

Foreword

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In just sixty years following the United States Supreme Court's decision in *Brown v. Board of Education*,¹ America has seen a reversal in the successes of the civil rights movement as it relates to education. Where the courts and government once protected African American children as they integrated public schools, school administrators today expel and suspend African American children from those same schools at alarming rates, putting them on a path to incarceration. This issue of the *Arkansas Law Review* highlights the issues discussed during the National Bar Association's Wiley A. Branton Issues Symposium Series under the theme "Education: The New Civil Right." The NBA brought together panelists from across the country to assess the current prospects in education for African American children. The focus of the symposium series was not only to discuss the pressing issues faced by African Americans in school disciplinary actions or in the inequity of education, but to come up with solutions through the judiciary, the legislative process, or in the community. With this issue of the *Arkansas Law Review*, the authors hope to create a public forum on various topics that reveal the broad lens of perspectives and solutions. It is only through the publication of the dual venture of academics and practitioners that society may glean a broader variety of insights and better formulate solutions to this problem of inequity experienced by African American children in our nation's schools.

The essays and articles in this issue confirm that today's educational policies create or exacerbate wide achievement gaps, offer unequal educational experiences, or result in negative life outcomes for African American children in this post-*Brown* era. Although many of the authors believe *Brown* sought to change the conduct of local school boards toward African

1. 347 U.S. 483 (1954).

American children, these same authors identify a variety of reasons on how the educational policies of today create a school-to-prison pipeline for African American and other minority children. The authors also agree that African American students in the public education system are disproportionately forced out of America's public schools. Some of the proposals reason that overly punitive discipline practices enable de facto segregation through zero-tolerance policies, create an increased police presence in schools, or result in failed initiatives such as No Child Left Behind. Other proposals focus not on the cause, but rather on the dramatic decline in judicial intervention during recent decades.

This Foreword hopes to connect the common messages of the academics and practitioners who contributed to this publication. It highlights the imperative need of the courts and this nation to deem education a fundamental right—"The New Civil Right"—that must be constitutionally protected.

I. INTEGRATION OF SCHOOLS PRIOR TO *BROWN V. BOARD OF EDUCATION*

Fitting for the beginning of this issue, former Dean Peter C. Alexander's essay, *Seeking Educational Equality in the North: The Integration of the Hillburn School System*, offers insight into his forthcoming book, *It Takes a Village: The Integration of the Hillburn School System*. His essay takes us on the journey of his family's effort, alongside then-attorney Thurgood Marshall and the National Association for the Advancement of Colored People, to integrate a school system in the North prior to *Brown*. Many think of the fight for desegregation as one that was fought in southern states. Dean Alexander, however, offers a vivid account of the fight for equal educational rights in Hillburn, New York during the 1930s and 1940s. Dean Alexander highlights the historical events that took place in Hillburn, a small village about forty miles northwest of New York City, with the full historical account documented in his book. He describes the remarkable distinctions between the conditions at the white school and the colored school in Hillburn and the determination of the local school board, one white man in particular, to keep the schools segregated. The essay provides a great narrative of the brave leadership and strategic tactics to desegregate the Hillburn schools by his grandfather, who served

as President of Hillburn's local NAACP chapter until 1943, the national NAACP, and other leaders in Hillburn. Because the 1940s saw a dramatic shift in attitudes toward civil rights and equal opportunities, the essay offers a contextual perspective of the events leading up to the *Brown* decision. This shift, broadly publicized in the South, was prevalent in the North as well.

II. THE NEED FOR JUDICIAL RE-INTERVENTION TO DEEM EDUCATION A FUNDAMENTAL RIGHT

The fight for equal educational opportunities for African American students will be successful when the United States Supreme Court finally recognizes education as a fundamental right. While the authors offer different perspectives from their own expert lenses, Professors Jose' Felipe' Anderson, Linda Sheryl Greene, and Regina Ramsey James collectively highlight and critique the various court decisions that continue to avoid the larger issue of why the nation's highest court has not yet deemed education as a fundamental right worthy of the constitutional protection it deserves. The authors all resoundingly argue that education is a privilege of United States citizenship and contend courts must acknowledge it as such.

