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## Not Just Another Brown Analysis: A Call for Public Education Reform

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## **NOT JUST ANOTHER *BROWN* ANALYSIS: A CALL FOR PUBLIC EDUCATION REFORM**

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## NOT JUST ANOTHER *BROWN* ANALYSIS: A CALL FOR PUBLIC EDUCATION REFORM

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### I. INTRODUCTION

#### A. *Statement of the Problem*

A substantial number of cases and commentaries have echoed the holding of the United States Supreme Court in its historical decision of *Brown v. Board of Education*.<sup>1</sup> The analyses have covered the intent, application, and scope of the school desegregation mandate articulated by the *Brown I* Court. Legal scholars need only shepardize *Brown* to validate its far-reaching impact on cases involving practically all aspects of education in public schools and universities.<sup>2</sup> Hence, all facets of public education have been impacted by *Brown I*, from the construction of new facilities on college campuses, to the implementation of grade school busing.<sup>3</sup> Although the Court concluded that separate educational facilities were inherently unequal, nearly four decades later, eliminating the vestiges of state-imposed segregation in public education continues to pose a challenge to the federal courts in the 1990's.

The application of the Court's reasoning in *Brown* to public education desegregation cases is clear; however, recurrent public debate has focused on the degree and magnitude of compliance school districts must demonstrate in order to remedy the vestiges of state-imposed segregation. Furthermore, as federal courts terminate desegregation decrees, public education must brace itself once more for new developments and contro-

\* Beyond recognizing the barriers eradicated by *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), this article acknowledges its historical significance and advocates student-specific education through methods that promote "the equal educational opportunity," consistent with the intent of the *Brown I* court. In addition to dedicating this article to the loving memory of my son, Carnell, I thank God for enabling me to "get this off my chest;" and Angela Dolby, a recent law school graduate, for assisting me as a research assistant.

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1. 347 U.S. 483 (1954). For a sample of noteworthy cases, see cases cited *infra* note 2.

2. See *Green v. County School Bd.*, 391 U.S. 430, 435 (1968) (all facets of public school operations covered under *Brown I*'s ruling: faculty, staff, transportation, extracurricular activities and facilities); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-30 (1971) (school busing acceptable means to desegregate schools and to assure a unitary school system); *Geier v. Univ. of Tennessee*, 597 F.2d 1056 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979) (merger of segregated college system approved). For more recent cases see also *Bd. of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630 (1991) (student reassignment plan validated); *United States v. Fordice*, 112 S. Ct. 2727 (1992) (good faith, race-neutral policies alone neither fulfill nor exceed state's constitutional duty to desegregate Mississippi Universities); *Freeman v. Pitts* 112 S. Ct. 1430 (1992) (court can relinquish supervision of school district in incremental stages of desegregation).

3. *Swann*, 402 U.S. at 29; *Geier*, 597 F.2d at 1056.

versy. Lower federal courts will require the Supreme Court's guidance since they may disagree about the precise standard to apply when terminating school desegregation decrees.

While courts grapple with the termination of public school desegregation decrees, the inevitable era of education reform has arrived.<sup>4</sup> Budgeting constraints call for greater utilizations of all resources, while menacing school desegregation issues still confront the courts. How much must be done toward compliance with decrees, and how long must compliance be demonstrated before public school and university officials can concentrate wholeheartedly on educating students free of court supervision?

Hence, as the demands placed on public education continue to mount, public education reform must encompass legal as well as common sense approaches designed to increase the probability of educating and training successful students. To achieve ultimate success in the arena of education, American society must demonstrate a commitment to quality public education that transcends mere technical compliance with judicially-imposed public school desegregation decrees. Organizers and advocates of quality education reform must not overlook the students, the direct beneficiaries, who stand to gain significantly from the successful implementation of education reform.

## B. Background

Modern educators recognize a paradox in public education. School desegregation efforts have not necessarily resulted in greater academic achievement for the intended beneficiaries of this historical decision.<sup>5</sup> At the same time, legal scholars<sup>6</sup> have also recognized that significant positive gains have not occurred in all instances where desegregation law has been enforced.<sup>7</sup> In fact, social scientists agree that public education is in

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4. For an insightful perspective on education reform see Spencer H. Holland, *Elementary and Secondary Education Special Population*, 25 U. MASS. SCH. EDUC. J. 40, 41 (1991) (quoting Keith Geiger, then president of the National Education Association).

School reform in the 1980s has put the emphasis at the wrong end of the education spectrum. We don't lose students in college. We don't lose them in high school. We do not even lose them in middle schools. Any elementary teacher can identify those students who need additional assistance in the early years to assure their success later on. We must start reforming our education system at the ground floor . . . .

5. See Russell Irvine & Jacqueline Irvine, *The Impact of the Desegregation Process on the Education of Black Students: Key Variables*, 52-4 J. NEGRO EDUC. 410 (1983).

6. See David Hall & George Henderson, *Brown Revisited: Charting A New Direction*, 9 BLACK L.J. 6, 8 (1984).

7. For one author's discussion of the paradox *Brown I* presents in education wherein the author calls the *Brown I* decision a "mindless act of social irresponsibility" because it eliminated the black schools and so denied "the legitimacy of the important concept of the community or the neighborhood public school," see Robert A. Sedler, *The Civil Rights Struggle in Retrospect*, 40 J. LEGAL EDUC. 543 (1991) (reviewing HAROLD CRUSE, *PLURAL BUT EQUAL: A CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY* (1987)).

shambles, leaving many of our children in need of immediate, progressive and effective intervention.<sup>8</sup>

National public education reform must receive, at a minimum, the same primacy afforded recent financial, health, and political concerns. Consider the financial concerns which have demanded the attention of consumers and policy makers: the insider-trading<sup>9</sup> and junk-bond scandals,<sup>10</sup> the S & L debacle,<sup>11</sup> the insurance crisis, which included the collapse and threatened insolvency of life insurance companies across the nation,<sup>12</sup> and the financing of "United States-backed rebel armies around the globe."<sup>13</sup> On the health scene, the AIDS epidemic continues to hold the world its "hostage."<sup>14</sup> Politically speaking, the 1992 presidential election sparked the attention and involvement of countless numbers of persons, resulting in a record voter turn-out.<sup>15</sup>

National public education reform must address the educational needs of the masses of public school students for whom private schooling is seldom an alternative. Private school enrollment has increased significantly<sup>16</sup> and will continue to accommodate the children of persons who are fortunate enough to forego public school enrollment altogether. Undoubtedly, the children of persons who benefitted from recent financial and securities ventures may also be beneficiaries of private schooling, considering the profits grossed from junk bonds, insider-trading, S & L crises and other money-laundering schemes. Given the educational needs of the school children who depend on public schools and who are excluded from the private school circles, the time has arrived to ensure

8. See Paula Allen-Meaures, *Educating Black Youths: The Unfulfilled Promise of Equality*, 35 SOCIAL WORK 283 (1990); see also Irvine & Irvine, *supra* note 5, at 419-20.

