

# PUBLIC SCHOOL ADMISSIONS AND THE MYTH OF MERITOCRACY: HOW AND WHY SCREENED PUBLIC SCHOOL ADMISSIONS PROMOTE SEGREGATION

RICHARD R. BUERY, JR.\*

*Public schools in America remain deeply segregated by race, with devastating effects for Black and Latinx students. While residential segregation is a critical driver of school segregation, the prevalence of screened admissions practices can also play a devastating role in driving racial segregation in public schools. New York City, one of the most segregated school systems in America, is unique in its extensive reliance on screened admissions practices, including the use of standardized tests, to assign students to sought-after public schools. These screens persist despite their segregative impact in part because they appeal to America’s embrace of the idea of meritocracy. This Article argues that Americans embrace three conceptions of merit which shield these screens from proper scrutiny. The first is individual merit—the idea that students with greater ability or achievement deserve access to better schools. The second is systems merit—the idea that poor student performance on an assessment is a failure of the system that prepared the student for the assessment. The third is group merit—the idea that members of some groups simply possess less ability. Each of these ideas has a pernicious impact on perpetuating racial inequality in public education.*

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\* Copyright © 2020 by Richard R. Buery, Jr., Chief of Policy and Public Affairs, KIPP Foundation; Public Service Fellow, Robert F. Wagner School of Public Service, New York University. Gratitude to Deborah Archer for her thoughtful feedback on early drafts. And thank you to Choyce Miller for your excellent research assistance.

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## INTRODUCTION

In America, kindergarten through 12th grade public education (“K12 education”) remains deeply segregated, and those on the wrong side are denied opportunity. “On every measure of achievement and attainment, race continues to be a salient factor in defining and dividing the American student population.”<sup>1</sup> Children of color in America are more likely to attend under-resourced, struggling schools and have poor educational outcomes, and are less likely to have economic opportunity in adulthood.<sup>2</sup>

School segregation is largely a function of residential segregation and the use of political boundaries to sort students on the basis of that segregation.<sup>3</sup> Segregated schools then contribute to the segregation of opportunity, as privileged children—disproportionately white and wealthy—attend separate schools that reinforce their privilege.<sup>4</sup> But residential segregation is not the sole driver of school segregation. The prevalence of screened K12 schools can also be a significant factor. Screened K12 schools use academic screens, including standardized tests, grades, class rank, essays, portfolio reviews, teacher recommendations, school attendance, or other academic factors, either in isolation or combination, to

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<sup>1</sup> Pedro A. Noguera, *Race, Education, and the Pursuit of Equity in the Twenty-First Century*, in RACE, EQUITY, AND EDUCATION: SIXTY YEARS FROM *BROWN* 4 (Pedro A. Noguera et al. eds., 2016). *See generally* JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (1991) (describing the extreme degree of educational inequality and racial segregation witnessed by the author during his visits to schools in different neighborhoods across America, persisting thirty-seven years after the court found segregated education was unconstitutional).

<sup>2</sup> *See* LAUREN MUSU-GILLETTE ET AL., U.S. DEP’T OF EDUC., *STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2017* (2017), <https://nces.ed.gov/pubs2017/2017051.pdf> (examining the educational challenges and progress students within the United States face by race/ethnicity).

<sup>3</sup> *See* *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that when students are segregated across school district boundaries, the courts have no authority to require student enrollment across those boundaries absent a finding that predominantly white districts are intentionally excluding Black students).

<sup>4</sup> *See, e.g.*, Richard Rothstein, *School Policy Is Housing Policy: Deconcentrating Disadvantage to Address the Achievement Gap*, in RACE, EQUITY, AND EDUCATION: SIXTY YEARS FROM *BROWN*, *supra* note 1, at 27–31 (arguing that segregated schools resulting from segregated neighborhoods compound economic and social disadvantages experienced by low-income and minority students); *see also* *Dismissed: America’s Most Divisive School District Borders*, EDBUILD, <https://edbuild.org/content/dissmised> (last visited Jan. 5, 2020) (describing how school district boundaries drive racial and economic segregation in K12 schools).

determine which students are admitted. Because white and wealthy students are more likely to perform well on these screens,<sup>5</sup> especially those relying heavily on standardized tests, school systems using admissions screens are more likely to be segregated. Although many communities have reduced their reliance on admissions screens,<sup>6</sup> these policies often persist despite their segregative impact. For example, in New York City, efforts to reduce reliance on admissions screens have faltered.<sup>7</sup>

Why are academic screens so durable despite their impact on segregation? One reason is America's obsession with the meritocracy. National news stories such as the college admissions scandal<sup>8</sup> and the challenge to Harvard's race-conscious admissions practices<sup>9</sup> have shown how merit-based admissions in higher education is largely a cover for privilege. We now know that nearly thirty percent of Harvard's entering class are athletes, legacies, the children of faculty or staff, or students otherwise of interest to Harvard because of who their parents are.<sup>10</sup> But this growing awareness of the "[m]yth of [m]eritocracy"<sup>11</sup> in higher education has not

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<sup>5</sup> See Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/the-black-white-test-score-gap-why-it-persists-and-what-can-be-done> (describing and explaining the test score gap between white and Black students); see also Christopher Bergland, *Why Do Rich Kids Have Higher Standardized Test Scores?*, PSYCHOLOGY TODAY (Apr. 18, 2015), <https://www.psychologytoday.com/us/blog/the-athletes-way/201504/why-do-rich-kids-have-higher-standardized-test-scores> (discussing the academic achievement gap between lower-income and higher-income children and discussing a correlative link found between family income and a child's brain).

<sup>6</sup> See Winnie Hu & Elizabeth A. Harris, *A Shadow System Feeds Segregation in New York City Schools*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/nyregion/public-schools-screening-admission.html> (contrasting New York City with Los Angeles, Boston, and Seattle, which have fewer schools using admissions screens).

<sup>7</sup> See Spectrum News Staff, *'Our Plan Didn't Work': De Blasio Indicates Openness to Keeping the SHSAT*, SPECTRUM NEWS (Sept. 25, 2019, 10:01 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2019/09/26/shsat-bill-de-blasio-says-plan-to-scrap-specialized-high-school-exam-did-not-work>.

<sup>8</sup> See Jennifer Medina et al., *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html> (discussing Operation Varsity Blues, where at least fifty-one people, including wealthy investors and television stars, have been accused of paying millions of dollars to cheat on the SAT and bribe college officials at elite universities); see also *Investigations of College Admissions and Testing Bribery Scheme*, U.S. DEP'T OF JUST.: U.S. ATT'Y'S OFF., DISTRICT OF MASS., <https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme> (last updated Dec. 30, 2019).

