat racism for a healthier, more inclusive society. Where the seeds of integration are possible and the environment for integration exists, it should be vigorously pursued. However, where entrenched racial segregation persists, or where white resistance remains truculent, other alternatives are needed and are needed now if generations of students are no longer to be relegated to the streets, death, or the prison industrial complex. Moreover, simply seeking white or middle-income students in the classroom is not a substitute for dismantling the devastating policies targeted to students of color that systematically repress them even in integrated learning environments. Further, integrated classrooms are no substitute for the dynamic teaching and learning that is needed, nor is that tactic a guarantee of the other benefits middle-income students typically enjoy outside the classroom, which can impact educational performance but which nonetheless can be replicated through

harlem-village.fortune/index.htm.

23. See BROOKINGS INSTITUTE, *THE BLACK-WHITE TEST SCORE GAP 1* (1998); Catherine Gewertz, *Consensus on Learning Time Builds Interest in Expanding Hours for Students to Master Academic, Social, and Workplace Skills is Mounting*, 28 EDUC. WK. 1, 2 (2008).

mentoring and holistic, comprehensive education reform in high-poverty schools.²⁴

Today, a new, altruistic, and dedicated character of well-apprenticed educator-mentors with cultural competence to comprehend and leverage racial and cultural competencies that transcend race, class, and color to embrace the individual intellectual, emotional, and psychological well being of students is needed. This new cadre of teachers, leaders, mentors, and community partners, along with parents and families, must redefine for children from the ground up a new self-empowerment, high expectations, and high commitment that brings out the best talents, interests, and abilities of students, regardless of where they are schooled. Our nation's schools are in need of teachers and leaders who continually promote a school culture of improving excellence and proven self worth.²⁵ Accordingly, this Article is a clarion call for reforms that include but also extend beyond integration. It is not a call to abandon the rights reform agenda of the *Brown* era. Reforms should use that agenda's arsenal to eradicate harmful, invidious, and nefarious educational policies that hinder excellence in developing students' full potential in society. This includes retaining a unique type of teacher quality reconceptualized for students of color where student engagement, cognitive inquiry, skills acquisition, and academic success for students in high-poverty, minority schools can flourish.

24. These resource considerations may include access to cultural events, adequate prenatal and obstetric care, visiting home literacy coaches, high-quality early childhood care including pre-kindergarten, preventive physical and mental health care, and high-quality after-school and summer programs. See generally MICHAEL A. REBELL & JESSICA R. WOLFF, A PROPOSAL FOR ESSENTIAL STANDARDS AND RESOURCES, IN PROVIDING COMPREHENSIVE EDUCATIONAL OPPORTUNITY TO LOW-INCOME STUDENTS (2011), available at <http://www.equitycampaign.org>.

25. Harold Wenglinsky, *The Link Between Instructional Practice and the Racial Gap in Middle Schools*, 28 RMLE ONLINE 1 (2004), http://www.nmsa.org/portals/0/pdf/publications/RMLE/rmle_vol28_no1_article1.pdf. See generally BRUCE WILSON & H. DICKSON CORBETT, LISTENING TO URBAN KIDS: SCHOOL REFORM AND THE TEACHERS THEY WANT (2001); L. Mickey Fenzel & Rosalind H. Monteith, *Successful Alternative Middle Schools for Urban Minority Children: A Study of Nativity Schools*, 13 J. EDUC. FOR STUDENTS PLACED AT RISK 381, 382 (2008) (citing Robert Balfanz & Douglas Mac Iver, *Transforming High-Poverty Urban Middle Schools into Strong Learning Institutions: Lessons for the First Five Years of the Talent Development*, MIDDLE SCH. J. EDUC. FOR STUDENTS PLACED AT RISK 137–58 (2000)).

However, rather than concentrating primarily on these considerations that focus on the needs of the alienated child of color in high-poverty areas, much emphasis in the scholarly literature is placed on racial or socioeconomic pupil reassignment remedial schemes at the expense of the former. While the more comprehensive approach this Article advocates may be criticized as unrealistically attempting to achieve educational equality and quality, one must bear in mind that it was also once considered unrealistic to have a 98 percent high school graduation success rate for African-American and minority students in KIPP schools when compared to the home school districts in which they operated. It was also considered unrealistic to see minority students outperform their peers in math and science in those same minority high-poverty home districts. Further, one might ask how realistic it is to have racial integration in light of today's judicial climate of hostility to racial remedies and whether socioeconomic integration is realistic when white flight and residential segregation have left many of the nation's urban high-poverty, minority schools with little to no higher socioeconomic demographics with which to integrate nor the political will to accomplish it.²⁶

Moreover, for racial minorities to fully realize the power of their growing numbers—they will become the nation's majority by 2050²⁷—it will behoove them to have the education, skills, and ability to be prepared to assume a new influence in the global economy. In order to prevent this emerging demographic paradigm from becoming a marginalized new majority with power still consolidated in the hands of the privileged few, a new focus on

26. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID—SEGREGATION AND THE MAKING OF THE UNDERCLASS I* (1993); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Segregation in the United States*, 22 HOW. L.J. 547, 559–60 (1979); Jania S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 U.C.L.A. L. REV. 1689, 1695 (1996); Florence W. Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 489 (1995).

27. See Colleen Curry, *Hate Groups Grow as Racial Tipping Point Changes Demographics*, ABC NEWS (May 18, 2012), <http://abcnews.go.com/US/militias-hate-groups-grow-response-minority-population-boom/story?id=16370136#.T-Zt-e38geM> (“The census found that 50.4 percent of births in 2011 were of Hispanic, black, Asian, and other minority children. White babies accounted for 49.5 percent of the country's newborns.”).

academic excellence and the acquisition of self-sufficient skills is needed now more than ever.

I. CHALLENGING THE STATUS QUO OF TEACHER RECRUITMENT IN HIGH-POVERTY SCHOOLS

The prevailing conventional wisdom in today's scholarly literature has accepted status quo assumptions and excuses where a student's individual demographic characteristics and attendance in high-poverty schools doom a student's educational outcomes.²⁸ Minority and low socioeconomic demographics in the social science literature often confirm the reality of limited access to highly qualified²⁹ and consistent teacher retention.³⁰ While there is broad empirical support for these long-held assumptions,³¹ and while it is certainly true that racial and socioeconomic demographics along with the limited financial resources of a cash-strapped public school district often play a determinative factor in deterring many highly qualified teachers away from high-minority,³² high-poverty schools,³³ it is also a little-questioned assumption whether teachers that make such decisions based primarily on these considerations would be best suited for

28. JAMES S. COLEMAN ET AL., DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 21–22 (1966).

29. See generally Richard J. Murnane & Jennifer L. Steele, *What is the Problem? The Challenge of Providing Effective Teachers for All Children*, 17 FUTURE CHILD. 15, 35–36 (2007).

30. Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417, 450 (2005); Jay Mathews, *Top Teachers Rare in Poor Schools*, WASH. POST, Sept. 10, 2002, at A5; Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECON. EDUC. REV. 377, 391 (2005); see Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 337 (2004); EDUC. TRUST, THEIR FAIR SHARE, HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 6 (2008), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/TXTheirFairShare.pdf>.

31. See generally Cassandra M. Guarino et al., *Teacher Recruitment and Retention: A Review of the Recent Empirical Literature*, 76 REV. EDUC. RES. 173, 189–99 (2006); Roslyn Arlin Mickelson, *Twenty-First Century Social Science on School Racial Diversity and Educational Outcomes*, 69 OHIO ST. L.J. 1173, 1205–13 (2008).

32. HEATHER G. PESKE & KATI HAYCOCK, TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON QUALITY, A REPORT AND RECOMMENDATIONS 1 (2006).

33. L. David, *Teacher Recruitment Incentives*, EDUC. LEADERSHIP, Apr. 2008, at 84, 85–86; Parker, *supra* note 20, at 35–37.

students in high-poverty schools in the first place. Likewise, it may well be true, as the conventional view holds, that without significant salary increases, many highly qualified teachers will still prefer schools with fewer numbers of poor and minority students.³⁴ But query whether such like-minded educators who primarily operate under these albeit practical considerations when entering the profession sustain their vigor and interest to remain effective in the profession after budget cuts in compensation or benefits or after job security of tenure is obtained?³⁵ Will they be moved to continually inspire and bring out the best in themselves or their students in such predominantly high-poverty, minority schools in the first place?³⁶ Or will they quit when these narrow motivations are no longer enough?³⁷

A. What Really Inspires Good Teaching? The Myth of Teacher Salary Incentives

At the successful HVA, high-quality teachers are not attracted by large salaries, and they do not have the benefit of tenure. High-quality teachers are attracted to HVA because they are given complete creative freedom to design their own curriculum as they see fit, and they implement their curricular visions with high accountability standards. This flexibility facilitates a school culture that empowers teachers and renews their inspiration to teach in ways that defy the conventional wisdom.³⁸ Conversely, it should come as no surprise that there is high teacher turnover in high-poverty, minority schools lacking these empowering characteristics.³⁹ We

34. See Hanushek et al., *supra* note 30, at 350–51.

35. See Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California*, 80 PEABODY J. EDUC. 44, 44 (2005).

36. See Geoffrey D. Borman & N. Mariza Dowling, *Teacher Attrition and Retention: A Meta-Analytic and Narrative Review of the Research*, 78 REV. EDUC. RES. 367, 371 (2008).

37. See, e.g., William K. Ingle, *Teacher Quality and Attrition in a U.S. School District*, 47 J. EDUC. ADMIN. 557 (2009); Brian A. Jacob, *The Challenges of Staffing Urban Schools with Effective Teachers*, 17 FUTURE CHILD. 129, 134 (2007); see generally Donald Boyd et al., *The Influence of School Administrators on Teacher Retention Decisions*, 48 AM. EDUC. RES. J. 303 (2010).

38. See Similoluwa Ojuronbe, *Harlem Village Academies: An Educational Oasis Where the Students Love to Learn*, NBC NEWS (June 7, 2012), <http://thegrio.com/2012/06/07/harlem-village-academies-an-educational-oasis-where-the-students-love-to-learn/>.

39. See ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV.,

know that low-motivated, ineffective teachers depress achievement, just as we also know that highly qualified teachers are correlated with high student achievement.⁴⁰ It should also come as no surprise that ineffective teachers not only disproportionately depress student achievement in the early formative years of schooling,⁴¹ but also correlate with increased student dropout rates and limited opportunities for higher education and employment.⁴²

To be sure, a handsome salary or generous loan forgiveness in light of educational debt burdens today could help attract high-quality candidates to urban, high-poverty schools. But today's mandate for success requires more from a new cadre of teachers and administrators—it demands more than just the paycheck-player complacent mindset. As one commentator recently observed:

KIPP and a few other renowned charter schools have successfully asked more from their teachers, students, and parents. They have paid teachers higher salaries, implemented longer school hours, added days to the academic calendar, required teachers to be on call during evenings and weekends, and expected parents to be engaged in their child's education. To the extent these practices are scalable, most of them require more money. State fiscal woes and political pressures often thwart even the best-intentioned policymakers from pushing for greater investment, particularly . . . revenues.⁴³

But is it worth the aspirational exercise to inquire as to whether there is a realistic answer to the costly reforms needed in education? In light of the current financial crisis, is it not more realistic to have

SEGREGATION OF AMERICAN TEACHERS 25–31 (2006), available at http://campaignforethnicstudies.pbworks.com/f/segregation_american_teachers12-06.pdf.

40. See generally Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1, available at <http://epaa.asu.edu/ojs/article/viewFile/392/515>.

41. Spyros Konstantopoulos, *Effects of Teachers on Minority and Disadvantaged Students' Achievement in the Early Grades*, 110 ELEMENTARY SCHOOL J. 92, 93 (2009).

42. JOSEPH B. BERGER ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., RACE AND THE METROPOLITAN ORIGINS OF POSTSECONDARY ACCESS TO FOUR YEAR COLLEGES: THE CASE OF GREATER BOSTON 19–21 (2004), available at <http://www.eric.ed.gov/PDFS/ED489181.pdf>.

43. Julian Castro, *Symposium: Education, Equality of Opportunity*, 6 HARV. L. & POL'Y REV. 1, 6 (2012).

unemployed college students in the era of the Great Recession become inspired through expertly apprenticed teaching experiences and to work at lower teacher salaries than to remain disengaged, uninspired, and unemployed? What does it cost to have mentors who are themselves from disadvantaged backgrounds, who have special needs, or who may have a personally vested interest in educating or guiding special education students in a public school?

One might easily dismiss these considerations as idealistic musings for teacher recruitment until a closer examination of human motivations reveals that greater job satisfaction may come with an increased sense of worth on the job, which in turn promotes greater retention and higher performance than a large salary alone.⁴⁴ Job satisfaction can account for work behaviors, such as organizational citizenship,⁴⁵ and withdrawal behaviors that manifest through increased absenteeism⁴⁶ and turnover.⁴⁷ It might very well be that even a system that consists of highly compensated individuals with no sense of significance or value to the employer or to the workplace leads to greater employee dissatisfaction and higher employee turnover. This may help explain why teacher turnover is so high in high-poverty, minority schools that have become lost in bureaucratic inertia and stale complacency.⁴⁸ These findings should give us pause to cautiously consider the common assumptions and conventional roles society and scholars often attribute to compensation in terms of

44. The Core Self-evaluations Model, proposed by Timothy A. Judge, Edwin A. Locke, and Cathy C. Durham in 1997, holds that there are four Core Self-evaluations that determine one's disposition towards job satisfaction: self-esteem, general self-efficacy, locus of control, and neuroticism. Under this model, higher levels of self-esteem (the value one places on his/her self) and general self-efficacy (the belief in one's own competence) lead to higher work satisfaction as does possessing a belief of an internal locus of control over one's own life. Finally, lower levels of neuroticism lead to higher job satisfaction. See Timothy A. Judge et al., *Core Self-Evaluations and Job and Life Satisfaction: The Role of Self-Concordance and Goal Attainment*, 90 J. APPLIED PSYCHOL., 257 (2005).

45. Dennis Organ et al., *A Meta-Analytic Review of Attitudinal and Dispositional Predictors of Organizational Citizenship Behavior*, 48 PERSONNEL PSYCHOL., 775–802 (1995).

46. See generally Jürgen Wegge et al., *'Taking a Sickie': Job Satisfaction and Job Involvement as Interactive Predictors of Absenteeism in a Public Organization*, 80 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 77–89 (2007).

47. Lise M. Saari et al., *Employee Attitudes and Job Satisfaction*, 43 HUMAN RES. MGMT. 395–407 (2004).

48. *Id.*

recruiting talented individuals with not only staying power, but also transformative power.

II. RE-THINKING THE SCHOOL FINANCE & EDUCATIONAL SUCCESS NEXUS: DOES SCHOOL FUNDING BREED ACADEMIC SUCCESS OR DOES ACADEMIC SUCCESS BREED FUNDING?

We should also be wary to adopt the conventional thinking that money is a necessary predicate for academic success when it is the exact opposite proposition that more often holds true. That is, contrary to widely held assumptions, success often breeds success and monetary influx is merely a reflection, or rather the recognition, of success already achieved through admirable pursuits.⁴⁹

Consider the Harlem Children's Zone, which through its Promise Academies takes a proactive, preventive approach beginning with its signature early intervention program known as the "The Baby College." It successfully provides educational forums for parents of young toddlers and children.⁵⁰ Through comprehensive intervention, wrap-around social services, after-school enrichment, health care interventions, and community capacity strengthening initiatives, its success in increasing academic outcomes—100 percent of third graders at Promise Academies I and II test at or above grade level on the math exam—has drawn national attention from donors.⁵¹ Over 93 percent of Promise Academy I third graders tested at or above grade level in English and Language Arts, while over 84 percent of Promise Academy II's students scored at or above grade level in that same area.⁵² The rigorous and challenging statewide Algebra Regents exam administered in 2008 yielded a 93 percent pass rate among the Children's Zone's Promise Academy High School ninth graders.⁵³ On

49. See, e.g., *infra* note 59 and accompanying text.

50. *The HCZ Project: 100 Blocks, One Bright Future*, HARLEM CHILDREN'S ZONE, <http://www.hcz.org/about-us/the-hcz-project> (last visited Nov. 6, 2011).

51. *Our Results*, HARLEM CHILDREN'S ZONE, <http://www.hcz.org/our-results> (last visited Nov. 6, 2011).

52. *Id.*

53. *Id.*

top of this, the Children's Zone boasts a 90 percent college acceptance rate for high-school seniors in the 2010–11 school year.⁵⁴

Given the success of its programs, the Children's Zone continues to find funding for its sizeable budget, which was in excess of \$48 million in fiscal year 2010.⁵⁵ It procures its funding notwithstanding the fact that it spends more per pupil than New York City spends per pupil in the public school system.⁵⁶ HVA received its initial funding from the Gates Foundation. While the criticism can be made that these are exceptional or idiosyncratic funding sources that are not always consistent or easily replicated, one must remember that where success truly occurs, money can and often does follow, allowing broad base expansion of many charter schools beyond a handful. The extensive KIPP charter school network illustrates this.

The KIPP Charter Schools network, first launched as a middle school program by Mike Feinberg and Dave Levin in 1994, has since grown to ninety-nine schools in twenty-one states around the country and currently enrolls more than 27,000 students.⁵⁷ Recent results show that KIPP graduates, comprised of approximately 95 percent African-American and Latino and overwhelmingly low-income students, outperform the national averages with a 95 percent high school graduation rate for students who have completed its middle schools, regardless of where they went to high school, and an 89 percent college matriculation rate.⁵⁸ Unlike traditional public schools, KIPP's success is supported by significant philanthropic contributions. This may suggest that success breeds not only greater monetary support but also that success can, at the very least, show

54. *Id.*

55. Helen Zelon, *Is The Promise Real? The Harlem Children's Zone Becomes a Template for National Change*, CITY LIMITS (Feb. 9, 2010), <http://www.citylimits.org/news/articles/4017/is-the-promise-real/2>; *Musician Prince Announces 1 Million HCZ Donation*, HARLEM CHILDREN'S ZONE, <http://www.hcz.org/media/news/511-musician-prince-announces-1-million-hcz-donation> (last visited Nov. 6, 2011).

