

School Desegregation or Affirmative Action?

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We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [of diversity in public higher education]. – Justice Sandra Day O'Connor¹

[C]onscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. – Justice Ruth Bader Ginsburg²

I. INTRODUCTION

Education is a fundamental component to success in today's world. Without quality education for each student, opportunities for advancement are limited while the playing field level remains unequal. Education leads to employment, productive rather than antisocial lives, citizen participation, and a better quality of life in terms of health as well as wealth. Educated people are also a great asset to the community and if they so choose, can help the community at large to better itself. In addition, a diverse society is itself disadvantaged by segregated education, as children do not learn public life and democratic skills sufficient to carry their nation's trust forward into the future.³

The landmark case of *Brown v. Board of Education*⁴ declared legal segregation in education unconstitutional, overturning *Plessy v. Ferguson*'s⁵ "separate but equal" regime. But during the period before *Brown*, generations of African-American school children were forced to attend schools that were not only separate as permitted under *Plessy* but also unequal, in violation of the letter of the case.⁶ This

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1. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).
2. *Id.* at 345 (2003) (Ginsburg, J. concurring).
3. See Mildred Wigfall Robinson, *Fulfilling Brown's Legacy: Bearing the Cost of Realizing Equality*, 44 *WASHBURN L.J.* 26-28 (2004).
4. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
5. 163 U.S. 537 (1896).
6. "Separate but equal" was thus honored in the breach by the court. See, e.g., *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (refusing to establish standards by which separate southern schools would be held to the "equality" principle). See also DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* 162 (5th ed. 2004).

damaged numerous generations of children, dramatically affecting the life chances of the entire black community.⁷

Despite *Brown*, this injury continues. It is sad to observe how many obstacles still remain in this arena, standing in the way of black people achieving the educational levels that they deserve. The primary focus of this article is on K-12 education in the nation's public schools, the foundation of our educational system, but I will say a few words about affirmative action toward the end of the piece.

In the United States today, children of African descent are generally located in *de facto* segregated,⁸ inferior,⁹ under-funded,¹⁰ and under-performing¹¹ public schools.¹² Even when such children are located in integrated suburban schools, they are typically segregated from their white counterparts through the internal segregation methods Professor Robinson listed in her Washburn lecture. The education of both *de facto* and suburban "re-segregated" children suffers greatly as a result.¹³

This disparity in K-12 education between African-American and white children manifests itself at the college and university levels and fuels the affirmative action controversies which are the most visible forums in which debate over our nation's diversity takes place. I will look more closely at two means by which African-American children have been "re-segregated" in nominally integrated school environ-

7. See BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 19 (2003) ("[T]he life of [all] blacks in America will bear for decades the scars of a century of discrimination."). *Id.*

8. The quality of public education for blacks in America remains inferior to that of white students. See, e.g., DR. A'lelia Robinson Henry, *Perpetuating Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education*, 27 J.L. & EDUC. 47, 65 (1998); Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 J.L. & EDUC. 431, 453-54 (2002); Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2009-10 (1992) (In 1980, about 40% of the black student population attended schools that were composed of 90% minorities, and 60% of black children attended schools comprised of a minority population that was 50%).

9. Brian P. Marron, *The Final Reform: A Centrist Vision of School Choice*, 8 GEO. J. ON POVERTY L. & POL'Y 321, 325 (2001) (noting urban schools as mostly old, poorly maintained, and overcrowded).

10. Joshua E. Kimerling, Comment, *Black Male Academies: Re-Examining the Strategy of Integration*, 42 BUFF. L. REV. 829, 853-54 (1994).

11. Marron, *supra* note 9, at 325-26 (noting urban schools' lower quality marked by inexperienced or uncertified teachers, obsolete curricula and a high teacher-student ratio).

12. About 30% of black public school students are enrolled in schools in large urban cities, and 56.2% of those children live in the South. Antoine M. Garibaldi, *Four Decades of Progress . . . and Decline: An Assessment of African American Educational Attainment*, 66 J. NEGRO EDUC. 105, 107 (1997) Between 1968 and 1994, the number of white public school students declined from 34.7 million to 28.46 million while the black student enrollment increased slightly from 6.28 million to 7.13 million. *Id.* With Hispanic students rapidly growing and the black student population remaining about the same, the nation's public schools now have a greater number of ethnic minority students in the public school system than they did in the 1970s. *Id.*

13. These students are disproportionately at risk for failure in school, school delinquency, involvement in criminal activities or drugs, pregnancy, and/or habitual unemployment. See William L. Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1709 (1986).

ments, primarily in the suburbs. Professor Robinson touches on these—tracking and special education classifications—in her lecture.

African-American children in urban schools suffer acutely from a different pair of troubles, however: inadequately financed schools and schools plagued with violence and disruption. Professor Robinson covers the question of financing urban schools in considerable detail. My only contribution there will be to highlight Congressman Chaka Fattah's Student Bill of Rights, proposed federal legislation addressed to the problem of underfinance.¹⁴ I will also touch on some of the causes of and remedies to school violence, in the name of which many white parents keep their children from schools with large minority enrollments, further deepening the re-segregation pattern. Finally, I will touch on affirmative action and the degree to which it might be rendered unnecessary by true equity and equality of opportunity in our K-12 system.

Justice Sandra Day O'Connor's quote leading this article reminds us of where we should be heading. Justice Ruth Bader Ginsburg reminds us of how far we have to go.¹⁵ Justice Ginsburg's picture, though stark, is still not complete. Even in nominally integrated environments black children are segregated. With such segregation comes not only disconnection from educational resources, but also disconnection from society's mainstream.

The conditions we face—re-segregation by tracking, "special ed," and the fear of school violence—and the continuing debate over affirmative action require public deliberation, not rancorous and divisive debate. Kettering Foundation president David Mathews once asked, "Is there a public for public schools?"¹⁶ We might now ask, "Is there a public for *integrated* schools?" "The public" itself is not integrated, but are there forums we can create where we can at least create a public for integrated schools?

I believe the participants in that discussion can be identified by first strengthening parent involvement in black children's education through vehicles such as the National Association for the Advance-

14. Student Bill of Rights, H.R. 236, 108th Cong. (2003).

15. Justice Ginsburg's full quote follows:

[I]t was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery. It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. As to public education, data for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. And schools in predominantly minority communities lag far behind others measured by the educational resources available to them.

Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (internal citations omitted).

16. DAVID MATHEWS, *IS THERE A PUBLIC FOR PUBLIC SCHOOLS?* (1996).

ment of Colored People's (NAACP), Parents' Councils. Then a dialogue can begin between such organizations and the largely-white Parent Teacher Associations (PTAs) that have such profound influence in the nation's more affluent schools. Perhaps that dialogue can be facilitated by "matching" inner-city schools and suburban schools¹⁷ and by dialogue within nominally integrated schools between the PTA and the Parents' Councils. This in fact has already begun in Montgomery County, Maryland, where the Parents' Councils were launched.