<sup>9</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019).

<sup>10</sup> Trial Exhibit DX 706, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB) (showing share of admitted students in ALDC categories).

<sup>11</sup> See Melinda D. Anderson, *Why the Myth of Meritocracy Hurts Kids of Color*, ATLANTIC (July 27, 2017), <https://www.theatlantic.com/education/archive/2017/07/internalizing-the-myth-of-meritocracy/535035>.

fully extended to screened K12 admissions.

This Article argues that Americans embrace three conceptions of merit which shield these screens from proper scrutiny. The first is individual merit—the idea that students with greater ability or achievement deserve access to better schools. The second is systems merit—the idea that poor student performance on an assessment is a failure of the system that prepared the student for the assessment. The third is group merit—the idea that members of some groups simply possess less ability. Each of these ideas has deep roots in the American psyche. And while the first two are more sympathetic than the third, each has a pernicious impact on perpetuating racial inequality in K12 public education because each preserves a status quo that undermines what should be K12’s central mission: to allow every student access to opportunity. The Article then discusses New York City public school admissions. New York City is unusual: No other American school system relies so extensively on academic screens to make admissions decisions.<sup>12</sup> The Article considers the impact those screens have on New York City K12 admissions and explores how these three conceptions of merit impact public debate on their continued use. Only by directly confronting the myth of meritocracy can we make meaningful progress towards expanding equal educational opportunity for all students.

## I

### THE APPEAL OF THREE DIMENSIONS OF MERIT

Screened K12 admissions systems persist for many reasons. Unlike some other cities, New York has a large base of middle-class families.<sup>13</sup> Admissions screens—which create a shadowy, high-quality system-within-a-system—is a key part of keeping it that way.<sup>14</sup> Of course, defenders of the status quo will rarely defend segregation explicitly in terms of preserving a privileged school system for white, middle-class children. Instead, the rhetoric supporting continuation of this screened admissions system resonates so strongly because it is grounded in America’s foundational myth of meritocracy.

#### A. *Merit of the Individual*

The most common conception of merit considers the achievements or potential achievements of individuals. In the context of K12 admissions, the meritocracy argues that smart and hardworking children should be rewarded

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<sup>12</sup> Hu & Harris, *supra* note 6.

<sup>13</sup> *Id.*

<sup>14</sup> *See id.* (noting that some highly coveted schools “operate like de facto private schools with competitive admissions that can require families to . . . pour thousands of dollars into tutors and admissions consultants”).

by gaining access to America's elite institutions, which then serve as an entryway to the American Dream. Originally coined by essayist James Truslow Adams, the American Dream is the idea that "life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement."<sup>15</sup> Another word for this idea is meritocracy, a system where benefits and advancement are based not on your caste, family, wealth, relationships, or some immutable characteristic, but instead on your skills, intelligence, ability, and credentials, ideally measured by objective assessments such as standardized tests.<sup>16</sup>

In a system where access to some institutions is limited, the argument goes, standardized tests are an appealing strategy to distribute a limited resource. "Test scores and grades are seemingly objective measures of merit in the minds of a public that has long prided itself on the belief that hard work and determination should be rewarded."<sup>17</sup> Before the 1960s, elite private colleges were not particularly selective.<sup>18</sup> In 1949, for example, 2800 men applied to Harvard College: 1651 were admitted.<sup>19</sup> But Ivy League College applicants did not represent a cross section of America—they represented predominantly white Christian men who attended a few elite preparatory schools.<sup>20</sup> Today, they continue to dominate Harvard admissions, but at least they no longer monopolize it. Standardized tests did not replace an equitable system for distributing elite educational resources. Despite the limitations of standardized testing,<sup>21</sup> including cultural bias, the discreditation of IQ tests on which the SAT is modeled, and the obvious role that socio-economic status plays in performance,<sup>22</sup> standardized tests have, in some ways, been a democratizing tool for educational access in higher education.<sup>23</sup>

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<sup>15</sup> JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1931).

<sup>16</sup> See EDUCATION AND SOCIOLOGY: AN ENCYCLOPEDIA 436 (David L. Levinson et al. eds., 2002).

<sup>17</sup> Linda F. Wightman, *The Role of Standardized Admissions Tests in the Debate About Merit, Academic Standards, and Affirmative Action*, 6 PSYCHOL. PUB. POL'Y & L. 90, 96 (2000).

<sup>18</sup> See DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* 6 (2019).

<sup>19</sup> Robert Paul Wolff & Tobias Barrington Wolff, *The Pimple of Adonis's Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. 379, 383 n.12 (2005).

<sup>20</sup> See Annika Neklason, *Elite-College Admissions Were Built to Protect Privilege*, ATLANTIC (Mar. 18, 2019), <https://www.theatlantic.com/education/archive/2019/03/history-privilege-elite-college-admissions/585088>.

<sup>21</sup> See, e.g., *What's Wrong with Standardized Tests?*, FAIRTEST (May 22, 2012, 8:26 PM), <https://www.fairtest.org/facts/whatwron.htm>.

<sup>22</sup> See *The Measure of Merit: Nicholas Lemann on Testing and Meritocracy*, ATLANTIC MONTHLY ONLINE (Aug. 22, 1995), <https://www.theatlantic.com/past/docs/unbound/aandc/trnscript/lemtest.htm>.