56. Helen Zelon, *Shaping Success*, CITY LIMITS (Feb. 9, 2010), <http://www.citylimits.org/news/articles/4019/shaping-success>; *Promise Academy Charter Schools: Going Beyond the Walls of the Classroom*, HARLEM CHILDREN'S ZONE, <http://www.hcz.org/programs/promise-academy-charter-schools> (last visited Nov. 6, 2011).

57. See Andrew J. Rotherham, *KIPP Schools: A Reform Triumph, or Disappointment?*, TIME, Apr. 27, 2011, available at <http://www.time.com/time/nation/article/0,8599,2067941,00.html>.

58. *Id.*

what may be possible in reconstituted traditional public school districts that truly endeavor to improve through systemic change.⁵⁹

III. ARE RACIAL DEMOGRAPHICS OUTCOME DETERMINATIVE OF ACADEMIC SUCCESS? WHAT CONVENTIONAL SCHOLARSHIP ON DESEGREGATION & SOCIOECONOMIC INTEGRATION IGNORES

It is often said that the comparison between KIPP and traditional public schools is unfair as the latter are obligated to educate students in ways that KIPP's student selectivity suggests it does not have to, leading some to call into question whether KIPP should be receiving greater funding.⁶⁰ However, as will be discussed later, traditional public schools employ various disciplinary and expulsion policies that operate as sorting and exclusionary mechanisms for students.

59. *Id.* (“KIPP schools collectively raise about \$40 million a year and Gap founders Doris and Don Fisher have given \$65 million to the network over the last ten years—KIPP now operates elementary, middle, and high schools that all focus on helping low-income students graduate from college.”). See also Michelle Rhee, *What It Takes To Fix Our Schools: Lessons Learned in Washington, D.C.* 6 HARV. L. & POL'Y REV. 39, 60 (2012).

Outside Detroit is another example of competition prompting improvement in the traditional public school system: Sankofa Shule, a public African-centered charter school whose students are achieving at high levels. It is in Lansing, a neighborhood where, at best, five percent more students achieve “proficient” standardized test scores than in Detroit. But at Sankofa Shule, low-income African American children “are reading from two to four levels above grade level . . . doing algebra and calculus in grade schools . . . and outscored the state and district on the state accountability test . . .” The school’s strategies positively impacted the district. *Education Report* described the observations of Superintendent Cain of Sankofa Shule: “‘Before they never had enough money for all-day kindergarten,’ she said. ‘But when the charters started offering it, suddenly Lansing found the money for it. They started offering more art, more music, more phys-ed. They responded to the competition.’”

Rhee, *supra*, at 61 (internal citations omitted).

60. See GARY MIRON ET AL., WHAT MAKES KIPP WORK? A STUDY OF STUDENT CHARACTERISTICS, ATTRITION, AND SCHOOL FINANCE 28 (2011), available at <http://www.edweek.org/media/kipstudy.pdf>.

If the demand is so high, why do few KIPP schools choose to fill the empty places created by students who flee during and between school years? Traditional public schools are expected and obliged to fill places when students turn up at their doors. If the same is not required of KIPP and if KIPP is making it a practice to only serve students who have the ability and supportive families to handle its rigorous program, then perhaps it should not be receiving more in public dollars per pupil than traditional public schools.

Id.

Such policies should not only call into question that critique but raise the more troubling concern whether traditional public schools are contributing to greater societal repression of students of color in our criminal justice system through the prison-to-pipeline phenomena. While KIPP generally educates a lower percentage of Latinos, students with special needs, and English language learners than surrounding school districts, it educates more African-American students in high-poverty areas than surrounding school districts.⁶¹ While it also falls short of its own ambitious goals for college graduation,⁶² KIPP's willingness to hold itself accountable for both college placement and college graduation rates may be viewed admirably as it pioneers efforts to address college retention by partnering with institutions of higher education that have a proven track record to support and allow students of color to thrive.⁶³ But whereas the dropout rate can be alarmingly high across the nation's public schools, high-performing, high-poverty, minority schools, in contrast, can increase their high school and college matriculation and retention with more developed mentoring and college counseling, which has been shown to have a significant impact.⁶⁴ KIPP's results

61. See CHRISTINA CLARK TUTTLE ET AL., MATHEMATICA POLICY RESEARCH INC., STUDENT CHARACTERISTICS AND ACHIEVEMENT IN 22 KIPP MIDDLE SCHOOLS at xi, xii (2010).

During 2008-09, KIPP enrolled a significantly higher proportion of African American students (55%) than did the respective local school districts (32%). However, KIPP schools served a substantially lower proportion of Hispanic students (39%) compared with local districts (50%). KIPP also enrolled substantially fewer white students (2%) compared with local districts (11%). KIPP schools enrolled a higher percentage of students eligible for free and reduced-price lunch (77%) than did the local school districts (71%). KIPP schools enrolled a lower percentage of students with disabilities (5.9%) than did their local school districts (12.1%). KIPP enrolled a lower percentage of students classified as English Language Learners (11.5%) than did their local school districts (19.2%).

MIRON ET AL., *supra* note 60, at 28.

62. Rotherham, *supra* note 57. KIPP endeavors to reach a 75 percent college graduation rate. However, evidence shows that more recent graduates from KIPP's New York City schools are completing college at a 46 percent rate compared to the 33 percent rate nationwide. Additionally, internal KIPP data points to approximately 19 percent of students remain in four-year degree programs while 5 percent earned a degree from a community college. See generally PATRICIA J. KANNAPPEL & STEPHEN K. CLEMENTS, PRICHARD COMM. FOR ACADEMIC EXCELLENCE, INSIDE THE BLACK BOX OF HIGH-PERFORMING HIGH-POVERTY SCHOOLS (2005).

63. See generally Rotherham, *supra* note 57.

64. See generally James E. Rosenbaum et al., *Gatekeeping in an Era of More Open*

are impressive in light of the long-held limiting beliefs that racial isolation and concentrated poverty, which are surely still significant factors, are not necessarily insurmountable outcome determinative factors that dictate automatic foreclosure to success when highly motivated, skilled, and engaged teachers serving as mentors hold students accountable for high performance.⁶⁵

Other successful models in public urban education can be found beyond the KIPP network. In New York, Harlem's Success Academy 1,⁶⁶ the HVA, and the Harlem Children's Zone are other positive standouts where high quality teaching takes place in highly concentrated poverty areas with high minority student enrollment.⁶⁷ With the advent of new reforms, we often lose sight of the optimal objective in urban education. The objective is not merely to seek assistance through more money or to build a culture of mounting paper compliance with state and federal mandates. Rather, the optimal objective is to develop people by bringing out the best in them. That is, educational leaders perform their highest function when they help students and teachers reach their full potential by developing an energy and culture where ownership of education and of one's role in the community is the central inspiration for learning.

These "intangibles" are not predicated on legal compliance, and they are not best fostered through legal mandates. Yet there are areas

Gates: High School Counselors' Views of Their Influence on Students' College Plans, 104 AM. J. EDUC. 257 (1996); PATRICIA M. McDONOUGH, CHOOSING COLLEGES 4 (1997); PATRICIA GÁNDARA & DEBORAH BIAL, NAT'L POSTSECONDARY EDUC. COOP., PAVING THE WAY TO POSTSECONDARY EDUCATION (2001); JACQUELINE E. KING, COLL. BD., THE DECISION TO GO TO COLLEGE (1996) (collecting surveys finding access to college counseling important in decision to go to college); ANDREA VENEZIA ET AL., BETRAYING THE DREAM (2002); Patricia M. McDonough, *Counseling Matters: Knowledge, Assistance, and Organizational Commitment in College Preparation*, in PREPARING FOR COLLEGE 69 (William G. Tierney et al. eds., 2005).

65. See *supra* note 43 and accompanying text discussing effective learning in exemplary schools located in minority high-poverty areas.

66. Joel Klein, *Scenes From the Class Struggle*, ATLANTIC, June 2011, at 66, available at <http://www.theatlantic.com/magazine/archive/2011/06/the-failure-of-american-schools/8497/6/>. See also Rhee, *supra* note 59, at 62 ("Harlem Success boasted eighty-eight percent and ninety-five percent proficiency rates in reading and math respectively, and ninety percent of its students reached the highest level in science. These statistics far surpass both the city (for example, just forty-three percent at the highest level in science) and white students at more than 700 schools across the state.") (internal quotations omitted).

67. See, e.g., David Brooks, Op-Ed., *The Harlem Miracle*, N.Y. TIMES, May 8, 2009, at A31.

where legal reform in education can help remove barriers to producing an effective culture for teaching and learning. For instance, it is quite possible that legal barriers enshrined in collective bargaining agreements systematically protect ineffective teachers too long in the ranks of educators⁶⁸ or create systematic disincentives to provide constructive feedback in collegial, dynamic settings where the goal and focus should be on student-centered learning. Legal and policy reform in education can focus on removing formal legalized strictures where teacher evaluations do not necessarily portend litigious-minded consequences that are counterproductive to fostering a culture that promotes teacher quality.⁶⁹

Rather than a renewed focus on teacher quality and creation of a dynamic culture of learning, the integrationists hope that by re-shuffling students, a dynamic climate of learning will be created. However, the call for the racial or socioeconomic desegregation approach to attract middle-income pupil assignments in high-poverty schools, rather than a focus on quality, culturally competent teachers seems inconsistent in light of existing data. For instance, an achievement gain study conducted by the Tennessee Value-Added Assessment System regarding its mathematics test found “that students taught by the least effective (bottom quintile of) teachers for three consecutive years displayed average achievement gains of 29%. In contrast, students taught by the most effective teachers gained 83%.”⁷⁰ It also found that “every additional dollar spent on more qualified teachers resulted in greater achievement gains than any other educational expenditure.”⁷¹

However, following desegregation efforts like those in *Liddell*, Richard Kahlenberg and others have called for continued rights reform but in the nature of socioeconomic desegregation of students,

68. Scott Reeder, *Cost to Fire a Tenured Teacher? More Than \$219,000*, HIDDEN COSTS OF TENURE, <http://thehiddencostsoftenure.com/stories/?prcss=display&id=295712>.

69. Bill Turque, *Parker Out as Washington Teachers' Union Chief*, D.C. SCH. INSIDER, Nov. 30, 2010, http://voices.washingtonpost.com/dcschools/2010/11/parker_voted_out_as_washington.html.

70. See *Improving Teacher Quality: Closing the Achievement Gap*, NAT'L GOVERNORS' ASS'N, available at http://www.subnet.nga.org/educlear/achievement/quality/quality_problem.html.

71. *Id.*

relying on middle-income students to close the achievement gap.⁷² The reasons given for such an approach are typically articulated as follows:

First, students depend heavily upon one another for their learning. They study together, teach one another, and compete against one another, raising the academic bar. Due to the opportunities they receive outside of school, middle- and high-income students tend to bring more educational capital to school and, thus, elevate the learning of those around them. Second, middle-income students come from families that tend to have higher academic expectations for their children. When these students are the majority in a school, the students create a culture of high achievement that benefits everyone. Third, middle-income students' parents tend to place high expectations on school officials and hold them accountable. As a result, these schools are more effective than others. Fourth . . . those resources that are important to learning—high-quality teachers, leadership, curriculum, financing, and facilities—all tend to exist when the majority of a school's students are middle income.⁷³

While these are important observations, we must bear in mind that there are numerous ineffective middle-class, white-majority classrooms across the nation that are failing their students in affluent schools, including some of those in Silicon Valley.⁷⁴ There, tech companies are forced to seek competent job applicants overseas

72. RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 47–76 (2001); UNC CTR. FOR CIVIL RIGHTS, THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 1–4 (2005), available at <http://www.law.unc.edu/documents/civilrights/briefs/charlottereport.pdf>; Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality: A Multi-level Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TCHRS. C. REC. 1201, 1201–02 (2010); Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, in THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY 27, 52–53 (Richard D. Kahlenberg ed., 2012).

73. See Derek W. Black, *Middle Income Peer As Educational Resources and the Constitutional Right to Equal Access*, 53 C.C.L.R. 373, 406 (2012).

74. See WAITING FOR “SUPERMAN” (Walden Films, Participant Media & Electric Kinney Films 2010).

instead of from their own neighborhood due to the lack of skilled graduates available in the United States.⁷⁵ Currently, two million jobs in the United States cannot be filled due to our education system's failure to adequately equip students for today's workforce.⁷⁶ Indeed, the nation is full of poor quality schools, both middle-income and lower-income, white and black, and the national and international benchmarks in educational progress point to a larger problem in how our schools educate or fail to educate all of their students in the antiquated Model-T Ford factory approach to pedagogy that is still employed today, despite our knowledge-based economy.⁷⁷

Nonetheless, racial and socioeconomic integration are laudable goals when they promote quality interaction between diverse students and not merely constitutional access to the same schools or courses. But even in efforts to integrate learning environments, classroom ability grouping/tracking, intra-school segregation, testing, school siting, exclusionary admissions policies, zero-tolerance policies, fundraising booster clubs, and other barriers between the privileged and non-privileged will soon be erected by recalcitrant suburban white families who will refuse to integrate with non-whites or lower income students even when attending the same neighborhood schools.⁷⁸

In light of this recalcitrance, one must query whether there are alternatives to the racial or socioeconomic desegregation approaches that rest on the same assumptions that advocates cite to support them.⁷⁹ For instance, Amy Stuart Wells argues that students attending

75. See Fareed Zakaria, *The GPS Roadmap for Making Immigration work*, CNN (June 6, 2012), <http://globalpublicsquare.blogs.cnn.com/2012/06/06/the-gps-roadmap-for-making-immigration-work/> (noting that tech companies face even greater challenges where the country's immigration policy turns away high-skilled workers desperately needed for skilled jobs that cannot be filled at home by local graduates).

76. Joy Resmovits, *Race To The Top 2012 Invites School Districts To Compete*, HUFFINGTON POST (May 22, 2012), http://www.huffingtonpost.com/2012/05/22/race-to-the-top-2012-school-districts_n_1534517.html (showing Jon Stewart interviewing Secretary of Education Arne Duncan noting two million jobs cannot be filled due to lack of qualified, educated candidates).

77. See *A Factory Model of Education: Heather MacTaggart Speaks*, CHANGELEARNING.CA (Jan. 28, 2008), <http://www.changelearning.ca/media/factory-model-education-heather-mactaggart-speaks>.

78. See generally BANKSTON & CALDAS, *supra* note 2.

79. See TUTTLE ET AL., *supra* note 61, at xi, xii; CHRISTINA CLARK TUTTLE ET AL.,

segregated schools lack “social networks and personal contacts with people in universities, businesses, law firms, or art museums—the types of contacts who could help them get summer jobs, teach them about career paths, and open their eyes to new possibilities for life after high school.”⁸⁰ For this reason, Wells and Robert Crain have also similarly advocated that school desegregation ought to end racial segregation rather than just raise test scores.⁸¹ Accordingly, the research supports the proposition that important opportunity networks could not be achieved in a segregated school.

But must this always be necessarily true? Consider whether it is possible that through dynamic peer-to-peer cooperative learning models tailored to students’ interests, like those employed in schools using the Khan Academy resources,⁸² students can learn heavily from one another in just the same, if not more effective, ways than socioeconomic integration. Next, consider whether it is also possible that students can be exposed to an enriched world that will enhance and elevate the learning of those around them—in the same way as racial or socioeconomic integration—through mentors from the legal, medical, and liberal arts communities, as the Wingspread Project currently does with medical schools and high schools. Next, consider if it is possible that teachers and administrators, working with outside mentors as well as parents, can create a culture of higher academic expectations for children, as we see in the KIPP schools, the

MATHEMATICA POLICY RESEARCH INC., STUDENT CHARACTERISTICS AND ACHIEVEMENT IN 22 KIPP MIDDLE SCHOOLS at xi, xii (2010); see also MIRON ET AL., *supra* note 60, at 28 (“*Student Characteristics: A Cross-Sectional Look at KIPP Schools Relative to Local Districts*, During 2008–09, KIPP enrolled a significantly higher proportion of African American students (55%) than did the respective local school districts (32%). However, KIPP schools served a substantially lower proportion of Hispanic students (39%) compared with local districts (50%). KIPP also enrolled substantially fewer white students (2%) compared with local districts (11%). KIPP schools enrolled a higher percentage of students eligible for free and reduced-price lunch (77%) than did the local school districts (71%). KIPP schools enrolled a lower percentage of students with disabilities (5.9%) than did their local school districts (12.1%). KIPP enrolled a lower percentage of students classified as English Language Learners (11.5%) than did their local school districts (19.2%).”).

80. Amy Stuart Wells, *The “Consequences” of School Desegregation: The Mismatch Between the Research and the Rationale*, 28 HASTINGS CONST. L.Q. 771, 780 (2001).

81. See Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531, 533 (1994).

82. Fareed Zakaria, *When Will We Learn*, FAREED ZAKARIA (Nov. 28, 2011), <http://fareedzakaria.com/2011/11/28/when-will-we-learn/>.

Children's Promise Academy, the Young Women's Leadership Schools and others. Next, we must ask, is it possible that in a school where the educational philosophy creates high expectations for students, parents do not need to push officials to higher accountability but rather can work hand in hand with each other to ensure continual and consistent high expectations as the KIPP schools currently do? Have we not seen already in exemplary schools in high-poverty areas that high-quality teachers, leadership, curriculum financing, and facilities can exist to support high expectations even when the majority of the school's students are not middle income or racially diverse? In light of all this, is it not possible to replicate the conditions of middle-income classes or the classroom benefits derived from such middle-income students? The answer given by this successful cadre of schools is a resounding yes.

