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## "CERD-ain" Reform: Dismantling the School-To-Prison Pipeline Through More Thorough Coordination of the Departments of Justice and Education

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# **“CERD-AIN” REFORM: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE THROUGH MORE THOROUGH COORDINATION OF THE DEPARTMENTS OF JUSTICE AND EDUCATION**

*Lisa A. Rich\**

*In the last year of his presidency, President Barack Obama and his administration have undertaken many initiatives to ensure that formerly incarcerated individuals have more opportunities to successfully reenter society. At the same time, the administration has been working on education policy that closes the achievement gap and slows the endless flow of juveniles into the school-to-prison pipeline. While certainly laudable, there is much more that can be undertaken collaboratively among executive branch agencies to end the school-to-prison pipeline and the endless cycle of people re-entering the criminal justice system.*

*This paper examines the rise of the school-to-prison pipeline through the international lens of the United Nations Committee to End All Forms of Racial Discrimination, which has repeatedly raised humanitarian concerns about the criminal justice system in the United States and its detrimental impact on underserved communities. The paper examines recommendations made by the Leadership Conference on Civil and Human Rights to the Committee and recommends that policymakers work harder to implement those recommendations so that the United States is in compliance with its treaty requirements.*

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*Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world . . . [T]hey are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.*

—Eleanor Roosevelt<sup>1</sup>

### I. INTRODUCTION

A mother of two preschool-aged children is at a party. She is talking to other mothers of preschool-aged children and recounts how her four-year old was suspended from preschool on three separate occasions within a matter of weeks, twice for throwing a chair and once for spitting on another child. Two months later, her three-year old was suspended for hitting a staff member on the arm, and he was called “a danger to the staff.”

As the mother recounts her story to the other mothers, they all express shock that her children had been suspended—first, because of children’s ages and, second, because many of their own children had engaged in similar activity or worse and had not been suspended. The difference? Their children were White.<sup>2</sup>

The United Nations Committee to End All Forms of Racial Discrimination (the “CERD Committee”), the body charged with overseeing implementation of the International Convention to End

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1. *Human Rights for All*, UNITED NATIONS, <http://www.un.org/en/globalissues/briefingpapers/humanrights/quotes.shtml> (last visited Sept. 7, 2015) (quoting Eleanor Roosevelt, Speech delivered on the tenth anniversary of the Universal Declaration of Human Rights: In Our Hands (1958)). Roosevelt chaired the Human Rights Commission beginning in 1946. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 357 (1996). See *id.* at 750–65 for a detailed examination of the United States’ involvement in the original Commission on Human Rights.

2. This is the story of Tunette Powell and her two children who were suspended from preschool a total of eight times in 2014. Tunette Powell, *My Son Has Been Suspended Five Times. He’s 3*, WASH. POST (July 24, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/07/24/my-son-has-been-suspended-five-times-hes-3/>.

All Forms of Racial Discrimination (CERD), expressed concerns in 2008 and again in 2014 about the inequality in education for minority youth in the United States.<sup>3</sup> In 2008, for example, the CERD Committee noted “that alleged racial disparities in suspension, expulsion and arrest rates in [United States] schools contribute to . . . the high dropout rate and the referral to the justice system of students belonging to racial, ethnic or national minorities.”<sup>4</sup>

In 2014, the CERD Committee commented that it remained concerned that minority students in the United States continue to be disciplined unfairly and disproportionately due to race, including “referral to the criminal justice system.”<sup>5</sup> It further noted concerns that “members of racial and ethnic minorities, particularly African Americans, continue to be disproportionately arrested, incarcerated and subjected to” harsher terms of imprisonment, and that such minorities are numerically over-represented in the United States criminal justice system.<sup>6</sup>

Juveniles from racial, ethnic, and national minority communities represent a disproportionate number of juveniles processed through the criminal justice system.<sup>7</sup> In particular, Black juveniles comprise approximately 15 percent of the juvenile population in the United States yet, in 2011 for example, Black juveniles were arrested twice as often as Whites.<sup>8</sup> According to a recent study by the United States Department of Education, Office of Civil Rights, Black children represent 18 percent of preschool enrollment in the United States but make up 48 percent of those receiving more than one out-of-school

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3. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention, ¶ 17, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), <http://www.state.gov/documents/organization/107361.pdf> [hereinafter *CERD 2008 Conclusions*]; Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶ 14, U.N. Doc. CERD/C/USA/CO7-9 (Sept. 25, 2014), <http://www.state.gov/documents/organization/235644.pdf> [hereinafter *CERD 2014 Conclusions*].

4. *CERD 2008 Conclusions*, *supra* note 3, ¶ 34.

5. *CERD 2014 Conclusions*, *supra* note 3, ¶ 14.

6. *Id.* ¶ 20.

7. See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *Civil Rights Data Collection Data Snapshot: School Discipline* (Mar. 21, 2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>. The term “juvenile” is used to describe a person under the age of eighteen for purposes of this Article.

8. THE LEADERSHIP CONFERENCE, CRIMINAL JUSTICE SYSTEM: CIVIL RIGHTS ACT REPORT (2014), <http://www.civilrights.org/publications/reports/civil-rights-act-report-december-2014/criminal-justice-system.html>.

suspension.<sup>9</sup> Moreover, the United States prison population remains extreme, despite reform movements in recent years—2.2 million people in prison as of 2013, with a significant percentage of those behind bars being minorities.<sup>10</sup>

This “school-to-prison” pipeline significantly impacts not only minority communities in the United States but the larger national economy, infrastructure, and identity. Some data suggest that the national economy loses between \$57 and 65 million dollars annually from formerly incarcerated individuals—most of whom are from minority communities—being under- or unemployed as a result of their criminal histories.<sup>11</sup> Moreover, data suggest that, as of 2009, if the United States had closed the education gap, its GNP would have been \$1.3 to \$2.3 trillion higher.<sup>12</sup> These alarming statistics and existing policies’ impact on minority communities directly contravene both the letter and spirit of CERD.

During the last two years, President Barack Obama and his administration have taken an active role in coordinating executive branch strategies to address continuing racial disparities and issues faced by underserved populations in this country. In addition, the administration has actively engaged in promulgating guidance to states, localities, and private interests regarding best practices for ameliorating policies that promote disparities for underserved communities. There is still more that could be done, however. Further integrating the underlying principles set forth in CERD—not just demonstrating how its actions already are consistent with those principles—will further efforts to end racial discrimination in all its forms. Specifically, the United States should use these guiding principles to fashion a holistic approach to criminal justice and education reform—including abolishment of zero-tolerance and other educational policies that are forming a seemingly inexhaustible school-to-prison pipeline that must be broken. Doing so will go far in

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9. *Id.*

10. *Incarceration*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Sept. 19, 2015).

11. JOHN SCHMITT & KRIS WARNER, *EX OFFENDERS & THE LABOR MARKET* 14 (2010), <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

12. Chaka Fattah, *Foreword* to EQUITY AND EXCELLENCE COMM’N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE (2013), <http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf>.

ensuring that “every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination.”<sup>13</sup>

This Article presents an overview of CERD and its general expectations of State Party signatories,<sup>14</sup> examines some of the key educational and criminal justice policies that have contributed to the development of the school-to-prison pipeline in the United States, including implementation of “zero-tolerance” and other disciplinary policies, sets forth the CERD’s 2008 and 2014 concerns regarding racial disparities in the U.S. criminal justice and educational arenas, and recommends that the United States more robustly follow the recommendations set forth in the July 2014 alternative report filed by The Leadership Conference Education Fund on behalf of The Leadership Conference on Civil and Human Rights with the International Convention on the Elimination of All Forms of Racial Discrimination 85th Session of the CERD Committee (“Leadership Conference 2014 Alternative Report”), particularly those recommendations calling for an end to the school-to-prison pipeline and a holistic approach to criminal justice and educational reform efforts.<sup>15</sup>

By adopting these recommendations, the United States can more readily address the CERD Committee’s concerns and ensure that the ideals articulated by Eleanor Roosevelt are met in the United States. Doing so also would be consistent with the Obama administration’s recognition that “policy is a key driver of change and reform,” particularly in the area of juvenile issues.<sup>16</sup>

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13. Roosevelt, *supra* note 1.

14. This Article does not provide an exhaustive analysis of CERD or its implementation in the United States. Rather, it provides a general overview of the Treaty and the operation of the CERD sufficient for the understanding of the United States’ obligations with respect to access to education and fairness in criminal justice. For a more detailed analysis of CERD, *see, e.g.*, HEATHER SMITH-CANNOY, *INSINCERE COMMITMENTS: HUMAN RIGHTS TREATIES, ABUSIVE STRATEGIES, CITIZEN ACTIVISM* (2012).

15. The author worked with the Leadership Conference and other national civil and human rights advocates to create and submit recommendations on criminal justice issues raised in the report. As discussed *infra*, alternative reports submitted to the CERD generally are limited in page length and level of detail. This article provides: (1) additional context and background for the recommendations set forth in the July 2014 alternative report, and (2) more detailed analyses of the recommendations and supporting documents for use by policymakers in fashioning policies that will end the school-to-prison pipeline.

16. Robert L. Listenbee, Adm’r, Office of Juvenile Justice and Delinquency Prevention, Remarks at the Juvenile Defender Leadership Summit (Nov. 2, 2013), <http://www.ojjdp.gov/enews/speeches/11-2-13.pdf>.

## II. OVERVIEW OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)

CERD is a multilateral treaty negotiated by United Nations representatives over the course of almost twenty years.<sup>17</sup> CERD is one of ten “core international human rights instruments.”<sup>18</sup> Human rights, as defined by the United Nations, are a series of interrelated, interdependent, and indivisible “rights inherent to all human beings, whatever . . . nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.”<sup>19</sup> The universality of human rights as a principle was first highlighted in the Universal Declaration on Human Rights in 1948,<sup>20</sup> and is embodied in the core international human rights documents including CERD.<sup>21</sup> CERD’s purpose is to “forbid racial and ethnic discrimination in all fields of public life.”<sup>22</sup>

The United Nations General Assembly adopted and opened CERD for signatures and ratification on December 21, 1965.<sup>23</sup> CERD entered into force in accordance with Article 19 on January 4, 1969.<sup>24</sup> Currently, there are 87 signatories and 177 State Parties to

17. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), <https://treaties.un.org/doc/Publication/UNTS/volume%20660/v660.pdf> [hereinafter *CERD*].

18. *The Core International Human Rights Instruments and Their Monitoring Bodies*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Sept. 7, 2015).

19. *What Are Human Rights?*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (last visited Sept. 7, 2015).

20. The Universal Declaration of Human Rights was two years in the making, ultimately being adopted by the U.N. General Assembly on December 10, 1948. *Human Rights for All: Making Progress*, UNITED NATIONS HUM. RTS., <http://www.un.org/en/globalissues/briefingpapers/humanrights/progress.shtml> (last visited Sept. 7, 2015). The Declaration itself is not a legally binding document but the “core international human rights instruments” and some fifty other documents inspired by it “constitute an international standard of human rights.” *Human Rights for All: Overview*, UNITED NATIONS HUM. RTS., <http://www.un.org/en/globalissues/briefingpapers/humanrights/index.shtml> (last visited Sept. 7, 2015). In 1993, 171 countries “reaffirmed their commitment to the Universal Declaration of Human Rights” and adopted the Vienna Declaration and Programme of Action, “which provides the new ‘framework of planning, dialogue and cooperation,’ to enable a holistic approach to promoting human rights . . .” *Human Rights for All: Making Progress*, *supra* note 20.

21. *See Core International Instruments*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Mar. 19, 2016) (noting that there are “ten core international human rights documents” of which CERD is one).

22. S. EXEC. REP. NO. 103-29, at 6 (1994).

23. *CERD*, *supra* note 17, at 212 n.1.

24. *Id.*

CERD.<sup>25</sup> CERD comprises three parts: Part I contains the substantive provisions of the treaty.<sup>26</sup> Part II creates the Committee on the Elimination of Racial Discrimination “consisting of eighteen experts of high moral standing and acknowledged impartiality by State Parties.”<sup>27</sup> Part II also sets forth State Party obligations to submit reports to the Committee and the processes by which the Committee considers such reports.<sup>28</sup> Part III sets forth the signature and adoption provisions.<sup>29</sup> Parts I and II are discussed in more detail below.

#### A. Part I: The Main Articles

Each of the Articles in Part I set forth specific duties and obligations of the State Parties. The substantive provisions of CERD set forth in Part I of the Convention represent the main mechanism by which Article 1 of the United Nations Charter, which emphasizes the prohibition of racial discrimination, is fulfilled by United Nations Member States.<sup>30</sup> By ratifying CERD, State Parties commit to review government policies, rescind those that create or perpetuate racial discrimination, encourage integrationist multiracial organizations, and condemn racial segregation and apartheid.<sup>31</sup> State Parties also commit to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”<sup>32</sup> CERD also

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25. *Status of Treaties: CERD*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg\\_no=iv-2&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en#EndDec) (last visited Sept. 19, 2015).

26. See *CERD supra* note 17, arts. 1–7 and the discussion *infra*.

27. See *id.* art. 8. The Committee members are chosen by secret ballot and serve staggered terms of four years. *Id.*

28. See *id.* arts. 9–16.

29. See *id.* arts. 17–25.

30. Connie de la Vega, *The Special Mandate of the International Convention on the Elimination of All Forms of Racial Discrimination: Lessons from the United States and South Africa*, 16 ILSA J. INT’L & COMP. L. 627, 627–28 (2010).

31. Steven Groves, *The Inequities of the U.N. Committee to End Racial Discrimination*, HERITAGE FOUND. (Aug. 7, 2008), [http://www.heritage.org/research/reports/2008/08/the-inequities-of-the-un-committee-on-the-elimination-of-racial-discrimination#\\_ftn5](http://www.heritage.org/research/reports/2008/08/the-inequities-of-the-un-committee-on-the-elimination-of-racial-discrimination#_ftn5) (citing arts. 2(1), 3).

32. *CERD, supra* note 17, art. 2(d). *CERD* also has provisions for “special measures” including such things as affirmative action programs. *CERD, supra* note 17, arts. 1(4), 2(2). In August 2009, the *CERD* adopted General Recommendation 32 to provide guidance on the scope and meaning of “special measures.” Comm. on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, ¶ 1, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009), [www.ohchr.org/english/bodies/cerd/docs/GC32.doc](http://www.ohchr.org/english/bodies/cerd/docs/GC32.doc).

has provisions for “special measures” including such things as affirmative action programs.<sup>33</sup>

Article 1 sets forth the governing definition of racial discrimination. Pursuant to CERD, the term “racial discrimination” means “any distinction, exclusion restriction or preference based on race . . . which has the purpose or effect of nullifying or impairing . . . the enjoyment . . . of human rights.”<sup>34</sup> CERD makes clear that racial discrimination includes policies and practices that are facially neutral but have unintended consequences or effects on a racial group.<sup>35</sup> CERD further clarifies that intent to discriminate is not required.<sup>36</sup>

Article 2 requires, among other things, that State Parties condemn racial discrimination and pursue “by all appropriate means” a policy to end racial discrimination and promote understanding among all races.<sup>37</sup> Article 3 similarly requires that parties prevent, prohibit, and eradicate all practices that result in racial discrimination.<sup>38</sup> Article 4 requires State Parties to condemn racist speech, punish the dissemination of ideas based on racial superiority, and prohibit public authorities and institutions from promoting or inciting discrimination.<sup>39</sup>

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33. *See de la Vega, supra* note 30, at 629. These special measures are set forth, “provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.” *CERD, supra* note 17, art. 1(4); *see also Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (noting that *CERD* and its supporting documentation support concrete measures to ensure adequate development and protection of certain racial groups or individuals thereof); G.A. Res. 2106 (14), annex, International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965).

34. *CERD, supra* note 17, art. 1(1).

35. *See id.* art. 2.1(a) (State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms . . .); *see id.* art. 2.1(c) (Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.).

36. *See id.* This language is particularly relevant to the discussion of the disparate impacts arising from the flawed criminal justice and education reform efforts that have led to the school-to-prison pipeline as discussed *infra*.

37. *Id.* art. 2(1).

38. *Id.* art. 3.

39. *See infra* note 100. The United States has submitted reservations with respect to Article 4. The United States Constitution protects freedom of speech, even racist speech; therefore, the United States has reserved itself from all the requirements of Article 4.

Article 5 provides a list of basic civil rights that State Parties are to protect.<sup>40</sup> As it relates to this article, CERD specifically requires State Parties to protect citizens' economic, social, and cultural rights, in particular: the rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration, and to education and training.<sup>41</sup>

Article 6 requires State Parties to provide access to all judicial and administrative bodies and provide protections and remedies against acts of racial discrimination.<sup>42</sup> Article 7 requires State Parties to:

adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to . . . propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.<sup>43</sup>

#### *B. Part II: The Implementation Articles*

Articles 8 through 16 of CERD establish the CERD Committee and the reporting requirements for treaty members; Article 9, the reporting requirements, is discussed in section C, *infra*. Article 8 provides for the creation of the CERD Committee, which was established in 1970, and represents the first treaty body established by the United Nations.<sup>44</sup> Article 10 provides for the adoption of rules by the Committee.<sup>45</sup> Articles 11 through 13 and Article 16 provide for State Parties to report to the CERD Committee concerns that other State Parties are “not giving effect to the provisions of”<sup>46</sup>

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40. For a complete list of the rights set forth in *CERD*, see *CERD*, *supra* note 17, art. 5.

41. *Id.* arts. 5(e)(i), (v).

42. *Id.* art. 6.

43. *Id.* art. 7.

44. *Id.* art. 8; see also *Working Methods for the Committee on the Elimination of Racial Discrimination*, OFF. OF THE HIGH COMM’R FOR HUM. RTS. (July 12, 2015), <http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx> (discussing the history of the CERD Committee).

45. *CERD*, *supra* note 17, art. 10.

46. *Id.* art. 11.

CERD and provide the mechanisms by which such concerns are to be addressed.<sup>47</sup>

### C. Article 9: The Reporting Requirements

The CERD process requires periodic reporting by State Parties. CERD also allows for—and encourages—the participation of non-governmental entities in the reporting process.

#### 1. State Party Reporting

All State Parties are obliged to submit regular reports to the CERD Committee on their progress implementing the rights set forth in CERD and eradicating all forms of racial discrimination pursuant to Article 9. State Parties are required to submit reports to the Committee one year “after the entry into force of the Convention.”<sup>48</sup> Thereafter, State Parties submit reports every two years, and as further requested by the Committee.<sup>49</sup> State Parties file these reports to detail the steps they have taken, and plan to take, to implement CERD and the principles on which it is drafted.

The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of concluding observations.<sup>50</sup> The Committee also submits an annual report to the Secretary General on its activities, in addition to reporting on its recommendations based on the State Party reports.

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47. *Id.* arts. 11–13, 16.

