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LAW, CULTURE, AND RIGHTS IN THE AGE OF GLOBALIZATION

NON-EDUCATION IN AMERICA: GATEWAY TO SUBSISTENCE LIVING

Cheryl George[†]

I. INTRODUCTION

Dropout rates are the proverbial canary-in-the-coal-mine. If ever there was a predictor of poverty, discrimination, abuse, neglect, inability to parent—in short the suffering of an entire generation—it is the lack of experience and education we are affording our minority students. This lack of education is invariably accompanied by lack of not only opportunity, but sustainability. We have a potential generation of students unable to make their way through life independent of government support. The worst crime in a capitalist society is to leave an entire group without the skill set to compete. Perhaps the biggest hurdle to objectively identifying schools that are failing our children is the presumption that schools, by virtue of their mission, are acting in “good faith.” In every scenario in which schools’ decisions and districts’ allocation of funds and energy are analyzed, courts have approached the dilemma from the standpoint that schools and educators act in good faith. After 50 years of inequity, it is indeed safe to say that in order to achieve such disparities in achievement between white

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I thank my family for their support during the time I was researching and preparing this paper. I give many thanks to my research assistant, Shannon Pustka Sevier (J.D., May 2007), for her untiring research and diligence. Truly I thank her for going the extra mile for this research. Immeasurable thanks go to the editing team of the Texas Wesleyan Law Review. Finally, a version of this paper was presented at the “Fourth Annual Gloucester Summer Legal Conference: Law, Culture, and Rights in the Age of Globalization-Marking the 200th Anniversary of the Slave Trade (1807),” sponsored by the Texas Wesleyan University School of Law, the law faculty of the University of Gloucestershire, and the Central Gloucester Initiative, held in Gloucester, England, July 19-21, 2007. I am most grateful for the warm reception and valuable comments received from the Conference organizers and participants.

I would also like to honor my father, James P. Taylor, who passed away on February 21, 2008. He was a math teacher for almost 40 years in the Houston I.S.D. My dad excelled at inspiring disadvantaged students. He and my mother taught my siblings and me the importance of a great education.

and minority groups there must be a complete absence of good faith. There is no other explanation.

II. WHAT ARE THE FACTORS DRIVING DROP-OUT RATES?

Rather than being termed a “failing” school due to low standardized test scores, many schools have enacted administrative provisions to push students out of school rather than retain them and have to report their low test scores. This practice has reached epidemic proportions in larger districts where stakes are high and some districts risk suit for their unfair practices:

New York’s pushouts are just now coming to public attention, in part because of the report by the public advocate and Ms. Hyman’s group (Advocates for Children), which has filed suit against the Education Department, accusing Franklin K. Lane High School in Brooklyn of dumping hundreds of students in the last three years.¹

Schools will use such reasons as “too many fights,” “excessive absences,” and even “excessive tardies” as means of barring grade-promotion (and test taking), which affects the earning of credits and eventually prevents the earning of diplomas. “According to a report by Ms. Hyman’s group and the city’s public advocate . . . the New York City schools discharged more than 55,000 high school students during the 2000–1 school year—a number far higher than that year’s graduating class of fewer than 34,000.”² This number is staggering. We have reached a point in America where we don’t even discuss quality of education, but are reduced to dickering over who may stay in school and possibly obtain a diploma that, whether any education is attached to it, may render a higher paying wage for the recipient after they have left the school system. In many cases those students who have been pushed out are the very group of students who work the hardest to stay in school, as the following two scenarios illustrate.

A. *Scenario 1: Jefferson Davis County, Mississippi*

“In 2000, the Mississippi Board of Education approved a change to graduation requirements. The policy revision applies to students who began the 9th grade in school year 1999–2000 or later. The new requirements are that in order to graduate, all high school students must pass four subject area tests. The subject area tests are: Algebra I, Biology I, English II, and US History from 1877 to present. These tests are to be phased in over time to replace the Functional Literacy Exam (FLE) as a requirement for graduation.