For far too long reformers and policymakers have attempted to find short cuts, temporary band-aids, or approximate proxies as substitutes for the hard work of creating the dynamic learning environment that only appears to come with a caring, talented, vested faculty unhindered and driven to make and re-make themselves, the curriculum, and the students they serve. As a former educator of both predominantly minority high school students in high-poverty, stricken areas of Harlem as well as some of the nation's wealthiest students in a well-regarded boarding school in Connecticut, I can attest that once students genuinely see that you care about them and their success, it is easier to gain their respect, attention, cooperation, and indeed enthusiasm to learn when it is contagiously spread from teacher to student and from student to student in classrooms and school-wide environments that promote it. I have also found that my most effective teaching colleagues, who hail from all walks of life, only make significant strides with students in this way as well. They make the daily and continual effort to improve as teachers, mentors, counselors, and friends all wrapped up in one for students and their families, regardless of the socioeconomic background of the students or the teachers employed. There are no substitutes, short cuts, or proxies for developing this kind of teacher-student, teacher-teacher, and peer-to-peer relationship in a student-centered, dynamic learning environment that permeates a school culture of high expectations

coupled with an excitement for creating individualized learning custom tailored to students' interests and concerns.

It is unlikely that the alienating, pedagogical assembly-line approach will yield desirable educational outcomes. Moreover, it is dubious that the quest for middle-income students in pupil reassignment schemes, or using teacher seniority as a proxy for teacher quality will produce positive results. It is also doubtful that using money alone as a substitute for creating a community of talented, caring and creative educators and parents will yield positive results in minority high-poverty areas.

Feeling a sense of reward in seeing the transformative changes that occur in both teachers and students alike requires teachers who are not only subject-matter competent but who are, in essence, life coaches, creative artists, and careful listeners. Many of these skills can be learned. Many may seem arduous unless, of course, the educators are truly moved by genuine care for their students and have the flexibility and the drive to act upon those feelings in a school culture that rewards such work and expects it as the norm every day. We are currently experiencing a crisis in apathy, a failure to promote creative, caring competence among our nation's inner-city and rural school communities. This apathy permeates faculty, administrators, and students alike. It is time for our educational laws and policies to recognize that, so as to not undermine caring competence, we need to help create the conditions for it to thrive.

A. In Racially Segregated Schools, Teacher Quality & School Culture Doesn't Have to Be Dysfunctional

Truly dedicated and inspired visionary individual educators and mentors who are highly skilled, motivated, and can pass on the passion and enthusiasm for self-improvement only need to apply themselves to make significant improvement in high-poverty, minority schools.⁸³ Finding effective mentors, teacher-mentors, and a community of people truly moved to empower children requires more than just financial capital. It also requires human capital, social

83. U.S. DEP'T OF EDUC., MEETING THE HIGHLY QUALIFIED TEACHERS CHALLENGE: THE SECRETARY'S SECOND ANNUAL REPORT ON TEACHER QUALITY 28, 30 (2003).

capital, compassion, and competence. True, loan forgiveness or competitive salaries would undoubtedly help the cause, but as previously shown, contrary to popular belief, money often follows success, and success is often a function of the individual spirit and culture of educators within a school community.⁸⁴

In her *Teaching Quality Manifesto*, Dr. Kenny, founder of the HVA, lays out that the principal feature in attracting teacher quality is not money in itself or compliance with the No Child Left Behind Act or other regulatory schemes. Rather, it is an institutional culture of teaching that promotes, perpetuates, and inspires quality teaching by bringing out the best in the teachers and the students themselves with an emphasis on caring. Competent caring requires us to move from the generalized question of “what works” in teaching and learning to “what works for whom and under what conditions” in teaching non-mainstream students of color where mainstream teachers often fail to recognize the intellectual resources that these students bring into classrooms from their homes and community environments. Truly investing in other people, finding their talents, and exploring ways to leverage their interests, talents, and backgrounds to create dynamic hands-on learning content that is tailored to individual students’ needs and their cultural, linguistic, and imaginative strengths is challenging and not a routine, easy exercise for a teacher primarily seeking job security or for teachers lacking cultural competency.⁸⁵

84. See Bob Herbert, *Where the Bar Ought to Be*, N.Y. TIMES, Feb. 23, 2010, at A27. Harlem Village Academies founder and C.E.O. Dr. Deborah Kenny:

I had five core things in mind for my kids, and that’s what I want for our students . . . I wanted them to be wholesome in character. I wanted them to be compassionate and to see life as a responsibility to give something to the world. I wanted them to have a sophisticated intellect. I wanted them to be avid readers, the kind of person who always has trouble putting a book down. And I raised them to be independent thinkers, to lead reflective and meaningful lives.

Id.

85. The idea of hands-on, learner-based contextual learning is well documented. See Okhee Lee, *Effective STEM Education Strategies for Diverse and Underserved Learners* (2011), available at http://www7.nationalacademies.org/bose/STEM_Schools_Lee_Paper_May_2011.pdf.

Calabrese Barton and colleagues carried out research with children living in poverty, specifically urban homeless children living in shelters who were most at risk of receiving an inequitable education or no formal education at all. Calabrese Barton allowed the students to take the lead in planning activities, documenting their

Teaching is truly a calling, and perhaps the best way to recruit the cadre of teachers that are needed requires that the students of today are excited about learning in order to become the nation's most effective teachers of tomorrow. No systemic proxies, short cuts in pupil assignments, or financing can yield results like those from the HVA:

Our teachers have indeed produced outstanding results, with test scores that rank our schools among the best in the country in math, science and social studies. Visitors see smart, driven, caring teachers in every classroom and ask us all the time: How do you do it? The answer: culture. Culture—how people feel at work, how they are treated, and the values exhibited by their colleagues—determines the caliber of people who are attracted to an organization. Once hired, culture determines whether people will do their best work. There are three aspects of culture that attract and develop effective teachers. The first is ownership. We need to trust teachers, affording them the freedom to do their jobs. Instead of mandating curriculum and micromanaging, we need to be clear about the goals, then get out of the way. In our academies, teachers choose their text

explorations, and making meaning of their findings (e.g., youth exploring their personal theories about pollution in the community, the shelter's policies around food, or involvement in community gardening projects). The role of the researcher, as teacher, was to validate the students' experiences as the starting point for their explorations in order to help them locate questions in their experiences and find ways to critically investigate those questions. Throughout the teaching and learning process, students' identities remained one central focus and democratic principles of empowerment remained another.

Pushing the idea of imposed definitions of science further, Fusco raised the issue of why youth find informal, out-of-school science experiences (i.e., non-school, non-curriculum-based interactions with science in environments such as science centers, museums, zoos, parks, and nature centers) more engaging and relevant to their lives than school science. Fusco worked with teenagers from homeless families in an after-school project that involved urban planning and community gardening. In this community-based science project, science became relevant or "real" to the students because: (a) it was created from their own concerns, interests, and experiences related to science, (b) it was an ongoing process of researching and then enacting ideas, and (c) it was situated within the broader community. A key conclusion is that schools must reconsider how science learning can become more closely connected to students' interests, experiences, and communities if it is to be relevant to the students' lives.

books, work closely with principals to make important school-wide decisions, and are not overly bothered with administrative work. A culture of ownership inspires teachers with an entrepreneurial spirit to turn on a dime and solve problems quickly. (One of our tenets: “If we ever become a bureaucracy, please shoot us.”) When a teacher has an idea, we say run with it. A math teacher took his fifth-graders on a 14-hour bus ride to Notre Dame University, where they became fired up about college. Ownership engenders passion and commitment in teachers, which inspires the same in students. In one classroom, a writing teacher is motivating students with a wacky song about homework, while another is leading a Socratic-style seminar with 28 students engrossed in “To Kill a Mockingbird.” The second element is teamwork: helping one another, having fun together, and treating each other as we would want to be treated. Gestures of camaraderie—a cupcake on your desk with a note of appreciation, or an email from a colleague to join a Saturday football game—create a sense of family that makes teachers happier and more productive. For teachers, teamwork also means the principal has your back in difficult situations, and the operations director works tirelessly to support you. We’ve learned the hard way that culture does not happen by itself. It’s like marriage: It has potential to be the deepest kind of love, but you need to really listen to the other person and nurture the relationship. Finally, schools need to elevate learning by creating a rich intellectual environment where teachers are treated as scholars and everyone is passionate about continually growing. The most profound professional development comes from teachers observing each other’s lessons, doing a play-by-play analysis, and sharing ways the instruction could be even tighter the next time. Our culture of learning means that we are relentless about ensuring that every child succeeds. Walk into the teachers’ office on any day and you see teachers looking at student work together and using data to create tutoring groups. Some even individualize homework. When a culture supports teachers to do their best work, students’ lives change. “I used to get Fs and Ds on everything,” a seventh-grade girl told me, “and I thought I

would never make it. Now I get As and Bs, and I've learned that you can do anything if you put your mind to it." Adult culture sets a powerful example for children. When an observer commented that he had never seen middle-school students showing so much kindness to each other, a special-education teacher explained, "I think they can tell that we're all a little bit in love with each other." The reason our kids are nice to each other is because their teachers set a tone of kindness and respect. What happens to bright teachers stuck in schools that don't have the right to hire by performance, provide teachers with freedom, and build a culture of excellence? They quit.⁸⁶

A student-centered culture of learning fostered through attitudes, policies, and the energetic contributions of all stakeholders who seek constant improvement accounts significantly for both high-quality teaching and learning.⁸⁷ Developing systematic as opposed to bureaucratic mechanisms that foster core standards, effective data gathering, self-assessment, instructional rigor and quality, and effective remedial action forms the basis for strengthening instructional core quality to implement enriched curricula.⁸⁸

86. Deborah Kenny, *A Teacher Quality Manifesto*, WALL ST. J., Sept. 22, 2010, available at <http://online.wsj.com/article/SB10001424052748703440604575496281030445268.html>.

87. See JERE CONWAY ET AL., ENGINEERING [FOR] EFFECTIVENESS IN MATHEMATICS EDUCATION; INTERVENTION AT THE INSTRUCTIONAL CORE IN AN ERA OF COMMON CORE STANDARDS (2011), available at http://www7.nationalacademies.org/bose/STEM_Schools_Confrey_Paper_May2011.pdf.

Education should be treated as an organizational system that seeks, and is expected, to improve continuously. As such, it is comprised of actors who must coordinate their expertise, set ambitious goals, formulate tractable problems, negotiate shared targets and measures of success, make design decisions within constraints, and develop and carry out protocols for inquiry. In such a "networked improvement community," one positions the causal cycles under investigation as "frames of action." Continuous improvement depends on iterations of collecting relevant, valid, and timely data, and using them to make inferences and draw conclusions, and take deliberate actions.

Id. at 5–6 (internal citations omitted).

88. *Id.* Recommended steps to strengthen the instructional core in relations to the curriculum are strategic.

1. Construct databases of assessment items linked directly to Common Core State Standards [CCSS] using a strong set of tags that distinguish among the features and measures, a variety of outcome measures to yield fair tests, and tests aligned to CCSS.

Whether alternative certification or traditional teaching routes are preferable ways to find quality teaching candidates is debatable,⁸⁹ and many are skeptical in light of watered-down regulatory standards.⁹⁰ However, as noted above, neither route in itself guarantees that quality teaching will take place. Empirical evidence shows that neither the level of education nor additional years of experience beyond the first initial years of teaching impacts teacher performance in the classroom.⁹¹ For those who find costs to be a barrier to finding quality candidates for high-poverty school districts in a national teaching shortage, the central question of how to interest America's most talented college students and mid-career candidates in teaching

Focus on creating automatized means of scoring that support the use of varieties of item types (multiple choice, constructed and extended response) and concentrate on how to get meaningful data to teachers and students.

2. Develop and implement a means of analyzing, documenting, and notating the alignment of a curriculum to the CCSS and of creating a standardized means of analyzing and representing content analysis of a curricular program.
3. Build a data system to gather and monitor data on curricular use, supplementation, and reasons for supplementation, gathered in real time;
4. Collect data on implementation factors such as those identified in the above studies.
5. Link the data system and various data categories and outcome measures to student, classroom, school, and district demographic data.
6. Link the data system to teacher demographic and survey data.
7. Find ways to conduct valid classroom observations (by teachers, supervisors, principals, specialists) for professional development purposes, and to triangulate these observations with teacher self-reports.
8. Form "networked improvement communities,"
9. Through the improvement communities, define tractable problems on which to focus, and identify and implement appropriate continuous improvement models.

Id. at 38–39.

89. JULIAN VASQUEZ HEILIG & SU JIN JEZ, *TEACH FOR AMERICA: A REVIEW OF THE EVIDENCE 1* (2010), available at <http://nepc.colorado.edu/files/PB-TeachAmerica-Heilig.pdf>.

90. John Affeldt, *Congress Poised to Call Novice Teachers "Highly Qualified" and Allow Concentration in Poor, Minority Schools*, HUFFINGTON POST (Dec. 16, 2010), http://www.huffingtonpost.com/john-affeldt/senate-poised-to-call-nov_b_798046.html; John Affeldt, *Congress Lowering Standards for Teachers; Hiding Truth from Poor, Minority Parents*, HUFFINGTON POST (Dec. 21, 2010), http://www.huffingtonpost.com/john-affeldt/congress-lowering-standar_b_799523.html (quoting Senator Tom Harkin, Chairman, Senate Committee on Health, Education, Labor & Pensions).

91. See Tara B eteille & Susanna Loeb, *Teacher Quality and Teacher Labor Markets*, in *HANDBOOK OF EDUCATION POLICY RESEARCH* 596, 597 (Gary Sykes et al. eds., 2009).

as a profession likely seems to be less burdensome a task in an economic downturn of the Great Recession. But as noted, the more effective means of selecting and sorting candidates may depend more on examining the core competencies, values, and passions that truly motivate a single individual to pursue what is and always will be a true calling to teach.

IV. THE PERVERSE FINANCIAL INCENTIVES CONVENTIONAL DESEGREGATION SCHOLARSHIP & EDUCATIONAL REFORM OF HIGH-POVERTY SCHOOLS IGNORE: THE SCHOOL-TO-PRISON PIPELINE & THE PRISON INDUSTRIAL COMPLEX INCENTIVE

It is often said that we cannot afford to turn away individuals willing to teach, but it may be the case that we cannot afford to permit ineffective teachers to remain as teachers. Supporting their benefits, pensions, and tenure disputes is a significant tax burden, as is the cost of many dropouts finding themselves in prison. Indeed, conventional wisdom holds that delivering education in schools with concentrated poverty is costly and economically inefficient.⁹² More specifically, it is said that providing a quality education to “at-risk” students can cost far more per pupil because it costs significantly more to recruit and retain high-quality teachers in high-minority districts,⁹³ to keep such schools safe,⁹⁴ and to provide wrap-around services and programs.⁹⁵ The cost assumptions that underlie this status quo view should be subjected to closer examination. For instance, what are the costs of being stuck with the least effective teachers protected by collective bargaining contracts?⁹⁶ What are the costs of valuing teacher seniority over teaching performance in

92. See GARY BARNES ET AL., THE COST OF TEACHER TURNOVER IN FIVE SCHOOL DISTRICTS: A PILOT STUDY 4–5 (2007), available at <http://nctaf.org/wp-content/uploads/2012/01/NCTAF-Cost-of-Teacher-Turnover-2007-full-report.pdf> (noting that finder’s fees and salaries impose considerable costs).

93. See generally Derek W. Black, *Middle-Income Peers As Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 409–11 (2012).

94. See Michelle Parhum, Note, *Using Litigation to Address Violence in Urban Public Schools*, 88 WASH. U. L. REV. 1021, 1031–37 (2011).

95. Campaign for Fiscal Equity v. State (*Fiscal Equity I*), 719 N.Y.S.2d 475, 490 (N.Y. Sup. Ct. 2001).

96. See Rhee, *supra* note 59.

contracts?⁹⁷ What are the costs of trying to fire poorly performing teachers in high-poverty schools with tenure⁹⁸ or those who abuse teacher union protections?⁹⁹ What are the costs to the nation in failing to provide a meaningful educational opportunity for the nation's poor minority students who will soon become the nation's majority by 2050?¹⁰⁰ Considering that the loss to the country in income tax revenues and social security contributions from high school dropouts is between \$58 billion and \$135 billion, one must begin to rethink the conventional wisdom underlying this widely held supposition.¹⁰¹

Too often we fail to frame these assumptions in the context of a larger question that forces us to see the true costs attendant with the broader picture. That is, how much does it cost not to deliver quality education to students in high-poverty, minority schools when this alternative leads to juvenile delinquency¹⁰² and the considerable

97. BETHENY GROSS, MICHAEL DEARMOND & DAN GOLDBERGER, SENIORITY RULES: DO STAFFING REFORMS HELP REDISTRIBUTE TEACHER QUALITY AND REDUCE TEACHER TURNOVER? (2010), available at http://www.crpe.org/cs/crpe/view/csr_pubs/341; TERRY M. MOE, BOTTOM UP STRUCTURE: COLLECTIVE BARGAINING, TRANSFER RIGHTS AND THE PLIGHT OF DISADVANTAGED SCHOOLS 3–6 (2011); JESSICA LEVIN ET AL., NEW TEACHER PROJECT, UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHERS UNION CONTRACTS 5–6 (2005); F. HOWARD NELSON, AM. FED'N OF TEACHERS, THE IMPACT OF COLLECTIVE BARGAINING ON TEACHER TRANSFER RATES IN URBAN HIGH-POVERTY SCHOOLS 24–25 (2006); see generally Lora Cohen-Vogel & La'Tara Osborne-Lampkin, *Allocating Quality: Collective Bargaining Agreements and Administrative Discretion Over Teacher Assignment*, 43 EDUC. ADMIN. Q. 433 (2007), available at <http://eaq.sagepub.com/content/43/4/433.abstract> (last visited Sept. 24, 2012).

98. Reeder, *supra* note 68.

Once it is obtained, it is a near lock on job security, and even chronic absenteeism and other faults are protected, creating a horrible barrier to getting rid of that small percentage of teachers who are just not effective. Tenure also significantly increases the cost of firing teachers if they are ineffective, further burdening school systems who need the resources directed to classrooms. In Illinois, it costs districts more than \$219,000 in legal fees to fire a tenured teacher. The costs are so significant that many districts make it an unstated policy to not fire tenured teachers. For example, only one in 1,000 tenured teachers were fired in New York, Chicago, and Los Angeles in recent years.

Rhee, *supra* note 59, at 55 (internal quotations omitted).

99. See, e.g., Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 CATO J., 155, 155 (2010); Evan Thomas & Pat Wingert, *F: Why We Can't Get Rid of Failing Teachers*, NEWSWEEK, Mar. 15, 2010, at 24.