But how do we frame the discussion once it is ready to proceed? The Kettering Foundation has done a great deal of work in developing "issue" booklets for public deliberation, and they deal with some of the questions I will raise in this article. But I believe the discussion can best be framed by charter schools set up as adjuncts of the Education Departments of Historically Black Colleges and Universities (HBCUs), whose major purpose would be to identify better ways to support the education of black children. I develop these ideas further at the end of this article.

II. TRACKING

The "track" system, first introduced in the District of Columbia's public schools immediately after the demise of segregation,¹⁸ separated students by ability, as gauged by performance on I.Q. tests and on teacher recommendations.¹⁹ There was one track for students deemed to have limited ability to learn, one for academically gifted students,²⁰ and one each for "above-average," and "average" students.²¹ The lower tracks prepared a generally "blue collar" student population for menial jobs as kitchen workers, stockroom clerks, janitors, or in construction.²² The highly able students, on the other hand, typically from affluent homes, were prepared for white collar occupa-

17. Similar to how inner-city and suburban churches have been matched in the past.

18. *Hobson v. Hansen III*, 269 F. Supp. 401, 411 (D.D.C. 1967), *aff'd in relevant part sub nom*; *Smuck v. Hobson*, 408 F.2d. 175 (D.C. Cir. 1969). "When tracking was introduced in the 1930s, most educators dismissed it when it was shown that the practice did not bolster achievement." Tonya L. Nelson, *Tracking, Parental Education, and Child Literacy Development: How Ability Grouping Perpetuates Poor Education Attainment Within Minority Communities*, 8 GEO. J. ON POVERTY L. & POL'Y 363, 364-65 (2001). The use of tracking began to increase after *Brown*, apparently to ensure that African-American and white students would not share the same classroom. *See id.* at 365.

19. *See Nelson, supra* note 18, at 406.

20. *See generally* BELL, *supra* note 6, at 186-89. Tracking internalizes the bias and stigma of segregation, nullifying the benefits of intraschool integration. Grouping students by ability resurfaced in the 1950s when desegregation began. Bell cited sociologist Bruno Bettelheim, "[t]racking reflects a desire by white liberals to support racial integration without endangering the privileged position of their own children." *Id.* at 188. Tracking in a sense creates two separate schools in one building. *Id.*

21. *Hobson*, 269 F. Supp. at 407.

22. *Id.*

tions.²³ Because the content of the lower-track curriculum was devoid of material likely to raise levels of achievement, students placed there were unlikely to “place out” of their initial classification.²⁴

Besides the obvious “classism” of the approach, it also had a racial angle. Black students were disproportionately represented in the lower tracks, regardless of income. Conversely, the majority of whites were placed into the higher tracks.²⁵ The District of Columbia Circuit Court in *Hobson v. Hansen*²⁶ found that black students were “more likely to be placed in lower tracked classes because of past discrimination in education, testing biased against [black and disadvantaged students,] and . . . low expectations resulting in poor performance.”²⁷ Ultimately, the court concluded that “the psychological effect of being labeled ‘dumb,’ being separated physically from the other students, and being taught basic skills by teachers with low expectations . . . [combined to] limit the educational opportunity and life chances of the . . . students.”²⁸

Hobson overturned the District’s track system as racially discriminatory²⁹ and violative of the Fifth Amendment’s Due Process Clause.³⁰ The use of the I.Q. test was particularly objectionable because it focused on the learning styles and information base of the white middle class.³¹ The bias in such standardized aptitude tests consigned black and disadvantaged students to the lower tracks.³² Expressing its discomfiture with the tracking system, the court

23. *Id.*

24. *See id.*; Jill Rachlin, *The Label That Sticks*, U.S. NEWS & WORLD REPORT, July 3, 1989 at 51 (stating that “[b]y the end of the 10th grade, those originally low-tracked kids were 12 percent more likely to have left school than their contemporaries in the average or high-ability groups”). “One study found that 39 percent of black high-school seniors and 44 percent of Hispanic seniors are in vocational tracks, as opposed to only 29 percent of whites.” *Id.*

25. A traditional definition of giftedness is “an ability to learn and perform remarkably well in any variety of intellectual domains, especially academic and artistic.” Linda S. Gottfredson, *Realities in Desegregating Gifted Education*, in *IN THE EYES OF THE BEHOLDER: CULTURAL AND DISCIPLINARY PERSPECTIVES IN GIFTEDNESS* 4 (Diane Boothe & Julian Stanley eds., 2003). The longstanding methods of identifying gifted students are standardized tests, academic achievement, and teacher referrals. These methods are not absolute, however. Standardized tests can be culturally biased and are not the best predictors of giftedness. Particularly, cultural bias extends not only to the material tested, but to the lack of resources and background in preparing students for these tests as well as the stigma associated with performance for minority students. Additionally, teacher referrals are often subjective and may reflect biases towards certain students, especially with respect to race and income.

26. 269 F. Supp. 401 (D.D.C. 1967).

27. *See Nelson*, *supra* note 18, at 368.

28. *Id.*

29. *See Hobson* 269 F. Supp. 401, 441; *Hobson v. Hansen II*, 265 F. Supp. 902, 919 (D.D.C. 1967) (holding the constitutional provision as empowering Congress to exercise exclusive legislation in all cases).

30. *Hobson*, 269 F. Supp. at 492-93 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954), regarding the Fifth Amendment’s applicability to the District’s public school system, and its guarantee of equal educational opportunity for all students attending the District’s public school system).

31. *Hobson III*, 269 F. Supp. at 406-07.

32. *Id.* at 407.

permanently enjoined the practice in the District's public school system.³³

Hobson's continuing vitality was called into question by the United States Supreme Court in *Washington v. Davis*.³⁴ In an "infamous" footnote, *Davis* disapproved of a number of circuit court cases which found equal protection violations without proof of discriminatory purpose, relying on disproportionate impact standing alone.³⁵

Hobson found that public school student tracking offended the Constitution's guarantees of equal opportunity even though the means were not proven to be purposeful. In fact, the court held that tracking was unacceptable even if accomplished by policies that were racially neutral. The disproportionate impact upon black students—the resulting *de facto* segregation which the policy created—provided sufficient ground upon which to find a constitutional violation. Though based on the Fifth rather than the Fourteenth Amendment, the *Hobson* theory of discrimination was thus essentially the same as that the federal circuits disapproved of in *Davis*.

Tracking has since spread far beyond the District to many other jurisdictions throughout the United States.³⁶ The *Davis* ruling makes it extremely difficult to challenge tracking under the United States Supreme Court's reading of the Fourteenth and Fifth Amendments, not because there is no racial animus involved in tracking, *but rather because racial animus is so difficult to prove*. It may still be possible to challenge tracking under a "disproportionate impact" theory under Title VI of the Civil Rights Act of 1964, however, which more closely scrutinizes discriminatory conduct.³⁷

33. See generally *Hobson II*, 269 F. Supp. at 499-503, 515-17. In District of Columbia schools, two-thirds of the students placed in the special education track had the academic ability to be placed in regular tracks. KENNETH J. MEIER ET AL., *RACE, CLASS, AND EDUCATION, THE POLITICS OF SECOND-GENERATION DISCRIMINATION* 26 (1989).

