THE CHILDREN WE LEAVE BEHIND: EFFECTS OF HIGH-STAKES TESTING ON DROPOUT RATES

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Not too long ago, I talked a former student, Ana, through a serious life-decision: whether she should drop out of high school. For every argument she posed as to why she should cut her education short, I had a response. She had dropout friends who were "doing alright"; I suggested those friends may not be "doing alright" in ten years. She needed to help her family financially; I explained that high school graduates are more likely to be able to support themselves and their families in the long run. Her classes were boring, and her teachers even more so; I replied that not everything worth learning must be enjoyable, but there is a purpose and a benefit to learning it. For every point she made, I passionately argued the counterpoint. "But Ms. Klima," she shouted in frustration, "there's just no way I'm going to pass AIMS,[1] and then I won't graduate even if I stay all four years!"

Even now, I am not sure how to best respond to that contention. Realistically, she was correct; she stood a very slim chance of passing, and if she did not, she would not graduate. My weak but adamant answer, which I repeated in two subsequent conversations, was that she needed to just try her best and, hopefully, she would pass. But even as I pushed her to study rigorously, it troubled me that she probably would not pass that test and, consequently, would not graduate from high school. Therefore, staying in school may not get her very far. It angers me that Arizona and

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[1] Arizona's Instrument to Measure Standards is a standards-based test given to all elementary, junior high and high school students.

many other states would have laws in place that encourage students to drop out.

It was against this backdrop that my Note topic was conceived. Part I of this Note explains the move toward the increased use of high-stakes testing in America and the resulting federal No Child Left Behind Act of 2001 ("NCLB" or the "Act"). Part II describes a related concern, the crisis in nationwide dropout rates. Part III explains how policies which dictate using high-stakes tests as baseline, necessary qualifications for graduation lead to devastating effects. Part IV explains how grade retention further complicates and impacts the dropout crisis. Finally, Part V argues for three policy changes: 1) standardizing and mandating dropout calculations; 2) forcing adherence to NCLB's graduation rate provisions and creating correlating state provisions; and 3) amending NCLB to prohibit the use of exam scores as mandatory requirements for graduation or promotion.

I. HIGH-STAKES TESTING AND NO CHILD LEFT BEHIND

Standardized achievement tests have been around for years in numerous countries and have become increasingly popular in U.S. school systems in the twentieth century.[2] During the 1990s and the early part of this century, virtually every state adopted new statewide standards and testing programs.[3] Unlike their predecessors, these tests often were used to determine both promotion to the next grade and high school graduation.[4]

In 2001, the U.S. Congress authorized a significant revision of the 1965 Elementary and Secondary Education Act ("ESEA") called the No Child Left Behind Act of 2001,[5] which was signed into law by President George W. Bush on January 8, 2002.[6] At NCLB's core—and indeed the most controversial part of the legislation—is the nationwide achievement

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[2] R. MURRAY THOMAS, HIGH STAKES TESTING: COPING WITH COLLATERAL DAMAGE 12–13 (2005).

[3] *Id.* at 15.

[4] *Id.* at 13–16. Thomas explains that this transition primarily was the result of international testing done by the International Association for the Evaluation of Educational Achievement in which American students in higher grades scored disturbingly low as compared to their international counterparts. "Thus, the educational reform movement was not generated from within the education system itself but, rather, was being forced on the schools by the business community and a worried public." *Id.* at 15.

[5] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as 20 U.S.C. §§ 6301–7941).

[6] THOMAS, *supra* note 2, at 16.

testing provision.[7] This testing is the method by which other goals of NCLB are carried out.[8] These goals include:

(a) distinguishing between good schools and bad schools,

(b) rewarding successful schools and punishing failing ones,

(c) transferring students from failing schools to successful ones,

(d) informing parents of students' achievement-test performance, and

(e) providing tutors for students whose test-scores have been unsatisfactory.[9]

Although NCLB requires such testing in order for states to qualify for the substantial federal funding offered, the Act does not explicitly recommend that these test scores be used to decide grade promotion or high school graduation.[10] Nevertheless, states are permitted to use the scores for such purposes, [11] and many have chosen to do so. Moreover, the U.S. Department of Education has encouraged such use of test scores.[12]

What used to be standardized achievement tests utilized only to measure and compare students and schools have turned into high-stakes tests with severe consequences for all parties involved. Under the Act, a school must make "adequate yearly progress" ("AYP") as defined by the state every academic year.[13] Under NCLB, AYP includes graduation rate accountability provisions,[14] but these provisions are not seriously enforced.

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[7] *Id.* The testing provision in NCLB requires a continuation of the ESEA-required testing in reading and math skills at three grade spans (grades three to five, six to nine and ten to twelve) until the 2005 to 2006 school year. After that, each child's progress in reading and math should be tested every year in grades three through eight and at least once during grades ten through twelve. Additionally, beginning in 2002–2003, students judged to have limited English proficiency have their English-language skills tested. By 2007–2008, all students must also be tested in science at least once in grades three through five, again in six through nine and once more in ten through twelve. States may also elect to test in other subject areas. Each state may create or adopt its own test, although they are all compared to an independent benchmark called the National Assessment of Educational Progress ("NAEP"), which is a series of exams created by the federal government. This is designed to ensure that states are not setting unacceptably low standards. For a further discussion of what is tested, who creates the tests and the passing standards in each state, see THOMAS, *supra* note 2, at 16–18.

[8] *Id.* at 82.

[9] *Id.*

[10] *Id.* at 18.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 18–19.

[14] Under the NCLB section entitled, "State Plans," adequate yearly progress in part "includes graduation rates for public secondary school students (defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years)." 20 U.S.C. § 6311(b)(2)(C)(vi) (Supp. 2002). NCLB also requires that each state create an annual state report card including graduation rates for secondary school students consistent with this definition. *Id.* § 6311(h)(1)(C)(vi).

Other aspects of the definition of AYP, especially the necessary test scores and resulting consequences, are strictly enforced.[15] A school that does not meet its AYP goal for two consecutive school years must be identified by the school district as "needing improvement."[16] School officials must then develop a two-year school improvement plan supported by the local education agency (usually the school district).[17] Students must be offered the option of transferring to another public school within the district that is not labeled as needing improvement, and the costs of this transfer are borne by the failing school.[18] If the school does not make adequate yearly progress for a third year, it remains in school improvement status, and students must continue to be given the option of changing schools within the district.[19] Additionally, students from low-income families are eligible for supplemental educational services, such as tutoring or remedial classes, from a state-approved provider.[20] In the fourth year that a school fails to make AYP as measured by the tests, the district must implement "corrective actions" for school improvement, such as replacing staff or implementing a

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[15] GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 10 (2004). According to the report, the graduation rate accountability provisions were inserted into NCLB's definition of adequate yearly progress in part to balance the incentive for teachers and administrators to push out struggling students. The original goal was to declare that a school with inadequate graduation rates was not meeting AYP and would have the necessary corresponding consequences enforced. However, the authors found that the federal Department of Education "has allowed confusion and inconsistency to reign," and in some cases, it has "taken steps that demonstrably weaken the graduation rate accountability provision in the law." *Id.* at 12. Regarding the federally approved state plans that correlate with NCLB, most states have no consequential graduation rate accountability. Thirty-nine states set what the Civil Rights Project calls "soft" AYP goals for graduation rates, meaning schools that fall below these rates can still meet AYP if they exhibit any minor improvements in the following year. In Texas, for example, schools must either meet the 70% benchmark "or show improvement." *Id.* A school meets the "improvement" clause if it moves up one-tenth of 1% per year. *Id.* Similarly, California's lofty 100% graduation rate goal can be otherwise met, for AYP purposes, if the school shows "any improvement." *Id.* Only ten states set true graduate rate floors which, if not met, means a school fails to make AYP for the year. *Id.* at 11–13.