“In the spring of 2003, Tamara was in her senior year of high school and planning to attend college in the fall. She had completed all of

1. Tamar Lewin & Jennifer Medina, *To Cut Failure Rate, Schools Shed Students*, N.Y. TIMES, July 31, 2003, at A1.

2. *Id.*

the requirements for graduation. She had even raised her grade point average over the course of her senior year; she was getting some B's and even some A's. She was, however, unable to pass the reading portion of the Functional Literacy Exam. After failing it once, she studied for over a year for the test, taking remedial classes offered by her school. She was unable to master it. Her mother had always suspected that her daughter had a learning disability with regard to reading. However, this disability had never been diagnosed.

"Tamara had never had an educational assessment performed, much less received any special services. Tamara's mother wanted desperately for Tamara to be re-tested over the summer so that she could attend college in the fall. She was told that there was to be no re-testing over the summer and that Tamara would need to retake the test in September if she wanted another opportunity to pass it. However this made it impossible for Tamara to enroll in college, which began in August. Discouraged, Tamara did not retake the exam this past fall, has not received a diploma, and recently got a job working at a local factory."³

A recent national study of enrollment trends produced by researchers at Boston College suggests that state policies that require schools to retain students in grade or deny them high school diplomas on the basis of test scores alone are increasing the likelihood that these students will drop out before graduating. . . . According to the report, "the decline in graduation rates is greatest in states that require students to pass exams in order to be promoted to the next grade and/or to graduate from high school."⁴

B. *Scenario 2: A Texas Story*

"Rose (a pseudonym) is a Hispanic female. She attended schools in Florida and then Texas until 1997. Her school experiences in Florida were positive, but she experienced school difficulties after she moved to Texas. She did not like the school she attended, felt that teachers were not positive and did not treat her fairly. Under a Texas statute passed in 1993 that made truancy a misdemeanor, she was fined for being tardy at school. . . . Rose explains how this policy contributed to her dropping out:

Well, the reason that I dropped out of high school is because they put me on probation because I missed a lot of school. And me and my Mom went to talk to a judge. I don't know how many months I

3. The scenario above is a passage from GARY ORFIELD ET AL., *LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS* 4 (2004), available at http://www.urban.com/UploadedPDF/410936_LosingOurFuture.pdf (citing an anecdote from Clara Hall, Chapter President, Parents for Public Schools) [hereinafter *LOSING OUR FUTURE*].

4. *Id.* at 9 (citing WALT HANEY ET AL., *THE EDUCATION PIPELINE IN THE UNITED STATES: 1970–2000*, 49–55 (2004)).

was on probation. But after that, I went to school every single day. I was in school and doing my work, but the thing about it is that I was tardy a lot. I was fifteen minutes late and because of my tardies; they counted it as though I was absent. They added all that up and they still made us pay the fine for me not going to school. Even though I was in school and doing my work, I was late. Because they had that policy, after three tardies you're absent. That just didn't work for me. If they are going to charge us, might as well drop out anyway. Now they are coming out saying that I didn't pay when my mom and me worked out a payment plan to pay it. My mother passed away last year and now I have warrants for tardies.

“Rose dropped out of school in 1997. She is now 23 years old and pursuing a GED degree.”⁵

The absurdity of Rose's situation confounds me. For working parents who barely make minimum wage, I cannot understand legislation that enables schools to bar their willing and eager children from attending school while making monetary fines a condition of their re-entry.⁶ I know from personal experience that fellow students of my daughters routinely miss weeks of school at a time for trips to Disneyland, athletic competitions, and to tour prospective colleges. I also know that a friend of my eldest daughter misses school whenever one of her younger siblings or cousins is sick because her parents cannot afford to take the day off. Should she be punished, but not the other children? Should her parents be made to attend weekend parenting sessions and pay fines because they cannot make a wage that enables one of them to stay home, or because they have an employer who views them as expendable and does not offer sick days?⁷

C. *Have drop-out rates remained constant, or are there permutations in current reporting that manufacture baseless trends that indicate more students are failing to graduate?*

The amount of money being spent on tracking graduation rates would indicate that it is both a low priority and of little importance. The Department of Education has never placed a premium on accurate graduation rates so trends are impossible to accurately isolate across the past few decades. “Given the strength of the relationship between high school graduation and students' life prospects, graduation rates are at least as important as test scores in assessing the per-

5. The scenario above is a passage from *LOSING OUR FUTURE*, *supra* note 3, at 72 (citing an anecdote from Donna Joseph Diaz, Doctoral Candidate at University of Texas, Austin).

