

A False Accountability Narrative: The Human Rights Implications of Developed Nations Over-Testing Youth in Education

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ABSTRACT

Standardized testing is a human rights issue that continues to plague the educational systems in developed nations. Within countries like the United States and the United Kingdom, vexatious accountability measures, such as those provided by standardized testing, have polarized the educational arena, leaving in its wake a litany of human rights concerns. This culmination of over-testing and outcome-only driven education equates to an end game where employment and dollar signs erode the very fabric of human rights for children. In this paper, we hope to inspire understanding of the issues of contention happening in developed nations today regarding standardized testing issues, and we will make recommendations that may help these nations move from the statistical to the enlightened view of growing responsible and civic-minded citizens into the twenty-first century.

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I. INTRODUCTION

The idea for this paper started straightforwardly — a curiosity about how human rights could help improve the field of education,¹ particularly in relation to the overuse of standardized testing² in developed nations.³ I began researching this idea and came across a Special Rapporteur report by the Commission on Human Rights (CHR).⁴ The Report, written by Katarina Tomasevski, focused largely on ensuring that children worldwide could access free and reliable primary education.⁵ However, within the Report, she asked a seemingly straightforward question that encompasses the crux of the debates surrounding the field: “Education for what?”⁶ This question raised some thoughts about what precisely societies, specifically developed nations, are educating their children for, if not for disseminating knowledge and

1. Melissa A. Harness, *Pretending Teaching is a Profession: Why Public School Teaching Will Never Be Considered a True Profession* (Aug. 2012) (Masters theses, University of Tennessee, Knoxville) (on file with student records) (education in the University of Tennessee, Knoxville) (referring to education as public education, although educational systems throughout the world use various ways to educate their public, including, private and non-state actors. In this way, any system that is used within a State to educate its populace should be considered ‘public education’ in this endeavor).

2. *See generally* John Gardner & Bryn Holmes, *Students’ Rights in Assessment Evaluation*, in 3 INT’L. ENCYCLOPEDIA OF EDUC. 378, 379-83 (Penelope Peterson, Eva Baker & Barry McGaw ed., 2010) (referring to standardized testing as the idea of an examination that contains a formulaic “format/questions,” “instructions,” and a specified “time allotment.” These tests usually require multiple choice answers because of the need for the format to be easily graded through machinery and computers. Although the questions may be jumbled in a different order within each test, all questions are the same, as well as the number of questions involved).

3. Marc Silver, *If You Shouldn’t Call It The Third World, What Should You Call It?*, NPR (Jan. 4, 2015), <https://www.npr.org/sections/goatsandsoda/2015/01/04/372684438/if-you-shouldnt-call-it-the-third-world-what-should-you-call-it> (noting the naming of countries into categories (First, Second, and Third World) has a history beginning around the Cold War era and was coined by French demographer Alfred Sauvy. These categorizations were largely precipitated upon an economic worldview of the financial solvency of nations. Basing country ‘rankings’ solely on economic criteria is contended by many researchers to be “out of date, insulting and confusing.” Although other terms have been coined, this article will use the term ‘developing’ and ‘developed’ nations to signify the difference concerning a litany of topics, many of which deal with issues around human rights).

4. *See generally* Katarina Tomasevski (Special Rapporteur on the Right to Education), *The Right to Education*, U.N. DOC. E/CN.4/2004/45 (Jan. 15, 2004).

5. *See id.* (Primary education globally is designated to children that are between the ages of 6 to 11 years of age. However, in most developed nations, primary education refers to all education levels that fall below the university or post-secondary rank).

6. *Id.* at 2.

promoting societal ties, both of which are in furtherance of human rights.⁷

As we have seen over the last three or so decades, too often, educational outcomes in developed nations, like the United States (U.S.) and the United Kingdom (U.K.), focus on the economy and an input/output model⁸ that has driven neoliberal⁹ policies and laws to make education seemingly bigger and better.¹⁰ We see this economic analysis played out in the U.S. today by the recent passing of educational laws in states like Florida, where politicians want to give large educational companies “the capacity to create a really exciting market.”¹¹ However, Tomasevski’s contention within her Special Report was to demonstrate that when individuals are afforded an opportunity to learn for the sake of learning, certain natural rights are unlocked, while denying such rights to an equal and equitable education leads to a derelict of human rights over time.¹² Some of the contentions, of course, come from questioning what equal and equitable education is.¹³ The answer to such questions over the millennia has varied according to the culture and communities the education comes from.¹⁴

7. *See id.*

8. Will Kenton, *Input-Output Analysis: Definition, Main Features, and Types*, INVESTOPEDIA (July 30, 2021), <https://www.investopedia.com/terms/i/input-output-analysis.asp> (stating an input/output model refers to a macroeconomic analysis “based on the interdependencies between different economic sectors.” This analysis usually estimates positive and negative effects and their rippling ramifications on the economy. In education, this model often is used to try and show the outcomes of educational funding to students through standardized testing, and the ability of students to later become gainfully employed due to their education).

9. *See generally* G.A. Res. 44/25 (Nov. 20, 1989); Nicola Smith, *Neoliberalism*, BRITANNICA MONEY (Mar. 24, 2024), <https://www.britannica.com/money/topic/neoliberalism> (defining, in its simplest form, neoliberalism as the model that seeks to transfer progress by more pragmatic means from the public sector to the private sector).

10. *See generally* Harness, *supra* note 1.

11. Ryan Mills, *DeSantis Cracks Down on Teachers’ Unions, Proposes Limits on Leader Pay*, DUES COLLECTION, NAT’L. REV. (Jan. 24, 2023, 1:46 PM), <https://www.nationalreview.com/news/desantis-cracks-down-on-teachers-unions-proposes-limits-on-leader-pay-dues-collection/>.

12. Tomasevski, *supra* note 4, at 6.

13. Sylvia Schmelkes, *Recognizing and Overcoming Inequity in Education*, UNITED NATIONS: UN CHRON. (Jan. 22, 2020), <https://www.un.org/en/un-chronicle/recognizing-and-overcoming-inequity-education>.

14. *See* Ileana Najarro, *Educational Inequality: 4 Moments in History that Explain Where We Are Today*, EDUC. WK. (Mar. 20, 2023), <https://www.edweek.org/leadership/educational-inequality-4-moments-in-history-that-explain-where-we-are-today/2023/03>.

However, a basis formed under human rights principles seems to be a good starting point to try and erode some of the major concerns being raised by heavily over-used standardized testing.¹⁵

The analysis of standardized testing, particularly in developed nations, and the human rights consequences can be viewed in a bifurcated way to examine both the discriminatory effects of the testing itself and the often-refuted, neoliberal consequences that occur in the aftermath of the tests. It is often stated that the reasoning for standardized testing is that it is an “inexpensive way to check that schools and teachers are [being held] accountable, that students and therefore the public are getting the education that public dollars are paying for” and that the tests themselves are intended to measure the entire health of the education systems.¹⁶ However, the sad realization is that they more often than not have dire consequences for individual schools, teachers, and the students themselves because of the ‘accountability’ and ‘credentialling’ measures that these tests have promulgated, particularly in developed nations over the last half-century.¹⁷

On average, in developed nations, children take between 112-125 standardized tests over the course of their primary school careers.¹⁸ Adding to the above number, are the teacher-made tests also conducted throughout the school year.¹⁹ In many nations, the numbers are even higher.²⁰ While the physical time for the testing can be upwards of forty or more hours a year, the mental exhaustion is far more impactful to not only the students but parents, teachers, and administrators because it is understood that these tests can demonstrate good parenting, good teaching, and good management of education systems, or the lack thereof.²¹ In the present day, because of the accountability push in

15. See John Poulsen & Kurtis Hewson, *Standardized Testing: Fair or Not?*, UNIV. LEITHBRIDGE (Apr. 24, 2024, 9:00 AM), <https://www.ulethbridge.ca/teachingcentre/standardized-testing-fair-or-not>.

16. *Id.*

17. David Hursh, *The Growth of High-Stakes Testing in the USA: Accountability, Markets and the Decline in Educational Equality*, 31 BRIT. EDUC. RSCH. J. 605, 606 (2005).

18. Valerie Strauss, *Confirmed: Standardized Testing has Taken Over Our Schools. But Who's to Blame?*, WASH. POST (Oct. 24, 2015, 2:10 PM), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/10/24/confirmed-standardized-testing-has-taken-over-our-schools-but-whos-to-blame/> [hereinafter Strauss1].

