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**EDUCATION LAW AND POLICY AT THE MARGINS:  
CRITICAL ANALYSES OF THE INTERSECTION OF RACE,  
RELIGION, GENDER & CLASS IN EDUCATION (AN  
INTRODUCTION)**

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STEVEN L. NELSON\*\*

Very soon we will commemorate the 65<sup>th</sup> anniversary of the Supreme Court's watershed decision in *Brown v. Board of Education*.<sup>1</sup> That you are reading this special issue of the University of Maryland Law Journal of Race, Religion, Gender, & Class highlights that we have not witnessed the purported promise of *Brown*: educational equity.<sup>2</sup>

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<sup>1</sup> See generally *Brown v. Board of Education of Topeka*, 347 U.S 483 (1954) (holding that state-sponsored segregation of public schools violated the Equal Protection Clause of the 14th Amendment); See also *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (requiring that public schools in school districts that were segregated by law must desegregate with all deliberate speed).

<sup>2</sup> See generally Gary Orfield & Erica Frankenberg, *Increasing Segregated and Unequal Schools as Courts Reverse Policy*, 50 EDUC. ADMIN. Q. 718 (2014) (arguing that schools are becoming more segregated by both race and class although the United States is becoming a more diverse nation. The authors suggest and support with evidence that a lack of judicial support for desegregation as a remedy to state-sponsored segregation has led to much of the deepening segregation in public schools in the United States); see also Steven L. Nelson & Alison C. Tyler, *Examining Pennsylvania Human Relations Commission v. School District of Philadelphia: Considering How the Supreme Court's Waning Support of School Desegregation Affected Desegregation Efforts Based on State Law*, 40 SEATTLE U. L. REV. 1049 (2017) (documenting how the Supreme Court's rulings at the federal level dissuaded, even well-intentioned states, from pursuing desegregation of public schools).

There is dissent concerning the enduring legacy of *Brown*,<sup>3</sup> the efficacy of *Brown* to provide educational equity for Black students,<sup>4</sup> and the lasting hope of integration, or desegregation, as a tool to secure educational equity for Black students.<sup>5</sup> This dissent exists even among scholars who study (de)segregation in public schools.<sup>6</sup> Much has changed in the 65 years since the *Brown* decision. From the legal perspective, the Civil Rights Movement contributed to other domestic human rights campaigns in the United States: disability rights, immigrant rights, Queer rights, etc. From a demographic perspective, the United States transitioned from a predominately white and Black society into a society in which ethnicity, in addition to race, is paramount. Our schools mimic these transitions. Issues of race, ethnicity, gender, sexual orientation, gender identity, disability, language, and more are at the forefront of issues that face educators in schools in the United States. It is this intersection that confronts us, as guest editors of this special issue. It is this important work to which this special issue is dedicated.

We invited some scholars and sought other scholars to speak to the daunting theme of this special issue, “Education Law and Policy at the Margins: Critical Analyses of the Intersections of Race, Religion, Gender, & Class in Education.” It is at the margins where we find those peoples who are characterized as the most vulnerable. These peoples are most vulnerable not due to their own actions, but they are instead vulnerable due to systematic and institutional white supremacy, classism, sexism, and xenophobia. In this issue, the authors responded to the call to interrogate the cross-sectional, multi-sectional, and intersectional manners in which education law and policy impact race, religion, gender, and/or class. We urged scholars to challenge and critique our extant understandings of race, religion, gender, and class in legal decisions *and* federal, state, and local laws and policies that touch and concern

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<sup>3</sup> Sonya D. Horsford, *School Integration in the New Jim Crow: Opportunity or Oxymoron?* 33 EDUC. POL’Y 257 (2019) (proffering that school desegregation research has failed to include the voices and perspectives of Black peoples and thus, efforts towards school desegregation suffer from severe limitations on their efficacy to achieve true equity of opportunity for Black peoples).

<sup>4</sup> See also Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 NYL SCH. L. REV. 1053 (2004).

<sup>5</sup> Beth A. Ferri & David J. Connor, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 TCHR. C. REC. 453 (2005); Beth A. Ferri & David J. Connor, *In the Shadow of Brown: Special Education and Overrepresentation of Students of Color*, 26 REMEDIAL & SPECIAL EDUC. 93 (2005) (both articles detail how the integration agenda of *Brown* failed due, in part, to various forms of interposition. The form of interposition documented in these articles suggest that the overrepresentation of Black students in special education served to maintain segregated schooling environments in public schools).