6. See Angela Freeman, *Treating Truants* (June 2006), <http://www.cpa.state.tx.us/comptrol/fnotes/fn0606/truants.html>.

7. See Marquette M. Maresh, *Admissions, Attendance, Truancy, and Tardies: What You Need to Know About the Law*, *TEX. SCH. ADMINISTRATORS' LEGAL DIGEST*, 1, 9 (Mar. 2000), available at http://www.wabsa.com/pdfs/Admissions_Attendance_and_Trucancy.pdf.

formance of our school system. Yet graduation rates have not received nearly as much attention as national test scores.”⁸

One trend that does bear discussion is that of a handful of districts in which white graduation rates grossly outpace black graduation rates.

For the most part, districts with low African-American and Latino graduation rates also had relatively low white graduation rates. A few districts, however, have large disparities between their white and minority graduation rates. For example, New York City graduates 80% of its white students but only 42% of its African-American and 45% of its Latino students. Dekalb County, Georgia has a 77% graduation rate for white students but only 46% of African-Americans and 29% of Latinos complete high school. Gwinnett and Cobb Counties in Georgia have similar large disparities between white and minority graduation rates. Milwaukee has a 73% graduation rate for whites while African-American and Latino students have graduation rates of 34% and 42%, respectively.⁹

Instead of a school failing to graduate students in a consistent fashion, they appear to be consistently graduating white students while consistently *not* graduating black students. Numbers like the rates mentioned above cannot stem from policy alone. The only explanation for such a dichotomy in student success is the result of individual choices; choices to ignore the problems encountered by one group of students and choices to affirmatively assist students of another. “While the national government spends over \$40 million for the National Assessment of Educational Progress, which the NCES¹⁰ uses to track performance on achievement tests, less than \$1 million is spent by the national government on dropout/high school completion statistics.”¹¹ Failing to accurately count and track certain groups of students makes ignoring them far easier, both in term of practice and conscience. “[B]ecause the survey does not sample institutionalized populations, the [Current Population Survey] has been criticized for its undercount of young Blacks and Latinos, who are incarcerated at disproportionately high rates.”¹² How are these groups of students being ignored, undercounted, and by-passed? Consider the following theories circulating amongst researchers who believe that No Child Left Behind (NCLB) legislation runs counter to seeing every child achieve with equal, much less adequate, resources, funding, and assistance. These are common practices among administrators while certain schools

8. Jay P. Greene, *High School Graduation Rates in the United States*, MANHATTAN INST. FOR POLICY RESEARCH (2002), http://www.manhattan-institute.org/html/cr_baeo.htm.

9. *Id.*

10. National Center for Education Statistics.

11. Greene, *supra* note 8 (citing Phillip Kaufman, *The National Dropout Data Collection System: Assessing Consistency*, HARVARD CIV. RTS. PROJECT (Jan. 13, 2001)).

12. LOSING OUR FUTURE, *supra* note 3, at 8.

have adopted more severe measures inclusive of retaining students in lower grades to avoid testing years and even helping entire classes to cheat just to improve school scores.

III. “GAMING THE SYSTEM”: METHODS USED TO MASK THE GRADUATION RATES OF MINORITIES

A. *Testing That Masks Lack of Progress*

In an effort to bolster scores and make schools and states appear more adept at educating their youth, 11 of 12 states evaluated were shown to use easy tests to produce reportable promotion numbers. When the National Assessment of Education Progress (NAEP) test scores for the same populations of students were analyzed, the number of those students passing fell drastically.¹³ Consider the data taken from the Policy Analysis for California Education (PACE) study conducted by researchers at Berkeley:¹⁴

State	State Reading % Proficient	NAEP Reading % Proficient	% Gap	State Math % Proficient	NAEP Math % Proficient	% Gap
Arkansas	51	30	21	50	34	16
California	47	21	26	50	28	22
Illinois	67	29	38	80	32	48
Iowa	78	33	45	79	38	41
Kentucky	68	31	37	45	26	19
Massachusetts	50	44	6	40	49	9
New Jersey	87	37	50	75	45	30
North Carolina	83	29	54	93	40	53
Oklahoma	79	25	54	84	29	55
Texas	79	29	50	81	40	41
Washington	80	37	43	61	42	19