<sup>23</sup> See Kathryn Juric, *The College Board Democratizes Access to Public*

In K12 systems, screened admissions tools, especially standardized tests, arguably play a similar role. For some students, standardized tests provide an opportunity to demonstrate their potential in a system that regularly undervalues them. New York City Public Advocate Jumaane Williams, a Black graduate of Brooklyn Technical High School, a New York City high school that uses a standardized test to admit students, put it this way: “If [my school] had used grades, if they had used behavior . . . if they had used attendance . . . I would not have had an access point to this quality education.”<sup>24</sup>

This is especially true when we consider the role of unconscious bias. Some New York City screened high schools rely on multiple measures rather than a single examination.<sup>25</sup> Although Black and Latinx students are better represented in the multiple-measure screened schools, so are white students; these seats come at the expense of Asian students who are presumably evaluated less fairly on subjective measures like essays, interviews, and recommendations.<sup>26</sup> These results resonate with claims made by plaintiffs in the Harvard affirmative action case that the university’s consideration of subjective characteristics allows anti-Asian bias to infect admissions decisions.<sup>27</sup>

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*Education*, HUFFPOST, [https://www.huffpost.com/entry/the-college-board-democra\\_b\\_1630582](https://www.huffpost.com/entry/the-college-board-democra_b_1630582) (last updated Aug. 27, 2012) (defending the College Board’s decision to invalidate some test takers’ scores on fairness grounds and recounting the SAT’s history of democratizing access to education); *The SAT and Higher Education*, COLLEGE BOARD, <https://collegereadiness.collegeboard.org/educators/higher-ed> (last visited Jan. 5, 2020) (“[T]he SAT was created to democratize access to higher education for all students and to ensure that all students had a chance to go to college.”). Despite this, American higher education continues to privilege those from wealthy backgrounds. Fifty-eight percent of Americans whose families were in the top income quartile earn a bachelor’s degree by age twenty-four, compared to 11% from the bottom quartile. It is even more extreme at the most elite colleges, where 72% of students come from the top quartile, versus 3% from the bottom quartile. MARKOVITS, *supra* note 18, at 135 (citing 2016 statistics).

<sup>24</sup> Jessica Gould & Danny Lewis, ‘It Was Racist Then and It’s Racist Now’: NY Assembly Wrestles with Specialized High School Admission Testing, *GOHAMIST* (May 10, 2019, 3:50 PM), <https://gothamist.com/news/it-was-racist-then-and-its-racist-now-ny-assembly-wrestles-with-specialized-high-school-admission-testing>.

<sup>25</sup> Gail Robinson, *The Problem with NYC High-School Admissions? It’s Not Just the Test*, *CITY LIMITS* (Feb. 8, 2016), <https://citylimits.org/2016/02/08/the-problem-with-nyc-high-school-admissions-its-not-just-the-test>.

<sup>26</sup> See Nicole Tortoriello, Note, *Dismantling Disparities: An Analysis of Potential Solutions to Racial Disparities in New York City’s Specialized High Schools Admissions Process*, 49 *COLUM. J.L. & SOC. PROBS.* 417, 427–28 (2016) (citing the differences in racial composition between multiple-measure and test-in schools and articulating critics’ concerns of anti-Asian bias).

<sup>27</sup> See, e.g., Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?*, *N.Y. TIMES MAG.* (Aug. 28, 2019), <https://www.nytimes.com/2019/08/28/magazine/affirmative-action-Asian-american-harvard.html>. In *SFFA*, Asian seats arguably were lost to white applicants, not Black and Latinx ones, begging the question why plaintiffs challenged affirmative action instead of legacy admissions. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*

### B. Merit of the System

Screened K12 admissions practices also resonate with another conception of merit: systems accountability for public schools. Although merit is usually understood as a measure of individuals, we might extend this concept to systems as well. Many supporters of admissions screens defend them as tools for measuring the performance of school systems.

In 1983, President Ronald Reagan's National Commission on Excellence in Education released *A Nation at Risk: The Imperative for Education Reform*,<sup>28</sup> arguing that America's public schools were failing its students and the nation. *A Nation at Risk* ushered in a new era of federal accountability in K12 education, where school districts would be held to account for the outcomes of their students.<sup>29</sup> This era reached its apotheosis with the No Child Left Behind Act (NCLB), the 2001 reauthorization of the Elementary and Secondary Education Act of 1965.<sup>30</sup> Passed with bipartisan support and signed into law by President George W. Bush, NCLB embraced standardized-testing as a tool of education reform.<sup>31</sup> As a condition of federal funding, states were required to establish robust academic standards and test students to measure their progress against those standards.<sup>32</sup> NCLB also required states to disaggregate data to understand whether schools were effectively serving traditionally under-served children, such as low-income students, students with disabilities, and students of major racial and ethnic "subgroups."<sup>33</sup>

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Coll., 397 F. Supp. 3d 126, 161 (D. Mass. 2019) ("The gist of SFFA's argument, however, is not that Asian Americans were excluded altogether, but rather that the non-ALDC Asian American applicants were stronger than the non-ALDC white applicants and should have been admitted at a higher rate.").

<sup>28</sup> THE NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), [https://www.edreform.com/wp-content/uploads/2013/02/A\\_Nation\\_At\\_Risk\\_1983.pdf](https://www.edreform.com/wp-content/uploads/2013/02/A_Nation_At_Risk_1983.pdf).

<sup>29</sup> DOUGLAS N. HARRIS ET AL., *BROWN CTR. ON EDUC. POLICY AT BROOKINGS, A PRINCIPLED FEDERAL ROLE IN PREK-12 EDUCATION 3* (2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_20161206\\_principled\\_federal\\_role\\_browncenter1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_20161206_principled_federal_role_browncenter1.pdf).

<sup>30</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

<sup>31</sup> See GAIL L. SUNDERMAN & JIMMY KIM, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *EXPANSION OF FEDERAL POWER IN AMERICAN EDUCATION: FEDERAL-STATE RELATIONSHIPS UNDER THE NO CHILD LEFT BEHIND ACT, YEAR ONE 16-18* (2014), <https://civilrightsproject.ucla.edu/research/k-12-education/nclb-title-i/expansion-of-federal-power-in-american-education-federal-state-relationships-under-the-no-child-left-behind-act-year-one/sunderman-kim-expansion-federal-power-american.pdf> (describing testing requirements under NCLB); Deven Carlson, *Testing and Accountability: What Have We Learned and Where Do We Go?*, in BUSH-OBAMA SCHOOL REFORM: LESSONS LEARNED 16 (Frederick M. Hess & Michael Q. McShane eds., 2018).

<sup>32</sup> See Carlson, *supra* note 31, at 16-17 (describing the stringency of the requirements upon which a school's Title I funding depended).

<sup>33</sup> Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), <https://www.edweek.org/ew/section/multimedia/no-child-left-behind-overview-definition-summary.html>.