<sup>6</sup> See *supra* notes 2-5.

educational institutions. We further urged contributing scholars to consider how race, religion, gender, and/or class impacts the processes of schooling and education. We actively sought pieces that explored these intersections through critical frameworks and theories.

We were particularly interested in submissions that referenced and considered the development of seminal cases or monumental occurrences in law and policy, especially as related to education. The six articles selected for this special issue view it as imperative for critical researchers to intentionally claim space to pay explicit attention to the ways that policies, rhetoric, and laws perpetuate the marginalization of groups it claims to assist.<sup>7</sup> Through the use of critical race studies, each author takes up intersectional issues that impacts educational and life trajectories for students and the adults that are a part of the educational institution

Individually, each of these articles offers a critical look at the ways that policy, law, and or political rhetoric mediates decisions within our educational system, how the intersectional identities of the humans in each space also mediates these decisions. Collectively, these articles offer a clear glimpse into the many ways that intersectional identities marginalize and subjugate students; ways that hinder the access, entrance, or completion of education. Each article considers a critical race framework and many of these frameworks are intersectional in nature. They consider, among many other things, the manners in which marginalized peoples are marginalized through the intersections of their multiple identities. The articles discuss race and ethnicity, some considering blackness in education law and policy,<sup>8</sup> with others considering how education law and policy serves to subjugate Latinax students.<sup>9</sup> Through reading these articles as a collective, a picture of the impact that race, religion, gender, and class have on the educational system is formed, this picture identifies race as salient to the ways in which intersectional identities permeates the educational system.

The articles, though ostensibly concerning differing topics, share much in common. The articles' similarities are both theoretical

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<sup>7</sup> Ann Aviles & David O. Stovall, *When "Class" Explanations Don't Cut It: Specters of Race, Housing Instability, and Education Policy*, 19 MD. L. J. RACE, RELIGION, GENDER, & CLASS 165 (2019).

<sup>8</sup> *Id.*

<sup>9</sup> David H.K. Nguyen, *Nativism in Immigration: The Racial Politics of Educational Sanctuaries*, 19 MD. L. J. RACE, RELIGION, GENDER, & CLASS 102 (2019).

and topical. For instance, nearly all of the articles reference the intersectional nature of oppression. The authors use multiple theoretical lenses to shed light on and critique how law and policy have combined to force some peoples into the margins. Furthermore, the authors almost always highlight how the advancement of one marginalized group is interdependent on the advancement of other marginalized groups. This is fairly evident in the Kenzo Sung and Ayana Allen-Handy piece.<sup>10</sup> Sung & Handy detail the ways in which Black and Latino rights competed with and supplemented each other in the 1968 Bilingual Education Act.<sup>11</sup> Similarly, Josué Lopez proffers a similar, yet unique, argument that discussions of immigration and immigrant rights are incomplete without a concomitant focus on indigenous peoples.<sup>12</sup>

Likewise, these articles serve to spotlight how existing law and policy in the realm of education serve to marginalize already disenfranchised peoples by positioning some marginalized peoples as insiders and others as outsiders. For instance, Antron D. Mahoney and Heather Brydie Harris employ a combination of Queer Theory of Color and Discourse Analysis to put forth a critique of state-sanctioned violence through the use of state-produced notions of Black liberation theology.<sup>13</sup> David H. K. Nguyen accounts for this same practice in his piece.<sup>14</sup> He exhibits how practices in higher education serve to position some immigrants as native and others as non-natives.<sup>15</sup> Finally, these articles share solutions. The pieces by Chelsea E. Connery, Preston C. Green, III, and James C. Kaufman<sup>16</sup> and Ann Aviles and David O. Stovall<sup>17</sup> provide innovative practices that could disrupt efforts to oppress already marginalized peoples in school systems in the United States.

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<sup>10</sup> Kenzo Sung & Ayana Allen-Handy, *Contradictory Origins and Racializing Legacy of the 1968 Bilingual Education Act: Urban Schooling, Antiracism, and Oakland Unified's 1996 "Ebonics" Language Education Policy*, 19 MD. L. J. RACE, RELIGION, GENDER, & CLASS 44 (2019).