19. *Id.*

20. *Id.*

21. See *id.*

education, in places like the State of Florida in the U.S. and the City of London in the U.K., teacher shortages are rampant, causing many locals to slacken or altogether dismiss credentialing protocols that were required because of what was considered a *lack of standards* and *low-quality education*.²²

In this paper, we desire to demonstrate that standardized testing has become a polarized and infectious outcome of neoliberalistic tendencies in developed nations over time.²³ These toxic tendencies to want to numerate and, in effect, reduce the humanity of children to a number have devastated millions of individuals.²⁴ This culmination of over-testing and outcome-only driven education equates to an end game where employment and dollar signs erode the very fabric of human rights for children in developed nations throughout the world. It is our further hope to inspire understanding of the issues and make recommendations that may help these nations move from the statistical to the enlightened view of growing responsible and civic-minded citizens into the twenty-first century.

II. EDUCATION AS HUMAN RIGHTS EXPLAINED

Human rights can be described as those rights that human beings “simply [possess] by virtue of being a person.”²⁵ The United Nations (U.N.), in 1948, working with many different States, drafted the Universal Declaration of Human Rights (DHR).²⁶ This Declaration protects the dignity, respect, and well-being of human life and freedom for nations that have adopted the treatise.²⁷ The U.K. ratified the DHR in 1953.²⁸ Although the U.S. has not done so, the DHR can be used as a

22. Caden DeLisa, *Even After Elimination, Standardized Testing Remains Polarizing in Florida*, THE CAPITOLIST (April 8, 2024, 8:35 AM), <https://thecapitolist.com/even-after-elimination-standardized-testing-remains-polarizing-in-florida/>.

23. See Hursh, *supra* note 17, at 609.

24. *Id.* at 614.

25. Janet M. Hostetler, *Testing Human Rights: The Impact of High-Stakes Tests on English Language Learners' Right to Education in New York City*, 30 N.Y.U. REV. L. & SOC. CHANGE 483, 485 (2006). See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

26. G.A. Res. 217 (III) A, *supra* note 25.

27. *Id.*

28. *European Convention on Human Rights*, ECHR (April 8, 2024, 9:05 AM), <https://www.echr.coe.int/european-convention-on-human-rights>.

commonly accepted approach to analyzing and highlighting issues that may be present in society.²⁹ The understandings that are brought forth with the DHR should be the base that developed nations reach for concerning problem-solving within their own states.

Nonetheless, Article 26 of the DHR of 1948 reads: “Everyone has the right to education,” and with this understanding,

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance, and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.³⁰

Further, in conjunction with the DHR, one can look to the United Nations Convention on the Rights of the Child (UNCRC) as well to help examine what is in a nation’s best interest concerning children and the over-testing in education.³¹ Articles three and twelve, respectively, protect the social welfare of those under the age of majority (eighteen years old in most developed nations³²) while also giving credence to issues directly affecting their education.³³ John Gardner and Bryn Holmes, researchers concerned with testing and the use of UNCRC in Western European countries, contend that the UNCRC “provide[s] a legal platform from which to challenge the more arcane of assessment practices today.”³⁴ They go on to state that “clearly there is an argument that state testing programs in the U.S. and the national curriculum tests of England are not in the best interests of the young students concerned.”³⁵

To further this line of argumentation, Article 3 of the UNCRC brings to bear issues concerning standardized testing by addressing the

29. Hostetler, *supra* note 25.

30. G.A. Res. 217 (III) A, *supra* note 25.

31. Gardner, *supra* note 2.

32. PF 1.8: Legal age thresholds regarding the transition from child- to adulthood, (2016), https://www.oecd.org/els/family/PF_1_8_Age_threshold_Childhood_to_Adulthood.pdf.

33. G.A. Res. 44/25, *supra* note 9.

34. Gardner, *supra* note 2, at 382.

35. *Id.* at 381.

best interest of the child.³⁶ Many researchers claim that such testing holds a “tenuous validity (and ethical basis) [for] using such tests of students learning for a purpose that is some way removed from their individual learning and progression, that is [for] school and state accountability” only.³⁷ However, in many developed countries such as the U.S. and the U.K., courts are “notoriously wary of becoming involved in challenging the internal judgments of schools, universities or examination agencies ... unless there is prima facie evidence of malpractice, which is amendable to statutory or common law-redress, they will often not proceed.”³⁸ Even when cases do proceed, the interests of the child are warped to accommodate for such accountability merits as standardized testing seemingly attains.³⁹ For instance, in the U.S. case, *Lemon v. Kurtzman*, the Justices alluded to the use of certain concepts like standardized testing to attain educational awareness of student development could be in the best interests of the child, therefore they provide a way to ensure students are meeting the threshold of educational standards in certain situations.⁴⁰ As long as there is a legitimate state interest in doing so, then the state has a right to give all the standardized tests it sees fit to obtain this goal.⁴¹ However, if we turn to human rights standards under Article 3, there is a contention that the Supreme Court is oversimplifying what is in the best interests of the child in order to fit into arbitrary accountability standards that neoliberalism has caused.⁴²

Turning to Article 12 of the UNCRC, it contends that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”⁴³ At the very minimum, standardized testing has a dramatic impact on student’s future education, and at this point, career aspirations.⁴⁴ Children have very little input regarding any

36. G.A. Res. 44/25, *supra* note 9.

37. Gardner, *supra* note 2, at 381.

38. *Id.* at 382.

39. *See id.*

40. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

41. Kenton, *supra* note 8. *See Lemon*, 403 U.S. 602.

42. *See Gardner, supra* note 2, at 381.

43. G.A. Res. 44/25, *supra* note 9.

44. Gardner, *supra* note 2, at 381.

aspect of the educational process in developed countries.⁴⁵ There are compulsory school laws that require every child under a certain age to attend school and follow the curriculum guidelines set out by those in charge of the systems.⁴⁶ The culmination of this control happens within standardized testing, where children are not given the opportunity to discuss the merits of the test, offered any feedback, allowed to provide any feedback, or have the ability to refuse to sit for an examination.⁴⁷ They really have no control whatsoever concerning their educational goals or ambitions in developed nations.⁴⁸

Because of the “fundamental nature of [sic] human right[s], [they should be] raise[d] above discretionary consideration.”⁴⁹ It becomes paramount that the examination of how we assess educational progress be considered carefully because of the impact that it has on inherent rights that children should have, such as those found under international treaties like DHR and the UNCRC. As developed nation’s courts often “look to other states for authoritative guidance in interpreting constitutional provisions, so too should states look outside domestic sources of law to international human rights law.”⁵⁰ The parameters of DHR and the UNCRC, in conjunction with the State’s own protections, provide more comprehensive parameters without overstepping existing policy.⁵¹ In this way, using human rights law allows for a legal platform to be established, creating a framework that supports and balances the rights and responsibilities of all stakeholders within the educational arena.⁵²

One might ask, “How did we get to the point where we are contending that we might have a human rights issue when it comes to testing in education?” The answer lies within the history of standardized testing. To fully understand the neoliberalistic tendencies and the inequitable inevitabilities within the tests themselves, the history of standardized testing becomes catastrophically relevant.

45. *Id.*

46. Kerry McDonald, *Compulsory Schooling Laws Aren’t Progressive, They’re Inhumane*, FOUND. FOR ECON. EDUC. (Apr. 2, 2019), <https://fee.org/articles/compulsory-schooling-laws-aren-t-progressive-they-re-inhumane/>.

47. Gardner, *supra* note 2, at 379.

48. McDonald, *supra* note 46.

49. Hostetler, *supra* note 25, at 485.

50. *Id.* at 486.

51. *See id.*

52. *Id.*; Gardner, *supra* note 2, at 380.

III. HISTORY OF STANDARDIZED TESTING

Standardized testing, since its inception, has been a source of conjectured debate among all stakeholders⁵³ in the educational arena for over half of a century. However, over the last forty years, these tests have become increasingly detrimental to societies and have led to sustained and widespread adverse effects⁵⁴ across the globe. Understanding where today's tests come from and why they look the way they do, is important to acknowledging the divergent issues their continued usage has on communities, especially within the understanding of the human rights arena.⁵⁵

A. Origin of Standardized Testing: Creating a Meritocracy

Standardized testing has a long, myriad, and meandering history globally. The first tracing of standardized tests leads back over 2,000 years ago, during the Han Dynasty in China.⁵⁶ These first tests were used to help appoint trusted bureaucrats for the emperor.⁵⁷ By 605 C.E., these tests evolved into the extensively termed imperial examination, whereby degrees were given based on testing results, thus allowing the government officials to best place the person within a bureaucratic position that aligned with their results, or in other words, the first meritocracy⁵⁸ through standardized testing.⁵⁹

53. Shelley Watts, *Stakeholders in Education*, STUDY.COM (Nov. 11, 2023), <https://study.com/academy/lesson/what-is-a-stakeholder-in-education-definition-examples.html> (noting that the stakeholders within the educational realm are many). Typical stakeholders referred to within public educational settings and specifically within this paper consist of students, teachers, parents, administrators within educational settings (principals, school boards, etc.), state legislatures, and the federal government.

