Something to Lose: The Black Community's Hard Choices About Educational Choice

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I. INTRODUCTION

> We've had all-boy schools in urban areas for all the wrong reasons. The moment we start to talk about something positive, then the folks come out of the woodwork.[1]

Through concerted community action, a group of African-American parents in Detroit pushed their school board to charter Afrocentric male academies for their children as "Alternative Schools of Choice."[2] Out of the woodwork came a swarm of commentators and critics of every stripe. In particular, the American Civil Liberties Union (ACLU) of Michigan and the National Organization of Women (NOW) initiated litigation that forced a grudging compromise on the Detroit School Board to establish less ambitious mixed-gender academies. This article analyzes the relevant case, *Garrett v. Board of Education*,[3] and the complex issues that form its backdrop.

The first issue concerns the experimental limits of the public school system. The public system of education is an artifact of the rights and policies that developed as a result of publicly funded and operated popular education in the United States. Whether the same policies would have been incorporated into primary and secondary schools had they developed in some other way is a moot question; the policies and the public

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1. Isabel Wilkerson, *Detroit's Boys-Only Schools Facing Bias Lawsuit*, N.Y. TIMES, Aug. 14, 1991, at A1 (quoting Dr. Clifford Watson, principal of Malcolm X Academy in Detroit, Michigan).

2. The Detroit School Board established a program, "Alternative Schools of Choice," in which public schools are "operated for students from throughout the City and offer educational programs that are unique and innovative and/or focus on the special problems of an identified population of students." Detroit Public Schools, Male Academy Grades K-8: A Demonstration Program for At-Risk Males 8 (Dec. 7, 1990) (draft on file with author). The "Alternative Schools of Choice" program is similar to, and would be subsumed in, the category of Public Charter School as discussed in this paper *infra* in the tables of Section II and the discussion of school choice options in Section IV.

3. Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991).

support have been and are linked in our present system. Consequently, some experiments in education will require a setting outside of the public school system. But is a system fair that only permits children to participate in these educational experiments if their parents can afford to purchase private education?

Second, the needs of this community have been poorly served by public education. The district has labored under court supervision to remedy the failings of the de jure segregation of Detroit which is documented in the *Milliken v. Bradley*[4] litigation. A Detroit parent group seized upon an opportunity to form an academy for boys that would be academically, morally and culturally uplifting, which would center around Afrocentrism.[5] It was perceived within the community that this kind of school was an essential first step in addressing community needs. The public school system however lacked the ability to offer male-only education.

Third, increasingly popular educational reform programs—such as school choice, vouchers and charters—and movements toward deregulating school systems, blur the distinctions between public schools and private schools. This article argues that these solutions are two-edged swords because the black community still has something to lose if the public schools continue to lose their tight link to public policy. In the long run, the Detroit black community may be better served by the principles vindicated by litigation, than by an actual victory itself: such a victory may well be Pyrhic, purchased by undermining the most effective structures for asserting educational rights.

II. THE PUBLIC SCHOOL SYSTEM AND ITS OPTIONS

The Detroit School District's inability to bring about the academies it desired stems from limits typical of any urban public school system. Schools in the United States increase in school autonomy inversely to their dependence on public funding. This Section offers an analytical basis for understanding this phenomenon.

A. The Spectrum of Schooling in the United States

Compulsory education is generally the law in the United States. The choice that is given to parents of school-age children is not *whether* to educate their children but *which school* shall do so. Typically state statutes offer two avenues for compliance: enrollment in a public school, or enrollment in schools of a residual category described variously as private, non-public, parochial or simply, as in the Massachusetts statute, "some other day school."[6] The Constitution prohibits states from excluding an alternative, non-public category.[7]

"Public schools" is a defined term in most statutes. They are differentiated from the residual category by virtue of being publicly financed institutions that are administered by public officials under an elected board and which are open or "common

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4. Milliken v. Bradley, 418 U.S. 717 (1974). For a history of the *Milliken* litigation, see *infra* note 42.

5. For a definition of Afrocentrism see *infra* note 27.

6. MASS. ANN. LAWS ch. 76, § 1 (Law. Co-op. 1996).

7. States are not permitted to limit parents to the public school system by outlawing alternative schools. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Despite the substantive economic due process arguments in the actual opinions, these holdings have been reaffirmed by the Supreme Court in numerous cases and are regarded to be good law today. *See* Runyon v. McCrary, 427 U.S. 160, 176-77 (1976); Community for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Board of Educ. v. Allen, 392 U.S. 236, 246-47 (1968); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452, 460 (N.D. Ill. 1974).

schools"[8] for the students of the district.[9] Public systems tend to be organized in the form of bureaucracies and standardized in their offerings.[10] A public education system is available in each state.[11]

To summarize schematically, a parent's choice between public schools and private schools in conforming to compulsory attendance laws is illustrated in Table 1.

	Public Sector	***Private Sector***
Responsibility for funding	Public	Private
Public Governance/ Regulation	Governed in all aspects; responsive to public policy via political governance and limitations on state action	Minimal regulation; minimal responsiveness to public policy; responsive to policies set by private owners
Accessibility & Standardization	Accessible to all children within district; tendency to standardization and centralization	Minimal restrictions on non-accessibility policies; private parties operating the school may have unique programs with presumption that the market forces of parental demand will create variation among private schools

Table 1

8. Jenkins v. Andover, 103 Mass. 94, 99 (1819).

9. "Public school" does not mean any school which is generally open to the public, even if it is tuition-free. For example, in *St. Joseph Church v. Assessor of Taxes*, 12 R.I. 19 (1878), an exemption from property taxes allowed by statute for "free public schools" was not available to a church school which was tuition-free and open to all students. The court found that "free public school" referred only to those schools "established, maintained and regulated under the statute laws of the state." Nor does a school become public simply because the school's operating funds are primarily derived from public grants. *Id.* at 20.

10. It is not the view of this author that the degree of bureaucratization and standardization that obtains in most public school systems is a legal requirement. Rather, much of it appears to be products of the favored organizational forms of an earlier time. On the bureaucratization of public schools and the historical drive toward standardization in education, see DAVID TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION (1974) and Michael Katz, *From Voluntarism to Bureaucracy in American Education*, *in* EDUCATION IN AMERICAN HISTORY (Michael Katz ed., 1973).

11. All state constitutions, except in Mississippi, charge the state with a duty respecting education to state citizens. *See infra* note 117 and Section IV.

Historically, however, this simple structure has never been a complete description of schools. On the private side, schools have varied in their degree of independence, while still being subject to governmental regulation in some way. As alternate providers for compulsory education, the private schools usually must provide a course of study substantially similar to their public school counterparts.[12] Some states require additional certification for the private schools and their teachers.[13] Furthermore, in some states internal school policies may be subject to public policy constraints.[14] In addition, some private schools voluntarily subject themselves to a greater degree of self regulation. Some interface with public agencies by participating in various public programs for school-aged children. An example of this is the offering of special services to their impoverished students.[15]

On the public side of the spectrum, many districts have modified their standard offerings in a few selected specialized schools or programs. Magnet schools created to foster racial integration are prime examples of modified and specialized public school programs.[16] These schools offer more variety and often enjoy more autonomy in the management of their site than the usual public school.

Taking into account these aspects of public and private schools, the spectrum in practice is more precisely rendered as illustrated in Table 2.

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12. State power to define criteria for schools that will satisfy a state's compulsory attendance requirements has generally withstood constitutional muster. *See* Board of Educ. v. Allen, 392 U.S. 236, 247 (1968) ("[I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."). State criteria have been invalidated for being excessively restraining, however, particularly where the Court finds the restrictions unduly impinge on free exercise concerns. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1922) (failing to find a compelling interest of the state in requiring formal schooling of Amish children past the eighth grade where it was alleged that continued schooling impinged religious rights); State v. Whisner, 351 N.E.2d 750, 768 (Ohio 1976) ("[T]hese standards [applied to a parochial school] are so pervasive and all-encompassing that total compliance with each and every standard . . . would effectively eradicate the distinction between public and non-public education. . . .").

13. State v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981); Meyerkorth v. State, 115 N.W.2d 585 (Neb. 1962). *But see* Kentucky State Bd. v. Rudasill, 589 S.W.2d 877 (Ky. 1979) (invalidating requirement of state certification for private school teachers based on state constitutional grounds).

14. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (limiting private racial discrimination in private school admissions).

15. There are state and federal programs providing funds for remedial programs, counseling and other pupil services for all students in need of these services whether in attendance at public or private schools. *See, e.g.*, Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-6514 (1994 & Supp. 1995)). Private schools that are not sectarian may provide for the services to be delivered on-site, but at least must cooperate in aiding the delivery of services to needy students. In some cases private school instructors may also be the providers of the services. *See, e.g.*, 34 C.F.R. §§ 76.650-76.662 (1997). Students in sectarian schools can receive the benefits of participation in programs under Title I of the Elementary and Secondary Act of 1965, although prior to the recent decision in *Agostini v. Felton*, 138 L. Ed. 2d 391 (1997), the services had to be offered off-site.

16. *See* 20 U.S.C. §§ 7201-7213 (1994); *infra* text accompanying note 127. Some districts have long had specialized schools as part of their system, e.g. New York's Science High and School of the Performing Arts. For the purposes of this article these schools can be loosely included in the magnet category, being relevantly similar institutionally in terms of their district-wide draw, specialties and site autonomy within the constraints of a fully public school within the public school system.

	Public Sector		***Private Sector***	
	Public Schools	***Public Magnet or Special Curriculum Schools***	***Private Schools with a Broad Regulatory Interface***	***Private Schools with a Small Regulatory Interface***
Responsibility for funding	Public	Public with occasional private grants	Primarily private with some public grants	Private
Public Governance/ Regulation	Governed in all aspects; responsive to public policy via political governance and limitations on state action	Primarily publicly governed but often with limited site-based autonomy	Limited public regulation; limited responsiveness to governmental policy goals	Minimal public regulation; minimal responsiveness to public policies; primarily responsive to policies set by private owners
Accessibility & Standardization	Accessible and uniform for all children within district	Somewhat reduced accessibility and uniformity	Limited nonaccessibility and nonuniformity	Minimal restrictions on school non-accessibility and nonuniformity

Table 2

B. The Movement in Tandem of Funding and Regulation

As the public funding burden increases, public governance and policy goals also increase. The avenues of public policy and controls, discussed in greater detail in Section III, *infra*, affect the private sector schools through statutes of general application, conditions set by the state for certification and the benefits of tax-exemption. Private schools receiving the benefits of public educational expenditures are also subject to statutory and regulatory limitations on the use of funds. In addition, public schools are subject to constitutional limitations and elected governing boards of education.

An increase in public influence resulting from public funding is certainly not surprising. Rather, it follows the old adage "who pays the piper calls the tune." In this case, it is not merely the source of the money which is ultimately the taxpayers', but the entity that assumes the responsibility for the financing of the schools that calls the tune. The taxpayers money is collected through the power and coercion of government and it, in turn, shoulders the duties with respect to the schools. Likewise, the govern-

ment bears the blame for schools' failures, just as the educational entrepreneurs shoulder the burdens for their enterprises. Although intuitive, the question of the justness and fairness of this "piper principle" remains to be shown.

C. Current Reform Proposals Within the Spectrum

Loosely grouped under the banner of school choice are a number of school reforms and proposals that have gained currency such as charter schools and voucher programs. Although not uniform from state to state, many states already have charter schools and voucher programs in operation. Under some schemes, the charter schools vary little from magnet schools.[17] Some states have stronger charter schemes that allow greater independence, but no charter program permits as much freedom as permitted for fully private schools.

