

Cash is King: How Market-Based Strategies Have Corrupted Classrooms and Criminal Courts in Post-Katrina New Orleans

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His frustration with some Americans was like that of a disappointed parent. He was so content in this country, so impressed with and loving of its opportunities, but then why, sometimes, did Americans fall short of their best selves?

—Dave Eggers, *Zeitoun*¹

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1. DAVE EGGERS, *ZEITOUN* 37 (2009). This nonfiction narrative traces the story of Abdulrahman Zeitoun. Though not about poverty, it does succinctly capture the frustration many people faced with post-Katrina New Orleans.

INTRODUCTION

On many accounts, it is a tale of two cities.

The headlines and marketing machines tout to the world that “The Big Easy is Back.”² But beyond the celebrations and parades, the story for poor Katrina survivors is very different. While many residents and businesses are enjoying a resurgence a decade after Katrina stormed through, others in post-Katrina New Orleans have a different experience. More than ten years after Hurricane Katrina, the city still struggles with systemic failures. These problem areas include housing, health care, mental health treatment, employment, education, and the criminal justice system. All of these challenges are much more apparent in poor, thinly-resourced communities of color.

This Article explores the impact capitalism and market-based strategies have had on the resurgence of New Orleans. The government’s embrace of privatization within historically public domains has only widened the gap between the poor and the affluent communities of New Orleans. The Article specifically uses the challenges poor people face in the schools and the criminal justice system to critique the importation of market-based strategies in the public arena. These practices are especially pernicious because of the cycle they promote. Impaired access to education and exposure to the criminal justice system have long been regarded as significant indicators of whether someone will remain in poverty.³ Moreover, a strong correlation exists between students who are cast out from the school system due to academic underperformance or minor disciplinary infractions and those who become trapped in the criminal justice system. The numerous legal challenges against the post-Katrina school and criminal court systems indicate that reliance on market-based strategies in these arenas is fraught with legal defects. The proliferation of charter schools and the privatization of the criminal justice system have allowed both systems to impair individual rights.

2. See, e.g., Mark Johanson, *For New Orleans It’s Been Anything But Easy, But the Big Easy Is Back, Post-Katrina Style*, INT’L BUS. TIMES (Aug. 25, 2012), <http://www.ibtimes.com/new-orleans-its-been-anything-easy-big-easy-back-post-katrina-style-758817>; Bob Schieffer, *The Big Easy Is Back & Better Than Ever*, CBS NEWS (Feb. 3, 2013), <http://www.cbsnews.com/news/schieffer-the-big-easy-is-back-better-than-ever/>.

3. REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 26 (2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

Following the introduction, Part I of this Article traces the unprecedented expansion of charter schools in post-Katrina New Orleans. This section examines the rise of charter schools in the city following the storm, tracks their gains, and identifies some limitations raised by the creation of an all-charter model. This section also highlights some of the questionable practices employed at charter schools to boost academic performance. Critics challenge such practices as concerted efforts to marginalize students who threaten the “bottom line.” Next, this section examines some of the lawsuits that came about as a result of New Orleans’ charter school model. It specifically analyzes the claims that the charter school model dilutes individual rights for the city’s most vulnerable populations—the poor, the learning-disabled, and children of color.

Part II of this Article discusses the ways in which indigent criminal defendants shoulder the financial burden for the New Orleans criminal justice system—from health care perks for judges to profits for jailers. In Part III, this Article explores possible solutions to level the playing field for people with limited resources in the classroom and criminal justice system. The Article specifically advocates for reform tied to greater community involvement and heightened accountability. Given the ways in which the pursuit of profit and the dilution of individual rights are inextricably bound, this Article makes a case for exercising caution within the capitalistic encroachment of market-based strategies in the public schools and criminal justice arenas. As New Orleans serves as an experimental model for the nation on these issues, the government must maintain stringent safeguards to guard against the marginalization of vulnerable communities. The influence of the city’s post-Katrina policy experiment is magnified as other urban areas look to its novel methods to confront similar challenges.

I. EXPANSION OF CHARTER SCHOOLS AT THE EXPENSE OF VULNERABLE STUDENTS

New Orleans’ charter school proliferation following Katrina is a national example of market-based influence in education. New Orleans has promoted this new system’s success by pointing to gains the district has made on standardized tests. Indeed, by many important measures, the charter schools in New Orleans look like a success story: high school graduation rates are up,⁴ more seniors are attending college,⁵ and some

4. Walt Garner, *Are New Orleans Charter Schools a Model?*, EDUC. WK. (Sept. 4, 2015, 7:54 AM), http://blogs.edweek.org/edweek/walt_gardners_reality_check/2015/09/the_truth_about_new_orleans_schools.html.

5. *Id.*

standardized test scores have improved.⁶ One study found academic gains among New Orleans charter school students,⁷ suggesting a clear improvement for students in New Orleans following the expansion of the charter system. For example, a comparison of scores before and after Katrina show the following gains: High school graduation jumped from 54.4% to 77.6%.⁸ The graduation rate for African-American males in New Orleans is 64.9%, higher than the national average.⁹ The average number of students performing at grade level in reading and math jumped from 23% in 2007 to 57% in 2013.¹⁰

Some insist, however, that because the public schools in New Orleans were in such dire straits, there was no place to go but up. Public schools in New Orleans were in bad shape long before Katrina arrived. The graduation rate was nearly 18% lower than the national average.¹¹ Among seventh and eighth graders, almost 70% were testing below basic proficiency in English, and 70% tested below proficiency in math.¹² There was widespread corruption in New Orleans's public school sys-

6. *Id.*

7. Danielle Dreilinger, *New Orleans' Charter School Academic Growth Superior, Study Says*, TIMES-PICAYUNE (Mar. 19, 2015, 3:39 PM), http://www.nola.com/education/index.ssf/2015/03/new_orleans_charter_school_suc.html (“Gains were especially large in mathematics, where charter students progressed almost twice as far in a year than their peers in conventional schools. In reading, they showed two thirds more progress.”). The data on academic gains in the post-Katrina charter schools has been widely studied. *See, e.g.*, Robert Garda, *Searching for Equity Amid a System of Schools: The View from New Orleans*, 42 FORDHAM URB. L.J. 613, 615–18 (2015); *see also* TULANE UNIV. COWEN INST. FOR PUB. EDUC. INITIATIVES, NOLA BY THE NUMBERS: SCHOOL ENROLLMENT AND DEMOGRAPHICS, OCT. 2013, at 1 (2014), *available at* <http://www.coweninstitute.com/our-work/applied-research/nola-by-the-numbers/nbtn-october-2013/#report>.

8. Lyndsey Layton, *In New Orleans, Major School District Closes Traditional Public Schools for Good*, WASH. POST (May 28, 2014), https://www.washingtonpost.com/local/education/in-new-orleans-traditional-public-schools-close-for-good/2014/05/28/ae4f5724-e5de-11e3-8f90-73e071f3d637_story.html.

9. *Ten Years After Hurricane Katrina: Where We Are Now*, RECOVERY SCH. DIST. (Aug. 2, 2015), http://www.rsdl.net/apps/news/show_news.jsp?REC_ID=363101&id=0. But that figure does not tell the whole story. “While 66 percent of black students in Louisiana graduated from high school, only 4 percent—among the lowest in the nation—showed they were ready for all four subjects tested on the ACT in 2015.” Will Sentell, *Black Students in Louisiana Continue to Rank Behind Peers on Education Tests, New Report Shows*, ADVOCATE (Dec. 10, 2015, 10:41 AM), <http://theadvocate.com/news/14228167-123/black-students-in-louisiana-continue-to-rank-behind-peers-on-education-tests-new-report-shows>.

10. Layton, *supra* note 8. However, it is important to note that critics challenge the validity of the statistics because shifts in student population—where thousands of students did not return to New Orleans after the storm—prevent a direct comparison. *Id.*

11. Colleen Kimmet, *10 Years After Katrina, New Orleans' All-Charter School System Has Proven a Failure*, IN THESE TIMES (Aug. 28, 2015), <http://inthesetimes.com/article/18352/10-years-after-katrina-new-orleans-all-charter-district-has-proven-a-failure>.

12. *Id.*

tem.¹³ In 2004, the Federal Bureau of Investigation (FBI) indicted almost a dozen people for criminal offenses against the district related to financial mismanagement.¹⁴ Superintendents came through the district like a revolving door; in seven years, there were eight people in the post.¹⁵ Corruption was so rampant that the FBI and other federal and local investigators set up a satellite branch in the school board's building itself.¹⁶ The systemic dysfunction was then compounded by infrastructure challenges left in the wake of Katrina.