54. See discussion *infra* Section IV.

55. Hursh, *supra* note 17, at 614.

56. Barry O'Sullivan & Liying Cheng, *Lessons from the Chinese Imperial Examination System*, 12 LANGUAGE TESTING ASIA 52, 1 (2022), <https://languagetestingasia.springeropen.com/counter/pdf/10.1186/s40468-022-00201-5.pdf>.

57. Megan Krance, *History of Standardized Testing: Creation & Debates*, STUDY.COM (Nov. 21, 2023), <https://study.com/academy/lesson/the-history-of-standardized-testing.html>.

58. Definition of Meritocracy, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/meritocracy> (last visited Mar. 30, 2024) (defining meritocracy as "a system, organization, or society in which people are chosen and moved into positions of success, power, and influence on the basis of their demonstrated abilities and merit.").

59. Krance, *supra* note 57; ALEX FRITH ET AL., UNDERSTANDING POLITICS & GOVERNMENT 64 (2003).

Although these first standardized tests could have had a “remarkable force for democratizing the government of China” because, in theory, anyone could take the tests, the reality was that only the privileged and wealthy had the luxury of studying as much as was necessary to pass them because of the rote memorization needed of various Chinese texts, including Confucianism.⁶⁰ However, if a person from a lower social ranking had the ability to pass the tests, they would join the more elite members of Chinese society, giving them and their families great honor and the ability to attain wealth and better treatment.⁶¹ As most would be able to conjecture, test-taking by those outside of the elites in China was minimal at best, leading to the understanding of the first recorded discrimination within a testing regime.⁶²

More modern standardized testing concepts came to Europe through the British Empire’s Chinese colonies in the early nineteenth century.⁶³ Competency tests were soon favored by governors in British colonies over more archaic, aristocratic heritage placement of individuals into positions of power.⁶⁴ The spread of standardized testing for such means was not limited to only the Old-World colonies and mainland Europe but also the New World.⁶⁵

B. Education Before Standardized Testing

In the New World colonies, as much as in other parts of Western Europe, most educational experiences were based on the Socratic method⁶⁶ created by the Greek philosopher Socrates.⁶⁷ The Socratic method allows educators not to have to teach in the mainstream,

60. Krance, *supra* note 57.

61. World History Worksheet on the Social Hierarchy of Han China, MRTREDINNICK, https://www.mrtredinnick.com/uploads/7/2/1/5/7215292/social_hierarchy_of_han_china.pdf (last visited Mar. 30, 2024).

62. Osman Özturgut, *Standardized Testing in the Case of China and the Lessons to be Learned for the U.S.*, 7 J. INT’L. EDUC. RSCH., 1, 4 (2011).

63. *Id.*

64. Krance, *supra* note 57.

65. Özturgut, *supra* note 62, at 5.

66. See generally Peter Conor, *The Socratic Method: Fostering Critical Thinking*, COLO. STATE UNIV.: INST. FOR LEARNING & TEACHING, <https://tilt.colostate.edu/the-socratic-method/> (last visited on Mar. 30, 2024).

67. *Id.*

contemporary use of the term⁶⁸ “per se” but rather is a dialogue between all learners that explores the complexities and uncertainties of the world around us.⁶⁹ Knowledge is discussed in an open forum, and nothing is off-limits. These dialogues lead to an exploration of understanding of the world as it could be explored at the time and are thus classified as a form of “liberal”⁷⁰ education.⁷¹

This understanding of education falls solidly outside the parameters that a staunch standardized testing curriculum creates, fostering a higher level of inquiry, learning, and knowledge through critical thinking at its most distinguished level.⁷² It is often associated with philosophical principles that can be found in most developed nations of the world.⁷³ This contrasts with the very ideologies behind modern standardized testing. In particular, the Founding Fathers⁷⁴ of the U.S., who grew up in the Western European education systems, would eventually strive for such principles found in a liberal education paradigm through the schooling of the masses after the Revolutionary

68. This is in reference to the idea of the mainstream public and their conceptions of the teacher holding the knowledge and the students receiving it through various delivery systems, including lectures and testing. This idea is not to mean that all teachers in every context employ this type of pedagogy but to signify that the perception and sometimes the reality is that this is how education works within the context of developed nations, particularly those with a heavy emphasis on standardized testing. *See* Harness, *supra* note 1.

69. Conor, *supra* note 66.

70. A ‘liberal’ education, as it is meant here and understood widely in educational circles, is meant to broaden, and cultivate a free human being. The idea is that education in and of itself has no extrinsic ends. Under this understanding, learning, and teaching are for their own sake and are undertaken for personal enrichment and attainment of knowledge itself. *See generally* Lars Løvlie & Paul Standish, *Introduction: Bildung and the Idea of a Liberal Education*, 36 J. PHIL. EDUC. 1 (2002).

71. Conor, *supra* note 66.

72. *Id.*

73. Linda Valli & Marilyn Chambliss, *Creating Classroom Cultures: One Teacher, Two Lessons, and a High-Stakes Test*, 38 ANTHROPOLOGY & EDUC. Q. 57, 60 (2007). *See generally* Harness, *supra* note 1.

74. G.A. Res. 217 (III) A, *supra* note 25. *See* Joseph J. Ellis, *Founding Fathers*, BRITANNICA (Mar. 1, 2024), <https://www.britannica.com/topic/Founding-Fathers> (demonstrating that there are principally ten men that have been found to make up what mainstream society in the U.S. have come to know as the Founding Fathers: George Washington, Thomas Jefferson, John Adam, Benjamin Franklin, Alexander Hamilton, Samuel Adams, Patrick Henry, John Marshall, George Mason, and James Madison. These men helped create the political and governmental systems the U.S. still employs today).

War.⁷⁵ Hans Zeiger, a public policy researcher, contends that “education was important to the founders because it closely linked to republican self-government and duty...In the founders’ estimation, learning and liberty were inseparable.”⁷⁶ Promoting and disseminating liberal education was a means of fostering “good government and happiness.”⁷⁷ Zeiger contended that the founding fathers found three categories of benefits resulting from the type of ‘liberal education’ they promoted.⁷⁸ Samuel Harrison Smith wrote about these benefits in his 1797 piece in the American Philosophical Society newspaper. Zeigler both quotes and paraphrases the following from the article:

First, “the citizen enlightened, will be a free man in its truest sense.” As a self-governing and virtuous individual, the citizen would know both his rights and his responsibilities. Second, the educated citizen would contribute to the political welfare of the country by his participation in its institutions and deliberations on the development of its political philosophy. In turn, finally, the nation would be an example to the world and “the most powerful nation on earth, if that example exhibited dignity, humility, and intelligence.”⁷⁹

C. Testing in Education: How Standardizing Testing Went from Meritocracy to Assessment

Before the mid-1800s, most tests given to children were done orally, confined to administrators and classroom teachers, as expected under a liberal education model.⁸⁰ However, by the mid-1800s, some schools began giving formal, written examinations to students, particularly in Western Europe, although not widespread. The push for

75. Hans Zeiger, *Educating Citizens: Have We Kept the Founders’ Ideals for Higher Education?*, PEPPERDINE: SCH. OF PUB. POL’Y, <https://publicpolicy.pepperdine.edu/academics/research/policy-review/2008v1/educating-citizens.htm> (last visited Mar. 30, 2024).

76. *Id.*

77. *Id.*

78. *Id.*

79. Zeiger, *supra* note 75 (internal citations omitted).

80. *History of Standardized Testing in the United States*, NAT’L EDUC. ASS’N (June 25, 2020), <https://www.nea.org/professional-excellence/student-engagement/tools-tips/history-standardized-testing-united-states> [hereinafter HSTUS].

such ‘standardized’ assessments in the U.S. was mostly established by one person, Horace Mann, secretary of the Massachusetts State Board of Education from 1837 to 1848.⁸¹ In 1843, Mann visited several European schools that tested written examinations for students.⁸² He returned to the States enamored with the idea that all students and schools should use such measurements.⁸³ By 1845, he had prepared and administered a standardized test for the Boston school system.⁸⁴ He used the results of this examination to “harshly criticize the teachers and the quality of education students were receiving.”⁸⁵ Teachers tried to fight back and reconcile that what they were teaching had little to do with what had been part of the test.⁸⁶ It didn’t matter, however. The stage had been set for the inequitable practices surrounding standardized testing that continue today.