34. 426 U.S. 229 (1976). "Disproportionate impact is not . . . the sole touchstone of an invidious racial discrimination [practice]." *Id.* at 242.

35. *Id.* at 245 n.12. "[I]n several contexts, [various federal circuit courts have held] that the racially disproportionate impact of [an] official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause [T]o the extent that those cases rested on or expressed the view that proof of racially discriminatory purpose is unnecessary in making out an equal protection violation, we are in disagreement." *Id.* at 244-45.

36. Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 505 (1996). "Tracking or academic grouping has been institutionalized into the American educational system. Indeed, it has been so institutionalized as a facet of education that few have questioned its validity and effectiveness." *Id.*

37. This in fact is the theory under which civil rights attorneys at the United States Department of Justice proceed when litigating these cases. Franz Marshall, Remarks at the Realities and Remedies panel of the Legacy of *Brown v. Board of Education: Reflections of the Last Fifty Years* symposium (Feb. 28, 2004).

III. "SPECIAL" EDUCATION AS A MINORITY DUMPING GROUND

"Special education," designed to assist children with a variety of learning disabilities, has become a new and sophisticated technique for maintaining, or re-creating, racial segregation in our nation's public schools. Some educators unfortunately view "special ed" as a place to dump students who are perceived as low achievers, disruptive, or simply with behaviors outside the parameters of majority cultural norms.³⁸ If these characterizations remind us of the older "tracking" approach, we should not be surprised to find similar, segregative outcomes.

In fact, the disproportionately high rates at which African-American children, especially males, are identified as mentally retarded, emotionally disturbed, and learning disabled are reminiscent of the "tracking" patterns which first concerned the Court of Appeals for the District of Columbia in *Hobson* almost forty years ago. The "emotionally disturbed" category is especially problematic, as it is so subjective. It is applied with particular severity against African-American boys.³⁹ Even the other categories have been misapplied, with inappropriate use of the I.Q. test still going strong after forty years.⁴⁰

As with the track system, black students are typically segregated from their white classmates, given a "watered-down" curriculum,⁴¹ and have little chance of escape.⁴² Also reminiscent of the older system, children so classified graduate at lower rates or drop out of school altogether.⁴³

The Individuals with Disabilities in Education Act (IDEA)⁴⁴ emerged from legal skirmishes over the segregative impact of "special ed" designations, primarily in the state of California, which began

38. This despite long-standing cautions against educating handicapped students in separate settings, calling for "mainstreaming" instead. See e.g., Lloyd M. Dunn, *Special Education for the Mildly Retarded - Is Much of it Justifiable?*, 35 *EXCEPTIONAL CHILDREN* 5 (1968).

39. Kim L. Hooper, *Race Eyed in Special Ed Placing; State Asks School Districts to Examine the Process They Follow in Evaluating Students*, *INDIANAPOLIS STAR*, Mar. 2, 2003, at 1B. "[A]ccording to state and national researchers, black males are more likely to be identified as emotionally handicapped or mildly mentally handicapped at [a] higher incidence than black girls or their white peers." *Id.*

40. See *id.*

41. See Brigid Schulte, *Disparity Seen in Special-Ed. in Montgomery; Troubled Blacks are More Likely to be Bused*, *WASH. POST*, Dec. 14, 1999, at A1.

42. See NAT'L ALLIANCE OF BLACK SCH. EDUC. (NABSE) & IDEA LOCAL IMPLEMENTATION BY LOCAL ADMIN'RS (ILIAD) PARTNERSHIP, ADDRESSING OVER-REPRESENTATION OF AFRICAN AMERICAN STUDENTS IN SPECIAL EDUCATION: THE PREREFERRAL INTERVENTION PROCESS, AN ADMINISTRATOR'S GUIDE 5 (2002), available at http://www.cec.sped.org/law_res/doc/resources/files/AddressingOverRep.pdf (last visited Nov.19, 2004). [hereinafter NAT'L ALLIANCE OF BLACK SCH. EDUC.]

43. Rosa A. Smith, *Black Boys*, 22 *EDUC. WEEK*, Oct. 30, 2002, at 40, 43. ("In many large cities, fewer than 30 percent of African-American boys graduate from high school with their peers.")

44. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37.

about ten years after tracking was introduced in the District of Columbia.⁴⁵ Today, the IDEA mandates non-discriminatory testing and classification, contains procedural safeguards against mis-classification, and provides parents of children so classified with a broader range of remedies than exist against classic tracking.⁴⁶

The IDEA, harkening back to Dr. Lloyd Dunn's arguments,⁴⁷ favors *mainstreaming* special ed students (including students with disabilities) in the regular classroom, permitting placement of disabled students in a separate class or facility "only if they cannot be educated satisfactorily in the regular educational setting with the use of supplementary aids and services."⁴⁸ Section 504 of the Rehabilitation Act of 1973⁴⁹ and Title II of the Americans with Disabilities Act of 1990 (ADA)⁵⁰ are similar to the IDEA in this respect. Perhaps more importantly, Section 504 and the IDEA provide procedural safeguards meant to afford parents some leverage vis-à-vis the school system where child placement is concerned. Chief among these is the requirement that parents be consulted before any "special ed" placement occurs, and that an Individualized Education Plan (IEP) be drafted to detail the reasons for the classification, the support and resources that will be provided, and even steps that will be taken to "mainstream" the child if possible.⁵¹

Pursuant to amendments to the IDEA in 1997, states are required to gather information and examine data on the race of the students classified in the various special education categories to identify and weed out disproportionate placement of minority students.⁵² According to its 2000 annual IDEA report to Congress, the United States Department of Education Office of Special Education Programs (OSEP) indicated that African-American students are three times more likely than white students to be labeled mentally retarded, two times more likely to be labeled emotionally disturbed, and nearly two

45. See *Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349 (9th Cir. 1974); *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd in part rev'd in part by*, 793 F.2d 969 (9th Cir. 1984). Title VI of the Civil Rights Act of 1964 bans racial discrimination by private and public institutions that receive federal funding and racial intentional discrimination as well as practices that have a disparate impact on minorities.

46. As discussed above, only Title VI remains as a barrier to classic tracking, and even that has been diminished by federal court interpretation over the years. See Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318, 1334-36 (1989).

47. See Hooper, *supra* note 39.

48. *Student Placement in Elementary and Secondary Schools and Section 504 and Title II of the Americans with Disabilities Act*, OFFICE FOR CIVIL RIGHTS (U.S. Dep't of Educ., Washington, D.C.), at <http://www.ed.gov/about/offices/list/ocr/docs/placpub.html?exp=0> (last revised in August 1998) [hereinafter Dept. of Ed./OCR Policy Guidance on Student Placement].