Hurricane Katrina was the most devastating natural disaster to hit the United States in seventy-five years.¹⁷ The storm and consequent levee breach took more than 1,800 lives,¹⁸ shattered homes, and crushed the public's faith in government. It also served a fatal blow to the city's public schools, which were already on life support. Following Hurricane Katrina's tear through New Orleans on August 29, 2005, the school system was virtually "wiped out."¹⁹ Buildings were not habitable.²⁰ More than 7,000 New Orleans teachers and staff—many of whom the storm left homeless—were on "disaster leave without pay."²¹

The combination of the pervasive dysfunction in New Orleans schools pre-Katrina, and the obliteration of infrastructure post-Katrina, set the stage for a massive takeover. Enter RSD. Prior to Hurricane Katrina, the state of Louisiana had established RSD, or the Recovery School District, as a special authority to take over the worst-performing schools in Louisiana.²² After the storm, the state moved almost all of

13. See Douglas N. Harris, *Good News for New Orleans*, EDUCATIONNEXT (Sept. 16, 2015), <http://educationnext.org/good-news-new-orleans-evidence-reform-student-achievement>.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Hurricane Katrina Statistics Fast Facts*, CNN (Aug. 24, 2015, 11:30 AM), <http://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/>. More than 500,000 people were displaced by Katrina. The damages were in excess of \$100 billion. *Id.* More than 70% of occupied housing in New Orleans was damaged by the storm. *Id.* The storm made landfall on the Gulf Coast as a Category Three storm. *Id.*

18. *Id.*

19. Thomas Toch, *The Big Easy's Grand Experiment*, U.S. NEWS & WORLD REPORT (Aug. 18, 2015, 9:00 AM), <http://www.usnews.com/opinion/knowledge-bank/2015/08/18/lessons-from-new-orleans-post-katrina-charter-school-experiment>.

20. *Id.*

21. *Id.*

22. Danielle Dreilinger, *Recovery School District Will Be Country's First All-Charter District in September 2014*, TIMES-PICAYUNE (Dec. 19, 2013, 5:51 PM), http://www.nola.com/education/index.ssf/2013/12/recovery_school_district_will_3.html. "The Recovery School District was created in Louisiana in 2003 to transform persistently failing schools. It started small in New Orleans, taking and chartering only five of the many eligible schools." *Id.*; see also Scott R. Bauries,

New Orleans' public schools under the RSD's umbrella.²³ The legislature acted aggressively to pass Act 35²⁴ to transfer more than 100 public schools to the RSD.²⁵ The RSD either closed the failing schools or converted them to charter models; in addition, it directly ran some schools in New Orleans that were not chartered.²⁶ School officials said there was never any intention to rebuild the traditional public school model.²⁷ Currently, New Orleans' schools are nearly all charter schools.²⁸ At the start of the 2014–2015 school year, the RSD administered fifty-seven charter schools operating in New Orleans under twenty-four different nonprofit charter management organizations.²⁹ The Orleans Parish School Board (OPSB) also oversees charters.³⁰ There are also a handful of independent charter schools overseen by the Board of Elementary and Secondary Education.³¹ The school system in New Orleans has a multitude of different school operators.³²

In 2005–2006, the OPSB had an operating budget of nearly \$400 million.³³ “Most of these monies [were] allocated to the state-run Recovery School District and privately operated charter schools, with only a handful of traditional public schools remaining under the locally elected board.”³⁴ Following Katrina, charter schools received the bulk of federal

State Constitutional Design and Education Reform: Process Specification in Louisiana, 40 J.L. & EDUC. 1, 57, 59–62 (2011).

23. Harris, *supra* note 13.

24. LA. REV. STAT. ANN. § 17:10.7 (2005) (amended 2008).

25. *Ten Years After Hurricane Katrina: Where We Are Now*, *supra* note 9.

26. Layton, *supra* note 8.

27. *See id.*

28. *See id.*; see also Kristen Buras, *Charter Schools Flood New Orleans*, PROGRESSIVE (Dec. 26, 2014), <http://www.progressive.org/news/2014/12/187949/charter-schools-flood-new-orleans> (calling New Orleans the nation's first all-charter school district).

29. *Ten Years After Hurricane Katrina: Where We Are Now*, *supra* note 9. By September 2015, the RSD oversaw fifty-two charter schools in New Orleans and the Orleans Parish School Board oversaw eighteen charter schools, as well as six direct-run schools. PATRICK SIMS, TULANE UNIV. COWEN INST. FOR PUB. EDUC. INITIATIVES, NEW ORLEANS PUBLIC SCHOOL GOVERNANCE 1 (2015), available at http://www.coweninstitute.com/wp-content/uploads/2015/09/Governance.Brief_2015.pdf. The Board of Elementary and Secondary Education also directly authorized five charter schools that operated out of New Orleans. *Id.*

30. Jennifer C. Berkshire, “Reform” Makes Broken New Orleans Schools Worse: Race, Charters, Testing and the Real Story of Education After Katrina, SALON (Aug. 3, 2015, 2:57 AM), http://www.salon.com/2015/08/03/reform_makes_broken_new_orleans_schools_worse_race_charters_testing_and_the_real_story_of_education_after_katrina.

31. *Id.*

32. TULANE UNIV. COWEN INST. FOR PUB. EDUC. INITIATIVES, THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: 2012 REPORT 1, 2 (2013), available at <http://www.coweninstitute.com/wp-content/uploads/2012/07/SPENO-20121.pdf> [hereinafter THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: 2012 REPORT].

33. Buras, *supra* note 28.

34. *Id.*

and private funding, including more than \$20 million in general funding and another \$25 million from the U.S Department of Education to establish new charter schools.³⁵

Indeed, there is a lot of money connected to charter schools. The charter schools system in America—just two decades old³⁶—brings both opportunities and challenges for students and educators. Charter schools and public schools are both funded by the public.³⁷ But they differ in many significant ways. Though the charter school is publicly funded, it is usually governed by a group under a legislative contract—or charter—with the authorizer (typically a state entity).³⁸ The charter exempts the schools from some traditional public school rules and regulations.³⁹ The school's charter sets out all details of the school's operation; everything from the curriculum, name, organization, and management, and methods of assessing student performance are set out in the charter.⁴⁰ Transportation decisions, building maintenance, and services offered to special needs students also fall under the control of the charter organizations, depending on the type of charter the operator has.⁴¹

Charter schools can operate with greater autonomy and flexibility because they are freed from district mandates and labor unions that sometimes impair the efficiency of staffing.⁴² They have been hailed by many education experts as innovation labs that allow for greater experi-

35. Nghana Lewis, *After Katrina: Poverty, Politics, and Performance in New Orleans Public Schools*, 11 LOY. J. PUB. INT. L. 285, 287 (2010).

36. See Layton, *supra* note 8; Claudio Sanchez, *From a Single Charter School, a Movement Grows*, NPR (Aug. 31, 2012, 6:19 PM), <http://www.npr.org/2012/09/02/160409742/from-a-single-charter-school-a-movement-grows>.

37. See *Fast Facts: Charter Schools*, NAT'L CENTER FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=30> (last visited May 22, 2016).

38. *Id.*

39. *Id.*

40. *Charter Schools: Finding Out the Facts: At a Glance*, CENTER FOR PUB. EDUC., <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Charter-schools-Finding-out-the-facts-At-a-glance> (last visited May 22, 2016).

41. Layton, *supra* note 8. There are seven types of charter schools that could be authorized in New Orleans and Louisiana. See Sims, *supra* note 29, at 2.

42. School leaders say the flexibility in personnel management is key to their design. Without union contracts tying their hands, leaders hired anyone they wanted, which often included teachers from alternative programs such as Teach for America or The New Teacher Project. Charter school proponents say such flexible staffing models are key contributors to school success. Harris, *supra* note 13. Charter school critics say such staffing models are disruptive because these teachers do not stay in their posts long, and that negatively impacts student learning. Rachel Monahan, *Charter Schools Try to Retain Students with Mom-Friendly Policies*, ATLANTIC (Nov. 11, 2014), <http://www.theatlantic.com/education/archive/2014/11/charter-schools-now-try-to-keep-teachers-with-mom-friendly-policies/382602/>.

mentation.⁴³ To the extent that charter schools minimize state oversight in favor of “success” markers, such as improved test scores and more choice for parents, they are representative of market-based principles—for better or for worse. “A defining characteristic of charter schools is that they introduce a strong market element into public education. Over time, the firms that are well run and that satisfy consumer preferences will tend to expand or be replicated while those that are less successful will go out of business.”⁴⁴ Generally, traditional public schools are replaced with independently managed schools that set their own standards for admission, discipline, expulsion, and fiscal accountability.⁴⁵ Rather than reporting to community and parent-stacked organizations, principals at charter schools function more like CEOs who report to nonprofit boards.⁴⁶

MIT professor and activist Noam Chomsky stresses that public education is a central component of democracy.⁴⁷ He has warned about the push to “corporatize” public schools and the dangers of overemphasizing high-stakes tests.⁴⁸ The expansive charter school system implemented in New Orleans provides an important case study⁴⁹ to examine the efficacy of charter schools, the opportunities they offer, and a chance to carefully consider the risks and possible legal hurdles created by the characterization of schools.