NCLB proved controversial for a number of reasons. Some critics rejected the expanded federal role in education.<sup>34</sup> Others argued that NCLB fostered a culture of “teaching to the test” that diminished the teaching profession and led school districts to disinvest in non-tested subjects like arts and foreign languages.<sup>35</sup> Others claimed that the law did not fund schools sufficiently,<sup>36</sup> and that its punitive approach to struggling schools was counterproductive and soured would-be allies.<sup>37</sup> Some rightly pointed out that poverty, racism, and unequal education opportunity could not be solved by federal accountability alone.<sup>38</sup> Ultimately, when President Obama signed a reauthorized Elementary and Secondary Education Act in 2015, now called the Every Student Succeeds Act, the balance of authority swung back toward the States.<sup>39</sup>

Despite NCLB’s problems, the law fostered a culture that holds school systems accountable for providing a quality education to all students—including those traditionally and tragically failed by K12 education. By revealing the extent of those gaps, rejecting “the soft bigotry of low expectations,”<sup>40</sup> and asserting that change is possible, NCLB represented a significant step forward in America’s quest of educational equity. Despite the legitimate complaints of those concerned with the role of standardized testing in America, those tests do represent a powerful tool of accountability. Without data, we cannot understand whether students are learning, which students are learning, and allocate resources accordingly.

Academic screens in K12 admissions can be understood as part of this movement to use data to hold school systems accountable for how they serve Black and Latinx students. In school systems where few Black or Latinx students are awarded admission to screened high schools because too few Black and Latinx students score highly enough on a standardized admissions

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<sup>34</sup> See, e.g., Lorraine M. McDonnell, *No Child Left Behind and the Federal Role in Education: Evolution or Revolution?*, 80 PEABODY J. EDUC. 19, 20 (2005) (describing state and local opposition to NCLB).

<sup>35</sup> See Carlson, *supra* note 31, at 23–24.

<sup>36</sup> See Helen F. Ladd, *No Child Left Behind: A Deeply Flawed Federal Policy*, 36 J. POL’Y ANALYSIS & MGMT., 461, 466–67 (2017) (characterizing the burdensome expectations placed on schools with inadequate support provided to those schools as a major flaw of the legislation).

<sup>37</sup> See Carlson, *supra* note 31, at 26–28 (describing unintended reactions of some states, schools, and parents to NCLB).

<sup>38</sup> See John Rogers, *Forces of Accountability? The Power of Poor Parents in NCLB*, 76 HARV. EDUC. REV. 611 (2006) (arguing that what is missing from NCLB policy narratives is a fundamental understanding of the problems faced by low-income students, including lack of resources and tools).

<sup>39</sup> Carlson, *supra* note 31, at 20.

<sup>40</sup> George W. Bush, U.S. President, Speech at the NAACP’s 91st Annual Convention (July 10, 2000), in *George W. Bush’s Speech to the NAACP*, WASH. POST: ON POLITICS, <http://www.washingtonpost.com/wp-srv/onpolitics/elections/bushtext071000.htm> (last visited Nov. 19, 2019) (articulating his vision for NCLB).



test, the meritocracy argues that the standardized test is not the problem any more than a smoke alarm is the problem during a fire. The problem is that the school system has not sufficiently prepared those students to excel on an otherwise fair test.

### C. *Merit of the Group*

Finally, I believe that some defenders of screened admissions are not disturbed by the relative lack of Black and Latinx students in screened schools because they believe that Black and Latinx students are less likely to merit admission. Moreover, the disproportionately large number of Asian families coincides with the Asian model minority myth,<sup>41</sup> itself a harmful stereotype which discounts the reality of anti-Asian racism and whose origins arise from efforts to chastise “less successful” ethnic groups.<sup>42</sup> Of course, not every defender of screened K12 admissions is racist. But some are.

## II

### THE MYTH OF MERITOCRACY IN K12 ADMISSIONS

#### A. *The Use of Standardized Tests to Admit Students to K12 Schools*

Race and poverty combine to limit opportunity and life outcomes for people in America’s most distressed communities. Segregated schools are among the most powerful institutions through which race and poverty do their work.<sup>43</sup> In part, this is a function of economics. Most education funding in America is driven by local taxes, so wealthier communities have better-funded schools.<sup>44</sup> But it is not a problem of school funding alone. The concentration of students facing significant disadvantage across a range of

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<sup>41</sup> See generally STACEY J. LEE, UNRAVELING THE “MODEL MINORITY” STEREOTYPE: LISTENING TO ASIAN AMERICAN YOUTH (2d ed. 2009) (describing the ways in which the model minority myth continues to impact Asian Americans).

<sup>42</sup> See ROSALIND S. CHOU & JOE R. FEAGIN, THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM 13–19 (2d ed. 2016) (“Like other Americans of color, Asian Americans serve as pawns in the racially oppressive system maintained at the top by whites.”).

<sup>43</sup> See Nancy McArdle & Dolores Acevedo-Garcia, *Consequences of Segregation for Children’s Opportunity and Wellbeing*, HARV. JOINT CTR. FOR HOUSING STUD. 11–12 (2017), [https://www.jchs.harvard.edu/sites/default/files/a\\_shared\\_future\\_consequences\\_of\\_segregation\\_for\\_children.pdf](https://www.jchs.harvard.edu/sites/default/files/a_shared_future_consequences_of_segregation_for_children.pdf) (describing how schools without concentrated poverty support increased academic achievement).

<sup>44</sup> In 2015–16, 8% of K12 education funding came from the federal government, 47% from states, and 45% from local sources. *Public School Revenue Sources*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/coe/indicator\\_cma.asp](https://nces.ed.gov/programs/coe/indicator_cma.asp) (last updated May 2019); see also Carmel Martin et al., *A Quality Approach to School Funding: Lessons Learned from School Finance Litigation*, CTR. FOR AM. PROGRESS (Nov. 13, 2018, 12:01 AM), <https://www.americanprogress.org/issues/education-k-12/reports/2018/11/13/460397/quality-approach-school-funding> (describing how school funding impacts educational quality).

domains, in schools that are cut off from social, economic, and political capital, combine to depress academic outcomes and deprive students of color of the American Dream.<sup>45</sup>

Tragically, some K12 systems are exacerbating these failures by utilizing the illegitimate tools of the “meritocracy” in student admissions. There is a long history of K12 systems using standardized tests and other academic screens to track students into more popular schools and programs.<sup>46</sup> And because white and wealthier students are more likely to leverage their privilege to perform well on these screens, they have preferred access to elite educational programs.<sup>47</sup>

### B. Screened Admissions in New York City Public Schools

The New York City public school system provides an instructive, though extreme, example. Perhaps the most racially segregated system in America,<sup>48</sup> New York City is also a leader in the use of “merit-based”