100. Curry, *supra* note 27.

101. See THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 117–18 (Clive R. Belfield & Henry M. Levin eds., 2007).

102. Eugene Maugin & Rolf Loeber, *Academic Performance and Delinquency*, 20 CRIME

taxpayer costs of incarceration that often follow?¹⁰³ Each year, the United States spends \$9,644 per PK-12 student compared to \$22,600 per prison inmate.¹⁰⁴ From 1977 to 1999, total state and local expenditures on corrections increased by 946 percent—about 2.5 times the rate of increase of spending on all levels of education (370 percent). A Post Secondary Opportunities analysis has shown the following:

between 1980 and 2000, when the national prison population quadrupled from 500,000 to 2 million, corrections' share of all state and local spending grew by 104%, higher education's share of all state and local spending dropped by 21.5% and the National Conference of State Legislatures reported K-12 education is budgeted to rise by a modest 1.5%, spending on corrections is expected to rise by 1.1%, while general fund spending on higher education is budgeted to decline by 2.3%.¹⁰⁵

Since 1980, the U.S. prison population has grown exponentially, expanding from approximately 500,000 to 2.3 million people in just three decades.¹⁰⁶ Today, our nation has the dubious distinction of leading the world in prison population, with approximately 25 percent of all prisoners incarcerated globally while the United States

& JUSTICE 145–264 (1996).

103. Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283, 289–90 (2009).

There is considerable evidence that educational failure is a significant risk factor for delinquent or criminal behavior. Deficiencies in educational systems, destructive school discipline policies, truancy, and the seeming inability of schools to identify and service disadvantaged youth who are in need of special educational services are directly related to the cycle of incarceration.

Id. at 289–90.

104. See *Cost Per Student Compared To Prison Inmate*, MIND DUMP (Jan. 21, 2010), <http://www.mind-dump.org/cost-per-student-compared-to-prison-inmate>.

105. Sidra L. Gifford, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 1999 (2002), available at <http://www.prisonpolicy.org/scans/jpi/EducationandIncarceration1.pdf>.

106. Steven Hawkins, *Education vs. Incarceration: More money must go to schools than prisons before high-crime neighborhoods can truly be reformed*, AM. PROSPECT, Dec. 6, 2010, available at <http://prospect.org/article/education-vs-incarceration>.

represents just 5 percent of the total global population.¹⁰⁷ America spends almost \$70 billion annually in sentencing adults to prison and jails, placing youth in detention centers, and supervising another 7.3 million individuals on probation and parole.¹⁰⁸ Indeed, the increasing costs associated with incarceration have claimed the lion's share of state and local government spending at the expense of education.

A. The Thirteenth Amendment & the Systematic Repression of High-Risk Students

It is worth challenging this assumption: should it cost more today to educate at-risk minority youth to make such schools safe when youth crime has steadily declined?¹⁰⁹ Is educating at-risk students economically inefficient as conventional assumptions would hold? Perhaps it is, but this conclusion would be for entirely different reasons than those articulated above by traditional advocates. It is significant to note here that while the Thirteenth Amendment to the

107. *Id.* See LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 3 tbl.1&2 (2011), available at <http://bjs.gov/content/pub/pdf/cpus10.pdf> (providing the adult correctional system populations in 2010: Probation, 4,055,514; Parole, 840,676; Prison, 1,518,104; Local Jail: 748,728; Multiple statuses (e.g., jail and probation): 86,823; Total: 7,076,200); see also *id.* at 3 tbl.1 (stating that the 2010 jail and prison population estimate was 2,266,800); ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (8th ed. 2009), available at http://www.prisonstudies.org/info/downloads/wpl-8th_41.pdf.

108. See Hawkins, *supra* note 106.

109. AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 8 (2010); DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 11 (2010); Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, available at <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/4669/>.

Since 1991 the rate of violent crime in the United States has fallen by about 20 percent, while the number of people in prison or jail has risen by 50 percent. The prison boom has its own inexorable logic. Steven R. Donziger, a young attorney who headed the National Criminal Justice Commission in 1996, explains the thinking: "If crime is going up, then we need to build more prisons; and if crime is going down, it's because we built more prisons—and building even more prisons will therefore drive crime down even lower."

Schlosser, *supra*; see also PEW CENTER ON STATES, PUBLIC SAFETY PERFORMANCE PROJECT: STATE CORRECTIONS SPENDING (2005), <http://www.pewcenteronthestates.org/uploadedFiles/Statistics%20and%20Facts.pdf> ("Federal, state and local governments spend approximately \$62 billion per year on adult and juvenile corrections.").

Constitution has outlawed slavery and involuntary servitude, it has not done so for punishments as a result of criminal convictions.¹¹⁰ Could it be the case that the failure to educate and retain students of color through disproportionate zero-tolerance expulsions¹¹¹ only enhances the already alarmingly high rate of dropouts,¹¹² juvenile delinquency, and drug use, which in turn becomes the principal contributor to modernized economic slavery where cheap prison labor is steadily supplied by high-poverty schools to for-profit prison companies?¹¹³ Such a nexus is not only conceivable but probable, particularly when one notes that for-profit prison entities such as the Corrections Corporation of America (CCA), the oldest and most well-known private prison company which remains listed on the New York Stock Exchange, recently reported nearly \$1.5 billion in total revenue.¹¹⁴ Similar for-profit entities across the United States have mushroomed into a billion dollar market in the last two decades.¹¹⁵ Recent evidence suggests that such perverse incentives could exist¹¹⁶

110. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction.”).

111. Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1086–88 (2009–2010).

112. *Diplomas Count 2010: Graduation by the Numbers: Putting Data to Work for Student Success*, EDUC. WK., June 10, 2010, at 4, available at [http://www.edweek.org/ew/articles/2010/06/10/34\(execsuh29.html](http://www.edweek.org/ew/articles/2010/06/10/34(execsuh29.html)); MICHAEL HOLZMAN, SCHOTT FOUND. FOR PUB. EDUC., YES WE CAN: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 1, 28 (2010), available at <http://www.nycej.org/wp-content/uploads/2010/08/bbreport1.pdf> (stating that in the 2007–08 school year, black males graduated from high school at a 47 percent rate in comparison to 78 percent for white males); Danielle Holley-Walker, *A New Era for Desegregation*, 28 GA. ST. U. L. REV. 423, 458–59 (2012) (“In some urban areas, these numbers are even more dismal, with black males graduating from high school at a rate of 24% in Charleston, South Carolina, 25% in Buffalo, New York, and 21% in Pinellas County, Florida.”).

113. See *Mass Incarceration in the United States: At What Cost?: Hearing Before the Joint Econ. Comm.*, 110th Cong. 2 (2007) (statement of Sen. Jim Webb, Member, Joint Econ. Comm.), available at http://jec.senate.gov/public/?a=Files.Serve&File_id=d4b29f7b-bb6b-4f88-be56-f7d1649b5c82 (emphasis added).

114. See CORRECTIONS CORPORATION OF AMERICA, 2007 ANNUAL REPORT 2 (2008), available at <http://investor.shareholder.com/cxw/annuals.cfm>.

115. See Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112 (2001).

116. See MICHAEL A. HALLET, PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE 65 (2006) (describing use of private, for-profit convict labor not only within the

and that there are indeed historical antecedents for destructive incentives to roll back civil rights gains during the post-Reconstruction era in our nation's history.¹¹⁷

One must also ask in today's Great Recession whether there exists a heightened need for such perverse financial incentives to the states. Perhaps through increased revenue from for-profit prisons, states may issue further tax breaks and greater funding to the prison industrial complex just to boost ailing state economies with jobs.¹¹⁸ Perhaps states may attempt to discourage prisons from relocating out-of-state at the expense of incarcerating high-poverty school students who are precipitously expelled or who drop out from schools that alienate them educationally, spiritually, and emotionally.¹¹⁹ These unfortunate outcomes of the prison industrial complex were certainly not the true intent of the Civil War Amendments¹²⁰ or the Thirteenth Amendment

prison itself, but also to provide goods through contracts with companies such as IBM, Motorola, Victoria's Secret, and Compaq).

117. Kim Gilmore, *Slavery and Prison, Understanding the Connections*, HISTORY AS A WEAPON, <http://www.historyisaweapon.com/defcon1/gilmoreprisonslavery.html>.

This [13th Amendment] stipulation provided the intellectual and legal mechanisms to enable the state to use "unfree" labor by leasing prisoners to local businesses and corporations desperate to rebuild the South's infrastructure. During this period, white "Redeemers"—white planters, small farmers, and political leaders—set out to rebuild the pre-emancipation racial order by enacting laws that restricted black access to political representation and by creating Black Codes that, among other things, increased the penalties for crimes such as vagrancy, loitering, and public drunkenness. As African Americans continued the process of building schools, churches, and social organizations, and vigorously fought for political participation, a broad coalition of Redeemers used informal and state-sponsored forms of violence and repression to roll back the gains made during Reconstruction. Thus, mass imprisonment was employed as a means of coercing resistant freed slaves into becoming wage laborers. Prison populations soared during this period, enabling the state to play a critical role in mediating the brutal terms of negotiation between capitalism and the spectrum of unfree labor. The transition from slave-based agriculture to industrial economies thrust ex-slaves and "unskilled" laborers into new labor arrangements that left them vulnerable to depressed, resistant white workers or pushed them outside the labor market completely.

Id.

118. Leslie Berestein, *Company Wants to Build a Mega-Prison in County*, SAN DIEGO UNION-TRIB., Mar. 20, 2008, at A1, available at http://www.utsandiego.com/uniontrib/20080320/news_1n20ccal.html (discussing a Corrections Corporation of America illegal immigrant detention facility contract, which will create 375 jobs).

119. See Judith Greene, *Banking on the Prison Boom*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 3, 13–16 (Tara Herivel & Paul Wright eds., 2007).

120. See *Slaughter-House Cases*, 83 U.S. 36, 71 (1873) (stating that the purpose of the

proviso.¹²¹ Nonetheless, they may serve as the justification for minority incarceration today with the assistance of our public education system.¹²²

Indeed, substantial evidence exists that public high-poverty, minority school districts have increasingly utilized punitive policies and harsher sanctions on students for minor disruptive behavior. These may include draconian punitive policies of school districts operating under the pressure of testing benchmarks to disproportionately push out students of color into the school-to-prison pipeline.¹²³ Once again, rather than fostering a culture of inquisitive learning, traditional high-poverty schools enrolling a disproportionately high number of minority students also have their mechanisms of student selectivity that foster a culture of hyper-criminalization, stereotypical failure, and structural incentives for student dropout or expulsion through increasing reliance on zero-tolerance policies.¹²⁴ The funneling of minority school youth into the

Civil War amendments was the “freedom of the slave race, the security and firm establishment of that freedom, and the protection...from the oppressions of those who had formerly exercised unlimited dominion over him”); *Plessy v. Ferguson*, 163 U.S. 537, 553 (1896) (Harlan, J., dissenting) (Justice Harlan argues: “[The Thirteenth Amendment] having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment ...These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship.”).

121. See 83 U.S. at 69 (“The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery . . . and the obvious purpose was to forbid all shades and conditions of African slavery.”).

122. Chris Weaver & Will Purcell, Comment, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 349 (1998).

123. ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL TO PRISON PIPELINE (2010), available at http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf; Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 582–88 (2009); Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868–70 (2010); ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005), available at <http://www.advancementproject.org/sites/default/files/publications/FINALEOLrep.pdf>; Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN’S J. LEGAL COMMENT 73, 77–78 (2006).

124. RUSSELL J. SKIBA, INDIANA EDUCATION POLICY CENTER, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE (2000); American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852–62 (2008); Heather A. Cole & Julian Vasquez Heilig, *Developing a School-Based Youth Court:*

school-to-prison pipeline through accountability pressures and zero-tolerance policies also comes at increasing social costs for minorities who wish to be civic participants as jurors,¹²⁵ voters on election day,¹²⁶ student loan borrowers,¹²⁷ or gainfully employed.¹²⁸

V. HOW EDUCATIONAL REFORMS FOSTER THE INTELLECTUAL, EMOTIONAL & SPIRITUAL ALIENATION OF STUDENTS IN FAILING SCHOOLS

Many reformers and scholars have pointed to the pedagogical characteristics of KIPP, Harlem Success Academy, HVA, and the Children's Promise Zone as emblematic attributes of their success. But they entirely miss the point that these schools also do not engage in racialized policies that promote the counterproductive culture of learning and self-worth. All too often, pundits and reform advocates fail to see the other side of the same coin. That is, they fail to consider not only what these schools are doing right, but also what they are doing that is so counterproductive in traditional public schools in high-poverty areas.

A Potential Alternative to the School to Prison Pipeline, 40 J.L. & EDUC. 4 (2011), available at <http://ows.edb.utexas.edu/sites/default/files/users/jvh/Heilig.pdf>.

125. Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109, 116 (2008) (outlining four categories of felon disenfranchisement laws); see also Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 64–65 (2006).

126. U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES 13 (2006), available at http://www.justice.gov/pardon/collateral_consequences.pdf; Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 157 (2003); see, e.g., HAW. REV. STAT. § 612-4(b)(2) (Supp. 2009) (excluding felons from jury service unless pardoned).

127. Congress amended the Higher Education Act with the Drug Free Student Loans Act, which made students convicted of a drug offense ineligible for any grant, loan, or work assistance for a specified period of time unless they completed a drug rehabilitation program. See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 483, 112 Stat. 1581 (1998).

128. Certain occupational licenses or vocations are off limits for those with criminal convictions. See, e.g., ALASKA STAT. § 08.87.110 (1995); S.D. CODIFIED LAWS § 35-2-6.2 (2004); OHIO REV. CODE ANN. § 4709.13 (West 2004). In New Jersey, any "criminal history" including arrests without conviction may disqualify an individual from health care professional status. N.J. STAT. ANN. § 45:1-29 (West 2011); see also CAL. BUS. & PROF. CODE § 480 (West 2011).

When deciding to replicate and scale the model for schools across the nation, it is significant that for schools that do serve more special need and at-risk students, a culture that promotes caring and positive relationships between educator and students' intellectual, emotional, and psychological needs must be keenly observed.¹²⁹ It may be a quick fix to dismiss a so-called trouble student from the class through zero-tolerance policies, mislabel academically challenged students as special education students, or track so-called undesirable students from a classroom that poses particular challenges for the teacher, but these policies all stem from the same perverse institutional apathy, disengagement, and non-accountability that characterize the culture of many of the failing traditional district and charter schools that educate the nation's poorest minority students.

Successful schools do not foster the school-to-prison pipeline or build a massive bureaucracy. Rather, they embrace well-being and the individual needs of teachers and students. Indeed, children should not be flattened into the social mold or crushed under the weight of its punitive sanctions.

Likewise, teachers should not be viewed in educational reforms as interchangeable widgets without regard to individual effectiveness. In this regard, Michelle Rhee, founder of StudentsFirst, highlighted what she called the "widget effect," which is the presumption that "teachers are interchangeable parts with the same level of effectiveness in each classroom."¹³⁰ Lock-step pay structures follow from the widget effect where "teachers are no more than assembly line workers performing simple, concrete tasks and passing products on to the next worker . . . sending the message to teachers that what they do is indistinguishable from what the next person does, and nothing they could do will stand out as excellent."¹³¹

129. Roger D. Goddard, *Relational Networks, Social Trust, and Norms: A Social Capital Perspective on Students' Chances of Academic Success*, 25 EDUC. EVALUATION & POL'Y ANALYSIS 59, 59–62 (2003); Mark T. Greenberg et al., *Enhancing School-Based Prevention and Youth Development Through Coordinated Social, Emotional, and Academic Learning*, 58 AM. PSYCH. 466, 468–69 (2003).

130. See Rhee, *supra* note 59, at 51. See also DANIEL WEISBERG ET AL., THE NEW TEACHER PROJECT, THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS 10 (2009), available at <http://carnegie.org/fileadmin/Media/Publications/widget.pdf>.

131. WEISBERG ET AL., *supra* note 130, at 13 ("Teachers recognize this: fifty-nine percent

School cultures and legal accountability mechanisms in the No Child Left Behind Act (NCLB) fail to see children as souls, nor does NCLB encourage the individual soul of a child to grow. To say no child is left behind presupposes the child is being evaluated longitudinally over the course of their entire K–12 career. In fact, it is a system of assessment based upon randomized and fluctuating enrollment from grade to grade. In an ideal culture of academic success, we would treat teachers and students in our society as unique individuals and

not as units of a social problem to be passed through some skillfully devised machinery and either flattened into the social mold or crushed out of it, but as souls suffering and entangled in the net and to be rescued, souls growing and to be encouraged to grow, souls grown and from whom help and power can be drawn by the lesser spirits who are not yet adult.¹³²

Assessments, student placements, and accountability are not based upon the child's creative expression of their intellect in writings, projects, and portfolios, or on their individual interests in music, literature, math, sports, or art in any meaningful curricular depth. Nor is their assessment dynamically tailored to the relevant life, personality, talents, and interests of the child.¹³³

In fact, the NCLB assessment is not tied to the individual child at all as he or she progresses from year to year and grade to grade. Rather, assessment is tied to mechanistic, conveyor-belt-style group performance. A group performance consisting of any subset of students passing through certain arbitrary grade level markers becomes the relevant benchmark for assessing student achievement. One is left to wonder just what is being measured by this approach, and what focus does this place on the individual child? Rather than a

of teachers and sixty-three percent of administrators say their district is not doing enough to identify, compensate, promote, and retain the most effective teachers. . . .”).

132. SRI AUROBINDO, *THE HUMAN CYCLE: THE IDEAL OF HUMAN UNITY WAR AND SELF-DETERMINATION* 257 (Sri Aurobindo Ashram Trust 1999) (1950).

133. Linda McSpadden McNeil, *Faking Equity: High-Stakes Testing and the Education of Latino Youth*, in *LEAVING CHILDREN BEHIND: HOW “TEXAS-STYLE” ACCOUNTABILITY FAILS LATINO YOUTH* 57, 91 (Angela Valenzuela ed., 2005).

growth model of assessment that measures how *that* individual child is progressing in subjects throughout their journey through the K–12 system, we fail to invest in the necessary attention and time to the child’s academic success and their emotional, physical, and psychological well-being as some of the most successful high-poverty schools do. We continue these mistakes even as we seek racial and socioeconomic integration in the classroom.