While proponents of charter school expansion cite to students’ unprecedented standardized test score improvements, not all reports of the

43. See Roland G. Fryer, Jr., *Learning from the Success and Failures of Charter Schools* 1, 5–9 (The Hamilton Project Discussion Paper No. 2012-06), available at http://scholar.harvard.edu/files/fryer/files/hamilton_project_paper_2012.pdf (addressing the innovation hallmark that is intended to define charter schools).

44. *Charter Schools Offer Free Market Solutions to Public Education*, NAT’L CENTER FOR POL’Y ANALYSIS (May 7, 2015), http://www.ncpa.org/sub/dpd/index.php?Article_ID=25635.

45. CENTER FOR PUB. EDUC., *supra* note 40. New Orleans has standardized both admission and expulsion practices. See Toch, *supra* note 19. Of course charter schools are still barred from discriminating on the basis of race, color, national origin, religion, disability, sex, and other characteristics protected by law.

46. Berkshire, *supra* note 30.

47. See Brian Canova, *MIT Professor Noam Chomsky Discusses Education, Chicago Teacher Strike Ahead of Public Speaking Events at MIT*, MASSLIVE (Sept. 25, 2012, 2:10 PM), http://www.masslive.com/news/index.ssf/2012/09/mit_professor_noam_chomsky_dis.html.

48. *Id.*

49. What is happening in New Orleans will have a huge impact on other school districts. “Nationally, New Orleans became an example to be praised or hated. People came from all over to see or work in the New Orleans ‘experiment’ or to publicize its problems. Michigan and Tennessee launched similar, smaller recovery districts; Georgia’s is underway. And the Recovery system took over several failing schools in Baton Rouge and Shreveport.” Danielle Dreilinger, *10 Years After New Orleans School Takeover, Here’s Where It Stands*, TIMES-PICAYUNE (Nov. 20, 2015, 2:47 PM), http://www.nola.com/education/index.ssf/2015/11/rsd_takeover_turns_10.html.

new charter schools in New Orleans have been positive. Critics of charter schools challenge the practices that led to such academic gains, arguing they leave some students behind. They say such practices “amplify concerns about racial equality and loss of parental control.”⁵⁰ Critics also complain that the public charter school system dilutes democratic accountability because charter organizations do not need to answer to voters.⁵¹ There are also concerns that the charter school system has stripped poor communities of a strong community base⁵² and has created a zero-tolerance culture that promotes worker–learners.⁵³ Others who have watched communities trade public schools for charter schools “report the same problems that New Orleans residents describe: closures of public schools that held neighborhoods together, younger and less experienced teachers, the loss of union jobs, experimental teaching practic[e]s that can be rigid or harsh, cherrypicking of students^[54] and rapid teacher burn-out.”⁵⁵

There have been allegations that some charter schools have deliberately under-enrolled and shut out students in an effort to protect test scores and maintain strong “success” markers.⁵⁶ This market-based ap-

50. Layton, *supra* note 8; *see also* Brooke Finley, Comment, *Growing Charter School Segregation and the Need for Integration in Light of Obama’s Race to the Top Program*, 52 SAN DIEGO L. REV. 933, 943–48 (2015); Garda, *supra* note 7, at 618 nn.17–19; Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1116 (2014) (addressing charter schools as a school choice scheme that perpetuates racial subordination); Sarah Carr, *School Choice Series: Grandmother Struggles to Navigate System*, TIMES-PICAYUNE (Nov. 10, 2009), http://www.nola.com/education/index.ssf/2009/11/post_44.html; Sarah Carr, *School Choice Series: Mother Is Determined to Find Best Public Pre-K*, TIMES-PICAYUNE (Nov. 10, 2009), http://www.nola.com/education/index.ssf/2009/11/school_choice.html.

51. Layton, *supra* note 8. In 2010, a public hearing was held on whether public schools would return to traditional management or remain under charter control. Buras, *supra* note 28. Hundreds of African Americans from the community attended the rally. *Id.* Those in attendance said “[t]he feeling of disenfranchisement was palpable that evening.” *Id.*

52. *See* Dreilinger, *supra* note 22 (“Alumni and some community members have decried the loss of many of the city’s historic high schools, which the Recovery School District has closed, merged or never reopened after the storm, including L.E. Rabouin, John F. Kennedy and Booker T. Washington.”).

53. Kimmitt, *supra* note 11.

54. Harris, *supra* note 13 (noting some principals at charter schools reported “cherry-picking students”—that is, counseling out students deemed poor fits and trying to attract better students with invitation-only events); *see also* Garda, *supra* note 7, at 625–54 and accompanying notes (describing challenges to guarantee equity in the New Orleans schools both behind and in front of the podium). The alleged “cherry-picking” practice has since been addressed through a OneApp, centralized enrollment system for assignment in New Orleans. *The State of Public Education in New Orleans: 2014*, TULANE UNIV. COWEN INST. FOR PUB. EDUC. INITIATIVES, <http://www.speno2014.com/operations-administration/> (last visited May 22, 2016).

55. Kimmitt, *supra* note 11.

56. *Id.* (noting one 2015 report found that about a third of school leaders used “creaming” to screen out undesirable students).

plication in the public schools system has distorted equal access to public education.⁵⁷ Several schools in poor, black communities have closed.⁵⁸ Critics have also noted that “in a city that is 65 percent black, the education reform movement, including the fastest-growing charter school networks, is almost entirely white led.”⁵⁹ The OPSB was highly criticized when it fired 7,000 teachers and paraprofessionals after Katrina, “the majority of whom were black New Orleanians and the backbone of the city’s middle class.”⁶⁰

The unprecedented charter expansion also contributed to the dangerous narrative that public schools are inherently defective. Such messaging is a key element in a cycle that moves funding from public schools to privatized, alternative models. Professor Chomsky warns against the dangers of such propaganda against troubled public schools: “The[] propose[d] alternatives, which sound at the beginning like good ideas: charter schools, magnet schools, vouchers, who could be against that? You gradually chip away, making the public system less and less

57. See, e.g., Kristen L. Buras, *Race, Charter Schools, and Conscious Capitalism: On the Spatial Politics of Whiteness as Property (and the Unconscionable Assault on Black New Orleans)*, 81 HARV. EDUC. REV. 296 (2011); see also Garda, *supra* note 7, at 613 (analyzing the cautionary lessons learned from the impact of market strategies in the New Orleans schools). Several other scholars have also traced the relationship between free market principles, social inequality, and education access. See, e.g., Areto Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Constitutional Education*, 22 U. FLA. J.L. & PUB. POL’Y 45, 90 (2011) (arguing that public education should be deemed a fundamental right under a new analysis that applies to positive rights).

58. See Danielle Dreilinger, *Civil Rights Complaint Alleges Unequal Treatment for New Orleans Black Public School Students*, TIMES-PICAYUNE, (May 13, 2014, 3:36 PM), http://www.nola.com/education/index.ssf/2014/05/civil_rights_complaint_alleges.html; see also Kimmitt, *supra* note 11. A federal civil rights complaint filed in May 2014 alleged that many of the schools closed by RSD were in “poor and working class African American neighborhoods.” Letter from Frank J. Buckley, Co-Founder, Conscious Concerned Citizens Controlling Cmty. Changes, and Karran Harper Royal, Educ. Advocate, Coalition for Cmty. Schools, to Eric Holder, Att’y General of the United States, Arne Duncan, Sec’y of Educ., U.S. Dep’t of Educ., and Taylor August, Reg’l Dir., Office for Civil Rights—Dallas, Civil Rights Complaint Filed against the Louisiana Department of Education, Recovery School District, and Louisiana State Board of Elementary and Secondary Education (May 13, 2014), available at http://b.3cdn.net/advancement/24a04d1624216c28b1_4pm6y9lvo.pdf.

59. Berkshire, *supra* note 30; Diane Ravitch, founder of the Network for Public Education, challenged the wisdom of the New Orleans all-charter model:

That model requires firing all the teachers, no matter their performance, allowing them to reapply for a job, and replacing many of them with inexperienced TFA [Teach For America] recruits. That model requires wiping out public schools and replacing them with privately managed schools that set their own standards for admission, discipline, expulsion, and are financially opaque. These heavy-handed tactics require a suspension of democracy that would not be tolerated in a white suburb, but can be done to powerless urban districts where the children are black and Hispanic.

Kimmet, *supra* note 11.

60. Berkshire, *supra* note 30.

functional”⁶¹ Though standardized test scores have improved, displacement of resources in support of privatized schools over traditional public schools has come at other “costs.” Moreover, the loss of community is an inherent, unavoidable consequence of all charter school systems. Many of these setbacks disproportionately impact the most vulnerable student populations.

