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# Disabling Racial Repetition

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## Disabling Racial Repetition

Zanita E. Fenton†

### Introduction

Because of institutionalized racism, combined with institutionalized ableism, extreme numbers of Black boys receive inadequate education. Black children, especially boys, are disciplined, suspended, and expelled when it is least likely that their parents will challenge the outcome; this most often is the case when their parents are in poverty.<sup>1</sup> When the parents of a Black child are more affluent and generally more engaged in the educational welfare of their child—often by challenging disciplinary measures—there is an increased likelihood that their child will be diagnosed as intellectually disabled (formerly known as mental retardation) or emotionally disturbed.<sup>2</sup> The effect of this dynamic is that Black children are expelled whenever feasible. When it is less than practicable, as when the parents are more affluent, the child is placed in an educational category that permits segregation from the general population, and is thereby placed in a position to receive inferior services and education.

The causes of the disproportionate representation of Black male students amongst the intellectually disabled and emotionally disturbed categorizations are “numerous and controversial,”<sup>3</sup> but most pertinently, are persistent.<sup>4</sup> This disproportional representation provides the “justifications” for continuation in

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1. Deborah L. Voltz, *Cultural Diversity and Special Education Teacher Preparation: Critical Issues Confronting the Field*, 21 TCHR. EDUC. & SPECIAL EDUC. 63, 64–66 (1998).

2. See Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1084 (2005).

3. *Id.* at 1093.

4. See DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 16–18 (2012), available at <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-ccrr-2012.pdf>.

segregated class placements.<sup>5</sup>

Despite remarkable legislative achievements over the last thirty-seven years, minority students remain doubly vulnerable to discrimination. First, they tend to receive inequitable treatment within school systems that remain segregated and unequal. Second, they are put disproportionately at risk of receiving inadequate or inappropriate special education services because of systemic problems with special education identification and placement.<sup>6</sup>

As Black males primarily bear the consequences of this repetition, the artificial categories of race, gender, and disability converge in the creation of this crisis. In spite of efforts at reform, social biases in the administration of education, in concert with legal structures enabling these biases in the system, produce extremely unjustifiable and disproportionate outcomes.<sup>7</sup> The frustration is that this is not a new circumstance, but one that continues to resurface, reinvent, and repeat itself.

Compounding this is a long history of educators using "punishment" as the primary approach to educating children with

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5. See Lloyd Dunn, *Special Education for the Mildly Retarded--Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD. 5, 6 (1968); Kathy-Anne Jordan, *Discourses of Difference and the Overrepresentation of Black Students in Special Education*, 90 J. AFR. AM. HIST. 128, 135–36, 140 (2005); Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L. J. 1, 27 (2006); see also U.S. DEP'T OF EDUC., TWENTY-SEVENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 48 (2005), available at <http://www.ed.gov/about/reports/annual/osep/2005/parts-b-c/27th-vol-1.pdf> (discussing data for students ages six to twenty-one, and noting that "Black students with disabilities . . . were more likely to be educated in *separate environments* . . .").

6. 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, 408 (2001) (citations omitted).

7. See Daniel J. Losen & Gary Orfield, *Racial Inequity in Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION xv, xxiii (Daniel J. Losen & Gary Orfield eds., 2002)

[T]rends include the following: (a) pronounced and persistent racial disparities in identification between [W]hite and [B]lack children in the categories of [intellectual disability] and emotional disturbance, compared with far less disparity in the category of specific learning disabilities; (b) a minimal degree of racial disparity in medically diagnosed disabilities [such as deafness, blindness, and orthopedic impairment] as compared with subjective cognitive disabilities; (c) dramatic differences in the incidence of disability from one state to the next; and (d) gross disparities between [B]lacks and Hispanics, and between [B]lack boys and girls, in identification rates for the categories of [intellectual disability] and emotionally disturbed.

*Id.*

learning disabilities.<sup>8</sup> “All too often, schools treat children whose emotional disabilities lead them to behave inappropriately as bad children who deserve to be punished rather than as children who need to learn to understand and control their own behavior.”<sup>9</sup> In a corresponding manner, teachers discipline Black children, especially boys, more than they discipline non-minority children for similar or lesser behaviors.<sup>10</sup> This over-disciplining of minority children, in combination with their disproportionate representation in special education, reinforces the segregation and inferior education of minority students, particularly Black males.<sup>11</sup> “That students of color are shunted into the special education ranks for disciplinary or other reasons is by no means a new phenomenon; in fact the history of the symbiotic relationship of [B]lack students and such labeling is long and protracted.”<sup>12</sup> With this relationship, one can only wonder whether the labeling of a disproportionate number of Black students as intellectually disabled is just another means of punishment.

Many education scholars credit Lloyd Dunn’s 1968 study<sup>13</sup> as first identifying the disproportionate placement of Black boys in low tracks or ability groups who are labeled as intellectually disabled or emotionally disturbed as an issue for concern.<sup>14</sup> Since this study, there have been numerous others that have reached the same conclusion, each at a different point in time.<sup>15</sup> There

8. Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 325–28 (1993) (detailing the “punitive paradigm” as an existing approach to disability in education and suggesting a “learning paradigm” would be more appropriate and effective).

9. *Id.* at 325–26.

10. See Mike Cole & Maud Blair, *Racism and Education: From Empire to New Labour*, in EDUCATION, EQUALITY AND HUMAN RIGHTS: ISSUES OF GENDER, ‘RACE’, SEXUALITY, DISABILITY AND SOCIAL CLASS 70, 77 (Mike Cole ed., 2d ed. 2006) (“Perhaps even more significant than the frequency of criticism and controlling statements which Afro-Caribbean [sic] pupils/students received was the fact that they were often singled out for criticism even though several pupils/students of different ethnic origins were engaged in the same behaviour[.]” (quoting DAVID GILLBORN, ‘RACE’, ETHNICITY, AND EDUCATION 30 (1990))).

11. See Jordan, *supra* note 5, at 129.

12. Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 EDUC. L. REP. 759, 772 (2000).

13. See Dunn, *supra* note 5.

14. See, e.g., Melvyn I. Semmel, Michael M. Gerber & Donald L. MacMillan, *Twenty-Five Years After Dunn’s Article: A Legacy of Policy Analysis Research in Special Education*, 27 J. SPECIAL EDUC. 481, 487 (1994) (indicating that Dunn’s 1968 paper marked a turning point in the field of special education contextualized by a new focus on the “fairness and appropriateness of the field’s procedures”).

15. See, e.g., John L. Hosp & Daniel J. Reschly, *Disproportionate Representation*

have been studies, changes in statutes, directives from case law, and discussions of best practices, none of which seem to change the ultimate conclusion reached by the next study. Even though Dunn's 1968 article continues to be widely cited,<sup>16</sup> the evils he pointed out remain largely unaddressed in the years since its publication.<sup>17</sup>

The legal origins of the modern manifestation of this crisis in the landscape of education are located in the case of *Brown v. Board of Education (Brown I)*.<sup>18</sup> *Brown I*, which prohibited legalized segregation but did not require *actual* equality, exemplifies how the law appears to promote profound change, yet simultaneously enables a migration back to the original state of affairs.<sup>19</sup> This paradox is the primary theme of this essay: that which is seemingly designed to address a problem is instead used as a tool to subordinate and maintain the status quo. Education, on the whole, continues to be segregated and differentially delivered.<sup>20</sup> On a basic level, *Brown I* eschewed meaningful equality in educational opportunity for the empty pragmatics of desegregation. *Brown I* was also less than definitive in its dictates

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of *Minority Students in Special Education: Academic, Demographic, and Economic Predictors*, 70 EXCEPTIONAL CHILD. 185 (2004); Thomas Parrish, *Racial Disparities in the Identification, Funding, and Provision of Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION 15 (Daniel J. Losen & Gary Orfield eds., 2002); Beth A. Ferri & David J. Connor, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 TEACHERS C. REC. 453 (2005). Since the 1970s, studies from the United States Office of Civil Rights have demonstrated the pervasive overrepresentation of students of color labeled as disabled. David J. Connor & Beth A. Ferri, *Integration and Inclusion – A Troubling Nexus: Race, Disability, and Special Education*, 90 J. AFR. AM. HIST. 107, 111 (2005).

16. See James McLeskey, *Classic Articles in Special Education: Articles That Shaped the Field, 1960 to 1996*, 25 REMEDIAL & SPECIAL EDUC. 79, 81–82 (2004).

17. See Gary Orfield, *Foreward* to LOSEN & GILLESPIE, *supra* note 4, at 4 (asserting that Black males are disproportionately suspended and “disproportionately placed into categories of special education that are associated with extremely poor outcomes”).

18. 347 U.S. 483 (1954).

19. For a discussion of the delays in implementing the remedies for educational segregation and of the current state of continued segregation in education and difference in opportunity, see CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004). Once there is a court decision, indeed a Supreme Court decision, which abolishes legal segregation, a “we took care of that” attitude emerges, a belief that all past problems are fixed. Even if everything is *not* fixed, the pervasive attitude suggests that the continuing problems are not legal, that these problems were not created by the law or legal systems, and that they may not even be the kind that can or should be fixed. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 5–9 (1992).

20. See MARTHA MINOW, *IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* 26–27 (2010).

of equality; it may have affirmatively disavowed segregation, but it did not then take the next step of affirming the principles of meaningful equality. In truth, the malleability of the legal doctrine arising from *Brown I* has been a significant means of facilitating retreat from the hope of equality promised by *Brown I*. Legislative acts and other legal options continue in the same manner, being so open to manipulation that the intended solution is instead used as a tool for subordination.<sup>21</sup> In effect, *Brown I* may have opened the door for equality in education, but it did nothing to prevent the undermining of its own basic principles.

Comprehension of the reoccurring, yet indefensible, disproportionate labeling of Black boys as intellectually disabled may be found in the labyrinth of structures perpetuated by laws, policies, and institutions that operate to ensure the continued subordinated status of groups based on race and disability, each used to reinforce the other. The repetition of disproportionate labeling of Black boys in the categories of intellectual disability and emotional disturbance is only symptomatic in a range of social repetitions related to education that operate to continue subordination of certain groups, most often defined by race, class, and disability status. Punishment for marginalized students is too often preferred over inclusion and needs-based education, preconditioning entry into the criminal justice system.<sup>22</sup> There are also repetitions in the differential delivery and inferior quality of education. Racial segregation continues both between school districts and within single schools.<sup>23</sup>

This crisis in education is situated at the juncture of social bias, inertial education policy, and malleable legislation. This essay seeks to illuminate the interaction of some relevant variables which routinely return to the original status. Part I engages in basic logic and light economic analyses to understand how, despite the fact that realization of universal education would maximize individual potential to the benefit of society, education has become a focus of social competition. Part I also describes the role of *Brown I* in both promising educational reform while simultaneously allowing restoration of the original predicament. Part II examines the exploitation of the interaction between socially subordinated categories to perpetuate those forms of subordination. It first focuses on the role of case law and

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21. See Garda, *supra* note 2, at 1090–93, 1100.