[16] THOMAS, *supra* note 2, at 19.

[17] *Id.*

[18] *Id.* The additional costs schools not meeting AYP must incur as the result of students choosing to leave such schools (i.e., for transportation reasons) are not funded by the federal government. Thus, already struggling schools must pull money from other allocations, leaving even fewer resources to spend on the students they are serving. Additionally, it may seem helpful to allow students to transfer to other schools within the district if their school is not meeting AYP. However, for many students in poor rural or inner-city schools, this option is not viable because all of the nearby public schools are labeled as needing improvement. If there are good public schools nearby, they are often quite full, and they have no incentive to admit students with low test scores coming from elsewhere. *See* Linda Darling-Hammond, *From "Separate but Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities*, *in* MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 3, 14 (Deborah Meier & George Wood eds., 2004).

[19] THOMAS, *supra* note 2, at 19.

[20] *Id.*

new curriculum.[21] The district must continue to offer public school choice and supplemental educational services for low-income students.[22] In the fifth year, the school district must make plans to "restructure" the school, such as reopening it as a charter school, replacing most or all of the staff or turning over the school to the state or a private company.[23] In addition to these dire consequences written into NCLB, states and districts often implement additional consequences for schools, administrators and teachers to "encourage" them to raise test scores.[24] These tests are not called high-stakes without reason.

II. THE NATIONAL DROPOUT CRISIS

Before examining specific effects of NCLB testing, it is important to realize that there is a national dropout crisis.

> Every September, approximately 3.5 million young people in America enter the eighth grade. Over the succeeding four years, more than 505,000 of them drop out—an average of nearly more than 2805 per day of the school year. Picture it: Every single school day, more than 70 school buses drive out of America's schoolyard, filled with students who will not return.[25]

Given such high dropout rates, we have cause to be seriously concerned. Students who drop out are more likely to be single parents, slip into poverty, be on welfare, commit crimes and be committed to prison.[26] A dropout earns $270,000 less than a high school graduate over his or her working life.[27] According to one study, having a high school diploma, as opposed to having the skills assessed by a minimum competency test, largely determines whether a person can obtain employment and how much money that person can earn.[28] Statistics show that in 1997, the unemployment rate of men in the 25- to 34-year-old range who did not graduate high school was more than twice that of men who did graduate; at those same

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 20.

[24] *Id.* For example, states may use federal funds for cash bonuses to teachers in schools that raise their test scores and to publish "distinguished schools" lists. *Id.*

[25] JAY SMINK & FRANKLIN P. SCHARGEL, HELPING STUDENTS GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION 9 (2004).

[26] *Id.* at 10.

[27] *See* ORFIELD ET AL., *supra* note 15, at 6.

[28] NAT'L RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 176 (1999).

ages, the unemployment rate of women without diplomas was three times higher than those with diplomas.[29]

A. THE INCONSISTENCIES IN STATE DEFINITIONS AND CALCULATIONS OF DROPOUTS

To understand the magnitude of the problem, we need to determine the total number of dropouts, but this endeavor alone is incredibly complex. Obtaining an estimate depends on how one counts and who is included within the definition of the word.[30] Indeed, a standard definition of "dropout" does not currently exist. The federal government provides a recommended definition,[31] but only thirty-six states and the District of Columbia report data using this definition.[32] States not working with the U.S. Department of Education ("USDE") on this effort include California, Florida, Michigan, New York and North Carolina.[33] These states are believed to have higher-than-average dropout rates.[34]

Another measure of the dropout rate is the Common Core of Data Survey of the USDE's National Center for Educational Statistics ("NCES").[35] Forty-six states and the District of Columbia "usually report" dropout data to the NCES, but only twenty-two states and the District of Columbia use the definition of dropout adopted by the NCES.[36] Ultimately, states differ in their definition of dropout; they use different time periods during the school year to collect data, various data collection methods, multiple ways of tracking youth no longer in school and varied methods of calculating dropout rates.[37] For instance, some states subtract students who return to school from their dropout total.[38] Some count students enrolled in high school equivalency programs as dropouts.[39] Some include students who register for college prior to obtaining a high school diploma,

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[29] *Id.*

[30] SMINK & SCHARGEL, *supra* note 25, at 10.

[31] The federal government's definition of a high school dropout is an individual who:

> (a) was enrolled in a district in grades 9 through 12 at some time during the preceding school year; (b) was not enrolled at the beginning of the current school year; (c) has not graduated or completed a program of studies by the maximum age established by a State; (d) has not transferred to another public school district, a nonpublic school, or a State-approved educational program; and (e) has not left school because of death, illness, or a school-approved absence.

DOE School Dropout Prevention Program, 70 Fed. Reg. 39,499, 39,449–39,501 (July 8, 2005).

[32] SMINK & SCHARGEL, *supra* note 25, at 10.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 10–11.

[36] *Id.*

[37] *Id.* at 11.

[38] *Id.*

[39] *Id.*

enter the military or enter correctional or mental institutions.[40] States differ based on whether they include students who complete high school with some credential other than a regular diploma, or those who receive their diploma by passing the Graduate Equivalency Degree ("GED") test.[41] States also have different laws regarding the age at which a student may legally leave school.[42]

B. THE INCONSISTENCIES IN DISTRICT DEFINITIONS AND CALCULATIONS OF DROPOUTS

The inconsistency between the states is further confounded by the lack of uniformity in definitions and methods of calculation *within* each state at the school district level. When students formally withdraw, districts use different and inconsistent codes to explain why each student leaves.[43] Students who do not formally withdraw but who stop attending school at some point pose an obstacle, and districts classify such students differently based on idiosyncratic policies.[44] For example, how long a student may be truant before he or she is classified a dropout varies widely among districts.[45] Districts are also inconsistent about classification of students who are in special schools, alternative programs and special education classes.[46] Districts even vary as to which grades are included in their reported dropout rates.[47] At the most basic level, different districts use different terminology that may or may not overlap with the term "dropout."[48] The Los Angeles Unified School District, for example, prefers the term "early school leavers."[49] All this has led Phi Delta Kappa's Center for Evaluation, Development, and Research to conclude:

> We simply cannot agree what a dropout is. In some districts, death, marriage, taking a job, entering the armed forces, entering college early, being expelled or jailed, going to a deaf school, business school, or vocational school causes one to be considered a dropout. In another district, none of these acts would be considered. . . .

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Floyd Morgan Hammack, *Large School Systems' Dropout Reports: An Analysis of Definitions, Procedures, and Findings*, *in* SCHOOL DROPOUTS: PATTERNS AND POLICIES 20, 23 (Gary Natriello ed., 1986).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 23–24.

[48] *Id.* at 26.

[49] *Id.*

> There are at least as many different definitions of a dropout as there are school districts recording dropouts. Some districts solved their problem of who to count as a dropout by not using any definition at all, whereas other districts had three or four definitions, and neither we nor they seemed to know which one was used.[50]

C. QUESTIONING THE FEDERAL GOVERNMENT

For the above-mentioned reasons, the USDE's dropout statistics seem questionable, and non-governmental sources are reacting. A recent report by the Business Roundtable questioned the USDE's data collection and tallying method.[51] The USDE places the national dropout rate at 11%.[52] The Business Roundtable used data gathered from the U.S. Census Bureau's Population Estimates and the USDE/NCES Digest of Educational Statistics. It then divided the total number of high school graduates in a school year by the total number of eighteen-year-olds in each state in that same year to come up with a national dropout figure as high as 30%.[53] The Business Roundtable also drew attention to a critical inaccuracy in the USDE's dropout figures: students who become incarcerated often are not counted, although many are dropouts or have not finished high school.[54] It also criticized the government's methodology as "substantially biased downward."[55]

Academics also question government statistics.[56] While the NCES found a national high school completion rate of 86.5% for the class of 2000, Jay P. Greene and Marcus A. Winters of the conservative Manhattan Institute found a completion rate of 69%.[57] They noted that this discrepancy in the findings was predominantly due to the NCES's counting recipients of GED certificates and other alternative credentials as high school diplomas, and the NCES's reliance on methodology that was likely to undercount dropouts.[58]

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[50] Dale Mann, *Can We Help Dropouts? Thinking About the Undoable*, *in* SCHOOL DROPOUTS: PATTERNS AND POLICIES, *supra* note 43, at 9 (citation omitted).