Similarly, vouchers involve the incorporation of parental choice in the assignment of students to public schools with specialized offerings; in this way they are essentially similar to magnet schools. In the most comprehensive voucher program to date—the choice plan for the city of Milwaukee—private, entrepreneurial projects have been included in the voucher program.[18] No voucher program, however, allows for public payments to totally unregulated, privately-owned and operated schools based upon the number of voucher-eligible students it enrolled.

Incorporating both strong and weak versions of voucher and charter schemas into the spectrum schema above, the "piper principle" still holds, as illustrated in Table 3.

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17. The personnel are public school teachers and employees, the administrators are ultimately accountable to the local school district, and the curriculum must still be within the policy guidelines for public school curriculum, although not necessarily identical in presentation.

For example, compare the rather weak charter statute of New Mexico, N.M. STAT. ANN. §§ 22-8A-1 - 28-8A-7 (Michie 1993), with that of its neighbor, Arizona, ARIZ. REV. STAT. ANN. §§ 15-181 - 15-189.02 (West Supp. 1997). New Mexico permits only public schools to convert to charters; the charter school then gains the ability "to develop and implement an alternative educational curriculum" and "to develop and utilize a school-based budget." N.M. STAT. ANN. § 22-8A-2(A) (Michie 1993). The Arizona statute, one of the most liberal of the charter statutes, will charter the schools of educational entrepreneurs as well, and exempts the schools from many statutes and rules governing the public schools, but certainly not all. ARIZ. REV. STAT. ANN. § 15-183 (West Supp. 1997). Compliance with federal, state and local rules, regulations and statutes relating to health, safety, civil rights and insurance is required, and the Department of Education is charged with promulgating regulations for charter schools. *Id.* The statute also has restrictions on admissions policies. *Id.* § 15-184.

18. The Milwaukee Parental Choice Program is an experimental voucher program that issues vouchers to students whose family income does not exceed 1.75 times the poverty level (as determined by the Office of Budget and Management). WIS. STAT. ANN. § 119.23 (West 1995). The program was originally enacted in 1990 and approximately 370 children participated in the program in its first year, with each voucher diverting about $2500 from the public school system to the participating private schools. Davis v. Grover, 480 N.W.2d 460, 463 (Wis. 1992). An attempt to extend the voucher to parochial schools was struck down as violative of the First Amendment Establishment Clause. State *ex rel.* Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

	Public Sector				Private Sector			
	Public Schools	***Public Magnet or Special Curriculum Schools***	***Magnet-like Voucher Schools***	***Public Charter Schools***	***Quasi-Private Voucher Schools***	***Entrepreneurial Charter Schools***	***Private Schools with a Broad Regulatory Interface***	***Private Schools with a Small Regulatory Interface***
Responsibility for funding	Public	Public with occasional private grants	Public variant funding; some private grants	Public variant funding; some private grants	Public variant funding and private funding	Public variant funding and private funding	Primarily private with some public grants	Private
Public Governance/ Regulation	Governed in all aspects; responsive to public policy via political governance and limitations on state action	Primarily publicly governed but often with limited site-based autonomy	Primarily governed with site-based autonomy	Primarily governed with site-based autonomy	Substantially regulated	Substantially regulated	Limited public regulation; limited responsiveness to governmental policy goals	Minimal public regulation; minimal responsiveness to public policies; primarily responsive to policies set by private owners
Accessibility & Standardization	Accessible and uniform for all children within district	Somewhat reduced accessibility and uniformity	Somewhat reduced accessibility and uniformity	Somewhat reduced accessibility and uniformity	Qualified non-accessibility and limited non-uniformity	Qualified nonaccessibility and limited nonuniformity	Limited non-accessibility and nonuniformity	Minimal restrictions on school non-accessibility and nonuniformity

Table 3

D. Fairness and Options

The operation in tandem of public financing and public regulation means the independence of a school is a function of its access to privately-held wealth. A private school must look to tuition, donations and generally to wealth held by individuals, a supporting group, a special community or religious group. This is not an uncommon situation for schools that cater to parents' desire to educate their children in conjunction with particular religious convictions. Where the parents or their religious community have the ability to fund a colorable alternative private school, the Supreme Court has stretched to legitimize this private school option. This was the case for the Old World Amish in *Wisconsin v. Yoder*.[19] The Satmar Hasidim, however, in *Board of Education v. Grumet*,[20] who, like the Old World Amish, maintained separate schools and lifestyles, could not stretch the accommodation to encompass receiving and administering public funds for remedial education in a Yiddish public school setting.

For *Yoder*, *Grumet* and similar religious school cases, the need for school autonomy arose from complex tensions inherent in our constitutional separation of church and state. There will be those who desire a private option for religious reasons but lack access to one due to financial limitations. Although they may feel aggrieved, they are not necessarily victims of an injustice; to suffer the loss of a desirable educational experience merely due to a lack of the funds necessary to indulge one's preferences has yet to be found to be an actionable burden.[21]

The case for an inherent injustice would become stronger if there were a nexus between the lack of a group's access to private funding opportunities and their reason for requiring an autonomous school—a nexus that implicates unfair actions by the state. This would be the case if, for example, the poverty of the group stemmed from laws barring the group from employment, training or similar economic opportunities.

Just such a linkage was arguably present in *Garrett v. Board of Education*.[22] Both the poverty that inhibited the black parents of the district from establishing a private option and the lingering educational disabilities and burdens that necessitated the option were laid at the door of state action in the injustice of de jure discrimination and previously in the benighted state-facilitated practice of slavery itself.[23]

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19. Wisconsin v. Yoder, 406 U.S. 205 (1972). Old Order Amish parents objected to their children's attendance of public school after the eighth grade as destructive to their lifestyle and religious values. The parents were charged with violating the compulsory education laws of Wisconsin upon withdrawing their children from public school after the eighth grade. The Court stretched to find that the students' continuing work on the community farms "demonstrat[es] the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education." *Id.* at 235.

20. Board of Educ. v. Grumet, 512 U.S. 687 (1994). The state sought to give the Satmar community access to federally-funded Title I remedial education within their village by designating the village a school district.

21. Discrimination by wealth does not offend the United States Constitution. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973); *infra* Section III.

22. Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991).

23. Under the oppressive forces of slavery, blacks in America were denied any opportunity to receive an education.

> All slaveholders agreed that the thinking slave was a potentially rebellious slave. Among the more insistently enforced sections of the black codes was the prohibition against teaching a slave to read or write or giving him or her pamphlets, not excluding the Bible or religious tracts. So apprehensive were members of the slavocracy about the great mischief that literacy might stir that in many states it was illegal to teach free as

Garrett then presents a challenge to the fairness of linking options to wealth and is a hard case for the "piper principle." It is an uphill battle to find justice in a principle that has an overall effect of compounding injustice. There is no question that the tandem linking of public policy and public funding burdened the Detroit black community in establishing the school that the leaders of the effort believed necessary for black advancement. This burden however is a cost in a system that in the long run contributes more to than it detracts from justice.

III. THE DETROIT BLACK MALE ACADEMY: A HARD CASE FOR FUNDING-POLICY LINKAGE

A. Grass Roots Origins of an Educational Reform

In March 1990 over five hundred citizens of greater Detroit attended a conference called "Saving the Black Male." The focus was on inner-city urban males, predominantly African-American, whose school performance and drop-out rates were, it was argued even more dismal than those of their female counterparts. As an outgrowth of this conference, a proposal was drafted and submitted to the Board of Education to create a Boys Developmental Academy. The Board authorized a task force to study the concept. The task force confirmed the concerns about this population's performance, linking it to increases in unemployment, homicide and incarceration rates.[24]

In February 1991, as a response to the task force findings, the Detroit Board of Education resolved to create a Male Academy.

> National and local statistics, research and curriculum information all support the need to take steps to improve the academic and behavioral performance of African American males. There are a number of problems afflicting males which cause them to suffer disproportionate rates of school incarceration [sic], and even death. Unless innovative measures are taken within the educational community, the survival of young African American males residing in Detroit and around the country

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well as enslaved Negroes.

RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 28 (1976).

Even after the end of slavery, many blacks, especially in the South, found themselves trapped in a system of peonage which was encouraged by the laws of the antebellum South. DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 29-41 (1978). It was not until the early part of the twentieth century that the federal government began enforcing anti-peonage laws that had been enacted in 1867. *Id.* at 44-62.

The legislative history of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (1994)), recognized that the end of slavery had not removed all the burdens facing blacks in America.

> More than a hundred years have elapsed since the Negro has been freed from the bonds of slavery. Yet, to this day, the Negro continues to bear the burdens of race under the traces of servitude. In employment, education, public service, amusement, housing, and citizenship, the Negro has faced the barrier of racial inequality.

H.R. REP. NO. 88-914, pt. 2, at 2 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2488.

24. The task force reported that elementary age males were disproportionately underachieving in reading and math. In high school the boys' drop-out rate was forty-five percent over four years. The unemployment rate for African-American males was over eighteen percent, more than twice the state average. The homicide rate was fourteen times the national rate and forty-seven times the homicide rate for white males in the state. Detroit Public Schools, *supra* note 2, at 3-4.

will be threatened.[25]

The proposed academy included a specially trained staff with "a substantial effort directed at recruiting male teachers, male mentors and male volunteers."[26]

The Board authorized a school to be chartered and become operational for the 1991-92 school year. Although the task force study focused on the problems of at-risk boys, the school was to be open to boys of all achievement levels. The goals of the school emphasized achievement-oriented vocational training, civic and political activity and spiritual values, using Afrocentric education, as the curricular vehicle.[27] The Afrocentric thrust of the curriculum was to enhance African-American children's self-esteem and social functioning by immersing them in a curriculum centered on cultural, historical and normative lessons derived from a pan-African foundation. Afrocentric curriculum architects argued that their curriculum would be valuable for different reasons for all students, including white students.

> Certainly, if African American children were taught to be fully aware of the struggles of our African forbears they would find a renewed sense of purpose and vision in their own lives. They would cease acting as if they have no past and no future. . . . If White children were taught the same information rather than that normally fed them about American slavery, they would probably view our society differently and work to transform it into a better place.[28]

By June 1991 the Detroit Board of Education had expanded the planned male academy program to open three separately chartered schools (the "Academies"). Al-

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25. Detroit Board of Education, Male Academy Resolution (Feb. 26, 1991) (unpublished resolution presented at a general board meeting) (on file with author).

26. Detroit Public Schools, *supra* note 2, at 25.

27. The curriculum was to be,

> Afrocentric-(pluralistic)-Students learn about their own ethnicity and receive instruction that reflects and respects cultural differences. Multiculturalism extends across subject areas, shows connections, and relates the experiences of African Americans and others to present day conditions[.]
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> Futuristic-Lessons stress 21st century careers and jobs and highlights African Americans and others in these career fields. There is focus upon preparation and employability skill training for high demand areas (i.e. engineers, computer technicians, robotics, etc.)[.]
>
> Linguistic-The power of communication is taught by developing oral, written and foreign language skills. Debate, forensics, public speaking, persuasive and expository writing are used to teach students to think critically, to solve problems and to resolve conflicts[.]
>
> Civic-Emphasis is placed on teaching students to accept responsibility first, for themselves (i.e. student behavior, choices, decisions) and then for bettering the conditions and/or relationships at home, school, and in the community. Forums, town meetings, and discussion groups organized around current issues are conducted for students, parents and community[.]
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> Holistic-The curriculum relates to the child as a total person who has cognitive, aesthetic, spiritual and personal needs that must be addressed. [I]nstruction incorporates strategies for meeting the unique needs of males especially in the area of self-esteem and leadership[.]
>
> Pragmatic-Students will learn practical, useful skills that promote self-confidence and a sense of accomplishment[] (i.e., computer skills, typing skills, photography and graphics, etc.). Activities that involve building, creating, constructing of an item, will be used to engender feelings of self-worth and self-esteem[.]

Id. at 27.

