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Michelle Parthum

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USING LITIGATION TO ADDRESS VIOLENCE IN URBAN PUBLIC SCHOOLS

I. INTRODUCTION

It is well recognized that America is facing a crisis in public education.¹ Nationwide, black and Latino students suffer from an achievement gap compared with white and Asian students: black and Latino students perform worse on standardized tests,² have lower high school graduation rates,³ and have lower college attendance and graduation rates than white and Asian students.⁴ This reality is connected to many other disturbing national trends, such as the disproportionate incarceration rate of black and Latino men⁵ and the disproportionate

1. See, e.g., Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1461 (2003) [hereinafter Chemerinsky, *Separate and Unequal*]; see also Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 133–34 (2004) (“American public education is separate and unequal, and . . . becoming ever more so. The reality is that the average African-American or Latino student receives a very different education than the average white student in the United States.” (footnote omitted)) [hereinafter Chemerinsky, *Deconstitutionalization of Education*]; *Meet the Press* (NBC television broadcast Nov. 15, 2009) (interview with U.S. Secretary of Education Arne Duncan, Newt Gingrich, and Al Sharpton) (transcript available at http://www.msnbc.msn.com/id/33931557/ns/meet_the_press/) (arguing that the United States is in a “time of educational, academic crisis”).

2. See Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1474 (2007) (“The ‘achievement gap’ results directly from the fact that high proportions of African-American and Latino students live in conditions of poverty and that by and large they attend segregated schools. Looking at the national performance averages on the National Assessment of Educational Progress . . . in recent years, the scores of white students continuously remain in the sixtieth percentile for both fourth and eighth grades in all subjects, while black student scores remain on average in the thirtieth percentile.” (footnote omitted)).

3. *Id.* (“In 1998, the national graduation rate of white students was 78%, significantly higher than African-American students (56%) and Latino students (54%).”). While graduation rates have improved overall, disparities among race persist. For the 2007–08 school year, the graduation rate of public high school students was 91.4% for Asians, 81.0% for whites, 63.5% for Hispanics, and 61.5% for blacks. ROBERT STILLWELL, U.S. DEP’T OF EDUC., NCES 2010-341, PUBLIC SCHOOL GRADUATES AND DROPOUTS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2007–08, at 7 (2010), available at <http://nces.ed.gov/pubs2010/2010341.pdf>. See also James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 274–75 (1999) (“Among the nation’s forty-seven largest school districts, the average dropout rate is nearly twice the national average.”); *Meet the Press*, *supra* note 1 (describing failing schools as “dropout factories” and stating that the dropout rate in the Washington, D.C., public school system—which is comprised largely of black and Latino students—is fifty percent).

4. In 2007–08, 71.8% of bachelor’s degrees were awarded to white students, 9.8% were awarded to black students, and 7.9% were awarded to Hispanic students. U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, tbl.285 (2009), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_285.asp. In the Washington, D.C., public school system, only 9% of students graduate college within five years of graduating from high school. *Meet the Press*, *supra* note 1.

5. NAACP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE

unemployment levels for black and Latino adults.⁶ It is clear that our nation's schools are not helping all children to succeed.⁷

Much attention has rightly been paid to the achievement gap in the last few decades.⁸ Politicians, scholars, parents, and teachers have come to realize that the achievement gap is a critical civil rights issue and have begun discussing ways that it could be overcome.⁹ This attention and conversation is essential. Over time, the focus has narrowed to “outputs,” the actual rate of student achievement as indicated by standardized tests.¹⁰ However, there are important characteristics of a child's schooling that have not found their way into conversations about academic outputs, and these issues deserve to be discussed alongside the very important topic of student achievement.

One such issue is student behavior and discipline within the school environment. It is true that in the wake of several highly publicized incidents of school violence in the last fifteen years, student behavior in

(2005), available at http://naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf [hereinafter SCHOOL-TO-PRISON PIPELINE]; see also MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 4 (2007), available at http://sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf (reporting data that in 2005, the rate of incarceration for whites was 0.4%, for Hispanics was 0.7%, and for blacks was 2.3%).