[51] SMINK & SCHARGEL, *supra* note 25, at 12.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 12–13.

[55] *Id.*

[56] *See* JAY P. GREENE & MARCUS A. WINTERS, PUBLIC SCHOOL GRADUATION RATES IN THE UNITED STATES, CIVIC REPORT NO. 31 (2002), *available at* http://www.manhattan-institute.org/pdf/cr_31.pdf.

[57] *See id.* at 3.

[58] *Id.* at 4.

D. THE DISPARATE IMPACT ON RACE AND ETHNICITY

Despite varying statistics in overall dropout rates, we do know that minority students are disproportionately more likely to drop out of school. Dropouts disproportionately include students of color, students from low-income families, students whose first language is not English and students with disabilities.[59] The Civil Rights Project at Harvard University estimated the 2004 national graduation rate of white students would be 74.9%, whereas only 53.2% of Hispanic students and 50.2% of black students would graduate.[60] When it looked further at gender differences within these groups, the research showed that less than half of minority males are graduating (48.0% of Hispanic males and 42.8% of black males).[61]

In California, for example, 75.7% of white students graduate, whereas only 57.0% of Hispanic and 55.3% of black students receive diplomas.[62] When this is broken down by gender, 51.3% of Hispanic males and 49.2% of black males are graduating in California.[63] The report explained that even in the states with the lowest graduation rates, the lowest rates for black and Latino students are over twenty percentage points below the lowest rates for white students.[64]

The data are even bleaker in some cases at the district level. In the Los Angeles Unified School District, which has an enrollment of over 720,000 students and is predominantly Hispanic, 40.2% of Hispanic and 48.1% of black students graduate compared to 68.1% of their white counterparts.[65] In New York City's school district, which is responsible for educating over one million students and is also predominantly Hispanic, while the average graduation rate is only 38.2%, there exists a significant discrepancy by race: a 57.9% graduation rate for white students, 32.2% for black students and 30.1% for Hispanic students.[66] In Oakland, which is predominantly black, 56.6% of white students receive diplomas, but the average district graduation rate is 30.4%, which is higher than the graduation rate of Hispanic students (25.3%) and of black students (23.4%).[67] Note that the racial and ethnic differences discussed above only represent the

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[59] SMINK & SCHARGEL, *supra* note 25, at 10.
[60] ORFIELD ET AL., *supra* note 15, at 2.
[61] *Id.*
[62] *Id.* at 27.
[63] *Id.*
[64] *Id.* at 4.
[65] *Id.* at 29.
[66] *Id.* at 57.
[67] *Id.* at 29.

public schools, so the actual differences may be more severe when private schools are included in the statistics.

Without some valid national dropout estimate, we cannot begin to deal with the problem. Furthermore, without accuracy in these data and honesty about how this all affects different minority groups, we cannot assess over time the effects of sweeping legislation like the No Child Left Behind Act on former students.

III. THE DISASTER CREATED BY USING EXIT EXAMS TO DETERMINE GRADUATION

A. HIGH-STAKES TESTING LEADS TO HIGHER DROPOUT RATES

The No Child Left Behind Act does not require or even recommend that test scores be used as a mandatory bar to decide high school graduation.[68] However, the USDE has encouraged such use,[69] and many states have opted to use the scores in this way. When a high-stakes test is used to determine graduation, it is often referred to as an "exit exam." The introduction of these exit exams and other high-stakes tests has been accompanied by increased dropout rates.[70] Students may actually fail the high-stakes tests and drop out, or they may just fear failure and drop out in anticipation of not passing.[71] In Massachusetts, in the first year that students were required to pass the state test in order to graduate (2003), the senior dropout rate in the Boston public schools rose from 7.0% to 7.7% (or 1405 students), in Holyoke from 7.6% to 10.2% and in Framingham from 1.2% to 3.7%.[72]

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[68] THOMAS, *supra* note 2, at 18. NCLB does, however, require that test scores be used for other specific purposes. First, the tests are to be used to judge individual schools' effectiveness and to track the progress of school-improvement efforts. Second, the test results are to be reported to federal and state officials. Third, the outcomes must inform communities of their schools' test results and resulting NCLB status. Finally, the test results must be communicated to parents to notify them of their children's academic success. *Id.*

[69] *Id.* As of 2000, more than half of the states had already implemented or were developing some form of high school exam that was mandatory for graduation. Laura S. Hamilton & Daniel M. Koretz, *Tests and Their Use in Test-Based Accountability Systems*, *in* MAKING SENSE OF TEST-BASED ACCOUNTABILITY IN EDUCATION 13, 45 (Laura S. Hamilton, Brian M. Stecher & Stephen P. Klein eds., 2002).

[70] THOMAS, *supra* note 2, at 200.

[71] *Id.* at 249. This anxiety is highlighted in the case of the student who came to me for advice. *See* Introduction *supra*.

[72] Anand Vaishnav, *High School Dropout Rates Are Up Sharply*, BOSTON GLOBE, Apr. 6, 2004, at B3.

Linda Darling-Hammond explains that studies have correlated the effects of grade retention, student discouragement and school exclusion policies stimulated by high-stakes tests with dropout rates in Georgia, Florida, Massachusetts, New York and North Carolina.[73] For example, according to the NCES, when new high-stakes testing policies were introduced in New York, graduation rates decreased from 63% to 58% between 1997 and 2001.[74] In Florida, a similar trend emerged when high-stakes testing began; there, the graduation rates fell from 57% to 52% during the same period.[75]

The National Research Council's Board on Testing and Assessment ("NRC") likewise observed this correlation.[76] According to the Board, although the exact causation is unclear, much of the existing research shows that the use of high-stakes tests is linked to higher dropout rates.[77] The NRC cited a study by Sean F. Reardon as an example of such research.[78] Reardon used data from the National Educational Longitudinal Study ("NELS") and found that high-stakes eighth-grade tests were "associated with sharply higher dropout rates" between the eighth and tenth grades.[79] Reardon also found that schools with high concentrations of students of low socioeconomic class were most likely to have high-stakes testing policies.[80] His analysis suggests that "it is the concentrated poverty of these schools and their communities, and their concomitant lack of resources, that link [high-stakes testing] policies to higher dropout rates, rather than other risk factors, such as student grades, age, attendance, and minority group membership."[81] Indeed, in Reardon's study, dropout rates between eighth and tenth grades were up to six percentage points higher than in comparable schools not requiring high-stakes testing.[82]

But it appears that there is more than just a correlation between high-stakes testing and increased dropout rates. In finding this correlation, Reardon manipulated variables in 720 schools and explained that his find-

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[73] Darling-Hammond, *supra* note 18, at 20.

[74] *See id.*

[75] *See id.*

[76] *See* NATIONAL RESEARCH COUNCIL, *supra* note 28, at 174.