A. Questionable Practices

Charter schools’ hyperfocus on standardized test scores fails to account for other important “gains” a student experiences through a robust education—cultural growth, autonomy, and community. One critic of charter schools said the “gains” come at a huge price:

But what about New Orleanians who have a more expansive definition of what schools should do—whose descriptions of successful schools include, not just academic achievement, but harder-to-measure concepts like community building, justice, liberation, and the ability of the city’s children to not just survive but thrive in their own world?⁶²

Vibrancy in any culture requires “community groups, libraries, public schools, neighborhood organizations,”⁶³ and other community-supported anchors to promote meaningful interaction between citizens.

In addition to the hard-to-measure disruptions in the community, there are specific and verified practices that make the charter school model less than ideal. These problems include posting test scores to shame students, “creaming” to filter the best students, extraordinarily long periods of time spent travelling on the bus because there are no neighborhood schools,⁶⁴ zero-tolerance discipline measures, cookie-cutter curricula,⁶⁵ and unprecedented teacher turnover.⁶⁶ Charter schools

61. DAVID BARSAMIAN & NOAM CHOMSKY, PROPAGANDA AND THE PUBLIC MIND: CONVERSATIONS WITH NOAM CHOMSKY 102 (2001).

62. Berkshire, *supra* note 30.

63. Robert W. McChesney, *Introduction* to NOAM CHOMSKY, PROFIT OVER PEOPLE 7, 11 (1999).

64. Berkshire, *supra* note 30. Some students have reported 10–12 hour days when factoring in cross-town travel necessitated by a free choice market. *Id.*

65. See Eric Westervelt, *A New Orleans Charter School Marches to Its Own Tune*, NPR (Oct. 13, 2014, 3:22 AM), <http://www.npr.org/sections/ed/2014/10/13/354090391/a-new-orleans-charter-school-marches-to-its-own-tune>. Despite some notable standouts, charter schools are often criticized for canned curriculum devoid of creativity. Critics say “too many charter schools here share a core focus on tough discipline and data-driven instruction that has produced a kind of pedagogic monoculture.” *Id.*

must show measurable gains in student test scores or risk closures.⁶⁷ Such practices have led to numerous complaints that highlight the legal challenges charter schools present.

B. Challenges from the Classroom to the Courtroom

The extensive charter school system in post-Katrina New Orleans has triggered numerous legal actions from students⁶⁸ disrupted by the change. New Orleans touts itself as a free market of educational options, but critics have alleged, in numerous lawsuits, that “choice” in theory does not always translate into meaningful “choice” in practice.⁶⁹ While many of the charter schools reported gains, “some pursued test scores without concern for community traditions, diversity in hiring, or taking care of the neediest students.”⁷⁰

Several complaints have been filed on behalf of students who claim they are disenfranchised by the charter school system. Recently, for example, the Asian American Legal Defense and Education Fund and the Vietnamese Young American Young Leaders Association filed a complaint with the United States Department of Education on behalf of Vietnamese and Spanish-speaking families with limited English proficiency (LEP).⁷¹ The parties alleged that New Orleans schools violated their obligations under Title VI of the Civil Rights Act of

66. See Monahan, *supra* note 42 (noting that critics “argue that high departure rates negatively affect student learning, create instability in the classroom, and are costly to taxpayers because districts and schools must recruit new teachers”); Westervelt, *supra* note 65.

67. Berkshire, *supra* note 30.

68. Disenfranchised students are not the only people seeking redress in the court. Veteran teachers also lodged a wrongful termination suit against the state and Orleans Parish School Board. See *Oliver v. Orleans Parish Sch. Bd.*, No. 2005-12244, 2012 WL 2648083 (La. Civ. Dist. Ct. June 20, 2012), *aff'd in part, rev'd in part*, 133 So. 3d 38 (La. Ct. App. 2014), *cert. granted*, 141 So. 3d 274 (La. 2014). These decisions were overturned by the Louisiana Supreme Court. *Oliver v. Orleans Parish Sch. Bd.*, 156 So. 3d 596, 623 (La. 2014). See also Kari Dequine Harden, *7,500 Fired Teachers Take Their Case to the U.S. Supreme Court*, LA. WKLY. (Mar. 16, 2015), <http://www.louisiana-weekly.com/7500-fired-teachers-take-their-case-to-u-s-supreme-court/>. The teachers enjoyed both victories and losses before the United States Supreme Court refused to hear their appeal. Bill Quigley, *New Orleans Pain Index at 10: Who Was Left Behind*, HUFFINGTON POST (July 20, 2015, 8:45 AM), http://www.huffingtonpost.com/bill-quigley/new-orleans-katrina-pain_b_7831870.html.

69. Berkshire, *supra* note 30.

70. Dreilinger, *supra* note 49.

71. Letter from Thomas L. Mariadson, Staff Att’y, Asian Am. Legal Def. & Educ. Fund, and Minh Nguyen, Vietnamese Am. Young Leaders Ass’n, Regarding Discrimination Against National Origin Minority Students and Parents Who Are Limited English Proficient (LEP) in Orleans Parish School Board (OPSB) and Recovery School District (RSD) Schools (Aug. 2, 2013), available at <http://aaldef.org/VAYLA%20AALDEF%20DOJ%20OCR%20Complaint.pdf>.

1964.⁷² Specifically, the complainants alleged that a charter school took a “deliberately hostile tone with LEP parents.”⁷³ The complaint also alleged that the schools do not provide appropriate interpretation services, do not make data about the number of bilingual staff and interpreters that are employed at the schools available, and negatively impact LEP parents’ ability to monitor their children’s academic performance, constituting discrimination on the basis of national origin.⁷⁴ Title VI of the Civil Rights Act bars discrimination by schools that receive federal money.⁷⁵ Failure to provide equal access to students and families with limited English skills constitutes discrimination on the basis of national origin.⁷⁶ Students further alleged that some schools placed them in English-as-a-second-language (ESL) classes they did not actually need because of their last names.⁷⁷

In addition, the Southern Poverty Law Center filed a lawsuit in 2010 against the Louisiana Department of Education, alleging that it failed to provide disabled students the same variety of educational programs and services as are available to nondisabled students.⁷⁸ In part a “disability discrimination” claim,⁷⁹ the suit ultimately settled in 2015.⁸⁰ The class action suit was brought on behalf of disabled children who sought relief under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), § 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act (ADA).⁸¹

72. *Id.* at 1.

73. *Id.* at 6.

74. *Id.* at 2, 5, 18.

75. 42 U.S.C. § 2000d-1 (2012); 34 C.F.R. § 100.3(b)(2) (2015).

76. *See* Lau v. Nichols, 414 U.S. 563, 568 (1974).

77. Danielle Dreilinger, *New Orleans Public Schools Inadequate for Non-English Speakers, Critics Say*, TIMES-PICAYUNE (Aug. 1, 2013, 5:47 PM), http://www.nola.com/education/index.ssf/2013/08/groups_to_file_complaint_alleg.html.

78. Complaint at 17, P.B. v. Pastorek (E.D. La. Oct. 26, 2010) (No. 2:10-cv-04049); *see also* Danielle Dreilinger, *Landmark New Orleans Special Education Case is Settled, Parties Say*, TIMES-PICAYUNE (Dec. 19, 2014, 2:18 PM), http://www.nola.com/education/index.ssf/2014/12/parties_ask_federal_judge_to_a.html; Louis Foglia, *How Katrina Changed Special Education in New Orleans*, CNN MONEY (Aug. 28, 2015, 8:39 AM), <http://money.cnn.com/2015/08/14/news/hurricane-katrina-special-education/>.

79. Foglia, *supra* note 78.

80. Press Release, S. Poverty Law Ctr., SPLC Negotiates Landmark Settlement to Help New Orleans Students with Disabilities (Dec. 18, 2014), *available at* <https://www.splcenter.org/news/2014/12/19/splc-negotiates-landmark-settlement-help-new-orleans-students-disabilities>. One portion of the suit was a disability discrimination claim; the bulk of the suit contained allegations that the Louisiana Department of Education violated the Individuals with Disabilities Education Improvement Act of 2004 (IDEA).

81. Complaint at 1–2, P.B. v. Pastorek (E.D. La. Oct. 26, 2010) (No. 2:109-cv-04049).

The lawsuit came after years of complaints about services delivered to special needs students in the charter system, which included allegations of emotional abuse, physical abuse, and “counseling out.”⁸² Ten students, representing a class of about 4,500 New Orleans students with disabilities, filed the lawsuit asserting that the defendants failed to properly coordinate, monitor, and oversee special education services of the various school districts operating in New Orleans.⁸³ RSD has since promised to increase services to special needs students.⁸⁴ Terms of the settlement include increased training and technical assistance for all New Orleans schools.⁸⁵ The settlement also includes a provision that ensures that charter schools’ applications and renewals require schools to provide a description of the school’s plans for delivering services to students with disabilities, among other things.⁸⁶

Furthermore, a federal civil rights complaint was filed in 2014 alleging discrimination against African-American students.⁸⁷ A national coalition of activists⁸⁸ filed the complaint, citing school closures in New Orleans as discriminatory against black students.⁸⁹ The complaint, filed pursuant to Titles IV and VI of the Civil Rights Act of 1964, alleges that black students were subjected to school closures at a much higher rate than white students, and that the state policy failed to provide adequate educational alternatives to black students once their schools were closed.⁹⁰

82. *New Orleans Recovery School District Not Quite as Recovered as Advertised*, NAT’L EDUC. POL’Y CTR. (July 13, 2015), <http://nepc.colorado.edu/newsletter/2015/07/new-orleans-recovery>.