The NCLB (which itself is named in terms of a negative—no child left behind—rather than in terms of a desired positive—achievement), attaches a whole host of negative, punitive educational and unintended spiritual consequences to unsatisfactory student performance based upon its flawed accountability machinery. “In this system of academic performance, the federal purse is the carrot; the pressure, using sanctions of measurable student performance through high-stakes testing, is the stick.”¹³⁴ Besides the threat to students to be retained in a grade or denied a diploma under high-stakes testing schemes, sanctions for underperforming schools and school districts also become increasingly punitive in nature.¹³⁵ Sanctions without

134. Daniel & Dyson, *supra* note 12, at 66; *see also* SHARON L. NICHOLS, GENE V. GLASS, & DAVID C. BERLINER, HIGH-STAKES TESTING AND STUDENT ACHIEVEMENT: PROBLEMS FOR THE NO CHILD LEFT BEHIND ACT 1–2 (Ariz. State Univ. Educ. Policy Research Unit 2005).

135. *See, e.g.*, 20 U.S.C. § 6311(g)(2) (2006). The No Child Left Behind Act (NCLB) requires each state to provide a formula for measuring success defined by adequate yearly progress (AYP), *id.* § 6311(b)(2)(B), which must include test scores and at least a 95 percent participation rate of all students, including those in sub-groups. *Id.* § 6311(b)(2)(I)(ii). AYP is achieved each year only if students attain the state-prescribed incremental improvement, which must eventually reach 100 percent. *Id.* § 6311(b)(2)(F). If schools or school districts have not made AYP for two years, they are designated as “in need of improvement.” *Id.* § 6316(b)(1)(A). Schools so designated are compelled to develop two-year academic improvement plans. *Id.* § 6316(b)(3)(A). Parents may also be offered the option of transferring their children to a school that has reached AYP. *Id.* § 6316(b)(1)(E)(i). Schools or school districts must achieve AYP for two consecutive years. *Id.* § 6311(b)(2)(H)(i). If the status continues beyond the second year, schools face other sanctions, including loss of federal funds, options for parents to send their children to other schools including charter schools and private schools, and possibly school restructuring. *Id.* § 6316(b)(1)(E). Mandated restructuring actions include turning over the school’s operation to the state educational agency; *id.* § 6316(b)(8)(B)(iv); contracting with an education management organization to run the school; *id.* § 6316(b)(8)(B)(iii); “replacing all or most of the school staff . . . who are relevant to the failure to make adequate yearly progress”; *id.* § 6316(b)(8)(B)(ii); and “[a]ny other major restructuring of the school’s governance arrangement that makes fundamental reforms . . . to improve student academic achievement in the school.” *Id.* § 6316(b)(8)(B)(v).

rewards, however, are a paltry substitute for creating the necessary conditions to inspire academic success.

It is said that “the argument on the part of supporters of high-stakes testing is that when faced with federal fiscal incentives and sanctions for poor performance, educators will expend more time and energy into exhorting students to work harder and smarter.”¹³⁶ But this ignores the perverse incentives to qualify and justify dropouts from the accountability framework. If we take the insights noted above into account, then it is the positive impact of creative, thoughtful inspiration and the genuine demonstrated regard for the success and well-being of students and teachers that are the impetuses behind constructive energy creation that promotes a school culture conducive to learning. If, as previously noted, the notion that students have to know you care before they care to learn what you know holds true, then it is not the fear of sanctions or even the loss of federal funds that “inspires” success.

A. The Role of Student Wellbeing & Its Conspicuous Absence in Educational Reform

NCLB fails to adopt positive incentives for favorable student performance, such as positive reinforcement, self-expression, cooperation, interaction, relevant learning, and discovery-focused skills acquisition. Moreover, under NCLB, students are isolated in dead-end, segregated, academic tracks based upon standardized tests rather than placed in academic tracks that would encourage interaction with motivated students of varying skills, interests, linguistic abilities, or cultural backgrounds.¹³⁷ NCLB, through its Title III provisions, has the effect of discouraging bilingual education

136. NO CHILD LEFT BEHIND AND OTHER FEDERAL PROGRAMS FOR URBAN SCHOOL DISTRICTS, ADVANCES 72 (Frank Brown & Richard C. Hunter eds., 2006).

137. See Barbara J. Brunner, *Bilingual Education Under the No Child Left Behind Act of 2001: ¿se quedará atrás?*, 169 ED. LAW. REP. 505, 510–14 (2002) (discussing the current status and future of bilingual education under NCLB); William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C.L. REV. 487, 487 (2002) (noting the end of bilingual education under Ron Unz’s initiative and in the passage of Proposition 227 in California); Kirsten Gullixson, Note, *California Proposition 227: An Examination of the Legal, Educational, and Practical Issues Surrounding the New Law*, 17 LAW & INEQ. 505, 505–06 (1999) (observing limited English immersion classrooms under California’s Proposition 227).

or dual immersion languages in the classroom.¹³⁸ Through its school choice transfer policies after consecutive school failure,¹³⁹ student bullying,¹⁴⁰ or if designated as a persistently dangerous school,¹⁴¹

138. What is significant to note is that Title III funds do not mandate a specific bilingual educational model and provide for the usage of alternative bilingual education programs such as dual immersion and ESL. For purposes of Title III, a language instruction educational program is defined as a program of instruction that: “may make instructional use of both English and the native language to enable the child to develop and attain English proficiency, and may include the participation of English proficient children if such course is designed to enable all participating children to become proficient in English and a second language.” No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 3301(8)(B), 115 Stat. 1425, 1730 (2002). Schools offering bilingual education programs must, of course, adhere to state law regarding the placement of students in these programs. *Id.* § 3102(1), 115 Stat. at 1690 (2002). However, notwithstanding this apparently flexible approach, there are a few observations that can be gleaned from the new Title III that suggest a contradictory posture. First, it appears after the Bilingual Education Act and the Equal Educational Opportunity Act, Title III of NCLB was designed to disturb the status quo viewed by many to be wholly unsatisfactory. Such a drastic measure presupposes that the current system of educating limited English proficiency students (“LEP”)—i.e., bilingual education—is in itself fundamentally flawed and ineffective. Second, the drafters’ disfavor towards bilingual education is evident in the Purpose section of Title III of NCLB. The Purpose section states that one goal of NCLB is for “students [to] develop high levels of academic attainment *in English*.” *Id.* § 3102, 115 Stat. at 1690 (emphasis added). This goal runs counter to the typical goal of bilingual education—attainment of English proficiency, while achieving academic success by educating LEP students primarily in their *native language*. Thus, while bilingual education focuses on academic success in the LEP student’s native language, NCLB demands that academic success be in English. Third, Title III’s stated purpose seems to reflect attitudes similar to those held by the drafters of Proposition 227. Much of the enacting language of NCLB is comparable, if not the same, to that of Proposition 227. NCLB is closely tied to the anti-bilingual and pro-English immersion movement in that it “reflects the spirit of state initiatives such as California’s Proposition 227 to the extent that it contends that bilingual education has largely failed to accomplish its goals and that English proficiency is the key to success in American society,” Barbara J. Brunner, *Bilingual Education Under the No Child Left Behind Act of 2001*, 169 ED. LAW. REP. 505, 510–14 (2002). Lastly, post-NCLB funding shifts seem to indicate disfavor towards bilingual education. Title III nonetheless requires that states hold Local Education Agencies accountable for meeting two annual measurable achievement objectives (“AMAOs”) for English learners. Under Title III, States must develop and meet two related AMAOs regarding English language proficiency. First, States must define a progress goal that requires States to demonstrate “annual increase[s] in the number or percentage of children making progress in English.” NCLB § 3122, 115 Stat. at 1703. Second, States must establish a proficiency objective that requires “annual increase[s] in the number or percentage of children attaining English proficiency by the end of each school year.” *Id.*

139. 20 U.S.C. § 6316(b)(1)(E) (2006); 34 C.F.R. § 200.44 (2011). These provisions are also difficult because it disregards the financial impact on the schools identified as needing improvement. *See generally* 20 U.S.C. § 6316 (2006).

140. Douglas E. Abrams, *A Coordinated Public Response to School Bullying*, in *OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA’S CHILDREN* 399 (Maurice R. Dyson & Daniel B. Weddle eds., 2009).

NCLB has the effect of removing the brightest talent, rather than those in greater need or removing those bullied rather than the bully from the learning environment.¹⁴² In so doing, NCLB's emphasis is to remove the few "bad" elements from a school rather than to transform the negative learning environment itself for the many more students left to languish in spiritually demoralized schools.

Consequently, genuine student self-esteem and self-efficacy that appears to be a core spiritual component of academic achievement fails to be nurtured. Academic standards have been lowered to avoid federal sanctions, and a watered-down curriculum only furthers the cultural, intellectual, and social alienation a child experiences. This alienation from his or herself occurs by not allowing the child to align with his or her own spiritual source of well-being through the discovery of his or her own talents and passions. In this way, we, as a society of parents, teachers, administrators, and lawmakers, commit the same "spiritual harm" as was previously committed in creating a stifling, repressive, control-centered, racially segregated system of Jim Crow, a system that engendered low self-esteem, low well-being and, by extension, low student achievement.¹⁴³

141. 20 U.S.C. § 7912 (2006) (providing that a student may be given the opportunity to transfer to one or more designated schools if he or she attends a school designated by the state as persistently dangerous or if he or she is subject to a violent criminal offense while on school grounds). A transfer offered from a school identified as persistently dangerous will be in effect until the original school is no longer identified as persistently dangerous. A transfer offered to a victim of violent crime will be in effect for the remainder of the school year, placing a stigma and onus on the victim rather than the victimizer).

142. Daniel B. Weddle, *Brutality and Blindness: Bullying in Schools and Negligent Supervision by School Officials*, in OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN, *supra* note 140, at 425.

143. See, e.g., "With an Even Hand" *Brown v. Board at Fifty*, <http://www.loc.gov/exhibits/brown/brown-brown.html> (last visited Aug. 21, 2012).

In the "doll test," psychologists Kenneth and Mamie Clark used four plastic, diaper-clad dolls, identical except for color. They showed the dolls to black children between the ages of three and seven and asked them questions to determine racial perception and preference. Almost all of the children readily identified the race of the dolls. However, when asked which they preferred, the majority selected the white doll and attributed positive characteristics to it. The Clarks also gave the children outline drawings of a boy and girl and asked them to color the figures the same color as themselves. Many of the children with dark complexions colored the figures with a white or yellow crayon. The Clarks concluded that "prejudice, discrimination, and segregation" caused black children to develop a sense of inferiority and self-hatred.

Where is the opportunity for children today to reach beyond their comfort zones or to discover with their own hands, their own minds, and their own sensibilities the lessons that evoke thought, emotion, and action? Where is the exposure to different cultures and people that offer an inspiring new outlook on life and a curiosity to explore the world around them? Where is the cultivation of self-esteem or respect for a non-native speaker's language or culture in enriching the classroom learning environment? In choosing between positive and negative attention, our educational law has in many instances focused on the latter to the near exclusion of the former. In this way, education law and policy only further the neglect of cognitive and affective needs of the child and the negative social stigma of failure without a meaningful positive investment in success through positive attention, focus, and incentives for learning, succeeding, and improving.

The situation remains the same for teachers who only face negative consequences for failure but no positive incentives for success¹⁴⁴ or recognition through awards and merit pay systems.¹⁴⁵ Any critical mass of good quality teachers would be loathe to teach in such despair-concentrated schools where they face the potential for job loss. So those most in need of the best teachers are the most likely to be the ones first deprived of them. Rather than encouraging or affirming the creative expression of the teacher and being a shared partner in developing dynamic teacher lesson plans that speak to children's interests, NCLB discourages the teacher's contribution, input, ideas, and creative expression that falls outside the confines of

144. See, e.g., Matthew G. Springer et al., *Teacher Pay for Performance: Experimental Evidence From the Project on Incentives in Teaching*, NAT'L CTR. ON PERFORMANCE INCENTIVES (Sept. 21, 2010), http://www.rand.org/content/dam/rand/pubs/reprints/2010/RAND_RP1416.pdf; Carolyn Kelley et al., *Teacher Motivation and School-Based Performance Awards*, 38 EDUC. ADMIN. Q. 372, 375 (2002); Michael Podgursky & Matthew G. Springer, *Teacher Performance Pay: A Review*, 26 J. POL'Y ANALYSIS & MGMT. 909, 912–14 (2007).

145. Merit pay systems remain a contentious issue. See generally Christopher Paslay, *Teacher Performance Pay Oversimplifies a Complex Problem*, CHALK & TALK (Apr. 7, 2009), <http://www.chalkandtalk.wordpress.com/2009/04/07/teacher-performance-pay-oversimplifies-a-complex-problem.html>; Dale Ballou, *Pay for Performance in Public and Private Schools*, 20 ECON. EDUC. REV. 51 (2001); Dan Goldhaber, *Teacher Quality and Teacher Pay Structure: What Do We Know, and What Are the Options?*, 7 GEO. PUB. POL'Y REV. 81 (2002); Richard J. Murnane & David K. Cohen, *Merit Pay and the Evaluation Problem: Why Most Merit Pay Plans Fail and a Few Survive*, 56 HARV. EDUC. REV. 1 (1986).

a narrow exam format. “Under a high-stakes scheme, all aspects of education including teaching, classroom facilities, subjects taught, teacher training, and even library collections become secondary to standardized test taking instruction, because school teachers and school administrators are held accountable only for producing passing scores on the state-based exams.”¹⁴⁶ While teachers are made fully aware of the negative performance for job loss, school restructuring, and the threat of federal funds, where is the promise and benefits of their success? Where is the encouragement to develop long-lasting relationships with their students? Where is the incentive to provide a dynamic environment for learning? Where are the accountability mechanisms to remove uninspired, ineffective teachers after having multiple, adequate opportunities to improve? What perverse effects can one expect to incentivize teacher merit pay while no effort is similarly made to incentivize students or to see such incentives for both teacher and student aligned to maximize their well-beings and, by extension, their enthusiasm for engaging in the learning environment?

It is not success but rather failure that truly triggers and makes relevant NCLB in the lives of students, teachers, and administrators through the failure to meet adequate yearly progress benchmarks and the threat of sanctions. The issue is not whether unions are good or bad. Rather the issue is the abusive use of monopolistic force in union contract law to subvert needed improvement that promotes failure and spiritual disinvestment in our students as children and unique individuals.

In noting the lessons learned in successful minority, high-poverty schools, I do not mean to suggest that there is no value to racial socioeconomic integration, which indeed is a laudable goal,¹⁴⁷ particularly when it promotes meaningful interaction and not merely access. But perhaps such integration is the result rather than the precursor of school quality and academic success. Quality schools

146. Daniel & Dyson, *supra* note 12, at 66.

147. See generally JoMills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School & Employment Desegregation*, 19 J. BLACK STUD. 267, 285–86 (1989) (discussing how early school segregation leads to greater adult segregation).

can attract diversity of income and race, and when developed in the absence of legally or socially sanctioned barriers of race, they will be both diverse and places where educational benefits can be equally enjoyed. But building quality schools is perhaps like that whispering voice reminding the main character in the movie *Field of Dreams*, “If you build it, they will come.” That is, if schools of excellence are built from highly skilled, altruistic, dedicated faculty, administrators, and parents seeking a better option for their children, then success will breed success not merely in terms of funding and test scores but also in terms of students and families seeking admission to schools in high-poverty neighborhoods and perhaps even from middle-income families where affordable quality school choices remain scarce. The heartbreaking conclusion in the critically acclaimed documentary *Waiting for Superman* demonstrates that this assertion is true, as it shows families having to be turned away from the limited slots available for the nation’s most effective charter schools.¹⁴⁸ But if racial integration does not result from such efforts, at the very least a quality local educational alternative in high poverty areas would then exist for students of color where the need is so great that many must be turned away.

B. The Real Harm of Exclusion & Separation

The nation can no longer wait for courts or local political sentiment to demand racial or socioeconomic integration, particularly when both arenas have shown such hostility to it as discussed herein. Government can help by empowering the best talent recruiters to make personnel decisions and using the power of the purse through loan forgiveness to help altruistic candidates truly moved by a personal sense of responsibility and compassion to develop new schools and to facilitate transformative school makeovers in the nation’s most high-poverty areas. We may continue to see efforts by the privileged to maintain their privilege at all costs through the erection of barriers to quality educational opportunity. School teachers and administrators who are moved to teach with an egalitarian focus on closing the achievement gap should reject the

148. See *supra* note 74 and accompanying text.

exclusionary policies that have shut the doors on minority youth in the past. They should widely share the insights of building their energetic ingredients for generating a culture of high performance and success so such models can be replicated across the nation. Dr. Kenny's Teacher Quality Manifesto¹⁴⁹ lists essential intangibles that only the most discerning talent recruiters can identify, evaluate, inspire, and consciously promote and tailor to their own community needs in order to reach greater heights of success and achievement.

Racial and socioeconomic integration, however, are certainly instrumental to see that our interrelatedness is to acknowledge our interdependence. Yet limited awareness proffers forth educational policies that deny or exclude individuals with differences that in effect deny our very interdependence and common humanity. Indeed, one can see that a societal ethos of ego conscience and its pitfall illusion of separate inherent existence are pervasively promoted in our educational legal system.

Whether it was the racial segregation laws of Jim Crow at issue in *Brown v. Board of Education*¹⁵⁰ or today's racially segregated classroom practices enforced by tracking and ability grouping,¹⁵¹ linguistically segregated policies that partition students into unequal resource tracks,¹⁵² racially exclusionary admissions practices of magnet schools,¹⁵³ discriminatory community district zoning laws of

149. See *supra* note 84 and accompanying text.

150. 347 U.S. 483 (1954).