[77] *See id.*

[78] *See id.*

[79] *See id.* (citing Sean F. Reardon, Eighth Grade Minimum Competency Testing and Early High School Dropout Patterns 5 (April 8–12, 1996) (paper presented at the Annual Meeting of the American Educational Research Association)).

[80] *Id.*

[81] *Id.* (quoting Sean F. Reardon).

[82] *See id.*

ings suggest that high-stakes testing actually *causes* higher dropout rates.[83] Additionally, researchers at Boston College recently conducted a national study of enrollment trends.[84] Their findings suggest state policies that require schools to deny graduation on the basis of test scores alone are *increasing the chances* that these students will drop out.[85] To be clear, it is not the implementation of a statewide standardized test that these researchers have found is leading to higher dropout rates, but rather the accompanying policies which require schools to deny diplomas on that basis.

B. NCLB WAS CREATED IN PART ON THE BASIS OF A FALSE "TEXAS MIRACLE"

Much of the NCLB legislation is based on the often-cited "Texas miracle" in the 1990s.[86] As Governor of Texas, George W. Bush worked closely with state corporate leaders to align Texas's system of public instruction with the latest approaches to cost-effective industry management.[87] Houston became the exemplary model of this school reform as it reported steadily rising passing rates on the Texas Assessment of Academic Skills ("TAAS") test,[88] and the district seemed to make remarkable strides in significantly reducing the achievement gap between white and minority children.[89] Houston claimed a dropout rate of 1.5%.[90] Administrators received bonuses, plaques were handed out and community leaders spoke highly of this "Texas miracle" of significant educational gains at minimal costs.[91] When George W. Bush later became President, he appointed Rod Paige, Houston's superintendent, as his new Education Secretary.[92] NCLB was in large part modeled after what happened in Houston in anticipation

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[83] *See* Sean F. Reardon, Eighth Grade Minimum Competency Testing and Early High School Dropout Patterns 31 (April 8–12, 1996) (paper presented at the Annual Meeting of the American Educational Research Association).

[84] *See* ORFIELD ET AL., *supra* note 15, at 9.

[85] *See id.*

[86] *See* George Wood, *A View from the Field: NCLB's Effects on Classrooms and Schools*, *in* MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS, *supra* note 18, at 36.

[87] *See* Dennis Carlson, *Are We Making Progress?: Ideology and Curriculum in the Age of No Child Left Behind*, *in* IDEOLOGY, CURRICULUM, AND THE NEW SOCIOLOGY OF EDUCATION: REVISITING THE WORK OF MICHAEL APPLE 91, 98–99 (Lois Weis, Cameron McCarthy, and Greg Dimitriadis eds., 2006).

[88] *See id.* at 99.

[89] *See id.*

[90] *See* Wood, *supra* note 86, at 36.

[91] *See id.*

[92] *See* Carlson, *supra* note 87, at 99.

that the nation's public schools would all see similar success within twelve years.[93]

We now know how the "Texas miracle" was produced, or as one author described it, "fabricated."[94] Widespread cheating has put 400 Texas schools under suspicion and at least twenty-three Houston schools under actual investigations.[95] In addition, according to the New York Times, the Texas Education Agency found that Houston schools also had a "rampant undercounting of school dropouts."[96] At Sharpston High School, for example, 463 of its 1700 students left during the 2001–2002 school year, but not one was reported as a dropout.[97] Instead, when the students left, they were assigned numerical codes indicating they had changed schools, gone for a GED or returned to their native country when this was not what they had told school authorities.[98] Thus, although the Houston School District reported only a dropout rate of 1.5%, in reality, the dropout rate in Houston was probably somewhere between 33% and 50%.[99] It is in large part on the basis of this false "Texas miracle" that No Child Left Behind was passed, particularly the strict exam requirements.[100]

The "Texas miracle" perhaps might still be considered a success story if the dropout rates were falsified, but the test scores of students who stayed in school had actually risen and the achievement gap between white and minority children had lessened. However, a Rand Corporation analysis exposed that the Texas score increases at that time were almost identical to national scores.[101] In comparing the results of the TAAS with the National Assessment of Educational Progress ("NAEP"), the study found that over a four-year period, the Texas average scores on the NAEP exceeded the national average only in fourth-grade math, and this very slight increase held only among white non-Hispanic fourth-graders.[102] With regard to Texas

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[93] *See id.*

[94] *See id.*

[95] *See* JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 207 (2005).

[96] Diana Jean Schemo & Ford Fessenden, *A Miracle Revisited: Measuring Success; Gains in Houston Schools: How Real Are They?*, N.Y. TIMES, Dec. 3, 2003, at A1.

[97] *See* Wood, *supra* note 86, at 36.

[98] *See id.*

[99] *See id.*

[100] *See id.*

[101] *See* Stephen P. Klein et al., *What Do Test Scores in Texas Tell Us?* 7 (Rand Corp., Issue Paper 202, 2000), *available at* http://www.rand.org/pubs/issue_papers/2006/IP202.pdf.

[102] *See id.* at 5. The researchers suggest that if a significant improvement had occurred in the math and reading skills of Texas students at this time, such improvements should have shown up outside of the TAAS. *See id.* The disparities in the results of the TAAS and the NAEP "raise important questions about the generalizability of gains reported on a state's own assessment, and hence about the

closing the gap between minorities and non-minorities, the study found that by 1998, the racial and ethnic gaps decreased substantially on the TAAS but got slightly wider over time on the NAEP.[103] It is thus questionable whether the achievement gap in Texas was significantly reduced.[104] The Rand study referred to "an increase in the prevalence of activities that substantially reduce the validity of scores."[105] The reason that state test scores rose then was not because of increased learning in Texas but rather because of increased dropout rates among students who were already struggling in school.[106] "Instead of receiving better instruction, lagging students were given high-stakes tests, which they flunked. Discouraged, they left school."[107] The "success" formula in Houston included allowing low-achieving students to drop out, encouraging schools not to report these dropouts and, ultimately, claiming higher achievement in the state due to the test scores of already successful students.

C. ALTERNATIVE DEGREES ARE NOT A SOLUTION

Despite the various flaws in the application of high-stakes testing, many states continue to use their standardized tests to determine graduation eligibility. Florida officials announced in June, 2003 that 13,000 seniors statewide would not receive high school diplomas because they had failed the state test.[108] In Nevada, 2195 students (roughly 12% of the State's senior class) had completed all coursework requirements but would not graduate because they scored too low on the math portion of the state test.[109] These students were granted "certificates of attendance," which are often

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validity of claims regarding student achievement." *Id.* at 12. "Put simply, how different could 'reading' and 'math' be in Texas than they are in the rest of the country?" *Id.* The researchers suggest that in addition to score inflation, too much specific test preparation might have had something to do with the higher TAAS exam results. *See id.* at 13. This is often called "teaching to the test," and it means teaching the skills to improve test scores rather than actually teaching the skills that are being tested. Such teaching has many of its own negative consequences: unmotivated teachers who have to use scripted programs and repeat drilling; the skills not being learned so much as testing strategies being memorized; a narrowing of the curriculum such that non-tested learning (i.e., the arts) is reduced or eliminated, often decreasing students' motivations to learn; and higher-level intellectual skills, such as prosaic writing or analytical skills, being abandoned. For a discussion on teaching to the test, see Wood, *supra* note 86, at 38–44; *see also* M. GAIL JONES ET AL., THE UNINTENDED CONSEQUENCES OF HIGH-STAKES TESTING 40–44 (2003); ALFIE KOHN, THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS 37–38 (2000).

[103] *See* Klein et al., *supra* note 101, at 8.

[104] *See id.*

[105] *Id.* at 13.

[106] THOMAS, *supra* note 2, at 6.