48. *Id.* art. 9(1). In addition to the reporting procedure, CERD establishes “three other mechanisms through which the Committee performs its monitoring functions: the early-warning procedure, the examination of inter-state complaints and the examination of individual complaints.” *Committee on the Elimination of Racial Discrimination, Monitoring Racial Equality and Non-Discrimination*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER ON HUM. RTS., <http://www2.ohchr.org/english/bodies/cerd/> (last visited Mar. 19, 2016).

49. *CERD*, *supra* note 17, art. 9(1)(b).

50. *See generally id.* art. 9 (discussing State Parties’ reporting requirements and the Committee’s requirements to review such reports and provide its findings and recommendations to the General Assembly); *CERD Introduction*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx> (last visited Aug. 23, 2015) (detailing CERD reporting procedures); U.N. Secretary-General, *Compilation of Guidelines on the Form and Content of Reports to Be Submitted by States Parties to the International Human Rights Treaties*, U.N. Doc. HRI/GEN/2/Rev.6 (June 3, 2009), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2fGEN%2f2%2fRev.6\\_&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2fGEN%2f2%2fRev.6_&Lang=en) (setting forth requirements for reporting under the international human rights treaties).

## 2. Alternative Reports

One of the most important aspects of the CERD reporting process is its emphasis on government and civic society interaction. The CERD Committee gives voice to this interaction by permitting civic groups, non-government organizations (NGOs), and other interested parties to submit their own reports<sup>51</sup> to the CERD Committee in response to State Party filings and CERD Committee conclusions and recommendations. These alternative reports supplement the official State Party filings and provide stakeholders on opportunity to expound more fully upon concerns raised by the CERD Committee during its review process, particularly because State Parties might not always be forthcoming with information that shows action inconsistent with CERD and its principles. The alternative reports can also help the CERD Committee target specific thematic interests it wishes to explore with a State Party.<sup>52</sup>

Alternative reports also allow these stakeholders to participate meaningfully in the process by providing robust analysis of the human rights causes in which they are directly involved. Specifically, alternative reports provide a useful mechanism for:

[A]ssessing and describing a government's track record in fulfilling its obligations to promote and protect human rights; monitoring governmental actions to honor commitments made through treaty ratification as well as at international conferences on human rights; building political pressure through publicity and education; and providing examples of "Best Practices" for NGOs to share with the domestic and international community.<sup>53</sup>

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51. Until relatively recently, these reports were referred to as "shadow reports" because they "shadowed" the official State Party reports. The term has fallen into disfavor among NGOs as having a potentially negative connotation and diminishment of the importance of these reports from non-State Parties. As such, this Article refers to "shadow reports" as "alternative reports."

52. The CERD Committee provides State Parties with certain themes it wishes to see addressed in periodic reports. *See, e.g.*, Comm. on the Elimination of Racial Discrimination, List of Themes in Relation to Combined Seventh to Ninth Periodic Reports of the United States of America, U.N. Doc. CERD/C/USA/Q/7-9 (July 7, 2014), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2fQ%2f7-9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2fQ%2f7-9&Lang=en); *Working Methods for the Committee on the Elimination of Racial Discrimination*, *supra* note 44.

53. GLOBAL RIGHTS, NGO SHADOW REPORTS UNDER THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 1 (2005), <http://www.law.unc.edu> (search "Shadow Reporting Manual"; then open document with that title).

In short, these reports provide a substantive body of material for the CERD Committee to consider when reviewing a State Party's submission, and encourage dialogue between the government and civic leaders, as well as among the civic leaders themselves. For example, the CERD Committee may require a State Party to address specific questions based on information set forth in an alternative report. This results in a greater transparency toward State Party action in the area of human rights. Alternative reports are particularly useful for review of United States progress on domestic human and civil rights because of the non-self-executing nature of CERD. With no right to sue provided by CERD, the engagement of NGOs and other civic leaders through the alternative report process lends some incentive to the government to be more forthcoming on its human rights efforts and adherence to CERD principles.<sup>54</sup>

#### *D. United States Signature and Ratification of CERD*

It took the United States almost thirty years to ratify CERD. The long road to ratification echoes the decades-long struggles the United States has had with domestic civil rights issues. As one commentator has noted, "It has often been observed that the history of America is in many ways the history of race relations."<sup>55</sup> An examination of the machinations behind the United States' ratification of CERD illuminates its remaining reticence to embrace more fully its underpinnings.

##### 1. Historical Backdrop to the Signing of CERD

At the same time that the United States was trumpeting the need for equality and peace throughout the post-World War II world, it was wrestling with its own domestic civil inequities. Although the Civil War had brought an end to slavery nearly fifty years before, the post-World War II United States was enmeshed in a "separate but

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54. CERD does not contain mandatory language nor is there "consistency in state practice that demands general compliance with Committee determinations as a matter of international law." See LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, U.S. FEDERALISM AND ITS IMPACT ON ICERD COMPLIANCE (2014), <http://www.lawyerscommittee.org/admin/site/documents/files/0481.pdf>.

55. MICHAEL G. TRACHTMAN, THE SUPREMES' GREATEST HITS: THE 34 SUPREME COURT CASES THAT MOST DIRECTLY AFFECT YOUR LIFE 58 (2006).

equal” quagmire in which racial segregation flourished.<sup>56</sup> Minority activists, including the NAACP, challenged this “separate but equal” construct, particularly with respect to education. In the 1954 Supreme Court case, *Brown v. Board of Education*<sup>57</sup> plaintiffs (represented minor African-American children) contended, “[S]egregated public schools are not ‘equal’ and cannot be made ‘equal,’ and that hence they are deprived of the equal protection of the laws.”<sup>58</sup> The Supreme Court agreed and held, “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>59</sup> Hence, the decision brought at least a facial end to school segregation, although it would take more than two decades to eliminate most systemic de jure segregation in the country.<sup>60</sup>

Throughout the 1950s and early 1960s, the issue of civil rights continued to gain momentum in the United States. Martin Luther King, Jr. and other civil rights activists brought much needed attention to the plight of African-Americans throughout the United States, but particularly in the South. President John F. Kennedy believed strongly in civil rights progress but purposely took a slow approach to broad-sweeping civil rights legislation for fear of losing votes and support from the “southern contingent” members of Congress.<sup>61</sup>

By 1963, however, events in the United States compelled President Kennedy to speak directly to Congress. On February 28, 1963, in a televised “Special Message on Civil Rights,” he articulated “an agenda of existing and prospective action [and]

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56. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 537–38 (1896) (endorsing a “separate but equal” treatment of Whites and minorities that led to a social and governmental construct that kept minorities from integrating with non-minorities).

57. 347 U.S. 483 (1954).

58. *Id.* at 488.

59. *Id.* at 495.

60. The slow progress was due in part to the Supreme Court’s reticence to dictate when states had to desegregate pursuant to *Brown v. Board of Education*. After the May 1954 decision, Chief Justice Warren ordered further briefings from states with segregated education systems to ascertain how best to implement *Brown*. In May 1955, the Court announced that desegregation was to commence with “all deliberate speed.” *Brown*, 349 U.S. at 301 (directing lower courts to take all necessary measures “to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases”).

61. See *Civil Rights Movement*, PRESIDENT KENNEDY PRESIDENTIAL LIBR., <http://www.jfklibrary.org/JFK/JFK-in-History/Civil-Rights-Movement.aspx> (last visited Aug. 23, 2015) (chronicling President Kennedy’s work on civil rights issues and noting his reluctance to upset southern congressional leaders given his small margin of victory in the 1960 election).

important legislative as well as administrative measures” to secure the civil rights of “all Americans.”<sup>62</sup> In addition to discussing measures related to voting rights and the extension and expansion of the Commission on Civil Rights, President Kennedy addressed the need to end segregation in schools and provide additional assistance to communities in need.<sup>63</sup> He specifically called for the end of segregation in all public institutions.<sup>64</sup> He emphasized the work undertaken by his administration on civil rights, chastised those who willfully resisted desegregation, and reminded Congress that it could not “escape its obligations” with respect to enacting civil rights legislation.<sup>65</sup>

As violence and protests continued throughout the country in 1963, President Kennedy continued to address civil rights issues at the executive level. For example, he used the National Guard to desegregate the University of Alabama on June 11, 1963.<sup>66</sup> That night he addressed the nation stating, “We face, therefore, a moral crisis as a country and as a people.”<sup>67</sup> He went on to explain that African Americans received inadequate education, were unable to find work at a rate two to three times higher than their White counterparts, and suffered other indignities keeping them from being fully free.<sup>68</sup> Thus, he promised that the following week he would ask Congress “to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law.”<sup>69</sup> He followed up on this promise sending a package of legislative requests to Congress on June 19, 1963, stating “the time has come for the Congress of the United States to join the Executive

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62. John F. Kennedy, Special Message on Civil Rights to Congress (Feb. 28, 1963), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-043-002.aspx>.

63. *Id.*

64. *Id.* Recent research suggests that one of the speeches President Kennedy delivered in 1963, in which he proposed legislation “barring discrimination in public accommodations,” was “the critical moment when Civil Rights is, for the first time, an issue of great importance to the majority of Americans and an issue clearly associated with the Democratic party.” Ilyana Kuziemko & Ebonya Washington, *Why Did the Democrats Lose the South? Bringing New Data to an Old Debate* (Nat’l Bureau of Econ. Research, Working Paper No. 21703, 2015), <http://www.nber.org/papers/w21703>.

65. Kennedy, *supra* note 62.

66. John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963), [http://www.jfklibrary.org/Asset-Viewer/LH8F\\_0Mzv0e6Ro1yEm74Ng.aspx](http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx).

67. *Id.*

68. *Id.*

69. *Id.*

and Judicial Branches in making it clear to all that race has no place in American life or law.”<sup>70</sup>

Legislation was introduced in the House and Senate following Kennedy’s speech but those bills moved slowly.<sup>71</sup> Following the death of President Kennedy in November 1963, policymakers in Washington, including President Lyndon B. Johnson, began working in earnest on civil rights legislation. In 1964, President Johnson signed the Civil Rights Act of 1964, which brought promises of social equality and fairness, most notably in employment and education.<sup>72</sup> In 1965, President Johnson worked with Congress to pass the Elementary and Secondary Education Act (ESEA) (discussed more fully *infra*) that, among other things, “focused on the inequality of school resources.”<sup>73</sup> As President Johnson noted in April 1965 when he signed the Act, EASA “represents a major new commitment of the federal government, to quality and equality in the schooling that we offer our young people. By passing this bill, we bridge the gap between helplessness and hope for more than five million educationally deprived children.”<sup>74</sup>

On June 4, 1965, President Johnson delivered the commencement address at Howard University in which “he outlined to . . . 5,000 people the most far-reaching civil rights agenda in modern U.S. history.”<sup>75</sup> In his address, President Johnson commented on the civil rights struggle noting:

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70. Letter from John F. Kennedy to Congress (June 19, 1963), <https://www.archives.gov/legislative/features/march-on-washington/kennedy.html>.

71. *See, e.g.*, S. 1731 introduced by Senator Mike Mansfield and H.R. 7132 introduced by Representative Emanuel Celler. H.R. 7132 would become the enacted version of the Civil Rights Act of 1964. *See S. 1731, June 19, 1963*, NATIONAL ARCHIVES, <https://www.archives.gov/legislative/features/march-on-washington/s1731.html> (last visited Mar. 11, 2016).

72. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *see* President Lyndon B. Johnson, Remarks upon the Signing of the Civil Rights Act of 1964 (July 2, 1964), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/640702.asp> (“Americans of every race and color have died in battle to protect our freedom. Americans of every race and color have worked to build a nation of widening opportunities. Now our generation of Americans has been called on to continue the unending search for justice within our own borders.”).

73. PAUL E. BARTON & RICHARD J. COLEY, THE BLACK WHITE ACHIEVEMENT GAP: WHEN PROGRESS STOPPED 3 (2010), <https://www.ets.org/Media/Research/pdf/PICBWGAP.pdf> [hereinafter *2010 ETS Report*].

74. President Lyndon B. Johnson, Remarks on Signing the Elementary and Secondary Education Act, 1 PUB. PAPERS 412, 413 (Apr. 11, 1965); *see also* JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH xi (2010) (noting that EASA marked the first time the federal government had engaged in “substantial federal funding for public schooling”).

75. PATTERSON, *supra* note 74, at ix.

[T]he barriers to that freedom are tumbling down. Freedom is the right to share, share fully and equally, in American society—to vote, to hold a job, to enter a public place, to go to school. It is the right to be treated in every part of our national life as a person equal in dignity and promise to all others . . . . [I]t is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.<sup>76</sup>

With this backdrop and President Johnson's commitment to his "Great Society" package of domestic reforms, the United States signed CERD on September 28, 1966. It did so with reservations, noting:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of the America.<sup>77</sup>

But signing CERD did not mean quick ratification. It would be another thirty years before the United States actually ratified the treaty.

## 2. Steps Toward Ratification of CERD

As policymakers in the United States slowly began to address its dismal domestic civil and human rights record, they were less inclined to ratify CERD (and other human rights treaties). As early as the 1950s, members of Congress had opposed such treaties because they "interfered" with United States domestic affairs.<sup>78</sup> For example, in 1953, the Truman administration informed the United States representative to the Commission that it would not become a party to an international treaty on human rights such as that being

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76. President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights, 2 PUB. PAPERS 635, 656 (June 4, 1965), <http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/650604.asp>.

77. *Status of CERD, Chapter IV Human Rights*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg\\_no=iv-2&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en#EndDec) (last visited July 13, 2015).

78. See STEINER & ALSTON, *supra* note 1, at 751–53 ("A number of different versions of the proposal to amend the treaty-making power under the U.S. Constitution were considered by the Congress . . . from 1952–1957.").

contemplated by the Commission and instead would “work toward the objectives of the Declaration by other means.”<sup>79</sup> This remained the prevailing sentiment among policymakers throughout the 1950s and 1960s.

In 1973, members of the House Committee on Foreign Affairs held a series of hearings on the international human rights framework, including CERD. Although the House of Representatives does not play a role in ratifying treaties, the committee used the opportunity to explore the U.S. role in international human rights development and pressed for ratification of CERD and other human rights treaties. Representative Donald M. Fraser, the chair of the committee, opened an October 1973 hearing by noting, “Human rights has traditionally been considered exclusively a matter of domestic jurisdiction and therefore outside the legitimate concerns of either foreign governments or of international organizations. The Charter of the United Nations reversed that notion.”<sup>80</sup>

As the title of the hearing series indicates, the purpose of the hearings was to address human rights within the context of U.S. foreign policy and “prompt” the Senate and administration to take up a human rights agenda. Many witnesses noted with dismay that the United States had claimed authorship and significant involvement in the United Nations announcement that one of its basic purposes was “the promotion of universal respect for human rights and fundamental freedoms,”<sup>81</sup> yet it refused to ratify the implementing human rights treaties such as CERD.<sup>82</sup>

The House hearings included witnesses who attempted to explain that international human rights were tied to domestic issues. For example, one witness explained that domestic security was tied

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79. *Id.* at 754.

80. *International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy: Hearing Before the H. Foreign Affairs Comm.*, 93d Cong. 219 (1973), <http://babel.hathitrust.org/cgi/pt?id=uiug.30112101596689;view=1up;seq=13> [hereinafter *1973 House Hearings*] (statement of Donald M. Fraser, U.S. Rep.).

81. *Id.*

82. *Id.* at 343 (statement of Bruno V. Bitker, former Rep. to the U.N. Int’l Conference on Human Rights). As a matter of comparison, the United States has ratified three human rights-related treaties: CERD; International Covenant on Civil and Political Rights; and Convention Against Torture, but it has only signed (not ratified) six treaties: International Covenant on Economic, Social, and Cultural Rights; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention on the Rights of Persons with Disabilities; and American Convention on Human Rights.

to international human rights protections: “It is my view that as a society we have not yet appreciated the extent to which our own national interests are at stake when foreign governments abuse fundamental human rights.”<sup>83</sup>

First, many House members had a procedural concern with the resolution and did not believe it was appropriate for the House to tell the Senate to take up the treaty.<sup>84</sup> Second, many organizations, including the American Bar Association, continued to voice opposition to these types of treaties on states’ rights grounds.<sup>85</sup>

President Jimmy Carter submitted CERD to the Senate on February 23, 1978, and recommended its ratification subject to certain reservations and understandings.<sup>86</sup> In his transmittal letter to the Senate, President Carter noted:

While the United States is a leader in the realization and protection of human rights, it is one of the few large nations that has not become a party to the three United Nations human rights treaties. Our failure to become a party increasingly reflects upon our attainments, and prejudices United States participation in the development of the international law of human rights. The two human rights Covenants are based upon the Universal Declaration of Human Rights, in whose conception, formulation and adoption the United States played a central role. The Racial Discrimination Convention deals with a problem, which in the past has been identified with the United States; ratification of this treaty will attest to our enormous

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83. *Id.* at 246 (statement of Richard Falk, Professor of Int’l Law, Princeton Univ.).

84. *See id.* at 340 (Bitker commenting on the fact that a similar approach had been suggested in previous years with other treaties and resoundingly criticized by House members). Article II, Section 2, Clause 2 of the U.S. Constitution provides the Senate with advice and consent functions, including the approval of the ratification of treaties (the Senate does not ratify the treaty itself). Senate Rules of Procedure require any consideration of treaties to begin with the Committee on Foreign Relations. S. DOC. NO. 113-18, at 24 (2013). Senate Rule XXX governs the process by which the full Senate considers a treaty. *Id.* at 43. Consideration and debate on a treaty ends with the conclusion of each two-year Congress. *Id.*

85. *See 1973 House Hearings, supra* note 80, at 338. During his testimony, Bruno Bitker presented an overview of the United States’ involvement in U.N. human rights policies and the domestic opposition raised to U.S. ratification of these policies. Many of these states’ rights arguments are still raised against CERD. *See, e.g.,* Heritage Foundation criticism of CERD, *infra* note 342.