Professor Anderson outlines the need for the federal courts to re-intervene in the fight for educational equality in his essay, "*Law Is Coercion*": *Revisiting Judicial Power to Provide Equality in Public Education*. He argues that the federal courts must use their judicial power as a coercive means to bring local officials into compliance with the Court's 1955 judgment in *Brown II*, as well as in later decisions. He states, "[i]t was during this time that a more aggressive Court and some lower federal courts utilized the full extent of their judicial power to make defiant states comply with the educational mandate announced in *Brown*." Professor Anderson passionately argues for accountability from local school officials, who must be compelled to address educational inequities. Ultimately, he urges the federal courts to more actively intervene in the decisions of local school boards and state education agencies. This will ensure that they provide equal education to all students, regardless of their race, socioeconomic status, or the neighborhood in which they live. Because of "the transformational power of education," Professor Anderson contends that states must use the resources to create an equal

educational opportunity for learning in public schools, which should have been designated a fundamental right long ago.

In her essay, *The Battle for Brown*, Professor Greene postulates that full citizenship includes the constitutional right to education, which is more important today than ever before. Looking at past decisions, such as *Brown* and *Plessy v. Ferguson*,² she contends the narrative must be grounded in intersectional equality that demands constitutional recognition by the courts in order to create full participation for minority students “in an exceedingly diverse and global America.” Professor Greene argues that the transformative nature of the *Brown* decision should create broader development in equal protection doctrine. She states that *Brown* should evolve into an affirmation obligation to afford full citizenship through a more broad application of the “idea that the Equal Protection Clause permits voluntary government measures to shore up inclusion and full participation in American society.” Professor Greene asserts that *Brown* remains a force in the twenty-first century for both its symbolic significance and the potential power of its vision of full citizenship, premised on the right to a suitable public education that allows students, as citizens, to participate in the civic and economic life of our nation. She states it is the task of a new team of interdisciplinarians to assemble and craft “a *Brown*-grounded narrative of intersectional equality that demands constitutional recognition and constitutionally sheltered correction.”

In her article, *How to Fulfill a Broken Promise: Revisiting and Reaffirming the Importance of Desegregated Equal Educational Access and Opportunity*, Professor Regina Ramsey James contends that the courts must do more to promote desegregation and equality in public education. She states that African American children are “guaranteed an opportunity for an education ‘equal’ to that of all other children in this country.” She opines that racial equality no longer seems to meet the United States Supreme Court’s definition of “compelling.” Thus, when it comes to equal education, Professor James argues the Court must recognize education as a fundamental right in order to force states to provide equal educational access to minority children. Professor James contends that the elevation

2. 163 U.S. 537 (1896).

of education to a fundamental right status will allow for a change in the funding structure of public schools, which will ultimately result in adequate funding and resources to provide equal opportunities. She calls for purposeful action by urging the entire community of stakeholders to hold true to its promise to provide the opportunity of equal educational access so public education is “available to all on equal terms.”

All authors analyze and critique the landmark cases, including *Plessy, Brown*, and *Cooper v. Aaron*,³ and the recent decisions addressing the educational inequalities in America’s schools, such as *Missouri v. Jenkins*,⁴ *Parents Involved in Community Schools v. Seattle School District No. 1*,⁵ and *The Coalition for Equity and Excellence in Maryland Higher Education v. Maryland Higher Education Commission*.⁶ The authors provide an evolutionary journey through court decisions on equal educational issues, including the foundational legal perspectives that may one day lead courts to the conclusion identified by all authors—that in the fight for civil rights, education is a fundamental right, “The New Civil Right.”

III. FROM PUBLIC SCHOOL TO BEHIND BARS: THE SCHOOL-TO-PRISON PIPELINE

This issue also addresses the problems related to the systematic criminalization of African American children in public schools through zero-tolerance policies, which serve as key stepping-stones toward the school-to-prison pipeline. Professors Tracie R. Porter and Ellen Marrus and attorneys Bethany J. Peak and Janel A. George boldly analyze this concept—one school districts would surely dispute if they chose to address the elephant in the room. As each author points out, a disproportionate number of African American youth are affected by zero-tolerance policies, which allows the school-to-prison pipeline to create a disparate impact on African American students. Each author’s assessment differs, but the problem is clear—we must address the school-to-prison pipeline before

3. 358 U.S. 1 (1958).

4. 495 U.S. 33 (1990).

5. 551 U.S. 701 (2007).

6. 977 F. Supp. 2d 507 (D. Md. 2013).

minority students can receive the equal education promised by *Brown*.