The standardized testing model that Mann created expanded broadly to Western European countries rather quickly as news spread about the issues that had been found while ‘testing’ students in Boston.⁸⁷ By 1900, there were over 1300 various examinations on the market, testing everything from athletic ability to vocational training.⁸⁸

D. Standardized Testing in the Military

However, beyond the schoolhouse, by World War I, standardized testing had become part of recruiting soldiers, helping to determine their mental aptitude for specific positions and ultimately dividing them by race and intelligence.⁸⁹ In 1917, the U.S. military

81. *History of Standardized Testing*, LEHIGH UNIV.: COLL. OF EDUC. (Oct. 18, 2013, 1:30 PM), <https://ed.lehigh.edu/news-events/news/history-standardized-testing> [hereinafter HST].

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See Torin Monahan, *The Rise of Standardized Educational Testing in the U.S.: A Bibliographic Overview* (Dec. 1998) (M.S. paper, Rensselaer Polytechnic Institute) (on file at <https://publicsurveillance.com/papers/testing.pdf>).

88. HSTUS, *supra* note 80.

89. *Id.*

recruited professor of psychology, Lewis Terman,⁹⁰ to produce intelligence tests⁹¹ based on the work of Alfred Binet.⁹² These tests would become known as the Army alpha and beta tests, and their results reflected the promotion of soldiers within the military.⁹³ Furthering the dissemination of such endeavors, the alpha and beta tests intrigued nations around the world, much like the imperial examinations of China had once done, and many of them started using a form of these tests on their military personnel as well, even though the tests were known to be wrought with racist and sexist undertones.⁹⁴

E. Standardized Testing and Eugenics

Terman's aims through 'testing' were furthered in 1923 by Carl Brigham, a psychologist, and eugenicist⁹⁵ who authored a book entitled *A Study of American Intelligence*, where he advocated for extensive assessment in schools by again using Terman's and Binet's work to help show that "African-Americans were on the low end of the racial, ethnic,

90. See Kendra Cherry, *How Lewis Terman Influenced the Field of Psychology*, VERYWELL MIND (July 25, 2023), <https://www.verywellmind.com/lewis-terman-biography-2795523> (noting that Lewis Terman was a eugenicist and psychologist whose primary work concerned distinguishing gifted students from those with cognitive disabilities. The Binet-Simone scale IQ test was the most widely used IQ test ever, although his work was fraught with issues scientifically, personally, and societally. His work often included research that has been criticized as showing significant racial and gendered bias.) [hereinafter Cherry1].

91. See *id.* (noting that Lewis Terman's new intelligence tests used a new formula that involved "taking the mental age, dividing it by chronological age, and multiplying it by 100 to come up with what is known as the intelligence quotient or IQ.").

92. See Kendra Cherry, *Alfred Binet and the History of IQ Testing*, VERYWELL MIND (Mar. 13, 2023), <https://www.verywellmind.com/history-of-intelligence-testing-2795581> (noting that Alfred Binet was a French psychologist that helped develop experimental psychology. In 1904, at the behest of the French government, Binet was asked to create a way for teachers and schools to 'test' students to identify those who might experience difficulty in school, thereby allowing the education system to get the students the help they needed *before* it got to be a problem. Binet and his colleague, Theodore Simon, created questions focusing on "attention, memory, and problem-solving skills." They found that these types of questions often predicted success academically for students. Inadvertently, their research would lead to other types of more sinister intelligence tests designs throughout the world, but particularly within the U.S.) [hereinafter Cherry2].

93. National Education Assoc., *History of Standardized Testing in the United States*, NAT'L EDU. ASSOC. (June 25, 2020), <https://www.nea.org/professional-excellence/student-engagement/tools-tips/history-standardized-testing-united-states>.

94. See Monahan, *supra* note 87.

95. John Rosales & Tim Walker, *The Racist Beginnings of Standardized Testing*, NEATODAY (Mar. 20, 2021), <https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing>.

and/or cultural spectrum.”⁹⁶ He warned that the “promiscuous intermingling” of new immigrants in the gene pool would be at the true detriment of American society and the world.⁹⁷ The research and writing of Brigham aided in the furthering of aptitude testing and were influential in helping to create the first widely used standardized examination, the Scholastic Aptitude Test (SAT).⁹⁸

By 1930, standardized tests were firmly entrenched in the world’s educational systems and began to be intertwined with decision-making at national levels.⁹⁹ However, pushback against such rigid demands in schools began to be voiced. John Dewey¹⁰⁰, a world-renowned educational researcher, and philosopher in the late 1920s and early 1930s, started admonishing standardized testing in educational settings.¹⁰¹ Dewey, along with other like-minded researchers, contended that with the racist and ‘pseudo-science’ based examinations, there would be a plethora of societal discriminations within the tests and a need to mechanize and industrialize the whole of civilization, starting with the education system.¹⁰² The belief is that the over-concern with percentages and averages brought about by mass standardized testing would form a “mental habit which reflects [a] social scene [that] subordinates education and social arrangements based on averaged gross inferiorities and superiorities.”¹⁰³ His essential contention was that this type of testing would dehumanize individuals in the education

96. *Id.*

97. *Id.*

98. *Id.* See *Manhattan Review SAT Prep - SAT History*, MANHATTAN REV., <https://www.manhattanreview.com/sat-history/> (last visited Mar. 30, 2024) (noting that the Scholastic Aptitude Test (SAT) was developed by Carl C. Brigham and debuted in 1926. The history of the SAT is rife with societal discrimination (race, gender, disability, etc.) in the test’s mechanisms and the questions’ formatting and substance).

99. HSTUS, *supra* note 80.

100. See James S. Gouinlock, *John Dewey*, BRITANNICA (Feb. 28, 2024), <https://www.britannica.com/biography/John-Dewey> (noting that John Dewey was an educator and the co-founder of pragmatism, specifically instrumentalism, where the “view that knowledge results from the discernment of correlations between events, or processes of change.” Further, Dewey believed that learning takes active participation in processes that were for living, not necessarily for the measure of future living, which standardized testing and the preparation for such examinations negates).

101. HSTUS, *supra* note 80.

102. Gouinlock, *supra* note 100.

103. *Id.*

system and subjugate certain students into life-long tracking¹⁰⁴ that would render their future potential inconsequential based solely on one or two numbers.¹⁰⁵ Their rights as human beings to education for the sake of knowledge and learning would no longer be guaranteed, thus becoming the ultimate human rights issue.¹⁰⁶

F. Standardized Testing in the Modern Education System

However, as the twentieth century progressed, standardized testing did not dwindle into the background of the educational arena as many of the early researchers had wanted but became more prevalent as automatic test scanners were invented, rudimentary computers were developed, and huge testing conglomerates¹⁰⁷ were formed.¹⁰⁸ These companies spend tens of millions of dollars a year lobbying governments to persuade them to pass legislation and policies that include standardized testing for all students.¹⁰⁹ In the U.S., legislation like The Elementary and Secondary Education Act (ESEA) of 1965¹¹⁰

104. See Cook-Sather, *supra* note 98 (Educational tracking, in its simplest term, separates students into different ability groups generally based on standardized testing. Exclusionary tracking has detrimental effects over time on a student's ability to continue into post-secondary education. Minorities, students in poverty, and English as second language learners often suffer the harshest tracking forms, leading to many and varied issues for their futures.).

105. Morgan K. Williams, *John Dewey in the 21st Century*, 9 J. INQUIRY & ACTION EDUC., 91, 95 (2017).

106. *Id.* at 94.

107. See *The Testing Industry's Big Four*, FRONTLINE PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/schools/testing/companies.html> (last visited Mar. 30, 2024) (noting that the big four testing companies are 1) Harcourt Educational Measurement; 2) CTB McGraw-Hill; 3) Riverside Publishing (a Houghton Mifflin company); and 4) NCS Pearson).