9. See generally *McLucas Says Remedies Act Could Mean More Good Soldier Cases*, 24 Sec. Reg. L. Rep. (BNA) No. 19, at SR-694 (May 8, 1992) (Recent legislation gives enhanced enforcement powers to the Security Exchange Commission).

10. See Stephen Cooper, *Private Placements Under Rule 144A: A Rose By Another Name*, 1992 N.Y. L.J. 1 (Rule 144A created after the collapse of the junk bond market).

11. *S & L Outside Professionals Warned By [Office of Thrift Supervision] Counsel*, 1-36 Thrift Regulator at 1 (1991) (Outside professionals may have to pay in order to reduce the "monstrous cost of the industry bailout").

12. Hillary Durgin, *Insurer's Plight has Sponsors On Guard*, Pensions & Investments (CCI), July 22, 1991, at 1.

13. *Bank With CIA Ties Hit With \$950,000 [Bank Secrecy Act] Penalty*, Money Laundering Alert, Banking 1992, available in LEXIS, Banking Library, MLA File.

14. See FAITH POPCORN, THE POPCORN REPORT 63 (1991) (Author asserts that AIDS is "our modern Black Plague. . .with all its terror and tragedy"). See also *Doe v. Atty. Gen. of United States*, 941 F.2d 780 (9th Cir. 1991) (Medical screening for FBI agents cannot be conducted by physician infected with the AIDS virus).

15. *All Things Considered* (National Public Radio broadcast, Oct. 29, 1992).

16. According to statistics compiled by the U.S. Department of Education, American private School enrollment is on the rise for the first time in twenty years. See Nanette Asimov, *Private Schools Grow as Public Schools Suffer Even in Recession, Parents Willing To Pay High Tuition*, S.F. CHRON., Dec. 27, 1991, at A2 (Asimov notes that the average annual tuition for private school is \$6,400).

that success through quality public education is the rule rather than the exception.<sup>17</sup>

Along with acknowledging the legal and social phenomena which have captivated the minds of many, we must also concede that the process of educating our children in the public school system has been diverted. Yet, who is to say at what juncture this diversion occurred? Clearly, public education is not immune from current social and historical developments. Furthermore, as some educators have already observed, the process of education does not occur in a vacuum and it cannot be treated as an "isolated entity";<sup>18</sup> education as a process that positively manipulates the "totality of forces"<sup>19</sup> which operate within an "ecological environment" to produce "educational and achievement motivation" has come of age.<sup>20</sup> The era has dawned to address the legal ramifications that may arise when new concepts in quality public education are introduced. Therefore, new concepts must be explored even if those concepts were not specifically enunciated by the Justices in *Brown I*.<sup>21</sup>

With that backdrop, this article attempts to explore the legalities raised by newly-devised plans to jumpstart a public education regime that may be reeling from the blows of segregation, discrimination, desegregation and desegregation litigation. This article examines some of the crucial legal and social issues that have evolved following the court-ordered termination of state-imposed segregation in public schools and universities. The article urges a shift in the appropriation of educational expenditures from long-resisted desegregation mechanisms to much-

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17. Exceptions exist. Professor Barbara Sizemore of the University of Pittsburgh, Pennsylvania tracked the outstanding academic achievements of Black students who were the highest ranking performers in Pittsburgh in Math and Science due to innovative teaching techniques that transcended race and class. Telephone Interview with Barbara Sizemore, Professor at the University of Pittsburgh (July 8, 1991). Recall the successful Marva Collins model of teaching children who the existing system rejected as "non-teachable" in Chicago, Illinois. See generally, Etta R. Hollins and Kathleen Spencer, *Restructuring Schools For Cultural Inclusion: Changing The Schooling Process For African American Youngsters*, 172 B.U. J. OF EDUC. 89, 91 (1990) (recognizing Collins' contribution as an educator). Also, Charles Warner developed a successful project at the Jackie Robinson Middle School where he changed the learning climate so that low income children could learn. Southern Regional Council of Atlanta, Georgia, *Public Education Visions and Strategies For Change*, 48th Annual Meeting and Conference, Nov. 19, 1992.

18. Allen-Meares, *supra* note 8, at 283.

19. Irvine & Irvine, *supra* note 5, at 419-20. (Educators during the 1980s analyzed these concepts suggesting that a holistic method of schooling would be beneficial to some children.)

20. *Id.*

21. For instance, Spencer H. Holland, Ph.D. has already devised a strategy that just may work. Mr. Holland has observed:

For minority males, early intervention and prevention are the keys to double action plans that can turn the tide of academic failure. Creating all-male kindergarten-through-third grade classes taught by male teachers would provide young black boys with consistent, positive, and literate black role models in the classroom. It would also help overcome many of the negative attitudes toward education that currently hamper black boys' academic achievement.

Spencer H. Holland, *Fighting The Epidemic of Failure*, TCHR. MAG. Sept.-Oct. 1989, at 88, 89.

needed, student-specific curricula. Because our children are our future, school authorities must begin to fine tune their focus to student-specific, quality instruction. By stressing the commonalities that confront all school children, when adopting student-specific programs educators can provide quality public education in spite of budgetary constraints.