<sup>45</sup> See, e.g., Matthew Desmond, *Severe Deprivation in America: An Introduction*, 1 RUSSELL SAGE FOUND. J. SOC. SCIS. 1, 3 (2015) (noting the “clustering of different kinds of disadvantage across multiple dimensions (psychological, social, material) and institutions (work, family, prison)” in low-income communities of color); McArdle & Acevedo-Garcia, *supra* note 43, at 4–8 (listing studies linking neighborhood poverty and socioeconomic disadvantages with worsened educational and social outcomes); Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE & SOC. PROBS. 21, 21 (2014) (“[S]ocial and economic disadvantage . . . depresses student performance, and . . . concentrating students with these disadvantages in racially and economically homogeneous schools depresses it further.”); Dear Colleague Letter Regarding Mobility via Education and Socioeconomic Opportunity from Julián Castro, Sec’y of Hous. and Urban Dev., John B. King, Jr., Sec’y of Educ., and Anthony R. Foxx, Sec’y of Transp., at 1 (June 3, 2016), <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf> (“We also recognize that children raised in concentrated poverty or in communities segregated by socioeconomic status or race or ethnicity have significantly lower social and economic mobility than those growing up in integrated communities.”).

<sup>46</sup> See TOM LOVELESS, BROWN CTR. ON EDUC. POLICY, THE 2013 BROWN CENTER REPORT ON AMERICAN EDUCATION: HOW WELL ARE AMERICAN STUDENTS LEARNING? 16–18, <https://www.brookings.edu/wp-content/uploads/2016/06/2013-brown-center-report-web-3.pdf> (finding consistent usage of tracking over the past two decades and a resurgence in ability grouping in the 2000s); Eric Grodsky et al., *Testing and Social Stratification in American Education*, 34 ANN. REV. SOC. 385, 389–91 (2008) (recounting the history and evolution of standardized testing in the United States).

<sup>47</sup> See Sonali Kohli & Quartz, *Modern-Day Segregation in Public Schools*, ATLANTIC (Nov. 18, 2014), <https://www.theatlantic.com/education/archive/2014/11/modern-day-segregation-in-public-schools/382846> (“Many education researchers have argued that tracking perpetuates class inequality and is partially to blame for the stubborn achievement gap in the U.S. educational system.”).

<sup>48</sup> See John Kucsera, *New York State’s Extreme School Segregation: Inequality, Inaction and a Damaged Future*, UCLA: THE CIVIL RIGHTS PROJECT (Mar. 26, 2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norfler-report-placeholder> (finding that in 2009, Black and Latinx students in New York State experienced the highest levels of school segregation in the country).

screens.<sup>49</sup> Recently, New York City has made the news for efforts to curtail the use of standardized tests in admissions.<sup>50</sup>

In New York City, admission to gifted and talented programs in elementary schools (“G & T”) is *exclusively* based on a standardized test taken by four-year-olds for entry in kindergarten.<sup>51</sup> The programs are hyper-segregated. In a system where 65% of kindergartners are Black or Latinx, only 18% of gifted and talented kindergarten seats are offered to Black or Latinx students.<sup>52</sup> Resourced and well-informed parents often devote significant time and financial resources in preparing four-year-old children for this test, and we see those payoffs reflected in admissions.<sup>53</sup>

Screening continues in the upper grades. About 36% of middle and high schools are fully or partially screened.<sup>54</sup> These include schools that rely exclusively on standardized tests, as well as those that use a combination of test scores, grades, essays, interviews, auditions, or other factors.<sup>55</sup>

<sup>49</sup> While New York City is not alone in utilizing admissions screens, it is unusual in its heavy reliance on those screens, and in particular the use of high stakes standardized tests as the exclusive admissions factor for several schools. *See, e.g.*, Hu & Harris, *supra* note 6 (finding that the number of New York City high schools relying on academic screening more than tripled from 1997 to 2017); Richard V. Reeves & Ashley Schobert, *Elite or Elitist? Lessons for Colleges from Selective High Schools*, BROOKINGS (July 31, 2019), <https://www.brookings.edu/research/elite-or-elitist-lessons-for-colleges-from-selective-high-schools> (“Most of these schools base their admissions on academic criteria alone, typically including performance on a specialized entrance exam.”); *see also* Eliza Shapiro, *Should a Single Test Decide a 4-Year-Old’s Educational Future?*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/nyregion/nyc-gifted-talented-test.html> [hereinafter Shapiro, *Should a Single Test Decide a 4-Year-Old’s Educational Future?*] (discussing the debate over relying on test scores for elementary school admissions).

<sup>50</sup> *See* Eliza Shapiro, *Only 7 Black Students Got into Stuyvesant, N.Y.’s Most Selective High School, out of 895 Spots*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html> [hereinafter Shapiro, *Only 7 Black Students Got into Stuyvesant*] (describing the debate over Mayor Bill de Blasio’s proposal to eliminate use of entrance exams).

<sup>51</sup> Shapiro, *Should a Single Test Decide a 4-Year-Old’s Educational Future?*, *supra* note 49.

<sup>52</sup> SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II: NEW PROGRAMS FOR BETTER SCHOOLS 26 (2019), [https://docs.wixstatic.com/ugd/1c478c\\_067f0c0a893c45a38620735f11e1dd43.pdf](https://docs.wixstatic.com/ugd/1c478c_067f0c0a893c45a38620735f11e1dd43.pdf).

<sup>53</sup> *See id.* at 29 (“Families who can afford to enroll their four and five year-old children in test prep programs have an important and often consequential advantage in G&T admissions.”).

<sup>54</sup> 21% are fully screened; 36% are fully or partially screened. Interview with Josh Wallack, Deputy Chancellor, N.Y.C. Dep’t of Educ. (Oct. 28, 2019); *see also* N.Y. APPLESEED, WITHIN OUR REACH: SEGREGATION IN HIGH SCHOOLS AND WHAT WE CAN DO ABOUT IT: HIGH SCHOOL CHOICE 9 (2014), <https://nyappleseed.org/wp-content/uploads/Within-Our-Reach-3rd-Brief-April-2014-FINAL.pdf>.