86. S. EXEC. REP. NO. 103-29, at III (1994).

progress in this field in recent decades and our commitment to ending racial discrimination.<sup>87</sup>

The Senate Committee on Foreign Relations held a series of hearings on CERD throughout November 1979 but “[d]omestic and international events at the end of 1979 . . . prevented the Committee from moving to a vote on [CERD].”<sup>88</sup> Ratification of CERD languished in the United States during the 1980s because neither the Reagan nor Bush administrations supported its ratification.<sup>89</sup>

In 1994, the Clinton administration renewed the United States’ commitment to CERD.<sup>90</sup> On April 26, 1994, the acting secretary of state, Strobe Talbott, wrote to the Senate and asked it to take up consideration of CERD.<sup>91</sup> Among other things, Secretary Talbott noted that enactment of CERD would “underscore our national commitment” to the principles embodied in CERD and lend the United States legitimacy in battling discrimination throughout the world.<sup>92</sup>

The Senate held hearings on ratification of CERD and the United States proposed reservations, understandings, and declarations on May 11, 1994.<sup>93</sup> In its report recommending ratification, the Senate Committee on Foreign Relations determined, “As a nation which has gone through its own struggle to overcome segregation and discrimination, the United States is in a unique position to lead the international effort to bring an end to racial and ethnic discrimination.”<sup>94</sup> The Committee concluded that, in general, the provisions of the treaty were “compatible” with statutory and domestic law and practice.<sup>95</sup> “In those few areas where U.S. law and

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87. *Id.*

88. *Id.* at 2. It should be noted that by 1979, the American Bar Association had changed its position on CERD and supported it. See *International Convention on the Elimination of All Forms of Racial Discrimination (Ex. C, 95-2): Hearing Before the S. Comm. on Foreign Relations*, 103d Cong. 35 (1994) (statement of Robert Drinan, S.J., on behalf of the Am. Bar Assoc., commending the chairman on holding the hearings and noting that the ABA fully supported and continues to support the ratification of CERD during its 1979 testimony before the committee).

89. S. EXEC. REP. NO. 103-29, at 2.

90. See, e.g., Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 Berkeley J. Int’l Law, 607, 610 (2003) (explaining that the Clinton Administration supported ratification of human rights treaties including CERD).

91. S. EXEC. REP. NO. 103-29, at 2.

92. *Id.*

93. *Id.* at 3.

94. *Id.*

95. *Id.* at 4–6.

[CERD] differ, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States.”<sup>96</sup>

The United States ratified CERD on October 21, 1994, subject to three reservations, one understanding, and one declaration.<sup>97</sup> With respect to the reservations, the United States noted that Articles 4 and 7 of CERD “reflect the view that penalizing and prohibiting the dissemination of ideas based on racial superiority are key elements in the international struggle against racial discrimination.”<sup>98</sup> However, the United States government is limited by the First Amendment to restrict or prohibit speech that expresses certain ideas; thus, the United States does not accept an obligation under CERD that has a limiting effect on “individual speech, expression and association guaranteed under the Constitution.”<sup>99</sup>

The United States did not accept any obligation under CERD that would “call for a broader regulation of private conduct” than that contemplated by the United States Constitution or its domestic laws.<sup>100</sup> The United States further commented in its understanding that, “Although federal antidiscrimination law reaches the state and local levels of government, it is limited to the enforcement of constitutional provisions or statutes otherwise based on powers delegated to the Congress.”<sup>101</sup> “To reflect this situation, the Administration is proposing an understanding to make it clear that the United States will carry out its obligations under [CERD] in a manner consistent with the federal nature of its form of government.”<sup>102</sup>

Finally, the United States also declared CERD to be non-self-executing.<sup>103</sup> In its report, the Senate Committee on Foreign Relations concluded, “In view of the extensive provisions present in U.S. law to provide protections and remedies sufficient to satisfy the

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96. *Id.* at 6.

97. *Status of Treaties: CERD*, *supra* note 25.

98. S. EXEC. REP. NO. 103-29, at 7.

99. *Id.*

100. *CERD Ratification Reservations*, UNITED NATIONS HUM. RTS., <http://indicators.ohchr.org> (last visited Mar. 17, 2016).

101. *Id.*

102. *Id.*

103. “A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.” *Medellin v. Texas*, 552 U.S. 491, 526 (2008).

requirements of [CERD], the Administration sees no need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of [CERD].”<sup>104</sup>

President Clinton went further—on December 10, 1998, he issued Executive Order 13107 “Implementation of Human Rights Treaties.”<sup>105</sup> Executive Order 13107 established the framework by which the United States would undertake its obligations under human rights treaties to which it is a party, including CERD.<sup>106</sup> Among other things, Executive Order 13107 established the federal Interagency Working Group on Human Rights Treaties to provide “guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters.”<sup>107</sup>

The Working Group is tasked with nine principal functions—

- 1) coordinating interagency review of “significant” issues associated with carrying out Executive Order 13107 (including analysis and recommendations regarding ratification of additional human rights treaties);
- 2) coordinating the preparation of reports required by the treaties;
- 3) coordinating the United States’ response to complaints against it concerning human rights violations;
- 4) “developing effective mechanisms” to ensure that legislation proposed by the Administration “is reviewed for conformity with international human rights obligations”;
- 5) developing proposals for improving the monitoring of state, commonwealth, territorial, and tribal actions for compliance with treaty obligations, the collection of

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104. S. EXEC. REP. NO. 103-29, at 8. The Senate Committee on Foreign Relations noted that this declaration was similar to the approach taken by the United States with respect to the ratification of other treaties. *Id.*

105. Exec. Order No. 13107, 63 Fed. Reg. 68,991, §§ 4(c)(i)–(ix) (Dec. 10, 1998).

106. *Id.* § 1.

107. *Id.* § 4(a). The Human Rights Working Group is chaired by a designee chosen by the Assistant to the President for National Security Affairs and comprises representatives from the Departments of State, Justice, Labor, Defense (including a separate representative of the Joint Chiefs of Staff), and “other agencies as the chair deems appropriate.” *Id.* § 4(b). The Department of Education is not represented on the Human Rights Working Group.

information for reports, and “the promotion of effective remedial mechanisms”;

6) developing public outreach and education plans regarding “CERD, and other relevant treaties, and human rights-related provisions of *domestic law*”;

7) coordinating an annual review of the United States reservations, declarations, and understandings of human rights treaties to determine if modifications or adjustments are appropriate;

8) making any other recommendations related to adherence or implementation of human rights treaties and related matters; and

9) coordinating other tasks related to human rights treaties or international human rights institutions.<sup>108</sup>

In addition, Executive Order 13107 requires all Executive branch agencies<sup>109</sup> to cooperate with the Human Rights Working Group in carrying out the order.<sup>110</sup> Further, all executive branch agencies are required to designate one person “responsible for overall coordination of the implementation of the order” and agencies must “maintain a current awareness of United States international human rights obligations that are relevant to their functions.”<sup>111</sup>

Executive Order 13107 met resistance, particularly among those who felt that the Order gave too much power to the United Nations over domestic policy. In January 1999, then-representative Bob Barr introduced H.R. 63 “to prohibit the use of funds to administer or enforce the provisions of Executive Order 13107.”<sup>112</sup> Representative Barr’s chief concern was that Executive Order 13107 directed federal agencies to adhere to and carry out obligations under treaties “to which the Senate has not given its advice and consent to ratification.”<sup>113</sup> Barr’s legislation died without action.<sup>114</sup>

108. *Id.* § 4(c).

109. Executive branch agencies that must comply with the executive order are those defined in 5 U.S.C. §§ 101–05 (2012).

110. Exec. Order No. 13107, *supra* note 105, § 5.

111. *Id.* § 2(a).

112. H.R. 63, 106th Cong. (1999).

113. Exec. Order No. 13107, *supra* note 105, § 2.

114. *See* H.R. 63, 106th Cong.

*E. United States Periodic Reports*

The United States filed its initial report with CERD in 2000.<sup>115</sup> It filed its combined “fourth, fifth and sixth” periodic report in 2007,<sup>116</sup> and its combined “seventh, eighth and ninth” periodic report in 2013.<sup>117</sup>

In March 2008, the United States also addressed specific concerns raised by the CERD Rapporteur in consideration of the 2007 Report.<sup>118</sup> Of particular relevance to this Article, the Rapporteur specifically asked the United States to provide more explanation of any “mechanisms in place, if any, to ensure a coordinated approach towards the implementation of the Convention at the federal and state levels.”<sup>119</sup>

This overview of CERD, and the United States ratification of such a broad human rights document, suggests that while the United States has embraced the treaty and its requirements, it has consistently done so more with a view to establishing legitimacy in ending racial discrimination internationally as opposed to domestically.<sup>120</sup> Yet, as many critics of the United States’ record on human rights have noted, as long as elements of significant, systemic domestic racial discrimination remain it will be difficult for the United States to act as an international advocate for the end of racial

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115. See Int’l Convention on the Elimination of All Forms of Racial Discrimination, Reps. Submitted by States Parties Under Article 9 of the Convention, U.N. Doc CERD/C/351/Add.1 (Oct. 10, 2000).

116. See U.S. DEP’T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2007), <http://www.state.gov/documents/organization/83517.pdf>.

117. See U.S. DEP’T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2013), <http://www.state.gov/documents/organization/210817.pdf>.

118. See Comm. on the Elimination of Racial Discrimination, Written Responses to the Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America, U.N. Doc. CERD/C/USA/6 (2008), <http://www.state.gov/documents/organization/107109.pdf>.

119. See *id.* at 16 (citing to ¶¶ 44, 46, 47, 60, 62, 64–66, 67–70, 72–76, 87, 89, 118–23, 189–91, 238–39, 268, and 352–53).

120. See, e.g., LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, 50 YEARS AFTER THE CIVIL RIGHTS ACT: THE ONGOING WORK FOR RACIAL JUSTICE IN THE 21ST CENTURY 26 (2014) (noting that the principle focus, even under the Obama Administration, of the Human Rights Working Group “has been on addressing human rights abuses in other countries”).

discrimination.<sup>121</sup> The United States' domestic shortcomings are particularly evident in its criminal justice and education systems.<sup>122</sup> As the next section demonstrates, if the United States cannot reform these two integral parts of its domestic framework, racial discrimination will continue to flourish.

### III. EDUCATION, CRIMINAL JUSTICE, AND THE BUILDING OF THE SCHOOL-TO-PRISON PIPELINE

#### *A. Introduction*

The policies that laid the foundation for the school-to-prison pipeline were not implemented to have detrimental impacts on minority students. To the contrary, they began as well-meaning, if not well-informed, attempts to raise educational standards and opportunities, particularly *for* minority and disabled students. Those involved in the educational reform movements of the late twentieth (and early twenty-first) century recognized the need to educate all students equally. But as reform movements progressed, and reports about school violence, bullying, gangs, and contraband in and near schools continued to be discussed by the media, reform began to look much like the “tough on crime” reforms being undertaken in the criminal justice system. And soon, the two systems seemed almost indistinguishable for minority and disabled students.

Thus, the goal to provide schools that were “safe havens” free from violence and contraband ultimately has proven unattainable for those most in need of such an environment. The achievement gap between minority and non-minority students continues to grow and the very policies that were designed to aid disadvantaged students have, in many instances, resulted in significant disruptions to their

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121. *See, e.g.*, Curtis Bradley, *The United States & Human Rights Treaties: Race Relations, the Cold War & Constitutionalism*, 9 *Chinese J. Int'l Law* 321, 341 (2010) (discussing criticisms that the United States stance on international human rights is purely symbolic). President Kennedy himself raised this issue during his civil rights speeches in 1963. In his June 11, 1963 address on civil rights, he stated, “We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world, and much more importantly, to each other that this is the land of the free except for the Negroes; that we have no second-class citizens except Negroes; that we have no class or caste system, no ghettos, no master race except with respect to Negroes.” Kennedy, *supra* note 66.

122. *See, e.g.*, Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 *ABA HUM. RTS.*, Fall 2010, at 14 (discussing racial disparities in the American criminal justice system).

education. Those most vulnerable are increasingly funneled toward, and into, a criminal justice system also in significant need of reform.

An examination of some of the key policy choices made during major educational reform movements in the United States, including an increased emphasis on “discipline,” provides a better understanding of how the proliferation of “zero tolerance” policies and other disciplinary educational reforms have impacted minority students detrimentally and continue to feed the school-to-prison pipeline. This pipeline results in a lifetime of missed opportunities and isolation from participation in the larger community for vulnerable students. These missed educational opportunities are perpetuating a civil rights and social crisis that the United States must address.

*B. The Desire to Strengthen Learning Outcomes and the School Environment: Education Policy from 1940–1965*

*Every child must be encouraged to get as much education as he has the ability to take. We want this not only for his sake—but for the nation’s sake.*

—President Lyndon B. Johnson<sup>123</sup>

The school-to-prison pipeline did not appear overnight. It resulted from policies enacted not only in response to reports of increased school violence, but also in response to policymakers’ concerns that without significant educational reform, the United States economy would remain stalled, and Americans would remain less educated than they had been in previous generations.<sup>124</sup> This section presents some of the key policy decisions made during the latter twentieth and early twenty-first century education (and criminal justice) reform movement that ultimately contributed to the flourishing of the school-to-prison pipeline.<sup>125</sup>

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123. President Lyndon B. Johnson, Special Message to the Congress: Toward Full Educational Opportunity, 1 PUB. PAPERS 26 (Jan. 12, 1965).

124. See, e.g., Samuel Bowles & Herbert Gintis, *Schooling in Capitalist America Revisited*, 75 SOC. EDUC. 1 (2002), <http://tuvalu.santafe.edu/~bowles/SchoolCapitalistAmerRevisit.pdf> (“[Education can] contribute to a more productive economy and a more equitable sharing of its benefits and burdens, as well as a society in which all are maximally free to pursue their own ends unimpeded by prejudice, the lack of opportunity for learning, or material want.”).

125. Because this Article is providing a review of only some of the most relevant policy decisions that have led to the school-to-prison pipeline, it does not provide a complete analysis of its development. For more detailed information see Nancy A. Heitzeg, *Criminalizing Education*, in *FROM EDUCATION TO INCARCERATION* (Anthony J. Nocella II et al. eds., 2014).

Although education seems to be a hallmark of United States culture, national policymakers often have been wary of creating federal education policy because of the strong belief that education is “local.”<sup>126</sup> As President Johnson noted when he signed the Elementary and Secondary Education Act of 1965, “Since 1946, Congress tried repeatedly and failed repeatedly to enact measures for elementary and secondary education.”<sup>127</sup>

In fact, after World War II, the theory of “progressive” education saw a bit of resurgence. Pioneered by John Dewey at the University of Chicago beginning in the early 1900s, progressive educators sought a holistic approach to education for all—rejecting the more common education theorists in the United States that sought to separate education for the few that focused on academics and the many that focused on vocational training.<sup>128</sup> Dewey’s teachings spawned experimental schools and the creation of the Progressive Educator’s Association, but with the emergence of the Cold War and a move away from New Deal liberalism, Dewey’s version of the progressive movement stalled.<sup>129</sup>

National policymakers in the 1940s, however, did begin to express concern about education particularly with respect to disparities that existed between the North and South, urban and rural areas, and between African Americans and Whites. During this time, the Educational Testing Service was founded,<sup>130</sup> veterans were given access to educational funds, and Congress passed the “impact laws” to assist state and local agencies with certain education-related costs

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126. President Johnson articulated this tension during his signing of the Elementary and Secondary Education Act:

From our very beginnings as a nation, we have felt a first commitment to the ideal of education for everyone. It fits itself into our Democratic creed. For too long political acrimony held up our progress. For too long, children suffered while jarring interests caused stalemates in the efforts to improve our schools.

President Lyndon B. Johnson, Remarks on Signing the Elementary and Secondary Education Act, 1 PUB. PAPERS 412, 413 (Apr. 11, 1965).

127. *Id.*

128. See, e.g., JOHN DEWEY, *THE CHILD AND THE CURRICULUM* (1902) (describing education as a dynamic process that involves an “immature” and “inexperienced” child on one side and “certain social aims, meanings, values incarnate in the matured experience of the adult” on the other and stressing that education must recognize the whole).

129. See, e.g., John Dewey Project on Progressive Education, *A Brief Overview of Progressive Education*, U. VT., <http://www.uvm.edu/%7Edewey/articles/proged.html> (last updated Jan. 30, 2002).

130. *Who We Are*, EDUC. TESTING SERV., <https://www.ets.org/about/who/> (last visited Aug. 16, 2015).

and burdens.<sup>131</sup> By 1953, the Department of Health, Education and Welfare was created.<sup>132</sup>

Spurred on by the technological advances being made by the then-Soviet Union during the Cold War (particularly the launch of Sputnik),<sup>133</sup> policymakers focused on “scientific” education in the 1950s. Senate efforts to pass federal education policies repeatedly failed in the House of Representatives during this time. After the launch of Sputnik, however, the Senate was able to move a bill forward that would provide federal aid to education.<sup>134</sup> Policymakers framed the debate not as one of education but as a matter of “national defense” and in 1958, Congress passed the National Defense Education Act (NDEA).<sup>135</sup>

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131. Act of Sept. 23, 1950, ch. 995, 1950 Pub. L. No. 81-815 (relating to the construction of school facilities) and Pub. L. No. 81-874, 64 Stat. 1100 (1950) (codified at 20 U.S.C. § 7701 (2012)) were known as the “impact laws” and provided the statutory “placeholder” for what would become the Elementary and Secondary Education Act—the guiding educational policy in this country. The “impact laws” were outgrowths of the 1941 Lanham Act and sought to relieve state and local educational agencies from burdens placed on them by the influx of military personnel to their jurisdictions. As the latter of these laws explains:

In order to fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that promotes control by local educational agencies with little or no Federal or State involvement, because certain activities of the Federal Government, such as activities to fulfill the responsibilities of the Federal Government with respect to Indian tribes and activities under section 571 of title 50, Appendix, place a financial burden on the local educational agencies serving areas where such activities are carried out, and to help such children meet challenging State standards, it is the purpose of this subchapter to provide financial assistance to local educational agencies . . . .

132. See *HHS Historical Highlights*, U.S. DEP’T OF HEALTH & HUM. SERVS., <http://www.hhs.gov/about/historical-highlights/index.html> (last updated Aug. 22, 2014); Dwight D. Eisenhower, 28 - Special Message to the Congress Transmitting Reorganization Plan of 1953 Creating the Department of Health, Education, and Welfare (Mar. 12, 1953) (“There should be an unremitting effort to improve those health, education, and social security programs which have proved their value.”) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=9794>).

133. On October 4, 1957, the then-Soviet Union “shocked the people of the United States by successfully launching” Sputnik, the first Earth-orbiting satellite. See *Senate History: 1941–1963*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/minute/Sputnik\\_Spurs\\_Passage\\_of\\_National\\_Defense\\_Education\\_Act.htm](http://www.senate.gov/artandhistory/history/minute/Sputnik_Spurs_Passage_of_National_Defense_Education_Act.htm) (last visited Sept. 21, 2015).

134. See, e.g., PAMELA EBERT FLATTAU ET AL., NATIONAL DEFENSE EDUCATION ACT OF 1958: SELECTED OUTCOMES I-1 (2007), <https://www.ida.org/-/media/Corporate/Files/Publications/STPIPubs/ida-d-3306.ashx>.

135. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (“The Congress hereby finds and declares that the security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women . . . . The defense of this Nation depends upon the mastery of modern techniques developed from complex scientific principles.”); see also *Senate History: 1941–1963*, *supra* note 133 (detailing the NDEA’s passing).