108. HSTUS, *supra* note 80.

109. Valerie Strauss, *Report: Big Education Firms Spend Millions Lobbying for Pro-Testing Policies*, WASH. POST (Mar. 30, 2015, 4:00 AM), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/03/30/report-big-education-firms-spend-millions-lobbying-for-pro-testing-policies/> [hereinafter Strauss2].

110. See generally Catherine A. Paul, *Elementary and Secondary Education Act of 1965*, VCU LIBRS. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965/> (noting that the federal Elementary and Secondary Education Act (ESEA) was introduced in 1965 by President Lyndon B. Johnson as part of his "War on Poverty." A first-of-its-kind federal education bill, this law promised to create equal access to quality education through federal funding that "emphasiz[ed] high standards and accountability.").

and No Child Left Behind (NCLB) of 2002¹¹¹ expanded standardized testing as a means to assess not only students but teachers and schools.¹¹² New laws, like the Every Student Succeeds Act (ESSA)¹¹³ put into law in 2015, have sought to reverse some of the trends of over-testing in the education arena;¹¹⁴ however, the push to maintain over-the-top expectations, accountability, credentialing, and the tie to future economic markers is a stalwart companion of the history of standardized testing for most industrialized nations.¹¹⁵

IV. ACCOUNTABILITY, CREDENTIALING, AND SCHOOL CHOICE

A. Accountability

Before Horace Mann and other like-minded individuals throughout Western Europe introduced standardized testing, education in the U.S. and most developed nations was focused on providing

111. See generally Jeannette L. Nolen & Brian Duignan, *No Child Left Behind*, BRITANNICA (Jan. 31, 2024), <https://www.britannica.com/topic/No-Child-Left-Behind-Act> (noting that the No Child Left Behind Act (NCLB), an update to the ESEA, was introduced into law in 2002 by President George W. Bush. This law significantly changed the “curriculum of public primary and secondary schools in the United States and dramatically increased federal regulation of state school systems.” Under this law, yearly standardized testing was required, and adequate progress toward proficiency in all areas was deemed essential. Under this law, teachers were required to meet much higher standards, and in many places, students test scores correlated with teachers’ pay and tenure rights. Most research suggests that NCLB had more negative impacts on U.S. education systems than positive ones).

112. HST, *supra* note 81.

113. See generally *Every Student Succeeds Act (ESSA)*, U.S. DEP’T OF EDUC., <https://www.ed.gov/essa?src=rn> (last visited Mar. 30, 2024) (noting that the Every Student Succeeds Act (ESSA) was introduced by President Barack Obama on December 10, 2015, as a reauthorization of ESEA. Its purpose is to advance equity in American schools while providing critical protections for America’s disadvantaged and high-needs students. Standardized testing is still mandated under the law).

114. *Every Student Succeeds Act: Assessments under Title I, Part A & Title I, Part B: Summary of Final Regulations*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/elsec/leg/essa/essaassessmentfactsheet1207.pdf> (last visited Mar. 30, 2024) (stating that testing should focus on equity and excellence. Assessments are to be done annually statewide, administered to all students in “reading/language arts and mathematics in grades 3-8 and once in high school, as well as assessments once in each grade span in science for all students and annual English language proficiency assessments in grades K-12 for all English learners.” Alternative testing for students with severe cognitive disabilities may be assigned an alternative test, but this is capped at 1 percent per state in each subject. These numbers do not include individual teacher, district, or state testing numbers.).

115. See *id.*

general knowledge and critical thinking skills so children could become responsible citizens capable of making informed decisions regarding government and religion while cinching societal ties within a nation.¹¹⁶ Originally, standardized testing was introduced to provide accountability for student performance, essentially making students responsible for their own learning, while also demonstrating the inadequacies of teaching staff and local school districts.¹¹⁷ However, accountability became the rallying cry for neoliberalism, and standardized testing became the catalyst in education.

By 1965, testing requirements laid out in the ESEA would cause the diffusion of assessment-driven data to spread to every state in the U.S., demonstrating that students were performing appropriately to compete in the modern market and continuing to improve economic performance.¹¹⁸ Education was no longer focused on creating well-rounded and responsible citizens, but on creating employees for modern businesses and corporations.¹¹⁹ Standardized tests seemingly provided the data necessary to determine whether students were obtaining the knowledge and skills to compete in a capitalistic job market.¹²⁰

However, in 1983, *A Nation at Risk* added a new caveat to the idea of accountability.¹²¹ The report incorrectly ascertained that not only were students failing to reach the academic standards necessary to compete in the local economy but children in the U.S. were falling behind their international counterparts, particularly in STEM¹²² areas.¹²³ Yet, according to experts, simply focusing on issues with standardized tests or the performance of children alone could not explain this failure—it must have some other common factor, one shared by all students in developed nations.¹²⁴ Thereby, the determining factor in *A Nation at Risk* seemingly revealed to many staunch accountability proponents that the educators themselves were failing to properly teach

116. Nancy Kober & Diane Stark Rentner, *History and Evolution of Public Education in the US*, CTR. ON EDUC. POL'Y 1, 2-3 (2020), <https://files.eric.ed.gov/fulltext/ED606970.pdf>.

117. *See* HST, *supra* note 81.

118. Hursh, *supra* note 17, at 605-06.

119. *See id.* at 609-11.

120. *Id.*

121. *See id.* at 606.

122. Refers to: Science, Technology, Engineering, and Math.

123. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983).

124. *See id.* at 11.

their students.¹²⁵ Thus, the idea of teacher accountability, not only in the U.S. but around the world in developed nations, began to promulgate throughout discourse regarding educational standards.¹²⁶ The teachers were to blame, becoming the scapegoat for State-led accountability *failure*.¹²⁷

Soon, standardized tests were not only being used to determine student accountability but were also used to determine if teachers were *appropriately* teaching their students.¹²⁸ Teacher accountability began to garner more steam throughout the educational and political discourse in the U.S. and the U.K.¹²⁹ Largely up until the 1980s, local school boards and teachers were responsible for creating the curriculum used for students.¹³⁰ Each individual school district determined the textbooks and materials required for the local curriculum.¹³¹ Most educators believed keeping education relevant to the localized area helped children engage within their communities and facilitated a sense of belonging and communal ties.¹³² For example, until 1988, when the Education Reform Act (ERA) was introduced in the U.K., the curriculum was decentralized throughout the country.¹³³ With the passing of the ERA in the U.K., a nationalized curriculum was advanced to all schools in England, Wales, and Northern Ireland that had to be followed.¹³⁴ Then Prime Minister Margaret Thatcher envisioned that “the changes would combine much greater control from the central government with the use of market forces to improve schools by permitting parents to choose among schools, in part on the basis of test results.”¹³⁵ Notwithstanding,

125. *See id.* at 11-14.

126. *See generally* Harness, *supra* note 1.

127. *See generally* Melissa Ann Harness, *Viewing Power, Politics, and Loss: A Critical Discourse Analysis of the Mass Media’s Representations of Teacher Unions in the United States and the Consequences Concerning Policy* (Dec. 2016) (Ph.D. dissertation, University of Tennessee, Knoxville) (on file with the University of Tennessee, Knoxville).

128. *See* Hursh, *supra* note 17, at 606-11.

129. *Id.* at 606-11, 614 & 618.

130. *Id.* at 606.

131. *See id.*

132. Kris Sloan, *The Expanding Educational Services Sector: Neoliberalism and the Corporatization of Curriculum at the Local Level in the US*, 40 J. CURRICULUM STUD. 555, 573 (2008).

133. Lynn Olsen, *England Refines Accountability Reforms*, EDUC. WK. (May 5, 2004), <https://www.edweek.org/policy-politics/england-refines-accountability-reforms/2004/05>.

134. *Id.*

135. *Id.*

however, both in the U.S. and the U.K., these state-standardized tests did not consider the needs of a locality but were based solely on often arbitrary state-raised standards and neoliberal principles.¹³⁶ Nonetheless, due to a continuing decline in performance on standardized testing in both countries, political discourse further became even more focused on centralizing educational standards and testing, paving the way for extremely overt state and federal government intervention.¹³⁷

B. Teacher Certification

In the U.S., by 2005, NCLB created an even more stringent new standard for education and teacher certification.¹³⁸ Suddenly, teachers had to meet specific criteria to qualify for a teaching license, such as passing a standardized test, obtaining a certain college degree, and spending a specified amount of time in the classroom before a license could be issued.¹³⁹ Teachers and school districts had to implement a curriculum created at the state level using guidelines set up by the U.S. Department of Education.¹⁴⁰ Students would be tested repeatedly throughout their primary and secondary education.¹⁴¹ They were also required to obtain a certain score, and schools could be punished for failing to obtain the mandatory results.¹⁴² Teachers were also responsible for ensuring an arbitrary percentage of their students received a passing score.¹⁴³ Teachers could be disciplined for inadequate test scores, up to and including termination.¹⁴⁴ Schools that failed to obtain a certain amount of passing scores were also disciplined (i.e., lower funding, teacher and administrative layoffs, closures, etc.).¹⁴⁵ The passing standard test scores would increase yearly based on the assumption that

136. *See id.* *See also* Hursh, *supra* note 17, at 606.