83. Complaint at 9–11, *P.B. v. Pastorek* (E.D. La. Oct. 26, 2010) (No. 2:109-cv-04049).

84. Press Release, *supra* note 80.

85. *Id.*

86. Notice of Proposed Class Action Settlement at 3, *P.B. v. White* (No. 2:10-cv-04049), available at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/resource/pb_v_white_-_notice_of_proposed_class_action_settlement.pdf.

87. Kimmitt, *supra* note 11.

88. The complaint was filed by local activists Conscious Concerned Citizens Controlling Community Changes and Coalition for Community Schools-New Orleans, and backed by several groups, including the Kenwood Oakland Community Organization in Chicago, Coalition for Community Schools, Vietnamese American Young Leaders of New Orleans, New Jersey’s Parents Unified for Local School Education in Newark, and Journey for Justice member organizations across the country. Letter from Frank J. Buckley, Co-Founder, Conscious Concerned Citizens Controlling Cmty. Changes, and Karran Harper Royal, Educ. Advocate, Coalition for Cmty. Schools, to Eric Holder, Att’y Gen. of the United States, Arne Duncan, Sec’y of Educ., U.S. Dep’t of Educ., and Taylor August, Reg’l Dir., Office for Civil Rights—Dallas, Civil Rights Complaint Filed against the Louisiana Department of Education, Recovery School District, and Louisiana State Board of Elementary and Secondary Education (May 13, 2014), available at http://b.3cdn.net/advancement/24a04d1624216c28b1_4pm6y9lvo.pdf.

89. *Id.*

90. *Id.*

The complaint alleges that RSD's "blanket acceptance" of charter schools and OPSB's school policies disparately impact black students and keep them "trapped in failing schools."⁹¹ According to the complaint, white students make up only 10% of the student population in New Orleans, but comprise 40% of the population in high-performing schools.⁹² By contrast, the complaint alleges that black students are 80% of the total school population, but only comprise 30% to 47% of the student population at these high-performing schools.⁹³ The disparity in school assignments reduces black students' access to AP classes, gifted classes, and arts and language programming.⁹⁴

The snapshot of lawsuits and civil rights complaints here is not exhaustive. Other complaints are rooted in funding decisions⁹⁵ and zero-tolerance disciplinary measures.⁹⁶ As other cities consider adopting charter schools, the legal challenges to such changes should compel other elected officials to act cautiously. At the very least, it should inform their judgment about how to improve transparency, accountability, and equal opportunity in public education.

II. THE POOR BEAR THE COSTS OF THE NEW ORLEANS CRIMINAL JUSTICE SYSTEM

In New Orleans and elsewhere, students who drop out or who are expelled from school face a high risk of future exposure to the criminal justice system.⁹⁷ Nearly 2.2 million Americans, a disproportionate share of whom are minorities, are currently in jail or prison.⁹⁸ Though the United States contains less than 5% of the world's population, it claims

91. *Id.*

92. *Id.* at 16.

93. *Id.* at 23.

94. *Id.* The Louisiana Education Superintendent dismissed the complaint as a "joke." Danielle Dreilinger, *John White: New Orleans Charter Civil Rights Complaint 'a Joke'*, TIMES-PICAYUNE (May 15, 2014, 9:51 PM), http://www.nola.com/education/index.ssf/2014/05/john_white_new_orleans_charter.html.

95. Associated Press, *Louisiana Judge Rejects Teachers Union in Charter School Lawsuit*, TIMES-PICAYUNE (May 15, 2015, 10:10 AM), http://www.nola.com/education/index.ssf/2015/05/louisiana_charter_school_suit.html.

96. See Buras, *supra* note 28 (addressing the civil rights complaint against charter operator Collegiate Academies for a "harsh and punitive discipline culture").

97. Carla Amurao, *Fact Sheet: How Bad Is the School-to-Prison Pipeline?*, TAVIS SMILEY REPORTS PBS <http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/> (last visited May 22, 2016).

98. Bill Keller, *Prison Revolt: A Former Law-and-Order Conservative Takes a Lead on Criminal-Justice Reform*, NEW YORKER, June 29, 2015, at 22–23 ("African-Americans are nearly six times as likely as whites to be incarcerated, and Latinos are more than twice as likely.").

25% of the world's incarcerated population.⁹⁹ For its part, Louisiana leads all other states in incarceration rates.¹⁰⁰ It has been called “the world's prison capital.”¹⁰¹ One in every seven black men is in prison, on probation, or on parole.¹⁰² New Orleans, the state's most populous city, houses more inmates than any other metropolitan area in the country.¹⁰³

Though double the national average, Louisiana's incarceration rates are consistent with a three-decade-long upward trend across the country.¹⁰⁴ The number of state and federal criminal defendants sentenced to terms of imprisonment more than quintupled from 1980 to 2010.¹⁰⁵ Though imprisonment rates grew steadily throughout the 1980s, the Violent Crime Control and Law Enforcement Act of 1994 ushered in the era of mass incarceration.¹⁰⁶ By any measure, the legislation remains the most expansive crime bill in U.S. history.¹⁰⁷ The law poured billions of discretionary dollars into local law enforcement,¹⁰⁸ increased funding for prison construction,¹⁰⁹ and enhanced penalties for various drug-related offenses.¹¹⁰

99. *Id.* at 23.

100. Campbell Robertson, *Suit Alleges 'Scheme' in Criminal Costs Borne by New Orleans's Poor*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleans-poor.html?_r=0.

101. Cindy Chang, *Louisiana Is the World's Prison Capital*, TIMES-PICAYUNE (Apr. 6, 2016, 12:39 PM), http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html (reporting that Louisiana's rates of incarceration are nearly five times greater than Iran's and 13 times greater than China's); see also *La. Retains Nation's and World's Highest Incarceration Rate*, LA. WKLY. (April 6, 2015), <http://www.louisianaweekly.com/la-retains-nations-and-worlds-highest-incarceration-rate/>.

102. Chang, *supra* note 101.

103. AM. CIVIL LIBERTIES UNION, *IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS* 17 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf.

104. Chang, *supra* note 101 (reporting that from 1992–2012, Louisiana's prison population doubled and “[o]ne in 86 adult Louisianans is doing time, nearly double the national average”).

105. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2013*, at fig.1 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf> (reflecting a total state and federal prison population of approximately 325,000 in 1979 to a “peak [population] of 1,615,500” in 2009).

106. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (1994), reprinted in 1 BERNARD D. REAMS, JR., *LEGISLATIVE HISTORY OF THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994*, at v (1997).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* In the early 2000s, the Bush administration capitalized on continued public support of aggressive crime control. ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 1 (2014). In 2003, Attorney General John Ashcroft issued a directive to federal prosecutors to “charge and pursue the offense or offenses that generate the most substantial sentence” and to “vigorously oppose” any proposed sentencing reductions. Memorandum from Att’y Gen. John Ashcroft to All Federal Prosecutors (Sept. 22, 2003), available at <http://www.justice.gov/archive/opa/pr/2003/>

In Louisiana, the 1990s prison-building boom gave rise to a \$182 million dollar industry dependent on inmate-packed cellblocks.¹¹¹ In addition to the emergence of homegrown, private prison companies, the mass incarceration movement turned rural sheriffs into “prison entrepreneurs.”¹¹² Specifically, to stretch budgets, the state encouraged sheriffs to take on the expense of new construction costs for jails in return for eventual profits.¹¹³ The agreement created obvious financial incentives to maximize inmate occupancy and minimize expenses.¹¹⁴ Today, the state pays a per-diem to jails for each inmate, prompting sheriffs to comb the state for “prime sources” of new prisoners.¹¹⁵ Often, inmates are moved to rural jails from urban areas, like New Orleans, that have populations to spare.¹¹⁶ The state profits as well, incurring significant savings by housing inmates in local jails rather than prisons.¹¹⁷ In 2013, Louisiana sheriffs housed 52% of inmates serving state time in local jails—by far the nation’s highest percentage.¹¹⁸

While crime rates nationwide have decreased over the last thirty years, a direct correlation between mass incarceration and the drop in crime is dubious.¹¹⁹ Various “social, economic, and environmental factors,” such as an aging population, decreased unemployment, and modest

September/03_ag_516.htm. Under Ashcroft’s direction, the Department of Justice steadily increased federal prosecutions of street-level drug and firearm possession crimes. See GOFFMAN, *supra*.