49. Rehabilitation Act of 1973, Pub. L. No. 93-112, sec. 504, 87 Stat. 355.

50. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, sec. 2, 101 Stat. 328.

51. Dep't of Educ./OCR Policy Guidance on Student Placement, *supra* note 49.

52. See generally 34 C.F.R. § 300.532 (2003) (Evaluation Procedures); 34 C.F.R. § 300.534 (2003) (Determination of Eligibility); 34 C.F.R. § 300.755 (2003) (Disproportionality).

times more likely to be labeled as having a learning disability.⁵³ African-American students represent approximately 16% of primary and secondary school children, while they comprise 32% of those students labeled as mildly mentally retarded⁵⁴ and placed in special education classes. Despite the fact that the ADA⁵⁵ and Section 504⁵⁶ prohibit discriminatory assignment of disabled students to segregated classes or facilities, 55% of white students are mainstreamed in the regular classroom as compared to only 37% of black students.⁵⁷ These statistics are strong evidence of large-scale patterns and practices of mislabeling and misplacing black children to achieve *de facto* segregation in public schools.⁵⁸

IV. SCHOOL VIOLENCE

Schools all over the nation have become increasingly dangerous. School violence directly impacts a student's ability to learn as concerns for their safety supercede their focus on education. School violence in inner-city schools, and even in inner suburbs, has unfortunately become commonplace, but now suburban and even rural schools have had to deal with this problem as well. The Columbine High school incident in the late 1990s was the most widely-publicized event of this type.

School administrators, concerned with the need to respond swiftly and decisively, have adopted many questionable solutions to the problem. Zero tolerance policies are the most high-profile examples of the new rules. Administrators identify a broad range of behaviors as unacceptable and make the maximum punishment for these activities mandatory, regardless of the circumstances. Zero tolerance policies do not consider the actual threat the infraction presents, punishing all offenders with the same severity.

Zero tolerance policies have resulted in the unnecessary criminalization of large numbers of students. Because the teachers and administrators who enforce the policy have no discretion in the matter,

53. See NAT'L ALLIANCE OF BLACK SCH. EDUC., *supra* note 43.

54. Theresa Glennon, *Race, Education and the Construction of a Disabled Class*, 1995 Wis. L. REV. 1237, 1251 (1995).

55. The ADA does not specify procedural safeguards related to special education nor does it specify evaluation and placement procedures. Kelly Henderson, *An Overview of ADA, IDEA, and Section 504: Update 2001*, at <http://ericec.org/digests/e606.html> (last visited Oct. 24, 2004).

56. See, e.g., 42 U.S.C. § 12131 (1998); 49 C.F.R. § 27.1 (2003).

57. Schools play a critical role in the placement of African-American students in special education. Only after other attempts to improve performance have failed is a child to be referred for evaluation for special education. See *id.*

58. The Civil Rights Project at Harvard University reports that in Connecticut, Nebraska, South Carolina, Mississippi, and North Carolina, black students were more than four times more likely to be identified as mentally retarded than were their white peers. HARVARD UNIV. CIVIL RIGHTS PROJECT, *Racial Inequity in Special Education* available at http://www.civilrightsproject.harvard.edu/research/special/IDEA_paper02.php (last visited Oct. 24, 2004).

students are being introduced to the criminal justice system for infractions that in earlier days were punished only by a trip to the principal's office.

Zero tolerance policies are more likely to exist in majority-minority schools. As a consequence, zero tolerance has had a disproportionate impact on minority students. The United States Department of Education's National Center for Education Statistics reveals that the vast majority of schools with zero tolerance policies were schools with a minority enrollment of 50% or higher.⁵⁹ Schools with large numbers of minorities seem to have given up on communicating with their students and seek instead to control them with hard-line approaches.

Zero tolerance policies backfire badly. If a productive student is expelled for a minor infraction, the student's peer group changes from school attendees to other children who have been suspended or expelled, making it likely the student will get into more severe trouble, possibly with official law enforcement. If the child does re-enter the school system, he will be stigmatized as a troublemaker. Here we can see parallels to the newly emerging practices of treating juvenile offenders as adults in the larger criminal justice system. Youngsters are taught how to be more antisocial than when they were first punished, are alienated from the mainstream, and become ripe targets for the worst kinds of trouble.

Zero tolerance policies, like some of our more extreme responses to terrorism,⁶⁰ are spurred by the kind of raw fear that ultimately loosens the very bonds of civil society that we are trying to protect. Such solutions tread heavily on the civil rights and civil liberties of students, but many parents seem willing to compromise their children's constitutional rights in exchange for the promise of safer classrooms. The parallels to the national response to terrorism are striking and hard to ignore.

The most productive strategies to solve school violence would involve programs that incorporate conflict resolution training, both as part of the curriculum and also as part of student extra-curricular activities. With the implementation of conflict resolution training, peer mediation programs, and focus groups, students may feel like they have an outlet to voice their concerns. Such approaches can increase cooperation and needed trust among students, parents, and school officials. Dialogue between all parties can encourage parents and students to cooperate with violence prevention programs, seeing

59. Nat'l Ctr. for Educ. Statistics, Fast Response Survey Sys., "*Principal/School Disciplinary Survey on School Violence*," FRSS63, 1997. (U.S. Dep't of Educ., 1998), at <http://nces.ed.gov/pubs98/safety/ta1a1.asp>.

60. See e.g., USA Patriot Act of 2001, H.R. 3162, 107th Cong. (2001).

themselves as beneficiaries rather than mere targets.⁶¹ Peer mediation programs can empower students to work out differences constructively and on their own.⁶²

We should also be mindful of the fact that students alienated from the mainstream classrooms by “special ed” classifications and other forms of tracking are prime candidates for violent and disruptive behavior. As discussed above, black children, especially boys, are being set aside not only for reasons of “ability,” but as “troublemakers” and disruptive students, a misapplication of ADA and IDEA law. With their academic engagement attenuated through special classifications, minority children, particularly males, view themselves less and less as citizens of the school. Teachers and administrators view them in the same way.⁶³

For these children especially, the pull of the streets is particularly strong.⁶⁴ Self-destructive and profit-driven images portrayed in the media for African-American male youths provide alternate, negative, and powerful paradigms for self-respect and importance, and these children are particularly susceptible. The Harvard Civil Rights Project reported that lack of support for these children correlates highly with dropout rates, suspension or expulsion, and helps explain why minority school-aged children are over-represented in the juvenile justice system.⁶⁵ However, the courts have been reluctant to intervene with regard to abuses of the relevant statutes⁶⁶ or with respect to disproportionate suspension and expulsion itself.⁶⁷

V. SCHOOL FINANCE

While the causes of school violence in the suburbs are more difficult to identify, violence in urban schools is often an overflow of violence in the communities in which they are located. The “liberal” position on this issue, with which I agree, is that such violence and

61. In some instances, the parents of children in trouble themselves had unhappy experiences in school, and those unfortunate memories hinder them from being effective advocates for their children in school today.