151. See CHARLES T. CLOTFELTER, AFTER *BROWN* 137–46 (2004). This factor captures race indirectly based upon the prevalent racially identifiable character of schools. See generally JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (1985); Thomas Good, *Two Decades of Research on Teacher Expectations: Findings and Future Directions*, J. TEACHER EDUC., 32, 38–47 (1987).

152. *Plyler v. Doe*, 457 U.S. 202 (1982); *Lau v. Nichols*, 414 U.S. 563 (1974); *Castenada v. Pickard*, 648 F.2d 989, 1007, 1009–10 (5th Cir. 1981) (establishing a three-part test for determining whether a school district has taken “appropriate action to overcome language barriers,” requiring that the school district’s program (1) be based on sound educational theories, (2) effectively implement the education theories, and (3) produce results showing that language barriers are being overcome); *Keyes v. Sch. Dist. No. 1*, 576 F. Supp. 1503 (D. Colo. 1983). See also THE CIVIL RIGHTS PROJECT, WHAT WORKS FOR THE CHILDREN? WHAT WE KNOW AND DON’T KNOW ABOUT BILINGUAL EDUCATION 3–5 (2002); Kevin R. Johnson & George Martinez, *Discrimination By Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1227–38 (2000); Lynn Olson, *Mixed Needs of Immigrants Pose Challenges for Schools*, EDUC. WK., Sept. 27, 2000.

153. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701

neighborhood schools, discriminatory zero-tolerance policies,¹⁵⁴ discriminatory educational finance systems,¹⁵⁵ sexually segregated schools and admissions policies,¹⁵⁶ the harassment and separation of LGBT students,¹⁵⁷ or the systemic exclusions of individuals with disabilities from the mainstream classroom and curriculum,¹⁵⁸ individual difference becomes the ego conscience cornerstone for justifying segregation and exclusionary practices. Law at its worst endorses and promotes narrow-minded difference by creating the necessary conditions for it to thrive. But, at its best, law can seek to promote the interrelatedness of humankind. In fact, one can view the educational, constitutional, and civil rights reforms of the past three

(2007); see also *Grutter v. Bollinger*, 539 U.S. 306 (2003).

154. See generally Anne J. Atkinson, *Zero Tolerance Policies: An Issue Brief* (Nov. 2005), available at http://www.doe.virginia.gov/administrators/superintendents_memos/2006/inf003a.pdf (last visited Jan. 5, 2008).

155. JONATHON KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 99–101 (1992); COUNCIL OF THE GREAT CITY SCHOOLS, *ADEQUATE STATE FINANCING OF URBAN SCHOOLS: AN ANALYSIS OF STATE FUNDING OF THE NEW YORK CITY PUBLIC SCHOOLS* 39–44 (2000), available at <http://www.cgcs.org/pdfs/NYCAdequateFinanceReport.pdf>; COUNCIL OF THE GREAT CITY SCHOOLS, *ADEQUATE STATE FINANCING OF URBAN SCHOOLS: AN ANALYSIS OF STATE FUNDING OF THE PHILADELPHIA PUBLIC SCHOOLS* 29–33 (1998), available at <http://www.cgcs.org/pdfs/PhiladelphiaAdequateReport.pdf>.

156. Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 21 (2004).

157. *Bullying in Schools: Harassment Puts Gay Youth At Risk*, MENTAL HEALTH AMERICA, http://www.mhacolorado.org/file_depot/0-10000000/30000-40000/31946/folder/76272/Bullying%20in%20Schools.pdf (last visited Aug. 25, 2012); *First Public Gay H.S. Opens in NYC*, USA TODAY.COM (July 28, 2003), http://www.usatoday.com/news/nation/2003-07-28-gay-high_x.htm.

158. See, e.g., *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Honig v. Doe*, 484 U.S. 305 (1988); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); Oscar Cohen, *Inclusion Should Not Include Deaf Students*, EDUC. WK., Apr. 20, 1994, at 35; Lisa Fine, *More Disabled Students Graduating*, *Ed. Dept. Report Says*, EDUC. WK., Dec. 6, 2000, at 26; Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L.L. REV. 407, 434 (2001); John O'Neil, *Q & A, A Better IDEA*, N.Y. TIMES, Apr. 14, 2002, at A17; U.S. DEP'T OF EDUC., *IDEA FINAL REGULATIONS: MAJOR ISSUES* (1999); U.S. DEP'T OF EDUC., *IDEA TOPIC BRIEF 10: PARENTALLY PLACED CHILDREN IN PRIVATE SCHOOLS* (1999); U.S. DEP'T OF EDUC., *IDEA FINAL REGULATIONS: DISCIPLINE FOR CHILDREN WITH DISABILITIES* (1999); U.S. DEP'T OF EDUC., *QUESTIONS AND ANSWERS ABOUT PROVISIONS IN THE INDIVIDUALS WITH DISABILITIES ACT AMENDMENTS OF 1997 RELATED TO STUDENTS WITH DISABILITIES AND STATE AND DISTRICT-WIDE ASSESSMENTS* (Aug. 24, 2000); David Krantz, *Separate Is Not Equal*, EDUC. WK., June 21, 1993, at 38, 40.

decades as a grand social saga that strikes at the heart of the ego-centered denial of our interrelatedness.¹⁵⁹

Yet our failure to achieve these laudable socio-legal goals comes not from a misguided legal approach. Rather, our failure to achieve the full promise and potential of integration stems from attempts to subvert enforcement of those very same laws, sometimes with the law as a tacit and explicit accomplice, as we have seen. School boards have played an active role in subverting integration.¹⁶⁰ Yet of course, one need only read the psychological impact of racial segregation or the emotional effects commonly detailed in student bullying and harassment opinions to see that the acceptance of their legal legitimacy may be all too common in our education system.¹⁶¹

159. See Allan H. Macurdy, *Rights Respiration: Disability, Isolation, and a Constitutional Right of Interaction*, 13 TEX. WESLEYAN L. REV. 737, 748 (2007).

[Dr.] King understood, and the experiences of individuals with disabilities confirm, that exclusion spills directly from the denial of our interdependence. Prejudice would have us see no connection between ourselves and others, and therefore no reason to acknowledge or respect our common humanity. Systematic and pervasive impediments to human interaction in the significant arenas of human life are corrosive of individual dignity and the maintenance of community, and thus isolation should be seen to be at a heart of the evil to be combated through our constitutional protections. Indeed, the purpose of all civil rights statutes, implementing those protections, is to enhance and ensure human interaction for the sake of human rights, the health of our democracy, and our common humanity. James Somerset, upon his arrival in England, breathed in the pure air of rights, air that carried to him the holy symbols of his humanity. As all of us take in from the same air, slavery cannot be allowed to exist because it poisons the atmosphere of rights upon which our humanity depends. Each relies upon the other to protect the air, and each is necessary to the effectuation of rights that have no meaning or consequence except within a web of relationship. Rights respiration can only occur within our social context, and thus isolation constitutes social asphyxiation and the death of self.

Id.

160. See, e.g., *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 228–29 (1964) (noting that school board, in response to a desegregation order, closed its public schools and opened a private school for whites); *Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649, 651 (E.D. La. 1961) (observing that school board changed public schools to private schools in order to avoid desegregation); see also *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 344 (2000) (Souter, J., concurring in part and dissenting in part) (“[T]he School Board had applied its energies for decades in an effort to ‘limit or evade’ its obligation to desegregate the parish schools.”) (internal quotation marks omitted).

161. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 968 (D. Kan. 2005).

[The plaintiff] began suffering from stomach problems that required prescription medication and depression so severe that his physician prescribed medication and he sought counseling. He was diagnosed with post-traumatic stress disorder, anxiety

C. What Harms Minorities in Public Education Will Ultimately Impact Majority Society: The Miner's Canary Thesis Revisited

We may also come to see that where the ego-conscience denial of interrelatedness (soul conscience) occurs, it produces inequality and results in a denial of interdependence that adversely affects all stakeholders involved: (1) native speakers are deprived of meaningful opportunities to learn language dynamically in dual immersion language programs with other non-native speakers, notwithstanding that such programs may have beneficial cognitive benefits for the mastery of math, music, and science skills of all involved;¹⁶² (2) opponents of diversity and affirmative action are deprived of the interpersonal skills of understanding, communication, tolerance, and acceptance, which are increasingly needed for American leaders to function in a multiracial society and globe;¹⁶³ (3) opponents of

disorder, and avoidant personality disorder that likely stemmed from the harassment. The harassment was so humiliating that he eventually left school. . . . The school district's argument that the harassment is not actionable because it involved only name-calling and crude gestures, not physical harassment, [is] without merit.

Id.

162. Cf. Joetta L. Sack, *Riley Endorses Dual Immersion Programs*, EDUC. WK., Mar. 22, 2000, at 34, available at <http://www.edweek.org/ew/articles/2000/03/22/28hisp.h19.html>.

163. See generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610 (2003).

The book, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* (Princeton University Press), also says that whether students report benefiting from crossracial interactions depends heavily on what those interactions are. Students with freshman-year roommates from different racial backgrounds, for example, are much more likely than others to have crossracial interactions later during college. Casual contact and superficial exchanges appear to have little impact on students' thinking. "Diversity work does not begin or end with the admission office," says Mr. Espenshade, who based his analysis on data on 9,000 students at 10 selective colleges collected through the National Survey of College Experience. At most colleges, he says, "there is not enough attention paid to relevant issues of mixing or mingling."

Peter Schmidt, *New Research Complicates Discussions of Campus Diversity-in a Good Way*, CHRON. OF HIGHER EDUC., Jan. 31, 2010, available at http://www.princeton.edu/~tje/files/Pub_Chronicle%20of%20Higher%20Ed%20combined%20articles.pdf.

Of course, diversity initiatives operating with social stigmas and racial exclusivity may nonetheless have adverse effects:

restorative school finance and inclusive housing policies may end up bearing the costs of educational inequity in higher crime rates, higher incarceration costs, and prisons in their neighborhoods;¹⁶⁴ (4) opponents of racial inclusiveness and acceptance in university ROTC educational programs may result in lack of legitimacy and racial tolerance that threatens to undermine the collective national security of America both domestically in army unit dissension and homogenous composition while adversely impacting its ability to function effectively abroad to win the hearts and minds of diverse global allies and enemies;¹⁶⁵ (5) opponents of affirmative action compromise the ability of corporate America to competitively engage in diverse international business environments;¹⁶⁶ (6) proponents of sexually segregated schools may often reinforce the sexual stereotypes they were designed to combat, intolerance to the opposite sex, and sexist conduct in the workplace and in interpersonal relationships;¹⁶⁷ (7) opponents of educational tuition benefits for undocumented immigrants may result in less economic growth for a

The book, *The Diversity Challenge: Social Identity and Intergroup Relations on the College Campus*, written by Mr. Sidanius and three other scholars, also says the UCLA study found not only that some black students' grades had suffered from their belief that they were admitted through race-conscious admissions policies, but also that involvement in racially or ethnically oriented campus groups appeared to hurt students' ability to relate to peers from other racial and ethnic backgrounds.

Schmidt *supra* (italics in original). Among some studies currently under way is one

by a collaborative of colleges based at the University of Michigan at Ann Arbor to measure the educational impact of 'intergroup dialogue,' a teaching approach that brings students from different backgrounds together and encourages them to grapple with points of conflict. On another front, the Higher Education Research Institute at UCLA is developing a national survey of colleges to measure students' experiences with diversity and how they are affected.

Schmidt *supra*.

164. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Crisis*, 86 NW. U. L. REV. 550, 551-52 (1992); Shilesh Muralidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and In Promoting Concentrated Poverty and Segregation*, 24 LAW & INEQ. 353 b (2006).

165. See generally Consolidated Brief for Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

166. Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

167. Williams, *supra* note 156, at 21.

nation in need of greater skilled labor to transition to a green economy.¹⁶⁸

Not so long ago, the notion that “it takes a village to raise a child” characterized a reform of a bygone area that must return. But the observation that it takes a village was not supposed to be the rallying call for greater bureaucracy and paperwork, administrative hearings, and regulatory compliance. Rather, it was intended to recognize the needs of the whole child, and the “village” was in essence a collective culture of caring individuals, mentors, teachers, school leaders, and community partners all working as a team on the individualized level of a student’s needs. Communities must not be passive, isolated enclaves focused on narrow self-interests. Invention and re-invention of the self must permeate every level of the educational enterprise and its complex interconnectedness with families, social services, community economic development, housing, and spiritual reform that brings students, parents, teachers, and counselors together as individuals.

Custom-tailored education for the individual student must be the hallmark of reform with a view to promoting a child’s overall well-being by promoting emotional, psychological, practical, and spiritual life skills in a broader reaffirming but robust educational community where diverse, dynamic interaction is the essential lifeblood of transformative reform. For this reason, the K–12 context remains the best place to promote racial integration.¹⁶⁹ Integration (both racial and

168. *Plyler v. Doe*, 457 U.S. 202 (1982).

169. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 426 F.3d 1162, 1175 (9th Cir. 2005) (“[D]esegregated educational experience opens opportunity networks in areas of higher education and employment.”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“The inculcation of [civil] values is truly the work of the schools.”) (internal quotation marks omitted); *Plyler*, 457 U.S. at 221 (discussing “the pivotal role of education in sustaining our political and cultural heritage”); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (recognizing that public schools teach children “the values on which our society rests”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (“[T]he public schools [are the] most vital civic institution for the preservation of a democratic system of government.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (noting that education is “the very foundation of good citizenship”); *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 356 (D. Mass. 2003) (“It is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking.”), *aff’d en banc*, 418 F.3d 1 (1st Cir. 2005).

socioeconomic) must be part of this individualized reform, but it should not come at the expense of focus on the individual student or teachers' abilities and interest by overemphasizing racial pupil assignments to the detriment of a meaningful, relevant, useful, and empowering education long deprived to minority students in high-poverty areas. Skills and a quality education suitable for the new global economy remain the best bulwarks against perpetuated poverty and dependency. Race is certainly not irrelevant because it continues to be perpetuated in the inter- and intra-segregation and harmful exclusion that stifles self-expression and growth.

Whether ignorance, racial prejudice, or discrimination, each contrived barrier serves as a pretext for individual separation. It is a separation from each other facilitated by a separation of the soul conscience level of awareness of our interdependent, interrelated selves that undermines our civic society and our foundations for democracy. What results from this distorted separateness is an inability to be accountable for the cause and effect of our own actions. Rather than the law demanding greater accountability, it may solely invoke the coercive force of the state to escape it.¹⁷⁰

These barriers, like racism, justify action without regard to consequence. They establish cause without regard to accountability for its effect, or they act in narrow self-interest by treating others as a means to an end rather than as ends themselves with the capacity to learn, engage, self-correct, and overcome. Similarly, overcoming racial subjugation compels extraordinary efforts at transcendence where national de facto resegregation becomes the familiar result of compartmentalizing our humanity and preserving white privilege.¹⁷¹ Therefore, race can serve as a metaphor to offer humanity a tool to see how interrelatedness and its resulting cause and effect of actions must be properly in balance to advance the consciousness of the subjugator and the subjugated alike if there is to be true

170. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

171. See generally Amelia E. Lester, *Still Separate After All These Years?*, HGSE NEWS (May 1, 2004), <http://www.gse.harvard.edu/news/features/orfield05012004.html>.; Maurice R. Dyson, *When Government is a Passive Participant in Private Discrimination: A Critical Look at White Privilege & the Tacit Return to Interposition in PICS v. Seattle School District*, 40 U. TOL. L. REV. 145 (2008).

transcendence over institutional discrimination that permeates and extends to high-poverty schools.¹⁷²

The injuries of race and racialization not only affect the racially subjugated, but they cause harm to the collective humanity of the subjugators themselves, albeit to a lesser extent. Artificial contrivances in the legal doctrine of segregation fostered a legal and societal fiction of separation that needed to be challenged.

In race relations, we see the law of cause and effect based upon our interdependent nature. This interrelated nature of the races can be gleaned from the thesis of *The Miner's Canary*.¹⁷³ As Lani Guinier and Gerald Torres noted:

Race is like the miner's canary. Miners often carried a canary into the mine alongside them. The canary's more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected, thus alerting the miners to danger. The canary's distress signaled that it was time to get out of the mine because the air was becoming too poisonous to breathe. Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all. It is easy enough to think that

172. Dr. King also understood this concept of divine interrelated oneness and its relationship to cause and effect with regard to viewing race as a barometer for the progress of society. When advocating a bus boycott as part of the Montgomery Improvement Association, Dr. King confronted the exaggeration from whites who held as their attitude that it was their city, their buses, their right to ride that was theirs alone as if it and they existed independently of blacks. Accordingly, whites exaggerated, and thus, in their ignorance underestimated or ignored the interdependent nature of things, i.e., the bus transportation system and the city's reliance on the revenue of African-Americans to support its economic life. Whites had no choice but to ultimately relent and yield to the interrelated and interdependent nature of reality.

173. See generally LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2003).

Ignoring racial differences—color blindness—has failed, they argue. Race and power intertwine at every level of social interaction, from classrooms to courtrooms to congressional districts. Only cross-racial coalitions can expose these embedded hierarchies of privilege and—through innovative power sharing and democratic engagement—demolish them. Guinier and Torres call this concept of enlisting race to resist power political race. The methodology of political race has policy implications for affirmative action, racial profiling, criminal justice, access to educational opportunity, voting and democracy. It is a methodology for diagnosing systemic injustice and then organizing to resist it.

when we sacrifice this canary, the only harm is to communities of color. Yet others ignore problems that converge around racial minorities at their own peril, for these problems are symptoms warning us that we are all at risk.¹⁷⁴

Although the races are not equally situated and those most vulnerable in society are the first to feel the effects of efforts to sever humanity's interrelatedness, it does lend support to the notion that what affects one will ultimately impact all of humanity if left unchecked, and we must cease to isolate one another or the relationship of one's actions upon another.

While racial minorities clearly suffer disproportionately in the Great Recession, we may now begin to see the effects of disinvestments in the nation's public education system and the skills it produced, which once supported the nation's and world's economy.

Yet the obstinate ignorance among many in our society to see how the oppressor affects the oppressed, particularly with harmful educational policies, is a blatant rejection of our interrelatedness and its attendant cause and effect principle. As Paulo Freire observed, "the behavior of the oppressed is a prescribed behavior, following as it does the guidelines of the oppressor."¹⁷⁵ Similarly, it is also a patent rejection of the cause and effect principle to turn a blind eye to our past actions' impact upon our present reality in failing schools.