22. See ANN ARNETT FERGUSON, BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY 230 (2000).

23. See Weatherspoon, *supra* note 5, at 9–13.

legislation in this ecosystem. It then discusses forms of social bias that serve as the basis for the discretion of relevant actors in the administration and delivery of education. Part III focuses on the No Child Left Behind Act and the manner in which it has intensified mis-education of all children and deepened levels of inequality in education. To conclude, Part IV laments the inadequacy of reform efforts that are sometimes more harmful than the subject of those reforms. It also ties mis-education to the other prevalent social disproportions for both persons of color as well as individuals with intellectual disabilities. It ends with a plea that future reform efforts struggle more intensely and effectively to accomplish the goal of equality in education.

## I. The Economics of Social Competition

### *A. Education: A Tragedy of the Commons*

Education is essential to the success and sustainability of most every area of social accomplishment and standing.<sup>24</sup> Therefore, education is a primary means of breaking barriers to achievement. Controlling for logistical practicalities and resource differentials, education might be viewed as being a good of infinite supply. It is conceivable that all individuals may receive an appropriate education. If, in fact, there is a limitless supply of education, it would seem that the relevant actors would have no incentive to perpetuate differential distribution.

However, because education as a variable is a key to entry to, or maintenance of, the various forums for social power, its access is jealously coveted.

[A study by McKinsey & Co.], . . . estimated closing the gap in the U.S. between White students and their Black and Latino peers could increase annual GDP by as much as an additional \$525 billion, or about 4%. In its report, McKinsey said existing achievement gaps have "created the equivalent of a permanent, deep recession in terms of the gap between actual and potential output in the economy."<sup>25</sup>

Even where the greatest overall benefit would be achieved without it, education becomes a catalyst for generating competition.<sup>26</sup> Thus, what would otherwise be a non-zero-sum

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24. See Catherine Foley Geib et al., *The Education of Juveniles in Detention: Policy Considerations and Infrastructure Development*, 21 LEARNING & INDIVIDUAL DIFFERENCES 3–6 (2011); Weatherspoon, *supra* note 5, at 8.

25. Robert Tomsho, *Study Tallies Education Gap's Effect on GDP*, WALL ST. J., Apr. 22, 2009, <http://online.wsj.com/article/SB124040633530943487.html>.

26. Here the meaning of "competition" is intended to be pejorative, consistent

game becomes zero-sum with multiple stakes, giving actors the impression that education as a good is scarce and is therefore one for which they must compete. The resulting perceptions of scarcity of goods gives incentives to the actors “at the top” of one hierarchy to cooperate with other actors “at the top” of another as a means of hoarding this scarce good and thus ensuring continuation of both positions. Other actors, consequently, have incentive to get to the top and then to maintain the relevant hierarchy. What results is a multi-party form of prisoner’s dilemma: a situation where the quest for individual benefit results in the least desirable results overall. More accurately, this situation is best described as a variation on the “tragedy of the commons.”<sup>27</sup> That is, even though the greatest good would be accomplished through a greater distribution of appropriate education, individuals generally perceive the good to be a limited resource and thus act in their self-interest.

This is consistent with the current observations of scholars within education:

[W]hat has come to be known as the disproportionate representation of minorities in special education programs is the result of a series of social processes that, once set in motion, are interpreted as the inevitable outcomes of real conditions with children. These social processes do not occur by happenstance, or by the good or evil intentions of a few individuals. Rather, they reflect a set of societal beliefs and values, political agendas, and historical events that combine to construct identities that will become the official version of who these children are.<sup>28</sup>

Recognizing the interaction of the relevant socially constructed hierarchies is essential to understanding the magnitude of the problem. Disability is often misunderstood and stigmatized; race has been, historically, a disabling factor in education and in most other areas of life.<sup>29</sup> Society emphasizes the medical nature of disability, understanding difference as “scientific, genetic, or inherent.”<sup>30</sup> Individuals have only recently come to understand disability as socially constructed. That is,

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with theories of social Darwinism, see Thomas C. Leonard, *Origins of the Myth of Social Darwinism: The Ambiguous Legacy of Richard Hofstadter's Social Darwinism in American Thought*, 71 J. ECON. BEHAV. & ORG. 37, 40 (2009), as contrasted with the assumed ambition for the efficient allocation of resources, see ADAM SMITH, *THE WEALTH OF NATIONS* (New York, Alfred A. Knopf, Inc. 1991).

27. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

28. BETH HARRY & JANETTE KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? 7 (2006).

29. See Jordan, *supra* note 5, at 136–40.

30. *Id.* at 135; see also FERGUSON, *supra* note 22, at 43.



disability is defined as a function of an individual's impairment in context.<sup>31</sup> This definition also easily functions for understanding race, gender, and sexual identity.<sup>32</sup> Each of these categories has been understood as "natural" difference, grounded in the "scientific," "genetic," "inherent," and considered "immutable."<sup>33</sup> The socially constructed variant of disability interplays with the "disabling" social identities of race and gender in ways we need to better understand. "All people have multiple identities. . . . These identities take on different meanings and importance in different contexts."<sup>34</sup> Each socially constructed category—especially in the context of education—has an impact on the success of, and on, the process by which the system of education should address its own failings.

We must also be mindful that there is overlap in the labels and categories when we discuss the lives and realities of real people. The position of Black males in public education, particularly in conjunction with their labeling as learning disabled, is at the crossroads of understanding this overlap, the impact on socially understood realities, and especially the failings of the current system of education:

By bringing into line through special education those who comply with ideological mandates, as well as by excluding and containing those who insist on staking their claim for recognition as human beings, these policies become the most effective way of supporting the *racialization of disability* and the *disabilization of race* in the ghettos of special education.<sup>35</sup>

"The dramatic racial disparities and negative consequences of identification as disabled occur in a society that claims to stand for racial equality but has historically had difficulty recognizing and

31. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1243, 1301–07 (1995) (citations omitted).

32. See Glennon, *supra* note 8, at 313–16 (describing the "social construction" approach and how it applies to all areas of "human understanding").

33. There are many parallels in the treatment of disability and race, understood through the lens of gender, especially in the context of education. It is important to acknowledge that the socially constructed category of gender has a racial component. That is, "maleness" becomes a subordinating factor when combined with a racial minority status. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006). In addition, this discussion implicitly (and sometimes explicitly) deals with issues of wealth or class. Class is implicit because of the long-standing disproportional representation of racial minority populations amongst the poor.

34. Susan J. Peters, *Disability Culture*, in 1 ENCYCLOPEDIA OF DISABILITY 412, 418 (Gary L. Albrecht ed., 2006).

35. Nirmala Erevelles, *Race and Ethnicity*, in 1 ENCYCLOPEDIA OF DISABILITY 1335, 1341 (Gary L. Albrecht ed., 2006).

remedying pervasive racial discrimination. Special education has been used as a tool of racial discrimination.<sup>36</sup> That is to say, stratifications based on race and those based on disability are used to reinforce each other.

It may be that the structure of any given hierarchy is invested in its own affirmation and continuation.<sup>37</sup> It is also the case that where there are multiple lines of hierarchy, each coordinates with others to maintain the social status quo. Indeed, the dynamic described within this essay suggests not only are all Black children presumed to have an intellectual disability, so are non-minority children who are labeled intellectually disabled implicitly tainted with "racial inferiority."<sup>38</sup>

When we ask policy makers and educators to eliminate the disparities in education, we must confront the question about how to educate the educators.<sup>39</sup> In a system of mutually sustaining hierarchies, altering only one element, rather than a wholesale redesign of the entire system (without more direction), allows readjustment and return to the original order. Single-focus reforms instead of systemic solutions account for the repetition in outcomes.<sup>40</sup> The familiarity of repetition emulates what is natural, providing a level of comfort and excusing society from analytic engagement in the underlying issues. The subordinating systems of race and of disability, along with legal structures, coordinate to ensure the continuation of the relevant hierarchies.<sup>41</sup> Repetition of subordination then becomes cathartic, even therapeutic, for those

36. Glennon, *supra* note 31, at 1242.

37. Some might suggest that this would not be true in a Marxist society because the intent of Marxist ideology is the elimination of hierarchy; at least as Marx saw it, Marxism aimed to eliminate both capitalism and the exploitation of workers. See KARL MARX & FREDERICH ENGELS, *THE COMMUNIST MANIFESTO* (Joseph Katz ed., Samuel Moore trans., Washington Square Press 1964) (1848). Nonetheless, societies that have attempted to follow Marxist ideals have most often replaced gaping economic and class disparities with other sorts of privileges, such as political privileges. MILOVAN DJILAS, *THE NEW CLASS: AN ANALYSIS OF THE COMMUNIST SYSTEM* 70–102 (1957).

38. Glennon, *supra* note 31, at 1276.

39. Karl Marx, *Theses on Feurbach*, in *THE MARX-ENGELS READER* 144 (Robert C. Tucker ed., 2d ed. 1978).

40. See Jordan, *supra* note 5, at 412–14.

41. See Losen & Welner, *supra* note 6 (exploring this dynamic regarding the coordination of systems of subordination); see also Zanita E. Fenton, *Silence Compounded – the Conjunction of Race and Gender Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 271 (2003) (describing the interaction of race and gender to create stereotypes justifying violence); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1 (1998) (discussing the interaction of race and gender to create stereotypes justifying violence).

in positions of power.

*B. Persistent Inequality Enabled by Brown's Paradox*

*Brown I* is most often cited and hailed for ending legalized racial segregation (even though *Loving v. Virginia*<sup>42</sup> was not decided for another thirteen years) and opening educational opportunities for non-White children.<sup>43</sup> *Brown I* is also understood by education advocates as a case that paved the way for the educational rights of children with disabilities.<sup>44</sup> The ideal of a right to education for students with disabilities was furthered by the requirement of a free and appropriate public education, as identified in *Pennsylvania Ass'n for Retarded Citizens v. Pennsylvania*<sup>45</sup> and in *Mills v. Board of Education of the District of Columbia*,<sup>46</sup> which mandated that no child, even one with behavioral problems, be excluded from public education for the reason of a disability. Given the credit for such monumental progressions, it is no wonder that *Brown I* has taken on an iconic appeal in the field of education.

However, *Brown I* has another side that completes the paradox. The Court in *Brown I* made a choice to eliminate state sponsored segregation in education, but did not mandate implementation of meaningful equality.<sup>47</sup> The aftermath of *Brown*

42. 388 U.S. 1 (1967).

43. See also *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd sub nom.* *Westminster Sch. Dist. of Orange Cnty. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (preceding *Brown I* and paving the way for desegregation for Latino students).

44. See David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 194 (1991).

45. 334 F. Supp. 1257 (E.D. Pa. 1971) (consent decree 1972).

46. 348 F. Supp. 866 (D.D.C. 1972).