137. *See* Hursh, *supra* note 17, at 606-611.

138. Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WK. (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See* Jason Fritz, *Many Children Left Behind: How the No Child Left Behind Act is Damaging our Children and our Schools*. PENN GRADUATE SCH. OF EDUC. PERSPS. ON URB. EDUC. (2004), <https://urbanedjournal.gse.upenn.edu/archive/volume-3-issue-3-spring-2005/meier-d-wood-g-eds-2004-many-children-left-behind-how-no-child->

144. *Id.*

145. Klein, *supra* note 138.

the increasing test scores would force teachers to hold students to higher standards yearly.¹⁴⁶ The rhetoric around these changes focused on the idea that such methods would hold teachers and schools accountable for failing to provide adequate instruction, which would inevitably lead to the deterioration of the overall workforce within the U.S.¹⁴⁷ As a result of these *standards*, it was touted, all schools would compete.¹⁴⁸ Failing schools would be remediated or closed and students as a whole would gain a more equal and equitable education as test scores increased or parents got to *choose* what schools were best for their children to attend.¹⁴⁹

Similarly, in the U.K., by the late 1990s, the ERA and accountability in education became a buzzword, and testing took on a whole new meaning.¹⁵⁰ Introduced in 1992, under then-conservative John Major's government, standardized tests were used to create 'School League Tables'¹⁵¹ with the aim of giving parents the "consumer information they needed to create a free market in school choice."¹⁵² Essentially, if schools were underperforming, parents would have the information they needed to help propel changes in policy or administration in *failing* schools or the ability to choose another school to send their children to.¹⁵³ However, by the early-2000s, these *School League Tables* simply shifted the priorities in many schools from teaching content for learning sake to teaching "exam tactics to help schools to advance up the league table rankings."¹⁵⁴ This was similar to what happened under the NCLB and Race to the Top programs in the

146. Fritz, *supra* note 143.

147. *See id.*

148. *See* Klein, *supra* note 138.

149. *Id.*

150. *See infra* notes 160-164 and accompanying text.

151. *What are School League Tables and Why Do They Matter?*, BBC NEWS (Dec. 12, 2019), <https://www.bbc.com/news/education-42310494> (noting that School League Tables list school performance data for standardized tests given at ages, 6, 10 or 11, 15 or 16, and 17 or 18. These tests are published by the Department of Education and available on their facility website.) [hereinafter League Tables].

152. Mike Baker, *League Tables: Only Half the Story*, BBC NEWS (Jan. 13, 2007, 1:16 PM), http://news.bbc.co.uk/2/hi/uk_news/education/6257063.stm.

153. *See id.*

154. Harriet Blackburn, *Lessons from Britain in What Not to Do with Standardized Testing*, CHRISTIAN SCI. MONITOR (Oct. 27, 2010), <https://www.csmonitor.com/Business/The-Adam-Smith-Institute-Blog/2010/1027/Lessons-from-Britain-in-what-not-to-do-with-standardized-testing>.

U.S.¹⁵⁵ However, by 2001, Northern Ireland abolished the *School League Tables*, while Scotland did so in 2003.¹⁵⁶ Even though these countries abolished the *School League Tables* because of the negative implications that were being raised about student and teacher accountability issues under them, Wales began publishing the performance of testing in 2015 through a color-coded system, while in 2017, Scotland began reporting reading, writing, and math as part of their new Curriculum for Excellence program.¹⁵⁷ Critics of the *School League Tables* in the U.K. argue, much like those in the U.S., that the overuse of standardized testing to *prove* accountability in education systems only go to “encourage competition, rather than collaboration, between schools in local areas and can lead to middle-class parents pushing to get their children into top schools, further driving down standards at less popular schools.”¹⁵⁸ Under such harsh standardized testing measures children seem to be pressed “into subjects and choices that make the school look good, rather than broadening their education.”¹⁵⁹

C. School Choice

Making these inequities even more substantiated as human rights violations is the preponderance of school choice advocates throughout developed nations.¹⁶⁰ The *packaging* of accountability and

155. See generally Harness, *supra* note 1.

156. League Tables, *supra* note 151.

157. *Education: System Measuring Wales' School Performance Scrapped*, BBC NEWS (June 27, 2022), <https://www.bbc.com/news/uk-wales-61938251> (noting that beginning in 2022, Wales decided again to change trajectory, scrapping the color-coded system for “a robust self-evaluation system.” This new system, which has not yet been put into place, is supposed to help facilitate ‘real’ learning in the classroom instead of teaching to a test. The leaders of the Welsh government found human rights issues relating to the *competition* created through the use of the color-coded reports and decided that changing evaluation practices away from standardized testing needed to be a measure taken within their State. The outcomes of such measures have yet to be known.) [hereinafter Education]. See EDUCATION SCOTLAND, MILESTONES: SUPPORTING LEARNERS WITH COMPLEX ADDITIONAL SUPPORT NEEDS (2019) (expanding the Curriculum of Excellence program to include health and wellbeing).

158. *School Performance Data Explained*, BBC NEWS (Jan. 29, 2015), <https://bbc.com/news/education-30210311>.

159. *Id.*

160. Lora Cohen-Vogel, *Integrating Accountability With Choice: Implications for School Governance*, 78 PEABODY J. EDUC. 4, 11 (2003) (noting that school choice advocates are those that are proponents of an “institutional arrangement whereby some opportunity exists for parents

choice was first introduced in the U.K. under Prime Minister Thatcher's administration and the neoliberal policies that were put into place in the late 1980's.¹⁶¹ The resulting fallout of this coupling was touted to be the "most ambitious" program of inspections mounted in the world."¹⁶² In the U.K. since making school choice an option under an accountability model, students and parents have felt anything but in control.¹⁶³ The process of trying to find a *decent* school "has created a maelstrom of anxiety and disenchantment" and is awash with inequalities.¹⁶⁴ In a report published by the U.K.'s Department for Education in 2018, "data revealed that schools with the highest numbers of pupils on free school meals are facing the deepest funding cuts," thereby furthering the inequality of a bifurcated education system and bashing the bastion of opportunity that it should hold within society.¹⁶⁵

Meanwhile, in the U.S., the coupling of choice and accountability has had a similar trajectory to the U.K. and other developed nations that are using school choice as an accountability measure; however, many states have taken this idea to an extreme.¹⁶⁶ For instance, Florida has become the nation's school choice laboratory of the U.S.¹⁶⁷ Florida's Governor Ron DeSantis signed HB1 into legislation in early 2023.¹⁶⁸ This bill allows families to receive \$7,600 a year in the

to choose the school their child attends in lieu of policies that assign students on the basis of catchment areas.").

161. *Id.* at 14 (noting the Education Reform Act (ERA) of 1988 used a catchment area to assign students to where they would attend school. Four years later, the catchment was disregarded, and a new open system where students were able to choose the school, they wanted to attend became available to them. By 1992, the Education Schools Act (ESA) in conjunction with the ERA gave the State regulatory control over curriculum and testing.).

162. *Id.*

163. Aveek Bhattacharya, *Letting Families in England Choose Schools Hasn't Made Things Better—Just More Stressful*, GUARDIAN (Mar. 1, 2022, 2:00 PM), <https://www.theguardian.com/commentisfree/2022/mar/01/england-choose-schools-stressful-national-offer-day-scotland>.

164. *Id.*

165. Frances Ryan, *'Choice' is Code for Inequality—and it has Polluted Our Education System*, GUARDIAN (May 3, 2018, 3:00 PM), <https://www.theguardian.com/commentisfree/2018/may/03/choice-inequality-education-system-social-segregation>.

166. *See generally* Harness, *supra* note 1.

167. Kevin Mahnken, *Florida Just Became the Nation's Biggest School Choice Laboratory*, THE 74 (Mar. 30, 2023), <https://www.the74million.org/article/florida-just-became-the-nations-biggest-school-choice-laboratory/>.