62. Peer mediation is most effective when introduced at the initial stages of conflict. Peer mediation and focus group activity could also be part of a general program of developing “social capital” in African-American communities. This article recommends the “study circle” approach. See *infra* note 121.

63. See *Lora v. Bd. of Educ. of New York*, 587 F. Supp. 1572 (E.D.N.Y. 1984). See also *infra* note 105.

64. See Smith, *supra* note 44.

65. See National Council On Disability: Reauthorization of the Individuals With Disabilities Education Act, 67 Fed. Reg. 15830, 15834 (Apr. 3, 2002).

66. See Daniel H. Melvin, II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 637 (1995); See also *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003).

67. *Clark v. Bd. of Educ. of Little Rock*, 449 F.2d 493 (8th Cir. 1971) (failing to find discrimination in expulsion/suspension contexts); See also *Reed v. Rhodes*, 1 F. Supp. 2d 705 (N.D. Ohio 1998).

other forms of social disorder and breakdown are directly correlated with poverty. Certainly, the poverty of many inner-city communities is reflected in the lack of financial and other resources with which to educate the children who live there. Both social disorder and lack of money are great barriers to achieving the level playing field of which Justice O'Connor spoke in *Grutter*.

As noted earlier, the Student Bill of Rights proposed by Congressmen Chaka Fattah addresses the disparity issues of public education finance in America.⁶⁸ The Student Bill of Rights “further[s] the goals of the No Child Left Behind Act of 2001 . . . and the Elementary and Secondary Education Act of 1965 . . . by holding States accountable for providing all students access to the fundamentals of educational opportunity.”⁶⁹

It has been said that the public schools are the only place where our citizens can learn about one another and accept one another’s diverse backgrounds and points of view and that as such, they are cornerstones in the foundation of our democracy. Congressman Fattah’s Bill seeks to ensure that all children in public school in addition “acquire the knowledge and skills necessary for responsible citizenship” by meeting “challenging State student academic achievement standards,” and learning to “compete and succeed in a global economy.”⁷⁰ The final purpose of the Bill is to end the pervasive pattern in state public school systems of disparate education in terms of race and class.⁷¹

Instead of focusing on the amounts of money necessary to yield a desired outcome, the Student Bill of Rights focuses on the desired outcome in real and concrete terms. One section requires that public educational services in poor districts be “at least comparable” to wealthy districts.⁷² The Bill also mandates that states “comply with any substantive Federal or State court order in any matter concerning the adequacy or equity of the State’s public school system.”⁷³ If a state fails to comply with these or other sections of the Bill, federal funds will be withheld.⁷⁴

The Student Bill of Rights will also serve as a directive for research on the issue of what constitutes an adequate education in American states. Section 131 mandates that the Secretary of Educa-

68. Student Bill of Rights, H.R. 236, 108th Cong. (2003).

69. *Id.* § 3(b)(1).

70. *Id.* § 3(b)(2).

71. *Id.* § 3(b)(3).

72. *Id.* § 112(b).

73. *Id.* § 112(c).

74. *Id.* § 123(b).

tion supply Congress with a detailed analysis of each state's educational system on an annual basis.⁷⁵

Each report is to inventory the number of students in each state, the numbers and types of schools, the average per-pupil expenditure, and the educational ranking as determined by test assessments.⁷⁶ The report will evaluate the annual level of progress that each state makes, particularly in terms of per-pupil expenditure and student access to educational opportunity.⁷⁷ This report will provide needed information for researchers seeking a better understanding of how to achieve academic equity and equality of opportunity in America.⁷⁸

Congressman Fattah presented this bill five times to the House of Representatives, and each time it failed to pass. With the language altered from an original emphasis on money to what money buys, the Congressman hopes to have the bill passed during the fiftieth anniversary of *Brown*.

VI. AFFIRMATIVE ACTION

The United States Supreme Court has become increasingly hostile toward affirmative action in general and in education in particular, at least since the case of *Bakke v. Regents of the University of California*.⁷⁹ When Allan Bakke applied to medical school at the University of California-Davis in 1973 and 1974, he was certain he would be admitted. Though the University conceded that Bakke was qualified for admission, so were hundreds, if not thousands of others who were also rejected.⁸⁰ Unlike the other rejected applicants, however, Bakke brought a reverse discrimination claim under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.⁸¹ For the first time in United States history, the same laws that were used to open the door for African-Americans would now be considered as a means to shut them out.

The University of California posited four reasons for its race-conscious admissions program: 1) to reduce "the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;" 2) to counter the effects of societal discrimination; 3) to increase "the number of physicians who will practice in communities currently underserved;" and 4) to obtain "the educational benefits

75. *Id.* § 131(a).

76. *Id.* § 131(b)(1).

77. *Id.* § 131(b)(2)(4).

78. This section could be of real benefit to the Reparations Academies I have proposed as vehicles for change in the African-American community's educational facilities.

79. *Bakke v. Regents of Univ. of Cal.*, 553 P. 2d 1152 (Cal. 1976).

80. *Id.* at 1162.

81. U.S. CONST. amend. XIV, § 1; Title VI of The Civil Rights Act of 1964, 42 U.S.C. § 2000d (1998)).

that flow from an ethnically diverse student body.”⁸² The Court struck down the first three as constitutionally impermissible, but Justice Lewis Powell led a one-vote majority for the University of California’s “diversity” rationale.⁸³

The circuit courts then split over whether diversity served a compelling governmental interest.⁸⁴ Justice Powell’s “diversity rationale” would be hotly debated for another twenty-five years until the Court upheld it by a narrow margin in June of 2003.⁸⁵

When Jennifer Gratz was denied admission to the University of Michigan in 1995, she premised her reverse discrimination claims with the sentiments, “I knew of people accepted to Ann Arbor who were less qualified, and my first reaction when I was rejected was, ‘let’s sue.’”⁸⁶ Similar were the attitudes of Allan Bakke and Cheryl Hopwood,⁸⁷ when they received their rejection letters from the Universities of California-Davis and Texas respectively. Admissions data revealed, however, that admission was offered to 109 other white applicants with significantly lower scores and grade point averages than Hopwood’s.⁸⁸

Various states have developed methods of bringing in minority students with techniques that are not as “race conscious” as the methods disapproved in cases like *Hopwood*. In Texas, for example, the legislature adopted a new law which guarantees admission into the state’s universities for all Texas students placing in the top 10% of their high school graduating class.⁸⁹ Critics of this particular solution point to the fact that minority students are now attending lower-tiered institutions in Texas’ state university system.⁹⁰ A particular irony of this approach is that minority parents who have worked hard to es-

82. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978).

83. *Id.* at 314. “[T]he interest of diversity is compelling in the context of a university’s admissions program[.]” *Id.*

84. *See Grutter v. Bollinger*, 288 F.3d 732, 742 (6th Cir. 2002) (“Because this court is bound by Justice Powell’s *Bakke* opinion, we find that the Law School has a compelling state interest in achieving a diverse student body.”); *but see Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“[A]ny consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”).

85. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

86. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1107 n.9 (2002) (quoting Ethan Bronner, *Group Suing U. of Michigan over Diversity*, N.Y. TIMES, Oct. 14, 1997, at A24).

87. *See, e.g.,* Laura Berman, *Bakke Case Could Gum Up Appeal in U-M Diversity Fight*, DETROIT NEWS, May 16, 2002, available at <http://www.detnews.com/2002/metro/0205/16/d01-491031.htm>; *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994).

88. *Hopwood*, 861 F. Supp. at 581.

89. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences*, HARVARD UNIV. CIVIL RIGHTS PROJECT (Feb. 7, 2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf>.

90. *See* Theodore Cross & Robert Bruce Slater, *How Bans on Race-Sensitive Admissions Severely Cut Black Enrollment at Flagship State Universities*, J. BLACKS HIGHER EDUC., available at http://www.jbhe.com/features/38_race_sensitive.html (last visited Oct. 30, 2004).

cape inner-city ghetto schools now find that their children are up against stiffer competition in the suburban schools than they would have in their old neighborhoods. In many ways, these solutions, spurred by Justice Powell's non-racial "diversity" rationale, fall short of the mark because they dismiss historic and contemporary racism as social "background noise" which the courts are no longer obliged to consider.⁹¹

Harkening back to *Bakke*, we can see today that only 4% of all doctors in the United States are black, a percentage which has not changed since 1990.⁹² "What you see in medical schools is a reflection of educational disparities that begin in kindergarten," said Professor Grumbach of the Department of Family and Community Medicine at the University of California at San Francisco.⁹³ Black enrollment in medical schools has dropped during this time as well,⁹⁴ as affirmative action programs come under attack.

In her opinion upholding the use of race as a factor in the University of Michigan's law school admissions process, Justice O'Connor observed the need for a "sunset" period on race-based admissions criteria. Whether that statement was meant to serve as a deadline or merely a guideline is currently unclear. However, minority students in primary and secondary schools continue to be denied educational opportunity. Obtaining a diverse student body at a selective law school such as the University of Michigan without using racial preferences will be very difficult to achieve as long as these conditions continue. A "sunset" on affirmative action will only be possible if minority students get the education and preparation that they deserve.

The University of Michigan should be commended for recognizing the that the "educational benefit" of diversity is important enough to warrant the use of race as part of its admissions criteria. But we must not lose sight of the fact that the American school system, every day, so underserves minority students that they face significant obstacles if they seek admission to selective universities under a race-neutral system. Justice Ginsburg concedes that point in her concurring opinion, stating "[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities."⁹⁵ She noted that "[d]espite these inequalities, some mi-

91. See *Adarand Contractors Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("[U]nder our Constitution there can be no such thing as either a creditor or debtor race.")

92. Employed Civilians By Occupation, Sex, Race, and Hispanic Origin: 1983 and 2002, U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. (2003), available at: <http://www.census.gov/prod/2002pubs/01statab/labor.pdf>.

93. D'Vera Cohn & Sarah Cohen, *Minorities, Women Gain Professionally*, WASH. POST, Dec. 18, 2003, at A1.

94. See AM. MED. ASS'N BD. OF TRUSTEES, *Diversity in Medical Education*, available at <http://www.ama-assn.org/ama/pub/article/6757-5569.html> (last updated Jan. 29, 2003).

95. 539 U.S. 306, 346 (2003).

nority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated."⁹⁶

So with true equity and equality of opportunity for all races in our nation's public schools, affirmative action might no longer be necessary. But will this happen? The K-12 arena is the most bitterly contested territory in our entire educational system. The architects of *Brown* shied away from it, building their case for integration first at the graduate and then at the undergraduate levels. It was not until precedent had been set in those easier cases that they thought they were ready to do battle over K-12.⁹⁷

The University of Michigan Law School, in keeping with Justice Powell's original *Bakke* formulation, argued that race was required as a factor in their admissions process if their students were to obtain "the educational benefits that flow from a diverse student body."⁹⁸ The "elephant in the room" that the opinion ignores, however, is the fact that it is possible for American citizens of college age to spend

96. *Id.* Even the Center for Individual Rights, which has been adamant in its opposition to affirmative action programs in higher education, acknowledges that "the single most effective way to increase minority enrollment is to increase the number of minorities applying to college. That means improving educational opportunity at every level, beginning in the early school years." Testimony of Curt Levey, Director of Legal and Public Affairs, Center for International Rights, before the Texas Senate Subcommittee on Higher Education (June 24, 2004), available at http://www.cir-usa.org/legal_docs/grutter_v_bollinger_levey_test.pdf. Thus, increasing the pool of eligible minority applicants will decrease the need for preferential admissions policies. In this regard, the Center for Individual Rights is on the same page with more liberal *amici*.

The National School Boards Association, a governing body for school boards and public school districts in the United States, stated in their brief supporting the use of race as a factor in admissions policies that

race matters to the core mission of elementary and secondary education in at least two fundamental ways: (1) to ensuring that all students are fully prepared to be productive citizens in our diverse democratic society; and (2) to ensuring that all students have the opportunity necessary to achieve high standards.

Brief of Amici Curiae National School Boards Association, et al. in Support of Petition for Respondent at 10, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

The State of Florida reiterated that point in its amicus brief opposing the use of race in the college admissions process. The State maintained that "the best way to ensure minority participation in all areas of higher education is to provide the same opportunities and support to all students and to hold minority students to the same standards as all other students." Brief of Amici Curiae State of Florida, et al. in Support of Petition for Respondent at 16, *Grutter* (No. 02-241). That statement does not just mean educating minority students in non-segregated schools. It also means not placing a disproportionate number of minority students in remedial classes and trade school curricula when they are in integrated environments. Ultimately, the solution to having minority college and graduate school students who can perform at the same level as their white counterparts is to expose them to the same academic rigors and demands as their white counterparts in K-12 education, and also to provide them with the same levels of academic support.

97. Charles J. Ogletree Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 *How. L.J.* 499, 517-19 (Spring, 2004).

98. *Grutter*, 539 U.S. at 328 (2003) (quoting Brief in Opposition at i, *Grutter* (No. 02-241)). They further express their desire for non-minority students to be exposed to a wide variety of minority viewpoints so that they can see that there is not a single minority viewpoint. *See id.* at 333.

their entire educational career without exposure to minority students at all, much less their “diverse viewpoints.” Fifty years have passed since *Brown*, but the majority of white students in America attend segregated primary and secondary schools.