28. Molefi Kete Asante, *The Afrocentric Idea in Education,* 60 J. NEGRO EDUC. 170, 177 (1991).

though the project gained wide popular appeal, it raised deep concerns for some. The teachers' union expressed a litigious anxiety about proposed modifications of the work rules in order to staff the school with the required male role models. NOW expressed deep concern about the rising interest in this kind of single-sex education.

> What is of great concern to women's equity advocates is the implication that it is the presence of females, rather than poor economic and social conditions founded on race *and* sex discrimination, which has led to the present failure of schools to educate the majority of children in this nation's urban schools. None of the proposals for African American male education have identified whether and how specific curricula would address the historical and present role and impact of African American women. Nor have they addressed what actions would be taken to mitigate the kind of chauvinism which can emerge in any monocultural environment.[29]

NOW also decried the statistics of failure for African-American boys that had motivated the Detroit board and community. Their advocacy mandate, however, was the promotion of equity and education for women and girls and the protection of their rights.

On August 5, 1991, the NOW Legal Defense and Education Fund and the ACLU of Michigan filed suit in the United States District Court for the Eastern District of Michigan on behalf of four girls seeking to have the single-sex schools enjoined. In their press release, NOW argued that "single sex education is inconsistent with the goals of this nation's public school system to develop an educated population able to transcend barriers of race and gender in society."[30]

The complaint charged that the Board's establishment of the Academies would offend the Equal Protection Clause of the Fourteenth Amendment,[31] a corresponding equal protection clause provision of article I, section 2 of the Michigan Constitution, Title IX of the Education Amendments of 1972,[32] its implementing regulations,[33] the

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29. NOW Legal Defense and Educ. Fund, Public Education Programs for African American Males: A Women's Educational Equity Policy Perspective 22 (April, 1991) (working draft on file with author).

30. NOW Legal Defense and Educ. Fund, Press Release (Aug. 5, 1991) (on file with author).

31. Gender classifications by governmental bodies must be supported by an "exceedingly persuasive justification." The classification must serve "important governmental objectives" and the discriminatory means employed must be "substantially related to the achievement of those objectives." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

32. 20 U.S.C. §§ 1681-1688 (1994). Title IX prohibits those educational programs receiving federal funds from treating students unequally on the basis of sex.

Title IX of the Education Amendments of 1972 applies, in respect to admissions, "only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;" there appears to be an exception for kindergarten through twelfth grades. This exception has been interpreted by the Office of Civil Rights of the Department of Education as not supporting the creation of new gender-segregated schools, therefore deeming new all-male public schools as violating Title IX. *See* U.S. GENERAL ACCOUNTING OFFICE, PUBLIC EDUCATION: ISSUES INVOLVING SINGLE-GENDER SCHOOLS AND PROGRAMS 7-10 (1996).

There have been attempts to effect a legislative overruling of this determination. During the 103d Congress, Senator Kay Bailey Hutchison (R-Tex.) introduced Senate Bill 829. The bill would have permitted waivers for up to five years of Title IX "and any other law prohibiting discrimination on the basis of sex" for local educational agencies conducting experimental single-sex educational programs for "low-income, educationally disadvantaged students." The bill provided that waivers are to be accorded to any educational opportunity school that,

> (A) establishes a plan for voluntary, same gender classes at one or more than one school in the community;
>
> (B) provides same gender classes for both boys and girls, as well as a coeducational option for any parent that chooses that option;

Equal Educational Opportunities Act,[34] the state gender discrimination statutes[35] and the state school codes.[36]

The School District argued vigorously that the Academies were an experimental program, an attempt to develop effective educational strategies for a population perceived to be at risk. Overall, they argued, the project's beneficial intent toward the boys was in no way an attempt to dilute the rights of girls. Public support for Detroit's position flowed from many, and occasionally unlikely places. Then-President Bush pleaded that standards should be bent to accommodate the Detroit academies, cautioning "let's not go overboard on this stuff, for heaven's sake."[37]

The district court enjoined the opening of the Academies, agreeing with the plaintiffs that the schools were likely to be found unconstitutional and otherwise contrary to law. The judge added: "this Court views the purpose for which the Academies came into being as an important one. It acknowledges the status of urban males as an 'endangered species.' The purpose, however, is insufficient to override the rights of females to equal opportunities."[38]

After bitter discussion, the School Board agreed to settle the suit by opening the Academies to girls, but acrimony was thick in the air. Community harassment had forced the named plaintiff to drop from the suit.[39] The settlement was denounced as "selling out the very lifeblood of young African-American males."[40] The Board's Vice-President declared that "the board has broken faith with its commitment to the community."[41]

(C) gives parents the option of choosing to send their child to a same gender class or a coeducational class.

S. 829, 103d Cong. (1994).

33. 34 C.F.R. §§ 106.1-106.71 (1997). The regulations implementing Title IX provide that students may not be given "different aid, benefits, or services" because of their sex. 34 C.F.R. § 106.31(b)(2). The regulations prohibit recipients of federal financial assistance from providing any course or otherwise carrying out any of their educational programs on the basis of sex, or from requiring or refusing participation therein by any students on such basis. 34 C.F.R. § 106.36.

34. 20 U.S.C. §§ 1701-1758 (1994). The Equal Educational Opportunities Act prohibits the denial of equal educational opportunity on the basis of race, sex or national origin.

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such students were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student.

20 U.S.C. § 1703(c). The *Garrett* complaint alleged that the creation of the male-only academies would create a greater degree of sex-segregation within the system.

35. The Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. §§ 37.2101-37.2804 (West 1985 & Supp. 1997) (providing that "full and equal utilization" of and benefit from educational institutions, facilities and public accommodations shall not be denied on the basis of an individual's sex).

36. MICH. COMP. LAWS ANN. § 380.1146 (West 1997).

37. Kenneth J. Cooper, *Bush, Citing Boy Scouts, Backs All-Boy Public Schools; President Criticizes Federal Ruling in Detroit Case*, WASH. POST, Sept. 10, 1991, at A2.

38. Garrett v. Board of Educ., 775 F. Supp. 1004, 1014 (E.D. Mich. 1991).

39. *See Under Court Order, Girls Admitted to Schools for Black Boys in Detroit*, EDUC. WK., Sept. 4, 1991, at 24.

40. Ron Russell, *Board Drops Fight for All Male Schools*, DET. NEWS, Nov. 7, 1991, at A1.

41. *Id.*

B. The Need for the Male Afrocentric Option

The Detroit parents confronted the reality that public education's track record for black urban youth was one of systemic, educational inequalities and concomitant brutal social repercussions. The failures of the Detroit school system for black Detroit had been the object of protracted litigation since 1970 when a modest three-year desegregation plan for the city was legislatively invalidated by the state. The NAACP initiated suit *Milliken v. Bradley* began long-running and agonizing litigation that would be heard twice before the Supreme Court.[42]

In searching for adequate education for their children, the Detroit parents that supported the Academies exercised their political clout to get their public school system to institute broad-reaching reforms. The *Garrett* court, in the fashion typical of legal treatments, reviewed elements of the proposal and found some wanting. As will be suggested *infra*, had the whole proposal been challenged, its poor fit with public

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42. The Detroit Board of Education on April 7, 1970 resolved to put into effect for the following school year a modest, voluntary, three-year plan to integrate its school system, applying initially to those students entering the tenth grade in September 1970. Three months later, the Governor of Michigan signed into law the Act of July 7, 1970, No. 48, 1970 Mich. Pub. Acts 136, *repealed by* The School Code of 1976, No. 451, § 1851, 1976 Mich. Pub. Acts 1541, 1699. Section 12 of this Act had the effect of delaying and ultimately blocking the implementation of Detroit's April 7th plan. Four members of the Detroit Board of Education who supported the April 7th plan were removed from office through a recall election, and four new members were appointed by the Governor of Michigan, who with the remaining four members rescinded the April 7th plan.

The NAACP filed the suit that August to prevent the enforcement of the statute and implement the proposed plan. The United States Court of Appeals for the Sixth Circuit invalidated portions of the Act of July 7, 1970, and on remand the district court ordered the school district to implement its attendance area plan pending the trial on the merits. Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970). That order was vacated by the court of appeals, which required that there first be a finding of de jure segregation. Bradley v. Milliken, 438 F.2d 945 (6th Cir. 1971).

The requisite showing was made for Detroit but because the School District sought to include contiguous suburban schools in the remedy additional hearings were required. Bradley v. Milliken, 338 F. Supp. 582, 585 (E.D. Mich. 1971). Subsequently the district court was satisfied that only a metropolitan remedy for segregation could be effective and the court appointed a panel to prepare a desegregation plan. Bradley v. Milliken, 345 F. Supp. 914, 916 (E.D. Mich. 1972). The state defendants challenged the metropolitan remedy, contending that the district boundaries could not be disregarded in ordering a remedy for desegregation of the city school system. The court of appeals upheld the metropolitan remedy, given the district court's finding that the state had been guilty of creating and maintaining racial segregation along school district lines and that the only feasible desegregation plan for the Detroit school district involved the crossing of the boundary lines. Bradley v. Milliken, 484 F.2d. 215, 249 (6th Cir. 1973). The United States Supreme Court reversed the court of appeals, holding that an interdistrict remedy is not constitutionally justified or required, without a showing that either the state or any of the outlying districts engaged in any activity that had a cross-district effect of segregation. Milliken v. Bradley, 418 U.S. 717, 744-45 (1974). The metropolitan solution was abandoned.

The litigants continued to wrangle over the use of busing, the inclusion of school enhancement programs as part of the remedy and the weighing of the financial conditions and resources of the school district as a limiting factor in the ordered remedy. Bradley v. Milliken, 402 F. Supp. 1096 (E.D. Mich. 1975), Bradley v. Milliken, 411 F. Supp. 943 (E.D. Mich. 1975), Bradley v. Milliken, 540 F.2d 229 (6th Cir. 1976). The desegregation plan again went before the United States Supreme Court which affirmed that remedial plans could validly be a constituent part of a desegregation plan and that courts could order the states to finance the remedy. Milliken v. Bradley, 433 U.S. 267, 291 (1977).

The subsequent history of *Bradley* remained volatile as the litigants warred over the proper treatment of the demographic changes in the city. Bradley v. Milliken, 460 F. Supp. 299 (E.D. Mich. 1978). At one point the court of appeals suggested the over-involved district court judge be assigned off the case, Bradley v. Milliken, 620 F.2d 1143, 1158 (6th Cir. 1980), and schisms broke out among the attorneys for the NAACP over the strategy for pursuing their goals, Bradley v. Milliken, 828 F.2d 1186 (6th Cir. 1987).

school policy would have been even more apparent. The Detroit's proposal, however, was not piecemeal. Its focus was holistic and clear. The Detroit proposal in the robust form that the community desired, if taken seriously, forces a choice between protecting present day public school policy and achieving this goal.

1. The Perceived Need for Male Academies

The Academies were to be male in part because of the large numbers of black males dropping out or failing in school and suffering incarceration. The school, however, was not confined to at-risk students; it also aimed to provide a model and standard for black males to fill masculine roles within the black community and the economy at large.[43] As one prominent proponent of the Academies put it, "We are at war to save the African-American male child."[44]

The all-male feature of the Academies was defeated as a result of the *Garrett* suit. In the *Garrett* settlement the Detroit School Board agreed to open the Academies to girls. The enrollment of girls, although rising, is disproportionately smaller. In the academic year following the *Garrett* litigation, only two girls sought admission to the Academies. As of academic year 1994-95 girls accounted for twenty-three percent of the students enrolled at the original three Academies involved in the *Garrett* litigation.[45]

Three more Academies have opened up since the *Garrett* litigation: Mae Jemison Academy, Henderson Institute and Blackwell Institute. Jemison, although originally designated by the Detroit School Task Force to be the girls academy, received as many applications from boys as from girls. Admissions were done on a lottery system, yielding a school nearly equally girls (fifty-seven percent) and boys (forty-three percent). The proportional distribution was nearly identical at Henderson and Blackwell Institutes.[46]

Taken together, the six academies served 1093 girls out of the 2874 academy students (thirty-eight percent). The low percentage is attributable to the continuing low representation of girls at the three original male Academies, which in turn appears to be due to deliberate institutional or community pressure to keep the original schools male-focused.[47]

One irony of this state of affairs is that there is substantial research supporting the salutary effects of single-sex education for girls,[48] while there are indications that males do not do as well in single-sex settings.[49] Moreover, the population that has

43. *See* 4 JAWANZA KUNJUFU, COUNTERING THE CONSPIRACY TO DESTROY BLACK BOYS (1995).