47. The Court did not require the implementation of any means designed to accomplish real equality when it overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896). The "separate but equal" doctrine, created by *Plessy*, proved to be followed only in required separation. Court challenges seeking to enforce the equality side of the doctrine (for example, *Sweatt v. Painter*, 339 U.S. 629 (1950) and *McLaurin v. Oklahoma*, 339 U.S. 637 (1950)) eventually led to the decision in *Brown I*, which overruled *Plessy* and ended legal segregation, but did not require or ensure formal equality. The unstated assumption that the elimination of legal segregation would be sufficient to foster equality was idealistic and naïve at best, but more likely a deliberate move to allow self-preservation of the state. The need to improve the international image of the United States as a moral authority during the ideological battles of the Cold War was more influential in accomplishing the *Brown I* decision than genuine commitment to the educational needs of segregated minority students. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 60-68 (2004); MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY*

I provided neither equality nor desegregation.<sup>48</sup> *Brown* also did not identify education as an individual right.<sup>49</sup> By failing to identify education as a fundamental right, the current legal order has created system-wide hurdles for democracy,<sup>50</sup> individual liberty and free speech,<sup>51</sup> work and self-sufficiency,<sup>52</sup> and equality. These very hurdles have been instrumental in perpetuating a form of homeostatic inequality within that system.<sup>53</sup> In addition, while the Court focused on desegregation, it deferred not only to state control, but went further in its deference to local financing schemes that relied only on the local tax base, ignoring the relevance of class or affluence.<sup>54</sup> This enabled a system of differential education, in this instance having the greatest impact on children in impoverished communities. Yet, *San Antonio v. Rodriguez* and *Milliken v. Bradley* are credited with prompting one means of resegregation, “White flight,” whereby Whites fled urban concentrations of the Black population to suburban and commuter communities.<sup>55</sup> Indeed, as education and residential

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107–09 (2000).

48. See Garda, *supra* note 2, at 1072 [citations omitted] (“Since the landmark decision of *Brown v. Board of Education* mandated desegregation in public schools, African-American students have been resegregated within public schools through their over-placement in special education classes.”); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (investigating whether or not courts are an effective mechanism for implementing social reform).

49. Despite an earlier ruling in *Plyler v. Doe*, 457 U.S. 202 (1982), finding that the denial of free public education to undocumented alien children is inconsistent with rights guaranteed under the Fourteenth Amendment, the Court later, in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973), refused to characterize education as a fundamental right.

50. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.”); *San Antonio v. Rodriguez*, 411 U.S. at 112 (Marshall, J., dissenting) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system.”); *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”).

51. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted* (exemplifying the struggle for minority students to become comfortable communicating in university classroom settings).

52. See *Rodriguez*, 411 U.S. at 112 (Marshall, J., dissenting) (quoting *Yoder*, 406 U.S. at 221) (“[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.”).

53. *But see Grutter*, 539 U.S. at 331–32 (“Ensuring that public institutions are open and available to all segments of American society, *including people of all races and ethnicities*, represents a paramount government objective.”) (emphasis added).

54. See *Rodriguez*, 411 U.S. at 1; *Milliken v. Bradley*, 418 U.S. 717 (1974).

55. See Kyle Crowder, *The Racial Context of White Mobility: An Individual-Level Assessment of the White Flight Hypothesis*, 29 SOC. SCI. RES. 223, 223 (2000);

choices continue to be closely associated with each other,<sup>56</sup> we continue to be profoundly racially segregated in both.<sup>57</sup>

Thus, in the years after *Brown I*, subsequent court decisions have effectively made quality education a scarce good, intensified the competition over education, and undermined the original social objectives. *Brown I* itself, along with its progeny, provided the very means to undermine its own core principles.

## II. Coordinated Subordination

### A. Segregation Redux: Tracking

Specialized classes were originally created as a means of giving focused attention to students with a learning disability.<sup>58</sup> Tracking emerged as a result of the practice of classifying and labeling students, so that they could receive this benefit.<sup>59</sup> That is, once a student was labeled—whether within the special education categories or the gifted student category—that student was placed in an academic “track” based on that label.<sup>60</sup> Thus, tracking proceeded and enabled labels to become permanent, often stigmatizing students during their academic careers and throughout life.<sup>61</sup> A secondary result in the aftermath of *Brown I* was that the same tracking intended to give greater attention to the needs of students with learning disabilities became an early means of racial resegregation within a school.<sup>62</sup> Tracking not only resegregated students within a single school—accomplished through the overrepresentation of the students of color in the special education tracks and simultaneous underrepresentation in the gifted tracks—but also found a new way to stigmatize students. These invidious labels stigmatized students as outside the mainstream, reinstituting effects that were supposed to be remedied by the decision in *Brown I*. *Brown I* spent a significant portion of its opinion decrying the stigmatizing effects of racial

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William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOC. REV. 425, 425 (1979) (defining White flight).

56. Hamilton Lankford & James Wyckoff, *The Effect of School Choice and Residential Location on the Racial Segregation of Students*, 14 ADVANCES IN APPLIED MICROECONOMICS 185, 232 (2006).

57. MINOW, *supra* note 20, at 5–9 (2010).

58. See Ferri & Connor, *supra* note 15, at 457.

59. *Id.*

60. Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 517 (1999).

61. *Id.* at 522, 538.

62. *Id.* at 521.

segregation in education.<sup>63</sup> The Court in *Brown I* explained how separating students solely based on race makes the students feel inferior: “[Segregation] may affect their hearts and minds in a way unlikely ever to be undone.”<sup>64</sup> The Court further emphasized that feelings of inferiority deprive the students of the motivation to learn and thus impede their mental and educational progress.<sup>65</sup>

Through tracking, ableism combined with racism to create a practice that systematically hurt Black students labeled with potential disabilities. *Hobson v. Hansen*,<sup>66</sup> thirteen years after *Brown I*, was the first major case raising questions about placement in special education. Judge Skelly Wright ruled that using test scores to group students into “tracks” was unconstitutional because it discriminated against Blacks and the poor, extending the ruling in *Brown I* to *de facto* as well as to *de jure* segregation.<sup>67</sup> Similarly, in *Diana v. State Board of Education* the plaintiffs were Spanish-speaking students who were placed in a class for mildly intellectually disabled students after they had scored low on an IQ test given to them in English.<sup>68</sup> The court ruled that Spanish-speaking children should be retested in their native language to avoid errors in placement.<sup>69</sup> When the students retook the IQ test in Spanish, the scores of eight of the nine students resulted in non-disabled classifications.<sup>70</sup> *Larry P. v. Riles*<sup>71</sup> was an expansion of the ruling in *Diana*, holding that schools are responsible for providing tests that do not discriminate on the basis of race.<sup>72</sup> However, less than a decade later, in the class-action case of *Parents In Action On Special Education (PASE) v. Hannon*,<sup>73</sup> the court interpreted a qualitatively similar test to that in *Larry P.* and found little evidence of bias in the test items.<sup>74</sup>

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63. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

64. *Id.* at 494.

65. *Id.*

66. 269 F. Supp. 401 (D.D.C. 1967). This case is additionally recognized as being the first time a bar was imposed against economic discrimination in the context of education.

67. *Id.* at 494.

68. See *Diana v. State Bd. of Educ.*, No. C-70-37, RFP (N.D. Cal. 1970) (consent decree 1973).

69. *Id.*

70. Connor & Ferri, *supra* note 15, at 108.

71. 793 F.2d 969 (9th Cir. 1984). The court agreed with the plaintiffs' allegation that “IQ tests being used to place children in the EMR category were biased against African American children.” HARRY & KLINGER, *supra* note 28, at 3.

72. *Larry P.*, 793 F.2d at 983.

73. 506 F. Supp. 831 (N.D. Ill. 1980).

74. One of the several tests used by the schools in *Larry P.* was the Wechsler

Though *Brown I* is viewed as opening the door of educational rights for children with disabilities, it was not until 1966 that Congress first addressed the education of students with disabilities when it amended the Elementary and Secondary Education Act of 1965 (ESEA) to establish grants to assist states in efforts to educate handicapped children.<sup>75</sup> Cases like *Hobson*, *Diana*, and *Larry P.*, which identified discriminatory practices in education affecting students in poverty and those with disabilities, were decided roughly at the same time as busing was attempted as a practical remedy for desegregation. Neither the discrimination cases nor the use of busing were ultimately effective in altering patterns of segregation. Resistance to racial integration was both intense and multifaceted. Disability classifications became one more means of effectuating the continuation of social hierarchy.

Also during this time, the Education for All Handicapped Children Act (EAHCA) was enacted in 1975, replacing the ESEA and requiring placement of special education students in the "least restrictive environment" (LRE), as well as permitting educators to segregate students according to disability classification.<sup>76</sup> By labeling and placing students in various special education classes or tracks, educators acted in accordance with the EAHCA's ambiguous LRE directive.<sup>77</sup> An increase in the use of testing to determine the IQ of students served to "justify the academic tracking of students according to 'abilities'"<sup>78</sup> Tracking created a "systematic form of racial segregation within schools" and labeling was "used to resegregate classrooms along race and class lines."<sup>79</sup> The stigmatizing effects of a low IQ score and the

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test, while the test used in PASE was a revised version of the Wechsler. The unrevised version of the Wechsler test was standardized based only on White children, while the revised Wechsler was standardized based on a population that included 305 Black children out of the 2,200 total children tested. *Id.* at 849-50.

75. Elementary and Secondary Education Amendments of 1996, Pub. L. No. 89-750, § 161, 80 Stat. 1191, 1204-08 (1996).

76. 20 U.S.C. § 1412(a)(5)(A) (1975). The Act defines LRE as follows:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

*Id.*

77. See Linda Ware, *Mainstreaming*, in 3 *ENCYCLOPEDIA OF DISABILITY* 1052, 1053 (Gary L. Albrecht ed., 2006) (discussing how students were sorted into classes based on their levels of disability).

78. Connor & Ferri, *supra* note 15, at 107.

79. Ferri & Connor, *supra* note 15, at 459 (quoting Jeannie Oakes et al.,

resulting low-track classification are long-lasting.<sup>80</sup>

Then in the 1980s, in response to the tracking that had become pervasive, some parents and educators called for efforts to reintegrate the disabled students into general education classes. This effort is known as “mainstreaming.”<sup>81</sup> Mainstreaming, in many obvious ways, mirrors desegregation efforts. *Pennsylvania Ass’n for Retarded Children v. Pennsylvania* also expressed a preference for mainstreaming similar to Congress’s preference in the EAHCA.<sup>82</sup> Just like in desegregation, policy makers should be mindful that these efforts are empty if they are solely about physical location. In other words, mainstreaming should not be another attempt to desegregate classrooms without substantive reform . . . again.

The subjectivity of the intellectual disability classifications perpetuates a vicious trend in which those with more mild classifications are still categorized together with the most severe cases. There are five types of retardation classifications: borderline, mild, moderate, severe, and profound.<sup>83</sup> The vast majority—eighty-nine percent—of those diagnosed with an intellectual disability are lumped into the mild category.<sup>84</sup> The mild category is the most subjective and allows for the most discretion.<sup>85</sup> “What is more disturbing than the law’s focus, or the

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*Detracking: The Social Construction of Ability, Cultural Politics, and Resistance to Reform*, 98 TEACHERS C. REC. 482, 492 (1997)).