This causal relationship was at the heart of Dr. King's exposition about the causes of the mass protest and demonstrations. He chided those who criticized this form of direct action without comprehending the root causes that spurred so many to action. He urged the reader to remember that for the consequence of mass protest being witnessed in the streets, there was a cause of injustice that prompted such discontent and civil disobedience. He reminded us that to castigate the demonstrators without fully castigating the racist behavior that led to it amounted to a fundamental misunderstanding of the cause and effect of past and present human behavior.¹⁷⁶

174. See generally GUINIER & TORRES, *supra* note 173.

175. PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 34 (Myra Bergman Ramos trans., 1970).

176. Martin Luther King, Jr., *Letter From Birmingham City Jail*, reprinted in A

VI. SUCCESSFUL EDUCATIONAL REFORM SHOULD NO LONGER
IGNORE INSTITUTIONAL SCHOOL REPRESSION

Similarly, we cannot fully understand our education system's racial and economic isolation, and the school-to-prison pipeline phenomenon cannot be addressed fully or adequately by merely advocating more middle-income and white students in the classroom. It requires understanding and accountability to eradicate the same mindset that led to white privilege and discrimination that has produced neighborhoods through white flight, racialized admissions policies, housing discrimination patterns, and, among other things, an alienation of children of color through stale curricula, teaching, and zero-tolerance expulsion policies that are supposed to be facially neutral but are more commonly found and enforced in high-poverty minority schools even when integrated. The root causes of discriminatory attitudes in the classroom by both student and teacher alike and the consequences they have for both minority and non-minority students must be addressed through legal, educational, and spiritual means for there to be a just justice and a culture conducive to learning—one not predicated merely on money judgment, racial, and socioeconomic integration, particularly at the expense of ignoring harmful exclusionary practices, but on transformative individual and institutional practices that compel us as individuals to lovingly confront one another as a family of human beings. In this way, we can resolve our conflicts within the context of interdependence.

TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.
297 (James M. Washington ed., 1986).

Recognizing this vital urge that has engulfed the Negro community, one should readily understand public demonstrations. The Negro has many pent-up resentments and latent frustrations. He has to get them out. So let him march sometime; let him make his prayer pilgrimages to the city hall; understand why he must have sit-ins and freedom rides. If his repressed emotions do not come out in nonviolent ways, they will come out in ominous expressions of violence. This is not a threat; this is a fact of history. So I have not said to my people: "get rid of your discontent." But I have tried to say that this normal and healthy discontent can be channelized through the creative outlet of nonviolent direct action.

Id.

Relying exclusively on courts for reform is problematic, both because the problem is greater than the legal system and because the courts have shown an increasing resistance to endorse racial remedies.¹⁷⁷ Relying on the political system for racial equity also seems dubious.¹⁷⁸

A. *Are We Really Racing to the Top?*

Nonetheless, where the legal and political will does exist to implement education reforms, such opportunities cannot be squandered. This includes the recent attempt to implement President Barack Obama's Race to the Top Initiative, a \$4.35 billion U.S. Department of Education contest designed to encourage innovative reforms in state and local district K–12 education, which has become the latest attempt by the executive branch to address this intractable educational policy dilemma.¹⁷⁹ On July 24, 2009, President Obama and Secretary of Education Arne Duncan announced the initiative as

177. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247–48 (6th Cir. 2006); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42–71 (Benjamin I. Page ed., 1991).

178. See, e.g., *The Michigan Civil Rights Initiative* (2006), http://www.civilrights.org/equal-opportunity/michigan/proposal_text.html [hereinafter Proposal 2]. Proposal 2 was adopted by 58 percent of Michigan voters on November 7, 2006 and became effective December 23, 2006. Proposal 2 amended Michigan's constitution to prohibit preferential treatment based on protected characteristics by "[t]he University of Michigan, Michigan State University, Wayne State University, and any other public college or university." The Nebraska Civil Rights Initiative, known as Initiative 424 ("I-424") was adopted by 58 percent of Arizona voters in November of 2008. I-424 amended Nebraska's constitution to prohibit preferences by public universities based on protected characteristics, and specifically included "any public institution of higher education." See *Alissa Skelton, UNL To Tweak Diversity Scholarships in Wake of Initiative 424*, DAILY NEBRASKAN, <http://www.dailynebraskan.com/news/unl-to-tweak-diversity-scholarships-in-wake-of-initiative-424-1.1041423> (last updated June 17, 2012). See also *Washington – Initiative-200*. In Washington a ballot initiative known as Initiative-200 ("I-200") was approved by 58 percent of voters on November 3, 1998. See WASH. REV. CODE § 49.60.400 (2011); *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (Cal. Ct. App. 2002). In *Crawford*, the California Court of Appeals held that Proposition 209 bars public school districts from using race as a consideration in school assignments to racially balance public schools, thus invalidating a school district's policy that allowed for open school transfers within the district.

179. U.S. DEP'T OF EDUC., *RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY* (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>; Arne Duncan, U.S. Sec'y of Educ., *The Race to the Top Begins* (July 24, 2009), available at <http://www.ed.gov/news/speeches/race-top-begins>.

part of the American Recovery and Reinvestment Act of 2009,¹⁸⁰ which was signed into law on February 17, 2009. The initiative awarded points to states for establishing educational reforms designed to improve student outcomes, including closing achievement gaps and raising high school graduation rates while ensuring success in careers and higher education.¹⁸¹

The program has not been without criticism. Teachers' unions and educators have stated the assessment exams it relies upon have not been effective and are an inaccurate and unreliable basis upon which to measure teachers, concerns have been raised about imposing federal control on state schools, and arguments have been made that its emphasis on charter school creation is not sound and weakens public education.¹⁸² There have been a number of additional criticisms about the Race to the Top program. Former Assistant Secretary of Education Diane Ravitch, for example, observed that empirical evidence "shows clearly that choice, competition and accountability as education reform levers are not working."¹⁸³ Several civil rights organizations, such as the Urban League, the NAACP Legal Defense Fund, and the Rainbow Push Coalition also argued that "such an approach reinstates the antiquated and highly politicized frame for distributing federal support to states that civil rights organizations fought to remove in 1965."¹⁸⁴ Other criticisms leveled at the program focused on the selection methodology as flawed and arbitrary.¹⁸⁵

180. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14006, 123 Stat. 115, 283 (2009).

181. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY, *supra* note 179.

182. Libby Quaid, *Obama Offers Race to the Top Contest for Schools*, GUARDIAN, July 24, 2009, available at <http://www.guardian.co.uk/world/feedarticle/8625198?FORM=ZZNR7>.

183. See Diane Ravitch, *The Big Idea—It's Bad Education Policy*, L.A. TIMES, Mar. 14, 2010, available at <http://articles.latimes.com/2010/mar/14/opinion/la-oe-ravitch14-2010mar14>.

184. See Seyward Darby, *The New Republic: Defending Obama's Education Plan*, NEW REPUBLIC, <http://www.npr.org/templates/story/story.php?storyId=128843021>; see also Michelle McNeil, *Civil Rights Groups Call for New Federal Education Agenda*, EDUC. WK (July 26, 2010), http://blogs.edweek.org/edweek/campaign-k-12/2010/07/civil_rights_groups_call_for_n.html.

185. For instance, the Economic Policy Institute found that the selection of Delaware and Tennessee was subjective and arbitrary, and did not reflect superior educational approaches to program priorities. See William Peterson & Richard Rothstein, *Let's Do the Numbers: Department of Education's "Race to the Top" Program Offers Only a Muddled Path to the*

Under the program, states could submit competitive applications focused on the following four core education reform areas:

Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy; Building data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction; Recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and Turning around the Nation's lowest-performing schools.¹⁸⁶

Even President Obama and Secretary Duncan have infused their centerpiece education improvement efforts, the Race to the Top grants, with incentives to improve teacher effectiveness based on “performance,” despite collective bargaining agreements that prevent performance pay schemes;¹⁸⁷ and “turning around the nation’s lowest-achieving schools.”¹⁸⁸ Applications from the District of Columbia and forty states were received in anticipation of winning competitive grant funds.¹⁸⁹ The Department of Education awarded funding to a total of eleven states and the District of Columbia.¹⁹⁰ The Department of Education selected two winning states to receive funding in the initial round: Delaware and Tennessee.¹⁹¹ Nine states—Florida, Georgia, Hawaii, Maryland, Massachusetts, New York, North Carolina, Ohio, and Rhode Island—and the District of

Finish Line, ECONOMIC POLICY INSTITUTE (Apr. 20, 2010), http://epi.3cdn.net/4835aafd6e80385004_5nm6bn6id.pdf.

186. U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY, *supra* note 179, at 2.

187. See generally Peterson & Rothstein, *supra* note 185. See also Sam Dillon, *Formula to Grade Teachers’ Skill Gains Acceptance, and Critics*, N.Y. TIMES, Sept. 1, 2010, at A1; Michele McNeil & Lesli A. Maxwell, *States Up Ante on Applications for Race to Top*, EDUC. WK., June 9, 2010, at 27.

188. See U.S. DEP’T OF EDUC., RACE TO THE TOP: EXECUTIVE SUMMARY, *supra* note 179, at 2; U.S. DEP’T OF EDUC., RACE TO THE TOP FUND (2012), <http://www2.ed.gov/programs/racetothetop/index.html>.

189. Arne Duncan, *Race to the Top—Integrity and Transparency Drive the Process*, ED.GOV BLOG (Jan. 25, 2010), <http://www.ed.gov/blog/2010/01/race-to-the-top-%E2%80%93integrity-and-transparency-drive-the-process/>.

190. U.S. DEP’T OF EDUC., RACE TO THE TOP FUND, *supra* note 188.

191. Press Release, U.S. Dep’t of Educ., Delaware and Tennessee Win First Race to the Top Grants (Mar. 29, 2010), <http://www2.ed.gov/news/pressreleases/2010/03/03292010.html>.

Columbia won awards during the second phase.¹⁹² Now in its third phase, seven other states have been awarded funds: Arizona, Colorado, Illinois, Kentucky, Louisiana, New Jersey, and Pennsylvania.¹⁹³

Yet there has been little “racing to the top” but rather snail-rate progress as states have been slow to spend their awarded funds with only \$38.6 million, or just 1.0 percent, of the grants drawn down,¹⁹⁴ even as one state’s status under the program may be jeopardized.¹⁹⁵

192. Press Release, U.S. Dep’t of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>.

193. Press Release, U.S. Dep’t of Educ., Department of Education Awards \$200 Million to Seven States to Advance K-12 Reform (Dec. 23, 2011), <https://www.ed.gov/news/press-releases/department-education-awards-200-million-seven-states-advance-k-12-reform>.

194. See Jennifer Cohen, *Assessing the Progress of Race to the Top*, NEW AMERICA FOUNDATION (July 12, 2011), http://edmoney.newamerica.net/blogposts/2011/assessing_the_progress_of_race_to_the_top-54686.

[The General Accounting Office (GAO)] finds that most states had barely scratched the surface of their year-1 funds as of June 3rd 2011. Delaware and Tennessee, the two Phase One winners, have drawn down 36 and 50 percent, respectively since they received their awards in March of 2010. These states have had access to the funds for nearly a year, giving them quite a head start. Of the 10 states in Phase Two, however, only four have drawn down more than 10 percent of their year 1 funds since August of 2010—the District of Columbia, Florida, Massachusetts, and North Carolina. As of February 11th 2012, Delaware had drawn down \$8.7 million, or 7.3 percent, of its \$119.1 million grant and Tennessee had drawn down \$26.9 million, or 5.4 percent of its \$500.7 million grant. However, these states are nearly one year into their three-year grants, meaning that they will have to spend their funds much more quickly over the next two years to spend down their grants entirely. The GAO finds many reasons for this slow rate of spending. Primarily, many states have found that their original timelines were “overly optimistic” and have had to rework the planned roll out of different efforts. Similarly, some states have had to shift their budgets to accommodate unanticipated salary requirements for the employees they need to carry out their proposals. Other states have had trouble awarding contracts for work associated with their grant proposals because crafting the necessary Request for Proposals documents has proven cumbersome. Every time a state changes its budget or timeline, the Department of Education must review and approve the change. This process is also taking longer than officials anticipated, perhaps due to the higher than expected number of changes states have submitted.

Id. (internal quotations omitted).

195. Michele McNeil, *Ed. Dept. Takes Action Against Hawaii for Race to Top Stumbles*, EDUC. WK. (Dec. 22, 2011), http://blogs.edweek.org/edweek/campaign-k-12/2011/12/this_is_the_departments.html. On December 21, 2011, Hawaii state officials were informed by the Department of Education that it was

Nonetheless, the Department of Education will likely push for its success principles in the Race to the Top program within the reauthorized Elementary and Secondary Education Act (ESEA) legislation.¹⁹⁶

B. How States are Slow to Use Race to the Top Funds

TABLE 1: STATES SLOW TO USE RACE TO THE TOP FUNDS¹⁹⁷

Race to the Top Obligations and Outlays

State	Obligated	Outlaid	Remaining	% Outlaid
District of Columbia	\$74,998,962	\$0	\$74,998,962	0.0%
Delaware	\$119,122,128	\$8,711,948	\$110,410,180	7.3%
Florida	\$700,000,000	\$460,267	\$699,539,733	0.1%
Georgia	\$399,952,650	\$0	\$399,952,650	0.0%
Hawaii	\$74,934,761	\$0	\$74,934,761	0.0%
Massachusetts	\$250,000,000	\$1,657,216	\$248,342,784	0.7%
Maryland	\$249,999,182	\$119,660	\$249,879,522	0.0%
North Carolina	\$399,465,769	\$175,010	\$399,290,759	0.0%
New York	\$696,646,000	\$112,246	\$696,533,754	0.0%
Ohio	\$400,000,000	\$507,736	\$399,492,264	0.1%
Rhode Island	\$75,000,000	\$0	\$75,000,000	0.0%
Tennessee	\$500,741,220	\$26,859,256	\$473,881,964	5.4%
Total	\$3,940,860,672	\$38,603,337	\$3,902,257,335	1.0%

The debate concerning NCLB and the reauthorization of the ESEA may be heavily influenced by the reforms pushed in the initiative, but results are too early and may be too tentative.¹⁹⁸ The

“placing the state on “high-risk status,” limiting access to its remaining grant money, rejecting several requests for significant changes and delays in its Race to the Top plan, and planning an extensive on-site review in early 2012. And, in a more overarching statement that puts the fate of Hawaii’s \$75 million grant in question, the [D]epartment said it is “concerned” that Hawaii can’t fulfill the commitments it made to win the grant.

Id.

196. RACE TO THE TOP FUND, *supra* note 188.

197. Table 1 is reproduced from Jennifer Cohen Kabaker, *Stock Progress Race to the Top*, NEW AMERICA FOUNDATION (Feb. 22, 2011), http://edmoney.newamerica.net/blogposts/2011/state_progress_on_race_to_the_top-45323.

198. Ben Wolfgang, *Feds Ready 3rd Round of “Race to Top” for Schools*, WASH. TIMES, May 24, 2011, available at <http://www.washingtontimes.com/news/2011/may/24/feds-ready-3rd-round-of-race-to-top-for-schools/>.

results of an analysis of existing data for about 700 of the roughly 850 schools that entered the program back in the 2010–11 school year (the only year for which results are available), seem tentatively promising, according to the U.S. Department of Education. For instance, the Department reports that “about one in four schools saw double-digit increases in math proficiency whereas about one in five schools posted double-digit increases in reading proficiency. Overall, during the first year of the competitive grant program, the percent of students who were proficient in math or reading went up in roughly 60% of School Improvement Grants (SIG) schools.”¹⁹⁹

C. What Initial Evidence Reveals About the Relationship Between Race to the Top Funds & Closing the Achievement Gap

To determine whether the use of the Race to the Top grant money is making a difference in closing the achievement gap, it may be instructive to take a closer look at the national assessment progress results in the three states with the greatest capital outlays of Race to the Top Initiatives funds to date. In so doing, we can see from Table 1 above that these are Massachusetts (\$1,657,216 or 0.7 percent) and the two state winners from Round 1, Delaware (spending \$8,711,948 or 7.3 percent) and Tennessee (\$26,859,256 or 5.4 percent). The results are mixed, with some decreasing the achievement gap a few percentage points, while in other cases the gap persisted or even increased in percentage points. As Table 2 illustrates, the white/black achievement gap in Massachusetts actually increased from the 2009–10 to 2010–11 school year under the first year of the Race to the Top initiative from 36.4 to 39.8. For all other categories, the state decreased the achievement gap, most notably the gap for white/Hispanic students, which decreased from 41.5 to 34.2, a statistically significant result. However, as Table 3 illustrates, Massachusetts had some slight incremental success in closing the achievement gap among white/black students in math at the eighth grade level from 35.3 to 32.5 and even more progress in decreasing the gap among male/female students from 3.6 to 0.9.

199. Cameron Brenchley, *School Turnarounds Are Succeeding*, ED.GOV BLOG (Mar. 19, 2012), <http://www.ed.gov/blog/2012/03/school-turnarounds-are-succeeding/>.

TABLE 2: MASSACHUSETTS GRADE 4 MATH NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰⁰

Achievement gap as measured by percentage point difference on NAEP Mathematics 2011	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Massachusetts' approved plan: SY 2010–2011
White/Black gap	36.4	39.8	19.8
White/Hispanic gap	41.5	34.2	24.3
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	38.9	34.7	21.5
Male/Female gap	3.7	3.5	2

TABLE 3: MASSACHUSETTS GRADE 8 MATH NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰¹

Achievement gap as measured by percentage point difference on NAEP Mathematics 2011	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Massachusetts' approved plan: SY 2010–2011
White/Black gap	35.3	32.5	31
White/Hispanic gap	37.2	37.2	31.8
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	32.3	33	27.3
Male/Female gap	3.6	0.9	2

200. This table is reproduced from *Massachusetts' Race to the Top Annual Performance Report*, RACE TO THE TOP, http://www.rtt-apr.us/sites/default/files/full_report_pdfs/kitchell_s/massachusetts.pdf (last visited Sept. 8, 2012).