44. Jawanza Kunjufu, *Detroit Male Academies: What the Real Issue Is*, EDUC. WK., Nov. 20, 1991, at 29.

45. Malcolm X Academy had 438 males and 94 (eighteen percent) females; Marcus Garvey Academy had 408 males and 123 (twenty-three percent) females; and Paul Robeson Academy enrolled 379 males to 140 (twenty-seven percent) females. Facsimile from Steve Wasko, Public Information Office, Detroit Public Schools, to Monica Strickland, Student, University of Miami School of Law (June 6, 1995) (on file with author).

46. *Id.*

47. *Id.*

48. CORNELIUS H. RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 147 (1990).

49. *Id.*

been found to profit most from single-sex schools are minority girls.[50] The Detroit priorities therefore seem upside-down.[51]

The *Garrett* suit itself may be indirectly responsible for the low percentage of girls served. In settling the case, the School Board agreed that schools would not be gender-segregated. Therefore, the three schools that started after the settlement could not be limited to girls only, even though they were originally conceived as the girls academies and named after distinguished black women. When the city-wide enrollment process began, the applicant pool had an equal representation of girls and boys. It would appear that the community has fewer qualms about sending boys into the girls school than sending girls in the boys school.[52]

Even if the *Garrett* settlement contributed to this state of affairs, it may be equally true that the entire situation could be viewed as demonstrating an unequal commitment both on the part of the school system and the community to their daughters' education. If so, certainly this is precisely the sort of situation—where local democratic institutions demonstrate an indifference to equal treatment—that justifies the specific constitutional and statutory guarantees that serve as inhibitors of a local school board's actions.[53] Where does this leave the community's judgment that addressing the needs of the boys is the most urgent next step?

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50. *Id.* Where minority boys did better in single sex-schools, Riordan states that the advantage seems to lie primarily in the effect of role-models. *Id.*

51. Citing literature supporting the value of single-sex education for girls, a local school district in New York approved the Young Women's Leadership School, a public middle school in East Harlem that will serve black and Hispanic girls. Jacques Steinberg, *All-Girls Public School to Open Despite Objections*, N.Y. TIMES, Aug. 14, 1996, at B1. The New York ACLU, the New York chapter of NOW and the New York Civil Rights Coalition filed an administrative complaint with the Chancellor of Schools and a joint complaint to the United States Department of Education challenging the single-sex school in light of United States v. Virginia, 116 S.Ct. 2264 (1996), which sets narrow conditions, arguably unmet, for single-sex education, and under Title IX of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301-8962 (1994 & Supp. 1995). At this time no male complainant has come forward in federal court to bring suit to enjoin the project.

52. A similar circumstance, with roles reversed, applies to the Philadelphia High School for Girls. Formerly the companion school to a boys high school (Central High), both schools were made coeducational after a successful challenge under Pennsylvania's Human Rights statute to the male-only school. Newburg v. Board of Educ., 478 A.2d 1352 (Pa. Super. 1984). An earlier challenge arguing that the dual schools offended equal protection under the laws was unsuccessful. Vorcheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977). Although the boys high school became effectively coeducational, the girls high school remains all female. According to the school, "Boys can apply . . . [b]ut they just have never come here." Mary B.W. Tabor, *Planners of a New Public School for Girls Look to Two Other Cities*, N.Y. TIMES, July 22, 1996, at B2. Philadelphia's school administrators say "Girl's High has held on to its girls-only status by virtue of a fragile blend of tradition, informal district policy and success in warding off the handful of boys who express interest." *Id.* In a 1992 review the Department of Education found that the school did not violate gender discrimination laws. *Id.*

53. A similar point was made by Peggy Orenstein, author of *Schoolgirls: Young Women, Self-Esteem and the Confidence Gap*, who has documented the problems of girls in schools and the historical advantages that women's schools have held for their graduates. Despite these advantages Orenstein expressed concern for the Young Women's Leadership School in New York. "Beyond the legal issues, the creation of public girl's schools is risky. The United States has been down the separate-but-equal road before, and it was not a happy trip. Once institutionalized, who can guarantee that educational resources will be divided fairly?" Peggy Orenstein, *All-Girl Schools Duck the Issue*, N.Y. TIMES, July 20, 1996, at 19.

2. The Perceived Need for Afrocentric Academies

The second important feature of the school—its Afrocentricity—was not litigated. Perhaps it could have been. There is a strong and a weak version of Afrocentricity and the strong version better matches the desires of the Detroit parents. I will however suggest *infra* that the strong version may not be an appropriate public school curriculum and is vulnerable to challenge. To expand on this point, I will term the weak version "Remedial Afrocentricity" and the strong version "Prescriptive Afrocentricity."

a. Remedial Afrocentricity

By Remedial Afrocentricity I mean a line of justification for curricular variations that stress their curative pedagogical value—that an Afrocentric curriculum will help an under-performing population overcome its deficits.[54] This kind of justification is invited by governmental policy. Remedial programs are attractive to urban public school districts where the goal of racial integration seems far out of reach.[55] In these districts, salutary program changes are among the few attainable remedies available to urban school systems laboring under consent decrees in civil rights suits.[56]

Remedial advocacy also puts forward the Afrocentric curriculum as a corrective to the standard curricula that inadequately describes the multiracial make-up of the United States,[57] thereby perpetuating psychological damage to African-American students by fostering a pervasive racism which discounts their national experience and importance.[58] An integrative[59] element in the remedial version is that the Afrocentric

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54. I know of no influential writer on Afrocentric education who confines his or her arguments entirely to the remedial features of the curriculum. I emphasize that weak Afrocentricity in this essay describes a line of *justification* for the curriculum. Some educational writers, such as Dr. Janice Hale-Benson, cited *infra* at notes 60, 61 & 86, stress the imparting of educational skills and tools than other writers, and hence, their writings and theories lend themselves to more easily to remedial justifications. *See also supra* text accompanying notes 25-27 & *infra* text accompanying note 62 (showing how the Detroit School Board stressed the remedial values in its description of Afrocentricity).

There are some remedial pedagogical justifications for Afrocentricity that do not presume that there is a deficit or problem in the black student population but rather that the method has merit on neutral grounds. For example some claim that beginning with Africa is a better starting point because such an approach tracks better historically. To the extent that this is true it may be only trivially so because historical development is only one factor to be considered pedagogically in presenting curriculum. For instance, few law schools have proposed a first year program highlighting Roman Law, Leviticus or the Code of Hammarabi: historical beginnings are not necessarily pedagogical beginnings.

55. *See* James S. Kunen, *The End of Integration: A Four Decade Effort is Being Abandoned As Exhausted Courts and Frustrated Blacks Dust off the Concept of Separate but Equal*, TIME, April 29, 1996.

56. Remedial and quality education programs have been ordered as part of desegregation remedies "to overcome the inequalities inherent in dual school system." Liddell v. Missouri, 731 F.2d 1294, 1313 (8th Cir. 1984). The United States Court of Appeals for the Eight Circuit recommended quality programs as part of the remedy for the St. Louis school system. Adams v. United States, 620 F.2d 1277, 1296-97 (8th Cir. 1980). *See* Arthur v. Nyquist, 712 F.2d 809, 811 (8th Cir. 1983); Oliver v. Kalamazoo Bd. of Educ., 640 F.2d 782, 789 (6th Cir. 1980); Evans v. Buchanan, 582 F.2d 750, 767 (3d Cir. 1978); United States v. Texas, 447 F.2d 441, 448 (5th Cir. 1971).

57. For example, leading Afrocentric theorist Molefe Kete Asante argues,

> Our society is multicultural and multiethnic, and the idea of teaching as if the idea of the African American has no historical legacy is to teach incorrectly and inadequately. More than this, it reinforces the false notion of white superiority and black inferiority . . . Afrocentricity does not negate Eurocentric views, it simply makes them one of several perspectives.

Molefi Kete Asante, *Missing the Point About 'Afrocentrism,'* WASH. POST, Sept. 29, 1990, at A21.

58. "Although desegregation's goal is to eliminate racially identifiable schools, certain remedial

curriculum will better prepare children to function in a larger society, particularly by the acquisition of skills that will lead to success on standardized tests[60] and in the job market.

Finally, some proponents argue that the learning style of African-American children differs from that of other children and that different approaches are required to teach the standard subjects.[61] In sum, the remedial justifications supporting Afrocentricity address deficits: informational deficits, skills deficits, psychological harms, and integrative deficits due to racial isolation.

The remedial thrust is apparent in the Detroit Public School's criteria for evaluating the Academies; the Board of Education commissioned a study using grade point averages, attendance rates and standardized test scores on the California Achievement Test.[62] The evaluation lacks the very thing that appeals to advocates of prescriptive Afrocentricity: it lacks an affirmative valuation of the differences perceived in children of various ethnicities. In prescriptive Afrocentricity there is as much concern for what the children may lose in an educational process as there is for what is gained.

b. Prescriptive Afrocentricity

Prescriptive Afrocentricity is that aspect of this curricular thrust that hypothesizes a greater proto-African cultural and conceptual system.

> Afrocentricism suggests the recapturing and regeneration of a once great continent and people who may now be culturally adrift. Redemption, renewal, integrity, and a sense of community are but a few themes underlying African cultural identification. . . . [A]s Black people piece together the shattered world of Africa, we make ourselves whole again.[63]

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educational devices may also prevent the stigma placed on Black children from becoming self-perpetuating. Afrocentric curricula promote *Brown's* aim of removing the psychological ignominy Black school-children experience in segregated settings." Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE. L.J. 1285, 1301 (1992).

59. Integrative value has been recognized by the courts as an intrinsic value of a program remediating de jure segregation. With respect to the Detroit school system itself, the court in *Milliken* justified the inclusion of certain remedial educational components by laying out the integrative value argument.

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream.

Milliken v. Bradley, 433 U.S. 267, 287 (1977).

60. Dr. Janice Hale-Benson, a pioneering educator in African-American early childhood programs and Professor of Education at Cleveland State University, includes in her curriculum a strong emphasis on "the development of cognitive skills, such as reasoning, memory, problem-solving, creativity, and language skills. . . . Even though standardized instruments can contain inherent biases toward minority children, a goal of this program is to de-mystify these tests for parents and to help children perform well on such measures." Janice Hale-Benson, *Visions for Children: African-American Early Childhood Education Program*, 5 EARLY CHILDHOOD RES. Q. 199, 200 (1990).

61. Anthony DePalma, *The Culture Question*, N.Y. TIMES, Nov. 4, 1990, at A22 (quoting Dr. Janice Hale-Benson). Differences claimed include that children are sensory-perceptual learners, broad-field dependent and more linguistically oriented. *See* James Traub, *Ghetto Blasters*, NEW REPUBLIC, April 15, 1991, at 21.

62. *See* Moore & Associates, Inc., 1992-93 African-Centered Academies Evaluation Final Report 2-5 (Oct. 31, 1994) (unpublished report submitted to Detroit Public Schools, on file with author).