Furthermore, in addition to addressing the common problems that confront many students, education reformers must simultaneously and collectively strategize to avoid turning a blind eye to the plight of inner-city youths who deserve to benefit now from public education reform. An undeniably swift undercurrent threatens the very lives of these school children and their positive participation in our society.<sup>22</sup> The disproportionate number of school dropouts and societal dropouts must be curtailed. Unless public education reform specifically incorporates strategies to counteract this threatening undercurrent, the well-documented adversities that lead to academic failure will hinder or destroy the school careers of these students.<sup>23</sup> So long as these adversities predominate, public

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22. Follow this undisputed pattern of failure that begins early in the lives of some school children. "It is well documented in educational research that many students—especially boys—who fail to complete high school drop out psychologically and emotionally by the 3rd or 4th grade. And inner-city, black male children drop out or leave at truly alarming rates." *Id.* at 88.

As to similar academic performance closer to home:

In a study of 1,771 students conducted between 1981 and 1985 in the Wake County Public School System, it was found that Black males attained the lowest average achievement scores when compared with Black females, non-Black males and non-Black females. It was also found that Black male students were disproportionately represented in such categories as retained students, school dropouts, and suspended and expelled students, as well as other criteria commonly associated with at risk students.

Hollard, *supra*, note 4, at 41.

And finally, as to the sum consequences of these unsuccessful educational experiences, consider these grim statistics:

The number of African-American males attending college has steadily declined since 1980 . . . along with the rate of completion for those who do attend. Prior to 1980, 'the majority of Black collegians were male; by the mid-'80s the ratio shifted to 60/40 female to male. In some schools in the South the ratio is almost 80/20 female to male.' 'Furthermore, the 1990 unemployment rate [was] three times higher than in 1960; relatedly, one-half of all Black children are born in poverty. . . . 'One in four Black men between the ages of 20-29 is behind bars' comprising one-half of the entire prison population, and '[a] young Black male has 1/21 chance of a homicide death, six times the rate of white males. African-American males are the only segment of the U.S. population with a decreasing life expectancy. . . .' and a median age that is less than the Black female, white female and white male. Kuumba Kazi-Ferrouillet, *The 21st Century Commission on African-American Males, New Realities, A New Initiative*, THE BLACK COLLEGIAN, Sept.-Oct. 1991, at 52, 55-56.

23. The key cases and articles that have been selected and cited, are intended to be illustrative and supportive rather than exhaustive on the issue discussed. In that light, while it is plausible that various arguments could be propounded, the position articulated herein is steadily mustering support from the legal and nonlegal communities, alike.

For instance, RJR Nabisco Inc.'s CEO, Louis Gerstner, Jr. and RJR Foundation President, Roger Semerad formulated an educational proposition to fund school reform experiments known as "Next Century Schools." See William Raspberry, *Re-inventing American Education*, CHAPEL HILL NEWS, July 26, 1991, at 5. See Hall and Henderson, *supra* note 65, at 6 (a legal article suggesting a reexamination along with reform strategies). See also Hollins and Spencer, *Restructuring Schools for Cultural Inclusion: Changing the Schooling Process For African-American Youngsters*, 172 B.U. J. EDUC. 89 (1990) (an educational article suggesting a restructuring of the education system). For

school children will fail to participate and achieve within society's infrastructure.

## II. LEGAL DEVELOPMENTS IN PUBLIC EDUCATION

### A. *Community Schools*: Roberts v. City of Boston

The idea of community-based or neighborhood schools has resurfaced. Whether they are used to educate middle class youngsters in the suburbs as part of voluntary student reassignment plans,<sup>24</sup> or inner-city males as recipients of race-specific instruction in specialized schools;<sup>25</sup> community-based, neighborhood, or "separate" schools may replace "desegregated" schools. While one contemporary result may be the demise of forced busing, the idea of community-based or separate schools is far from being a contemporary idea. The neighborhood school idea is nearly as old as the federal Constitution itself.<sup>26</sup> Just as the idea is not new, the goal of the neighborhood school has remained consistent throughout the years: quality education for school children through an equal educational opportunity.<sup>27</sup>

In tracing the legal battles that have been fought regarding the establishment of neighborhood schools during the past 142 years, some legal scholars suggest that legal challenges to public education are cyclical phenomena.

The Boston case [decided in 1850] is a good example of the circle in which American education has moved as it has struggled to deal with the aspirations of a disenfranchised people. The ebb and flow is consistent. The gains and losses are cyclical and the arguments tend to always be the same. Our main concern is that the results also tend to be the same—a loss in black upward mobility, a loss in self-control, a loss in spirit and identity, and equally devastating, an impediment to the intellectual development of black children. The major gains which blacks sought through the integration strategy were the very ones which they lost in the

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educational articles discussing the impact and legacy of BROWN in public education see Allen-Meares, *supra* note 8, at 283, and Irvine & Irvine, *supra* note 5, at 422.

24. Bd. of Educ. of Oklahoma City v. Dowell, 111 S. Ct. 630, 634-35 (1991).

25. See generally Jill Nelson, *Racist or Realistic?* HERALD-SUN (Durham, N.C.) May 17, 1991 (U.S.A. Weekend), at 4 (discussing whether segregated schools for African-American boys is an answer to curbing the plight of African-American boys).

26. Hall & Henderson, *supra* note 6, at 7 n.3 (citing DERRICK BELL, IN RACE, RACISM AND AMERICAN LAW 385 (1973), that in 1787, Prince Hall, a renowned black leader, petitioned the Massachusetts Legislature for a separate school for black children in Boston. During this time the school children had experienced mistreatment and racial insults in Boston public schools that were neither segregated nor closed to black children).