<sup>11</sup> *Id.*

<sup>12</sup> Josué López, *CRT and Immigration: Settler Colonialism, "Foreign" Indigeneity, and the Education of Racial Perception*, 19 MD. L. J. RACE, RELIGION, GENDER, & CLASS 134 (2019).

<sup>13</sup> Antron D. Mahoney & Heather Brydie Harris, *When the Spirit Says Dance: A Queer of Color Critique of Black Justice Discourse in Anti-Transgender Policy Rhetoric*, 19 MD. L. J. RACE, RELIGION, GENDER, & CLASS 7 (2019).

<sup>14</sup> Nguyen, *supra* note 9.

<sup>15</sup> *Id.*

<sup>16</sup> Chelsea E. Connery, Preston C. Green, III, & James C. Kaufman, *The Underrepresentation of CLD Students in Gifted and Talented Programs: Implications for Law and Practice*, 19 MD. L. J. RACE, RELIGION, GENDER, & CLASS 81 (2019).

<sup>17</sup> Aviles & Stovall, *supra* note 7.

Each article brings a distinct - a rather unique – consideration to the overall conversation of this special issue. Uniquely centering the intersection of race, religion and gender, Antron D. Mahoney and Heather Brydie Harris argue that anti-transgender policies are often passed off as a spin-off of the Civil Rights Movement’s liberatory theology.<sup>18</sup> They pushback against such positioning and set forth a new, Black Queer resistance strategy.<sup>19</sup> Kenzo Sung and Ayana Allen-Handy’s work contextualizes the antiblackness of the Oakland Unified School District’s efforts to recognize *Ebonics* as a formal language, thus allowing for the school district to use monies and strategies linked to bilingual education to improve academic outcomes for Black students.<sup>20</sup> Though both papers discuss the impact of education law and policy on Black peoples, the articles take two separate pathways to highlighting the antiblackness of education law and policy.

The article by Chelsea E. Connery, Preston C. Green, III, and James Kaufman also considers the impact of law and policy on students who are language minorities.<sup>21</sup> This piece, while not deriving from a critical race perspective, is necessary to highlight that students who are language minorities are excluded from efforts to increase academic performance through supplemental instruction *and* enrichment. The work of David H. K. Nguyen continues this special issue’s focus on language.<sup>22</sup> He uses a Critical Discourse Analysis to highlight how immigration status, through the lens of school and school district actions, can and does bestow racial inferiority on Peoples of Color.<sup>23</sup> Though the works of Kenzo Sung and Ayana Allen-Handy, Chelsea E. Connery, Preston C. Green, III, and James Kaufman, and David H. K. Nguyen consider the use of language as oppression, each does so through different arguments that, in fact, supplement each other. Josué Lopez discusses the myriad ways that Indigenous Peoples are erased in discussions of immigration.<sup>24</sup> The work of Ann Aviles and David O. Stovall addresses a forgotten population: students who experience housing instability.<sup>25</sup> Though the works of Lopez and Aviles and Stovall both

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<sup>18</sup> Mahoney & Harris, *supra* note 13.

<sup>19</sup> *Id.*

<sup>20</sup> Sung & Allen-Handy, *supra* note 10.

<sup>21</sup> Connery, et al., *supra* note 16.

<sup>22</sup> Nguyen, *supra* note 9.

<sup>23</sup> *Id.*

<sup>24</sup> Lopez, *supra* note 12.

<sup>25</sup> Aviles & Stovall, *supra* note 7.

consider forgotten peoples, each reminds us that we have work left to do when working towards inclusion in the fight of social justice.

As you read this special issue, we hope that you find the articles as interesting as we did. We hope that you see education law and education policy as a critical site for understanding how law and policy can be and are often used to push minoritized peoples into the margins. However, we hope that you will discover the many sites of resistance, survivance, and thrivance<sup>26</sup> that exist and are home for those of us who live our lives on the boundaries.

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<sup>26</sup> We conceptualize thrivance as a place where those at the margins thrive in spite of the ways in which law and policy seeks to subjugate us. Moreover, we assert that every action that a person at the margin takes is either coping with or resisting oppression. To that end, thrivance suggests that the very acts of happiness, prosperity, or even existing are radical acts that juxtapose oppression.