The NDEA focused primarily on collegiate education but it also provided funds to educational agencies to promote science, math, and “modern” foreign language study.<sup>136</sup> Congress made clear, however, that its foray into federal education was limited: “The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education. The national interest requires, however, that the Federal Government give assistance to education for programs which are important to our defense.”<sup>137</sup>

In fact, Congress specifically prohibited “federal control of education” in the NDEA: “Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system.”<sup>138</sup>

In 1960, then-vice president Lyndon Johnson began laying the foundation for what would become his “Great Society” domestic agenda—based on education. Known as the “teacher who became president,” Johnson focused on education and poverty. In a special message to Congress in January 1965, President Johnson stated, “Poverty has many roots but the taproot is ignorance.”<sup>139</sup> President Johnson noted gains that the United States had made in education but also lamented that education in this country has a “darker side.”<sup>140</sup>

President Johnson laid out many of the problems that continue to plague policymakers in this country and foreshadowed the onslaught of the school-to-prison pipeline—high dropout rates, particularly among the poor and minorities, and students unable to attend college through lack of funding and opportunity.<sup>141</sup> President Johnson noted:

The cost of this neglect runs high—both for the youth and the nation.

—Unemployment of young people with an eighth grade education or less is four times the national average.

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136. See National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580.

137. *Id.* § 101.

138. *Id.* § 102.

139. Johnson, *supra* note 123, at 27.

140. *Id.* at 25.

141. *Id.*

—Jobs filled by high school graduates rose by 40% in the last ten years. Jobs for those with less schooling decreased by nearly 10%.

We can measure the cost in even starker terms. We now spend about \$450 a year per child in our public schools. But we spend \$1,800 a year to keep a delinquent youth in a detention home, \$2,500 a year for a family on relief, \$3,500 a year for a criminal in state prison.<sup>142</sup>

Thus, it was clear that policymakers were opening a second campaign to bolster federal involvement in education: not only was education a matter of national defense,<sup>143</sup> but also now it was the answer to criminal justice issues. The first piece of the school-to-prison pipeline was in place.

Congress passed ESEA in April 1965.<sup>144</sup> The legislation was a highlight of President Johnson’s “War on Poverty” and provided direct financial assistance to state agencies for the education of children of low-income families.<sup>145</sup> In its declaration of policy, Congress declared:

[I]t to be the policy of the United States to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to

142. *Id.*

143. President Johnson did not abandon the connection between national security and education in his special message to Congress. According to Johnson:

We want [full education] not only for [the children’s] sake—but for the nation’s sake. Nothing matters more to the future of our country: not our military preparedness—for armed might is worthless if we lack the brain power to build a world of peace; not our productive economy—for we cannot sustain growth without trained manpower; not our democratic system of government—for freedom is fragile if citizens are ignorant.

*Id.* at 26; Likewise, then-Vice President Nixon, in a September 1960 speech noted:

[T]here is a further new dimension [to education in the United States]—one that turns mere urgency into a matter literally, of life or death. The threat of communism, and the constant danger that the threat will be backed up by recourse to total war, has made precious our margin of safety and, more than this, has denied us the luxury of permissible error, of timelag, of tolerance of half-effort and mediocrity. As the routine norm of our civilization, we can accept nothing short of the best.

Vice President Richard M. Nixon, Discussion of Education (Sept. 25, 1960) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=25453>).

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

145. *Id.* at 29.

meeting the special educational needs of educationally deprived children.<sup>146</sup>

By passing this legislation President Johnson believed, “[W]e bridge the gap between helplessness and hope for more than [five] million educationally deprived children.”<sup>147</sup> President Johnson articulated the importance he placed on the legislation by reflecting on his own past:

As a son of a tenant farmer, I know that education is the only valid passport from poverty. As a former teacher—and, I hope, a future one—I have great expectations of what this law will mean for all of our young people. As President of the United States, I believe deeply no law I have signed or will ever sign means more to the future of America.<sup>148</sup>

### *C. Dissatisfaction with ESEA and Its Results: 1966–1983*

Passage of ESEA did not result in quick eradication of the achievement gap nor did it settle debates about what constituted sound education policy. As part of the Civil Rights Act of 1964, then-secretary of education Harold Howe commissioned the “Coleman Report” on equality in educational opportunity to answer questions about what, in fact, was contributing to the continued education gap in the United States.<sup>149</sup>

The Coleman Report is considered the seminal study of education in the twentieth century<sup>150</sup> and is “the second largest social science research project in history, covering 600,000 children in 4,000 schools nationally.”<sup>151</sup> The Coleman Report’s conclusions,

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146. *Id.* at 27.

147. Johnson, *supra* note 126, at 413.

148. *Id.* at 414.

149. Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POL’Y INST. (Aug. 27, 2013), <http://www.epi.org/publication/unfinished-march-public-school-segregation/>; *see also* Education Testing Service, Policy Report, *The Smallest School: Family 2* (1992) (describing the Coleman Report’s findings that “family background factors, measured by parents’ education, family income, and parents’ occupation” contribute to a student’s ability to excel in school), <http://www.ets.org/Media/Research/pdf/PICSMSCCHOOL.pdf>.

150. One retrospective study conducted in 2006 noted that the Coleman Report “has been cited in academic journal articles more than 2,700 times.” Adam Gamoran & Daniel A. Long, *Equality of Educational Opportunity: A 40-Year Retrospective* 3 (Wisc. Ctr. for Educ. Research, Working Paper No. 2006-9, 2006), [http://www.wcer.wisc.edu/publications/workingPapers/Working\\_Paper\\_No\\_2006\\_09.pdf](http://www.wcer.wisc.edu/publications/workingPapers/Working_Paper_No_2006_09.pdf).

151. Gary Ravani, *Why ‘No Excuses’ Makes No Sense: Revisiting the Coleman Report*, WASH. POST (July 23, 2011), [http://www.washingtonpost.com/blogs/answer-sheet/post/why-no-excuses-makes-no-sense-revisiting-the-coleman-report/2011/07/23/gIQAo7W7UI\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/why-no-excuses-makes-no-sense-revisiting-the-coleman-report/2011/07/23/gIQAo7W7UI_blog.html).

contained in 737 pages of analysis, demonstrated that much more needed to be done with respect to closing educational gaps. The report's authors concluded "black children started out school trailing behind their white counterparts and essentially never caught up—even when their schools were as well equipped as those with predominantly white enrollments."<sup>152</sup> The Coleman Report authors further found that "parental economic status and segregated schools were the most important factors."<sup>153</sup> These findings were troubling to many and resulted in the very unheralded release of the report on a July Fourth weekend.

The Coleman Report's findings spurred action on segregation and education but also fueled the ongoing "academic debates and social conflicts about the structure and purposes of education" that were very much a part of the domestic debates and changes occurring in the 1960s.<sup>154</sup> The Coleman Report findings "and subsequent research pushed policymakers to consider outcome-based measures of success and spurred interest in reform strategies that focus on changing the incentives within the public school system."<sup>155</sup> These debates and strategy revisions continued into the 1970s, policymakers and educators raised concerns about the state of American schools.

Federally funded programs like Head Start<sup>156</sup> and others authorized in the Elementary and Secondary Education Act were not having the long-term success policymakers had hoped.<sup>157</sup> President

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152. Debra Viadero, *Race Report's Influence Felt 40 Years Later: Legacy of Coleman Study Was New View of Equity*, EDUC. WK., June 21, 2006, at 1–21.

153. Ravani, *supra* note 151.

154. Bowles & Gintis, *supra* note 124, at 1.

155. Brian A. Jacob & Jens Ludwig, *Improving Educational Outcomes for Poor Children*, FOCUS, Fall 2009, at 56, 60, <http://www.irc.wisc.edu/publications/focus/pdfs/foc262j.pdf>.

156. Head Start began as a pilot program in 1965 as part of the Johnson Administration's "War on Poverty." See *History of Head Start*, OFF. HEAD START, <http://www.acf.hhs.gov/programs/ohs/about/history-of-head-start> (last visited Aug. 26, 2015) ("Head Start was designed to help break the cycle of poverty, providing preschool children of low-income families with a comprehensive program to meet their emotional, social, health, nutritional and psychological needs. A key tenet of the program established that it be culturally responsive to the communities served, and that the communities have an investment in its success through the contribution of volunteer hours and other donations as nonfederal share."); *Id.* (despite concerns about the efficacy of Head Start, it was reauthorized in 2007 and has served "over 30 million children" since its inception).

157. MARIS A. VINOVSIS, THE ROAD TO CHARLOTTESVILLE: THE 1989 EDUCATION SUMMIT (1999) [hereinafter ROAD TO CHARLOTTESVILLE] (citing Maris A. Vinovskis, *Do Federal Compensatory Programs Really Work? A Brief Historical Analysis of Title I and Head*

Richard Nixon was turning his back on the Great Society approach to education but continued to advocate for desegregation and local control of schools.<sup>158</sup> For instance, in 1970, President Nixon proposed the Emergency School Aid Act of 1970, authorizing significant expenditures to desegregate schools in the United States.<sup>159</sup> Following up on findings from the Coleman Report and the continued impacts of both de facto and de jure segregation, President Nixon noted:

The educational effects of racial isolation, however, are not confined to those districts that previously operated dual systems. In most of our large cities, and in many smaller communities, housing patterns have produced racial separation in the schools, which in turn has had an adverse effect on the education of the children. It is in the national interest that where such isolation exists, even though it is not of a kind that violates the law, we should do our best to assist local school districts attempting to overcome its effects.<sup>160</sup>

Public attention also focused on increased efforts to desegregate schools, particularly in the Northeast.<sup>161</sup> At the same time, Americans experienced significant economic turmoil, including the oil crisis of 1973.<sup>162</sup> Because of the myriad of issues facing most Americans at the time, as well as presidential candidate Ronald Reagan's view that the federal government had intruded too far into the field of education,<sup>163</sup> broad national education reform was not a high priority in the early 1980s. Educational reform remained a regional issue, however, particularly in the southeast because of continual underperformance by students in that region.<sup>164</sup>

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*Start*, 3 AM. J. EDUC. 107, 187–209 (1999), <http://govinfo.library.unt.edu/negp/reports/negp30.pdf>).

158. This is similar to the position he took as vice president and during his 1960 presidential campaign. See Nixon, *supra* note 143.

159. President Richard M. Nixon, Special Message to the Congress Proposing the Emergency School Aid Act of 1970, 1 PUB. PAPERS 448 (May 21, 1970).

160. *Id.* at 449.

161. See ROAD TO CHARLOTTESVILLE, *supra* note 157, at 3.

162. *Id.*

163. Reagan had campaigned on a platform that included elimination of the Department of Education. See Sam Blumenthal, *Why Ronald Reagan Couldn't Abolish the Department of Education*, NEW AMERICAN (June 29, 2012), <http://www.thenewamerican.com/reviews/opinion/item/11904-why-ronald-reagan-couldnt-abolish-the-department-of-education>.

164. *Id.* at 6–7.

Despite the rather lukewarm reception to national education reform, President Reagan's first secretary of education, Terrel H. Bell, believed that education reform was essential, particularly in light of the economic downturn. Bell persuaded President Reagan to appoint a presidential commission to study the issue. On August 26, 1981, the National Commission on Excellence in Education was formed and tasked with reporting its findings within eighteen months of its first meeting.<sup>165</sup> The eighteen-member, bi-partisan commission released its report in April 1983.<sup>166</sup> The report, entitled *A Nation At Risk: The Imperative for Educational Reform*, provided specific findings and recommendations regarding the state of the American education system.

Instead of quelling concerns that a poor educational system was contributing to a decline in the United States overall, the report emphasized that fact. According to the report:

Our Nation is at risk. Our once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world. This report is concerned with only one of the many causes and dimensions of the problem, but it is one that undergirds American prosperity, security, and civility . . . . Our society and its educational institutions seem to have lost sight of the basic purposes of schooling, and of the high expectations and disciplined effort needed to attain them.<sup>167</sup>

Among its many recommendations for strengthening the overall educational system, the Commission recommended that schools, colleges, and universities “adopt more rigorous and measurable standards, and higher expectations, for academic performance and student conduct . . . .”<sup>168</sup> The Commission also recommended that the “burden on teachers for maintaining discipline should be reduced through the development of firm and fair codes of student conduct that are enforced consistently, and by considering alternative

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165. *See A Nation at Risk*, U.S. DEP'T OF EDUC. (Apr. 1983), <https://www2.ed.gov/pubs/NatAtRisk/risk.html>.

166. *Id.*

167. *Id.*

168. *Id.*

classrooms, programs, and schools to meet the need of continually disruptive students.”<sup>169</sup>

The Commission concluded its report with a plea “that all segments of our population give attention to the implementation of our recommendations. Our present plight did not appear overnight, and the responsibility for our current situation is widespread.”<sup>170</sup> The report further called on parents to help children understand that “excellence in education cannot be achieved without intellectual and moral integrity coupled with hard work and commitment.”<sup>171</sup>

Today, however, scholars note that the Commission’s use of data may not have been sound, and its conclusory nature suggests a predetermined outcome that was in keeping with the secretary’s and others’ beliefs that American schools were failing.<sup>172</sup> Moreover, the report’s recommendations clearly show that the words “discipline” and “morality” were to play an ever-increasing role in education, and that if a student could not act within pre-set expectations, they should not be permitted to stay within that particular educational environment.<sup>173</sup> This report provided the initial blueprints for creation of the school-to-prison pipeline.

#### *D. 1980s Education Reform and Continued Emphasis on Discipline*

By the mid-1980s, “most of the American public and policymakers accepted the idea that the United States was threatened

169. *Id.*

170. *Id.*

171. *Id.*

172. See, e.g., ROAD TO CHARLOTTESVILLE, *supra* note 157 (citing Maris A. Vinovskis, *Do Federal Compensatory Programs Really Work? A Brief Historical Analysis of Title I and Head Start*, 3 AM. J. EDUC. 107, 187–209 (1999)).

173. For example, in its recommendations for revising the “time” teachers and students spent studying the “new basics” the report states: “The burden on teachers for maintaining discipline should be reduced through the development of firm and fair codes of student conduct that are enforced consistently, and by considering alternative classrooms, programs, and schools to meet the needs of continually disruptive students.” With respect to standards and expectations the report states:

[T]hat schools, colleges, and universities adopt more rigorous and measurable standards, and higher expectations, for academic performance and student conduct, and that 4-year colleges and universities raise their requirements for admission. This will help students do their best educationally with challenging materials in an environment that supports learning and authentic accomplishment.

A Nation at Risk, U.S. Dep’t of Educ. (Apr. 1983), <http://www2.ed.gov/pubs/NatAtRisk/recomm.html>.

by an unprecedented, escalating educational crisis.”<sup>174</sup> The continued economic downturn, combined with reports about increased drug and gang violence and mixed testing scores, led policymakers and the general public to believe that America’s economic problems were directly related to inadequacies in the public school system.<sup>175</sup>

Moreover, other stakeholders like the Committee for Economic Development were voicing concerns about education and the economy. In a 1985 report, the Committee noted that it saw “increasing evidence that education has a direct impact on employment, productivity, and growth, and on the nation’s ability to compete in the world economy.”<sup>176</sup> The Committee went on to decry the fact that “[n]early 13 percent of all seventeen-year-olds still enrolled in school are functionally illiterate and 44 percent are marginally literate.”<sup>177</sup>

During this time, reformers also specifically focused on student achievement and ways in which such achievement could be measured. Coming off the “success” of the 1983 Nation at Risk Report, Reagan’s secretary of education instituted the “wall chart.”<sup>178</sup> The “wall chart” ranked states by their academic achievement and its release became a widely publicized event.<sup>179</sup> Education stakeholders and policymakers increasingly relied on the assessments used in compiling the wall chart, and the release of state-level data paved the way for more national goals emphasizing performance on standardized tests.<sup>180</sup> Despite these efforts, the achievement gap between minority and non-minority students continued to be significant. Specifically, data indicates that there had been a narrowing of the gap in both reading and mathematics since the 1970s, but the gap was increasing by the late 1980s.<sup>181</sup>

Although Secretary Bell and the Department of Education were undertaking some reform efforts, state-level policymakers were really taking the lead in the real education reform movement,

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174. *Id.* at 5.

175. *Id.* at 6.

176. *Id.* at 6 (citation omitted).

177. *Id.*

178. *Id.* at 13 (citation omitted).

179. *Id.*

180. *Id.* at 13–14.

181. 2010 ETS Report, *supra* note 73, at 6.

particularly those in southern states.<sup>182</sup> For example, in 1985, the National Governors Association announced its seven goals for national education, including “helping at-risk children and youth meet higher education standards.”<sup>183</sup> Moreover, the Southern Regional Education Board (SREB), an organization of southern governors, legislators, and education officials, published its own report in the 1980s entitled “The Need for Quality.”<sup>184</sup> Throughout 1988, SREB advocated for education reform, culminating in its “Goals for Education: Challenge 2000.”<sup>185</sup> The goals for academic achievement—to be achieved by 2000—included reducing the dropout rate by half and ensuring that 90 percent of adults had a high school diploma or equivalent.<sup>186</sup> Also in 1988, Congress established the National Assessment Governing Board to formulate policies for NAEP.

In 1989, the Bush administration, the National Governors Association, and other education stakeholders held the National Education Summit. By holding the Summit, President Bush felt that he had “made good” on his claim to be the “Education President.”<sup>187</sup> The Summit took place after almost a year of planning and meetings by and among education leaders, including the National Governors Association, the Department of Education, and White House officials.<sup>188</sup> Each of these interest groups came to the Summit with their own sets of goals and expectations for the path of American education going into the new millennium.<sup>189</sup>

For example, the agencies within the Department of Education tasked with preparing for the Summit included as a goal that every

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182. ROAD TO CHARLOTTESVILLE, *supra* note 157, at 7. Southern state policymakers were particularly concerned because their students generally underperformed and “[m]anufacturers were hesitant to move their operations to the South, as they feared they might have trouble attracting the necessary skilled labor force.” *Id.* at 6.

183. *Id.* at 17.

184. *Id.* at 19. Southern governors and legislators who recognized the link between education and the economy created the SREB in 1948. *About SREB*, S. REG’L EDUC. BD., [http://www.sreb.org/page/1068/about\\_SREB.html](http://www.sreb.org/page/1068/about_SREB.html) (last visited Aug. 18, 2015).

185. S. REGIONAL EDUC. BD., GOALS FOR EDUCATION: CHALLENGE 2000 (1988), <http://files.eric.ed.gov/fulltext/ED301966.pdf>.

186. *Id.* at 13–14.

187. ROAD TO CHARLOTTESVILLE, *supra* note 157, at 23–26.

188. *Id.* at 28–31.