<sup>55</sup> Each year, 80,000 NYC students apply to 700 high school programs. Schools fall into one of the following admissions categories: audition; education option (schools select 16% high-performing students, 68% middle-performing, and 16% low-performing students based on seventh grade state standardized test scores); screened (using a combination of state test scores, grades, recommendations, essays, interviews, attendance, punctuality, an additional test, and in some cases a zone preference); unscreened (randomized admissions); zoned (randomized admissions with a

The highest-profile screened schools in New York City are its eight specialized high schools. A state law, the Hecht-Calandra Act,<sup>56</sup> requires the three original specialized high schools—Stuyvesant High School, the Bronx High School of Science, and Brooklyn Technical High School—to offer admissions *exclusively* on the basis of the Specialized High Schools Admissions Test (SHSAT).<sup>57</sup> In 2019, Black and Latinx children were 70% of public-school students but received just 10% of admissions offers to one of New York City’s eight specialized high schools.<sup>58</sup> At Stuyvesant, just seven of 895 seats were offered to Black students in 2019.<sup>59</sup> Some believe that Hecht-Calandra was adopted by the New York State legislature in 1971 as a defense against efforts to increase Black and Latinx admissions.<sup>60</sup>

The SHSAT is an effective barrier to students without privilege. Students have to proactively sign up for the SHSAT.<sup>61</sup> Many Black and Latinx students attend struggling schools that fail to notify those students

zoned preference); and specialized high schools (based on the SHSAT or in the case of LaGuardia High School, an audition). See Przemyslaw Nowaczyk & Joydeep Roy, *Preferences and Outcomes: A Look at New York City’s Public High School Choice Process*, N.Y.C. INDEP. BUDGET OFF.: SCHS. BRIEF (Oct. 2016), <https://ibo.nyc.ny.us/iboreports/preferences-and-outcomes-a-look-at-new-york-citys-public-high-school-choice-process.html>. Another category, limited unscreened, gave preference to students who expressed interest in a school by, for example, attending an admissions fair. This alternative has been phased out. See Monica Disare, *City to Eliminate High School Admissions Method That Favored Families with Time and Resources*, CHALKBEAT (June 6, 2017), <https://www.chalkbeat.org/posts/ny/2017/06/06/city-to-eliminate-high-school-admissions-method-that-favored-families-with-time-and-resources>.

<sup>56</sup> N.Y. EDUC. LAW § 2590-h(1)(b) (McKinney 2019).

<sup>57</sup> New York City could change admissions at five additional specialized high schools opened since passage of Hecht-Calandra without approval from the State Legislature. See Katrina Shakarian, *The History of New York City’s Special High Schools*, GOTHAM GAZETTE, <https://www.gothamgazette.com/government/5392-the-history-of-new-york-citys-special-high-schools-timeline> (last visited Jan. 5, 2020).

<sup>58</sup> Eliza Shapiro & K.K. Rebecca Lai, *How New York’s Elite Public Schools Lost Their Black and Hispanic Students*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/interactive/2019/06/03/nyregion/nyc-public-schools-black-hispanic-students.html> (describing rapid decline of Black and Latinx admissions at the specialized high schools since the 1970s).

<sup>59</sup> Shapiro, *Only 7 Black Students Got into Stuyvesant*, *supra* note 50.

<sup>60</sup> See Nicole Tortoriello, *Dismantling Disparities: An Analysis of Potential Solutions to Racial Disparities in New York City’s Specialized High Schools Admissions Process*, 49 COLUM. J.L. & SOC. PROBS. 417, 424–25 (2016) (“The law was passed under the guise of preventing a ‘lowering of standards.’ Yet the surrounding circumstances and other actions by the legislature raise questions as to the true motive behind the law’s adoption.”) The Hecht-Calandra Act also authorizes the Discovery Program, by which “disadvantaged” students may win admission by participating in a summer program. See N.Y. EDUC. LAW §§ 2590-h(1)(b), 2590-g.

<sup>61</sup> See *Specialized High Schools*, N.Y.C. DEP’T EDUC., <https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/specialized-high-schools> (last visited Feb. 28, 2020) (providing instructions on how students can register for the SHSAT); see also Christina Veiga, *By the Numbers: New York City’s Specialized High School Offers*, CHALKBEAT (Mar. 19, 2019), <https://www.chalkbeat.org/posts/ny/2019/03/19/by-the-numbers-new-york-citys-specialized-high-school-offers> (showing that white and Asian students take the test in disproportionately high numbers).

that the SHSAT, and the schools to which the test admits students, even exist.<sup>62</sup> White and Asian students are 48% of test takers<sup>63</sup> but only 30% of students.<sup>64</sup> And even more than the G & T exam, the SHSAT has spawned an extensive test-prep industry.<sup>65</sup> Families with means invest heavily in expensive test preparation, and some predominantly poor and working class Asian families spend thousands of dollars and hours preparing for the test.<sup>66</sup> To add insult to injury, white families may be gaming this already-gamed system, as wealthier and white families are significantly more likely to seek and receive testing accommodations giving them twice the time to take the SHSAT.<sup>67</sup>

The combination of residential segregation and extensive screening means New York City essentially operates two school systems. One is predominantly white and Asian, serves mainly middle-class families, and privileges those with resources or information. The other is predominantly Black and Latinx. Recently, some advocates and elected officials have proposed phasing out G & T programs,<sup>68</sup> and replacing the SHSAT with a more inclusive set of screens.<sup>69</sup> However, neither proposal has gained traction.<sup>70</sup> Interestingly, each proposal received limited support from Black activists and elected officials, with many leaders of color calling for expanding test preparation and adding additional G & T programs and

<sup>62</sup> Shapiro & Lai, *supra* note 58.

<sup>63</sup> See Veiga, *supra* note 61.

<sup>64</sup> Shapiro & Lai, *supra* note 58.

<sup>65</sup> See, e.g., Alice Yin, *Asian Test-Prep Centers Offer Parents Exactly What They Want: Results*, N.Y. TIMES MAG. (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/magazine/asian-test-prep-centers-offer-parents-exactly-what-they-want-results.html> (profiling one such test-prep tutoring center, GPS Academy).

<sup>66</sup> See Elizabeth A. Harris & Winnie Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html>.

<sup>67</sup> See Kevin Quealy & Eliza Shapiro, *Some Students Get Extra Time for New York's Elite High School Entrance Exam*, N.Y. TIMES (June 17, 2019), <https://www.nytimes.com/interactive/2019/06/17/upshot/nyc-schools-shsat-504.html> (describing how forty-two percent of students who receive testing accommodations are white).

<sup>68</sup> See Eliza Shapiro, *Desegregation Plan: Eliminate All Gifted Programs in New York*, N.Y. TIMES (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/nyregion/gifted-programs-nyc-desegregation.html> (describing the recommendation of a panel appointed by Mayor de Blasio that the city do away with most G & T programs).