[107] *Id.*

[108] *Id.* at 71.

[109] *Id.*

meaningless to employers and colleges.[110] In Boston, of the 636 seniors who did not pass the state exam and, therefore, would not receive diplomas, 455 of them (roughly 72%) had met all other traditional graduation requirements.[111] In late 2003, Jack O'Connell, California's Superintendent of Public Instruction, recognized a potential crisis and opted to postpone the exam-passing requirement from 2004 to 2006.[112] A pilot study in 2003 showed half of the State's English-language learners and 75% of special-education students who took a preliminary version of the California test had not passed.[113] As a result, these students would not graduate when the test became an official requirement.[114]

Students who do not pass the exams in states that require passing for graduation are often offered alternative degrees, as was the case mentioned above in Nevada. States have awarded certificates of attainment, certificates of attendance or second-tier diplomas as alternatives to regular diplomas.[115] The problem is that such school exit documents may be regarded by both the students and the public as inferior credentials which are not the equivalent of actually graduating high school.[116] The alternative documents may be viewed as consolation prizes.[117] Even the GED option

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[110] *Id.*

[111] *Id.*

[112] *See id.* at 8.

[113] *Id.* The California High School Exit Examination ("CAHSEE") is only offered in English due to the intersection of this exam with California Education Code section 30, which states, "English shall be the basic language of instruction in all schools." Thus, while English learners must be allowed to take the exam with certain accommodations, such as hearing test directions in their primary language or using a translation glossary, having this status of an English learner does not exempt a student from taking the test. English language learners are required to take the CAHSEE in tenth grade along with their peers, even if the test falls within their first twenty-four months of being in a California school. This may be one factor in the disparate results between white students' test scores and their Hispanic/Latino counterparts' results. In 2002–2003, while 63% of white students passed the math portion of the exam, only 30% of Hispanic/Latino students passed. On the English portion, while 84% of white students passed, only 53% of Hispanic/Latino students passed. In 2005–2006, the year that these results were supposed to have graduation implications, 77% of white students, but only 49% of Hispanic/Latino students, passed the math portion of the exam; 81% of white students, but only 50% of Hispanic/Latino students, passed the English portion. In California, a student must pass both portions of the exam independently to be considered to have passed the entire exam. For more information about California's exam and the results by year and race/ethnicity, see California Department of Education, California High School Exit Exam (CAHSEE) Results, http://cahsee.cde.ca.gov (last visited Nov. 18, 2007). For an in-depth discussion on how these tests and other recent educational accountability measures uniquely affect Latino youth, see LEAVING CHILDREN BEHIND: HOW "TEXAS-STYLE" ACCOUNTABILITY FAILS LATINO YOUTH (Angela Valenzuela ed., 2005).

[114] *See generally* LEAVING CHILDREN BEHIND, *supra* note 113.

[115] *See* THOMAS, *supra* note 2, at 133.

[116] *See id.* at 134.

[117] *See id.*

may be viewed by employers as second-rate.[118] But in New York City, more than 37,000 school-age students were in GED programs in 2004, a significant increase (48%) from the 25,000 enrolled in 2002.[119] In New York, "much of the increase in the number of GED participants apparently resulted from the legislature requiring students to pass five Regents exams in order to graduate."[120] Alternative degrees simply do not resolve the problems created when states use a test-related minimum bar for graduation.

D. THE DISPARATE IMPACT ON RACE AND ETHNICITY

No Child Left Behind lays out in its statement of purpose that its aim is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[121] Subsection (3) states that this purpose can be accomplished in part by "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers."[122] However, NCLB is both highlighting an ever-growing educational disparity between minority and nonminority children and contributing to that disparity.

Minority students already have higher-than-average dropout rates. According to the National Dropout Prevention Center/Network, testing has identified a widening of the achievement gap between students of different races.[123] Of the nineteen states using exit exams, twelve supplied data showing that passing rates for minority students and students living in poverty are at least twenty percentage points lower than those of white students.[124] According to the Center on Educational Policy, just 33% of black students in Minnesota passed the state math test on their first attempt, which was forty-five percentage points lower than the white students' passing rate.[125] On the reading test in that state, black students' passing rate was thirty-eight percentage points behind their white counterparts.[126]

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[118] *See id.*
[119] *See id.* at 245.
[120] *Id.*
[121] 20 U.S.C. § 6301 (Supp. 2002).
[122] *Id.*
[123] *See* SMINK & SCHARGEL, *supra* note 25, at 17.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 17–18.

The scores posted on the California Department of Education website show similar inequity in results. In the 2003–2004 school year, an average of 74% of all students in the state passed the Math portion of the exam.[127] Yet, only 54% of African-American students and 61% of Hispanic/Latino students passed, as compared to 87% of white students.[128] On average, 75% of all students passed the English-only Language Arts test that year, but only 63% of African-American students and 62% of Hispanic/Latino students passed as compared with 88% of white students.[129] The following school year's results were no better. Forty-four percent of African-Americans passed Math and 54% of them passed English Language Arts.[130] Fifty-one percent of Hispanic/Latino students passed Math and 53% of Hispanic/Latino students passed English Language Arts.[131] This is in contrast to the 80% of white students passing Math and 83% of white students passing English Language Arts.[132] The most recent test scores from the 2005–2006 school year show the grimmest reality. Only 40% of African-Americans and 49% of Hispanic/Latinos tested in the State of California passed the Math test as compared with 77% of white students.[133] Only 50% of African-Americans and Hispanic/Latinos passed the English Language Arts test as compared with 81% of white students.[134]

When high stakes are applied to students, it is obvious who will disproportionately be denied diplomas as a consequence of failing an exit exam.[135] If only 40% of African-American students in California pass the Math portion of the state test, no more than 40% will earn a diploma. This is assuming that all 40% will pass the Language Arts portion and fulfill all other requirements. Faced with such odds, it is no wonder students choose to drop out, and clear why dropout rates are disproportionately high among African-Americans. As noted earlier, the score gains in Houston that gave the appearance of a decreased achievement gap were in part a function of high dropout rates for African-American and Latino students.[136] Unless

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[127] *See* California Department of Education, California High School Exit Exam (CAHSEE) Results for Mathematics and English Language Arts (ELA) by Gender and Ethnic Designation (2004), http://cahsee.cde.ca.gov/reports.asp (select "State Reports"; select appropriate year; then select "High School Exit Exam Results by Gender, Ethnicity").

[128] *See id.*

[129] *See id.*

[130] *See id.*

[131] *See id.*

[132] *See id.*

[133] *See id.*

[134] *See id.*

[135] *See* KOHN, *supra* note 102, at 40.

[136] *See* Darling-Hammond, *supra* note 18, at 22.

interventions occur soon, this country could soon face a scenario that might be referred to as "educational ethnic cleansing."[137]

E. CREATING AN INCENTIVE TO PUSH KIDS OUT

Until now, the discussion on dropping out has centered on students making this life-changing decision with the assumption that teachers and administrators would never encourage it. As a former teacher, I cannot imagine having counseled one of my students to drop out, or even having not responded strongly against such a proposal. However, NCLB and the states' derivative statutes have created serious consequences for schools not meeting AYP and the teachers and administrators who are allegedly not making adequate efforts in this regard.[138] Because the incentives are so high, school personnel are doing everything they can to improve their schools' scores. In some cases, this includes encouraging students who are unlikely to pass the state exam to drop out before they are calculated in the total numbers for the school.