189. *Id.* at 34 (citing NAT’L GOVERNORS’ ASS’N, SYNTHESIS OF PRE-SUMMIT OUTREACH HEARINGS (1989)). It is important to note that part of the reason stakeholders had different goals was that the Summit came about as the result of “quick and often secret deliberations.” *Id.* at 43.

student should leave school with “attitudes and habits necessary for full participation in our society.”<sup>190</sup> Then-governor Bill Clinton, representing the Democratic Governors Association at the Summit, included in his memorandum of Summit goals that “[d]isparities in achievement levels of students of different races and economic backgrounds will be dramatically reduced” along with ensuring a dramatic reduction in the dropout rate.<sup>191</sup>

The historic Summit not only resulted in specific national education goals, but it shifted a great deal of power from state and local government to the federal system, which is exactly the opposite of what President Reagan had championed.<sup>192</sup> The Summit produced six goals for national education including:

- By the year 2000, every child must start school ready to learn.
- The United States must increase the high school graduation rate to no less than 90 percent.
- School diplomas will be meaningful and in critical subjects in the 4th, 8th, and 12th grades student performance will be assessed.
- By the year 2000, U.S. students must be the first in the world in math and science.
- Every American adult must be a skilled, literate worker and citizen.
- Every school must offer the kind of disciplined environment that makes it possible for our kids to learn. And every school in America must be drug-free.<sup>193</sup>

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190. *Id.* at 31 (citing OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, 2002: A NATION OF LEARNERS (1989)).

191. *Id.* at 35–36 (citing BILL CLINTON, EDUCATION SUMMIT: PREPARATIONS AND EXPECTATIONS, MEMORANDUM TO THE DEMOCRATIC GOVERNORS’ ASSOCIATION (1989)).

192. *See id.* at 43 (noting that Bush’s participation in the Summit ensured a commitment to a larger and more active federal role in improving education than envisioned by Reagan).

193. *Id.* at 44.

*E. Criminal Justice and Education Policies Become  
More Entangled in the late-1980s and 1990s*

*Every school must offer the kind of disciplined  
environment that makes it possible for our kids to learn.  
And every school in America must be drug free.*

—President George H.W. Bush, January 1990 State of the  
Union Address.<sup>194</sup>

The “disciplined environment” goal of the historic Education Summit marks the significant entanglement of education and criminal justice policy. During the late 1980s and early 1990s, the Bush administration and Congress were actively engaged in significant criminal justice reform designed to “enhance enforcement and prosecution” of drug and other crimes that were described as “the most harrowing domestic threat to the future of America.”<sup>195</sup> This activity followed on the heels of major criminal justice reform, including significantly increased penalties for trafficking in substances like crack cocaine, included in the Sentencing Reform Act of 1984 that created the federal sentencing guidelines, among other things.<sup>196</sup> In 1988, Congress passed additional legislation that again increased penalties for drug trafficking and firearms offenses, including significant mandatory minimum penalties, and increased capacity of the federal prisons all of which the Bush administration and Congress claimed were designed to ensure “both certainty and severity of punishment.”<sup>197</sup>

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194. President George H.W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 131 (Jan. 31, 1990).

195. President George H.W. Bush, Remarks to the National Governors Association in Chicago, Illinois, 2 PUB. PAPERS 1035 (July 31, 1989).

196. Act of Oct. 12, 1984, Pub. L. No. 98-225, 98 Stat. 50 (codified at 18 U.S.C. §§ 3551–59 (2012)). The federal sentencing guidelines have been much criticized for the way they were developed and their contribution to the lengths of imprisonment terms served by federal offenders. *See, e.g.*, PAUL J. HOFER ET AL., U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf) (noting that creation of the federal sentencing guidelines, as well as the abolishment of parole and statutory mandatory minimum sentences all contributed to increased sentence lengths for federal crimes).

197. Bush, *supra* note 195, at 1038. In his July 1989 address, President Bush called on the governors to “Toughen your laws and put the worst offenders behind bars. If you do, we will take back the streets.” *Id.*

It was “easy” for policymakers to tie the “War on Drugs” and violent crime to education reform. By 1990, the Bureau of Justice Statistics reported that while overall crime in America was dropping, twelve- to nineteen-year olds were “more likely to be victims of crime than other segments of the population.”<sup>198</sup> Minorities and those from lower income households were significantly more likely to be victims of crime.<sup>199</sup> During this time “firearm[s] [were] the leading cause of death” for Black adolescent boys and young men.<sup>200</sup> And those from urban areas also were more likely to be victims of crime than those from suburban or rural areas.<sup>201</sup>

In addition to voicing continued concerns about students achieving higher educational goals, by the late 1980s, federal, state, and local governments as well as teachers and administrators began a serious examination of the safety of American public school systems with an emphasis on providing safe havens from poverty, drugs, and weapons violence.<sup>202</sup> At this time in American culture, there were a number of gun-related incidents at schools being reported by the media,<sup>203</sup> as well as reports of significant gang presence in schools.<sup>204</sup> For example, one Michigan study from 1992 found that

198. LISA D. BASTIAN & MARSHALL M. DEBERRY, JR., CRIMINAL VICTIMIZATION 1990, at 6 (1990), <https://www.ncjrs.gov/pdffiles1/Digitization/170378NCJRS.pdf> [hereinafter BJS 1990 STATISTICS]; see Lisa Jennings, *Survey of Teen Health and Safety Finds Crime Prevalent in Schools*, EDUC. WK. (Sep. 7, 1988), <http://www.edweek.org/ew/articles/1988/09/07/08370020.h08.html?tkn=TOQF0jSZp9gOxOx8xZGr3cTaGqMnA1Ngfls%2F&print=1>. The Census Bureau survey further noted that three million incidents of “street crime”—assault, rape, and theft—“took place in schools or campuses during 1986.” *Gun-Free School Zones Act of 1990: Hearing on H.R. 3757 Before the Subcomm. on Crime of the H. Comm. of the Judiciary*, 101st Cong. 48 (1990) (statement of Joel Packer, Legislative Specialist, National Education Association and National Parent-Teacher Association).

199. BJS 1990 STATISTICS, *supra* note 198, at 6.

200. *Gun-Free School Zones Act of 1990: Hearing on H.R. 3757 Before the Subcomm. on Crime of the H. Comm. of the Judiciary*, 101st Cong. 48 (1990) (statement of Mark D. Widome, M.D., Associate Professor of Pediatrics, Pennsylvania State University College of Medicine).

201. BJS 1990 STATISTICS, *supra* note 198, at 6.

202. See, e.g., Nancy A. Heitzeg, *Criminalizing Education*, in FROM EDUCATION TO INCARCERATION 20 (Anthony J. Nocella II et al. eds., 2014). Achievement gaps occur when one group of students outperforms another group and the difference in average scores for the two groups is statistically significant. *Achievement Gaps*, NAT’L CTR. FOR EDUC. STAT., <http://nces.ed.gov/nationsreportcard/studies/gaps/> (last updated Sept. 22, 2014).

203. See, e.g., Richard N. Ostling, *Shootouts in Schools: Educators Adopt Tough Tactics to Cope with Classroom Violence*, TIME, Nov. 20, 1989, at 116 (reporting on gun violence in schools in New York city, Washington, D.C., and Chicago, Illinois). The article cites a study by the National School Safety Center at Pepperdine University indicating three million crimes per year happened at schools with “183,590 injuries reported in 1987.” *Id.*

204. See *Gun-Free School Zones Act of 1990: Hearing on H.R. 3757 Before the Subcomm. on Crime of the H. Comm. of the Judiciary*, 101st Cong. 1 (1990) (statement of William Hughes,

slightly 1.3 percent of all eighth to tenth grade students brought a gun to school “at least monthly.”<sup>205</sup>

President Bush and his Department of Education took note of the reported violence. In his 1990 State of the Union Address, President Bush set forth six goals for education in America and declared, “By the year 2000, every school in the *United States* will be free of drugs [and] violence [and] will offer a disciplined environment conducive to learning.”<sup>206</sup> These goals were eventually codified in the Goals 2000: Educate America Act,<sup>207</sup> which was designed to provide a cohesive approach to education in America<sup>208</sup> and ensure that by the year 2000 there had been a significant increase in the number of students graduating high school and that “the gap in high school graduation rates between American students from minority backgrounds and their non-minority counterparts will be eliminated.”<sup>209</sup> In order to meet the goals set forth in the Educate America Act, a series of expectations and requirements were developed for schools.<sup>210</sup>

Congress, members of which were notably excluded from the Education Summit, also responded to the concerns over school violence with passage of the Gun Free Schools Zone Act of 1990.<sup>211</sup> The Gun Free School Zones Act made it a federal felony to possess a firearm within 1,000 feet of the grounds of a public school.<sup>212</sup> Support for the legislation came from a variety of sources including the Bureau of Alcohol, Tobacco, and Firearms, state and local law enforcement, the National Education Association (NEA),

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Chairman (“We are bombarded by news reports of yet another student or teacher killing at the hands of either an armed and deranged person, or by an angry and armed fellow student.”).

205. Callie E. Walton, *The Gun-Free School Zones Act: A Token Fix or a Workable Solution?*, 24 J. L. & EDUC. 335 (1995).

206. President George H.W. Bush Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers 129 (Jan. 31, 1990); Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994).

207. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994).

208. *Id.* § 101.

209. *Id.* § 102(2).

210. *Id.* §§ 701 et seq.

211. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789. The Gun Free School Zones Act was part of the more comprehensive Crime Control Act of 1990 which also included provisions regarding drug free school zones including a directive to the attorney general to develop an overarching program and strategy for creating and maintaining drug free school zones. *Id.*

212. *Id.* For purposes of the Act, the term “public schools” meant a public school that provides elementary or secondary education, as determined under state law.

pediatricians, and others.<sup>213</sup> The NEA noted, for example, that in one year some 282,000 students are physically attacked in secondary schools each month.<sup>214</sup> Members of Congress, citing statistics from the NEA, also noted that according to one study conducted by the organization, “about [eight] percent of junior and senior high school students had missed at least [one] day of school a month the previous year because they were simply afraid to go to school.”<sup>215</sup>

President Bill Clinton and Congress continued to perpetuate the entanglement of education and criminal justice policy. In addition to adding the Safe Schools Act of 1994 provisions to the Goals 2000: Educate America Act, Congress addressed school violence and firearms again in the wake of *United States v. Lopez*.<sup>216</sup> Congress passed the Gun-Free Schools Act of 1994, which again sought to create gun-free zones around schools and protect students from violence.<sup>217</sup> This legislation gave further impetus to schools to toughen their disciplinary policies by requiring schools that received federal funding to (1) have policies in place to expel students (for a calendar year) who bring firearms to school or within a school zone; and (2) report that student to local law enforcement.<sup>218</sup> Tying it to the Goals 2000 education initiative also further enmeshed criminal justice and educational policy.

In an April 8, 1995 speech to the National Education Association School Safety Summit in Los Angeles, California, President Clinton commended passage of the Gun-Free Schools Act.

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213. See *Gun-Free School Zones Act of 1990: Hearing on H.R. 3757 Before the Subcomm. on Crime of the H. Comm. of the Judiciary*, 101st Cong. 1 (1990) (receiving testimony from representatives of the Bureau of Alcohol, Tobacco and Firearms, the Cleveland, Ohio Police Department, the Center to Prevent Handgun Violence, the NEA and PTA, and the American Academy of Pediatrics, all generally in support of the Gun-Free School Zones Act of 1990).

214. *Id.* at 46 (written statement of Joel Packer, National Education Association and National Parent-Teacher Association).

215. *Id.* at 7 (statement of Rep. Edward F. Feighan). According to the representative of the NEA and PTA, “Students in Chicago, New York, Miami and elsewhere [were] exhibiting signs of ‘post-traumatic stress syndrome’” from attending school. *Id.* at 46–47 (written statement of Joel Packer, National Education Association and National Parent-Teacher Association).

216. 514 U.S. 549, 567 (1995). In *Lopez*, the Supreme Court invalidated the Gun Free School Zones Act of 1990, holding that “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.*

217. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994).

218. *Id.*; see also Heitzeg, *supra* note 202, at 20 (explaining that this legislation became the impetus for “zero tolerance” policies in education because of its tough requirements for schools to enforce drug and gun-free zones).

He went on to note, “You can’t succeed in school if you’re not secure when you’re there, and we can’t expect our schools to be safe unless we do more to make our communities safe and our homes safe.”<sup>219</sup> In praising his efforts to be tougher on crime and bring “safety” to schools, President Clinton stated:

Last year I fought hard to pass [a] crime bill [that] was comprehensive because it did have tougher punishment and more prisons, but it also put another 100,000 police on our street in community settings so we could lower crime and make people safer, because it had provisions for making our schools safer, because it had a domestic violence component for violence against women and children.<sup>220</sup>

Thus, education and crime were inexorably linked—a crime bill that made schools safe in part by increasing prison capacity.

During his tour of California, President Clinton went on to tout his commitment to “zero tolerance” in schools. “Last fall, we passed [the Gun-Free Schools Act of 1994] requiring states to adopt a simple but powerful rule: If somebody brings a gun to school, they’ll be expelled for a year, no excuses.”<sup>221</sup> And he proudly stated during his address to the NEA, “[t]hat’s why I directed [Education] Secretary Riley to enforce one rule for the whole country. If a State doesn’t comply with zero tolerance it won’t get certain important Federal education funds, period.”<sup>222</sup> During a press outing to an alternative school, President Clinton commented, “I believe in zero tolerance . . . I’m trying to get every place in the country to adopt that.”<sup>223</sup> As he noted in his NEA address:

This is not just a school problem, this is a social problem. That’s why we have to support the efforts of our police chiefs, our sheriffs, and . . . others . . . . Education is an opportunity. Lawfulness is a responsibility, you cannot have one without the other.<sup>224</sup>

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219. President William J. Clinton, Remarks at the National Education Association School Safety Summit in Los Angeles, California, 1 PUB. PAPERS 505 (Apr. 8, 1995).

220. *Id.*

221. *Id.* at 507.

222. *Id.*

223. Tony Perry & Lee Romney, *Clinton Calls for Education Reform, Criticizes GOP*, L.A. TIMES (Sept. 23, 1995), [http://articles.latimes.com/1995-09-23/news/mn-49182\\_1\\_education-reform](http://articles.latimes.com/1995-09-23/news/mn-49182_1_education-reform).

224. Clinton, *supra* note 219, at 507–08.

These policies did not operate as intended, however. By the late 1990s, the achievement gap between minority and non-minority students remained.<sup>225</sup> Schools still were wracked with gun and gang violence. Teachers and school administrators continued to seek ways to instill “discipline in the classroom” but the effects simply were that more and more students were falling behind and getting caught in a system of school enforcement. With seemingly no relief to the violence and drugs in schools, school systems increasingly tightened their policies to the point that there was “zero tolerance” for disciplinary infractions or non-conformist behavior, not just for the presence of firearms on school grounds.

There is no “official” definition of a “zero tolerance” policy.<sup>226</sup> As originally contemplated after the passage of the Gun-Free School Zones Act of 1994, discussed *infra*, these policies were “initially related solely to serious misconduct such as possession of firearms”<sup>227</sup> and similarly serious misconduct like bringing drugs or alcohol in school zones.<sup>228</sup> While these policies were designed to promote student safety and close the achievement gap, in fact the opposite happened. Increasingly, these policies resulted in students, primarily minority and disabled students, finding themselves entangled in the criminal justice system—what quickly became known as “zero tolerance” disciplinary policies.

These policies funnel students into the criminal justice system in two ways. First, students who are disciplined through suspension or other means have their educational experience interrupted. This interruption, “is more likely to cause a student to drop out of high school,” for instance, than “any other factor, including . . . socioeconomic status . . . .”<sup>229</sup> Second, stemming from the

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225. See, e.g., Mai Miksic, *The Persistent Achievement Gaps in American Education*, CUNY INS. FOR EDUC. POL’Y (Mar. 20, 2014), <http://ciep.hunter.cuny.edu/the-persistent-achievement-gaps-in-american-education/> (noting that the achievement gap in math scores grew in the 1990s); Ronald Roach, *Study: Black-White Achievement Gap Has “Political Foundations”*, DIVERSE ISSUES IN HIGHER EDUC. (July 3, 2013), <http://diverseeducation.com/article/54389/> (noting that closure of the achievement gap stalled in the 1990s).

226. See Heitzeg, *supra* note 202, at 20.

227. *Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Const., Civil Rights, and Human Rights, S. Comm. on the Judiciary*, 112th Cong. 2 (2012) [hereinafter *2012 Hearing*] (statement of Laurel G. Bellows, President, American Bar Association), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012dec12\\_prisonpipeline\\_s.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012dec12_prisonpipeline_s.authcheckdam.pdf).

228. Heitzeg, *supra* note 202, at 20.

229. *2012 Hearing*, *supra* note 227, at 2.

requirements of the GFSA of 1994, students often are referred to local law enforcement, even for non-violent offenses.<sup>230</sup> Research indicates that this interruption, particularly if it is the result of suspension, “can also contribute to a youth’s involvement in delinquency and gang[s], as it provides substantial time alone without adult supervision.”<sup>231</sup>

Zero tolerance policies rapidly became a way for school officials “to get rid of troubled students” in the name of safety.<sup>232</sup> But it became abundantly clear that while these policies may have rid the classroom of the perceived problem in the short term, they did not help students (and their parents) “deal with their real problems.”<sup>233</sup>

Zero tolerance policies seemed to do little to curb school violence. For example, on April 20, 1999, two students entered Columbine High School in Littleton, Colorado, and began systematically firing on students and teachers. By the end of the day, twelve students, one teacher, and the teenage shooters, Dylan Klebold and Eric Harris, were dead. The shootings were said to have been the result of the shooters being “teased and bullied” in school.

The shooting resurrected the public’s concerns about safety in schools. School officials responded by enacting even tougher disciplinary and enforcement policies. Students found themselves in disciplinary proceedings for such events as bringing nail clippers to school, dyeing their hair an “antisocial color,” and other seemingly innocuous behavior.<sup>234</sup> But by enforcing zero tolerance for disciplinary infractions, schools had “taken the guesswork” out of determining whether a student’s behavior was merely disruptive or deadly.<sup>235</sup>

Thus, despite the nation’s leaders’ desperate attempts to create safe, secure learning environments for school children to excel, they

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230. See Heitzeg, *supra* note 202, at 21; see also 2012 Hearing, *supra* note 227, at 2 (discussing ramifications of zero tolerance policies on students).

231. 2012 Hearing, *supra* note 227, at 4 (citing Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 376 (1999)).

232. John Cloud, *The Columbine Effect*, TIME (Dec. 6, 1999), <http://content.time.com/time/printout/0,8816,35098,00.html> (quoting John Whitehead of the Rutherford Institute).

233. *Id.*

234. *Id.* For additional accounts of “relatively minor” student behavior that resulted in significant disciplinary action see Heitzeg, *supra* note 202, at 21–22 (collecting anecdotal examples of students being expelled or suspended for their misdeeds in the classroom).