80. See Losen, *supra* note 60, at 522 (“Students in low-track classes tend to have lower aspirations and have their plans for the future frustrated more often.”).

81. Ware, *supra* note 77, at 1053. Proponents of mainstreaming took the following approach:

Special education advocates urged a three-pronged approach to mainstreaming in which physical, social, and academic considerations would be merged. Thus, a disabled student would have access to receive his or her education in proximity to the *place* where other students received their education . . . . *Social* suggested participation in the common social activities of the school in nonacademic settings . . . that is, interactions within the general social milieu of the school. The third prong of mainstreaming was specific to instruction and the general curriculum . . . . It was argued that . . . modification . . . was commonplace for all students, and, hence, it was equally an option for students identified with special needs.

*Id.*

82. 334 F. Supp. 1257, 1260 (E.D. Pa. 1971).

83. MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 31 (1999).

84. *Id.* at 33.

85. HARRY & KLINGER, *supra* note 28, at 5–6 (“[T]he categories do not necessarily reflect real disabilities within children. Rather, their differential usage supports the perspective that the categories are reliant on definition and interpretation, which are influenced by social and political agendas of various states, groups, and individuals.”).



number of cases devoted to one group or another, is that current rules often treat degrees of retardation together, as though differences become slight once the 'retardation' label is attached."<sup>86</sup> If the goal of classifications is to identify how to tailor education to each groups' needs, this goal is not served by treating all the mentally handicapped as one group. Not only does this undermine the efficacy of special education, but it reinforces the stigmatizing effect of the intellectual disability label.

Another troubling fact is that minority students who are labeled with a disability are more likely to be placed into a more restrictive educational placement than their White peers with the same label.<sup>87</sup> One article concludes, "[m]inority students deemed eligible for special education are significantly more likely than their [W]hite counterparts to wind up in substantially separate settings with a watered-down curriculum."<sup>88</sup> Another points out that "increased time in the regular education classroom is largely attributable to a special needs student's race."<sup>89</sup>

In the United States, students whose native language is not English, and those from poor socioeconomic backgrounds, tend to score lower on IQ tests, yet many of these persons do not have a mental handicap.<sup>90</sup> The American Association on Intellectual and Developmental Disabilities (AAIDD) (formerly the American Association on Mental Retardation (AAMR)) requires that a person have both a low IQ score *and* "significant[ly] limit[ed]" adaptive skills in order to qualify as intellectually disabled.<sup>91</sup> Examples of such skills include "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work."<sup>92</sup> The latter requirement of the AAIDD is a subjective one and is easily made based on bias and subject to teacher discretion. Further, research

86. FIELD & SANCHEZ, *supra* note 83, at 33.

87. Ferri & Connor, *supra* note 15, at 458.

88. Losen & Welner, *supra* note 6, at 427.

89. Connor & Ferri, *supra* note 15, at 116 (quoting Edward Garcia Fierros & James W. Conroy, *Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION 39, 53 (Daniel J. Losen & Gary Orfield eds., 2002)).

90. FIELD & SANCHEZ, *supra* note 83, at 23.

91. *Definition of Intellectual Disability*, AM. ASS'N OF INTELLECTUAL AND DEVELOPMENTAL DISABILITY, [http://www.aamr.org/content\\_100.cfm?navID=21](http://www.aamr.org/content_100.cfm?navID=21) (last visited Sept. 17, 2012). Adaptive behavior skill types include conceptual skills, social skills, and practical skills. *Id.*

92. FIELD & SANCHEZ, *supra* note 83, at 29 (quoting AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (1992)).

shows that subjectivity makes its way into *all* aspects of the evaluation process, including which students to test, the test used, and how the results are interpreted.<sup>93</sup> Thus, the AAIDD's attempt to make intellectual disability/mental retardation classifications dependent solely on IQ tests is ineffective because the subjective "social skill" criteria can be easily manipulated.

Tracking has become a means of stigmatizing children, sending messages of inferiority, instilling low self-esteem, and lowering expectations for specific children.<sup>94</sup> It reasserts segregation in a different form, replicating differential education and delivery of services based primarily on racial classification, but now enabling "inclusion" in these classifications of the poor and the learning disabled. Most significantly, however, it continues the legacy of stigma and miseducation.

### *B. Punishing Disability*

In 1975 the EAHCA and the regulations implementing it provided for a free, appropriate public education (FAPE) for all handicapped children. In *Smith v. Robinson*,<sup>95</sup> the Supreme Court found that Congress intended the EAHCA to be the "exclusive avenue" for disabled students to claim their right to equal access in public education. In response to this ruling, Congress passed the Handicapped Children's Protection Act of 1986 (HCPA), which amended the Education of the Handicapped Act to allow for the granting of "reasonable attorneys' fees" under the law.<sup>96</sup> In 1987, the Court in *Honig v. Doe*<sup>97</sup> found that the expulsion of a learning disabled student violated the Education of the Handicapped Act's "stay-put" clause, which requires states to educate all handicapped children, including those whose disabilities cause disruptive behavior, by holding that students with disabilities may not be expelled without due process.<sup>98</sup> The earlier decision of *Mills v.*

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93. *Racial Inequity in Special Education: Executive Summary for Federal Policy Makers*, CIVIL RIGHTS PROJECT AT UCLA (June 25, 2012, 3:29 PM), <http://wrenchproject.com/linked/racial%20inequity%20in%20special%20.pdf>.

94. See JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* 8 (1985).

95. 468 U.S. 992, 1021 (1984), *superseded by statute*, Handicapped Children's Protection Act of 1986 § 2, 20 U.S.C. § 1415 (1989).

96. *Id.*

97. 484 U.S. 305 (1987).

98. *Id.* at 306. See also *Special Education Terms and Student Discipline*, MINN. HOUSE OF REPRESENTATIVES, HOUSE RESEARCH (Oct. 9, 2002), <http://www.house.leg.state.mn.us/hrd/issinfo/specedterms.htm> ("The purpose of the [stay-put] provision was to prohibit a school from unilaterally excluding a disabled child from a classroom for dangerous or disruptive behavior caused by the

*D.C. Board of Education*<sup>99</sup> laid the groundwork for the decision in *Honig*. The *Mills* court's ruling extended the legal right to public education to all handicapped children in the D.C. area,<sup>100</sup> and the "zero reject policy," a core principle of the free and appropriate education requirement in the EAHCA of 1975, prevented schools from expelling students with handicaps because of behavioral problems.<sup>101</sup> This ruling also requires school districts to provide adequate funding of special education services for handicapped children.<sup>102</sup> Unfortunately, but perhaps predictably, "[i]n the years since the Supreme Court's decision in *Honig*, schools have continued to advocate for the authority to punish students with emotional disabilities rather than the treatment of their behavior as an issue to be addressed through an [Individualized Educational Program]."<sup>103</sup> In 1990, Congress also passed the Americans with Disabilities Act (ADA), a civil rights law that prohibits discrimination based on disability.<sup>104</sup> It is intended to provide similar protections for people with disabilities as those provided against discrimination for reasons of race, religion, sex, national origin, and other characteristics under the Civil Rights Act of 1964.<sup>105</sup> In 1997, the IDEA received significant amendments, including a requirement that education agencies provide parents with the opportunity to use mediation to resolve

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disability.").

99. 348 F. Supp. 866 (D.D.C. 1972).

100. *Id.* at 878.

101. See WAYNE SAILOR & MATT STOWE, NAT'L COUNCIL ON DISABILITY, SCHOOL VOUCHERS AND STUDENTS WITH DISABILITIES, (2003), available at <http://www.ncd.gov/publications/2003/April152003> ("IDEA [formerly EAHCA] supports the Zero Reject principle in several ways. For example, IDEA mandates . . . [p]rocedures to address behavior problems that might otherwise result in removal.").

102. See *Mills*, 348 F. Supp. at 876 ("[The defendants'] failure to fulfill this clear duty to include and retain these [exceptional] children in the public school system, or otherwise provide them with publicly-supported education . . . cannot be excused by the claim that there are insufficient funds.").

103. Theresa Glennon, *supra* note 8, at 330.

104. 42 U.S.C. § 12101 (1990).

105. Compare Americans with Disabilities Act of 1990 § 302(a), 42 U.S.C. § 12182 (1990) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."), with Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a(a) (2011) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.").

disputes over their child's free and appropriate education.<sup>106</sup> Evaluating student behavior is complex and inherently subjective; unfortunately, it is apparent that these points of subjectivity are not resolved in the favor of Black students often enough.<sup>107</sup> One must wonder whether these standards will have a meaningful effect.

In 2004, IDEA was once again amended by the Individuals with Disabilities Education Improvement Act of 2004, now known as IDEIA.<sup>108</sup> This version revised the requirements for evaluating children with learning disabilities and added more concrete provisions relating to discipline of special education students. Unfortunately, as one author notes, "[t]he IDEIA cannot effectively reduce minority overrepresentation because it does not limit the bias that accompanies highly subjective identification practices."<sup>109</sup> Thus, even the most recent of reforms enable their own subversion.

Unfortunately, the IDEA has been at times a double-edged sword . . . . It has been overly used to label and disproportionately place African-American males in special education programs and out of mainstream educational instruction. At the same time, African-American males with mental disabilities have been suspended and expelled from school in lieu of receiving services required by the IDEA.<sup>110</sup>

Out-of-school suspensions disproportionately affect Black male students, occurring at nearly *three times* the rate for other students.<sup>111</sup> "More than twice as many Black male students as White male students receive out-of-school suspensions and three times as many Black male students as White male students are expelled."<sup>112</sup> Out-of-school suspensions in many cases lead to students ending their school careers before graduation.<sup>113</sup> Even

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106. 20 U.S.C. § 1415 (1990), *amended by* Individuals with Disabilities Education Act Amendments for 1997 § 1415, 20 U.S.C. § 1415 sec. 615(b)(5) (1997).

107. These decisions, for the most part, are individually made by teachers, social workers, and psychologists. It is not possible to adequately study or understand the extent to which decision-makers' judgments are conscious as opposed to subconsciously influenced. In either case, institutional structures, including legal frameworks, set the stage.

108. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

109. Garda, *supra* note 2, at 1100.

110. See Weatherspoon, *supra* note 5, at 29.

111. LOSEN & GILLESPIE, *supra* note 4, at 6 (establishing that Black students are at a higher risk for suspension in comparison with White students).

112. MICHAEL HOLZMAN, SCHOTT FOUND. FOR PUB. EDUC., YES WE CAN: THE 2010 SCHOTT FIFTY STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 35 (2010), available at <http://www.blackboysreport.org/bbreport.pdf>.