63. William H. Watkins, *Black Curriculum Orientations: A Preliminary Inquiry*, 63 HARV. EDUC.

The societal goal toward which remedial justifications have an appeal are often the very malaise that strong Afrocentrism targets: the ordinary educational standards "[r]ooted in empiricism, rationalism, scientific method and positivism. [Eurocentricism's] . . . aim is prediction and control. . . . African epistemology, on the other hand, is circular and seeks interpretation, expression, and understanding without preoccupation with verification. Afrocentric orientations hold that Europeans have colonized not only the world, but also its knowledge."[64]

Afrocentricity in education is akin to other Afrocentric thrusts in philosophy, social science and psychology,[65] seeking a new paradigm for human functioning with roots in Africa and natural resonance in the African diaspora. Strong Afrocentricity seeks to build a particular identity in the students.

The failure to grasp the culture-building feature of Afrocentricity, substituting instead ordinary remedial assumptions about it, makes much of the national discussion about Afrocentricity unintelligible. Consider an aspect of strong Afrocentric educational theory that became a national tempest—ebonics.[66] In his book, *The Afrocentric Idea*, Molefi Kete Asante describes ebonics as a metagrammatical category describing "the prototypical language of the African Americans."[67] The metatheoretical analysis "aid[s] us in determining the innovations in African American communicative behavior without an undue concentration on either grammatical, syntactical, semantic or lexical components."

Asante believes the discourse reflects qualities that he views as distinctive among blacks; for example, a frame of mind with the values of humanism, communalism, rhythm and style in the forefront.[68] Moreover, he argues it incorporates "an African concept of communication rooted in traditional African philosophies" that demonstrates a different rhetorical approach, activity and purpose.[69] African American oratory,

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REV. 321, 331 (1993).

64. *Id.* (citation omitted).

65. *See generally* the works of Wade W. Nobles and Maulena Karenga, including Wade W. Nobles, *African Philosophy: Foundations for Black Psychology*, *in* BLACK PSYCHOLOGY 18 (Reginald L. Jones ed., 1972), and MAULENA KARENGA, INTRODUCTION TO BLACK STUDIES (1982).

66. The event that catapulted this aspect of Afrocentricity into the public eye was a resolution by the Oakland School Board to train teachers in ebonics. The proposal was a part of a set of task-force recommendations addressing the performance of black students in the Oakland school system. The Board's vote was an eleventh-hour measure submitted directly to an out-going Board without any substantial discussion leaving them grasping for remedial-based explanations when the resolution caused a media flash-fire. The proposal was attacked directly as a teaching failure and collaterally as a shameless grab for federal bilingual education funds. The original people proposing ebonics to Oakland had their intellectual roots in prescriptive Afrocentricity and like Asante had a particular concern with an affirmation of the traits of African rhetoric as opposed to remediating some aspect of speech. *See* Peter Applebome, *Dispute over Ebonics Reflects a Volatile Mix That Roils Urban Education*, N.Y. TIMES, Mar. 1, 1997, at A1.

67. MOLEFI KETE ASANTE, THE AFROCENTRIC IDEA 35 (1987).

68. Asante has stated that,

> It would be nonsense to argue that theories which emerge about black language and discourse can claim uniformity in black behavior; but the variance among blacks is less than between blacks and non-blacks. Dixon and Foster state that six essential elements comprise the black referent: (1) the value of humanism, (2) the value of communalism, (3) the attribute of oppression/paranoia, (4) the value of empathetic understanding, (5) the value of rhythm, and (6) the principle of limited reward. There is, in addition, a seventh element: the principle of styling.

Id. at 37.

69. *Id.* at 59.

symbols, functional art, and operation in a collective activity are all crucial to Asante and features that he claims inhere in prototypical African speech. It is not something that is to be remedied. Instead, it is something to cultivate, for it promotes, inter alia, desirable character traits and abilities deemed also prototypical.[70]

In the frenzied national debate the concept of ebonics was variously conflated with African-American Vernacular English (A.A.V.E.)[71] with sub-standard speech and with various parodies of black speech, hip-hop and street patois.[72] Generally the focus of the national debate could not break away from a universal disparaging of whatever it was that the Oakland children spoke, denouncing it as an unpromising language for economic advancement. The remediation or supplementation of African-American children's speech to achieve standard English was the rule of the day.

With the ebonics of Asante's description, however, it seems entirely possible to engage in speech acts that are highly representative of ebonics without necessarily being particularly good examples of A.A.V.E.—for instance, the speeches of Martin Luther King, Jr. Indeed, a textbook example of A.A.V.E. might be a poor example of ebonics because the Afrocentric point is an enhancement of a rhetorical disposition, not grammatical construction and diction. As such it has little to do with, for instance, curing children of using, or training teachers to understand, unusual or aberrant uses of the verb "to be." Consequently a debate that focuses on the remediation *vel non* of black children's speech patterns never really joins the question for the strong version of ebonics.

It is however a very tall order for public teachers to be charged to use and encourage a non-western rhetorical structure as opposed to their more familiar charge to learn to listen to their students and correct grammar. It is the former, however, that is the educational mandate for prescriptive Afrocentricity.

In addition to the divergent philosophical features of Afrocentricity, there are normative commitments that are at the heart of Afrocentricity. The winter festival of Kwanzaa, an Afrocentric tradition rapidly becoming familiar to the mainstream, is not intended to be an abstract historical or anthropological presentation; rather it is struc-

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70. Asante has further stated that,

> Clearly, the statement of a metatheoretical position for African communication suggests how we can structure our symbols to be more useful. Ethno-rhetorics concerned with exploring the persuasive potentials of languages within ethnic/cultural groups may be stimulants for a broader philosophical consideration of symbolic utility for a more humanistic society.

Id. at 58.

71. The Linguistic Society of America reminded the critics that A.A.V.E. is a systematic and rule-governed speech variety. Linguistic Society of America, *Resolution on the Oakland "Ebonics" Issue Unanimously Adopted at the Annual Meeting of the Linguistic Society of America, Chicago, Illinois, January 3, 1997* (last modified Jan. 31, 1997) <http://www.lsa.umich.edu/ling/jlawler/ebonics.lsa.html>. This was an important distinction and contribution that linguists made in the 1970's when black speech was treated as an indicia of mental deficiency. *See, e.g.*, WILLIAM LABOV, LANGUAGE IN THE INNER CITY: STUDIES IN THE BLACK ENGLISH VERNACULAR (1972).

72. *See, e.g.*, James Hannaham, *Ebonics for Travelers*, VILLAGE VOICE, Jan. 14, 1997, at 37 ("Good morning, *Yo.* Good evening, *Yo.* Good Night, *Peace.* . . . We would like a room with a double bed and a private bath, *Could y'all direck us to d' white folks' hotel?* Have you a room with a better view? *You got sum'in don't face no brick wall?*").

With less wit but with the same conflation from the right, the National Review chose ebonics as an "Outrage du Jour" with the headline "Hooked on Ebonics, It Been Done Work for Me!" (Dec. 4, 1996) <http://www.townhall.com/nationalreview/outrage/old/120496out.html> (referencing Carol Innerst, *'Black English' Pushed for 'Bilingual' Education*, WASH. TIMES, Nov. 28, 1996, at A1).

tured to be a moral-cultural statement.[73] This African-American holiday, celebrated from December 26 to January 1, synthesizes African and African-American customs and traditions to expound seven core principles expressed in the East African dialect of Kiswahili: Umoja (unity), Kujichagulia (self-determination), Ujima (collective work and responsibility), Ujamaa (cooperative economics), Nia (purpose), Kuumba (creativity) and Imani (faith).[74] The celebration is for a salutary and spiritual renewal, intended to be of special meaning to African-Americans.

> Tribal values of unity and self-determination, along with love, hope, and imagination, arrived in America with the kidnapped African men and women who built this country. Kwanzaa celebrates the survival of these traditions and helps us not only make sense of experiences, both ordinary and extraordinary, but find a deeper purpose to life.[75]

Some Afrocentric writers take the controversial view that there is a proto-culture that is identified as an African worldview, and that this worldview is a deep structure that is to be reclaimed in people of African heritage.[76] Some Afrocentric psychologists have sought to demonstrate empirically an inborn predisposition in blacks of certain values—harmony with nature, spiritualism, collectivism, strong religious orientation and interdependence—in contrast to the more individualistic and materialistic Eurocentric values.[77] To the extent Afrocentricity is prescriptive, it would entail a duty in the educator to develop these dispositions in the children and keep them from being overwhelmed by the pervasive elements active in the larger culture and considered Eurocentric. This element of Afrocentricity has been bitterly denounced by some white scholars as divisive.[78]

The most cogent scholarly critiques against prescriptive Afrocentricity attack its reinterpretation of historical sources, its essentialism and its normative stances. Afrocentric scholarship has drawn extensive fire from other scholars for nearly mythic assertions about the origin of peoples and roots of science and culture,[79] extrapolated loosely by some Afrocentrists from revisionist historical works like Martin Bernal's *Black Athena*[80] written on the subject of African and Egyptian foundations of western

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73. As expressed by Maulena Karenga, who developed the holiday celebration in 1966, "the core principles of Kwanzaa . . . which I developed and proposed during the Black Cultural Revolution of the sixties [are] a necessary minimum set of principles by which Black people must live in order to begin to rescue and reconstruct our history and lives." DOROTHY WINBUSH RILEY, THE COMPLETE KWANZAA: CELEBRATING OUR CULTURAL HARVEST 4 (1995).

74. *Id.* at 5.

75. *Id.* at 17.

76. *See, e.g.*, LINDA JAMES MYERS, UNDERSTANDING AN AFROCENTRIC WORLD VIEW: INTRODUCTION TO AN OPTIMAL PSYCHOLOGY (2d ed. 1993); Linda James Myers, *The Deep Structure of Culture: Relevance of Traditional African Culture in Contemporary Life*, 18 J. BLACK STUD. 72 (1987).

77. *See, e.g.*, Joseph A. Baldwin & Reginald Hopkins, *African-American and European-American Cultural Differences as Assessed by the Worldsviews Paradigm: An Empirical Analysis*, 14 W. J. BLACK STUD. 38 (1990).

78. *See generally*, ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA (1992) (offering a bitter critique of Afrocentrism as "a cult of ethnicity").

79. For an example of an extreme view, there is the theory of melanism attributed to Afrocentric theorist Leonard Jeffries Jr., formerly of City College of New York, that white people are "ice people" and warlike while blacks are "sun people" and communal. The debate carried over into the courts when Jeffries' ideas caused him to be disciplined by his home institution, the City College of New York. Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994), *vacated sub nom.* Harleston v. Jeffries, 513 U.S. 996 (1994).

80. 1 MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION:

civilization. These highly contested areas of scholarship have attracted severe criticism of Afrocentricity as fostering pseudo-history.[81]

Of perhaps greater significance than white scholarly dissatisfaction is the fact that Afrocentrism is still the focus of vigorous debate within the African-American community. Cornel West, a highly visible theorist on race, characterized Afrocentricity as "a gallant yet misguided attempt"[82] and, with others, has critiqued the essentialism of the approach as constricting, internally divisive,[83] homophobic,[84] and masculinist.[85] Eventually this dialogue must play itself out intra-culturally as the African-American community works its way through its many differences to the recreating and celebrating of its suppressed African culture and heritage. It would be wrong to suggest that there are no legitimate differences within the African-American community about the messages that should be taught to African-American children, and one must wonder whether this intra-minority debate is one a public school board in Detroit or any other city can arbitrate.

c. Legal Problems in the Adoption of Strong Afrocentricity by a Public School

The plaintiffs in *Garrett* did not challenge the Afrocentric element of the curriculum, but this element of the Academies is vulnerable to legal challenge because the selection of the curriculum is so race-aware. While there are the neutral-sounding remediation arguments that the Afrocentric curriculum is merely an academic antidote to faulty history in the standard public school curriculum, that the correction is viewed as one of greater importance to black students is clear even in the more remedial ver-

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THE FABRICATION OF ANCIENT GREECE 1785-1985 (1987). Relying on linguistic clues and interpretations of ancient writings, Bernal contrasts what he calls the Aryan account with the ancient account of the continuity of the philosophy and culture of Greece with earlier civilizations in Africa (Phoenicia and Egypt).