235. Cloud, *supra* note 232.

had created a system in which students were quickly subsumed for non-conformist behavior. Concern over violence overtook more reasoned approaches to the underlying causes for a student's disciplinary behavior. The policies that were enacted to provide hope to students and help them achieve academic success had instead served only to hinder many minority students. The school-to-prison pipeline began to flourish.

*E. No Child Left Behind: A New Approach to Closing the Achievement Gap*

As discussed above, EASA was the federal government's first foray into significant funding for public education designed to level the playing field for all students to achieve a solid public education. Yet over the years, and despite numerous attempts at reform, the national educational system seemed completely unable to overcome the achievement gap between minority and non-minority students. Moreover, students in lower-income, depressed schools continued to be disadvantaged in their access to education.<sup>236</sup>

EASA reauthorization gave President George W. Bush the opportunity to make good on commitments he made during his speech to the NAACP 91st Congress in July 2000. During that speech, Bush remarked:

I will confront another form of bias: the soft bigotry of low expectations . . . . In 43 years, we have come so far in opening the doors of our schools. But today we have a challenge of our own. While all can enter our schools, many—too many, are not learning there. There's a tremendous gap of achievement between rich and poor, white and minority. This, too, leaves a divided society.<sup>237</sup>

President Bush worked with Congress to reauthorize EASA and pass what is now known as the No Child Left Behind Act of 2001

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236. See H.R. REP. NO. 107-63, pt. I, at 264–65 (2001) (“Over the years Congress has created scores of programs under the Elementary and Secondary Education Act of 1965 that intended to address problems in education without asking whether or not the programs produce results, or knowing their impact on local needs. Yet, after spending billions of dollars on education, we have fallen short in meeting our goals for educational excellence. The academic achievement gap between rich and poor, minorities and non-minorities, is not only wide, but in some cases is growing wider still.”).

237. George W. Bush, Remarks Before the NAACP 91st Conference, July 10, 2000, <http://www.washingtonpost.com/wp-srv/onpolitics/elections/bushtext071000.htm>.

(NCLB).<sup>238</sup> NCLB promised “a new path of reform, and a new path of results.”<sup>239</sup> NCLB states as one of its primary purposes, “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.”<sup>240</sup> To close the achievement gap, the law required the end of children “just being shuffled through the system.”<sup>241</sup> The law sought to streamline the role of the federal government in education by implementing tough federal standards but also by mandating state and local policymakers’ involvement in ensuring success in their schools.<sup>242</sup>

NCLB set forth specific goals under five broad principles: (1) strong results-based accountability; (2) expanded flexibility and local control of schools; (3) emphasis on evidence-based teaching (particularly with respect to reading); (4) expanded options for parents to change schools, particularly for those with students in low-performing schools; and (5) ensuring “high quality” teachers.<sup>243</sup> Proponents of NCLB also touted that it made schools “safer” by *authorizing* “the Safe and Drug-Free Schools program, the 21st Century Community Learning Centers Act, and the Gun Free Schools Act—which helps States and local school districts fund drug and violence prevention programs and before- and after-school activities” and allowing “teachers to remove violent and persistently disruptive students from the classroom without fear of legal repercussions.”<sup>244</sup> As President Bush commented during his signing of NCLB, “poor performance” of schools would no longer be tolerated.<sup>245</sup>

Unfortunately, “poor performance” under NCLB is based almost exclusively on student performance on standardized tests. Educators

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238. No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

239. President George W. Bush, Remarks on Signing the No Child Left Behind Act of 2001, 1 PUB. PAPERS 23 (Jan. 8, 2002), <http://www.presidency.ucsb.edu/ws/index.php?pid=73220> [hereinafter *President Bush Remarks*].

240. No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1439.

241. *President Bush Remarks*, *supra* note 239, at 25.

242. *See, e.g.*, H.R. Rep. No. 107-63, 265-66 (discussing the “new” role of the federal government in education and the emphasis NCLB places on local schools and school districts “to demonstrate results”).

243. *See President Bush Remarks*, *supra* note 239.

244. H.R. REP. NO. 107-63, *supra* note 236, at 266.

245. *President Bush Remarks*, *supra* note 239.

and policymakers now seem to be coming to agreement that such a narrow focus on test results may be causing more harm than good in the classroom for disadvantaged and other minority students.<sup>246</sup> Because a school is “judged” by how well its students perform on tests, teaching to the test and other measures have become the norm.<sup>247</sup> The proliferation of testing and the need to maintain a strict testing environment has resulted in more stringent disciplinary policies in schools and less student-teacher engagement. As a result, students are more likely to become “bored” in the classroom, act out, and get suspended thus feeding the school-to-prison pipeline.<sup>248</sup>

In October 2015, the Obama administration announced a new “Testing Action Plan” designed to alleviate some of the classroom burdens associated with federally mandated standardized testing under NCLB.<sup>249</sup> According to the Obama administration, “Done well and thoughtfully, assessments [standardized testing] are tools for learning and promoting equity. They provide necessary information for educators, families, the public, and students themselves to measure progress and improve outcomes for all learners.”<sup>250</sup>

The Obama administration explained that no one intended to “create situations where students spend too much time taking standardized tests or where tests are redundant or fail to provide

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246. Josh Lederman & Jennifer C. Kerr, Obama Encouraging Limits on Standardized Student Tests, Associated Press (Oct. 24, 2015), <http://bigstory.ap.org/article/d819af4dbccb46a3aeea20b7be288f04/obama-cap-class-time-devoted-standardized-student-tests>.

247. See, e.g., Kevin G. Ulner & William J. Mathis, Reauthorization of the Elementary & Secondary Education Act: Time to Move Beyond Test-Focused Policies, Nat'l Educ. Pol'y Ctr. 3 (Feb. 2015), <http://nepc.colorado.edu/files/nepc-policymemo-esea.pdf> (describing parental and political concerns that policies focused on testing have not resulted in successful education reform); Nancy Kober, Knowing the Score: The Who, What & Why of Testing 1, 6 (Nov. 2015), <http://www.cep-dc.org/publications/index.cfm?selectedYear=2015> (noting that “concerns have intensified” with regard to standardized K-12 testing and explaining that under NCLB, virtually every student in elementary and secondary education must be tested in math, English language arts, and science).

248. Brian Washington, *Educators Vow to Keep Students from Entering the School-to-Prison Pipeline*, EDUC. VOTES (Aug. 7, 2013), <http://educationvotes.nea.org/2013/08/07/educators-vow-to-keep-students-from-entering-school-to-prison-pipeline/>; see also Lily Eskelsen Garcia & Otha Thornton, “No Child Left Behind” Has Failed, WASH. POST (Feb. 13, 2015), [https://www.washingtonpost.com/opinions/no-child-has-failed/2015/02/13/8d619026-b2f8-11e4-827f-93f454140e2b\\_story.html](https://www.washingtonpost.com/opinions/no-child-has-failed/2015/02/13/8d619026-b2f8-11e4-827f-93f454140e2b_story.html) (standardized testing results in less student engagement with potential detrimental effects).

249. U.S. DEP'T OF EDUC., Fact Sheet: Testing Action Plan (Oct. 2015), <http://www.ed.gov/news/press-releases/fact-sheet-testing-action-plan>.

250. *Id.*

useful information.”<sup>251</sup> President Obama admitted that his administration had perpetuated the problem out of good intentions but that existing testing policies have:

[U]nintended effects of policies that have aimed to provide more useful information to educators, families, students, and policymakers and to ensure attention to the learning progress of low-income and minority students, English learners, students with disabilities, and members of other groups that have been traditionally underserved.<sup>252</sup>

*F. Current State of the Criminal Justice  
and Education Systems*

*This job of keeping our children safe, and teaching them well, is something we can only do together, with the help of friends and neighbors, the help of a community, and the help of a nation.*

—President Barack Obama.<sup>253</sup>

The trend of school violence has not decreased despite efforts at every level of government to counter it. Data indicate that the “vast majority of children in the juvenile justice system have been exposed to multiple types of traumatic violence, crime, or abuse over a course of many years in their homes, schools and communities.”<sup>254</sup> A 2012 study conducted by the National Center for Education Statistics in conjunction with the Bureau of Justice Statistics noted, for instance, that “74 percent of public schools recorded one or more violent incidents of crime in the 2009–2010 academic year.”<sup>255</sup> The study also included findings that, in 2011, among students ages twelve to eighteen, there were about 1,246,000 nonfatal victimizations at school, which include 648,600 victims of theft and 597,500 victims of violence (simple assault and serious violence).<sup>256</sup> Moreover, the study included findings that over 75 percent of students between the

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251. *Id.*

252. *Id.*

253. *Working to Keep Schools and Communities Safe*, U.S. DEP'T OF EDUC., <http://www.ed.gov/school-safety> (last visited Sept. 14, 2015).

254. Listenbee, *supra* note 16, at 5.

255. *Working to Keep Schools and Communities Safe*, *supra* note 253; SIMONE ROBERS ET AL., NAT'L CTR. FOR EDUC. STAT., BUREAU OF JUST. STAT., INDICATORS OF SCHOOL CRIME AND SAFETY: 2012, at v (2013), <http://nces.ed.gov/pubs2013/2013036.pdf>.

256. SIMONE ROBERS ET AL., *supra* note 255, at iv.

ages of twelve and eighteen had some sort of surveillance cameras in school and 70 percent reported the presence of security guards or other law enforcement.<sup>257</sup>

What's worse, the well-meant attempts to raise students and provide a safe, welcoming learning environment for students have resulted in minority and disabled students not achieving in school and being herded into the criminal justice system at substantial rates.<sup>258</sup> As the co-chairs of President Obama's Commission on Equity and Excellence noted in the Commission's final report, "America's K-12 education system, taken as a whole, fails our nation and too many of our children. Our system does not distribute opportunity equitably. Our leaders decry but tolerate disparities in student outcomes that are not only unfair, but socially and economically dangerous."<sup>259</sup>

This opportunity disparity not only impacts minorities' ability to earn an education but it increases their likelihood of forever remaining in the criminal justice system. As a result, they earn less over their lifetimes and have far fewer opportunities to be contributing members of their community. They are disenfranchised, prohibited from certain housing and financing opportunities, and are far more likely than their non-minority counterparts to end up in prison.<sup>260</sup>

The United States is the world's leading jailer with nearly 2 million people in prison and one in fifty-two adults on some form of

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257. *Id.* at iii.

258. See Listenbee, *supra* note 16 (explaining that scientific studies show that juveniles exposed to violent trauma in early childhood and adolescence suffer derailed brain development and often suffer from inability to delay impulses and gratification or tolerate disagreement and conflicts with other people thus further perpetuating their likelihood of incurring disciplinary punishment in school).

259. Christopher Edley, Jr. & Mariano-Florentino Cuellar, *Foreword* to EQUITY AND EXCELLENCE COMM'N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 9 (2013), <http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf> (for additional information about the Commission on Equity and Excellence, see *Equity and Excellence Commission*, U.S. DEP'T EDUC., <http://www.ed.gov/about/bdscomm/list/eec/index.html> (last visited Sept. 30, 2015)). The twenty-seven-member Commission was a federal advisory committee chartered by Congress to "examine the disparities in meaningful educational opportunities that give rise to the achievement gap, with a focus on systems of finance, and recommend ways in which federal policies could address such disparities." *Equity and Excellence Commission*, *supra* note 259.

260. See discussion, *infra* and accompanying footnotes discussing the intersection of criminal justice and education policies and their detrimental effects on minorities.

community supervision.<sup>261</sup> A significant portion of these individuals are minorities.<sup>262</sup> They often have already had interactions with law enforcement by the time they arrive in prison, have had limited educational opportunities, face significant jail time, and then are further limited upon reentry into society.<sup>263</sup>

Moreover, the achievement gap is as present as it was in 1989, perhaps more so. Data indicate that, in fact, the achievement gap particularly between Blacks and Whites increased and has remained substantial since 1988.<sup>264</sup> And the alarm sounded in the 1983 Nation at Risk Report is still sounding:

For the first time in our nation's history, we are confronted with the very real possibility that we will, through inaction or active disregard, fail to meet a global challenge head on. For all the progress our nation has made in expanding educational opportunity and achievement, there are countries far larger than ours that are advancing and improving [education] at rates that surpass ours . . . . American global competitiveness demands the full, active participation of every young person and his or her talents, regardless of location or circumstance of birth.<sup>265</sup>

In 2014, the United States Department of Education conducted a study that concluded, "Black students are suspended and expelled at

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261. E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUST. STAT. (Sept. 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>; see also *Incarceration*, SENT'G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107>; BUREAU OF JUST. STAT., *Probation & Parole in the United States, 2014* (Nov. 2015), <http://www.bjs.gov/content/pub/pdf/ppus14.pdf>. On December 3, 2014, "an estimated 4,708,100 adults were under community supervision"—a decrease of 45,300 persons from 2013. *Id.* at 1.

262. In 2014, 45 percent of those under some form of community supervision were non-Caucasian. *Id.* at 5.

263. See, e.g., EEOC Enforcement Guidance 915.002, at 3 (Apr. 25, 2012) (noting detrimental effects on minorities of criminal history and concomitant background checks on offenders' ability to secure employment); THE LEADERSHIP CONF. ON CIV. & HUM. RTS., *Falling Further Behind: Combatting Racial Discrimination in America* (2014) (discussing various ways educational and criminal justice policies negatively impact the abilities of minorities to succeed).

264. See BARTON & COLEY, *supra* note 73, at 5–7 (noting that the achievement gap between Blacks and Whites narrowed through 1988, then increased and has remained relatively constant since).

265. Chaka Fattah, *Foreword to EQUITY & EXCELLENCE COMM'N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE* 11 (2013), <http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf>.

a rate three times greater than white students.”<sup>266</sup> The study noted that the disparate impact on minority students started far younger, and had more significant consequences for minorities than their non-minority counterparts. Data indicate that Black children represent 18 percent of American preschool enrollment but 48 percent of preschool children receiving one or more out-of-school suspensions.<sup>267</sup> Moreover, Black students represent 16 percent of enrollment in American schools but 27 percent of students referred to law enforcement, and 31 percent of students subject to a school-related arrest.<sup>268</sup>

Significantly, despite all of the education reforms undertaken in the past forty years, high school graduation rates remain alarmingly low for minority students: only about 60 percent of racial minorities graduate from high school versus 83 percent of their White peers.<sup>269</sup> This is particularly troubling because the number of minorities in American schools is growing. The 2013 Digest of Education Statistics reports that:

[T]he percentage of students in public elementary and secondary schools who were White decreased from 67 to 52 percent between 1991 and 2011. The percentage of students who were Hispanic rose from 12 percent to 24 percent, and the percentage of students who were Asian/Pacific Islander rose from 3 to 5 percent. The percentage of students who were Black rose from 16 to 17 percent between 1991 and 2001, and then decreased to 16 percent in 2011.<sup>270</sup>

And while there is no single factor that researchers have discovered that has the most significant impact on the achievement gap between minority and non-minority youth, their greater likelihood of facing disciplinary proceedings is a serious contributing

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266. U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

267. *Id.* at 7.

268. *Id.* at 1.

269. THE LEADERSHIP CONF. ON CIV. & HUM. RTS., FALLING FURTHER BEHIND: COMBATING RACIAL DISCRIMINATION IN AMERICA ¶ 37, at 12 (2014), [http://www.civilrightsdocs.info/pdf/reports/CERD\\_Report.pdf](http://www.civilrightsdocs.info/pdf/reports/CERD_Report.pdf). This rate drops to 50 percent for Blacks attending high-poverty schools. *Id.*

270. *Elementary and Secondary Schools: Enrollment by Race and Ethnicity*, NAT’L CTR. FOR EDUC. STAT. (2013), [http://nces.ed.gov/programs/digest/mobile/Enrollment\\_ES\\_Enrollment\\_by\\_Race\\_and\\_Ethnicity.aspx](http://nces.ed.gov/programs/digest/mobile/Enrollment_ES_Enrollment_by_Race_and_Ethnicity.aspx).

factor.<sup>271</sup> If minorities continue to underachieve during their educational careers, “[c]oncerns about disparities in income distribution [in the United States] will . . . be an ever-present element of the U.S. future.”<sup>272</sup>

#### IV. THE CERD COMMITTEE’S 2008 AND 2014 CONCERNS WITH RESPECT TO UNITED STATES HUMAN RIGHTS EFFORTS

In its 2008 Concluding Observations, the CERD Committee commented critically that juveniles from racial, ethnic, and national minorities appeared to be disparately represented in the number of juveniles suspended, expelled, and arrested in American schools.<sup>273</sup> It also voiced concerns about the persistent achievement gap between students belonging to racial, ethnic, or national minorities and their non-minority counterparts.<sup>274</sup> The Committee also called upon the United States “to encourage school districts to review their ‘zero tolerance’ school discipline policies” and limit the use of suspension and expulsion for “the most serious cases of school misconduct.”<sup>275</sup>

Similarly, in its 2014 Concluding Observations, the Committee again raised concerns that students from “racial and ethnic minorities disproportionately continue to . . . [be] disciplined unfairly and disproportionately due to their race, including through referral to the criminal justice system.”<sup>276</sup> The Committee further commented that the United States should do more to close the achievement gap between minorities and non-minorities and noted that such gaps in education “contribute to unequal access to employment opportunities.”<sup>277</sup> The Committee again raised concerns about the “disproportionate rate at which youth from racial and ethnic

271. See THE LEADERSHIP CONF. ON CIV. & HUM. RTS., *supra* note 269, ¶ 36, at 12 (“Taken together, these factors function to undermine the economic, social, and political potential and opportunities of racial minorities in the United States.”).

272. EQUITY AND EXCELLENCE COMM’N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 13 (2013), <http://www2.ed.gov/about/bdscmm/list/eec/equity-excellence-commission-report.pdf>. The report notes that if the education gap could be closed—and kept closed—Black and Hispanic students could contribute a “staggering” \$50 trillion to the U.S. economy over the next eighty years. *Id.* Unfortunately, closing the education gap is only one aspect of the problem—minority students also must be kept out of the school-to-prison pipeline so they can meaningfully participate in their communities.

273. CERD 2008 Conclusions, *supra* note 3, ¶ 26 (citing arts. 5(e)(v), 2(2)).

274. *Id.* ¶ 34.

