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The State of Education Reform

Danielle Weatherby*

From the earliest days of the common school to the present struggle to meet the needs of an increasingly diverse population, the country has expected that education will equip citizens for economic survival and growth; prepare them for an increasingly global marketplace; strengthen the bonds among people from different racial, ethnic, cultural, and social class groups; and sustain the nation's democratic institutions. If schools are to do their part in contributing to fulfilling these goals, they need to be extraordinarily resilient and resourceful, and they need to be open to change.

Although data from the National Center for Education Statistics indicates that high school graduation rates in the U.S. are at an all-time high, with 84 percent of high school students earning a diploma in four years,¹ the most recent international standardized test results offered a bleak outlook for America's international rankings, placing American high school students "in the middle of the pack" and, in some cases, far "behind many other advanced industrial nations."² They also show that nearly two dozen other nations still boast secondary-school graduation rates higher than that of the United States³ and that racial and ethnic minorities are more likely to drop out than that of their peers.⁴ So, we still have work to do.

* Associate Professor, University of Arkansas School of Law. Email: dweath@uark.edu. I am deeply indebted to Kristi Bowman of Michigan State Law School for that incredibly helpful lunch we shared at AALS almost a year ago now, Professor Derek Black of South Carolina Law School for generously sharing his expertise and connections with me, and Associate Dean Brian Gallini for his insight and guidance throughout the planning process. Thanks to each of the panelists for their tireless dedication to the field.

1. U.S. Department of Education, National Center for Education Statistics, (2019), available at: <https://nces.ed.gov/fastfacts/display.asp?id=805>.

2. PISA Worldwide Rankings, Organization for Economic Cooperation and Development 2015-2016, available at: <http://www.oecd.org/pisa/data/>

3. *Id.*

4. U.S. Department of Education, National Center for Education Statistics, (2019),

Of course, the social and economic costs of a student not matriculating through graduation are enormous. Indeed, research indicates that high school graduates who attend college are more likely to find employment, to earn at higher levels, to go onto advanced degree programs, and to contribute more taxes than non-graduates.⁵ They are more likely to engage positively in their communities and less likely to depend on social programs.⁶ That is why sustaining a dialogue about how to right the ship is so important.

When people think of the term “education reform,” they think in broad-brush strokes, an umbrella term for the efforts that advocates are making to improve our public education system. During the 2018 *Arkansas Law Review* symposium, we brought together the leading experts in the field to talk about just a few of the themes that have emerged within this movement.

The topics covered by our featured scholars offered just a taste of the efforts made by school advocates, education law experts, and reformers to improve our K-12 system, but they are by no means exhaustive. The panels were inspired by the themes that our experts themselves have observed as emerging within the broader education reform movement and included school choice, the judiciary’s role in education reform, educational equity, and issues affecting Arkansas public schools.

In short, education reform merits discussion and thought because public education is the foundation of our democracy.

For these reasons, I am delighted to introduce the *Arkansas Law Review*’s 2018 symposium issue on *Hiding in Plain Sight: What Education Reform Needs*. The event featured a keynote address by Professor Derek Black and three scholarly panels devoted to a discussion of important issues affecting public education. The symposium also featured a panel dedicated to the state of public education in Arkansas.

Professor Black’s article, *Breaking the Norm of School Reform*, contemplates the reasons why recent school improvement efforts have failed. Black explains that federal

available at: <https://nces.ed.gov/fastfacts/display.asp?id=16>.

5. Fact Sheet: Focusing Higher Education on Student Success, U.S. Department of Education (July 27, 2015), available at: https://www.ed.gov/news/press-releases/fact-sheet-focusing-higher-education-student-success#_ftnref1.

6. *Id.*

attempts at education reform have generally failed because they raise large policy questions that ignore fundamental problems in our public schools. Specifically, he notes that the major comprehensive reform efforts over the last few decades simply preserve the *status quo* and ignore the more basic inequities that pervade the nation's public schools, including inequities in public school funding, student enrollment, and teacher distribution. What makes these glaring oversights even more troublesome, he adds, is that we know better. Tracing the historical evolution of our nation's system of public education from the founder's aspirational goal of equipping children with the skills necessary for citizenship and the post-Civil War adoption of education clauses in state constitutions to the century following that laid the framework for our school desegregation doctrine and the more recent efforts in the late 1990s and early 2000s to hold states accountable for carrying out their duty of preparing *all* students for citizenship, Black embraces the goals that these eras established. He reiterates the basic value upon which our public education system was created: that our democracy rests upon the function of public schools to equip all citizens – “uniformly and equally” - with the skills necessary to become productive members of society. In conclusion, Black suggests that reformers are missing the forest for the trees, ignoring this most basic value and reforming merely for reform's sake. Instead, he argues that we need to break two problematic norms before making any meaningful improvement. By ending the practice of locally funding schools and ceasing the replication of racial and socioeconomic isolation in our public schools, we can reclaim the “common good that makes public schools public.”