B. *Aggregation of Minority Groups and Exclusion of Certain Student Pools*

There are two common ways in which students are systematically dropped from reporting. The first is by virtue of when they arrived in the school district. For instance, in Texas, administrators do not need to include those students who arrived at the school after the month of October. What this is meant to do is not hold schools accountable for students they did not have ample time in preparing, but, given the

13. See POLICY ANALYSIS FOR CALIFORNIA EDUCATION, IS THE NO CHILD LEFT BEHIND ACT WORKING? THE RELIABILITY OF HOW STATES TRACK ACHIEVEMENT (2006), <http://pace.berkeley.edu/reports/WP.06-1.pdf>.

14. *Id.*

methodical way in which students are ignored once it is determined that they are “a lost cause” or able to be excluded from reporting, students who transfer in the month of October or later run the risk of being pushed out of the richest learning environments. Some schools go so far as to group problem students and late-comers with one teacher, usually a new one, so they do not interrupt the learning or pace of the other classes.

A second way that students may “not count” stems from states’ definitions of the subgroup size required for disaggregation. If states define subgroup size expediently, the scores of various subgroups will continue to be buried in schoolwide averages. Again, Texas is a good example of artful definition of subgroup size. Under the Texas state accountability system, subgroups must include at least 30 students and account for at least 10% of all students—or include 50 or more students—to be evaluated. Under Texas’ NCLB implementation plan, subgroups must include at least 50 students and make up at least 10% of all students—or include 200 or more students—to be evaluated. Under the state system, 82% of Houston schools with African American test-takers disaggregate scores for African American students, while for the purposes of NCLB, only 66% do.¹⁵

Using this type of methodology, administrators sometimes exclude the very students that NCLB legislation is meant to address.

Whether it is Hispanics in California, African-Americans in inner-city Chicago, American Indians in Texas, Arkansas, and Washington, or even special education students in Virginia,¹⁶ a large number of states have been successful in petitioning for exclusion of large groups of students. Their basis for exclusion is that these groups number so small that they are “statistically insignificant” and the cost of reporting on these students far outweighs the impact of the scores upon overall achievement levels.¹⁷ What is curious to me, however, is that these statistically insignificant populations could be so readily identified and then tracked, so as to exclude them. What is also curious is that no matter how small a group, if they are over-performing, like Asians in Austin, they are not only included, but used to skew minority numbers. “In all, the tests of more than 24,000 mostly minority children in Missouri aren’t being counted as groups, AP’s review found. Other states have much higher numbers. California, for in-

15. Jennifer Booher-Jennings, *Rationing Education in an Era of Accountability*, 87 *PHI DELTA KAPPAN* 756, 760 (2006).

16. See Frank Bass et al., *States Help Schools Dodge No Child*, *CHICAGO SUN-TIMES*, Apr. 18, 2006, at 3.

17. Frank Bass, *States Omit Minorities’ School Scores*, *USA TODAY*, Apr. 17, 2006, available at http://www.usatoday.com/news/education/2006-04-17-nclb-loophole_x.htm.

stance, isn't counting the scores of more than 400,000 children. In Texas, the total is about 257,000."¹⁸

C. "Educational Triage"¹⁹

Some schools have started the systematic practice of identifying students who are likely to perform well on standardized tests and identifying those which it has been determined that are likely not to pass. Of the students who are likely not to pass, the next determination is a cost-benefit analysis in which teachers determine the amount of effort it will take for students to pass standardized testing. If the students are far behind, or if teachers have a high amount of at-risk students, they begin the process of ignoring those students who are less likely to succeed so that they can concentrate on students who are "on the bubble." Employing economic theory to manipulate testing data and to determine which students to invest in seems far-fetched but has been documented in several states inclusive of Texas, California, Illinois, New York, and Pennsylvania. Former educators now make a living as consultants to school districts, instructing teachers on how to segregate their class lists and determine who to focus their attentions on, as shown in this excerpt from *Phi Delta Kappan*:

"Take out your classes' latest benchmark scores," the consultant told them, "and divide your students into three groups. Color the 'safe cases,' or kids who will definitely pass, green. Now, here's the most important part: identify the kids who are 'suitable cases for treatment.' Those are the ones who can pass with a little extra help. Color them yellow. Then, color the kids who have no chance of passing this year and the kids that don't count—the 'hopeless cases'—red. You should focus your attention on the yellow kids, the bubble kids. They'll give you the biggest return on your investment."²⁰

Not only are students segregated in this manner at many schools, but teachers are also feeling pressure from their administrators as they are ranked against each other according to who is able to advance the most students.

As the bell tolls a final warning to the boisterous 9-year-olds bringing up the rear of her class line, Mrs. Dewey stares blankly into the hallway. Never did she believe that the advice offered by that consultant would become Marshall's educational mantra. Focus on the bubble kids. Tutor only these students. Pay more attention to them in class. Why? It's data-driven. Yet this is what her colleagues have been doing, and Marshall's scores are up. The community is

18. Jamie McKenzie, *NCLB Loopholes*, NOCHILDLEFT.COM (Apr. 2006), <http://nochildleft.com/2006/apr06holes.html>.

19. See Jamie McKenzie, *Gaming the System*, NOCHILDLEFT.COM (June 2006), <http://nochildleft.com/2006/jun06gaming.html>.

20. Booker Jennings, *same note*, at 757.

proud, and the principal has been anointed one of the most promising educational leaders in the state. At every faculty meeting, the principal presents a “league table,” ranking teachers by the percentage of their students passing the latest benchmark test. And the teachers talk, as they always do. The table makes perfect fodder for faculty room gossip: “Did you see who was at the bottom of the table this month?”²¹

While I feel for any teacher who is up against such stringent reporting standards, my stomach turns when I imagine my daughter’s teachers listening to such a consultant on some random teacher in-service day. While I used to imagine teachers across America sitting in professional development seminars learning some new technique in cognitive development, it is more likely they are listening to some hack tell them where to draw the line in their grade book, signifying which group of students to write off. What do I hope most, that my child made the cut? Or that my daughter’s teacher didn’t listen?

IV. WHAT EFFECT DOES DROPPING OUT OR GETTING A GED HAVE ON STUDENTS LATER IN LIFE?

Subjects are less likely to participate in leadership, resulting in a lack of diversity in all levels of business and politics, and are less likely to vote, resulting in a voiceless lower class. “High school dropouts are significantly less likely than better-educated Americans to vote, trust government, do volunteer work, or to go to church, according to a . . . report that reveals a widening gap in ‘civic health’ between the nation’s upper and lower classes.”²² In addition, these individuals are less likely to be employed, and if employed, are less likely to live above poverty levels. “In 2001 the unemployment rate for dropouts 25 years and older was almost 75 percent higher than for high school graduates—7.3 versus 4.2 percent.”²³ “Among those over 25 years old who failed to complete high school or receive a GED, 55% report no earnings in the 1999 Current Population Survey of the U.S. Census compared to 25% of those with at least a high school degree or GED.”²⁴

Apart from employment, these former students are not likely to pursue advanced education, much less return to school or a GED program to finish their degree. Even if they do participate in a GED program and complete their diploma requirements, they have relegated themselves to poverty. “A final study found that GED holders were less likely to be employed and invest in post-high school educa-

21. *Id.*

22. Amy Goldstein, *Civic Involvement Tied to Education*, WASHINGTON POST, Sept. 19, 2006, at A19.

23. LOSING OUR FUTURE, *supra* note 3, at 6 (citing findings from the National Center for Education Statistics).

24. Greene, *supra* note 8.

tion and training than graduates with diplomas.”²⁵ And while such individuals are most likely to require two incomes to support a household with children, this is the largest demographic of single-parent households. “Students who fail to graduate high school are also significantly more likely to become single parents and have children at young ages. And students who do not graduate high school are significantly more likely to rely upon public assistance or be in prison.”²⁶ When taken across a lifetime, the differences in potential quality of life are staggering:

The U.S. Census estimates that high school dropouts will earn \$270,000 less than high school graduates over their working lives. Census data also show that the earnings gap between high school graduates and dropouts has grown over the last two decades—in 1975, high school [dropouts] earned [0.9 times the earnings of] high school graduates; in 1999, high school dropouts earned [0.7 times] as much. . . .