27. *Id.* at 8. See also Sedler, *supra* note 7, at 543 (Noting that a defeated Congressional Bill, the Blair Education Bill, would have "required 'separate but equal funding for racially segregated schools in the south'" in 1890.) In addition, the Brown I court acknowledged equalization efforts by schools. *Brown I*, 347 U.S. at 486-89 n.1 & 492 n.9.



process.<sup>28</sup>

In *Roberts v. City of Boston*,<sup>29</sup> one of the first lawsuits filed by parents in Boston, Massachusetts to desegregate public community schools, the plaintiffs complained about Boston's segregated system of education and chided the "inferior equipment and facilities and substandard staffing at black schools and the inability of black children who lived closer to white schools than to a black school to attend the white school."<sup>30</sup> Although the Court ruled against the plaintiffs, the significance of this decision lies in the fact that the judge and various highly respected Black citizens reached the same conclusion. They rejected the idea of school desegregation in 1850, reasoning that racially separate facilities were not inherently unequal.<sup>31</sup>

Hence, more than 100 years before disputes were decided in *Brown I*, and forty-five years before *Plessy v. Ferguson*,<sup>32</sup> the legal issue of educating school children in a community school setting was resolved by the acceptance and implementation of the principle that racially separate schools were not inherently unequal. The obvious physical inferiorities that existed in a comparison of the educational facilities for children in the black community with the educational facilities for the children in white community were not conclusively determinative of the educational commitment made to the students served by the facilities.<sup>33</sup> On a positive note, during the time *Roberts* was decided the racially separate school for blacks had a reputation for producing orderly and disciplined scholars; the students' cheerfulness and spirit were said to have been unsurpassed by any of the other city schools.<sup>34</sup> However, predictions were cast that if the *Roberts* plaintiffs were ever successful in their school desegregation challenge, the results "would be educationally and psychologically detrimental to black children and the black community."<sup>35</sup> Today, the desegregation of public schools cannot be blamed for all of the woes confronting public schools;<sup>36</sup> yet Thomas P. Smith's prediction that "the integration of [the Boston] schools would require a tremendous expenditure of time and resources, and that separate schools would de-

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28. Hall & Henderson, *supra* note 6, at 12.

29. 59 Mass. (5 Cush.) 198 (1859).

30. Hall & Henderson, *supra* note 6, at 10.

31. *Id.* at 11.

32. 163 U.S. 537 (1896). Plaintiff's challenge to the "separate but equal" rule governing railway cars was defeated.

33. Hall & Henderson, *supra* note 6, at 10.

34. *Id.*

35. *Id.*

36. This article is not intended to be an exhaustive essay on whether school desegregation has been successful in terms of its positive effect on academic achievement. The available research could be used to support either a positive or negative reading of the relationship between school desegregation and academic achievement. For a survey of pertinent articles, see ORSTEIN & LEVINE, FOUNDATIONS OF EDUCATION 456 n.25 (4th ed. 1989).

velop again”<sup>37</sup> is, in fact, a reality in modern public education.

On the other hand, when the Massachusetts legislature enacted a law against segregated schools in 1855, some black leaders hailed the enactment a victory.<sup>38</sup> Yet that victory turned out to be costly in many ways. Their “victory” brings to mind words to a Brook Benton song: “[They] got what [they] wanted, but [they] lost what [they] had.”<sup>39</sup> Derrick Bell, one of the nation’s leading civil rights professors, has poignantly described the costly victory:

When school officials complied with the desegregation law, they closed the black schools and dismissed the black teachers. White parents, they feared, would not send their children to the former nor allow them to receive instruction from the latter. Textbook aid provided black children under segregation was also ended and after a decade or so, state officials conceded that Boston’s public schools had again become identifiable by race.<sup>40</sup>

The Boston case represents a good example of the legal and social challenges to which American public education has responded. Thus, the quantifiable gains in theoretical legal rights have often yielded dubious practical results; these theoretical rights have not always led to immediate qualitative gains in the lives of all of the intended beneficiaries.<sup>41</sup>

## B. *Equal Education*

More than 100 years after the decision in *Roberts, Brown I* was decided in an era during which the country had become well entrenched in the “separate but equal” doctrine of education. In the public accommodations arena, the separate but equal doctrine was enunciated in 1896 in the *Plessy v. Ferguson* decision. Even before the plaintiffs in *Plessy* unsuccessfully challenged the racially segregated railway system in Louisiana, politicians were defeated in their effort to enact a federal Congressional Bill in 1890 that would have provided separate but equal funding for racially segregated schools in the South.<sup>42</sup> Along with acknowledging the obvious disparities in funding, *Brown I* is replete with equalization discussions that reveal the separate, but far from equal, educational facilities of the segregated schools then in existence.<sup>43</sup>

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37. Hall & Henderson, *supra* note 6, at 11-12 (quoting BELL, *RACE AND RACISM* 368, see *supra* text accompanying note 26).

38. *Id.* at 12 n.22.

39. Brook Benton, *I Got What I Wanted*, (Black Tulip Special Records 1990).

40. Hall & Henderson, *supra* note 6, at 12 n.23.

41. *Id.* at 12.

42. Sedler, *supra* note 7, at 543 n.6 (discussing Cruse’s focus on the 1890 defeat of the Blair Education Bill, ten years after its introduction in Congress).

43. 347 U. S. 483, 486-87 n.1. For instance, here the Court discusses the Virginia case in which the federal district court had found “the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to ‘proceed with all reasonable diligence and dispatch to remove’ the inequality in

The *Brown I* Court based its equal education analysis on the Fourteenth Amendment of the United States Constitution.<sup>44</sup> It construed holdings of prior higher education cases as it outlawed the separate but equal doctrine that had existed in public schools, arguably, as early as 1850 when *Roberts* was decided.

These higher education cases were decided during the 1930s and 1940s after qualified black applicants using the same Fourteenth Amendment argument successfully challenged racially discriminatory admission policies that excluded black applicants from law schools.<sup>45</sup> Yet despite the noted importance of the equalization rationale to the Court's analysis in *Brown I*, the equalization principle was purposefully relegated to the backseat, as desegregation, and subsequently, integration juttet full speed ahead. The Court recognized that *Brown I* was more than a mere comparison of the tangible factors in the black and white schools. The Court went farther to examine "the effect of segregation itself on public education."<sup>46</sup> Consequently, from 1954 until the present, as school desegregation decrees have ripened for termination, the equalization of educational opportunities remains a burning challenge.

Although *Brown II*<sup>47</sup> required full implementation of the constitutional principles articulated in *Brown I*, subsequent case law demonstrates the crafty and organized resistance school districts and other officials engaged in, notwithstanding the law of the land. Thus, school desegregation litigation increased in the 1960s and 1970s, forcing the technical eradication of dual, or racially-segregated school districts, albeit the constitutional mandate had been enunciated in 1954.<sup>48</sup> Forced,

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physical plant." *Id.* at 487 n.1. Further the Court acknowledged the existence of satisfactory equalization programs for facilities located in the states of Kansas, South Carolina, Virginia and Delaware. *Id.* at 492 n.9.