168. *Id.*

form of a voucher or scholarship account to defray the expense of tuition.¹⁶⁹

V. CONSEQUENCES OF THE ACCOUNTABILITY, CREDENTIALING, AND SCHOOL CHOICE MOVEMENTS

As discussed above, the changes in accountability and teacher credentialing, as well as school choice, supposedly came from the idea that students would be able to receive a better and more equitable education if local parents were aware of the inadequacies in their local schools and the options available to them. However, within a few years, it became apparent that NCLB had not achieved any of the legislature's goals in the U.S.¹⁷⁰ Instead of improving, more and more schools were listed as failing every year.¹⁷¹ Part of the trouble with NCLB was that the law did not account for increasing test scores to determine if a school was failing.¹⁷² Instead, NCLB created an arbitrary score that schools had to meet to succeed.¹⁷³ Since the base score increased yearly, many schools would fail to pass, regardless of whether their test scores improved.¹⁷⁴ This led to a cyclical depression of the failing school.¹⁷⁵ The NCLB required that schools have their funding cut while simultaneously increasing mandatory spending at the school level.¹⁷⁶ These cuts and increased expenditures were usually aimed at schools that had large populations of minority and impoverished students.¹⁷⁷ As a result, programs run by the school to help these students succeed were cut, and measures had to be taken to prevent further disciplinary actions against the school.¹⁷⁸

Further, in many developed nations, the pressure on schools to use methods to artificially inflate test scores is encouraged, such as prompting problem students to drop out, transferring poor test-taking students to special education classes, and particularly in the U.S., failing

169. *Id.*

170. Klein, *supra* note 138.

171. *Id.*

172. Hursh, *supra* note 17, at 612-13.

173. *Id.* at 613.

174. *Id.*

175. *See id.* at 608-09.

176. *Id.* at 609.

177. *Id.* at 612-13.

178. *See id.* at 614-16.

English as Second Language (ESL) students repeatedly to prevent them from taking the standardized exams.¹⁷⁹ In the U.S., enrollment of minority students in special education classes increased significantly after NCLB was passed.¹⁸⁰ Dropout rates for minority and low socioeconomic students dramatically increased over the same period.¹⁸¹ Additionally, test scores for ESL students decreased during this time, especially since many states only give the tests in English; which is still the case in 2023.¹⁸² Racial and economic disparities in educational performance increased after NCLB was passed.¹⁸³ Instead of improving education and making educational performance more equitable, NCLB caused the exact opposite.¹⁸⁴ The same consequences concerning racial and economic disparities under standardized testing regimes happened in the U.K.¹⁸⁵

In 2015, NCLB was replaced by the Every Student Succeeds Act (ESSA).¹⁸⁶ However, the ESSA did not radically alter the accountability measures or criteria for teacher credentialing that opponents of standardized testing hoped to correct.¹⁸⁷ The terms of performance-based accountability for teachers and schools have largely been left up to the individual states to handle, and in many ways have narrowed the interactions and infusion of the federal government in educational settings.¹⁸⁸ At first glance, limiting more government involvement would seem to be a way in the right direction concerning standardized

179. *See id.* at 614-16 & 618.

180. *Id.* at 616.

181. *Id.* at 615-16.

182. *See* LISA TABAKU ET AL., MIDWEST COMPREHENSIVE CTR. REV., STATE ASSESSMENTS IN LANGUAGES OTHER THAN ENGLISH 2 (2018) (noting that only 29 states, including the District of Columbia (D.C.) and Puerto Rico offer standardized tests in languages other than English, while only four states offer their tests in another language other than English or Spanish). *See also* Rosales, *supra* note 95, at 10; Hostetler, *supra* note 25, at 484.

183. Hursh, *supra* note 17, at 615-18.

184. *See id.* at 617-18.

185. *See* Jessica Ayre, Cultural and Linguistic Capital, Standardized Tests and the Perpetuation of Educational Inequalities (Feb. 2012) (Ph.D. dissertation, University of British Columbia) (on file with the University of British Columbia).

186. *See* discussion *supra* History of Standardized TESTING.

187. *See generally* Harness, *supra* note 1.

188. Alexander Walsh et al., *Has the "Every Student Succeeds Act" Left Children Behind?*, REGUL. REV. (Aug. 6, 2022), <https://www.theregreview.org/2022/08/06/saturday-seminar-has-the-every-student-succeeds-act-left-children-behind/>

testing; however, in certain parts of the U.S.,¹⁸⁹ the in-equitabilities that are allowed to creep into the educational systems have in some ways become worse, especially concerning the allocations of resources passed onto “underperforming and disadvantaged subgroups of students” including ESL, minority, and those in lower-socio economic regions.¹⁹⁰

Much like in the U.K., the U.S. is battling with the issues of choice in conjunction with accountability measures, leaving schools without the funding needed for not only the families with children but the entire system overall including teachers.¹⁹¹ In most states in the U.S., as mentioned earlier, teachers must be credentialed as part of the accountability standards created through standardized test scores and previous legislative action upon the states.¹⁹² However, in places where school choice, over-testing, and overburdensome accountability measures have become significant human rights issues, states have been hard-pressed to find teachers to fill the classrooms and have begun to lessen restrictions on credentialing.¹⁹³

Returning to Florida once again as an example, where some school systems no longer require any formal training or education other than a high school diploma to become a teacher.¹⁹⁴ It is estimated that approximately 2.4% of teacher positions are vacant in 2023.¹⁹⁵ Compounding the problem is the fact that even more teacher aids and other support staff is reported as vacant.¹⁹⁶ Schools cannot afford to pay their teachers a higher salary because of the poor management school

189. See generally Nick Anderson, *Political Polarization is Sorting Colleges into Red and Blue Schools*, WASH. POST (April 3, 2023), <https://www.washingtonpost.com/education/2023/04/03/red-blue-college-culture-war/>.

190. Walsh, *supra* note 188.

191. See Harness, *supra* note 1.

192. See generally Hursh, *supra* note 17.

193. Katie LaGrone, *Proposed New Bill Eases Licensing Requirements to Become a Teacher in Florida*, ABC ACTION NEWS: WFTS TAMPA BAY (Feb. 22, 2023, 10:36 AM), <https://www.abcactionnews.com/news/state/proposed-new-bill-eases-licensing-requirements-to-become-a-teacher-in-florida>.

194. *Id.* As of the writing of this article, those with a high school diploma, associate degree, or bachelor's degree, depending on the jurisdiction, and teaching in Florida must meet other requirements as they continue into their career as an educator, including taking classes meant for teachers and undergoing reviews by administrators.

195. *Id.*

196. *Teacher and Staff Shortage*, FL. EDUC. ASS'N (Sept. 2022), <https://feaweb.org/issues-action/teacher-and-staff-shortage/>.

choice causes.¹⁹⁷ A proposed solution as of early 2023 would allow teachers to extend temporary teaching certificates for three to five years and cancel the general knowledge test for teacher certification pending positive principal evaluations.¹⁹⁸ Although this may help alleviate some of the issues concerning teacher vacancies now, it does not address the harsh realities that standardized testing and accountability standards created and continue to manifest concerning teacher recruitment and retention.¹⁹⁹

Like accountability and teacher credentialing standards, school choice programs have failed to achieve the lofty goals envisioned by its supporters. Although some bills, such as the one recently passed in Florida, promise choices to families that may be struggling at some schools, the cost of following this kind of model is extreme to students, parents, teachers, and many schools throughout the state.²⁰⁰ For example, in Hillsborough County, Florida, a child that struggles with dyslexia may find options that would accommodate and significantly help them overcome or highly manage this debilitating educational issue in certain schools.²⁰¹ However, most schools within the state hold lotteries for new incoming students every year, and even if a child were able to have their ‘number’ drawn for a spot, the average cost of sending a child that has an issue like dyslexia to one of these schools outside their zoned district is around \$18,700 per year, “not including books,

197. Mahnken, *supra* note 167.

198. LaGrone, *supra* note 193.

199. See generally Harness, *supra* note 1; *Florida Will Dump Standardized Tests in Favor of Progress Monitoring in Public Schools*, WFSU PUBLIC MEDIA (Mar. 16, 2022, 8:47 AM), <https://news.wfsu.org/state-news/2022-03-16/florida-will-dump-standardized-tests-in-favor-of-progress-monitoring-in-public-schools> (noting that furthering and in conjunction with what the state is doing concerning the many issues in its education system, it decided to ‘give up’ standardized testing, in favor of ‘progress monitoring’ in public schools only. Students will be required to take three state ‘progress’ tests per year. These ‘progress’ tests will be used to determine school grades, grade promotion, and high school graduation. These tests are essentially higher stakes than the original standardized testing that has been given historically and still are being given as accountability measures for the state. This testing will officially begin in the 2023-2024 school year.).