During the 2001 to 2002 school year, 17,400 Chicago Public School students dropped out, which represented 17.6% of the total enrollment and was a significant increase from 13.5% in 1992.[139] Illinois Superintendent of Education Robert Schiller publicly explained that NCLB was an important cause behind this increase.[140] The policy exerted pressure on school officials to push out low-performing students whose individual test scores lowered a school's composite scores.[141] Alternative school director William Leavy agreed that the district was pushing out its least-supported, neediest students, exacerbating the dropout problem in Chicago.[142] Likewise, in New York in 2003, 500 students were pushed out of Brooklyn's Franklin K. Lane High School by way of shifting them from one bureaucratic category to another such that the school's total dropout rate did not appear to increase.[143] The City's Public Advocate, Betsy Gotbaum, contended that this was likely not an isolated case.[144] She stated that 160,000 students—about 20%—had been pushed out of New York's public school system in the previous three academic years.[145] In Birmingham, Alabama,

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[137] KOHN, *supra* note 102, at 41.
[138] For the discussion of consequences for schools not meeting AYP, see *supra* Part I.
[139] THOMAS, *supra* note 2, at 98.
[140] *Id.* at 98–99.
[141] *Id.* at 99.
[142] *Id.* (quoting William Leavy).
[143] *Id.*
[144] *Id.*
[145] *Id.*

522 students were expelled in 2000 for "lack of interest" prior to the state exam, and school administrators admitted to eliminating students in order to filter the test pool.[146]

High-stakes testing may even turn teachers against students.[147] Whereas prior to such testing, a low-performing student might have been seen as a challenge to a teacher, now this student is a serious liability.[148] In fact, what Linda Darling-Hammond calls "[p]erhaps the most adverse, unintended consequence of NCLB's accountability strategy" is the weakening of safety nets for struggling students rather than strengthening them.[149] She explains that NCLB's accountability provisions actually create incentives for schools to push out students who they believe have little chance of passing these tests.[150] As such students disappear, the schools' overall test scores increase.[151] Darling-Hammond cites recent studies which have found that systems that reward or sanction schools based on average student scores, as opposed to looking at the growth of individual students, create incentives for schools to manipulate their student populations.[152] Schools will retain students in grade so that their grade-level scores will look better, exclude low-scoring students from admissions and encourage such students to leave or drop out.[153] In fact, many of the steepest test score increases have occurred in schools with the highest dropout rates.[154] That is what happened in the so-called "Texas miracle," where teachers and administrators were encouraged to make thousands of students "disappear" from schools in order to raise test scores.[155] According to the whistle-blowing principal at Houston's Sharpston High School, where over 25% of the student body vanished in the 2001–2002 school year without a single one being reported as a dropout, this pattern was wide-spread and encouraged by the district.[156]

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[146] *Id.*
[147] KOHN, *supra* note 102, at 28.
[148] *See id.*
[149] Darling-Hammond, *supra* note 18, at 18.
[150] *See id.* at 18–19.
[151] *Id.* at 19.
[152] *See id.* at 20.
[153] *Id.*
[154] *See id.* at 21.
[155] *Id.*
[156] *Id.*

IV. THE MAGNIFIED EFFECTS OF RETENTION

A. PROMOTION VERSUS RETENTION

The practice of *social promotion* moves students up to the next grade level regardless of performance so that they continue with their age peers.[157] By contrast, the practice of *earned or tested promotion* requires students to meet some predetermined minimum standard to advance to the next grade level.[158] Such requirements may include passing grades, tests and teacher recommendations.[159] The goal behind tested promotion is two-fold: to encourage hard work by both students and teachers and to ensure that students arrive in the higher grade with a proper baseline level of knowledge.[160] Failing to meet the set standard results in retention in the same grade for another year.[161] At an increasing rate, school districts have abandoned social promotion in favor of tested promotion.[162] However, with the adoption of high-stakes tests, all evidence of student progress other than state test scores has been eliminated. Many school districts make decisions of retention or promotion solely on the basis of one high-stakes test.[163]

B. RETENTION IS HARMFUL AND IS CLOSELY CORRELATED WITH STUDENTS SUBSEQUENTLY DROPPING OUT

Many studies have demonstrated that grade retention is harmful to students, both academically and socially, and the research on retention's negative effects is clear.[164] Out of sixty-six studies conducted on retention from 1990 to 1997, sixty-five found the practice to be ineffective and/or harmful to the retained students.[165] Professor E. House at the University of Colorado at Boulder states, "It would be difficult to find another educational practice on which the evidence is so unequivocally negative."[166] According to the research, 50% of retained students do not perform better

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[157] THOMAS, *supra* note 2, at 95.
[158] *Id.*
[159] *See id.*
[160] *Id.* at 96.
[161] *Id.* at 95.
[162] *Id.*
[163] *Id.*
[164] JONES ET AL., *supra* note 102, at 128–29.
[165] *Id* at 129.
[166] PAM MCCOLLUM ET AL., INTERCULTURAL DEV. RESEARCH ASS'N, FAILING OUR CHILDREN: FINDING ALTERNATIVES TO IN-GRADE RETENTION, A POLICY BRIEF 2 (1999).

in the second year and 25% actually perform worse.[167] Then, when students progress to the next grade level after being retained, they perform worse, on average, than their peers who were not retained.[168]

In addition, retention is strongly linked to subsequently dropping out of school.[169] Students who are held back and slated to repeat a year are 40% to 50% more likely to drop out of school later on, and those forced to repeat twice have that risk increase to 90%.[170] In fact, poor academic performance linked to retention in a grade is the single strongest school-related predictor of dropping out.[171] Retention is an even stronger predictor of dropping out than socioeconomic class.[172] One report indicated that out of every ten dropouts, nine had been held back at least once throughout their educations.[173]

The research clearly and repeatedly shows a close correlation between grade retention and subsequently dropping out.[174] However, the correlation may be the result of other mitigating factors.[175] It may be, for example, that poor achievement explains both phenomena.[176] To explore this issue, two researchers used a path analysis (also called causal modeling) to reanalyze data from schools in Austin, Texas and Chicago, Illinois.[177] After "[c]ontrolling for differences in achievement scores, sex and race/ethnicity," the researchers established that grade retention actually *significantly increases* the likelihood that students drop out of school.[178]

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[167] *Id.* at 3.

[168] *See* JONES ET AL., *supra* note 102, at 129.

[169] *Id.*

[170] *See id.* at 129–30.

[171] SMINK & SCHARGEL, *supra* note 25, at 33.

[172] KOHN, *supra* note 102, at 93.

[173] SMINK & SCHARGEL, *supra* note 25, at 33.

[174] *See* Richard R. Valencia & Bruno J. Villarreal, *Texas' Second Wave of High-Stakes Testing: Anti-Social Promotion Legislation, Grade Retention, and Adverse Impact on Minorities*, *in* LEAVING CHILDREN BEHIND: HOW "TEXAS-STYLE" ACCOUNTABILITY FAILS LATINO YOUTH, *supra* note 113, at 119.

[175] *See id.*

[176] *See id.*

[177] *Id.*

[178] *Id.*

C. HIGH-STAKES TESTING IS OFTEN USED TO RETAIN, LEADING TO MORE DROPOUTS

While retention is not a new concept, currently, it "seems to be reaching epidemic proportions."[179] This is the direct result of high-stakes testing in two ways.