44. "No state shall deny to any person within its jurisdiction the equal protection of the laws. . . ." U. S. Const. Amend XIV, § 1. *Cf.* N.C. Const. Art. I § 15: "The people have a right to the privilege of education, and it is the duty of the state to guard and maintain that right."

45. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (Missouri had failed to provide legal education for qualified Black students, forcing them to seek out-of-state admissions. Policy was held to violate 14th Amendment); see also *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (State of Oklahoma denied admission to qualified Black applicant based on color alone. State ordered to provide legal education in conformity with 14th Amendment's Equal Protection Clause). Therefore, the *Brown* Court's equal education rationale applies as forcefully to higher education desegregation cases that may arise even today.

46. 347 U.S. at 492.

47. *Brown v. Bd. of Educ.*, 349 U.S. 294, 299.

48. See *supra* text accompanying note 2; see also *Milliken v. Bradley*, 433 U.S. 267, 279 (1977) (*Milliken II*) (first time the Supreme Court directly the addressed question of whether federal courts could order remedial education programs as part of school a desegregation decision, following a remand due to an interdistrict remedy for *de jure* segregation in the Detroit school system which exceeded the Constitutional violation.) See also *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (action for declaratory and injunctive relief against Secretary of Health, Education and Welfare (HEW) and Director of Office of Civil Rights (OCR) for failing to enforce school desegregation decrees in public educational institutions receiving federal funds).

mere technical compliance has resulted in a panoply of expensive litigation. Who has prospered as a result of this litigation? Have the school children who have been educated in this post-*Brown* era?

As educators and legal practitioners seek to apply the holding of *Brown I* to the circumstances that are presented in classrooms today, they should ponder whether obtaining an education today is as essential in 1993 as it was in 1954 when the *Brown I* court wrote:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>49</sup>

Obtaining an education today is probably even more essential given the global markets in which America and other leading nations now operate.

Many questions remain that must be answered. For instance, how will education reformers hurdle the difficulties and devise methodologies to provide a quality public education for all students? After acknowledging *Brown I*'s historical impact and conceding its historical importance in public education, can we fulfill the intent of *Brown I* by providing an equal educational opportunity in an environment that is free of state-imposed segregation and its vestiges? Further, since times have changed since 1954, should the intent of *Brown I* be interpreted broadly enough to permit the implementation of strategies calculated to increase success in neighborhood classrooms when those reform strategies are fairly implemented so that academic success motivates the educational decisions that must occur? Answering these and related questions requires a candid and informative scrutiny of developments that have occurred since the Supreme Court decided the *Brown* cases. In concluding that the plaintiffs in *Brown I* had been "deprived of their equal protection of the laws guaranteed by the Fourteenth Amendment"<sup>50</sup> through systemic state-imposed segregation, the Court also acknowledged that "the formulation of decrees in these cases presents problems of considerable complexity."<sup>51</sup> Subsequently, in its "Siamese" decision known as *Brown II*, the Court

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49. 347 U.S. at 493.

50. *Id.* at 495.

51. *Id.*

ordered that the good faith implementation of the *Brown I* principles should begin with school authorities coupled with judicial oversight.<sup>52</sup>

The Court's realization that equitable principles would guide the lower courts in devising appropriate decrees to effectuate the *Brown I* mandate was an endorsement of confidence in the equitable powers provided the judiciary in fashioning decrees.<sup>53</sup> In construing the traditional attributes of equity, the Chief Justice stated, "equity has been characterized by a practical flexibility in shaping its remedies. And by a facility for adjusting and reconciling public and private needs."<sup>54</sup> Reconciling the public and private needs today calls for solutions that work in practice as well as in theory. Equitable reconciliations to further the *Brown I* mandate require appropriate measures which speak to form, as well as substance. No doubt, some of the deficiencies evident in modern education may have been eliminated or at least minimized, had full compliance with *Brown I* been willfully achieved. Case law is replete with school desegregation compliance cases demonstrating that while desegregation litigation, decrees and enforcement actions, ran rampant,<sup>55</sup> the equal education opportunity *in substance*, slipped farther and farther into oblivion. Consequently quality education has received neither equal time nor fair play. And the results are apparent.

Yet, if education activists are to salvage and secure a public education system that remains instrumentally critical in the lives of school children, they must not shelf *Brown I* as a relic of the past. Instead, they must expand its scope by fulfilling the Court's intent to provide constitutionally what had been denied unconstitutionally to many: The right to an equal education, devoid of inferiorities rooted in state-imposed segregation. Admittedly, one modern and reasonable interpretation is that absent the discriminatory, state-imposed segregation, an equal educational opportunity can be provided in separate schools that are easily identifiable by race, so long as there are valid educational justifications.

### C. *Legal Implications of Recent Desegregation Cases*

In *Board of Educ. of Oklahoma City v Dowell*, the Supreme Court decided that on remand, a district court could enter findings that one-race or racially identifiable schools may resemble segregation, but these racially identifiable schools probably do not constitute the pre-*Brown* mode of segregation.<sup>56</sup> The district court had found "present residential

52. 349 U.S. at 299.

53. *Id.* at 300.