113. *Id.*

when engaging in similar behavior as other students, Black students, especially males, are “disciplined at rates that far exceed” their numbers in the relevant population.<sup>114</sup> In fact, there has yet to be published any convincing studies that show that Black males have higher rates of unruly behavior than other students.<sup>115</sup> Educators using discipline in the place of education locate responsibility for negative outcomes with the individual student rather than with the school or the system of education. “The disproportionate suspension of [B]lack males falls in line with the other discriminatory practices protected, supported, and obfuscated by educational policies.”<sup>116</sup>

Poor parents are less likely to be involved in the school-related matters of their children than wealthier parents.<sup>117</sup> Educators understand that involvement by poor parents is less likely and that minorities are more likely to be poor and must spend more of their time on “basic survival needs.”<sup>118</sup> “[I]t seems reasonable that these parents may not always be physically, emotionally, or cognitively available to participate as vigorously in the education of their children as educators—and, perhaps, they themselves—would desire.”<sup>119</sup> Thus, children who are both from poverty and from minority backgrounds are the most likely to be expelled with little or no challenge from their parents.

The wealthier the parents are, the more likely they are to be involved in the educational matters of their children.<sup>120</sup> The focus on a “medical” problem ostensibly based in science,<sup>121</sup> deflects parental attention away from the more familiar fight against racism. In addition, when educators identify the “problem” as a diagnosable disorder, they locate the problem with the student rather than with the system or in the overall approach to

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114. Carla R. Monroe, *African American Boys and the Discipline Gap: Balancing Educators' Uneven Hand*, 84 EDUC. HORIZONS 102, 102 (2006).

115. *Id.* at 104.

116. Maurice C. Taylor & Gerald A. Foster, *Bad Boys and School Suspensions: Public Policy Implications for Black Males*, 56 SOC. INQUIRY 498, 504 (2007).

117. See Wenfan Yan, *Successful African American Students: The Role of Parental Involvement*, 68 J. NEGRO ED. 5, 7 (1999) (“A substantial amount of evidence supports the existence of a positive relationship between [socio-economic status] and parental involvement.”).

118. Voltz, *supra* note 1, at 65.

119. *Id.*

120. See Yan, *supra* note 117, at 7.

121. See Jordan, *supra* note 5, at 140 (discussing how the “learning disability” label “blam[es] the individual student” and therefore perpetuates the “common myth that schools are level playing fields.”).

education.<sup>122</sup> Thus, even when the multilayered challenges of poverty do not predetermine the expulsion of minority students, racial stereotyping of the child as well as social realities make it more likely that minority parents will accept directives from authority figures, resulting in the acceptance of inferior education for a disproportionate number of these students. "Discrimination on the basis of ability doesn't receive the same amount of protection as discrimination based on race, religion, or ethnicity,"<sup>123</sup> effectively allowing disability discrimination to be a proxy for continuing racial discrimination and perhaps also explaining why it lacks institutional priority.

The influence of race is apparently more significant than poverty in trends for labeling intellectually disabled students. "Recent studies show that overrepresentation [in special education] persists even when poverty is taken into account and, alarmingly, African-American students are in fact more likely to be identified as eligible in upper- and high-income schools."<sup>124</sup> As the wealth of a school district increases, the more likely it is that Black students, especially males, will be labeled intellectually disabled.<sup>125</sup> One can only wonder if, in fact, labeling Black males as having an intellectual disability is a form of punishment that furthers the tacit objective of educating as few Black male children as possible. The influence of race is apparently distinct from poverty in trends for labeling mental retardation.<sup>126</sup> To put a fine point on the confluence, "when race and gender are disaggregated for students with disabilities, we see the highest rates for male children of color with disabilities . . ."<sup>127</sup>

122. *Id.*

123. SAILOR & STOWE, *supra* note 101.

124. Garda, *supra* note 2, at 1088 (suggesting that these studies "verify court findings of the 1960s and 1970s, specifically citing *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984)); see also Individuals with Disabilities Education Improvement Act of 2004 § 601, 20 U.S.C. § 1400(c)(12)(E) (2004) ("Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education."); Donald P. Oswald et al., *Community and School Predictors of Overrepresentation of Minority Children in Special Education*, in RACIAL INEQUITY IN SPECIAL EDUC. 1, 8 (2002) ("[A]mong communities with the lowest poverty rates, the identification for [B]lack males was substantially higher than even the most liberal prevalence estimates."); Losen & Welner, *supra* note 6, at 415 ("Most disturbing was that as factors associated with *wealth increased*, contrary to the expected trend, African American children were *more likely to be labeled 'mentally retarded.'*").

125. Losen & Welner, *supra* note 6, at 415.

126. See *id.*

127. LOSEN & GILLESPIE, *supra* note 4, at 35.

### C. Punishing Lessons

In educational settings, it seems that punishment is preferred over education, especially for Black boys.<sup>128</sup> This is the case even though it is proven that low levels of education have a high correlation to high-risk behaviors leading to delinquency or adult prison.<sup>129</sup> Even though it has also been proven that education and opportunity are essential for lasting rehabilitation, educational instruction and opportunity, especially for individuals with disabilities, is limited or lacking in prison settings.<sup>130</sup>

Some suggest that because of the mismatch between the philosophies of punishment and education, correctional educational services often lack the sufficient tools and qualified staff to develop, implement, and sustain educational reforms consistent with the delivery of the special education and related services mandated by law under both the NCLB and IDEA. As a result, such well-intentioned legislative goals promoting high-quality educational services for all children often fail to reach the children behind bars.<sup>131</sup>

Notably, it is cheaper to educate prisoners than to incarcerate them.<sup>132</sup>

“Poor educational opportunity leads to high-risk behaviors such as dropping out of school, abusing substances, and becoming involved in delinquent activities.”<sup>133</sup> Given the high rates of disciplinary actions, as well as labeling of Black male students as intellectually disabled, leading to poor educational opportunities and outcomes, it is little surprise that in the juvenile correctional facilities, individuals incarcerated are disproportionately male, African American, poor, and have an intellectual disability—many undiagnosed.<sup>134</sup> “Of note is that rates of disabilities among

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128. See Weatherspoon, *supra* note 5, at 5.

129. *Id.*

130. Harriet R. Morrison & Beverly D. Epps, *Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System*, 71 J. NEGRO EDUC. 218, 225 (2002).

131. Geib et al., *supra* note 24, at 4.

132. María Elena Torre & Michelle Fine, *Bar None: Extending Affirmative Action to Higher Education in Prison*, 61 J. SOC. ISSUES 569, 591 (2005).

133. Morghan Vélez Young et al., *Schooling in a Youth Prison*, 61 J. CORR. EDUC. 203, 203 (2010).

134. *Id.*; see also David Osher et al., *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in RACIAL INEQUITY IN SPECIAL EDUCATION (Daniel J. Losen & Gary Orfield eds., 2002); Peter E. Leone & Sheri Meisel, *Improving Education Services for Students in Detention and Confinement Facilities*, 17 CHILD. LEGAL RTS. J. 2 (1997); Peter E. Leone et al., *Understanding the Overrepresentation*

incarcerated youth are estimated at 30-70%, as compared to 10-13% in the general population.<sup>135</sup>

Individuals under the age of twenty-one who are incarcerated are entitled to an education, as first required under the EAHCA,<sup>136</sup> and currently required under the IDEA.<sup>137</sup> Nonetheless, the requirement that FAPEs be given to all children, "youth entering the juvenile justice system, . . . eligible for special education services, often do not receive these services while in detention resulting in an unwarranted reduction of services."<sup>138</sup> Juvenile justice practitioners often lack training and even awareness of the legal rights of juveniles with disabilities and are therefore ill-equipped to provide proper services.<sup>139</sup>

Rehabilitation is often understood as a key objective of incarceration, especially for juvenile and youth offenders.<sup>140</sup> Effective education is a logical and proven means of accomplishing this goal. "Programs in juvenile corrections should promote the academic and social competence of their students and ensure that they reenter their communities better prepared to assume roles as students, workers and citizens."<sup>141</sup> Unfortunately, the "policies of incapacitation, control, retribution, and punishment" and their related practices, as well as the disparity between the philosophies of punishment and education, undermine the implementation and realization of such objectives.<sup>142</sup> The structure, organization, and constant presence of prison staff mean that "a disciplinary presence [is] a part of classroom life."<sup>143</sup> The restrictions affect both basic and modern means of learning, from pencils to computers, for concerns over safety and control.<sup>144</sup>

Perhaps because of the transient nature of the prison population and the variable levels of academic ability and grade levels of the incarcerated students, the rigor of instruction is

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*of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995); Clyde A. Winters, *Learning Disabilities, Crime, Delinquency and Special Education Placement*, 32 ADOLESCENCE 451 (1997); Morrison & Epps, *supra* note 130, at 218.

135. Geib et al., *supra* note 24, at 4.

136. Kathleen A. Lewis et al., *Service Coordination Between Correctional and Public School Systems For Handicapped Juvenile Offenders*, 55 EXCEPTIONAL CHILD. 66 (1988).

137. Individuals with Disabilities Education Act, *supra* note 108.

138. Geib et al., *supra* note 24, at 5.

139. *Id.*

140. Leone & Meisel, *supra* note 134, at 5.

141. *Id.* at 7.

142. Geib et al., *supra* note 24, at 5; Young et al., *supra* note 133, at 204.

143. Young et al., *supra* note 133, at 209.

144. *Id.* at 211.



relatively low. The result is that schoolwork in prison is easier than schoolwork in outside schools, enabling incarcerated students to earn much needed credits, but not preparing them for re-entry into more rigorous educational environments once released.<sup>145</sup> "The inadequacies of educational programs in correctional facilities provide little hope for juveniles in transition back into the general population. Many are released, still lacking the necessary skills for success, only to return to juvenile or adult correctional facilities."<sup>146</sup>

### III. Miseducation and Inequality

#### A. *No Child Left Behind: The Emperor Has No Clothes*

The No Child Left Behind Act of 2001 (NCLB)<sup>147</sup> is the current reauthorization of the Elementary and Secondary Education Act (ESEA),<sup>148</sup> which Congress has reauthorized every five years since its enactment in 1965. NCLB is the most far-reaching federal legislation affecting education ever passed by Congress, funding primary and secondary education, while explicitly forbidding a national curriculum.<sup>149</sup> It emphasizes equal access to education, establishes high standards and accountability, and aims to reduce achievement gaps among students by providing fair and equal opportunities.<sup>150</sup> The ESEA, and now the NCLB, authorizes funds for professional development, instructional materials, educational programs, and encourages parental involvement initiatives.<sup>151</sup> NCLB applies to students with disabilities.<sup>152</sup> In fact, section 1421 requires a school district to provide a FAPE to each qualified person with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the person's disability.<sup>153</sup>

NCLB requires all government-run schools receiving federal funding, through Title I of the ESEA, to administer an annual

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145. *Id.* at 214–15.

146. Morrison & Epps, *supra* note 130, at 230.

147. No Child Left Behind Act, 20 U.S.C. §§ 6301–7941 (2006).

148. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

149. 20 U.S.C. §§ 1681–1688 (2006).

150. *See id.* at §§ 6301–7941.