111. Chang, *supra* note 101.

112. *Id.*

113. *Id.*

114. *Id.* (“With maximum occupancy and a thrifty touch with expenses, a sheriff can divert the profits to his law enforcement arm, outfitting his deputies with new squad cars, guns and laptops.”); see also Jan Moller, *Prison Sentence Reform Efforts Face Tough Opposition in the Legislature*, TIMES-PICAYUNE (May 16, 2012, 6:43 AM), http://www.nola.com/crime/index.ssf/2012/05/prison_sentence_reform_efforts.html (“The[] financial stake [of sheriffs] in the prison system means they will lose money if sentences are shortened.”).

115. Cindy Chang, *In World of Prisons, Some Rural Parishes’ Economies Hinge on Keeping Their Jails Full*, THE TIMES-PICAYUNE (May 13, 2012, 9:53 AM), http://www.nola.com/crime/index.ssf/2012/05/in_world_of_prisons_some_rural.html.

116. *Id.*

117. *Id.* (“The Department of Corrections saves a huge amount of money by housing inmates [in jails]. An inmate at the Angola state penitentiary costs \$63.15 a day, compared with the \$24.39 sheriff’s per diem.”).

118. Julia O’Donoghue, *Louisiana Sees Prison Population Fall, but Maintains the Highest Incarceration Rate in the United States*, TIMES-PICAYUNE (Sept. 17, 2014, 7:55 AM), http://www.nola.com/politics/index.ssf/2014/09/louisianas_prison_population_f.html.

119. DR. OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 3 (2012), available at https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf (noting that although crime rates have fallen since 1991, the United States “has incarcerated a higher percentage of its people, and for a longer period, than any other democracy”).

income growth, have contributed to overall crime reduction.¹²⁰ Put simply, the salutary effect of skyrocketing imprisonment rates on lower crime is negligible.¹²¹ Louisiana offers a striking case study. Despite incarcerating more people than any other state—and for longer periods of time—Louisiana still has one of the nation’s highest rates of both violent crimes and property crimes.¹²² On the other hand, the economic cost and human toll of the “vast, costly social experiment” is incalculable.¹²³ The policies associated with the War on Drugs fractured families, disenfranchised millions of offenders, and created entrenched social inequality.¹²⁴ The fallout is most acute in impoverished urban neighborhoods like Center City in New Orleans, where five in six children grow up without two parents in the household.¹²⁵ In New Orleans and elsewhere, the instability wrought by mass incarceration left families and communities “broken beyond repair.”¹²⁶

Presently, a marked philosophical shift away from costly and punishment-focused crime control has gained traction. Since the beginnings of the mass incarceration movement, progressive counterarguments have centered on the disproportionate focus and deleterious effects on low-income urban neighborhoods.¹²⁷ A growing chorus on the right has now

120. *Id.* at 5.

121. *Id.* at 7, 15. According to the report, incarceration has been declining in effectiveness as a crime control tactic since before 1980. *Id.* at 4. Since 2000, the effect of increasing incarceration on the crime rate has been “essentially zero.” *Id.* The incarceration rate jumped by more than 60% from 1990 to 1999, while the rate of violent crime dropped by 28%. *Id.* at 7.

122. Chang, *supra* note 101.

123. GOFFMAN, *supra* note 110, at 3 (“Since the 1980s, the War on Crime and War on Drugs have taken millions of Black young men out of school, work, and family life, sent them to jails and prisons, and returned them to society with felony convictions.”).

124. *Id.*; see also Timothy Williams, *Report Details Economic Hardships for Inmate Families*, N.Y. TIMES (Sept. 15, 2015), http://www.nytimes.com/2015/09/16/us/report-details-economic-hardships-for-inmate-families.html?_r=0.

125. John Simerman, *Prison Rips Up Families, Tears Apart Entire Communities*, TIMES-PICAYUNE (May 18, 2012, 5:00 AM), http://www.nola.com/crime/index.ssf/2012/05/prison_rips_up_families_tears.html; see also Williams, *supra* note 124 (citing a survey by the Ella Baker Center for Human Rights finding that nearly two-thirds of families with a member in jail or prison struggle to meet their basic needs due to costs associated with incarceration, such as traveling for prison visits).

126. Williams, *supra* note 124 (“Incarceration weakens the social fabric and disrupts the social ecology of entire communities through the way that it disrupts families’ economic stability [and] [o]ften, it leaves it broken beyond repair.”) (quoting Azadeh Zohrabi of the Ella Baker Center for Human Rights).

127. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). Alexander writes that crime control practices over the last 30 years created a “racial caste system” in which “it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans, . . . [including] employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service.” *Id.* at 2.

moved towards sensible reforms to the criminal justice system.¹²⁸ The impetus for change varies in conservative circles with budgetary concerns,¹²⁹ interests in personal liberty, and the “moral and spiritual” implications of mass incarceration all cited as bases for reform.¹³⁰ Regardless of its primary motivation, the turnabout has generated bipartisan support for a new approach.¹³¹

Without question, a criminal justice system that favors alternatives to imprisonment holds promise.¹³² Meaningful sentencing reform, however, requires more than the replacement of prison terms with probation, fines, or other noncustodial sentences.¹³³ While a concession to the inefficacy of long prison sentences, this model also represents a cost-shifting measure from taxpayers onto the backs of the poor.¹³⁴ More troublingly, it traps indigent criminal defendants in an endless cycle of courtrooms and confinement due to an inability to pay costs associated

128. See *Agency Perspectives: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. 65, 67 (2014) (statement of David E. Patton, Exec. Dir., Fed. Defenders of N.Y.); Keller, *supra* note 98, at 23.

129. See ROEDER, EISEN & BOWLING, *supra* note 119, at 1 (reporting that American taxpayers spend \$260 billion per year on criminal justice); Marc Santora, *City's Annual Cost Per Inmate Is \$168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), <http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html> (citing a 2010 Vera Institute study calculating an aggregate cost of \$39 billion to house inmates in the forty states participating in the study and an average taxpayer cost of \$31,286 per inmate).

130. *Agency Perspectives: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. 65, 216 (2014) (statement of David E. Patton, Exec. Dir., Fed. Defenders of N.Y.) (“Conservatives denounce the unnecessary and unwise fiscal costs, the assault on personal liberty, and the harshness of a system that has become unmoored from foundational religious principles such as redemption and mercy.”); see also Keller, *supra* note 98, at 23, 25.

131. Keller, *supra* note 98, at 23, 25. Patrick J. Nolan, a former Republican congressman who served twenty-five months in prison for a racketeering conviction, describes cost containment as “ancillary” and “human dignity” as the driving force for change. *Id.* at 25. Nolan, by his account, became disillusioned with the lack of emphasis on inmate education, job training, and other rehabilitative efforts (“The implication is: you’re worthless, you come from nothing, you are nothing, you’ll never be anything.”) and the corresponding high rate of recidivism (“[W]hen prisoners were released the guards would say, ‘See you in a few months.’”). *Id.*

132. NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2014: DEVELOPMENTS IN POLICY AND PRACTICE 1, 13 (2014), available at http://sentencingproject.org/wp-content/uploads/2016/02/sen_State_of_Sentencing_2014.pdf (highlighting the efficacy of expanded sentencing alternatives, including broadening probation and parole policies, among “legislative changes to improve criminal justice policy”).

133. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> (characterizing “user fees” and other financial penalties associated with criminal convictions as “new paths to prison for those unable to pay their debts”).

134. *Id.* at 1; see also Williams, *supra* note 124 (citing a study by the Ella Baker Center for Human Rights that a defendant’s average debt for court-related fines and fees is \$13,607).

with a conviction.¹³⁵ For example, in Texas, former Governor Rick Perry has touted the state's movement towards rehabilitation-focused probationary sentences for drug offenders as an alternative to incarceration.¹³⁶ Texas, however, imposes mandatory fees upon probationers to offset the cost of supervision—a near-insurmountable obligation for indigents.¹³⁷ Failure to pay the fees may result in the accrual of additional financial penalties, suspension of the probationer's driver's license, or jail time.¹³⁸ In a similar vein, Senator Marco Rubio celebrated Florida's commitment to helping "individuals and families whose lives have been wrecked by drugs find a productive path forward."¹³⁹ But for defendants convicted of such crimes, that "path" includes mandatory recoupment fees for court-appointed public defenders, onerous payment schedules, and obligations to private collection agencies that charge up to a forty percent surcharge on amounts collected.¹⁴⁰

Like Texas and Florida, Louisiana funds its criminal courts by leveling stiff financial obligations on indigent criminal defendants.¹⁴¹ Eight in ten Louisiana criminal defendants qualify as indigent.¹⁴² After an ephemeral dip in 2007, the poverty rate has risen to 18% statewide and 27% in New Orleans.¹⁴³ Still, the state's court-imposed financial ob-

135. BANNON, NAGRECHA & DILLER, *supra* note 133, at 1; GOFFMAN, *supra* note 110, at 17–18. Goffman details the plights of several young black men who personify this cycle, including "Mike" who, in the span of five years, spent three and a half years in jail or prison and "out of the 139 weeks he was not incarcerated, he spent 87 weeks on probation or parole for five overlapping sentences. He spent 35 weeks with a warrant out for his arrest, and had a total of ten warrants issued on him. He also had at least 51 court appearance over the five-year period." *Id.* See also AM. CIVIL LIBERTIES UNION, *supra* note 103, at 21. The ACLU profiles Torey Tobias, who was "trapped in the system for almost six years after pleading guilty to possession of marijuana" due to unpaid "user fees." *Id.*

136. JOSEPH R. BIDEN, JR. ET AL., SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE 90–91 (Inimai Chettiar & Michael Waldman eds., 2015), available at https://www.brennan-center.org/sites/default/files/publications/Solutions_American_Leaders_Speak_Out.pdf.