Peak's article, *Militarization of School Police: One Route on the School-to-Prison Pipeline*, analyzes the connection between school militarization and the school-to-prison pipeline. Peak first identifies all children of color as fatalities. She then addresses the detrimental impact of school militarization on students of color. After endowing readers with the history of local police forces, who have changed their models toward militarization, she points out the overwhelming non-verbal or symbolic impact of militarization on local communities. From this premise, Peak compares the structure and duties of school police and describes the twenty-six school districts across the country that have acquired military equipment through the Department of Defense's 1033 Program. She concludes schools become militarized in three ways: (1) through the placement of permanent police officers in schools; (2) through the acquisition of military-grade weaponry by school police departments; and (3) through the performance of unannounced drills at schools using actual weapons. She charges these militarized schools with a direct impact on the school-to-prison pipeline because the militarization of school police creates and contributes to "poor conditions of learning," especially for students of color. Peak urges school districts to adopt a community policing structure to transform our nation's schools back into institutions purely devoted to learning. In turn, this promises to eliminate the use of military-grade weapons and military-style tactics, both in our schools and in our communities.

When inequality in education persists, Professor Marrus identifies all children of color as casualties. In her essay, entitled *Education in Black American: Is It the New Jim Crow?*, Professor Marrus reminds us of the forgotten children in our educational system. She confronts the limited opportunities for African American youth educated from the foster care system, juvenile or adult locked prison institutions, or caught in the net of juvenile justice programs. After addressing the disproportionate number of African American children involved in the child welfare system, affected by zero-tolerance policies, or trapped in the juvenile justice system, Professor Marrus considers how each system interrupts the education of African American youth. She attributes the negative causes of school

interruptions to five factors: (1) the mobility of foster home placements and schools; (2) the delayed transfer of school records; (3) the absence of communication and collaboration between agencies and schools; (4) the lack of an advocate for youth during school transfers and a similar lack of diagnosis for students requiring special education; and (5) the feeling of stigmatization among youth. Because these five factors comingle with the school-to-prison pipeline, Professor Marrus determines these “forgotten” African American children experience a loss of educational opportunities. To give children the education and tools they need to become productive citizens, Professor Marrus advances policy recommendations for each of the problems discussed in her essay.

In *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, George concludes that race and gender bias uniquely impact and undermine the educational experiences and outcomes of African American girls. She scrutinizes how race and gender stereotypes, cultural beliefs, and perceived behavioral deficiencies function to criminalize African American youth under zero-tolerance policies. She places specific emphasis on African American girls and reports that the school-to-prison pipeline is a reality predicated on race and gender bias. Since African American girls are the fastest-growing segment of the juvenile justice system, George explains how the educational experiences of African American girls are impacted by explicit and implicit biases in the phenomenon known as “the school-to-prison pipeline.” From a multi-layering of misunderstanding, she reports that racial stereotypes based on history and the legacy of slavery are today framed as a failure to conform to society’s ideals of womanhood. Therefore, African American girls are forced to endure the consequences of overly punitive sanctions such as suspensions and expulsions. George suggests extra-judicial responses such as quantitative research to expose the race and gender bias underlying discipline disparities for African American girls. She also proposes the dissemination of best practices to avoid compromising the education and the futures of African American girls.

Professor Porter’s essay, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, observes the school-to-prison pipeline from the

corporate perspective and ties the discipline of public school students to the profit goals of the private prison industry and government prison system. Professor Porter undertakes a critical examination of the incarceration of youth, discussing how the private prison industry and government organizations benefit and their disinterest in educating youth in public schools. Equipped with statistics from private, federal, and state prisons, Porter exposes the interests of the various stakeholders in the proliferation of the zero-tolerance policies adopted by many school districts. She reports that private prisons, corporations, and the government all reap extraordinary gain from prison labor. Essentially, Professor Porter highlights that many prison systems generate free or cheap labor from our children, from whose service they profit. Professor Porter also correlates how the free labor comes from students funneled by school administrators into the school-to-prison pipeline. But more importantly, she exposes the disproportionate number of African American and Latino students who have been disenfranchised from receiving an education and exploited by the government and private prison systems in pursuit of a financial windfall. Professor Porter urges lawmakers to eliminate the school-to-prison pipeline because it encourages financial exploitation for private gain, funds political parties, and values children as commodities. To cease this practice, Professor Porter believes the attitudes of the education policymakers must change in order to redirect the funds invested in prisons to the education of our public schoolchildren.

IV. CONCLUSION

In the end, all of the authors more than adequately support the narrative expressed by dozens of panelists during the National Bar Association's twenty-fifth anniversary Wiley A. Branton Issues Symposium Series. At the heart of each essay and article in this issue of the *Arkansas Law Review* is the theme selected by the NBA for this symposium series—"Education: The New Civil Right."