200. See *supra* notes 166-169 and accompanying text.

201. Laura Pappano, *Florida Just Expanded School Vouchers—Again. Here’s What it Could Mean for Public Education*, USA TODAY (Apr. 24, 2023, 1:06 PM), <https://www.usatoday.com/story/news/education/2023/04/24/florida-private-school-voucher-expansion/11688114002/>.

supplies, uniforms, tutoring, and other expenses.”²⁰² This extra incurred debt is not affordable for many students throughout the state.²⁰³

The whole premise of standardized testing was so that teachers and school systems would be held accountable for their failings, thus explaining why excessive education and complicated credentialing measures for teachers are so important within the legislation that was put forth throughout the history of these neoliberalistic movements around assessment in the U.S. and other developed nations like the U.K.²⁰⁴ These movements were based on the premise that schools needed to make sure students were ready for corporate employment.²⁰⁵ However, since states are lessening the requirement for teachers, it seems that either the premise around accountability measures rests on false, arbitrarily contrived notions of progress, or that schools are aware that standardized testing is a farse to achieve their goal of privatizing K-12 education.²⁰⁶ These realities concerning standardized testing should not have occurred in the first place. Upon examination, it could be said that all the issues surrounding the tangled, multi-layered web of atrocities that are created by standardized tests, accumulate to massive human rights violations that need to be exterminated.

VI. RECOMMENDATIONS

Standardized testing and accountability standards have caused the education system to slowly become less equitable, and, as presented in the last section, the education system is getting worse in developed nations that subscribe to this model.²⁰⁷ To correct this problem we have developed a three-part solution that will make education more equitable and accountable.

A. Remove Education from the Globalized Market

The first recommendation regarding the contention that the overuse of standardized testing is a human rights violation needs to come from a change in the rhetoric concerning the purposes behind

202. *Id.*

203. *Id.*

204. *See generally* Harness, *supra* note 1.

205. *See* Cohen-Vogal, *supra* note 160, at 5-6.

206. *See generally* Harness, *supra* note 1.

207. *See supra* Section IV.

testing in education. The discourse from neoliberal policies and economists about standardized testing creating ‘equality,’ ‘accountability,’ ‘competition,’ ‘economic-growth potential,’ and most recently, ‘choice’ must no longer be one of the loudest voices heard in the educational arena, particularly in developed nations.²⁰⁸ Just because the discourse of standardized testing sounds good does not mean it is justified to complete the understanding of the whole of education. These types of discourses only go to overpower and negatively influence state guarantees of education equity under a human rights model.²⁰⁹

Further, the lack of a shared discourse between neoliberal forces and state education systems will further deteriorate the needed successes that no standardized testing can create.²¹⁰ There must be a consensus and a shared vocabulary between all stakeholders, thereby creating a “rights-based” stance on the vocabulary that deals with human rights issues related to education.²¹¹ This will help guarantee moving forward that testing is not equated only with traditional economic principles, but with the new ideology behind understanding education as a human rights issue that is separate and unique, not confining to a globalized market mentality.²¹²

B. Use Standardized Testing to Teach, Not to Punish

The second recommendation regarding standardized testing in developed nations is the need for state legislators to create laws that guarantee certain student rights concerning the learning and performance aspects of standardized assessments. If developed nations are going to hold accountable teachers, students, and parents for the results of standardized testing (or any other discourse used to equate to the same principled idea of standardized testing), then there needs to be more transparency and the ability to learn from the successes and failures of such endeavors. Getting a raw and adjusted score back the

208. See generally Harness, *supra* note 1.

209. *Id.*

210. Tomasevski, *supra* note 4, at 6-7.

211. *Id.*

212. Chris McNutt, *Unpacking “Neoliberal” Schooling*, HUM. RESTORATION PROJECT (May 6, 2020), <https://www.humanrestorationproject.org/writing/unpacking-neoliberal-schooling>.

following school year is not good enough if, as nations, we are resting our educational competency on them. Another recommendation is for transparency and control of such items to redress rights that are neglected or refused to students and teachers historically.²¹³ Students should have the right to “receiv[e] academic information on tests (e.g., the curriculum covered and assessment criteria),” to “receiv[e] technical information on tests (e.g., reliability and validity),” to “hav[e] annotated scripts returned,” the ability to “hav[e] recourse to appeals,” and to “hav[e] opportunities to re-sit a test.”²¹⁴

A cotangent argument to the recommendation above is to use students’ test scores not as a measure of accountability but as a remediation measure (i.e., what these students should focus on). For example, suppose the standardized assessment shows that the student has a deficiency in mathematics. In that case, the student should be given more instruction in that subject, whether that includes more mathematics classes or smaller class sizes. This would allow the student to receive the correct amount and type of instruction according to the subject area at issue. Further, the testing should also consider the student’s previous test performance to determine if any improvement has been made instead of using an arbitrary set percentage. This will allow educational systems and individual teachers to realize needs that may not have previously been available to them.²¹⁵

C. Do not be Afraid to Fail, Learn from It

Finally, governments have a responsibility to uphold human rights obligations within education.²¹⁶ There are guarantees that need to be made by developed nation governments to provide not just a free and equal education to everyone, but an equitable one that under human rights policies broadens the understanding that the best interests of a child are not served by requiring they perform to a minimum standard just to make sure they are accountable for either their failure or success

213. Gardner, *supra* note 2, at 379.

214. *Id.* at 382.

215. These types of assessments discussed in this recommendation are not meant to determine grades, promotion, or graduation as many ‘alternative’ tests, like the ‘progress tests’ in Florida are designed to do. These tests are still high-stakes tests that are accountability minded and do not adhere to the human rights principles discussed within this work.

216. Tomasevski, *supra* note 4, at 7.

going into the future.²¹⁷ We must remember that most successful people fail many times before becoming accomplished.

VII. CONCLUSION

Katarina Tomasevski stated eloquently that education is a human right. She wrote:

Governmental human rights obligations are based on the premise that education is a public good and institutionalized schooling a public service. A global commitment to education as a right demands acceptance of human rights obligations by all. Governments, individually and collectively . . . Global education strategies, economic or fiscal policies, international trade law, or anti-terrorism campaigns can constrain – rather than enhance – both the ability and the willingness of individual Governments to guarantee the rights to education.²¹⁸

Throughout developed nations it is essential that human rights are promoted in a way that creates a culture fostering as few abuses as possible. Accountability, inequality, and inequity have often been stalwart companions of testing regimes throughout these states.²¹⁹ Often, the overuse of standardized testing reinforces a model in society that if a student cannot perform within the parameter of *acceptable* ranges, then the student is considered a *burden* in the community where the student lives. This leaves millions of children without hope of a brighter future in an accountability-stressed paradigm.²²⁰

Governments have a responsibility to uphold human rights obligations in relation to education.²²¹ There are guarantees that need to be made by developed nation governments to provide not just a free and

217. *Id.*

218. *Id.* at 8.

219. Poulsen, *supra* note 15.

220. *Id.*

221. Tomasevski, *supra* note 4, at 7-10.

equal education to everyone, but an equitable one that under human rights policies broadens the understanding that the best interests of a child are not served by requiring they perform to a minimum standard just to make sure they are accountable for either their failure or success going into the future.²²² We must remember that most successful people fail many times before becoming accomplished.

But, failure on standardized tests equates to the promulgation necessitating intervention either by the state or federal government in many cases. Thus, the stakes are high for children in developed nations, especially since it may be near impossible to separate educational purposes from neoliberalism itself or to redress the issues surrounding testing and inherent bias and inequities within the tests themselves.²²³ So, what is of importance going forward is to make sure that international treaties, like the UNCRC, are made instruments of purpose and promise in these places.

Much of the reluctance to question standardized testing in developed nations comes from the underrepresentation within the court systems and the absence of human rights treaties within these countries. Even if it is decided that these international instruments should not come to bear to help further protect citizens within these countries, we should look to these documents to persuade and illuminate human rights violations within standardized testing because education should not be “subject to partisan shifts and political whims” at the expense of children’s rights.²²⁴

222. *Id.*

223. *See* McNutt, *supra* note 212.

224. Hostetler, *supra* note 25, at 486.