151. *Id.*; Elementary and Secondary Education Act of 1965 § 303.

152. SAILOR & STOWE, *supra* note 101, at 9 ("Since children receiving special education are also students in general education, the NCLB . . . applies to students with disabilities.").

153. 20 U.S.C. § 1421.

state-wide standardized test to all students.<sup>154</sup> The Act requires states to use “the same academic assessments . . . to measure the achievement of all children.”<sup>155</sup> The students’ scores are used to determine whether the school has taught the students well. Schools that receive this federal funding must make Adequate Yearly Progress in test scores.<sup>156</sup> NCLB imposes sanctions and “corrective actions,” “reconstitutions,” and “restructurings” for missing “targets,”<sup>157</sup> and thus, gradually requires student transfers (along with a loss of funding) and possible state take-over or private management.<sup>158</sup>

This accountability structure requires the biggest gains from the lowest performing schools, which contain the students who need the most assistance.<sup>159</sup> States with the “highest standards will have the most schools wanting,” even with high relative levels of performance,<sup>160</sup> and states that use the most ambitious tests and high standards will experience the greatest failure rates.<sup>161</sup>

NCLB’s complicated accountability structure is predicted to produce between eighty-five and ninety-nine percent of the nation’s “failing” public schools within the next few years.<sup>162</sup> “However, there is growing evidence that the law’s strategy for improving schools may, paradoxically, reduce access to education for the most vulnerable students.”<sup>163</sup> This compounds the damage of existing structural inequalities that make it likely that minority students from impoverished backgrounds are punished and expelled, while those from more affluent backgrounds are labeled with an intellectual disability and provided inferior education. With the NCLB incentive structure, this pattern is intensified as schools that manage to raise test scores often “lose” large numbers

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154. *Id.* at § 6316.

155. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111, 115 Stat. 1425 (2002).

156. Stan Karp, *NCLB’s Selective Vision of Equality: Some Gaps Count More than Others*, in *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS* 53, 54–55 (Deborah Meier & George Wood eds., 2004).

157. *Id.* at 53.

158. *Id.* at 54–55.

159. Linda Darling-Hammond, *From ‘Separate but Equal’ to ‘No Child Left Behind’: The Collision of New Standard and Old Inequalities*, in *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS* 3, 10 (Deborah Meier & George Wood eds., 2004).

160. *Id.* at 16.

161. *Id.* at 15.

162. Linda Darling-Hammond, *Evaluating ‘No Child Left Behind’*, *NATION*, May 21, 2007, at 11, 14.

163. *Id.*

of low-scoring students, mostly Black and Latino students,<sup>164</sup> while "exclusionary policies were used to hold back, suspend, expel or counsel out students in order to boost test scores."<sup>165</sup>

Since test-score targets that are not met are tied to school sanctions, NCLB gives schools incentives to punish, and ultimately expel, students who are struggling or on whom the system has already given up.

Tests alone do very little to increase the capacity of schools to deliver better educational services. . . . The keys to school improvement are not standards and tests, but teachers and students. And while teachers and students need a complicated mix of support, resources, motivation, pressure, leadership, and professional skills to succeed, the idea that this mixture can be provided by test-driven sanctions is simply wrong and is not supported by any educational research or real world experience.<sup>166</sup>

NCLB is destroying independent and innovative thought because "serious intellectual activities . . . are being driven out of many [U.S.] schools by the tests promoted by NCLB."<sup>167</sup>

The "one-size-fits-all" approach of the NCLB is not a legitimate means of providing meaningful education for any child. Diversity could be the U.S.'s strength in a competitive world. Maximizing individual talents ought to be the goal; not dwelling on differences or "deficiencies."

Yet the goal of equality in test scores for all student groups, including special education and bilingual students, contrasts sharply with the widespread inequality that is tolerated or even promoted, by federal policy in many other areas. . . . A closer look at this contradiction sheds light on why critics see NCLB as part of a calculated political campaign to use achievement gaps to label schools as failures, without providing the resources and strategies needed to overcome them.<sup>168</sup>

The core of a democratic society ought to be education of its citizens and future citizens. "In such a society, teachers would not

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164. *Id.* at 16.

165. *Id.* at 14.

166. Karp, *supra* note 156, at 58.

167. Darling-Hammond, *supra* note 162, at 14.

168. Karp, *supra* note 156, at 53-54.

merely employ the curriculum, pedagogy, and assessments as determined by others but would become educative leaders engaged in deliberation with the community.”<sup>169</sup>

*B. NCLB—Vouchers, Funding, and Resources:  
Papa’s Got A Brand New Bag*<sup>170</sup>

Where states have replaced investing with testing . . . students are forced to attend underresourced schools where they lack the texts, materials, qualified teachers, computers, and other necessities for learning. In lieu of resources, the state offers tests, which are used to hold students back if they do not reach benchmarks (a practice found to increase later dropout rates but not to improve achievement) and to deny them diplomas, which in today’s economy is the equivalent of denying access to the economy and to a productive life.<sup>171</sup>

A further problem is that the NCLB authorizes the use of vouchers, both public and private, enabling depletion of public funds for general education, as well as for special education, further ravaging those schools that serve students in greatest need.<sup>172</sup>

“Under Title I, section 1116(b)(E) of the NCLB, schools, beginning with the 2002-2003 school year *must* offer public school choice to their students if those schools are in their first or second year of school improvement, in corrective action, or in a planning year for restructuring.”<sup>173</sup> In addition, “NCLB is the first federally supported (though not mandated) program that allows federal funds to purchase educational services from private entities.”<sup>174</sup> However, the IDEA rights, as a general rule, do not extend to children with disabilities who take advantage of voucher programs.<sup>175</sup> Section 504 of the Rehabilitation Act and the Americans with Disabilities Act still applies to the administration of the program, but not to the activities of private schools.<sup>176</sup> The inapplicability of the IDEA to voucher programs run through private schools is inconsistent when one considers that the IDEA

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169. David Hursh, *Assessing No Child Left Behind and the Rise of Neoliberal Education Policies*, 44 AM. EDUC. RES. J. 493, 515 (2004).

170. JAMES BROWN, PAPA’S GOT A BRAND NEW BAG (King Records 1965).

171. Darling-Hammond, *supra* note 162, at 22.

172. *Id.* at 14.

173. SAILOR & STOWE, *supra* note 101, at 9.

174. *Id.* at 2.

175. *Id.* at 2–3.

176. *Id.* at 1.

allows the use of public funds to finance private school education (1) when parents find an appropriate private program in response to a public school's failure to provide a FAPE, and (2) when a private school placement is identified as the appropriate Individual Education Plan (IEP) as mandated by the IDEA.<sup>177</sup> Regardless of how the placement occurs, private schools are not bound by the requirements of IDEA; private schools are free to abandon the LRE "almost entirely."<sup>178</sup> Students with disabilities using a general education voucher will not rely upon the IDEA in private schools.<sup>179</sup>

Because vouchers can only cover a portion of costs of special education over and above the cost of private school tuition in many cases, particularly for students with moderate, low-incidence, and severe disabilities, such programs may benefit only the affluent who can afford to supplement vouchers to cover actual costs.<sup>180</sup>

In addition to the issues of relative wealth, parental participation in their child's education becomes less likely as affluence decreases.<sup>181</sup> Since parental participation is essential for the success of students legitimately identified as disabled, "the weakness of this approach is with marginalized groups that do not have sufficient market power to influence the school. Without expanded protections, individuals in a dissatisfied minority will have no recourse except to pull their students out of the private school,"<sup>182</sup> making it even less likely that these children will benefit from these programs.

Even worse, for children who cannot or do not seek to, participate in the voucher programs, public school districts are still obligated to provide FAPEs for all children, now with depleted funds and looted coffers.<sup>183</sup> This reality is in conjunction with the growing evidence that "a large-scale universal voucher program would not generate substantial gains in overall student achievement and that it could well be detrimental to many

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177. *Id.* at 11.

178. *Id.* at 24.

179. SAILOR & STOWE, *supra* note 101, at 14.

180. *Id.* at 9.

181. Beth Harry and Mary G. Anderson, *The Disproportionate Placement of African American Males in Special Education Programs: A Critique of Process*, 63 J. Negro Ed. 602, 611 (1994); Voltz, *supra* note 1, at 63-70.

182. Voltz, *supra* note 1, at 23.

183. *Id.* at 9, 14.

disadvantaged students.”<sup>184</sup>

Florida created an alternative to a general voucher program for students with disabilities: The John M. McKay Scholarship Program for Students with Disabilities (McKay). The McKay program is a statewide voucher program aimed at providing the resources necessary for disabled students to attend a different public school or a private school, if they so choose.<sup>185</sup> McKay scholarships are available to any Florida public school student who, because of his or her disability, was assigned an IEP during the prior year.<sup>186</sup> The amount of the scholarship is equal to the amount the student would have received in the public school to which the student is assigned, or the amount of the chosen private school’s tuition and fees, whichever is less.<sup>187</sup>

The McKay program appears to be successful, at least in that parents who choose to participate in the program, regardless of race, are well informed of their choices, and make the effort to research the resources available.<sup>188</sup> It also does not pose the same issues for disabled students, which are structurally endemic in general voucher programs. Nevertheless, there are still major shortcomings of this program. The McKay program seems to have provided motivation for the creation of new schools to serve the needs of disabled students.<sup>189</sup> This trend proceeds in the face of scientific documentation supporting the provision of educational services to disabled students in the least restrictive environment and inclusive of other opportunities.<sup>190</sup> “The end result of large-scale voucher extensions to students with disabilities could lead to a new kind of institutionalization at public expense.”<sup>191</sup>

Furthermore, NCLB’s authorization of funding for charter schools, “school choice,” and voucher programs implicitly endorses private residential as well as educational racial segregation.<sup>192</sup> The Supreme Court cases of *Rodriguez*<sup>193</sup> and *Milliken*<sup>194</sup> were modes of

184. Helen F. Ladd, *School Vouchers: A Critical View*, 16 J. Economic Perspectives 3, 4 (2002).

185. SAILOR & STOWE, *supra* note 101, at 3.

186. *See id.* at 10 (showing that any disabled student is eligible for scholarships and all disabled students are assigned IEPs).

187. *Id.* at 3.

188. Virginia R. Weidner & Carolyn D. Herrington, *Are Parents Informed Consumers: Evidence from Florida McKay Scholarship Program*, 81 PEABODY J. OF EDUC. 27, 43 (2006).

189. SAILOR & STOWE, *supra* note 101, at 28.

190. *Id.* at 29–30.

191. *Id.*

192. Lankford & Wyckoff, *supra* note 56, at 232.

193. *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

retrenchment after *Brown I*<sup>195</sup> and *II*,<sup>196</sup> encouraging “White flight” and permitting the return or continuation of segregated residential patterns, and hence, geographically induced racial segregation in education.