First, some states now have laws or school districts have policies that require retaining an elementary student who does not pass a standardized test.[180] New York City officials in 2003 ordered strict compliance with a non-promotion policy for third-graders who received low test scores.[181] In the 2003 to 2004 academic year in Florida, 40,000 third-graders were slated to be retained, although this was revisited when it became apparent that the size of the third-grade classes would swell and the fourth-grade classes would diminish by unacceptable levels.[182] In Texas in 2003, roughly 12,000 third-graders were actually retained upon failing the state test.[183]

Second, schools are holding back primarily older students in order to have them evade the state tests and avoid tarnishing their school's performance.[184] One anecdote of Perla A. in Houston is telling:

> Perla passed all her courses save one, Algebra, in ninth grade. But when she returned the following year she was told she would repeat the same grade and courses. Protesting, she was told by her counselor, "Don't worry about it . . . I'm just doing my job." She spent three years in ninth grade, finally passing Algebra in summer school and being promoted right to eleventh grade—past the tenth grade and the all-important test. Lacking the credits to graduate, she dropped out.[185]

Perla's story is not rare. Massachusetts' retention level for ninth-graders jumped from 6.3% in 1995 to 8.4% in 2001.[186] Twelve school districts in the state retained more than 20% of their ninth-graders, with three of those districts holding back between 27% and 38% of the freshman class.[187]

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[179] Wood, *supra* note 86, at 37.
[180] *See id.*
[181] THOMAS, *supra* note 2, at 97.
[182] *Id.* at 98.
[183] SMINK & SCHARGEL, *supra* note 25, at 17.
[184] *See* Wood, *supra* note 86, at 37.
[185] *Id.* at 38 (citation omitted).
[186] THOMAS, *supra* note 2, at 98.
[187] *Id.*

Recall the national study that found state policies which require schools to deny graduation on the basis of test scores are increasing the odds that these students will drop out.[188] That same study also found similar state policies requiring schools to retain students on this basis are likewise increasing the chances that these students will drop out.[189] In light of these findings, we may not yet be looking at NCLB's worst results. It may be that when the flood of retained elementary school students matures into teenagers, we will have an even greater national dropout crisis.

Researchers Greene and Winters argue that the prior studies on grade retention do not apply to state retention policies.[190] They explain that past retention research was conducted on the basis of subjective criteria, like teachers' evaluations.[191] Therefore, this research should not be used to evaluate systemic retention policies based on objective criteria such as test scores.[192] "For example, it is possible that the potentially harmful stigma currently associated with retention might not apply to the same extent under the new system, which holds back much larger numbers of students."[193]

However, Reardon's study,[194] cited by the NRC, actually does consider the effects of systemic retention policies on dropout rates.[195] His data revealed that high-stakes eighth-grade tests which led to systemic large-scale retentions were associated with markedly higher dropout rates.[196] Another study, which looked at students in the Chicago Public Schools in the late 1980s, when the district had some restrictive promotion policies, showed that the retained students had lower achievement scores.[197] So in contrast to Greene and Winters' argument, there are actually data on the effects of systemic retention, and that data support other retention research.

Additionally, threatening retention is what is intended to encourage students to do well on these exams. That threat rests on the basis of a continuing stigma. If the stigma of being retained does not apply under the new system, the new system has just rid itself of one of its main incentives. States and districts that use retention in connection with the high-stakes

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[188] *See* ORFIELD ET AL., *supra* note 15, at 9.

[189] *See id.*

[190] *See* Jay P. Greene & Marcus A. Winters, *An Evaluation of Florida's Program to End Social Promotion* 1 (Manhattan Inst. for Policy Research, Education Working Paper No. 7, 2004), *available at* http://www.manhattan-institute.org/pdf/ewp_07.pdf.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *See supra* Part III.A.

[195] *See* NATIONAL RESEARCH COUNCIL, *supra* note 28, at 174.

[196] *Id.*

[197] *See id.* at 31.

tests are relying on prior research on retention as a foundation for their policies. Suggesting that all prior understanding of retention is in limbo because of its new application supports the argument that such significant, and apparently indefinite, consequences should be halted immediately. The results might be far more disastrous than originally assumed if we are enforcing a national educational policy that is not grounded in any existing research.

Greene and Winters also evaluated Florida's law, which mandates that third-graders receive a minimum score on the reading portion of the state test in order to be promoted to the fourth grade.[198] The legislation first affected the third-grade class of 2002 to 2003, and the researchers' paper was published in December of 2004.[199] Greene and Winters claimed that Florida's policy improves academic proficiency and said that these findings were encouraging for the adoption of such high-stakes testing policies.[200] However, the authors admitted, "[The findings] are also limited because we are only able to evaluate the effects of the first year of the program. It is certainly possible that the gains made by students affected by the program might not hold up later in their academic careers."[201] In September of 2006, the same research team claimed "confidence that test-based retention in Florida has academic benefits" but later qualified this by explaining, "We do not know whether the gains we have observed two years after students are retained will continue to hold, expand, or disappear over time."[202] These researchers studying third-graders one year after the legislation went into effect could not project the possible effects on the future dropout rates of these students. Thus, to call these findings "encouraging" does not look at the long-term effects, disastrous as they may be, of inflating our dropout rates. Additionally, in a meta-analysis of sixty-three controlled studies of grade retention in elementary and junior high, the data showed that retention initially had a positive effect on academic achievement after about one year, but that effect faded away completely after three or more grades.[203] Perhaps what Greene and Winters were mistakenly calling "encouraging" is the initial positive academic effect that wears away over time, leaving only the aforementioned negative effects.

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[198] *See* Greene & Winters, *supra* note 190, at 1.

[199] *See id.*

[200] *See id.* at 2.

[201] *Id.*

[202] JAY P. GREENE & MARCUS A. WINTERS, GETTING FARTHER AHEAD BY STAYING BEHIND: A SECOND-YEAR EVALUATION OF FLORIDA'S POLICY TO END SOCIAL PROMOTION, CIVIC REPORT NO. 49 11 (2006), *available at* http://www.manhattan-institute.org/pdf/cr_49.pdf.

[203] *See* NATIONAL RESEARCH COUNCIL, *supra* note 28, at 129.

D. THE DISPARATE IMPACT ON RACE AND ETHNICITY

Remember that No Child Left Behind was intended to "clos[e] the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers."[204] We already know that racial and ethnic minority populations are disproportionately affected by high dropout rates, and that they are disparately impacted by the decisions of some states to use NCLB tests to establish exam-passing graduation requirements. In addition, retention has a more devastating effect on minority students than on nonminority students.

Racial and ethnic minority students are already more likely to be retained. By ages nine through eleven, 5% to 10% more blacks and Hispanics than whites have been retained.[205] These differentials continue to grow with age, and by ages fifteen to seventeen, almost 50% of black males have been retained at least once.[206] In a national investigation that used data from the National Education Longitudinal Study of 1988, researchers took the total number of retained students, which turned out to be 19.3% of the total population, and disaggregated that number by race and ethnicity.[207] The findings showed that 29.9% of blacks and 25.2% of Hispanics in the sample were retained at least once, whereas only 17.2% of white students repeated a grade.[208]

As discussed above, there are significant differences in the results of high-stakes exams by race and ethnicity. Therefore, when such test scores are used to retain students by state law or district policy, there is a disproportionate impact on minority populations. When added to the current overrepresentation of minorities in retention statistics, this will heighten the retention disparities. Further, since such retentions will translate into subsequent higher dropout rates, such high-stakes retention policies will, in turn, transform into increasing discrepancies between minority and nonminority dropout rates. In direct contrast to the intentions listed in No Child Left Behind, these state policies will severely widen, rather than close, the achievement gap between minority and nonminority students.

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[204] 20 U.S.C. § 6301(3) (Supp. 2002).
[205] *See* NATIONAL RESEARCH COUNCIL, *supra* note 28, at 122.
[206] *See id.*
[207] Valencia & Villarreal, *supra* note 174, at 117.
[208] *Id.*

V. CONCLUSIONS AND RECOMMENDATIONS FOR CHANGE

A. TYING IT ALL TOGETHER

In the wealthiest and most powerful nation in the world, there is a dropout crisis which we have not even clearly and uniformly defined, much less acknowledged and begun to solve. In response to political pressure to make educational change, and on the basis of a 1990s Texas scam, President Bush rode the high-stakes testing wave by signing the No Child Left Behind Act without looking at its potentially destructive effects on an already high dropout rate. And although NCLB does not explicitly require states to use such tests for high-stakes purposes, many states have taken the cue to do just that.