201. *Id.*

TABLE 4: MASSACHUSETTS GRADE 4 READING NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰²

Achievement gap as measured by percentage point difference on NAEP Reading 2011	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Massachusetts' approved plan: SY 2010–2011
White/Black gap	33	35.4	30
White/Hispanic gap	35.3	36.2	30
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	35.8	37.5	27.3
Male/Female gap	5.2	6.6	3.75

TABLE 5: MASSACHUSETTS GRADE 8 READING NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰³

Achievement gap as measured by percentage point difference on NAEP Reading 2011	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Massachusetts' approved plan: SY 2010–2011
White/Black gap	31.6	32.6	22.5
White/Hispanic gap	31.9	35	24.5
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	32.6	32	30
Male/Female gap	11.2	10.5	9.25

202. *Id.*

203. *Id.*

TABLE 6: DELAWARE—GRADE 4 READING NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰⁴

Achievement gap as measured by percentage point difference on NAEP Reading	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Delaware’s approved plan: SY 2010–2011
White/Black gap	27.4	24.2	N/A
White/Hispanic gap	22.8	25.2	N/A
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	24.2	28.9	N/A
Female/Male gap	5	5.9	N/A

TABLE 7: DELAWARE—GRADE 8 READING NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰⁵

Achievement gap as measured by percentage point difference on NAEP Reading	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Delaware’s approved plan: SY 2010–2011
White/Black gap	24.9	23.4	N/A
White/Hispanic gap	19.9	15.8	N/A
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	22.1	20.1	N/A
Female/Male gap	11.7	13.6	N/A

204. This table is reproduced from *Delaware’s Race to the Top Annual Performance Report*, RACE TO THE TOP, http://www.rtt-apr.us/sites/default/files/full_report_pdfs/kitchell_s/delaware_-_race_to_the_top.pdf (last visited Sept. 8, 2012).

205. *Id.*

TABLE 8: DELAWARE GRADE 4 MATH NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰⁶

Achievement gap as measured by percentage point difference on NAEP Mathematics	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Delaware’s approved plan: SY 2010–2011
White/Black gap	33.5	34.5	N/A
White/Hispanic gap	27.9	28.5	N/A
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	27.3	29.3	N/A
Female/Male gap	6.4	3.2	N/A

TABLE 9: DELAWARE GRADE 8 MATH NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰⁷

Achievement gap as measured by percentage point difference on NAEP Mathematics	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Delaware’s approved plan: SY 2010–2011
White/Black gap	30.3	29.8	N/A
White/Hispanic gap	21.2	22.9	N/A
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	23.9	25.7	N/A
Female/Male gap	1.6	-2.2	N/A

206. *Id.*

207. *Id.*

TABLE 10: TENNESSEE—GRADE 4 MATH NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰⁸

Achievement gap as measured by percentage point difference on Tennessee's NAEP Mathematics 2011	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Tennessee's approved plan: SY 2010–2011
White/Black gap	28.9	24	N/A
White/Hispanic gap	16.5	17	N/A
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	25.9	25.1	N/A
Male/Female gap	1.4	1.4	N/A

TABLE 11: TENNESSEE—GRADE 8 MATH NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²⁰⁹

Achievement gap as measured by percentage point difference on Tennessee's NAEP Mathematics 2011	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Tennessee's approved plan: SY 2010–2011
White/Black gap	20.6	19.2	N/A
White/Hispanic gap	11.2	12.8	N/A
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	21.9	22.9	N/A
Male/Female gap	1.2	4.5	N/A

208. This table is reproduced from *Tennessee's Race to the Top Annual Performance Report, RACE TO THE TOP*, http://www.rtt-apr.us/sites/default/files/full_report_pdfs/kitchell_s/tennessee.pdf (last visited Sept. 8, 2012).

209. *Id.*

TABLE 12: TENNESSEE—GRADE 4 READING NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²¹⁰

Achievement gap as measured by percentage point difference on Tennessee's NAEP reading 2011	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Tennessee's approved plan: SY 2010/2011
White/Black gap	21.8	20.4	N/A
White/Hispanic gap	17.5	15.2	N/A
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	21.5	26	N/A
Male/Female gap	4.9	5.4	N/A

TABLE 13: TENNESSEE—GRADE 8 READING NAEP ACHIEVEMENT GAP RESULTS UNDER RACE TO THE TOP—YEAR 1²¹¹

Achievement gap as measured by percentage point difference on Tennessee's NAEP reading 2011	Baseline: SY 2008–2009	Actual: SY 2010–2011	Target from Tennessee's approved plan: SY 2010–2011
White/Black gap	22.6	19.6	N/A
White/Hispanic gap	13	7.7	N/A
Not National School Lunch Program Eligible/National School Lunch Program Eligible gap	22.7	20.9	N/A
Male/Female gap	8.2	9.4	N/A

As the foregoing tables illustrate, in the states with the greatest drawdown of grant funds to date under the Race To The Top initiative, the outcome has been mixed, with incremental progress in some cases and increasing gaps in others. Although slight progress has been made, it is worth asking what accounts for this progress.

For instance, what did Tennessee do to narrow the achievement gap among whites and blacks in fourth grade reading NAEP (from

210. *Id.*

211. *Id.*

21.8 to 20.4) and among whites and Hispanics (17.5 to 15.2) between 2009–10 to 2010–11? Tennessee also narrowed the achievement gap in fourth grade math between whites and blacks (from 28.9 to 24).²¹² What accounts for this? Tennessee's eighth grade reading NAEP also narrowed between whites and blacks from 22.6 to 19.6) and between those not eligible for reduced school lunch and those that were (22.7 to 20.9) and in eighth grade reading NAEP between whites and Hispanics (from 13 to 7.7).²¹³ It also narrowed the achievement gap between whites and blacks in eighth grade math NAEP (from 20.6 to 19.2).²¹⁴ In Tennessee, preliminary college enrollment rates, as reported by National Student Clearinghouse, show significant increases among ethnic demographics from 2009–10 to 2010–11: American Indian, 45.7 percent to 63 percent; Asian or Pacific Islander, 75.9 percent to 78.4 percent, a slight increase among Black non-Hispanics from 54.8 percent to 55.9 percent.²¹⁵ Hispanic college enrollment declined slightly from 47.9 percent to 46.7 percent.²¹⁶ Children with disabilities increased from 27.5 percent to 32.6 percent.²¹⁷ College course completion increased for every racial/ethnic subgroup except whites which remained the same. American Indian/Alaska natives increased from 65 percent to 78.6 percent.²¹⁸ Asian/Pacific Islander increased from 83.6 percent to 85.4 percent,²¹⁹ and Black, non-Hispanics increased from 64.7 percent to 65.3 percent.²²⁰

Since being awarded upward of \$501 million, Tennessee's state and local school districts have begun executing a dramatic set of school reforms. The first year was a combination of planning and successes. Among these accomplishments, Tennessee re-engineered its accountability system to use data in classrooms and evaluation. It proposed changes to tenure connected to the new evaluation system

212. See *supra* note 208 and accompanying table 10.

213. See *supra* note 211 and accompanying table 13.

214. See *supra* note 209 and accompanying table 11.

215. See *Tennessee's Race to the Top Annual Performance Report*, *supra* note 208.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

and lengthening the tenure window from three to five years. It also improved its feedback mechanisms by achieving state-wide participation on the TELL Tennessee Survey, the “first learning conditions survey in the state and making Tennessee the #1 state for first time participation.”²²¹ It also used data to institute professional development and infused resources needed to support “parental involvement, leadership development, identified professional development and school wide climate change.”²²² Tennessee also increased professional development opportunities to “improve instruction such as training Value Added Specialists in the use of value added data, districts on the use of formative assessment practices to improve instruction and more than 90,000 hours of available online course training.”²²³ Tennessee also established the STEM Innovation Network to build and connect science, technology, engineering, and math resources across the state.²²⁴ Notably, Tennessee was successful in supporting the Stratford Academy of Science and Engineering, which opened in Metro Nashville in fall 2010.²²⁵ Knox County opened a STEM school in fall 2011.²²⁶ Tennessee also replicated the UTEACH program at state universities to recruit high-performing math and science students to take courses in education and earn teaching certificates.²²⁷ The state also contributed funds to “grow and support charter schools in a broad public-private partnership and made extensive progress towards selecting the state supported rubric for the observation portion of the new teacher evaluation.”²²⁸ Newly certified teachers in the state also increased from 4,866 to 5,123.²²⁹ Progress in implementing a high-quality STEM plan, the statewide percentage of students meeting college and career-ready benchmarks increased in math from 24

221. See RACE TO THE TOP, TENNESSEE REPORT, YEAR 1—SCHOOL YEAR 2010–2011 12–17 (Jan. 10, 2012), available at <http://www2.ed.gov/programs/racetothetop/performance/tennessee-year-1.pdf>.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

percent to 40 percent and in science from 18 percent to 36 percent since 2009.²³⁰ While Tennessee has made some progress in closing the achievement gap based on preliminary results, it is by far not the best in raising overall academic achievement on NAEP benchmarks. Massachusetts may be much better in that regard whereas others, such as Washington, D.C., which hail recent increases in NAEP test scores, nonetheless trail behind Mississippi, Louisiana, California and Alabama, which appear to have a poorer record of achievement.²³¹ However, the reforms Tennessee has adopted are similar to other states but with some inconsistency, delay, and inefficiencies in communication and political buy-in.²³² Yet the need for greater collaboration, coordination, and communication is needed among the states, local stakeholders, and the Department of Education to ensure that these reforms are successful.²³³

It is instructive to note that many of the reforms in Tennessee did not focus on the reassignment of students based on race or middle income. While there is certainly a worthwhile benefit in promoting racial acceptance in K-12 education through such integration

230. *Id.*

231. Bill Turque, *Closer Look Puts D.C. NAEP Math Scores in Context*, WASH. POST (Nov. 2, 2011), http://www.washingtonpost.com/blogs/dc-schools-insider/post/closer-look-issues-dc-naep-math-scores-in-context/2011/11/02/gIQA8uxfM_blog.html.

Forty percent of fourth graders are below basic, far behind Mississippi (28 percent) Louisiana (27 percent) California (26 percent) and Alabama (25 percent). Just 21 percent are proficient/advanced, again trailing Mississippi (25), Louisiana (26) and Alabama (28). The numbers [in D.C.] are worse in 8th grade with 52 percent below basic, again trailing Mississippi (42) Alabama (40) and Louisiana (37). The District is dead last in proficient/advanced (17 percent).

Id.

232. See generally Ulrich Boser, *Race To the Top: What Have We Learned from the States So Far*, CENTER FOR AMERICAN PROGRESS (Mar. 26, 2012), http://www.americanprogress.org/issues/2012/03/pdf/rtt_states_execsumm.pdf.

233. *Id.* at 4. The Center for American Progress has made a number of recommendations for the Race to the Top Program. It notes, *inter alia*, that “[s]tates should build capacity for reform. States promised a great deal in their Race to the Top [RTT] grants. If states plan to achieve these lofty goals they will need to do far more to improve capacity at the state and local levels to deliver on their promises.” It also notes that “[c]ollaboration among key interest groups—administrators, unions, and parents—will be key to the success of Race to the Top and states and districts must do more to create buy-in. In some states, the voices of key stakeholders have not been heard, and so we recommend that states and districts do more to build a big tent when it comes to RTT implementation.” *Id.*

schemes,²³⁴ reducing racial or poverty isolation has not been the focus of closing the achievement gap under Race to the Top. Many of the reforms in Tennessee were among the six reform priorities called for in the grant program which included: (1) comprehensive education reform;²³⁵ (2) an emphasis on Science, Technology, Engineering and Math (STEM) programs,²³⁶ (3) improving early learning outcomes,²³⁷ (4) expansion and adaptation of statewide

234. *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 742 (2d Cir. 2000); *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 355–56 (D. Mass. 2003); *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 65 n.12 (D. Mass. 2000); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 15 (1st Cir. 2005); *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 485 n.5 (1979); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

235. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY (2009), *supra* note 179, at 4.

To meet this priority, the State's application must comprehensively and coherently address all of the four education reform areas specified in the [American Recovery and Reinvestment Act Of 2009] as well as the State Success Factors Criteria in order to demonstrate that the State and its participating [Local Education Agencies (LEAs)] are taking a systemic approach to education reform. The State must demonstrate in its application sufficient LEA participation and commitment to successfully implement and achieve the goals in its plans; and it must describe how the State, in collaboration with its participating LEAs, will use Race to the Top and other funds to increase student achievement, decrease the achievement gaps across student subgroups, and increase the rates at which students graduate from high school prepared for college and careers.

Id.

236. *Id.*

To meet this priority, the State's application must have a high-quality plan to address the need to (i) offer a rigorous course of study in mathematics, the sciences, technology, and engineering; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities for students; and (iii) prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics, including by addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering, and mathematics.

Id.

237. *Id.*

The Secretary is particularly interested in applications that include practices, strategies, or programs to improve educational outcomes for high-need students who are young children (pre-kindergarten through third grade) by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.

longitudinal data;²³⁸ (5) P-20 seamless coordination vertically (grade to grade between early childhood and K–12, or between K–12 and postsecondary/careers) as well as horizontally (coordination across schools, state agencies and community partners);²³⁹ and (6) school-level conditions for reform, innovation and learning.²⁴⁰

Id.

238. *Id.* at 4–5.

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, English language learner programs, early childhood programs, at-risk and dropout prevention programs, and school climate and culture programs, as well as information on student mobility, human resources (*i.e.*, information on teachers, principals, and other staff), school finance, student health, postsecondary education, and other relevant areas, with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked, answered, and incorporated into effective continuous improvement practices. The Secretary is also particularly interested in applications in which States propose working together to adapt one State’s statewide longitudinal data system so that it may be used, in whole or in part, by one or more other States, rather than having each State build or continue building such systems independently.

Id. (footnote omitted).

239. *Id.* at 5.

The Secretary is particularly interested in applications in which the State plans to address how early childhood programs, K–12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners (*e.g.*, child welfare, juvenile justice, and criminal justice agencies) will coordinate to improve all parts of the education system and create a more seamless preschool-through-graduate school (P-20) route for students. Vertical alignment across P-20 is particularly critical at each point where a transition occurs (*e.g.*, between early childhood and K–12, or between K–12 and postsecondary/careers) to ensure that students exiting one level are prepared for success, without remediation, in the next. Horizontal alignment, that is, coordination of services across schools, State agencies, and community partners, is also important in ensuring that high-need students (as defined in this notice) have access to the broad array of opportunities and services they need and that are beyond the capacity of a school itself to provide.

Id.

240. *Id.*

The Secretary is particularly interested in applications in which the State’s participating LEAs (as defined in this notice) seek to create the conditions for reform and innovation as well as the conditions for learning by providing schools with flexibility and autonomy in such areas as—(i) Selecting staff; (ii) Implementing new structures and formats for the school day or year that result in increased learning time (as defined in this notice); (iii) Controlling the school’s budget; (iv) Awarding credit to students based on student performance instead of instructional time; (v) Providing comprehensive services to high-need students (as defined in this notice) (*e.g.*, by mentors and other caring adults; through local partnerships with community-based

CONCLUSION

This Article has alluded to some of the same priorities nominally noted in the Race to the Top Plan selection criteria, but they are not the only worthwhile or even the most effective reforms. How they are implemented and the extent to which they are soundly adopted will determine the success of the program in truly closing the achievement gap. Indeed, more emphasis on the well-being of the whole child is needed, and merely replicating the mistakes of NCLB, or without removing its nefarious effects, the Race to the Top program will be working at cross-purposes with itself. As Mark Spitz, a recent commentator on MSNBC, noted, when the spiritual, emotional, and psychological needs are ignored whereby sports programs are cut, leading minority youth to find camaraderie not among team members but among gang members as a substitute means of self-expression and a sense of belonging, we miss critical opportunities to leverage extracurricular events to foster greater attachment to the school community that helps to counteract absenteeism and dropout.²⁴¹

It is time not only to focus on what schools are doing right in ways that defy conventional wisdom but also to see what they are not doing wrong with respect to the systematic repression that is the silent elephant in the room. Race to the Top reforms need to attach penalties as disincentives for adopting or leaving in place such devastating policies (including those under NCLB) that undermine a culture of excellence, well-being, and high expectations. An open, honest dialogue with the Department of Education and with all local stakeholders is needed to hold schools and other private and public actors accountable for the way in which students of color are treated and regarded in our interlocking systems of repression. It is often said that there is no silver bullet to the educational crisis facing our nation's educational system. Perhaps we are still waiting for

organizations, nonprofit organizations, and other providers); (vi) Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; and (vii) Implementing strategies to effectively engage families and communities in supporting the academic success of their students.

Id.

241. Mark Spitz, *Morning Joe, Top Talkers*, MSNBC (June 21, 2012), <http://www.msnbc.msn.com/id/3036789/vp/47901067#47901067>.

Superman. But as John F. Kennedy said, “[o]ur problems are man-made, therefore they may be solved by man. And man can be as big as he wants. No problem of human destiny is beyond human beings.”²⁴² This does not mean, however, that the same conventional thinking that created these issues will be sufficient to address them. As Albert Einstein astutely noted, “[t]he world we have created today as a result of our thinking thus far has problems which cannot be solved by thinking the way we thought when we created them.”²⁴³ No educational reform will succeed if it does not address both sides of the same coin: systemic racial discrimination in and beyond the classroom (as opposed to solely classroom racial integration) and self-empowerment. As humanity seeks answers to these problems, it must confront its worst enemy and lay its hope on the only Superman savior it will have—itsself.

242. John F. Kennedy, Address at American University, Washington, D.C. (June 10, 1963).

243. DAVID E. ROWE & ROBERT SCHULMANN, *EINSTEIN ON POLITICS: HIS PRIVATE THOUGHTS AND PUBLIC STANDS ON NATIONALISM, ZIONISM, WAR, PEACE, AND THE BOMB* 383 (David E. Rowe & Robert Schulmann eds., 2007).