54. *Id.*

55. See *supra* text accompanying notes 2 and 38.

56. See *Bd. of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630 (1991). On remand, the federal district court dismissed the lawsuit, 778 F. Supp. 1144 (W.D. Okla. 1991), and denied the plaintiff's subsequent motion to reopen the case. 782 F. Supp. 574 (W.D. Okla. 1992).

segregation. . . [to be] the result of private decision making and economics" rather than a "vestige of former school segregation."<sup>57</sup>

In January of 1991, the Supreme Court considered a "student reassignment plan" when it entered a ruling in *Dowell*, the desegregation case in which a school board sought the termination of desegregation decrees after the board had complied in good faith with those decrees for a number of years.<sup>58</sup> While the Court may have enunciated a "new standard" for the dissolution of school desegregation decrees, a closer examination of its reasoning and rationale may reveal a standard that is common-sensible, albeit not perfect. The new standard appears appropriately suited to the circumstances that developed over time in the Oklahoma school system. From the Court's discussion, the new standard<sup>59</sup> would more than likely provide that a school board may demonstrate purposeful compliance with a school desegregation decree established in response to prior legally-imposed segregation by showing that the "Board has *complied in good faith* with the desegregation decree since it was entered *and* the vestiges of past discrimination have been eliminated to the *extent practical*."<sup>60</sup>

Once this standard is satisfied, absent a discriminatory intent, school districts may adopt student reassignment plans, like the Oklahoma City plan,<sup>61</sup> thereby leading to the demise of forced busing. Further, the "District Court found that the School Board, administration, faculty, support staff, and student body were integrated, and transportation, extracurricular activities and facilities within the district were equal and nondiscriminatory."<sup>62</sup> The district court concluded that "[b]ecause

57. *Dowell*, 111 S. Ct. 630, 638 n.2.

58. *Id.* at 634.

59. Yet, when examined against the logical position of a strongly-worded dissent by Justice Marshall, the newly-enunciated standard is but a watered-down version of more rigid standards enunciated by the Court in prior school desegregation cases after *Brown I*. *Id.* at 639. For instance see the widely-cited school desegregation cases Justice Marshall references for support of his contention that formerly de jure segregated school districts are required to take all feasible steps to eliminate racially identifiable schools. Among these cases are *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968) (student reassignment plan); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (school busing); and *Milliken v. Bradley*, 433 U.S. 267, 281-88 (1977) (*Milliken II*) (remedial education). These cases arose in Virginia, North Carolina, and Michigan, respectively. Further, the dissent's major thrust may be that the standard or burden of proof under the majority's test, for dissolving the desegregation decree has not been fully explored. Justice Marshall reasons the standard should have more to do with whether the purposes of the desegregation decree have been achieved, rather than the duration of the decree and the Court's supervision of that decree. *Dowell*, 111 S. Ct. at 647 n.10.

60. *Dowell*, 111 S. Ct. at 638 (emphasis added).

61. *Id.* at 634-35. The 1984 Student Reassignment Plan (SRP) in Oklahoma City relied on neighborhood assignments for students in grades K-4 beginning in the 1985-1986 school year. Busing continued for students in grades 5-12. Further, any student could voluntarily "transfer from a school where he . . . was in the majority to a school where he . . . would be in the minority." *Id.* at 634.

62. *Id.* at 634.

unitariness had been achieved,. . . court-ordered desegregation must end."<sup>63</sup>

Without forced busing as school desegregation decrees terminate, the path to one-race schools is cleared. Call them neighborhood schools; separate schools; segregated schools; inner city schools; or suburban schools. Even more importantly, without demonstrable constitutional violations, the nation's highest Court will continue to endorse terminations of court-ordered desegregation, even where *de jure* segregation once existed, so long as good faith compliance with desegregation orders can be shown.

Consistent with its liberal compliance reasoning, the Supreme Court subsequently permitted a district court to use its equitable discretion to fashion a partial dissolution of a school desegregation order, although full compliance had not been demonstrated. In *Freeman v. Pitts*,<sup>64</sup> the Court rejected the "all or nothing" approach the court of appeals would have used to resolve a school desegregation decree compliance issue in Dekalb County, Georgia. Once the Court determined that good faith compliance in some areas of school operations had been achieved, the Court reinstated the "equitable discretion" approach developed by the district court to relinquish supervision and control of the school district.<sup>65</sup> The district court acknowledged that two areas involving faculty assignments and resource allocations required additional supervision and monitoring to achieve compliance in every facet of school operations, which included student assignments, transportation, physical facilities, and extracurricular activities.<sup>66</sup> The court of appeals' decision called for full compliance by the school district in all areas of school operations, or the retention of full remedial authority in the district court.<sup>67</sup> The Supreme Court reversed the court of appeals, approved the equitable discretion approach used by the district court and rejecting the valiant method fashioned by the court of appeals.<sup>68</sup>

In so doing, the nation's highest court paid special deference to such factors as the school district's good faith commitment to the entire desegregation decree, the district's full and satisfactory compliance with the decree leading to the withdrawal of judicial supervision, and the district's necessary or practicable need to remain under judicial control to achieve compliance in areas where compliance had not yet been achieved.<sup>69</sup> Hence, *Freeman* clearly demonstrates that the standard for dissolving

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63. *Id.*

64. 112 S. Ct. 1430 (1992).

65. *Id.* at 1441-42.

66. *Id.* at 1441.

67. *Id.*

68. *Id.* at 1446.

69. *See id.*

school desegregation decrees has been reformulated by the federal district courts and endorsed by the nation's highest court to take into account the good faith compliance efforts of the local school districts. Because the federal district court traditionally scrutinized the actions of the school districts before, during, and after the issuance of desegregation orders, federal district courts are in the best position to assess whether court-ordered desegregation should end for districts that have demonstrated good faith compliance.

### III. CONTEMPORARY QUESTIONS ASKED AND ANSWERED

Contemporary issues should focus on whether recent decisions can be applied to achieve equity in education for the masses of school children. The initial inquiry should be how can these reformulated standards be used to maximize the equal educational opportunity for all public school students. Next, should public school expenditures be used to fund additional litigation in the courtrooms to resist the termination of Court-ordered desegregation or should expenditures be allocated to explore greater innovation in the classrooms? At this juncture our society must pursue greater innovation in the classroom.

The re-emergence of the neighborhood school is inevitable. Yet the re-emergence of racially identifiable schools, where neighborhoods are racially identifiable need not be injurious to the quality education that many public school students await. Given the recent segregative patterns identified in public education, innovative strategies must be implemented to constructively utilize neighborhood schools. The emphasis must shift from racial considerations to sound educational programming.