As the architects of *Brown* recognized, because K-12 education is compulsory, schools at that level are the most likely candidates for producing a truly integrated society. Only a small percentage of United States citizens of any race ever experience higher education, so that arena is a fragile reed upon which to rest our nation’s hopes for the kind of diversity and equity we need for a healthy democracy. The interest in “diversity” thus mirrors the interest in educational equity. Until we attack the evil twins of racially discriminatory tracking in suburban schools and *de facto* discriminatory under financing of inner-city ones, the level playing field for African-American children will never become a reality.

VII. SOLUTIONS

The black community needs some new institutional and organizational vehicles to respond to the new—and old—challenges of re-segregation and unequal financial support which dramatically affect the schooling of our children. I have proposed that these new vehicles revolve around a set of “Reparations Academies.”⁹⁹

Reparations Academies are comprehensive K-12 charter schools for the victims of educational racism.¹⁰⁰ The legislature of each state that maintained *de jure* segregated schools, Congress in the case of the District of Columbia, should be required to establish at least one such school at a Historically Black College or University (HBCU) located within the state’s borders¹⁰¹ as part of the HBCU’s Department of Education.

Each of the Reparations Academies would be chartered to develop “best practices” for countering the effects of our country’s history of “separate and unequal” education of African-American

99. These are named “Reparations Academies” because funding would be secured, through litigation and legislation, as reparations for the damage done to black children through the denial of equal education facilities during the segregation era. See Harold A. McDougall, *Brown at Sixty: The Case for Black Reparations*, 47 *How. L.J.* 863, 896 (2004) [hereinafter McDougall, *Brown at Sixty*].

100. Charter schools are autonomous public schools, operated with public funds. The charter school movement began in 1992. Since that time over 1,600 schools have been opened in 31 states and the District of Columbia, over 430,000 students have been served. Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 *TUL. L. REV.* 563, 567 (2001). The intent of charter schools is to “foster educational excellence by encouraging unconventional approaches to learning, curricula, and instruction.” Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 *DUKE L.J.* 753, 764 (2000). For more on charter schools’ role in this process, see McDougall, *Brown at Sixty*, *supra* note 100, at 899-904.

101. For example, Howard University in the District of Columbia.

children with an eye toward Justice O'Connor's idealized level playing field.¹⁰² The faculty of the school and of its partner HBCU would circulate and publish their findings through symposia, publications, and on-site internships.¹⁰³ High on their agenda, no doubt, would be teacher retraining,¹⁰⁴ teacher recruitment,¹⁰⁵ curriculum change¹⁰⁶ including experiments with Afro-centric curricula,¹⁰⁷ single-sex schools primarily for black males,¹⁰⁸ black private schools, and home schooling among African-Americans.¹⁰⁹

There are some political and legal obstacles to the Reparations Academies; strategies to overcome these obstacles have been previously identified.¹¹⁰ Two strategies further discussed in this article are parental involvement in advocacy, not simply damage control, and community-wide deliberative dialogue away from the media-driven influence of our country's extreme right wing.

102. "The Amistad Academy of New Haven, Connecticut, is perhaps the best charter school model for the Reparations Academies." McDougall, Brown at Sixty, *supra* note 100 at 903.

103. As an example, John Hanson French Immersion Montessori School, at <http://www.pgcps.pg.k12.md.us/~jhmomt/> (last visited Oct. 30, 2004).

104. See Susan Black, *Teachers Who Connect with Kids*, 186 AMER. SCH. BD. J. 42, 42 (1999); Kati Haycock, *Good Teaching Matters: How Well-Qualified Teachers Can Close the Gap*, 3 THINKING K-16 1, 6 (Summer 1998); Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII and Justifying the Use of Race in the Hiring of Special Educators*, 2001 B.Y.U. EDUC. & L.J. 179. "Black students are seen as fun-loving, happy, cooperative, energetic, and ambitious by black teachers, while they are more likely to be seen as talkative, lazy, high-strung, and frivolous by white teachers." Linehan, *supra* at 189-90. See also Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133, 182-86 (1999).

105. See, e.g., William R. Bryant, Note: *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 211-12, 219 (1998); Linehan, *supra* note 105 at 193; Clarence Waldron, *Why We Don't Have More Black Male Teachers*, JET, July 17, 1995, at 6.

106. See, e.g., Fenwick English, *Deciding What to Teach and Test: Developing, Aligning, and Auditing the Curriculum*, 4 SUCCESSFUL SCHOOLS: GUIDEBOOKS TO EFFECTIVE EDUCATIONAL LEADERSHIP 1, 63 (1992); Kati Haycock, *Closing the Achievement Gap*, 58 EDUC. LEADERSHIP 6, 9 (Mar. 2001).

107. Some African-American parents, finding that public schools "leave their children lacking in pride and self-esteem," are turning to Afro-centric schools. See Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 817-18 (1993); Joanna R. Zahler, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995, 1030 (1999); Roberta L. Steele, Note, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591 (1993).

108. See, e.g., Kimerling, *Black Male Academies*, *supra* note 10, at 833; Michael John Weber, *Immersion in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 (1993).

109. See, e.g., Daniel H. Pink, *School's Out*, REASON, Oct. 2001, at 29, available at <http://reason.com/01110/fe.dp.schools.shtml>; Julianne Malveaux, *A Guide to the School-Choice Debate*, ESSENCE, Sept. 2000, at 158; John Cloud & Jodie Morse, *Home Sweet School*, TIME, Aug. 27, 2001, at 46; Carolyn Kleiner, *Home School Comes of Age*, U.S. NEWS & WORLD REP., Oct. 16, 2000, at 52; Michael H. Romanowski, *Common Arguments about the Strengths and Limitations of Home Schooling*, THE CLEARING HOUSE, Nov. 1, 2001, at 79.

110. McDougall, Brown at Sixty, *supra* note 100, at 903-07.

A. *Parental Involvement*

Historically, African-American parents have used the courts as their avenue for relief, advocacy, and protection, and this year we celebrate the fiftieth anniversary of the landmark *Brown* case. However, litigation standing alone fell short of achieving the intended goals, as first the larger society and then the courts themselves turned away from the cause of equity and opportunity for African-American children.¹¹¹

Further, the ability to lobby the legislative and executive branches on their children's behalf became diluted as the African-American community itself began to fragment along class lines, with the more affluent moving to the suburbs as their white counterparts had done a generation before.¹¹² The recent attacks made by comedian Bill Cosby against the less affluent in the African-American community are the most public evidence of this schism.¹¹³ With the community divided in this way, it has become more and more difficult to find remedies all can support. African-American children and their parents in suburban communities face different challenges than those faced by their counterparts in inner city, and even inner-suburban areas.

The need for parent advocacy for African-American children regardless of their residential location, however, provides a common ground. As we have seen, relatively affluent parents in suburban neighborhoods, if they are not vigilant, can see their children's education sabotaged just as effectively as if they still lived in the ghetto neighborhoods they worked so hard to escape.