The “bundling” of education and residential location is the continuing custom. NCLB supports and furthers this reality in several ways. “Choice” facilitates the option of White parents to move away, further decimates funding for schools in urban areas, and enables the privatization of education by removing it from state and federal regulation.<sup>197</sup>

[E]stimates suggest that the school choices afforded to parents through private school choice and residential location importantly affect the racial segregation of schools. . . . Whites confronted with urban public schools with even moderate concentrations of African-Americans or Latinos are much more likely to opt for private schools or choose suburban public schools. When they do choose private schools they choose those with lower concentrations of non[-W]hites. In combination, the effect is to make schools more racially segregated. As a result of this sorting directly related to race, urban public schools, which already have substantially higher concentrations of non[-W]hites than their suburban counterparts, have become even more segregated.<sup>198</sup>

“Choice” is a means to return to *social* “choice,” grounded in stereotype, endorsed by *Plessy v. Ferguson*<sup>199</sup> and maintained by the state through Jim Crow segregation.<sup>200</sup> Furthermore, the legislative move to preference private choices over the public good, and ultimately towards the privatization of schools, is one that further disenfranchises marginalized and subordinated populations.<sup>201</sup>

194. *Milliken v. Bradley*, 418 U.S. 717 (1974).

195. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

196. *Brown v. Bd. of Educ. (II)*, 349 U.S. 294 (1955).

197. See Ladd, *supra* note 184, at 8.

198. Lankford & Wyckoff, *supra* note 56, at 232.

199. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954).

200. Michelle Alexander makes a powerful case that “Jim Crow” continues to systematically exist through the operation of the criminal justice system. She states, however, that she is only addressing one piece of the broader picture. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

201. The direction of the federal government in supporting the “social choices” of some citizens over the civil rights of others is also part of a historical “repetition” reflected in cases such as *United States v. Cruikshank*, 92 U.S. 542 (1876), *United*

The rhetorical posture of NCLB is one with which it is difficult to disagree; however, its operation and effects reaffirm and intensify differential delivery of educational services, racial segregation in education and residence, and the closure of schools in the neighborhoods where they are most needed.<sup>202</sup> The unfortunate effects of the focus on testing are the removal of marginal students from school altogether and an education lacking in broad substance or critical thinking for the rest.<sup>203</sup> The rhetoric and “ideals” that enabled the passage of NCLB also enable the state to avoid the real problems and the real educational needs of students.<sup>204</sup> Shamefully, we are in an era where the rhetoric need only be so thinly veiled, and the structure may be so transparent, as to confirm everything else stated in this essay.

#### IV. Reform

##### A. Solutions? Consequences.

The harmful and destabilizing effects of NCLB are real and widespread. Perhaps because these effects are felt by more than the minority population of students or the population of students with disabilities, either independently or combined,<sup>205</sup> and perhaps because NCLB is a version of the ESEA that imposes more requirements on states, undermining their control in matters of education, it has encountered criticism from multiple sectors. Recently several states have sought waivers from the harsh requirements of NCLB,<sup>206</sup> at least one suing in court for relief.<sup>207</sup>

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*States v. Harris*, 106 U.S. 629 (1883), and *The Slaughter-House Cases*, 83 U.S. 36 (1873). However, this elucidation is better undertaken elsewhere.

202. See Darling-Hammond, *supra* note 162, at 12–14.

203. See Darling-Hammond, *supra* note 159, at 18–19.

204. See *id.* at 25–26.

205. “Interest convergence,” a phenomenon identified by Derrick Bell, which accurately described the impetus behind *Brown*, most accurately describes the current situation. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

206. See, e.g., Evan Bevins, *States Looks for Waivers of ‘No Child Left Behind’*, MARIETTA TIMES, Feb. 26, 2012, available at <http://www.newsandsentinel.com/page/content.detail/id/557949/States-looks-for-waivers-of-No-Child-Left-Behind-.html?nav=5061>; Hattie Brown Garrow, *Va. to Pursue No Child Left Behind Waiver, Official Says*, VIRGINIAN-PILOT, Sept. 24, 2011, <http://hamptonroads.com/2011/09/obama-rolling-back-no-child-left-behind> (describing Virginia’s consideration of a waiver request); Leah McDaniel, *Ark. Looks to Waiver No Child Left Behind*, HERALD (Arkansas State University), Feb. 23, 2012, <http://www.asuherald.com/mobile/news/ark-looks-to-waiver-no-child-left-behind-1.2705830>; Jeremy Slayton, *No Child Left Behind Act: Virginia Finalizes Waiver Request*, STAR EXPONENT, Feb. 24, 2012, <http://www2.starexponent.com/news/2012/feb/24/no-child-left-behind-act-virginia->



As each of these waivers is granted we can hope for the wholesale dismantling of NCLB in favor of a more effective act encouraging universal education. However, given the track record of mis-education and non-education for boys of some communities, educators, policy makers, and the authors of legislation must be more vigilant in finding a means of honestly meeting educational objectives for all members of society.

We have seen judicial decisions that identify the problem and fashion solutions from *Brown I*<sup>208</sup> to *Mills*<sup>209</sup> and beyond. We have seen legislation and amendments from the EAHCA to the IDEA and NCLB “intending” to identify the problem and create solutions. Despite these solutions, we continue to have disproportional representation of Black male students in the categories of Intellectually Disabled and Emotional Disturbance. No “solution” will work if we do not own up to the core of the problem—competition for the modes of success—as well as the combining effects of the tools for maintaining the status quo—racism and ableism.

The approaches to which we look for solutions have several structural flaws. The continued results of litigation, as well as the legislative attempts to fix the problem and to direct the focus onto the individual, often results in deflecting responsibility from the system.<sup>210</sup> Education and civil rights cases have focused on remedying past discrimination, not on preventing future harm or inequities. In its backward-looking posture, the law seeks to form rigid structure to provide consistency rather than providing useful flexibility or experimentation for good.<sup>211</sup> Solutions intended to

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finalizes-waiver-ar-1712797/ (reporting Virginia’s finalization of a waiver request); Kailey Burton, *Local Educators React to ‘No Child Left Behind’ Waiver*, WJFW (Feb. 24, 2012), [http://www.wjfw.com/print\\_story.html?SKU=20120224174440](http://www.wjfw.com/print_story.html?SKU=20120224174440) (“Wisconsin education officials applied for an exemption to the federal education mandate ‘No Child Left Behind’. So far 11 states have been granted those exemptions.”).

207. See, e.g., Ed Gordon, *Connecticut Sues Over ‘No Child Left Behind’*, NPR (Aug. 24, 2005), <http://www.npr.org/templates/story/story.php?storyId=4813502> (“Connecticut Attorney General Richard Blumenthal talks about the state’s lawsuit against the federal government. . . . It’s the first state to file such a lawsuit, but other states could follow.”).

208. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

209. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

210. See Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 39–40 (1988) (discussing discrimination against persons with disabilities as based in environmental factors rather than located with the disabled individual). This type of discrimination is not unlike identifying poverty as the fault of the poor, rather than the overall system of capitalism.

211. See, e.g., *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991)

address the needs of students have become additional tools for subordination.<sup>212</sup> Policies that are intended, on their face, to assist are used as additional tools for oppression.<sup>213</sup>

Pre-referral interventions, in which teachers implement intervention strategies for six weeks prior to the decision to place a student in special education,<sup>214</sup> as well as other efforts in making labels and eligibility determinations more objective, can be successful in decreasing minority overrepresentation in special education programs. These outcomes are the direct result of the 1967 case of *Lee v. Macon County Board of Education*<sup>215</sup> in Macon County, Alabama. Here, the court found that African-American students in the state were three times more likely to be labeled Intellectually Disabled than White students,<sup>216</sup> and in 2000 the court ordered that a pre-referral process be initiated pursuant to the long-standing consent decree in the 1967 case.<sup>217</sup> By 2003, pre-referral intervention resulted in zero referrals of African-American students.<sup>218</sup> Despite this success, the current IDEA does not require pre-referral interventions, nor does it provide real incentive for their use; they are purely voluntary, leaving the prevailing subjectivity in place. Ultimately, understanding the landscape of general education is an important backdrop for discussions of disability education, especially as it intersects with racial concerns. Alterations to education for disabled students, as well as changes designed to provide integration in education, seem only to be band-aids on a greater problem. Mainstreaming, just like desegregation, only works if it focuses on good teaching, not just integration and assimilation as the magic salve.<sup>219</sup> "It is

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(holding that the Detroit school system's justification for creating all-male academies was not enough to outweigh the interests of female students in attending the academy); see also, Zanita E. Fenton, *Sleight of Hand or the Old Bait & Switch?: Article III and the Politics of Self-Policing by the Court in Parents Involved*, 63 U. MIAMI L. REV. 561 (2009) (discussing the Court's refusal to allow efforts at integration which were not also required for desegregation). But see Access to Classes and Schools, 34 C.F.R. § 106.34 (2007) (amending the regulations implementing the education amendments to the federal gender antidiscrimination statute, Title IX, 20 U.S.C. §§ 1681-1688 (2000 & Supp. 2003) and expanding the public elementary and secondary schools' abilities to provide single-sex educational opportunities).

212. See Garda, *supra* note 2, at 1081.

213. See *id.* at 1081-85.

214. *Id.* at 1127.

215. 267 F. Supp. 458 (M.D. Ala. 1967).

216. Garda, *supra* note 2, at 1126-27 (citing *Lee v. Phoenix Cnty. Bd. of Educ.*, C.A. No. 70-T-854 (M.D. Ala. 2000)).

217. *Id.*

218. See *id.* at 1127.

219. See Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 151

through effective regular education, not special education, that we may begin to see the racial disparities reduced.<sup>220</sup> There are studies showing that all students, including those with learning disabilities, benefit from the same type of instruction and learning activities, broadly speaking, regardless of gender or race.<sup>221</sup> Perhaps if we focused on good education for all children, minor differences or needs could be accommodated.<sup>222</sup> “[M]inor modifications to content, delivery, and instruction are not special education, but rather good pedagogy for all students. Good teaching requires adjustments to classroom instruction to meet the varying individual needs of all students.”<sup>223</sup> “NCLB contains some major breakthroughs. . . . The first-time-ever recognition of students’ right to qualified teachers is historically significant.”<sup>224</sup> Of course, this breakthrough is undermined by an operational structure used to penalize schools, and a remarkable lack of resources and accountability to students, parents, and teachers.<sup>225</sup>

Most centrally, the law does not address the profound educational inequalities that plague our nation. . . . School funding lawsuits brought in more than twenty-five states describe apartheid schools serving low-income students of color with crumbling facilities, overcrowded classrooms, out-of-date textbooks, no science labs, no art or music courses and a revolving door of untrained teachers, while their suburban counterparts, spending twice as much for students with fewer needs, offer expansive libraries, up-to-date labs and technology, small classes, well-qualified teachers and expert specialists, in luxurious facilities.<sup>226</sup>

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(2009) (“[T]here is an air of racial discrimination in the way African-Americans are treated in the special education system, including eligibility and placement determinations, just as there is in the way African-Americans are treated in the educational system in general.”).