81. *See, e.g.*, MARY LEFKOWITZ, NOT OUT OF AFRICA: HOW AFROCENTRISM BECAME AN EXCUSE TO TEACH MYTH AS HISTORY (1996). Lefkowitz states that,

> Extreme Afrocentric "ancient history" has no place in the curriculum of schools or of universities. Appealing mythologies about the past bring satisfaction in the short run, but in the end they damage the very cause they are intended to promote. The events of this century have shown that it is dangerous to allow propaganda to usurp historical truth.

Id. at 155.

82. CORNEL WEST, RACE MATTERS 4 (1993). West explains that,

> Afrocentrism, a contemporary species of black nationalism, is a gallant yet misguided attempt to define an African identity in a white society perceived to be hostile. It is gallant because it puts black doings and sufferings, not white anxieties and fears at the center of discussion. It is misguided because—out of fear of cultural hybridization and through silence on the issue of class, retrograde views on black women, gay men, and lesbians, and a reluctance to link race to the common good—it reinforces the narrow discussions about race.

Id.

83. *See, e.g.*, BELL HOOKS, YEARNING: RACE, GENDER, & CULTURAL POLITICS 29 (1990). Hooks states that,

> When black folks critique essentialism, we are empowered to recognize multiple experiences of black identity that are the lived conditions which make diverse cultural productions possible. When this diversity is ignored, it is easy to see black folks as falling into two categories: nationalist or assimilationist, black-identified or white-identified.

Id. at 29.

84. *See, e.g.*, Rhonda M. Williams, *Living at the Crossroads*, *in* THE HOUSE THAT RACE BUILT, 136 (Wahneema Lubiano ed., 1997).

85. *See, e.g.*, Wahneema Lubiano, *Black Nationalism and Black Common Sense: Policing Ourselves and Others*, *in* THE HOUSE THAT RACE BUILT, 232 (Wahneema Lubiano ed., 1997).

sions of the curriculum. For instance, Dr. Janice Hale-Benson explained her action in changing Thanksgiving Day to "Family Day" for her Afrocentric elementary class by stating that "we don't dress black children up in Pilgrim hats and tell them those were their ancestors. Three-year-olds who are confused about whether pilgrims were their ancestors will be confused when they are 18-year-old voters."[86]

Afrocentricism is race-aware to the extent that it identifies features to address in a particular racially-identified population of students. Strong Afrocentrism goes even further to forge a particular sense of identity in black students with the continent it pushes to the fore. This curriculum in a public school could conceivably face a challenge in one of several ways: (1) if it appears to promote black self-image at the expense of others; (2) if it is deemed to discourage integration; and (3) if it runs contrary to the traditional, assimilationist, color-blind mission of public schools.

In *Brown v. Board of Education*, the Supreme Court specifically denounced as violative of equal protection the debilitating effect of segregation on the psyche of the affected children and their self-images, as demonstrated by sociological evidence.[87] Although subsequent civil rights jurisprudence has moved away from *Brown's* empirical approach, certainly the case remains on point for the racial effects of curriculum. Putative empirical effects of an Afrocentric curriculum on a white student could generate a reverse-*Brown* equal protection problem. Some extreme positions that have been laid at the door of Afrocentricity—the doctrine of melanism, for instance, suggesting mental advantages inhere in peoples with dark skins[88]—could probably fit the bill.[89]

Yet an even more tempered curriculum—one that simply de-emphasizes Eurocentricism—may be too much. To date, cultural non-emphasis has not been found actionable; minorities who have challenged the public school system over the failure to respectfully elaborate their culture have not been successful. In *Guadalupe Organization v. Tempe Elementary School District No. 3*,[90] the United States Court of Appeals for the Ninth Circuit found no denial of right or statutory violation in the offering of monolingual, monocultural education to Mexican-American and Yaqui Indian children even though their culture was not represented in their curriculum. The court remarked that a monocultural education was a rational provision by the state and "the same perforce would be said were the appellees to adopt the appellant's [viz., the Mexican's and Yaqui's] demands and be challenged by an English-speaking child and his parents whose ancestors were Pilgrims."[91] While this assertion that turnabout would be fair play seems facially reasonable, it is not precisely the same case. Most standard American curricula were in fact developed with the English speaking child as its target student, but this racial bias lies buried in the common school rhetoric.[92] Such schools are

86. Anthony DePalma, *supra* note 61 (quoting Dr. Janice Hale-Benson).

87. Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

88. *See* Leon Jaroff, *Teaching Reverse Racism: A Strange Doctrine of Black Superiority Is Finding Its Way into Schools and Colleges*, TIME, Apr. 4, 1994, at 74.

89. A hostile educational environment due to race or national origin may generate a colorable claim under 42 U.S.C. § 1983 (1994). *See* Nicole K. v. Upper Perkiomen Sch. Dist., 964 F. Supp. 931 (E.D. Pa. 1997) (recognizing the possibility of a valid claim for hostile educational environment, but dismissing the particular claim of a white student who was called a "nazi" by her teacher as no more than state tort defamation without state action).

90. Guadalupe Org. v. Tempe Elementary Sch. Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978).

91. *Id.* at 1027.

92. Attempts to include other cultures in textbook materials is fairly recent. For most of the history of public schools in the United States, inclusiveness was actively discouraged. The first effective

simply "normal" and as such provide a base-line against which education is measured. Deviation from the base-line requires explanation and a race-based explanation will be suspect. Consequently, while courts may be slow to find culpable problems where the minority student is a bad fit with the common curriculum, the same may not be true where the curriculum appears to be moving away from the perceived common student.

This phenomenon is already found in the tribunal of public opinion. Journalists have indicted Afrocentrism for its departure from "normal" without particularly critiquing "normal."

> The point that they have forgotten, or seem to ignore, is that America has always been a multicultural society. And, from the beginning cultural exchange has been the rule—when the first Europeans began to make the first Africans into Americans, the Africans were also making the Europeans into Americans. The pattern is one that has held until recently: all of us who make up this nation of immigrants come with different languages, different cultural and ethnic traits, but sooner or later we give up some of what makes us different to become part of the larger society. On balance, what we gain outweighs what we lose.[93]

Strong Afrocentricity seeks to build on a pan-African identity and reclaim what makes people different, hence the charge that Afrocentricity tribalizes America. Yet there is conspicuously lacking in the description any principled way to distinguish between the larger society as some sort of American essence or the larger society as some sort of *fable convenue* for a status quo embraced by those immigrants whose dispositions it best reflects. Whatever the larger society is, it is reified and defined only in contradistinction to the different cultural and ethnic traits. The departure from the legitimized norm is noticed, while the roots of the norm are not.

The Afrocentrists seeking to embrace and expound their uniqueness are not alone: Jewish people, Hawaiians, Anabaptists and others have all created schools to preserve what makes them different.[94] They have been able to do so, however, by

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attempt to incorporate curricular material into public schools representing the experience of African-Americans in the United States was the 1930's junior high social science series of textbooks entitled *Man and His Changing Society* written by Harold Rugg at Columbia's Teachers College. Volume one of the series asked "What is an American?" and answered that America was a nation of immigrants. It made an effort to break down stereotypes of various nationalities by stressing the contributions of various immigrant groups. Very modern for its day, the text had chapters on the "African immigrants" brought to the country as slaves. Rugg presented an unusually candid account of the slave trade, quoting at length the story of James Morley, a gunner on one of the slave ships. The texts also compared the lives and living conditions of the rich to the poor, and of men to women. Radical for its time, it was quickly targeted for removal from the public school systems within a few years of its adoptions. The heated debate sprawled well outside of the schoolhouse walls. Bert Forbes used his *Forbes* magazine as a podium to denounce it as anti-American; the American Legion printed an article on the series entitled *Treason in the Textbooks*. Despite a spirited defense of Rugg by other leading scholars, the textbook series went into rapid decline after 1940. HERBERT M. KLIEBARD, THE STRUGGLE FOR THE AMERICAN CURRICULUM 1893-1958 202-07 (1987).

93. David Nicholson, *'Afrocentrism' and the Tribalization of America*, WASH. POST, Sept. 23, 1990, at B4.

94. The right to have such schools was the subject of the landmark case *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Oregon measure that was invalidated by the Court would have prohibited private education and pitted the Lutherans, Seventh-Day Adventists, Catholics, and Jewish community, all of whom maintained significant private school initiatives, against the bill's advocates, notably the Ku Klux Klan. *See* DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, 177-85 (1987). *Wisconsin v. Yoder*, 406 U.S. 205 (1972), vindicated the apprenticeship-style secondary schooling administered by the Wisconsin Amish within their Anabaptist rural communities. Schools for children of native Hawaiian ancestry were established and financed by the proceeds of the

providing private financial support for the schools in their own communities and not through the public schools. There is an obvious trade-off here: the more Afrocentric curriculum is publicly financially supported, the less that curriculum can be of the strong, prescriptive type due to the policy constraints of the public school system. Yet the changes necessary to open the door to real fulfillment of the Detroit ideal may be so costly that it may be a process that is not worth the costs.

IV. THE TRADE-OFFS IN A STRONG POLICY-FUNDING LINKAGE

In its application to the Detroit African-American community, the linkage between public funding and public policy burdened the creation of a public school program that might have helped alleviate the perceived damage to black youth. To achieve the goal of an Afrocentric academy was simply beyond the scope of the public policy. And the next option, a private option, was out of reach due to the community's lingering economic debilitation.

Rather than a compounded injustice, this may simply be a cost to the African-American community in its search for justice. The linking of public policy to funding has been a prime tool in enforcing anti-discrimination policy and other important policies, and de-linking the two in the present day presents new dangers to the African-American community.[95]

A. Historical Review of Legislative Enactments and Judicial Holdings on Civil Rights, Public Schools, Public Policy and Private Schools

African-Americans became beneficiaries of funding-policy linkage when the Civil Rights Act of 1964[96] denied federal assistance to those who practice discrimination, and the Elementary and Secondary Education Act of 1965[97] dedicated a significant amount of federal resources to the education of disadvantaged children with remedial and compensatory services under Title I of the Act.[98] It was the carrot of this increased federal funding coupled with the stick of strict enforcement and its policy

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ancestral lands of Hawaii's royal Kamehameha family placed in a charitable trust for that purpose by Princes Bernice Pauahi Bishop in 1884. *See, e.g.*, Leigh Caroline Case, Note, *Hawaiian Eth(n)ics: Race and Religion in Kamehameha Schools*, 1 WM. & MARY BILL RTS. J. 131, 131-32 (1992); Alix M. Freedman & Laurie P. Cohen, *Bishops Gambit: Hawaiians Who Own Goldman Sachs Stake Play Clever Tax Game*, WALL ST. J., Apr. 25, 1995, at A1 (stating that the education charitable trust was so wealthy that its influence activities as an investor appear to eclipse its educational mission).

95. These two arguments lead me to the conclusion that it would be counter-productive for the African-American community to push for a weakening of the linkage. I leave for another day the question whether there are other possibilities for this community to achieve fully the educational experiment it seeks.

96. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (1994)). Section 2000d provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

97. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 29 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-8962 (1994 & Supp. 1995)).

98. Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 29 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-6514 (1994 & Supp. 1995)). Indeed, this may be a quintessential example of implementing public policy through public spending. After passage of the Act, the South's share of federal educational funding was larger than the average in the United States. The national average per state was about seven percent of its funding, while the southern states averaged from nine percent to twenty-two percent. *See* Michael Klarman, *Brown, Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7, 43 (1994).

limitations that finally penetrated southern resistance to school desegregation. In the ten years between the change from segregation to mandated school desegregation[99] and the Civil Rights Act of 1964, there was virtually no compliance with *Brown v. Board of Education* in the South. No black child attended an integrated public school in South Carolina, Alabama or Mississippi.[100] North Carolina and Virginia had an integration rate of less than one percent.[101] An aggressive enforcement effort by the Department of Health, Education and Welfare to bring the funding recipients into line with the policies of the Civil Rights Act of 1964 increased the number of schools with some degree of integration to thirty-two percent in 1968-69 and to ninety-one percent in 1972-73.[102] In 1970, at President Nixon's urging, Congress passed the Office of Education Appropriation Act[103] which was specifically directed at aiding local districts with the costs of complying with court desegregation orders.[104]

In 1981 the Reagan Administration consolidated many federal school aid programs with Chapter 2 of the Education Consolidation and Improvement Act of 1981,[105] replacing them with block grants that substantially stripped many policy restrictions and goals from the categorical programs.[106] Cuts overall in social spending have further eviscerated the imposition of national policy goals by federal spending.

Political philosophies notwithstanding, there is no way to put the genie entirely back in the bottle; that the policy was implemented through the spending power, and that the educational policies can be so implemented is a potentiality that the government retains. One commentator, Mark Tushnet, has argued provocatively that a governmental body can impose on private schools, by statute or regulation, most of the legal constraints currently borne by public systems.[107] He concludes that "the distinction

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99. Brown v. Board of Educ., 347 U.S. 483 (1954).

100. Klarman, *supra* note 98, at 9-10.

101. *Id.* at 9.

102. *Id.* at 10.

103. Office of Education Appropriation Act, Pub. L. No. 91-380, 84 Stat. 800 (1970). Later legislation included tougher compliance standards and pre-grant review. Emergency School Aid Act of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972), *repealed by* Education Amendments of 1978, Pub. L. No. 95-561, § 601(b)(2), 92 Stat. 2143, 2268.

104. Similarly, federal funding was an important catalyst for expanding educational opportunity and access for children with disabilities through the Individuals with Disabilities Education Act (Education of the Handicapped Act), Pub. L. No. 91-230, tit. VI, 84 Stat. 121, 175 (1970) (codified as amended at 20 U.S.C. §§ 1400-1491*o* (1994 & Supp. 1995)).

105. Chapter 2 of the Education Consolidation and Improvement Act of 1981, Title V, Subtitle D, Chapter 2, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 469 (1981), *repealed by* Augustus F. Hawkins—Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, tit. I, § 1003(a), 102 Stat. 130, 293. The categories of activities funded are basic skills development, education improvement and support services, and special projects.

106. Reflecting the Reagan administration's commitment to its New Federalism, the block grants shifted decisions about the allocation of federal funds to the state and local educational authorities. To no one's surprise, the Education Consolidation and Improvement Act, Title V, Subtitle D, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 463 (1981) (repealed 1988), resulted in diminished spending in desegregation efforts and programs for the educationally disadvantaged. A tendency to fragment the block grants into small grants resulted generally in a diminished capacity to support broad-based programs; the most popular expenditures for the small grants were educational equipment, particularly computer equipment. *See* Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1255-56 (1984).

107. Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 44.

between public and private schools that is part of the standard conceptual apparatus of constitutional lawyers turns out to be substantially thinner than many would find comfortable."[108] Although states can and have added policy conditions to voucher and charter agreements that have influenced participating private schools, I would argue that the situation is not necessarily effectively the same.

From my point of view, the question is more complicated. The fact that policy can be imposed by regulation upon private schools will not answer the question of whether a resulting regulated system of privatized schools will have the same potential for responsiveness as the contemporary public system. The public system has been shaped and formed by its history as an activity of the government, subject to limitations set by the Constitution on governmental acts. Indeed, many of these limits were established in the context of public schooling itself. Public schools have due process limits on the discharge of students or arbitrary evaluation of them in a manner that diminishes the value of their educational degree.[109] There are requirements for equitable educational treatment of students across categories of gender[110] as well as between and among the races.[111] There are student rights respecting intellectual freedom,[112] which include rights to be free from proselytizing by adults.[113] There are

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108. *Id.* at 44.

109. *See* Goss v. Lopez, 419 U.S. 565 (1975) (stating that notice of charges and opportunity for hearing were required before the school could suspend student); Smith v. City of Hobart, 811 F. Supp. 391 (N.D. Ind. 1993) (invalidating as arbitrary and capricious a punitive four percent grade reduction for each day a high school student was on academic suspension for a non-academic breach of discipline).

110. 20 U.S.C. § 1681(a)(1). *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (finding a violation of the Equal Protection Clause in a limitation of a nursing educational program to single gender in absence of substantial compensatory purpose).

111. Milliken v. Bradley, 418 U.S. 717 (1974). *Compare* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), *with* the decision below, 313 F. Supp 61, 83 (D. Colo. 1970) (stating that a misallocation raises specter of segregative attempt and is disallowed under *Plessy v. Ferguson*, and the school board "must at a minimum . . . offer an equal educational opportunity"). *See* Plyler v. Doe, 457 U.S. 202 (1982) (giving access to all children within the jurisdiction); Hobson v. Hansen, 269 F. Supp. 401, *cert. dismissed*, 393 U.S. 801 (1967) (outlawing pernicious race-based tracking with a school system and intra-school inequalities).

112. The courts have found that curriculum is an area in which educators retain substantial discretion. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Virgil v. School Bd., 862 F.2d 1517 (11th Cir. 1989). Nevertheless, in the curricular area public schools have conflicting pressures — some to expand the curricular offerings and others to contract them. An impetus to expand is expressed in *Board of Educ. v. Pico*, 457 U.S. 853 (1982). In a confusing array of seriatim opinions, the majority of the Supreme Court, in striking down the censoring of a school library, appeared to agree that students have a First Amendment right to some range of literature and information. Much of the recent litigation in respect to curriculum has been mostly unsuccessful suits by fundamentalist Christians to curtail the exposure of their children to certain doctrines. *See, e.g.*, Smith v. Board of Sch. Comm'rs, 655 F. Supp. 939, *rev'd*, 827 F.2d 684 (11th Cir. 1987) (claiming that schools' curriculum constitutes secular religion); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (challenging the content of readers as inconsistent with fundamentalist Christian beliefs). I do not intend in this paper to take up issues of parent rights in respect to children's schooling. Addressing the question would take this article well beyond its scope, since parents have asserted rights against the school and school systems, and the modification of school rights to accommodate parental rights is complex and unsettled. *See, e.g., In re* Charles, 504 N.E.2d 592 (Mass. 1987) (finding the right of parents to direct their children's education, with respect to home-schooling, must be reconciled with the substantial state interest in education).

113. Religious proselytizing by teachers has been found to violate First Amendment rights of students, justifying the discharge of teachers. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (finding moment of silence for meditation or voluntary prayer unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (finding school-sponsored voluntary recitation of non-denominational prayer violated Establish-

student rights to some degree of personal expression[114] and from unreasonable search and seizure.[115] In many cases these rights can be of particular importance to the African-American community. In particular, the rights respecting equity in educational resources and non-discrimination are obvious. Furthermore, due process rights respecting labeling students are extremely important because black males are the most likely population to be burdened by "learning disabled" labeling.[116]

In addition to the Federal Constitution, state constitutions have a formative force on public school systems for they are often the implementation vehicle for state educational mandates. One of the most productive litigation strategies for overcoming shortcomings and inequities in education has been litigating a state's responsibilities under the educational clauses in its constitution.[117] A case in point is school finance inequalities. Vast discrepancies in educational expenditures between often adjacent school districts have been one of the most visible and galling examples of inequality in education.[118] Hopes for a national policy for wealth-equalization of educational ex-

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ment Clause); West Virgina State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding unconstitutional a requirement that student salute the flag despite religious objection); Lipp v. Morris, 579 F. 2d. 834 (3d Cir. 1978) (invalidating statute requiring students to stand for flag salute); Breen v. Runkle, 614 F. Supp. 355 (W.D. Mich. 1985) (praying and telling Bible stories); LaRocca v. Board of Educ., 406 N.Y.S.2d 348 (N.Y. App. Div. 1978) (recruiting students to attend meetings of teacher's religious organization).

114. In *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), the Court upheld limited rights to personal expression by school children. The rights of children to freedom of belief are also supported by the First Amendment limits on the public schools prohibiting the inclusion or advocacy of religious practices in the school.

115. New Jersey v. T.L.O., 469 U.S. 325, 333 (1985).

116. *See* Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (providing an example of a successful class action suit brought by black school children in California challenging as racially biased the use of I.Q. tests in the placement process for educable mentally retarded classes as violative of the Education for All Handicapped Children Act and the Fourteenth Amendment); Beth Harry & Mary G. Anderson, *The Disproportionate Placement of African American Males in Special Education Programs: A Critique of the Process*, J. NEGRO EDUC. 602 (1994) (documenting disproportionate special education placement, corporeal punishment and suspension of blacks, particularly males).

117. William E. Thro has written extensively on education clause litigation and has described school finance litigation as going through three waves, the first based on equal protection clauses and the last two, more successful, waves based on school education clauses. Education clauses respecting a free, public education system are found in all state constitutions except that of Mississippi. ALA. CONST. art. 14, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, §§ 1, 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § VII, para. I; HAW. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. 9, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. V, § II; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MO. CONST. art. 9, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. VIII, § 2; N.D. CONST. art. VII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14, R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1; *see* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994).

118. State school finance inequality is a common resultant of the manner in which public schools are typically financed. A millage on local property has historically been the mainstay of public school systems—local taxes levied by a local school district have been the hallmark of local control of schools. Local property taxes account for roughly fifty percent of funds available to public schools

penditures were dashed when the United States Supreme Court declined to so interpret the requirements of the Equal Protection Clause in the Federal Constitution in *San Antonio Independent School District v. Rodriguez*.[119] Shortly after *Rodriguez* the New Jersey Supreme Court ruled that the state's constitutional directive to provide a thorough and efficient system of education required remediating interdistrict funding and service disparities. Litigation along this line has continued.[120] The recent decision by the Ohio Supreme Court in *DeRolph v. Ohio*[121] found the state's School Foundation Program unconstitutional under the Ohio Constitution which, like New Jersey's, mandates a "thorough and efficient system of common schools throughout the state."[122]

B. Dangers in the New Privatization Thrusts: Charters and Vouchers

The increasingly popular answers to fostering experimental programs in education are school choice options: vouchers and charter schools. Vouchers found their way into the public imagination in the 1960's in essays by the economist Milton Friedman,[123] who proposed them as a free-market solution to government-sponsored educational mediocrity. In the 1970's vouchers were featured in the proposals of John Coons as a way to increase democracy and fairness in education.[124] More recently vouchers were suggested by commentators John Chubb and Terry Moe[125] as a meth-

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nationally, although the percentages vary significantly from state to state, and from district to district. By the turn of the twentieth century a majority of states were supplementing the taxes of local communities with flat grants of money, apportioned on a per capita basis, to local school districts for educational purposes. WALTER I. GARMS, ET AL., SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION 188 (1978). A majority of states adopted the "Strayer-Haig plan," also known as "the foundation program plan," and its variants, which took into account to some extent the disparity of wealth from district to district and special needs (e.g., retardation, deafness, giftedness) in computing the state contribution to the local school districts. These grants were seldom enough made to cause poor district schools to not even remotely resemble the schools of the affluent.