275. *Id.*

276. CERD 2014 Conclusions, *supra* note 3, ¶ 14.

277. *Id.* at 6.

minorities are arrested in schools and are referred to the criminal justice system, prosecuted as adults, incarcerated in adult prisons and sentenced to life imprisonment without parole.”<sup>278</sup>

To address these and other concerns, the Committee recommended that the United States continue to work on a comprehensive plan “with concrete goals” that addressed all forms of disparate treatment of minorities.<sup>279</sup> The Committee further called upon the United States to “intensify its efforts to address racial disparities in the application of disciplinary measures” and “the resulting ‘school-to-prison’ pipeline.”<sup>280</sup> And it suggested that the United States “take all necessary steps” to guarantee equal treatment throughout the criminal justice system, including the implementation of “national strategies or plans of action aimed at the elimination of structural racial discrimination.”<sup>281</sup>

In preparation for the presentation of the United States’ Seventh and Ninth Periodic Reports to the CERD Committee, it sent a “List of Themes” designed to guide the dialogue between the CERD Committee and state representatives.<sup>282</sup> The CERD Committee asked that the United States be ready to discuss “[r]acial disparities at different stages of the criminal justice system, including overrepresentation of individuals belonging to racial and ethnic minorities, in particular African Americans, among persons who are arrested, charged, convicted, incarcerated and sentenced to death.”<sup>283</sup> It also asked the United States to be prepared to discuss “[r]acial and ethnic disparities in education, poverty, housing, health and exposure to crime and violence.”<sup>284</sup> In addition, the CERD Committee asked the United States to discuss “[a]doption of a national strategy or a plan of action to fully implement the provisions of the Convention and to eliminate structural discrimination.”<sup>285</sup>

In its Concluding Observations on the Combined Seventh and Ninth Periodic Reports of the United States, the CERD Committee noted its continued concern that the United States is not doing

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278. *Id.* at 10.

279. *Id.* at 7.

280. *Id.* at 10.

281. *CERD 2008 Conclusions*, *supra* note 3, ¶ 20.

282. *See CERD Committee*, *supra* note 52.

283. *Id.* at 2 (citing ¶¶ 20, 65).

284. *Id.* at 2 (citing ¶¶ 16, 17, 32–34).

285. *Id.* at 2 (referring to *CERD*, *supra* note 17, art. 7).

enough to “[i]mprove the system of monitoring and response by federal bodies to prevent and challenge situations of racial discrimination.”<sup>286</sup> The CERD Committee specifically noted that the United States, despite substantial coordination at the federal level, still lacks an “institutionalized coordinating mechanism” to ensure effective implementation of the Convention at the federal, state, and local level.<sup>287</sup>

## V. PROPOSALS & RECOMMENDATIONS

The crisis in the public schools is part of larger racial injustices that remain throughout American communities.<sup>288</sup> The school-to-prison pipeline is a significant contributor to the racial disparities that persist in every level of the American criminal justice system.<sup>289</sup> Minority youth in the United States face a number of disadvantages including low-income, single or no parent households, lack of access to healthcare and nutrition, violence in the home, substandard schools and access to education, and substandard employment opportunities. All of these concerns lie at the core of what CERD requires State Parties to eradicate—racial discrimination in all of its forms, at all levels of society. Thus, in order to meet its obligations under CERD, the United States must take a more

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286. CERD Committee, *supra* note 17, at 2.

287. *Id.* ¶ 6. The CERD Committee calls on the United States to implement an international human rights oversight body. While noble, it is not likely that such a body will be formed.

288. See THE LEADERSHIP CONF. ON CIV. & HUM. RTS., *supra* note 269, ¶ 10; see also U.S. DEP’T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION ¶ 2 (2013), <http://www.state.gov/documents/organization/210817.pdf> (“We recognize, however, that the path toward racial equality has been uneven, racial and ethnic discrimination still persists, and much work remains to meet our goal of ensuring equality for all.”).

289. See Dep’t of Educ. Guiding Principles: A Resource Guide for Improving School Climate and Discipline 2 (Jan. 2014), <http://www2.ed.gov/policy/elsec/guid/secletter/140108.html> (“The widespread overuse of suspensions and expulsions has tremendous costs. Students who are suspended or expelled from school may be unsupervised during daytime hours and cannot benefit from great teaching, positive peer interactions, and adult mentorship offered in class and in school. Suspending students also often fails to help them develop the skills and strategies they need to improve their behavior and avoid future problems. Suspended students are less likely to graduate on time and more likely to be suspended again, repeat a grade, drop out of school, and become involved in the juvenile justice system.”); Marvin J. Berlowitz, Rinda Frye & Kelli M. Jette, *Bullying and Zero-Tolerance Policies: The School to Prison Pipeline*, Mult. Cultural Learn. Teach 2015, DOI 10.1515/mlt-2014-0004, [http://www.auburn.edu/outreach/opce/antibullying/documents/2015presentations/JetteKelli\\_School%20to%20Prison%20Pipeline%20Official.pdf](http://www.auburn.edu/outreach/opce/antibullying/documents/2015presentations/JetteKelli_School%20to%20Prison%20Pipeline%20Official.pdf) (discussing the various impacts of the school-to-prison pipeline on minorities).

aggressive, holistic approach to criminal justice reform to include significant educational reforms that end the school-to-prison pipeline.

The Leadership Conference on Civil Rights & Leadership Conference on Civil Rights Education Fund July 2014 Alternative Report (as well as other alternative reports submitted on behalf of civil rights organizations) contains a number of specific recommendations for how the United States can better meet CERD's expectations.<sup>290</sup> This Article advocates for the immediate adoption and expansion of four broad principle recommendations related to criminal justice and education reform. Adopting these recommendations will further address the continued disparities in education and criminal justice encountered by minority students in the United States.

#### *A. Continued Holistic Reform of the Criminal Justice System*

First, with respect to improvements in the criminal justice system, as the Leadership Conference on Civil Rights and Leadership Conference on Civil Rights Education Fund note, the United States must take a more holistic, systematic review and reform of the criminal justice system at virtually every level from the first moment law enforcement interact with an individual through an individual's reentry into society.<sup>291</sup> Specifically, the report recommends that the United States should encourage criminal justice agencies "to collect and evaluate data on racial outcomes at key decision making points" throughout the criminal justice process.<sup>292</sup> For example, the Office of Juvenile Justice and Delinquency Prevention made a grant to support the "Juvenile Indigent Defense Special Initiative" to "reduce the overrepresentation of minority youth in the juvenile justice system and to improve access to counsel and quality of representation for youth with unique needs, including

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290. See Jonathan Gruber, What Have We Learned About the Problems of and Prospects for Disadvantaged Youth? (Oct. 2009), <http://www.nber.org/chapters/c0585.pdf>. In this version of Gruber's chapter on disadvantaged youth, he explains that "numerous studies" have shown that youth who experience lower educational opportunities have worse life outcomes. *Id.* at 2.

291. See generally LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, JULY 2014 ALTERNATIVE REPORT 3-7 (2014) (setting forth general recommendations as to how the United States could better meet its obligations under CERD).

292. *Id.* at 40.

children with disabilities, substance abuse problems, and language-access needs; as well as lesbian, gay, bisexual and transgender youth.”<sup>293</sup>

More funding of such programs is necessary, but that funding also has to include recognition and disaggregated data collection for these disadvantaged juveniles. Studies suggest that, “Although some youth may be more likely to engage in crime than other youth, research indicates that the majority of adolescent risk-taking and delinquency is transient and exploratory. As such, intense justice system interventions may be unnecessary for the majority of youth.”<sup>294</sup> Having robust, disaggregated data related to minority youth would further determine and help weed out those programs that are having a discriminatory impact on minority achievement.

More data collection in a disaggregated manner is necessary to continued reform efforts. Specifically, statisticians and policymakers should collect disaggregated data on the number of juveniles imprisoned in adult facilities, “including demographic data and time spent in solitary confinement.”<sup>295</sup> Juveniles often are housed in solitary confinement within adult facilities for significant stretches of time.<sup>296</sup> Juveniles are segregated into solitary confinement often to achieve one of three goals:

to punish young people (this is often called disciplinary segregation); to manage them, either because their classification is deemed to require isolation (often called administrative segregation) or because they are considered particularly vulnerable to abuse (often called protective custody); or to treat [them], such as after a threatened or attempted suicide (this is often called seclusion).<sup>297</sup>

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293. Listenbee, *supra* note 16, at 3–4.

294. JORDAN BECHTOLD BEARDSLEE, UNDER THE RADAR OR UNDER ARREST: HOW DOES CONTACT WITH THE JUVENILE JUSTICE SYSTEM AFFECT DELINQUENCY AND ACADEMIC OUTCOMES? 22 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/248533.pdf>.

295. LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, *supra* note 291, at 7.

296. *World Report 2013: United States*, HUM. RTS. WATCH, <http://www.hrw.org/world-report/2013/country-chapters/united-states> (last visited Aug. 16, 2015).

297. AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE U.S. 20 (2012).

Such confinement has been found to promote “serious mental and physical health problems, and undermines . . . rehabilitation.”<sup>298</sup>

Advocates in the Leadership Conference 2014 Alternative Report further recommend that the government, through the Department of Education, conduct audits to “ensure that data collected and reported by local education agencies (LEAs) and states pursuant to current federal requirements are current, complete, and accurate.”<sup>299</sup> The Elementary and Secondary Education Act (ESEA) requires all school systems accepting federal funding to publicly report accountability and assessment results for the district and each of its schools, along with state performance on the NAEP test.<sup>300</sup> The Leadership Conference 2014 Alternative Report encourages the Department of Education to use its audit function to review these data to ensure that information being reported by LEAs, particularly with respect to minority and disabled student educational issues, is accurate.<sup>301</sup> Following these recommendations with respect to data is consistent with CERD Articles 2 (elimination of racial discrimination) and 5 (rights of individuals to be treated equally by State Party governments at all levels).

### *B. Continued Reforms of the National Education System*

Second, as evidenced by the growth of the school-to-prison pipeline and proliferation of “zero tolerance” policies, reform of the criminal justice system should be accompanied by reforms to the educational system, particularly as it relates to minority access to education.<sup>302</sup> For example, the Leadership Conference 2014 Alternative Report recommends that the United States government and state entities do a better job of collecting disaggregated data on

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298. World Report 2013: United States, *supra* note 296, at 2. Isolation for twenty-two hours per day or more, and for one or more days, fits the generally accepted definition of solitary confinement. See AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, *supra* note 297, at 20.

299. LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, *supra* note 291, at 7.

300. See, e.g., S.D. DEP’T OF EDUC., ELEMENTARY AND SECONDARY EDUCATION REPORTING INFORMATION AND REQUIREMENTS (2014), <http://www.doe.sd.gov/oess/documents/RepRequ15.pdf> (explaining reporting requirements for school districts under the ESEA).

301. See LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND ¶ 34.

302. See, e.g., Remarks of President Barack Obama to the NAACP Conference (July 2015), <https://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be> (noting for example that “for every dollar that we invest in preschool, we save at least twice that over the long run in crime reduction”).

the impact of juvenile justice policies on minorities.<sup>303</sup> Continuing to refine data collection, as well as refining the interpretation thereof, is important because while “disparities in student discipline rates in a school or district may be caused by a range of factors, . . . substantial racial disparities of the kind [currently being collected] are not explained by more frequent or more serious misbehavior by students of color.”<sup>304</sup>

Sociologists examining the impact of the juvenile justice system on adolescents have demonstrated consistently “that arrested youth have worse achievement-related outcomes than non-arrested youth and more intense involvement with the justice system seems to be related to poorer academic and occupational attainment.”<sup>305</sup> But these studies have been shown to have limitations, thus data should be collected in more refined, disaggregated, and controlled ways to better understand the intersection of adolescence with the education and justice systems.<sup>306</sup>

As policymakers in the Departments of Justice and Education explained in their joint guidance to school systems in January 2014, the collection of detailed disaggregated data from schools and school districts may help alert education leaders that “groups of students [are being or] have been subjected to different treatment or that a

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303. LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, *supra* note 291, at 42.

304. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *Joint “Dear Colleague” Letter on the Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (citations omitted). The January 2014 “Joint Dear Colleague” letter is deemed a “significant guidance document” under Office of Management and Budget protocols. This designation is given to documents that are :

[D]isseminated to regulated entities or the general public that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; or (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866, as further amended.

Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

305. BEARDSLEE, *supra* note 294, at 12.

306. *Id.* at 16 (explaining the shortcomings in prior studies involving juvenile exposure to the justice system including omitting relevant control variables, using the same data collection methods, and approaching the issue from a criminal justice as opposed to developmental point of view).

school policy or practice may have an adverse discriminatory impact.”<sup>307</sup> The collection and review of quantitative data also plays a significant role in the Departments’ review of potentially discriminatory practices and policies.<sup>308</sup> Thus, keeping more detailed data leads directly to one of CERD’s desired goals—the elimination of facially neutral policies that have disparate impacts on minorities.

The 2014 Leadership Conference Alternative Report also recommends that the Departments of Justice and Education “develop a comprehensive plan to address concentrated poverty and racial isolation in schools and neighborhoods.”<sup>309</sup> Specifically, the report calls for a coordinated approach that ensures that the problems encountered by minority youth—low-income, single or no parent households; lack of access to healthcare and nutrition; violence in the home; substandard schools and access to education; and substandard employment opportunities—are addressed together as each of these disadvantages contributes significantly to the lack of opportunity afforded to minorities.<sup>310</sup>

For the last forty years (and more), policymakers have sounded the alarm about educational gaps and the growth of the school-to-prison pipeline but it has been just that, an alarm. If one compares the 1983 Nation at Risk Report with the 2013 Equity and Excellence Report, the concerns and recommendations are remarkably similar—despite thirty years having passed. “Federal enforcement in the area[] . . . discipline has been slow and scant in relation to the scope of the problem and the irreparable harm to

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307. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 304. For example, failure to keep appropriate records and data can lead to a number of remedial steps by the Departments of Education and Justice for schools pursuant to Title VI of the Civil Rights Act of 1964.

A non-exhaustive list of data-related remedies required of schools found to be in noncompliance with Title VI includes the following: developing and implementing uniform standards for the content of discipline files; developing and training all staff on uniform standards for entry, maintenance, updating and retrieval of data accurately documenting the school’s discipline process and its implementation, including its racial impact; and keeping data on teacher referrals and discipline, to assess whether particular teachers may be referring large numbers of students by race for discipline (and following up with these teachers, as appropriate, to determine the underlying causes).

*Id.*

308. *Id.*

309. LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, *supra* note 291, at 13.

310. *Id.*

school-aged children.”<sup>311</sup> Compare those reports with the concerns raised by Professor Dewey and other education advocates as far back as the turn of the twentieth century, and it is painfully clear that little has changed despite all efforts to counter education gaps.<sup>312</sup>

The Departments of Education and Justice have begun to coordinate their efforts with respect to school discipline and its contribution to the school-to-prison pipeline, but much more needs to be done. In January 2014, the Departments issued guidance to:

assist public elementary and secondary schools in meeting their obligations under Federal law to administer student discipline without discriminating on the basis of race, color, or national origin. The Departments recognize the commitment and effort of educators across the United States to provide their students with an excellent education. The Departments believe that guidance on how to identify, avoid, and remedy discriminatory discipline will assist schools in providing all students with equal educational opportunities.<sup>313</sup>

311. *Id.* at 12.

312. In *The School & Social Progress*, Dewey wrote at length about his concerns that American educational systems were divorcing school lessons from life lessons and thus disrupting the social order and natural way of learning. JOHN DEWEY, *THE SCHOOL & SOCIAL PROGRESS* 19–44 (Chicago Press 1907).

There is no obvious social motive for the acquirement of mere learning, there is no clear social gain in success thereat. Indeed, almost the only measure for success is a competitive one, in the bad sense of that term—a comparison of results in the recitation or in the examination to see which child has succeeded in getting ahead of others in storing up, in accumulating the maximum of information. So thoroughly is this the prevalent atmosphere that for one child to help another in his task has become a school crime.

*Id.* at 29. Similarly, in his remarks before the National Negro Conference of 1909, Dewey dismissed other race-based beliefs held by leading academics of the time such as the neo-Lamarckians. See Thomas D. Fallace, *John Dewey Ethnocentric? Reevaluating the Philosopher’s Early Views on Culture and Race*, 39 *EDUC. RESEARCHER* 471, 475 (Aug./Sept. 2010), [http://lhc.ucsd.edu/mca/Mail/xmcamail.2010\\_08.dir/pdfQ0jIKQhqTF.pdf](http://lhc.ucsd.edu/mca/Mail/xmcamail.2010_08.dir/pdfQ0jIKQhqTF.pdf). He noted simply:

All points of skill are represented in every race, from the inferior individual to the superior individual, and a society that does not furnish the environment and education and the opportunity of all kinds which will bring out and make effective the superior ability wherever it is born, is not merely doing an injustice to that particular race and to those particular individuals, but it is doing an injustice to itself for it is depriving itself of just that much of social capital.

John Dewey, Address Before the National Negro Conference 71–72 (May 31–June 1, 1909), [http://darrow.law.umn.edu/documents/Proceedings%20of%20the%20National%20Negro%20Conference%201909\\_%20New%20York\\_%20May%2031%20and%20June\\_1.pdf](http://darrow.law.umn.edu/documents/Proceedings%20of%20the%20National%20Negro%20Conference%201909_%20New%20York_%20May%2031%20and%20June_1.pdf).

313. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 304.

While “the Departments have provided a set of recommendations to assist schools in developing and implementing student discipline policies and practices equitably and in a manner consistent with their Federal civil rights obligations,”<sup>314</sup> they could do more to help minority children and their communities. As recommended in the Leadership Conference 2014 Alternative Report, the Departments “should develop a comprehensive plan to address concentrated poverty and racial isolation in schools and neighborhoods.”<sup>315</sup> The Leadership Conference 2014 Alternative Report notes that this coordinated plan should include “enforcement of federal civil rights laws, as well as programs and policies to incentivize school improvement; racial and socioeconomic integration; economic and infrastructure development (including affordable housing and transportation); coordinated health and social services; and effective re-entry programs.”<sup>316</sup>

Guidance is good; action is better. This proposed plan far exceeds the authority of the Departments of Justice and Education and suggests that the better course of action would be a holistic, government-wide plan of action to better address the myriad issues minorities face in this country that are inexorably tied to education and criminal justice.<sup>317</sup>

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314. *Id.*

315. LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS & LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, *supra* note 269, ¶ 37, at 12, [http://www.civilrightsdocs.info/pdf/reports/CERD\\_Report.pdf](http://www.civilrightsdocs.info/pdf/reports/CERD_Report.pdf).

316. *Id.*

317. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 304. The Obama administration has moved, if slowly, in this general direction. For example, in addition to the Joint Colleague Letter guidance issued by the Departments of Justice and Education on school discipline issues, the Departments of Education and Health and Human Services have authored similar joint guidance. U.S. DEP’T OF HEALTH & HUM. SERV. & U.S. DEP’T OF EDUC., Policy Statement on Expulsion & Suspension Policies in Early Childhood Settings (2014), <https://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ece-expulsions-suspensions.pdf>. On the criminal justice end, the administration has convened an interagency, cabinet-level group on offender reentry issues, and the Departments of Labor and Justice have issued guidance on offender reentry issues. DEP’T OF LABOR, Prisoner Re-entry: Issues & Answers, [http://www.doleta.gov/PRI/PDF/Prisoner\\_Reentry\\_Issues\\_Questions.pdf](http://www.doleta.gov/PRI/PDF/Prisoner_Reentry_Issues_Questions.pdf) (discussing collaborative efforts among various cabinet level departments and faith-based and community organizations to alleviate issues with ex-offender reentry).