[A] 2002 Census Bureau report shows that the mean earnings of young adult Latinos who finish high school are 43% higher than those who drop out. . . . A 2003 report on the Chicago job market shows that more than half of young adult male African American dropouts in that city have no job at all.”²⁷

Layer upon layer of lost opportunity and lack-of-options compounds invariably leading to public assistance and the cycle perpetuates. “[T]he median income for those who left school without a high school diploma or GED is \$15,334 compared to \$29,294 for people with at least a high school degree or GED.”²⁸ To compound matters, this group represents the largest group of incarcerated Americans as well. “Approximately, two thirds of all state prison inmates have not completed high school.”²⁹ What makes matters worse is that Congress and the President have taken steps to make the work place even less hospitable by refusing to pass minimum wage laws and by paving the way to ship more jobs overseas.³⁰

More than just making a living wage we are talking about the systematic exclusion of entire racial groups from positions of authority and leadership in high schools, civic groups, colleges, and professional

25. LOSING OUR FUTURE, *supra* note 3, at 8 (citing Russell W. Rumberger, *The Economic and Social Impact of High School Dropouts*, Draft, Jan. 12, 2004).

26. Greene, *supra* note 8 (citing Phillip Kaufman et al., *Dropout Rates in the United States: 1999*, NAT'L CENTER FOR EDUC. STAT.: STAT. ANALYSIS REP., No. 2001-022, Nov. 2000, <http://nces.ed.gov/pubs2001/2001022.pdf>).

27. LOSING OUR FUTURE, *supra* note 3, at 6 (citing 2003 U.S. Census Bureau data; Rumberger, *supra* note 25; and U.S. CENSUS, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 13 (July 2002), <http://www.census.gov/prod/2002pubs/p23-210.pdf>).

28. Green, *supra* note 8.

29. LOSING OUR FUTURE, *supra* note 3, at 6.

30. See Jamie McKenzie, *A Nation of Dropouts?*, NOCHILDLEFT.COM (Apr. 2006), <http://nochildleft.com/2006/apr06dropouts.html>.

groups. We are talking about the complete disruption of the normal progression of the American success story. “[I]t is unacceptable to BAEO³¹ that Black America’s long-held goal of racial and ethnic diversity among our nation’s economic and political leadership is undermined by the massive failure of our young people to graduate from high school.”³² If you cannot complete high school, the likelihood that you will participate in the American Dream is far diminished.

V. CONCLUSION

Even if all students did have access to the same education, I am not sure we would be that much better off. Schools have abandoned holistic teaching and the classical education for rote memorization and teaching to various tests. Education has become narrow and stale. Instead of teaching a broad scope of literacies and tending to the creative nurturing of young minds, teachers follow boxed curriculums geared toward test limited proficiencies. Exposing every child to such mind-numbing exercises is not the answer; a complete overhaul of the present system is. Considering recent legislation, it does not appear that Congress or the President much cares:

Bush’s budget proposal does away with 42 education programs. These include career and technical education, school counseling, Safe and Drug-Free Schools, education technology grants and drop-out prevention. Also on the chopping block are GEAR-UP, TRIO Talent Search, and Upward Bound, programs that have helped generations of disadvantaged students prepare for and attend college.³³

We must send a message, as parents, citizens, neighbors—as Americans—that our education system simply won’t do. It’s not the administrators; it’s not the teachers, not the parents, or the students. It’s *us*, all of us. Until we stand up as a group, get over ourselves, and invest in our future, our children—half our population—will tank, which in essence means we tank.

31. Black Alliance for Educational Options.

32. Kaleem Caire, *Forward to Green*, *supra* note 8.

33. Jamie McKenzie, *Leaving the Other America Behind*, NOCHILDLEFT.COM (Feb. 2006), <http://nochildleft.com/2006/feb06behind.html>.