The first successful challenge to interdistrict inequalities in a foundation program was in California in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), in which the scheme was invalidated under the state constitution and under the Federal Equal Protection Clause (although this latter holding would be overruled by the Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)). The financing scheme for California public school districts permitted wealthy districts such as Beverly Hills to spend thirteen times as much on their students as poorer districts like Baldwin Hills. *Serrano*, 487 P.2d at 1248. While the state had an equalizing contribution formula, *id.* at 1246, the maximum state supplement of $355 per child, *id.*, was obviously inadequate to equalize the disparities between the school districts.

119. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

120. *See, e.g.*, Opinion of the Justices, 624 So. 2d 107 (Ala. 1993); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Secretary of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

121. DeRolph v. Ohio, 677 N.E.2d 733 (Ohio 1997).

122. OHIO CONST. art. VI, § 2.

123. Milton Friedman, *The Voucher Idea*, N.Y. TIMES, Sept. 23, 1973, (Magazine) at 21.

124. *See* JOHN COONS & STEPHEN SUGARMAN, EDUCATION BY CHOICE (1978).

125. JOHN E. CHUBB & TERRY MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS (1990). This book was the flagship for the new paradigm conservatives advocating privatization schemes, particularly vouchers, to improve public schools by substituting market controls for democratic and interest group controls that in their view dominate the current system of public education.

od to convert the current centralized governmental system of schools to a more efficient privatized one relying on market forces and parental choice.

In operation, most voucher options that have been implemented look less like Friedman's proposal and more like magnet schools.[126] While magnet programs may have increased the variety of school programs available to those amenable to their integrative goals, magnets are not autonomous schools. They do not markedly decentralize public schooling nor do they radically depart from common school policy. Similarly, most school choice programs depart only slightly from the public school norm. Like magnets, they offer the possibility for some innovative or specialized curriculum, but their greatest ameliorative potential is creating some market-mimicking competitiveness among public schools.[127]

In any event, most extant choice plan schools are generally subject to the same restraints that apply to public schools in the relevant political subdivision, except for possible special waivers in work rules. Consequently, they do not open a new avenue for an African-American community to establish a project like a strong Afrocentric male academy.

On the other hand, to court more independent voucher programs is to court their inherent dangers of perpetuating and increasing inequality of educational opportunity, particularly by class, under the seemingly neutral guise of choices by individuals. There are a number of possible dangers: that the better voucher schools will require tuition supplements, leaving the poor to bare-bones voucher-only schools; that schools may cut costs by labeling difficult students and expelling them to some public school of last resort; that policing would be needed to assure that the schools did not reject students on the basis of suspect characteristics; that the voucher schools will simply siphon off the "cream of the crop" leaving the rest in some sort of residual public setting; that the vouchers are simply devices to funnel funds into the parochial school systems at the expense of the public system.[128]

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126. Federal subsidies have been available for magnet programs, defined by statute as "a public elementary or secondary school or public elementary or secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. § 7204 (1994). The purposes of the subsidy include "the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial portions of minority students," and the enhancement of educational quality through "courses of instruction . . . that will substantially strengthen the knowledge of academic subjects and the grasp of tangible and marketable vocational skills of students attending such schools." 20 U.S.C. § 7202 (1994).

127. The results of choice programs to date are mixed. The intradistrict choice programs of East Harlem, Cambridge, Massachusetts and Montclair, New Jersey have had some good results. *See* THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE: A SPECIAL REPORT 29-46 (1992) [hereinafter CARNEGIE REPORT]. The results of interdistrict statewide programs have not uniformly shown an advantage. Minnesota, Arkansas, Idaho, Iowa, Massachusetts, Nebraska and Utah have statewide programs; additional states have more limited voluntary choice plans. *Id.* at 47-62.

128. Some voucher proponents have developed very complex schemes for avoiding these pitfalls and other inequalities. *See, e.g.*, JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE 131-212, 224-30 (1978) (giving a model state constitutional amendment creating voucher schools with sections specifically addressing, inter alia, limits on the schools' rights in respect to admission and expulsion, including the assurance of procedural due process in discipline and dismissal, regulation, certification, public disclosure of school information and the collective bargaining rights of the teachers). In Judith Areen & Christopher Jencks, *Education Vouchers: A Proposal for Diversity and Choice*, 72 TCHRS. C. REC. 327 (1971), Areen and Jencks present a proposal which would recast the terms public and private, public meaning that it is open to all students on a nondiscriminatory basis, charges no tuition and provides full information about itself to anyone who asks. Public schools would receive funding subject to further rules governing admissions (including circumstances in which the

Moreover, vigorous protection of personal rights may be compromised even in a weak voucher scheme. Wisconsin's voucher plan in Milwaukee was criticized for exempting the private voucher schools from accepting disabled students.[129] Consequently only nine of the 341 students using vouchers at private schools in the first year of the voucher program had disabilities.[130] There are many rights of students attending public schools that will be onerous to carry over into a private setting. Agitation to waive them should be expected.[131]

There are more subtle features of privatizing schemes that may affect African-Americans collaterally. Privatization may lead to re-feminizing and deprofessionalizing the teaching corps. African-Americans have a stake in the status of the teaching profession, as there are many black jobs at stake. Although blacks only constitute approximately 7.3%[132] of the national teaching corps, this is a sizable number (188,000),[133] and blacks are concentrated in the urban public schools, the highest paid sector.[134] In the private sector, black representation is very low at 2.2%.[135] The salary differential between public and private school is substantial nationally,[136] and private school teachers also report fewer medical, dental and pension benefits.[137] Consequently, much of the touted cost-savings of choice plans that incorporate entrepreneurial, non-public schools, rests on loss of remuneration by teachers. In the Milwaukee voucher experiment the teacher salary differential made up a substantial part of the greater economic efficiency of private over public schools in the voucher experiment; the private schools' salary range of $11,500 to $27,000 being substantially below the public schools' $23,000 to $47,000 range.[138]

There is one form of compensation more common to private school teachers than public: in-kind income of housing, meals, child care and tuition. In excess of ten percent of private school teachers accept compensation in the form of tuition waivers

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school assigns its vacant slots by lottery), suspensions, expulsions and curricular standards. *Id.* at 330-32.

129. The small scale of extant voucher programs does not readily highlight the larger systemic problems to be expected should the free-market type solutions be given a free rein, although even on a small scale the problems are visible. Milwaukee's voucher program suffered accusations and problems stemming from under-regulation. The Carnegie Foundation's report found that one half of the private schools on the voucher system in the first year met their performance requirement merely by submitting attendance records stating that the average school attendance was ninety percent; no additional assurance of quality was required. Also in the first year one school shut down in the middle of the year from mismanagement. CARNEGIE REPORT, *supra* note 127, at 67.

130. *Id.* at 68.

131. *See supra* notes 110-16.

132. U.S. DEP'T OF EDUC., AMERICA'S TEACHERS: PROFILE OF A PROFESSION 16 (1993) [hereinafter AMERICAN TEACHER PROFILE]

133. *Id.* at 12.

134. *Id.* at 16. Compare the educational professional representation to that of other professions, for example in the honorable practice of law where blacks comprise 3.3% of the attorney corps, approximately 32,000, and are concentrated in the lower tiers. *See* BARBARA M. CURRAN & CLARA M. CARSON, THE AMERICAN BAR ASSOCIATION LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990'S (1994).

135. AMERICAN TEACHER PROFILE, *supra* note 132, at 15.

136. The Department of Education's 1993 teacher profile reported base salaries for beginning teachers averaging $17,180 for public schools, $12,389 for private, and even greater discrepancies for experienced teachers with masters degrees ($28,415 for public schools, $18,854 for private). These figures were based on 1987-88 school data. *Id.* at 106-11.

137. *Id.* at 112-14.

138. CARNEGIE REPORT, *supra* note 127, at 71.

for their own children's tuitions.[139] The private-side compensation profile—in-kind tuitions for teacher's children and the lack of benefits—fits most comfortably a teacher with a family and access to the benefits of a better-compensated spouse. As long as males tend to have better access to higher compensation, this profile will best fit wives. Given that one of the concerns of the Detroit parents was the lack of male role models in school, it would follow that any trend encouraging greater feminization of the teaching force would be unwanted. Of course, if all schools in a system were voucher schools, the attractiveness of in-kind tuition payments would diminish, but then so might much of the cost efficiency of private schools if the Milwaukee voucher system is a guide.

The trade-offs are similar in respect to charter school programs. The charter statutes vary from state to state.[140] Some charter statutes do no more than create an optional arrangement for existing public schools to enjoy a change in their method of governance, allowing them more site autonomy; other states have tried more far-reaching schemes, providing public funding for minimally regulated entrepreneurial schools.[141] The trade-off, however, is the same as with the voucher programs: the more the charter program is strongly decentralized, lightly regulated and cordial to a broad spectrum of educational endeavors, the more schools there are on the public fisc that need not comply with the existing public policies. This is a Hobson's choice for much of the constituency for an Afrocentric male academy, a population that has a strong stake generally in opposing the racheting back of rights of access, but who cannot fit their favored school within the public school policies.

V. CONCLUSION

Despite the eclipse in popularity of using public funds to foster public policy, the modern public school systems were forged in that fire. The government's operating public schools and regulating private ones has resulted in qualitatively different public school and private school spheres. The shortcomings of the public system in respect to under-served communities like Detroit are not likely to be any closer to a remedy by the weakening of the policy linkage. Options that retain parallel systems of public and private schools are preferable to options that muddy the distinction at the cost of rights hard won.

There remains the dilemma of those who cannot access the private school option. One insightful commentator, Kevin Brown, writing in support of African-American immersion schools, discounts the possibilities of a private option for them.

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139. AMERICAN TEACHER PROFILE, *supra* note 132, at 117.

140. Many states have enacted charter legislation. ARIZ. REV. STAT. ANN. §§ 15-181 - 15-189 (West Supp. 1994); CAL. EDUC. CODE §§ 47600-47616 (West 1993); GA. CODE ANN. § 20-2-255 (Michie Supp. 1994); HAW. REV. STAT. §§ 296-101 - 296-102 (Michie Supp. 1994); KAN. STAT. ANN. §§ 72-1903 - 72-1910 (Supp. 1994); MASS. GEN. L. ch. 71, § 89 (Supp. 1995); MICH. COMP. LAWS ANN. §§ 380.501-380.518 (West 1997); MINN. STAT. ANN. § 120.064 (West Supp. 1995); N.M. STAT. ANN. §§ 22-8A-1 - 22-8A-7 (Michie Supp. 1994); WIS. STAT. ANN. §§ 115.001, 118.40 (West 1994); WYO. STAT. ANN. §§ 21-3-201 - 21-3-207 (Michie 1997).

141. For example, the charter schemes of Georgia, Hawaii and New Mexico concern only the conversion of existing public schools to charter status. The charter is usually a performance-based agreement, negotiated and approved by the local school boards, that exempts the schools from some regulations, although typically it does not affect the collective bargaining agreements, prohibitions against religious, race and gender bias, or safety requirements. GA. CODE ANN. § 20-2-255 (Michie Supp. 1994); HAW. REV. STAT. §§ 296-101 - 296-102 (Michie Supp. 1994); N.M. STAT. ANN. §§ 22-8A-1 - 22-8A-7 (Michie Supp. 1994).

> If America were still engaged in efforts to successfully integrate public schools, I would strongly advocate that such education [i.e., Afrocentric immersion schools] only take place in private institutions such as churches and community centers located within the African-American community. I would counsel against public schools revising their educational programs and policies to meet the needs and interests of African-Americans. Rather, I would urge judges, politicians, and educators to focus on true multicultural education, with the goal of instilling cross-cultural competency of various ethnic cultures in an ethnically diverse student body. Unfortunately in the 1990's, this position fails to consider the current situation and future direction of the racial composition of student enrollments in American public schools.[142]

The author is sympathetic to Professor Brown's stance but is not convinced that more cannot be done to expand the base of private support wider than local churches and community centers, and hopes to explore this further in a subsequent paper.

142. Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 821 (1993).