C. *Address Disparate Disciplinary Actions Across Educational Systems*

Third, as part of its holistic approach to reforming the criminal justice and educational systems, the United States must actively address the disparate disciplinary enforcement that occurs in schools. Not only should policymakers abolish “zero tolerance” policies but they also need to ensure uniform application of disciplinary procedures to *all students*. Minority students are more likely to suffer severe disciplinary action in schools in which they represent the largest percentage of the student body and they also suffer more frequently in those schools with non-minority majorities.<sup>318</sup> As the Departments of Education and Justice concluded:

The administration of student discipline can result in unlawful discrimination based on race in two ways: first, if a student is subjected to *different treatment* based on the student’s race, and second, if a policy is neutral on its face—meaning that the policy itself does not mention race—and is administered in an evenhanded manner but has a *disparate impact*, *i.e.*, a disproportionate and unjustified effect on students of a particular race.<sup>319</sup>

It is not enough to recognize these disparities and decry them; action is required. The Office of Juvenile Justice and Delinquency Prevention notes that “the juvenile justice system is not the adult criminal justice system in miniature”<sup>320</sup> but the disparate disciplinary enforcement activities perpetuated by zero tolerance policies amount to exactly that. The government can help end these disparate impact policies if it adds more “teeth” to its enforcement efforts and does more than merely issue guidance to schools on how to discipline students. Although education is often left to the local education agencies (for good reasons), if these entities are receiving federal funds then the federal government should have some say as to how those entities operate, particularly when it comes to disparate impacts

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318. LEADERSHIP CONFERENCE EDUC. FUND & EDUC. PROJECT, STILL SEGREGATED: HOW RACE AND POVERTY STYMIE THE RIGHT TO EDUCATION ¶ 13, at 7 (2013), [http://civilrightsdocs.info/pdf/reports/Still\\_Segregated-Shadow\\_Report.pdf](http://civilrightsdocs.info/pdf/reports/Still_Segregated-Shadow_Report.pdf).

319. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 304. According to the Departments, this is also tied to the need for better and disaggregated data discussed *supra*. “Under both inquiries, statistical analysis regarding the impact of discipline policies and practices on particular groups of students is an important indicator of potential violations.” *Id.*

320. Listenbee, *supra* note 16, at 4.

on minorities. Ultimately, “the challenges that schools face in developing and maintaining safe, positive climates for learning are complex, but schools must remain safe havens in communities for students and their families.”<sup>321</sup>

The National Education Association, once a proponent of educational reforms that included zero-tolerance policies, is now an active opponent of them and their contribution to the school-to-prison pipeline.<sup>322</sup> As EASA comes up for reauthorization, the NEA and other advocacy groups are calling on Congress and national policymakers to do more to end zero tolerance policies irrespective of claims that such policies make schools “safer.”<sup>323</sup>

One significant component of these policies is the removal of students who are acting out in the classroom from the traditional educational environment. This practice is problematic for several reasons. For instance, as sociologists continue to explore juvenile contact with the justice system from a developmental as opposed to criminal justice perspective, there is developing evidence to suggest that juveniles of different ages may be more susceptible to negative influences than others.<sup>324</sup> There are characteristics that suggest early adolescent brain development may make younger juveniles more negatively impacted by contact with the juvenile justice system.<sup>325</sup> “As identities are fluid during early adolescence, younger adolescents are likely to obtain self-identities based on large, reputation based crowds, which could be problematic if justice system contact propels [them] toward delinquent crowds and pushes them away from pro-social contacts.”<sup>326</sup>

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321. *Working to Keep Schools and Communities Safe*, U.S. DEP’T EDUC., <http://www.ed.gov/school-safety> (last visited Aug. 23, 2015).

322. See NAT’L EDUC. ASS’N, *Let’s Stop the School-to-Prison Pipeline*, <http://www.nea.org/home/60137.htm> (last visited Apr. 19, 2016) (recognizing the school-to-prison pipeline “is a serious issue that deserves serious solutions and is tackling the problem on multiple fronts,” noting the ways in which zero tolerance policies have detrimental impacts on students, and providing resources for alternative disciplinary actions to zero tolerance policies).

323. See, e.g., Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut It Down*, NEATODAY (Jan. 5, 2015), <http://educationvotes.nea.org/2015/01/11/the-school-to-prison-pipe-line-time-to-shut-it-down/> (noting that in 2013 “NEA members and leaders made a formal commitment to close” the school-to-prison pipeline).

324. See BEARDSLEE, *supra* note 294, at 23.

325. *Id.*

326. *Id.* (citing B. Brown & J. Larson, *Peer Relationships in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOL. 74 (R. Lerner & L. Steinberg eds., 2009)); see also Flannery, *supra* note 323 (commenting on the impact of zero tolerance policies on students’ ability to bond with teachers in the classroom).

The NEA and others have noted that, “An adolescent’s relationship with and perceptions of [their] school and [their] teacher may have profound effects on [their] achievement and [their] choice to engage in or abstain from antisocial and illegal behaviors.”<sup>327</sup> This need to ensure that students have positive, engaged interactions with their peers and teachers is similar to that required for individuals re-entering their communities after incarceration; the more positive interactions they have, the presence of stable employment, and positive family and community interactions all lead to less-likely recidivism.<sup>328</sup> Thus, policies that specifically remove a student from the traditional educational environment including in or out of school suspension, expulsion, or transfer to alternative schools, are more likely to result in segregation and marginalization of students thus having the opposite impact as intended.<sup>329</sup> Instead, the United States (at all levels of policymaking) should be focused on programs that keep juveniles actively involved in their schools and communities.<sup>330</sup>

#### D. Further Address American Drug Policy

Fourth, the United States should do more to address its drug policies, as the “War on Drugs,” which served as a kind of blueprint for educational reform in the 1980s, has had a serious impact on minority communities. More minorities are incarcerated for significantly longer periods of time for drug-related offenses than

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327. BEARDSLEE, *supra* note 294, at 25 (citations omitted); *see also* Washington, *supra* note 248 (noting that zero tolerance and other disciplinary measures that criminalize minor school infractions lead to student disengagement).

328. *See, e.g.*, Mark T. Berg & Beth M. Huebner, *Reentry & The Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382 (2011) (concluding that strong familial and social ties assist reentering persons with avoiding recidivism and unemployment).

329. *See, e.g.*, BEARDSLEE, *supra* note 294, at 28 (discussing how grouping “delinquent youth” together “might provide a platform from which lower level, first-time offenders become embedded in a deviant lifestyle” because of adolescent propensity to follow peers and adhere to “cultural norms” that may “devalue academic success”).

330. *See id.* at 129–30 (citing T. Moffitt, *Adolescence-Limited and Life-Course Persistent Anti-Social Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993)) (concluding that for the justice system to combat juvenile delinquency, it should “require and ensure that youth stay enrolled in school and attend school on a regular basis” as absence from school was related to more offending, more substance abuse, and less school attachment, and noting that the justice system should reorient itself as her study suggests that while contact with the juvenile justice system may have a “first-time” positive effect, “it is unlikely that there will be positive effects as youth are channeled deeper into the justice system and they become increasingly ‘ensnared’ in the criminal lifestyle”).

others.<sup>331</sup> In 2013, the attorney general announced a directive to federal prosecutors that aims to ensure that low-level, non-violent drug offenders with no ties to gangs or other organized criminal activity are not subjected to significant mandatory minimum sentences.<sup>332</sup> As a result, the number of federal drug cases has dropped. For example, in 2012, the United States Sentencing Commission reported 24,736 drug trafficking cases; in 2013 that number was 22,254—a decrease of almost 2,500 cases.<sup>333</sup> In Fiscal Year 2014, the U.S. Sentencing Commission reported another decline in federal drug cases: 21,323 drug trafficking cases, which was 931 cases fewer than 2013.<sup>334</sup>

Decreasing the number of minority offenders serving time in prison for drug crimes is important for a number of reasons. First, minority offenders tend to serve longer sentences as the majority of their offenses involve drugs such as crack or powder cocaine that carry significant penalties.<sup>335</sup> Second, these offenders often have little education, thus making it even more difficult for them to obtain meaningful employment upon release. In 2012, almost half (48.2 percent) of all federal drug trafficking offenders had less than a high school education.<sup>336</sup> And just over a third (34.1 percent) had a high school education.<sup>337</sup>

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331. See, e.g., U.S. SENTENCING COMM'N., 2012 SOURCEBOOK OF SENTENCING STATISTICS Table 8 (17th ed. 2012) (demonstrating that 25.9 percent of federal drug offenders were Black and 46.2% were Hispanic); LEADERSHIP CONF. ON CIV. AND HUM. RTS. & LEADERSHIP CONF. EDUC. FUND, *supra* note 269, ¶ 16 (“[T]he ‘War on Drugs’ has had a significant impact on minority communities and fueled the country’s incarceration rates.”).

332. See U.S. Att’y Gen. Eric H. Holder, Jr., Remarks to the ABA House of Delegates (Aug. 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> (announcing new policies on federal enforcement of criminal penalties and noting “As President Obama said last month, it’s time to ask tough questions about how we can strengthen our communities, support young people, and address the fact that young Black and Latino men are disproportionately likely to become involved in our criminal justice system—as victims as well as perpetrators”).

333. U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 3 (19th ed. 2014).

334. U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 3 (2015), <http://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table03.pdf>.

335. U.S. SENTENCING COMM'N, *supra* note 331, Table 34 (indicating that in 2012, over 82 percent of crack cocaine drug trafficking offenders were Black and the average sentence length was ninety-seven months. During that same year, 55.7 percent of powder cocaine offenders were Hispanic, and the average sentence length was eighty-three months).

336. U.S. SENTENCING COMM'N, *supra* note 331, Table 8.

337. *Id.* Table 34.

The Federal Bureau of Prisons is tasked with ensuring that all offenders leave incarceration with at least an eighth grade education but that does little to ensure that they can compete in the workforce upon release.<sup>338</sup> Federal offenders (like all other formerly incarcerated individuals) face significant collateral consequences as a result of their convictions. Combined with a lack of education and significant time served in prison, these individuals face almost insurmountable challenges to successful re-entry, and this “triple threat” demonstrates the lasting impact of minority disengagement in the educational system.<sup>339</sup> The more policymakers promulgate policies to keep minority students actively enrolled in education, the less likely students are to face the perils associated with the criminal justice system.<sup>340</sup>

CERD requests that State Parties do more than just discuss the need to eliminate racial disparities in all forms. State Parties, particularly at the national level, must engage in action across all entities. In keeping with CERD’s requirements, the United States government should “lead a national conversation, raise national awareness, support data collection and research, disseminate the latest findings from that research, and suggest broad outlines for policy and practice”<sup>341</sup> that reform both the criminal justice and educational systems under the guidance of CERD’s premise: equality and access for all.

Critics of CERD and its potential impact on domestic governmental policies argue that by virtue of raising issues such as disparities in education or criminal justice, the CERD Committee and

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338. See, e.g., Joan Peterselia, When Prisoners Return to the Community: Political, Economic, and Social Consequences, *Sentencing & Corrections: Issues for the 21st Century*, No. 9 (Nov. 2000), <https://www.ncjrs.gov/pdffiles1/nij/184253.pdf> (describing the collateral consequences associated with reentry including “including increases in child abuse, family violence, the spread of infectious diseases, homelessness, and community disorganization” and explaining that the trend of increased incarceration of certain community groups “may affect the socialization of young people, the power of prison sentences to deter, and the future trajectory of crime rates and crime victimization”); Michale Schulte & Eric Cochling, *Increasing Employment Opportunities for Ex-Offenders: Policy Recommendations for the State of Georgia* 8 (Dec. 2013), <http://georgiaopportunity.org/assets/2014/10/GCO-Report-workforce-web.pdf> (discussing multiple barriers faced by ex-offenders trying to reenter society including need for employment).

339. See generally *id.* (discussing impact of education and length of incarceration on reentering offenders).

340. Congressional leaders noted this correlation when passing NCLB. See H.R. REP. NO. 107-63, pt. 1, at 264–65 (2001) (discussing funding for after-school and other programs that keep students engaged in the school setting).

341. Listenbee, *supra* note 16, at 7.

the United Nations are improperly involving themselves in matters that “constitute legal, social, and cultural components of American life,” that “must be left to the American people to consider and decide.”<sup>342</sup> Simply raising these issues or calling for the United States to address them in a manner consistent with the principles set forth by CERD does not amount to a usurpation of domestic power, nor should it fly in the face of our federalist form of government.<sup>343</sup> Instead, it should serve as a reminder to policymakers that in order to maintain legitimacy as a global advocate for freedom, democracy, and international practices that condemn racial discrimination, the United States should be doing what it can to serve as a role model to the international community.<sup>344</sup>

The issues and criticisms raised by the CERD Committee or civic organizations in their alternative reports should not merely be viewed as “passing judgment”<sup>345</sup> but as avenues by which policymakers can examine their policies and ask, “Can we do better?” Implementing cohesive national strategies that can be echoed in state and local communities is not a dereliction of the federalist principles upon which this country is founded.

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342. Steven Groves, *Furthering the U.N.’s Leftist Agenda: The U.N. CERD Committee Report*, HERITAGE FOUND. (Apr. 22, 2008), <http://www.heritage.org/research/reports/2008/04/furthering-the-uns-leftist-agenda-the-un-cerd-committee-report>.

343. See LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 54, ¶ 2 (citing U.S. DEP’T OF STATE, U.S. INITIAL REPORT TO THE COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION 45 (2000)) (“[The United States] does not dispute the proposition that its federal structure cannot be used as an excuse for noncompliance with ICERD.”); see also U.S. DEP’T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION ¶ 11 (2013), <http://www.state.gov/documents/organization/210817.pdf> (discussing limits of reach of the federal government to impose treaty obligations on the states).

344. Interestingly, in a joint book by President George H.W. Bush and General Brent Scowcroft, Bush describes a 1988 meeting between then-vice president Bush and Mikael Gorbachev. Bush raised with him the issue of human rights in then-communist Russia. Gorbachev interrupted and said, “Within the borders of the US you don’t respect human rights” or—referring to African-Americans—“you brutally repress their rights.” As President Bush put it, the “gist” of the conversation was “don’t lecture us on human rights, don’t attack socialism but let’s each take our case to discussion.” GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED: THE COLLAPSE OF THE SOVIET EMPIRE, THE UNIFICATION OF GERMANY, TIANANMAN SQUARE, THE GULF WAR 4* (1998). President Bush noted that this was a “common” refrain from world leaders about the United States and its record on human and civil rights. *Id.* This impression of the United States should not continue for another fifty years.

345. See, e.g., Groves, *supra* note 342 (condemning the authority of the CERD Committee members to sit in judgment of the United States when many of them also come from states with significant histories of racial discrimination and abuse).

*E. Add the Department of Education to the Standing Interagency Working Group on Human Rights*

Finally, one of the simplest ways to address some of the most pervasive impacts on minorities would be to add the Department of Education to the existing Interagency Working Group on Human Rights. Of course doing so would officially move the thrust of that group from international to domestic issues but such a move would accomplish a number of important goals under CERD. First, it would give a more comprehensive, cohesive view of domestic civil and human rights issues that still is lacking.<sup>346</sup> Second, adding the Department of Education to the standing Working Group is consistent with Executive Order 13107 in that it would better allow the Working Group to carry out specific functions including coordinating the preparation of reports required by the treaties; coordinating the United States response to complaints against it concerning human rights violations; “developing effective mechanisms” to ensure that legislation proposed by the Administration “is reviewed for conformity with international human rights obligations”; developing proposals for improving the monitoring of state, commonwealth, territorial, and tribal actions for compliance with treaty obligations, the collection of information for reports, and “the promotion of effective remedial mechanisms”; and developing public outreach and education plans regarding “CERD, and other relevant treaties, and human rights-related provisions of domestic law.”<sup>347</sup>

## VI. CONCLUSION

The United States has made significant progress in its pursuit of complete racial desegregation, particularly with respect to intentional, systemic discriminatory practices. If the United States continues to implement cohesive strategies that (1) follow the guiding principles set forth by CERD and (2) that cross all departments and levels, it is far more likely to eradicate those policies that contribute to minorities being denied access to

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346. See, e.g., LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & THE LEADERSHIP CONFERENCE EDUC. FUND, 50 YEARS AFTER THE CIVIL RIGHTS ACT: THE ONGOING WORK FOR RACIAL JUSTICE IN THE 21ST CENTURY 26–27 (2014) (lamenting the ad hoc basis in which domestic civil rights are addressed).

347. Exec. Order No. 13107, *supra* note 105 (emphasis added).

education and being funneled into the criminal justice system. Doing so not only ensures that the United States is meeting its treaty obligations under CERD but also that it is conforming to purposes and goals of the 1993 Vienna Declaration and Programme of Action, calling on State Parties to enable a holistic approach to promoting human rights and involving actors at the local and national levels in achieving these important goals.<sup>348</sup>

Moreover, ensuring that the basic principles articulated in CERD are adopted throughout our domestic policies is consistent with President Obama's declaration that U.S. national security depends on its pressing for international "transformative investments in areas like . . . education";<sup>349</sup> if such programs are good for the international community, then they should be good for domestic communities still suffering from inequality. Only if the United States takes this approach can Eleanor Roosevelt's ideal of every person having equal justice, equal opportunity, and equal dignity without discrimination be truly attainable.

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348. See, e.g., LAWYERS' COMM. FOR CIVIL RIGHTS, *supra* note 55, at ¶¶ 15–18 (discussing ways in which the federal government can work with and incentivize state and local entities to engage in policymaking that promotes CERD principles); COLUMBIA LAW SCH. HUMAN RIGHTS INST. & INT'L ASS'N OF OFFICIAL HUMAN RIGHTS AGENCIES, THE NEED FOR EFFECTIVE FEDERAL OUTREACH AND MECHANISMS TO COORDINATE AND SUPPORT FEDERAL, STATE, AND LOCAL IMPLEMENTATION OF THE CONVENTION: RESPONSE TO THE SEVENTH TO NINTH PERIODIC REPORTS OF THE UNITED STATES TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 2 (2014), [http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/cerd\\_shadow\\_report\\_state\\_and\\_local\\_implementation\\_-\\_final.pdf](http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/cerd_shadow_report_state_and_local_implementation_-_final.pdf) (discussing ways in which the CERD Committee can encourage the United States to do more than embrace an "ad hoc approach to human rights reporting and implementation without meaningful avenues for state and local government participation").

349. PRESIDENT BARACK OBAMA, STATEMENT ON THE 2015 NATIONAL SECURITY STRATEGY (2015), [http://www.whitehouse.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy\\_2.pdf](http://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf).