<sup>69</sup> See Elizabeth A. Harris, *De Blasio Proposes Changes to New York's Elite High Schools*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/06/02/nyregion/de-blasio-new-york-schools.html> (describing Mayor de Blasio's proposal to replace SHSAT with a screening method based on class rank and statewide standardized tests).

<sup>70</sup> See, e.g., Shapiro, *Only 7 Black Students Got into Stuyvesant*, *supra* note 50 (describing broad opposition to Mayor de Blasio's proposal to eliminate the SHSAT); Shapiro, *Should a Single Test Decide a 4-Year-Old's Educational Future?*, *supra* note 49 (describing Mayor de Blasio's distancing himself from a proposal to scrap the G & T exam and confirmation that no changes would be made during 2019–20 school year).

specialized high schools, with no fundamental changes to admissions practices.<sup>71</sup> Even leaders of communities victimized by admissions screens seem unwilling to scrutinize them.<sup>72</sup>

### III

#### SCREENED ADMISSIONS SYSTEMS AND THE MYTH OF MERITOCRACY

Screened admissions systems such as those used extensively by New York City appeal to three American conceptions of the meritocracy: The best students should attend the best schools; racial disparities in testing are the result of racial disparities in the education students have received; and most disturbingly, whites and Asians are better students. Each idea is flawed.

##### A. *Individual Merit Screens in K12 Mask Inherited Privilege*

The meritocracy idea is deeply problematic in a system where opportunity is so clearly a function of race and socioeconomics.<sup>73</sup> The myth of meritocracy has largely replaced one dynastic system—landed aristocracy—with another. In a race that begins before conception, families with wealth invest that wealth in their children’s development, place those children in elite institutions, and provide them with extensive human, social, and economic capital. They then enter an economy which prioritizes their training and credentials. Now grown, these “winners” marry other “winners” and continue the cycle with their children.<sup>74</sup> This takes place in a country where the tax system subsidizes elite education, capital gains, and intergenerational wealth transfer.<sup>75</sup> In some ways, the meritocracy is a more

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<sup>71</sup> See Madina Touré, *Fight over Specialized Schools Reveals Rift Among Black Leaders*, POLITICO (May 8, 2019), <https://www.politico.com/states/new-york/albany/story/2019/05/08/fight-over-specialized-schools-reveals-rift-among-black-leaders-1009563> (describing Black leader Kirsten John Foy’s opposition to Mayor de Blasio’s plan).

<sup>72</sup> See MARKOVITS, *supra* note 18, at 15 (describing how the myth of meritocracy is so seductive that even critics of income inequality fail to criticize the meritocracy myth).

<sup>73</sup> See Angela Hanks et al., *Systematic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality> (reporting on wealth disparity between Blacks and whites).

<sup>74</sup> See Richard V. Reeves, *The Rich Marrying the Rich Makes the Income Gap Worse, but It’s Not Our Biggest Problem*, BROOKINGS: SOC. MOBILITY MEMOS (Apr. 8, 2016), <https://www.brookings.edu/blog/social-mobility-memos/2016/04/08/the-rich-marrying-the-rich-makes-the-income-gap-worse-but-its-not-our-biggest-problem> (“Other things equal, the like-marries-like tendency is likely to make intergenerational mobility rates lower.”).

<sup>75</sup> See Alexandra Thornton & Galen Hendricks, *Ending Special Tax Treatment for the Very Wealthy*, CTR. FOR AM. PROGRESS (June 4, 2019, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2019/06/04/470621/ending-special-tax-treatment-wealthy> (describing how provisions of the U.S. tax code exacerbate inequality by failing to adequately tax wealth); C. Eugene Steuerle, *How Government Tax and Transfer Policy Promotes Wealth Inequality*, TAX POL’Y CTR.: TAXVOX (Feb. 5, 2019),

effective means of preserving and expanding intergenerational wealth than the aristocracy. It certainly has a better backstory, because it claims that the privileges it grants are *earned* rather than inherited.<sup>76</sup> The old trope about being born on third base and thinking you hit a triple applies here. Worse, the meritocracy has convinced many of the other players that the baserunner really did earn that triple.

If individual merit is to have any meaning, it must be after we have actually invested in all young people. Only after all children in America receive a truly excellent education, with the emotional, economic, and social supports that all humans need and deserve, can we possibly assess whether they have taken advantage of it.

K12 is special in this regard. It is one thing to evaluate which students merit access to medical school;<sup>77</sup> it is quite another to evaluate which students merit access to a quality K12 public education, especially when you begin asking the question before kindergarten. The challenge is that we are not using screens to sort children between great accelerated schools and great non-accelerated schools. We are using them to sort between good schools and failing schools.<sup>78</sup>

An over-reliance on merit-based screens in K12 also calls into question the function of the school. If a school only accepts students who are already high-performing, what value is the school adding? For example, research suggests that attending a New York City specialized high school has limited impact on later academic performance, and what impact exists appears to be a function of a student's peers, rather than the school itself.<sup>79</sup> Speaking in the

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<https://www.taxpolicycenter.org/taxvox/how-government-tax-and-transfer-policy-promotes-wealth-inequality> (same); David Sirota & Josh Keefe, *How the Richest U.S. Colleges Get Richer Through Huge Tax Subsidies*, NEWSWEEK MAG. (May 10, 2017, 10:32 AM), <https://www.newsweek.com/2017/05/19/tax-havens-richest-us-colleges-get-richer-606707.html> (describing how universities are failing to use money from large tax subsidies to lower tuition rates or admit more low-income students).

<sup>76</sup> See MARKOVITS, *supra* note 18, at xi (“Once, aristocrats got status by birthright, based on race or breeding . . . . Today, meritocrats claim to win their status through talent and effort—to get ahead fair and square, using means open to anyone.”).

<sup>77</sup> Even in the case of medical school, merit should not be understood simply as a function of grades and test scores.

<sup>78</sup> To the extent we use screens in K12 admissions, using multiple measures, even imperfect ones, is more effective than using a single high-stakes test. See CMTY. SERV. SOC’Y ET AL., THE MEANING OF MERIT: ALTERNATIVES FOR DETERMINING ADMISSION TO NEW YORK CITY’S SPECIALIZED HIGH SCHOOLS 4 (2013), [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/CSS\\_MeaningOfMerit\\_finalWebSmaller.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/CSS_MeaningOfMerit_finalWebSmaller.pdf) (“Educational experts agree that a single test cannot be considered a definitive measure of a student’s knowledge. Because all measures have some degree of uncertainty and imprecision, it is best to use multiple criteria in combination . . . .”).