137. BANNON, NAGRECHA & DILLER, *supra* note 133, at 7.

138. *Id.* at 6, 23, 24.

139. BIDEN, JR. ET AL., *supra* note 136, at 97.

140. BANNON, NAGRECHA & DILLER, *supra* note 133, at 14, 17.

141. *Id.* at 4; see also Micah West, Comment, *Financial Conflicts of Interest and the Funding of New Orleans's Criminal Courts*, 101 CALIF. L. REV. 521, 524 (2013).

142. Robertson, *supra* note 100. Louisiana is in step with the national average. 80%–90% of those charged with criminal offenses qualify for indigent defense. BANNON, NAGRECHA & DILLER, *supra* note 133, at 4.

143. *Who Lives in New Orleans Now and Metro Parishes Now?*, DATA CENTER, <http://www.datacenterresearch.org/data-resources/who-lives-in-new-orleans-now/> (last updated Feb. 16, 2016). Notably, though post-Katrina poverty rates are roughly the same as 2000 levels, cost of living has increased. For instance, housing is now unaffordable with 37 percent of renters in the city paying more than 50 percent of their pre-tax income on rent and utilities in 2013, up from 24 percent of renters in 2004. *Id.*

ligations rival the most oppressive fees nationwide.¹⁴⁴ Individuals convicted of an offense in New Orleans are charged \$100 simply to enter into a payment plan for court costs.¹⁴⁵ Fines, fees, and corresponding payment plans are formulated without consideration about the defendant's ability to pay.¹⁴⁶ Those who fail to render payment in full within sixty days accrue additional interest and late fees.¹⁴⁷ In addition, parishes are authorized by state law to levy discretionary "special court costs" upon criminal defendants.¹⁴⁸ Remarkably, Louisiana lacks a mechanism to track the total amount of court-related fees imposed on criminal defendants.¹⁴⁹ Yet the state "has dozens, if not hundreds, of assessments" throughout its criminal code.¹⁵⁰

The monies amassed through fines, penalties, and so-called user fees against indigent defendants fund virtually every facet of the New Orleans criminal justice system.¹⁵¹ Indeed, the dollars cover more than operational expenditures and extend to nonessentials such as "premium health care benefits" for judges.¹⁵² The benefits, which cost up to \$15,000 per judge annually, are paid for through a "judicial expense fund"—a kind of "slush fund" for discretionary spending.¹⁵³ To sidestep restrictions on state-funded health benefits, judges characterize fines and fees as "self-generated" and not public money.¹⁵⁴ In effect, "judicial expense funds" encourage judges to convict criminal defendants, impose harsh fines, and issue arrest warrants for nonpayment.¹⁵⁵

Beyond monetary sanctions for failure to pay court-related costs, Louisiana suspends driver's licenses for missed payments—creating a Hobson's choice for individuals whose ability to earn a paycheck relies on driving to work.¹⁵⁶ Moreover, courts routinely extend probation terms

144. See BANNON, NAGRECHA & DILLER, *supra* note 133.

145. *Id.* at 6.

146. *Id.* at 1.

147. *Id.* at 17 n.89 (citing LA. CODE CRIM. PROC. ANN. art. 886(A) (2015)).

148. *Id.* at 10.

149. *Id.* at 1.

150. *Id.* at 10.

151. West, *supra* note 141 (listing the criminal district court, the sheriff's office, and the public defender's office as recipients of funding from financial assessments); Robertson, *supra* note 100.

152. See West, *supra* note 141, at 532–33.

153. *Id.*; Robertson, *supra* note 100 ("This fund is intended to cover costs—from coffee to office supplies to the salaries of court support staff—unmet by state and local dollars.").

154. Claire Galofaro, *Orleans Judges Spent Generously on Supplemental Insurance, Audit Finds*, TIMES-PICAYUNE (Nov. 26, 2012, 6:54 PM), http://www.nola.com/politics/index.ssf/2012/11/orleans_judges_spent_generousl.html.

155. See West, *supra* note 141, at 547.

156. BANNON, NAGRECHA & DILLER, *supra* note 133, at 24 (citing LA. CODE CRIM. PROC. ANN. art. 885.1 (2015)).

for failure to pay a debt in full, even when the defendant has satisfied the other conditions of supervision.¹⁵⁷ Of course, lengthier probation sentences increase the likelihood of additional violations and revocation. Revocation of probation may deprive otherwise-eligible individuals of Temporary Assistance to Needy Families (TANF), food stamps, earned income tax credits, and Supplemental Security Income (SSI).¹⁵⁸

Finally, arrest warrants for debt-related violations of supervision are routine—and generally mean jail time after bond is automatically set at \$20,000.¹⁵⁹ In New Orleans, a recently filed federal lawsuit documents that “poor people are indefinitely jailed if they fall behind on payments of court fines, fees and assessments.”¹⁶⁰ The complaint describes “curso-ry and fleeting” court hearings taking place “days or weeks” after an arrest.¹⁶¹ The hearings often fail to identify the specific debts or fees owed, their amounts, or the date on which they were incurred.¹⁶² If the debtor cannot pay “an arbitrary amount of money,” he or she is sent back to jail.¹⁶³ As in all other proceedings, the court makes no inquiry into the debtor’s ability to pay.¹⁶⁴

Louisiana’s ignominious incarceration rates have long been driven by market-based strategies that generate private sector profits and government savings.¹⁶⁵ Currently, the state’s prison population is declin-

157. *Id.* at 25 (citing LA. CODE CRIM. PROC. ANN. art. 894.4 (2015)). “When a defendant has been sentenced to probation or is on parole and has a monetary obligation . . . the judge may extend the period of probation or parole until the monetary obligation is extinguished.” LA. CODE CRIM. PROC. ANN. art. 894.4 (2015).

158. West, *supra* note 141, at 527–28.

159. See John Simerman, *Federal Lawsuit Claims Orleans Parish Judges Create ‘Debtors’ Prison’ by Illegally Jailing People for Failure to Pay Fees and Fines Without Hearing*, NEW ORLEANS ADVOCATE (September 17, 2015, 10:53 AM), <http://www.theneworleansadvocate.com/news/13471963-123/federal-lawsuit-claims-orleans-parish>; Robertson, *supra* note 100 (stating that according to a class action lawsuit filed by indigent defendants against the city, “[i]f a person misses payments, . . . a collections agent will sign the judge’s name to a warrant” and bond is automatically set at \$20,000).

160. Robertson, *supra* note 100; see also Cain v. City of New Orleans, No. 15-4479, 2015 WL 7783557 (E.D. La. Dec. 3, 2015).

161. Complaint at 21, Cain v. City of New Orleans, No. 15-4479, 2015 WL 7783557 (E.D. La. Dec. 3, 2015); see also AM. CIVIL LIBERTIES UNION, *supra* note 103, at 25 (“[The chief public defender] has seen many cases sped through to conclusion so that courts can collect fines and fees as quickly as possible.”).

162. Complaint at 21, Cain v. City of New Orleans, No. 15-4479, 2015 WL 7783557 (E.D. La. Dec. 3, 2015).

163. *Id.*

164. *Id.* at 22.

165. Chang, *supra* note 101 (reporting that “[a] majority of Louisiana inmates are housed in for-profit facilities” and “[t]he hidden engine behind the state’s well-oiled prison machine is cold, hard cash”).

ing and is expected to decrease by three percent by 2018.¹⁶⁶ In place of long prison sentences, unpaid fines and “user fees” have created a kind of “poverty to jail” pipeline. Tellingly, Calvin Johnson, a former chief judge in Orleans Parish Criminal District Court has described the city’s system “crazy”: “[Paying] \$23 a day to the Sheriff to house someone in the Jail for 30 days to collect \$100.”¹⁶⁷ Less “crazy” than calculated, the strategy keeps jails and court coffers full at the expense of the poor.