For at the same time school desegregation decrees terminate, at least three bothersome patterns of resegregation have become apparent. The first pattern reflects an increase in the number of city school districts that are said to "have become increasingly low income and minority in their student composition, with a high proportion of minority students attending predominantly minority, poverty schools."<sup>70</sup> In the second pattern, evidence exists that suburban public schools in some of the nation's metropolitan areas are experiencing resegregation "as middle-class minority families move to suburbs next to the Central City and then find that white enrollment falls as the white population declines or withdraws."<sup>71</sup> A number of suburban school districts have experienced the second pattern of resegregation: Baldwin Park, Duarte, Pasadena and Pomona in the Los Angeles Metropolitan area; University City in the St. Louis area; and East Cleveland in the Cleveland, Ohio area.<sup>72</sup>

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70. ORSTEIN & LEVINE *supra* note 34, at 451.

71. *Id.* at 485.

72. *Id.*



Finally, the third pattern involves the disproportionate numbers of nonwhite students who are *conveniently* labeled mentally retarded (MR) or emotionally disturbed (ED).<sup>73</sup> As a consequence of these labels, students are settled into programs that are segregated on the basis of stigmatizing labels. The failure to incorporate quality educational programs in the MR and ED placements discriminates against the children so labeled.

Some also believe that disproportionate numbers of minority students are shunted into classes for the emotionally disturbed or the retarded mainly to alleviate teachers' problems in dealing with culturally different children and youth. Many educators and parents worry that such placements may constitute a new version of segregation and discrimination by sentencing minority students to special classes with low, or nonexistent educational expectations.<sup>74</sup>

The relative ease with which these three patterns of resegregation can be identified suggests the need for an immediate strategy to educate the public school children left behind who have been referred to as "low-income," "inner-city," or "poverty-stricken." Even greater planning for intellectually challenging instruction may be required to educate the school children labeled MR or ED. Responding to the questions raised herein means recognizing that these same educationally-abandoned children possess the potential to conceive, achieve and believe, pertinent ideas, accomplishments, and principles — in the same manner as youngsters upon whom no similar stigmas have been placed.

Is this not what the old "American Dream" achievement mindset once implied? Get a good education and be "somebody." Or, has there somehow developed via social and legal mechanisms a "low-income" American dream that deprives youngsters of meaningful educational opportunities? Any proponent of a "low income" American dream should realize the futility in advocating such a repulsive point of view. Public school children, regardless of the neighborhoods in which they reside, must not be led to develop a "low income" dream that stops short of the fundamental promise of proper nutrition, success, safety, security and salvation in which most Americans are taught to believe.

#### IV. FACING THE LEGALITIES OF CONTEMPORARY SOLUTIONS

At a minimum, children who must be publicly educated in the city schools require and deserve an education that is tailor-fitted, not only to their current stations in life, but also to their aspired stations based on merit and carefully orchestrated guidance. By the same token, the era

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73. *Id.* For a story closer to home regarding the "in-school segregation" phenomenon in North Carolina, see Tim Simmons, *Racial Tilt Cited In Gifted, Retarded Classes*, NEWS AND OBSERVER, June 28, 1991, at B1.

74. ORSTEIN & LEVINE, *supra* note 36, at 485.

has arrived in which the focus in public education must pivot from desegregation litigation to education innovation. In balancing these competing interests, educators must explore innovative and interventive strategies designed to guide the school children who have been identified as most at risk. Strategies for inner-city males may already be in place.

Educator Spencer H. Holland, Ph.D., has developed a specific strategy to address the educational needs of inner-city males, in addition to the all-male academies he has recommended as a solutions. As the creator and director of the Center for Educating African-American Males, based at Morgan State University's School of Education and Urban Studies in Baltimore, Maryland, he has established that the "center's primary goal is to develop programs that create a learning environment in city schools in which Black school-age boys are encouraged and expected to succeed academically."<sup>75</sup> Although "Project 2000" may be his best known program, one other program known as the "Curriculum Revision" program has been designed to create curricula on the specific developmental and cognitive needs of Black males to complement current curricula.<sup>76</sup>

All-male academies established for inner-city males and staffed predominantly by male role models should pass constitutional muster. In addition, the establishment of these schools does not run afoul of the Court's intent in *Brown I*. The facts and statistics show that inner city schools are overwhelmingly comprised of minority students,<sup>77</sup> but state-imposed segregation or *de jure* segregation has not reemerged. On the other hand, *de facto* segregation is a reality in the public education system throughout many parts of America.<sup>78</sup> Since school systems have already become selectively segregated, in part because of segregated housing patterns, it does not follow that utilizing these schools in ways to benefit the students currently enrolled would amount to the illegal segregation that *Brown I* eradicated.

Clearly, it is not the exclusive job of any one sector of society to bail out the students most at risk. Yet, bailing out these students may be of greater urgency to those adults who realize a solution has to start somewhere, and that they must be a viable part of that solution.

Educational equity in form and theory is interesting. Educational equity in substance and practice is compelling. The struggle to gain equality in education does not cease at the elementary and secondary levels. Witness the current litigation in the Mississippi University desegregation case.<sup>79</sup> Some opponents worry that the ultimate decision may have a

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75. Kazi-Ferrouillet, *supra* note 20, at 150.

76. *Id.*

77. See ORSTEIN & LEVINE, *supra* note 34, at 451.

78. Allen-Meares, *supra* note 8, at 284.

79. *United States v. Fordice*, 112 S. Ct. 2727 (1992). The United States Supreme Court remanded to the lower federal court for a determination as to whether Mississippi had complied with

negative impact on the existence of the equal educational opportunity in higher education. At the same time, education advocates should question the unfavorable patterns of resegregation occurring in elementary and secondary school districts throughout the land. All male academies have generated questions and debates;<sup>80</sup> and questions will continue to be asked.

As Courts terminate school desegregation decrees and resources tighten, difficult questions and anxieties are certain to arise as solutions to difficult problems are created. Nevertheless, any questions and anxieties may be handled positively through sincere, innovative educational strategies that have been specifically designed to address the needs of individual students. Quality education that is specific to each child should start with an assessment of needs by professionals who would consider the student's current position in life, along with the student's desired achievements and aspirations for the future.