<sup>79</sup> See Matt Barnum, *Is Attending the ‘Best’ High School Academically Irrelevant?*, ATLANTIC (Oct. 31, 2016), <https://www.theatlantic.com/education/archive/2016/10/is-attending-the-best->

context of higher education, a researcher noted that “American faculty members . . . love [merit-based screens] because [they] produce[] student bodies of intelligent people who use a college’s resources to learn. ‘These are students the faculty doesn’t have to teach. . . .’”<sup>80</sup> New York City Mayor Bill de Blasio proposed offering specialized high school seats to the highest performing students at each middle school in the City.<sup>81</sup> Acknowledging that the students at many lower-performing middle schools may be less prepared than others, what does it say about prestigious high schools if they are not able to teach highly-motivated Black and Latinx students who work hard and excel at some of the country’s most challenging middle schools?

### *B. High-Stakes Tests Are a Poor Systems Accountability Tool*

Second, standardized tests are certainly critical to holding states, cities, and school systems accountable for student learning. However, high-stakes K12 admissions tests are not necessarily the best accountability tools. School administrators, teachers, and students all have incentives that distort these tests’ effectiveness as a measure of student learning. For example, they lead to an over-reliance on test preparation, a focus on a narrow range of subjects, and outright cheating.<sup>82</sup> You do not need to use high-stakes tests to hold school systems accountable. For example, the National Assessment of Education Progress (NAEP), a biannual assessment which carries no stakes for test-takers, measures a broader range of skills, and is administered only to a sample of schools, is likely a much better tool for measuring whether a school system is effective and does so without driving some students into poorer performing schools.<sup>83</sup>

Whatever value test-based admissions screens offer for accountability, those benefits are largely outweighed by the deleterious impact they have on students’ educational options. We do not need to perform discrimination (by using tests with demonstrated disparate racial impact to make admissions

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high-school-academically-irrelevant/505940 (describing a study of Chicago public schools finding that, after controlling for a number of factors, the academic benefits of attending a selective school decreased dramatically but non-academic benefits due in part to students’ peers remained).

<sup>80</sup> Scott Jaschik, *Who Defines Merit?*, INSIDE HIGHER ED (Jan. 17, 2014), <https://www.insidehighered.com/news/2014/01/17/admissions-leaders-gather-and-consider-how-define-merit>.

<sup>81</sup> See SARITA SUBRAMANIAN, N.Y.C. INDEP. BUDGET OFFICE, ADMISSIONS OVERHAUL: SIMULATING THE OUTCOME UNDER THE MAYOR’S PLAN FOR ADMISSIONS TO THE CITY’S SPECIALIZED HIGH SCHOOLS 2 (2019), <https://ibo.nyc.ny.us/iboreports/admissions-overhaul-simulating-the-outcome-under-the-mayors-plan-for-admissions-to-the-citys-specialized-high-schools-jan-2019.pdf> (describing details of the plan).

<sup>82</sup> See Carlson, *supra* note 31, at 22–27 (discussing studies indicating a reliance on intense test preparation and instances of cheating).

<sup>83</sup> See *id.* at 22 (describing NAEP as a reliable measure for gauging student learning gains resulting from school accountability).



decisions) to prove discrimination. There is a difference between a test that is high stakes for adults, and one that is high stakes for children.

*C. We Must Confront the Racism Behind Some Support for K12 Screened Admissions*

It is clear that at least some of the support for the SHSAT is driven by racist assumptions about Black and Latinx middle school students, including the belief that they and their families do not value education as much as white and Asian families. For example, *The New York Times* interviewed Donna Lemon, a Black member of the Stuyvesant Class of 1985. When Ms. Lennon found out in March that only seven Black students had scored high enough . . . to receive an offer to attend Stuyvesant, she logged onto the school's alumni Facebook page. There, she found her own white and Asian classmates arguing that the decline was because Black children did not work as hard as other students, or because their parents did not care as much as others' did.<sup>84</sup>

After I debated a pro-SHSAT advocate on a New York news show, the advocate patiently explained to me and the show's host, who like me is Black, that Black families valued sports while Asian families valued education. Asian families did not complain about being underrepresented in the NBA; Black families should not object to being underrepresented at the specialized high schools.

It is difficult to demonstrate the extent to which support of the SHSAT is driven directly by racial animus. But until we directly challenge the racism that underlies some of America's fetishization of standardized tests as an admissions tool, we cannot have the full and frank discussion we need to advance the worthy goals of integration and opportunity.

#### CONCLUSION

Testing can help teachers and parents know whether students are learning, which in turn helps teachers and parents support students and gives teachers powerful feedback on their practice. Testing can help us evaluate the quality of our schools and school systems and give shape to the ways in which our country continues to disinvest in poor students, immigrant students, special education students, English-language learners, and students of color. When used with other measures, testing can be a valid tool for identifying students with particular gifts and challenges and ensuring that all students are offered the opportunity to learn in beneficial environments.

But it is also true that by importing the bluntest tools of the so-called meritocracy into K12 admissions, New York City and other jurisdictions are

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<sup>84</sup> Shapiro & Lai, *supra* note 58.

perpetuating the sins at the center of America's disgraceful educational history. We do not need to reject standardized testing and other academic screens in K12 admissions wholesale. To do so would be inconsistent with a commitment to excellence and to the important work of holding institutions accountable for their responsibilities to all students. But we must apply deeper scrutiny to the screens we use, how they are used, and the impact they have.

Admissions practices that offer value in higher education may be nonsensical when applied to kindergartners. A standardized test may provide an admissions officer with a useful data point, but relying on that test to the exclusion of all other data may be an exercise of willful ignorance. Meeting the individualized needs of all students, including those who would benefit from accelerated learning in some disciplines, is good pedagogy. But thinking that some students are "gifted" in all domains and some are not, and separating those students into schools that challenge the former and fail the latter, is malpractice. When that malpractice leads to results that are plainly inconsistent with the distribution of intelligence and talent among all children, the continued reliance on those practices is racist.

Providing equal educational opportunity to all of America's children, including those that have been historically excluded from that opportunity, is one of the central challenges facing our nation, 65 years after *Brown v. Board of Education*<sup>85</sup> and more than four centuries after Black children began making their way to America. We must reckon with the role that the myth of meritocracy plays in preventing that opportunity.

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<sup>85</sup> 347 U.S. 483 (1954).