That high-stakes testing in itself corresponds with higher dropout rates seems to have no effect on NCLB and the correlating states' legislative measures. That alternative degrees, which are not seen as equivalent, are offered is not a suitable solution to an increasingly urgent problem. That school districts and states are opting to retain students on the basis of exams when the evidence shows that retention is not only linked to but actually causes students to subsequently drop out is irresponsible. And that all of these measures are disproportionately hurting minority populations comprised of exactly those students who were supposed to be helped by this legislation is inexcusable and atrocious.

In this debate, it is easy to get wrapped up in massive numbers and forget that there are actual individuals behind this crisis whose lives are or will be detrimentally affected by this political disaster. However, every time I talk with former students (who are predominantly low-income black and Latino teenagers) and hear the devastating news of yet another teen "choosing" to drop out, I am fueled with anger at a system that all but physically locks the doors of opportunity to these children. I cannot understand how, by law and by policy, we continue to increase their odds of dropping out by adding to the barriers they face and to those factors that guide them towards such catastrophic decisions. I am appalled by the lack of responsibility on the part of a system that purports to be based on "accountability." But more than that, I am terrified where such scandalous policies will leave students like Ana in a few short years.

B. CHANGE IS NECESSARY

Based on the above discussion, I suggest three specific and absolutely necessary policy recommendations. First, if we are to take the dropout cri-

sis seriously, we must conduct a rigorous empirical inquiry into the scope and nature of the problem. We need to establish a national definition for the term "dropout" and a nationally standardized method of computing such a rate. We must comprehensively look into all categorical factors used by different school districts and states, determine which of these are actually useful in our analysis and come up with national, state and district figures that are meaningful. George Morrow recommends the following definition:

> A dropout is any student, previously enrolled in a school, who is no longer actively enrolled as indicated by fifteen days of consecutive unexcused absence, who has not satisfied local standards for graduation, and for whom no formal request has been received signifying enrollment in another state-licensed educational institution. A student death is not tallied as a dropout. The designation of dropout can be removed by proof of enrollment in a state-licensed educational institution or by presentation of an approved high school graduation certificate.[209]

While I will not assess here the quality of this definition as compared to others, such a definition seems to be a valid starting point in the critical discussion about a national definition. Similarly, Morrow recommends two different computations of dropout rates:

> The annual dropout rate is the total number of students (grades K–12) qualifying for the status of dropout within a full calendar year (July 1 to June 30), divided by the average daily attendance (ADA) of all secondary school students (grades 7–12).
>
> The cohort dropout rate is the total number of students qualifying for the status of dropout who, at the time of dropping out, were members of a cohort of students (grades 7 through 12), divided by the absolute number of students assigned to the cohort minus those students who died or were formally transferred to another state-licensed educational institution. Students are assigned to a cohort at the beginning of the seventh grade or upon transfer into the district. Cohort members and cohort dropout rates are associated with the year of expected graduation from high school.[210]

The Civil Rights Project at Harvard University suggests that a more accurate method of tracking graduation and dropout rates could be attained by assigning students lifetime school identification numbers that would follow them throughout the entire span of their educational careers.[211] Such

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[209] George Morrow, *Standardizing Practice in the Analysis of School Dropouts*, *in* SCHOOL DROPOUTS: PATTERNS AND POLICIES, *supra* note 43, at 49.

[210] *Id.*

[211] ORFIELD ET AL., *supra* note 15, at 9.

information would then be monitored to trace what happens to different students.[212]

I am not advocating for any one suggested definition or method of computation. However, it is critical that we prioritize this discussion and establish a standard definition and method(s) of calculation based on the collective efforts of educators, administrators and researchers. As a nation, we expend considerably more money gathering and checking exam data than on accurately assessing whether students are graduating.[213] According to Phillip Kaufman of MPR Associates, the federal government spends over $40 million on the NAEP test, but probably less than $1 million on dropout statistics.[214] It is time to reevaluate our priorities and spend more of our tax dollars in helping our children graduate.

Second, No Child Left Behind already has graduation rate accountability provisions within its definition of adequate yearly progress that a school must meet. These provisions should be enforced with the same rigor with which the rest of the AYP provisions are enforced. Likewise, state plans that correlate with NCLB should set realistic AYP graduation rate floors and improvement goals, and then the states should be mandated to enforce these terms. If some of the Act's provisions are adhered to so strictly, then I recommend that those provisions that actually improve the dropout problem or do not contribute to it be enforced just as rigorously.

Third, I recommend an amendment to the NCLB which specifies that exam scores may not be used by states or districts as an absolute bar for graduation or promotion. Test performance may be used to make decisions within the context of other comprehensive data for students, such as grades, attendance and teacher recommendations. However, exam scores should not be the baseline, necessary qualification to be promoted or to graduate.

As the NRC explains, the distinction is between the use of a conjunctive versus a compensatory model.[215] In a conjunctive model, adequate performance is required on each individual measure.[216] For example, a conjunctive model used for graduation requirements might say that students must pass the state exam with a particular score, have all passing grades and have a particular attendance record. In that case, no matter what the student's grades or attendance record was, he or she would not be eligible to graduate if he or she did not meet or exceed the necessary exam score.

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[212] *See id.*
[213] *Id.* at 7.
[214] *Id.*
[215] NATIONAL RESEARCH COUNCIL, *supra* note 28, at 165.
[216] *Id.*

In contrast, a compensatory model allows performance on one measure to offset substandard performance on another.[217] In this model, a student's state exam score that did not meet the desired score might be compensated for by higher-than-required grades or attendance.[218]

The NRC recommends:

> High-stakes decisions such as . . . promotion, and graduation should not automatically be made on the basis of a single test score but should be buttressed by other relevant information about the student's knowledge and skills, such as grades, teacher recommendations, and extenuating circumstances.[219]

It later continues:

> Scores from large-scale assessments should never be the only sources of information used to make a promotion or retention decision. No single source of information—whether test scores, course grades, or teacher judgments—should stand alone in making promotion decisions. Test scores should always be used in combination with other sources of information about student achievement.[220]

The NRC is promoting a compensatory model. I concur with this recommendation. I would add this provision to NCLB such that all high-stakes decisions, including, but not limited to, promotion and graduation, may not be made on the basis of an inflexible, baseline exam score. The amendment should specify that if test scores are used at all to determine graduation or retention, they may only be used in a compensatory model where other factors may counteract lower scores. Under no circumstances should the exam scores alone serve as a bar to promotion or graduation.

Finally, it is time to recognize that we are at a point of crisis in American education. We need to begin to prioritize educational reform in our national agenda, and we must stop choosing "quick fix" solutions for complex social problems. We need to prioritize research on the dropout crisis. We must find incentives to keep students in school—at least through high school graduation—so that they have opportunities to succeed in the

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[217] *Id.*

[218] I am not suggesting that a student who has excellent attendance graduate or be promoted on this basis alone; that would mirror a social promotion model. However, there is a difference between a student with near-perfect attendance who cannot pass the standardized exam and a student who misses a significant number of school days and fails the test. I am advocating for a comprehensive model in which all such factors are considered together in making significant decisions. In this Note, I am not commenting on which specific factors are to be used or how much weight each of these factors should have.

[219] *Id.* at 279.

[220] *Id.* at 286.

future. We cannot afford to continue on our destructive path if our goal is to leave no child behind.