III. POSSIBLE CORRECTIVE MEASURES

In the context of post-Katrina New Orleans schools and criminal justice systems, there are several prescriptive remedies that warrant exploration. For students left behind the “progress” made by New Orleans charter school system, the solution is as simple as putting more energy into protecting the public system. More importantly, those schools already subject to market-based principles should be held to the same standards for admissions,¹⁶⁸ access, discipline, and teacher retention as public schools. Adherence to government-mandated standards will promote more equitable access to education. Supervision by locally elected school board members—rather than a private nonprofit—will increase accountability. The “gains” of charter schools in standardized test scores are outweighed by the much more significant “costs” to community, accountability and access. Furthermore, state and local officials should pursue a more equitable allocation of resources to traditional public schools to correct the problems that plague such schools, rather than force a community into an entirely different model. Finally, community-based groups must actively participate in the creation of school policies that considers challenges created by poverty. This is particularly important in urban areas such as New Orleans, where thirty-nine percent of children live below the poverty level.¹⁶⁹

In the criminal justice realm, just treatment of indigent defendants requires broad systemic changes. First, New Orleans courts—like their

166. See *La. Retains Nation’s and World’s Highest Incarceration Rate*, *supra* note 101 (reporting that Louisiana’s prison totals have declined by approximately 3,000 inmates since 2012); Julia O’Donoghue, *Louisiana Expects to See a Decline in Its Prison Population by 2018*, *TIMES-PICAYUNE* (Nov. 26, 2014, 6:27 AM), http://www.nola.com/politics/index.ssf/2014/11/louisiana_expects_to_see_a_dec.html (citing a Pew Charitable Trusts report that Louisiana “is one of just six states that expects to see a decline in its prison population by 2018”).

167. AM. CIVIL LIBERTIES UNION, *supra* note 103, at 23.

168. Improvements such as the OneApp now used to centralize applications is an important step in the right direction. See *supra* note 54.

169. Vicki Mack, *New Orleans Kids, Working Parents, and Poverty*, *DATA CENTER* (Feb. 26, 2015), http://www.datacenterresearch.org/reports_analysis/new-orleans-kids-working-parents-and-poverty/. This figure is seventeen percent above the national average in the United States. *Id.*

federal counterparts—must impose fines based on a defendant’s ability to pay. Under federal law, a court must consider the defendant’s “income, earning capacity, and financial resources” in determining whether to levy a fine.¹⁷⁰ Federal courts must also assess the burden a fine will place upon the defendant and any person who is financially dependent on the defendant.¹⁷¹ Due process demands that New Orleans courts conduct similar inquiries when a fine is initially imposed and throughout any further proceedings. Moreover, an indigency determination at any proceeding should exempt defendants from user fees or related costs. Adoption of standards modeled after federal law will protect the rights of indigent defendants and encourage New Orleans to implement a more just, equitable, and sustainable method of funding its court system.¹⁷²

Secondly, monies collected through the New Orleans court system should, at most, cover only essential operational expenses. Allocation of fines and fees to pay for judicial perks presents a clear conflict of interest and raises constitutional concerns. To this end, the “judicial expense fund” should be eliminated altogether.¹⁷³

Finally, justice requires that courts end the routine practice of incarcerating indigent defendants for failure to pay a debt.¹⁷⁴ Those least able to afford onerous fines and fees must not be further exploited by jails and prisons to shore up profits.

The mythology of the “free” market has been debunked as a shift from the fantasy of a free, fair and competitive market to one that is almost never competitive.¹⁷⁵ Instead, it is consolidated power in the hands of an “effectively totalitarian” organization “operating along nondemocratic lines.”¹⁷⁶ This truth is manifested in the post-Katrina charter school

170. 18 U.S.C. § 3572(a)(1) (2012).

171. *Id.* § 3572(a)(2).

172. Amy Liu, *Post-Katrina New Orleans is Bouncing Back, But Not for the Better*, HUFFINGTON POST (Aug. 27, 2015, 12:12 PM), http://www.huffingtonpost.com/amy-liu/post-katrina-new-orleans-not-for-the-better_b_8049646.html (“Putting a region on a better economic trajectory can be done[,] . . . [and it requires] deliberate civic focus and collaboration.”).

173. *See, e.g., Connally v. Georgia*, 429 U.S. 245, 247 (1977) (holding that due process is violated when a judge has a personal financial interest in the imposition of fines, fees, or other costs).

174. For an example of a statute that prohibits jailing for nonpayment of a fine or related fees, see 18 U.S.C. § 3572(e) (2012).

175. *See* McChesney, *supra* note 63, at 12. “The same corporations that exult in neoliberal ideology are in fact often hypocritical: they want and expect governments to funnel tax dollars to them, and to protect their markets for them from competition, but they want to assure that governments will not tax them or work supportively on behalf of non-business interest, especially on behalf of the poor and working class.” *Id.* at 13.

176. *See id.*

expansion by the near shut-out of community-based school advocates.¹⁷⁷ Local groups in New Orleans that have been denied charters by the Board of Elementary and Secondary Education charge that the “process unfairly favors national groups.”¹⁷⁸

But the post-Katrina charter school’s commitment to market-based principles of autonomy and deregulation also opens the door for neglect and weakens accountability. The current charter system—with more than 44 school boards¹⁷⁹—overwhelms parents. The deregulation leaves most people trying to navigate the system so confused that they do not know where to start.¹⁸⁰ Governance challenges translate into less oversight,¹⁸¹ and less accountability. For poor people with limited resources, the combination of exclusion and confusion makes it difficult to access quality public education and obtain justice in the criminal courts.

CONCLUSION

If we have learned anything from Katrina, we have learned the special challenges disaster response holds for poor people. While market-based strategies have had some undeniable benefits in New Orleans, the blind adherence to market-based strategies is inherently problematic in schools and criminal courts. Over-reliance on “the bottom line”—whether in standardized test scores or court funding—is not as important as protecting individual rights.

Access to education and fair process within the criminal justice system are especially critical markers of whether someone will be trapped in poverty. Government officials and lawmakers should be slow to embrace capitalism within the classroom or courtroom. The numerous efforts to guard against the erosion of civil rights are being pursued in the courtroom, but litigation challenges will likely yield spotty and inconsistent results. Lawmakers must therefore adhere to strong public policy that finds the proper balance between accountability and the protection of individual rights. Moreover, other cities should see New Orleans as a

177. Berkshire, *supra* note 30. Said school reform advocate Andre Perry: “We can’t have a white-led reform movement in New Orleans where all of the decisions are made by three or four power brokers.” *Id.* (internal quotation marks omitted).

178. THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: 2012 REPORT, *supra* note 32, at 36.

179. Bill Quigley, *New Orleans Katrina Pain Index at 10: Who Was Left Behind*, INST. FOR S. STUD. (July 20, 2015, 11:15 AM), <http://www.southernstudies.org/2015/07/new-orleans-katrina-pain-index-at-10-who-was-left-.html>.

180. Marta Jewson, *In New Orleans Schools, Decentralization Creates Confusion Over Who Exactly Is in Charge When There’s a Problem*, HECHINGER REP. (Dec. 4, 2014), <http://hechingerreport.org/new-orleans-schools-decentralization-creates-confusion-exactly-charge-theres-problem/>.

181. THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: 2012 REPORT, *supra* note 32, at 2.

cautionary tale of what could happen when market-based strategies corrupt the classroom and the courtroom.¹⁸² Within the classrooms and criminal justice system, the pursuit of market-based principles should not trump justice.

182. Many other districts are looking to New Orleans' reform as a model. See Stacy Teicher Khadaroo, *New Orleans Goes All in on Charter Schools. Is It Showing the Way?*, CHRISTIAN SCI. MONITOR (Mar. 1, 2014), <http://www.csmonitor.com/USA/2014/0301/New-Orleans-goes-all-in-on-charter-schools.-Is-it-showing-the-way>. Nevertheless, the New Orleans school system is still in flux. On May 12, 2016, the Louisiana Governor signed a bill that will open the door to yet another transition—moving the charter schools back to local control over the next several years. Jessica Williams, *Gov. John Bell Edwards Signs Bill Bringing New Orleans Public Schools Under Local Control*, ADVOCATE (May 12, 2016), <http://theadvocate.com/news/neworleans/neworleansnews/15771106-123/panel-appointed-to-craft-path-toward-local-control-for-new-orleans-public-schools>. The new model is supposed to allow charter schools to keep flexibility, but allow the board to serve as manager and regulator. Kate Zernike, *New Orleans Plan: Charter Schools, With a Return to Local Control*, N.Y. TIMES (May 9, 2016), http://www.nytimes.com/2016/05/10/us/charter-driven-gains-in-new-orleans-schools-face-a-big-test.html?_r=0. Proponents of the new model have dubbed it a “reunification” while critics have dismissed it as a “Trojan horse.” Emma Brown, *New Orleans Tries to Mix Charter Schools with Democracy*, WASH. POST (May 11, 2016), https://www.washingtonpost.com/local/education/new-orleans-tries-to-mix-charter-schools-with-democracy-is-this-the-district-of-the-future/2016/05/10/67bdb94a-16ba-11e6-924d-838753295f9a_story.html. Only time will tell whether the transition will quiet or inflame complaints about the current charter model in New Orleans.