The plausibility and feasibility of developing a "student-specific" curricula increases when you consider that quality planning and quality education can be accomplished, notwithstanding the neighborhood in which the school is located, or the physical structure wherein the educational site is located. Legal challenges to student-specific instruction under the auspices of *Brown I* are unlikely to succeed unless there is a reversal in segregated residential housing patterns. Student-specific education can and must occur so that all public school children will receive the quality instruction they deserve, even when that means receiving an education in their neighborhood schools.

The resegregation issues may be unique to elementary and secondary public education. In the current debate over equal opportunity in higher education, no one pretends that the dual system as it existed before *Brown I* has been replaced in all instances by a unitary university system that is racially non-identifiable. For instance, in Mississippi a "reemergence of segregation" in higher education has not occurred because, for the most part, *de facto* segregation in higher education has prevailed. Therefore, the resegregation issue has yet to become ripe in higher education where the struggle continues for the equal education opportunity.

A closely connected issue in higher education is the resurgence of ra-

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the Equal Protection Clause under the standard the Court established. The Court indicated that the policies traceable to *de jure* segregation violate the Equal Protection Clause to the extent they continue to have segregative effects, serve no sound educational purpose, and can be practicably eliminated or reformed. *Id.* at 2737.

80. One recent debate transpired at the Duke Law School on January 25, 1992, when Educator Spencer Holland, Ph.D., squared off with lawyers and professors over the subject of Race-Specific School Strategies in inner cities. Spencer H. Holland, Ph.D., Remarks at Duke Law School's 3rd Annual Frontiers of Legal Thought Conference 1992: Race, Gender and Justice (Jan. 25, 1992).

cial tensions and conflicts across American university and college campuses. While racial tensions mount, American university officials intensify their efforts to enroll African-American students.<sup>81</sup> However, African-American students in white colleges oftentimes do not experience a sense of belonging which leads to motivation and academic success.<sup>82</sup> Consequently, "as they become alienated from their peers and their teachers, their motivation falters."<sup>83</sup> Reports of racial incidents include occurrences that began in 1987 at well-known American academies: the Universities of Michigan, Massachusetts, Columbia and Tennessee, and the Citadel and Purdue.<sup>84</sup> In addition, studies have been conducted to track whether this resurgence is an aberration or a trend which may have some connection to the equal educational opportunity that students seek to obtain under the law.<sup>85</sup>

## V. CONCLUSION

The implementation of the reforms in elementary and secondary school education as outlined herein, probably will not eliminate all litigation in the equal education arena. At the post-secondary level, similar equal opportunity issues will probably be litigated again in federal courtrooms. Proponents and opponents of historically black institutions and historically white institutions, alike, realize that the standard for the dissolution of university desegregation decrees will be firmly set when the federal courts finally decide *United States v. Fordice*.<sup>86</sup> The decision will set a gauge for measuring the duration and scope of compliance states like Mississippi must demonstrate to remedy the vestiges of state-imposed segregation in higher education.

At the same time, the relationship between the equal educational opportunity and racial tensions across American campuses of higher learning must be examined so that a legal, social or academic resolve can be firmly established. Public higher education deserves a thorough analysis designed to specifically discuss the equal educational opportunity and desegregation issues that have continued to plague higher education for the last fifty-three years, starting with *Gaines v. Canada*,<sup>87</sup> and extending be-

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81. Dhyana Ziegler & Camille Hazeur, *Challenging Racism on Campus*, THOUGHT AND ACTION, Fall 1989, at 31.

82. *Id.*

83. *Id.*

84. *Id.* at 32.

85. Camille A. Clay, *Campus Racial Tensions: Trend or Aberration?*, THOUGHT AND ACTION, Fall 1989, at 21. Clay discusses the resurgence of racial intolerance and notes the increase in racial conflicts during recent years at American colleges and universities including: the University of Massachusetts, Yale, Stanford, the University of Mississippi and Oberlin College.

86. *Fordice*, 112 S. Ct. 2727.

87. 305 U.S. 337 (1938).

yond *Fordice* and into the twenty-first century. An adequate analysis must be forthcoming.

The focus of the foregoing analysis covers the elementary and secondary phases of public education where the masses of school children begin their education. This starting point was selected to permit a "Janus-styled" analysis in which the author has attempted to analyze the equal educational opportunity retrospectively and prospectively as well. This analysis suggests that since education is designed to improve the quality of life overall, the successful commencement and facilitation of that process demands adequate attention, notwithstanding the equal education opportunity issues that must be resolved in higher education. Increasing the possibility of success at the critical beginning years means increasing the probability of success throughout the educational careers of students. Therefore, whereas college students are battling college admission policies and cultural diversity issues, they have a better chance of improving the quality of their lives than the elementary school children who are unsuccessful in completing even their elementary public education.

This is not to say that we must choose the improvement of one sector of students to the exclusion of others; but, certainly the students at the elementary and secondary levels must be educationally prepared for success prior to their college years. If students continue to fail in the primary grades at alarming rates, their numbers and their quality of life at the university level will continue to decline.

Education continues to play a vital role in the lives of children in 1993, just as it did in 1954 when the *Brown I* Court recognized education as "perhaps the most important function of state and local governments."<sup>88</sup> In 1993, just as the Court acknowledged in 1954, "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>89</sup> If provided by the state, the opportunity of an education "must be made available to all on equal terms."<sup>90</sup> In this last decade of the twentieth century, the Supreme Court will write the law of the land as it re-examines the intersection of race and public education in America. "[W]here existing racial identifiability is attributable to the State. . . and the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system,"<sup>91</sup> the Supreme Court will no longer order the federal district courts to maintain their remedial supervision over the local school districts and public universities where sound educational justifications exist to justify the continuation of sound educational policies.<sup>92</sup>

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88. *Brown*, 347 U. S. at 493.

89. *Id.*

90. *Id.*

91. *Fordice*, 112 S. Ct. at 2735.

92. *See id.* at 2743.

The need to reform public education urgently calls out. Debating whether the precise circumstances found in today's public classrooms were envisioned by the *Brown* Court does not lessen the urgency of the call to reform public education. The difficult questions are: How must we answer today's call? Shall we heed the urgency of today's call? Or, can we afford to prolong its urgency by exercising judicial options in the courtrooms instead of exploring practical solutions in the classrooms? The final outcome remains to be seen.