The first scholarly panel was titled *The Promises and Pitfalls of School Choice*. It featured an article by Preston C. Green III and Chelsea Connery. In *Charter Schools, Academy Schools, and Related-Party Transactions: Same Scams, Different Countries*, Green and Connery use comparative legal research methodologies to explore why governmental monitoring systems have had a difficult time regulating related-party transactions in both United States charter schools and England's academy schools. Using a technique called functionalism, which examines the problem-solving approach in

different legal systems, Green and Connery compare the monitoring and regulation of related-party transactions in U.S. charter schools to England's academy schools, making insightful suggestions for improving both nations' systems. Ultimately, they conclude that the remarkable similarities between the two countries' monitoring systems unsurprisingly yield similar problems.

Also included in this Issue is an article by Professor Kevin Brady and Wayne D. Lewis, Jr., the Commissioner of Education for the Commonwealth of Kentucky, titled *Unchartered Territory for the "Bluegrass State": Lessons to be Learned from Over a Quarter-Century of State Charter School Legislation*, which explores the correlation between features of state charter school laws and charter school success. In light of the research surveying a span of over twenty-five years of charter school legislation, Brady and Lewis offer important lessons to be learned from existing charter school legislation, identifying four key aspects of Kentucky's recently-passed charter school law.

The remainder of the Issue's authors participated in a panel titled *The New Impediment to School Reform*. It featured articles by Professors Scott Bauries, Areto Imoukhuede, Twinette Johnson, and Joshua Weishart. Professor Bauries' article, *Perversity as Rationality in Teacher evaluation*, critiques the modern-day version of rationality review, characterizing it as "judicial review in name only," through the lens of Florida's teacher evaluation technique called "value-added modeling." Citing *Lochner v. New York*, Bauries argues that modern courts have neglected their duty of reviewing challenged legislation and serving as a check on legislative action that is irrational, protectionist, and contrary to the public interest. In *In the Room Where it Happens: Including the "Public's Will" in Judicial Review of Agency Action*, Professor Johnson urges a rethinking of agency deference schemes in light of the importance of recognizing the people's will in the courtroom. Professor Johnson argues that the current level of judicial deference to agency action is misplaced when considering the constitutionality of laws like the Higher Education Act, a super-statute that represents a clear resolution by the people that access to post-secondary education through its Title IV financial aid funds be preserved over time. Professor Imoukhuede's article

Enforcing the Right to Public Education argues that the judiciary does not provide meaningful and consistent enforcement of what each state in the union has recognized as a right to public education. Recognizing that states have neither enforced racial equality in public education nor consistently implemented quality standards, Imoukhuede suggests that the only way to remedy this enforcement gap is to recognize once and for all a federal fundamental right to public education. Finally, Professor Weishart's article titled *Rethinking Constitutionality in Education Rights Cases* criticizes what he calls a "judicial exit strategy" - the judiciary's review of constitutionality in school funding formulas. He argues that instead of judging school funding formulas as "reasonably calculated" to achieve an adequate or equitable education, which assumes a fixed point of compliance, judicial review of constitutionality in education rights cases should require a "demonstrable and durable fidelity to the constitution."

These pieces provide a nuanced glimpse into just a few areas that occupy the field of education reform and educational policy generally. They explore normative problems with our current thinking about education reform, analyze the judiciary's role in providing a check on state and local power, make illuminating and thoughtful comparisons to other educational models, and offer thought-provoking suggestions for improvements to our public education system. It is with great pleasure that I invite you to read and reflect on this symposium issue of the *Arkansas Law Review* on *Hiding in Plain Sight: What Education Reform Needs*.

There are so many people who worked to make this symposium a truly excellent event. I am grateful to Dean Margaret Sova McCabe, Vice Chancellor for Economic Development and Dean Emeritus Stacy Leeds, Associate Dean Brian Gallini, and my faculty colleagues at the University of Arkansas School of Law for their tremendous support for this event. I am also thankful to Professor Derek Black for delivering the keynote address and to each of the panelists for contributing their expertise to this important discussion. I am also deeply grateful to the members of the *Arkansas Law Review*—particularly Maggie Rushing and McKenzie Raub—who worked tirelessly to plan and host an outstanding

symposium. Finally, I am thankful to all of the Law School staff—especially Michele Payne, Bob Wheeler, Darinda Sharp, and Jacqueline Sites—for their incredible work behind the scenes to make the symposium a truly memorable event.