220. Glennon, *supra* note 31, at 1335.

221. See, e.g., FRANK G. BOWE, *UNIVERSAL DESIGN IN EDUCATION: TEACHING NONTRADITIONAL STUDENTS* (2000) (describing a style of teaching that is accessible to diverse groups); see also, Kati Haycock, *Good Teaching Matters . . . A Lot*, 13 *OAH MAG. OF HIST.* 61, 62–63 (1998) (arguing that Black children would benefit from the same teachers that White children do).

222. For a discussion of one comprehensive approach to integrating general and special education in an all-inclusive learning environment, see Deborah L. Voltz et. al., *What Matters Most in Inclusive Education: A Practical Guide for Moving Forward*, 37 *INTERVENTION IN SCH. & CLINIC* 23, 25–29 (2001).

223. Garda, *supra* note 2, at 1122.

224. Darling-Hammond, *supra* note 162, at 11–13.

225. Garda, *supra* note 2, at 1122 (citing CHARLOTTE DANIELSON, *ENHANCING PROFESSIONAL PRACTICE: A FRAMEWORK FOR TEACHING* (1996)); see Darling-Hammond, *supra* note 159, at 18–19.

226. Darling-Hammond, *supra* note 162, at 13.

Predictably, statistics regarding those who are labeled as Intellectually Disabled and those who are most likely to be punished eerily correlate with other social statistics imposing consequences on society. Black students are disproportionately represented in special education—in one study Black children accounted for only seventeen percent of the total school population but an astounding thirty-five percent of the special education for Learning Disabled students.<sup>227</sup> For Emotionally Disturbed classes, the same study found that “at least [eighty percent] of the students in the [Emotionally Disturbed] program were Black.”<sup>228</sup> On average, Black males are more likely to attend the most segregated and least resourced public schools.<sup>229</sup> Minority students account for the highest percentage of high school dropouts in any given year. From 1987 to 2007, students of Black and Hispanic origin—specifically male students—were consistently the highest percentage of dropouts.<sup>230</sup> In 2005, 7.5% of Black males dropped out of high school as compared to 3.4% of White males and 5.6% of Hispanic males.<sup>231</sup> Figures from the United States Census indicate that Black males have consistently low educational attainment levels. Only 16.4% of Black males aged twenty-five to twenty-nine years achieved four or more years of college.<sup>232</sup> Blacks comprise a disproportionately large percentage of the population that is in

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227. HARRY & KLINGER, *supra* note 28, at 6.

228. *Id.* at 6.

229. See Jaekyung Lee & Kenneth K. Wong, *The Impact of Accountability on Racial and Socioeconomic Equity: Considering Both School Resources and Achievement Outcomes*, 41 AM. EDUC. RES. J. 797, 809 (2004).

230. U.S. CENSUS BUREAU, HIGH SCHOOL DROPOUTS BY RACE AND HISPANIC ORIGIN: 1980 TO 2007 Tbl.262 (2008), available at <http://www.census.gov/compendia/statab/2010/tables/10s0262.pdf>.

231. *Id.*

232. NAT'L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT – OCTOBER 2011 POSTSECONDARY EDUCATION 45 (2011), available at [http://www.ncd.gov/progress\\_reports/Oct312011](http://www.ncd.gov/progress_reports/Oct312011) (“Nearly 28 percent of the general population of people 25 years of age and older have completed college, but people with disabilities complete college at half that rate. Increased efforts are needed to close the gap between people with and without disabilities.”); see also CAMILLE L. RYAN & JULIE SIEBENS, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2009 at 5 n.15 (2012), available at [www.census.gov/prod/2012pubs/p20-566.pdf](http://www.census.gov/prod/2012pubs/p20-566.pdf) (showing that about sixteen percent of Blacks and Hispanics have achieved a bachelor's degree); U.S. CENSUS BUREAU, STATISTICAL ABSTRACTS OF THE UNITED STATES: 2012 151(2012), available at <http://www.census.gov/prod/2011pubs/12statab/educ.pdf> (showing that Black and Hispanic bachelor's degree achievement increased to 17.7% in 2010); INSTITUTE OF EDUCATION SCIENCES, NATIONAL CENTER FOR EDUCATION STATISTICS Tbl. 8 (2011), available at [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_008.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_008.asp) (listing statistics from 1910–2011).

poverty; the group's unemployment rate is twice as high as the national average with annual incomes at only three-quarters of that for White men.<sup>233</sup> Black men live about seven years less than men in other racial groups<sup>234</sup> and are also seven times more likely than other men to spend time in jail.<sup>235</sup>

The social problems confronting individuals with some form of disability are not so dissimilar from those of African Americans.<sup>236</sup> People with disabilities experience low rates of educational attainment. In 2008, approximately twenty-four percent of non-institutionalized persons aged twenty-one to sixty-four years with a disability in the United States had an educational attainment that was less than a high school degree.<sup>237</sup> This is the same percentage in this category as those who live below the poverty line.<sup>238</sup> The percentage of individuals with a disability who achieve a college degree or higher depends on the nature of the disability and has generally been increasing over time, yet the achievement of those with mental retardation or an intellectual disability remains consistently at the lowest end.<sup>239</sup> People with disabilities are more likely to be in poverty than almost any other group,<sup>240</sup> and have extremely high rates of

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233. In 2011 Black males had unemployment rates as high as seventeen percent. BUREAU OF LAB. STATISTICS, ECONOMIC NEWS RELEASE Tbl A-2 (2012), available at <http://www.bls.gov/news.release/empst.t02.htm>.

234. Elizabeth Arias, CDC, *United States Life Tables, 2004*, 56 NAT'L VITAL STATISTICS REPS. 1 (2007), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_09.pdf).

235. According to the Bureau of Prisons, Blacks comprise 37.3% of the prison population. FED. BUREAU OF PRISONS, *Quick Facts About the Bureau of Prisons* (last updated Sept. 29, 2012), <http://www.bop.gov/news/quick.jsp>; see also MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007) ("African Americans are incarcerated at nearly six (5.6) times the rate of [W]hites.").

236. The populations discussed are not exclusive of each other, neither are they co-extensive.

237. Cornell University, *Find U.S. Disability Statistics in 3 Easy Steps*, DISABILITY STATISTICS, <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=9> (last visited on Nov. 5, 2012) (under "Year" select "2008" then press "Search" button).

238. W. ERICKSON ET AL., 2008 DISABILITY STATUS REPORT: THE UNITED STATES 6 (2010).

239. See, e.g., MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010 22 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf> (showing individuals with severe disabilities had the lowest percentage of bachelor's degrees); Cornell University, *supra* note 237 (under "Education" select "a BA degree or higher" and then compare the various years by selecting either "2008," "2009," or "2010," along with the various categories under "Disability Type" by selecting one and pressing the "Search" button).

240. The percentage of non-institutionalized persons aged twenty-one to sixty-

unemployment. The percentage of non-institutionalized people in the United States, male or female, with a disability, from ages twenty-one to sixty-four, of all races, regardless of ethnicity, and at all education levels, who were employed in 2008, was approximately 39.5%.<sup>241</sup> This group is also highly unlikely to carry health insurance.<sup>242</sup> Finally, disproportional numbers of the mentally ill are represented in the prison population to the point where it seems prison is the preferred form of treatment.<sup>243</sup> This statistic, along with those concerning Black males, is very troubling, not only because of the correlation with our choice to punish rather than educate elementary school age children, but also because of society's apparent preference to warehouse people who are different, rather than finding meaningful assistance and solutions.

The correlation between low educational attainment and other social statistics relevant to Black males, as well as to individuals with disabilities, is evident. To the extent that education is central to achievement and status in life, focusing on the education of Black male children is essential. Part of this focus is in appropriately determining the needs of each child. This, in effect, will help all children, and especially enable the proper resources to be directed to the education of those with real intellectual disability. The United States faces a crisis in its public education system. The teaching techniques and structuring of school systems that are beneficial for the education of Black males and students with genuine learning disabilities will ultimately also be ones that create a better system of education for all students. Finding ways to alter conceptualizations of effective teaching without inappropriate labeling, categorizing, or tracking may lessen the prevalence of inappropriate labeling, categorizing, or tracking in other areas of society. Thus, the repetitions are not just chronological in a vertical sense, but also horizontal in their reach and consequence throughout all aspects of life and society. In essence, by not correcting the disparities early, especially in

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four years with a disability in the United States who were living below the poverty line in 2008 was approximately 25.3%. ERICKSON ET AL., *supra* note 238, at 43.

241. *Id.* at 32.

242. The percentage of non-institutionalized persons aged twenty-one to sixty-four years with a disability in the United States who were uninsured in 2008 was approximately 18.2%. *Id.* at 56.

243. See Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391 (2006); H. Richard Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERV. 483, 486 (1998) ("[I]t appears that a greater proportion of mentally ill persons are arrested compared with the general population.").

education, we are ensuring the perpetuation of disparities in all other areas of life.

*B. Conclusions—Wanting . . . Something Different.*

Rather than educating all of our children, we use education as another means of subordination. We label many children, most often Black males, as Intellectually Disabled to avoid fully educating them. The systematic over-labeling of students as Intellectually Disabled reduces resources and attention that may be paid to those students with genuine disabilities, reducing the quality of education for them. We use laws and policies that promote racial segregation within schools and between school districts. These same laws and policies also encourage and permit differential delivery of educational services. We punish and expel large numbers of children, most often Black males, rather than finding ways to reach and include them in their own education. Even though we understand that education is a major factor in solutions for crime and repeated incarceration, we not only prefer punishment and expulsion, leaving high-risk behaviors as the likely outcome, we also water-down and create large barriers to education within incarceration facilities, further limiting opportunity and increasing the likelihood of recidivism. Where education could be the solution and a path to prosperity for individuals and for the collective welfare of the nation, it appears instead that educational settings use the promises of education to the detriment of some.

The system of (mis)education operates from a structure perpetuated by laws, policies, and institutions that operate to ensure the continued subordinated status of groups based on race and disability; one used to reinforce the other. This is not unlike the manner in which the system of "mass incarceration" operates to ensure the subordinate status of a group, defined largely by race.<sup>244</sup> "Rather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind."<sup>245</sup> The connection between these two areas and their relative operation cannot be mistaken.

In Chicago (as in other cities across the United States), young [B]lack men are more likely to go to prison than to go to college. . . . In fact, there were more [B]lack men in the state's

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244. See ALEXANDER, *supra* note 200, at 4.

245. *Id.* at 2.

correctional facilities . . . just on drug charges than the total number of [B]lack men enrolled in undergraduate degree programs in state universities. . . . The young men who go to prison rather than college face a lifetime of closed doors, discrimination, and ostracism. Their plight is not what we hear about on the evening news, however. Sadly, like the racial caste systems that preceded it, the system of mass incarceration now seems normal and natural to most, a regrettable necessity.<sup>246</sup>

The system of education creates a system where we punish those labeled as disabled to keep them from an education; we label those in prison as felons to create legal and social disabilities.

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246. *Id.* at 185 (emphasis omitted).