Majority parents in suburban areas have traditionally asserted their influence in the school system through the Parent Teachers Association. PTA members sponsor fundraisers for their children's schools, organize extra-curricular activities, and lobby the principal, teachers, and the school board on their children's behalf. Suburban PTAs are typically dominated by well-educated, affluent, stay-at-home mothers from the majority racial group, and they guard their institutions jealously. It is no simple matter to gain influence in such

111. See generally, Bell, *supra* note 6, at 170-92.

112. This ability of the middle class to escape the inner-city ghettos was, ironically, created by the civil rights movement itself, which included people who were not middle class. See generally, 42 U.S.C. §§ 3603, 3604 (1998) (The Fair Housing Act of 1968 opened the suburbs to blacks and Jews, overcoming many barriers erected by suburban residents and brokers.). See also John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998); John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1130 (2002).

113. *Cosby Attacks Lower Class African-Americans*, World Entm't News Network May 20, 2004, available at 2004 WL 76881415; see also Christopher John Farley, *What Bill Cosby Should be Talking About*, TIME MAGAZINE, June 3, 2004, available at <http://www.time.com/time/nation/article/0,8599,645801,00.html>.

groups, even for white parents. Black parents have even greater hurdles to overcome.

Even where the PTA is interested in attracting black parents, black families may be unable to participate because they are two-earner families without wealth and income comparable to their white counterparts. In the face of such odds, African-American parents in the suburbs have established "Saturday Schools" that are more consistent with the schedules of working parents. They also have developed summer programs to give African-American children a "head start" before they enter new grades. Funding comes from parent donations, charitable foundations, and sponsorships from organizations like the NAACP. African-American parents in suburban, "integrated" schools also must do special advocacy work for their children in the face of re-segregation trends in the arenas of special education and discriminatory application of disciplinary action.

Emerging advocacy groups like the NAACP Parents' Councils have been formed to provide black parents with some of the same kind of influence wielded by the mainstream PTAs. What they lack in resources they make up with hard work and "sweat equity." They also enjoy the support of national organizations such as the NAACP. Another example is an independent group, D.C. Parents United, which was formed by the Washington Lawyers Committee for Civil Rights Under Law, and helps parents with legal advocacy for their children as well as in organizing Saturday schools and summer "catch-up" programs.¹¹⁴ The Reparations Academies could assist such groups, thus becoming training institutes not only for teachers and students, but for parents as well.¹¹⁵

B. *Deliberative Dialogue*¹¹⁶

Techniques must be devised to engage the African-American population as a whole in dialogue about the need for education of the community's children in environments which are fair, supportive, safe, well-financed, and as diverse as is practicable. Advocacy groups have done a fine job of raising the general consciousness of the community in these areas, but to dig deep into the community we will have to

114. See Parents United for the D.C. Public Schools, available at <http://www.parentsunited4dc.org/> (last visited Oct. 30, 2004).

115. James Forman's original reparations call, which prompted Bittker's book, specified "institutes to develop skills in community organizing and communications" as one demand. BITTKER *supra*, note 7, at 169.

116. See generally Gail Bingham, *When the Sparks Fly: Building Consensus When the Science is Contested* (May 2003), available at http://www.resolv.org/tools_pubs.htm (discussing the use of dialogue in leadership and problem-solving).

build capacity, social capital, and civic infrastructure in the black community.¹¹⁷

The best way to facilitate a community-wide, inclusive dialogue on the educational future of African-American children would be by organizing small-group meetings designed to engage African-American parents, students, teachers, and administrators as well as their supporters in the majority community. Carrying on the dialogue in small-group format will not only spread information and ideas more quickly and effectively, but will also build relationships and capacity among the participants themselves.¹¹⁸ Excellent models of this type of discussion are Swedish “study circles,” used there primarily for adult education and civic participation, but often including the youth as well.¹¹⁹

The primary role of the Reparations Academies would be to develop “issue booklets” of the type pioneered by the Kettering Foundation in its work on public deliberation.¹²⁰ These booklets would “name and frame” issues such as school finance, school violence, and racial segregation stemming from disparate application of tracking and special education classifications. They would pose choices of the leading competing solutions to these problems, developing each choice so as to support reasoned and thorough deliberation by their respective adherents.

The small-group “study circles” of concerned African-American citizens and their majority supporters would deliberate on the choices and communicate them to a central clearing house comprised of an Assembly of representatives of all the study circles as well as the major civil rights organizations.¹²¹ The civil rights organizations, particu-

117. This is a project which I have been researching and promoting since the publication of my book. HAROLD A. McDOUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* (1993).

118. See *id.* at 162-65. Note that James Forman’s original call for reparations, quoted in Bittker’s book, listed among its demands the establishment of a “training center for teaching skills in community organizing and communications.” BITTKER, *supra* note 7, at 169.

119. See, e.g., Folkbildningsrådet, *Liberal Adult Education in Sweden 2003* at <http://www.folkbildning.se/page/60/english.htm> (updated 2003); Ministry of Education and Science - Adult Education, (article updated Apr. 29, 2004) at <http://www.sweden.gov.se/sb/d/2063/a/21953> The Montgomery County School Board is already using study circles, particularly among Latino parents. See, Study Circles Resource Center, *Focus on Study Circles* (Fall 2002), at <http://www.studyircles.org/pdf/fall02.pdf>. In the United States, the Study Circles Resource Center of Pomfret, Connecticut is promoting study circles. See Martha L. McCoy & Patrick L. Scully, *Deliberative Dialogue to Expand Civic Engagement: What Kind of Talk Does Democracy Need?*, 91 NAT’L CIVIC REV., 117 (2002); www.studyircles.org (last visited Oct. 30, 2003).

120. KETTERING FOUNDATION, *Creating Citizens Through Public Deliberation: How Civic Organizations in Ten Countries are Using Deliberative Dialogue to Build and Strengthen Democracy* (2004), at http://www.kettering.org/Foundation_Publication/Publications2/CREATING_CITIZENS.pdf.

121. Donald L. Anderson, *The Assembly: A Tool for Transforming Communities*, Sixteenth Annual E.F. Schumacher Lecture (Oct. 1996), available at <http://www.smallisbeautiful.org/lec-and.html>.

The Assembly follows certain rules of logic: in order for masses of people to enter into collective decision-making they must be organized prior to any decisions having been made. This means that for an anti-poverty effort to succeed, structure must be estab-

larly the NAACP, with its large and broad-based membership, could be instrumental in convening the study groups, coordinating their work, and publishing the results of the resultant plebiscite on “where we go from here.”

lished prior to the creation of any program; otherwise it is likely that programs will be designed and controlled by persons outside the community.

Under an Assembly organization, each county or city is organized like a country, but instead of unwieldy Congressional districts there are districts of fifty people – or in cities, fifty households. These districts of manageable size are called Conferences.

The representational dimension of the Assembly enables it to function community-wide. Each Conference elects one Representative to the Assembly. Thus, if there are five thousand adults (in cities, five thousand households) in a given community, there will be one hundred Representatives for one hundred groups of fifty people (in cities, fifty households). If there are ten thousand adults (or households), there will be two hundred Representatives, and so forth.

Id.