6. While the unemployment rate for white and Asian Americans in 2009 was 8.5% and 7.3% respectively, it was 14.8% for black Americans and 12.1% for Hispanic Americans. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES 197-99 (2010), available at <http://www.bls.gov/cps/demographics.htm#race> (follow “Employment status by race” and “Employment status by Hispanic ethnicity and detailed ethnic group” hyperlinks). For black Americans without a high school degree, the unemployment rate in 2009 was dramatic, at 21.3% (compared to 13.9% for whites, 8.4% for Asians, and 13.7% for Hispanics). *Id.* (follow “Annual table: Employment status by educational attainment, sex, race, and Hispanic ethnicity” hyperlink). Given the comparatively low graduation rate of black students, see *supra* note 4, this data is particularly troubling.

7. See Chemerinsky, *Deconstitutionalization of Education*, *supra* note 1, at 123 (“American public education is characterized by poor, African-American city schools surrounded by wealthy, white suburban schools spending a great deal more on education.”); see also Lawyers' Comm. for Civil Rights Under Law, *Racial Disparities in Educational Opportunities in the United States: Violations of the International Convention on the Elimination of All Forms of Racial Discrimination*, 6 SEATTLE J. FOR SOC. JUST. 591, 595-96 (2008) [hereinafter *Racial Disparities*] for an argument that the United States is violating its treaty obligations under the International Convention on the Elimination of all Forms of Racial Discrimination by maintaining “apartheid conditions” in public education that operate to the disadvantage of minority students.

8. See, e.g., JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005); Chemerinsky, *Separate and Unequal*, *supra* note 1; *Racial Disparities*, *supra* note 7; Ryan, *supra* note 3.

9. See *Meet the Press*, *supra* note 1 (arguing that education “is the number one civil right of the 21st century”).

10. See Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2421 (2004) (“[T]he equal educational opportunity doctrine now focuses on outcomes rather than such inputs as race and resources.”).

schools has received periods of passing attention from politicians and the media.¹¹ However, there is a phenomenon of school violence that has received very little attention or discussion, and it is essential that these conversations begin to take place. This phenomenon is the everyday violence of inner-city schools populated predominantly by black and Latino students. These schools are plagued with violence and behavioral disruptions that dwarf such incidents at suburban schools attended predominantly by white and Asian students.¹² The culture of disruption and violence in these schools is troubling for many reasons. Incidents of violence and behavioral disruptions take away the instructional time so desperately needed by students in these schools.¹³ The frequency of these incidents creates a school culture of chaos and disruption, undermining the learning environment.¹⁴ Incidents of disruption and violence normalize antisocial behavior¹⁵ in students and prevent these schools from fulfilling one of their obligations to students and parents: training students to become productive members of society.¹⁶ This is evident in a phenomenon called the school-to-prison pipeline, which posits that inner-city schools have become staging grounds for the acts of violence that will land their students in prison.¹⁷ This issue is critically important to the social and emotional development of students in inner-city schools, as well as to their academic progress. It is for this reason that a discussion of school

11. See, e.g., Christina Curtis, Note and Comment, *Responding to Columbine: Kent School District and the Use of Handcuffs*, 28 WHITTIER L. REV. 793, 793 (2006); Katie Hammett, Comment, *School Shootings, Ceramic Tiles, and Hazelwood: The Continuing Lessons of the Columbine Tragedy*, 55 ALA. L. REV. 393, 393, 395–96 (2004); Richard Salgado, Comment, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 BYU L. REV. 1371, 1371–72.

12. See *infra* Part IV.

13. See Heise, *supra* note 10, at 2424.

14. “[D]isciplinary violations create a threatening environment and cause heightened levels of stress for all of a school’s students.” Cara Suvall, Comment, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547, 549 (2009).

15. *Id.* at 552.

16. See, e.g., Sara B. Poster, *An Unreasonable Constitutional Restraint: Why the Supreme Court’s Ruling in Town of Castle Rock v. Gonzales Rests on Untenable Rationales*, 17 TEMP. POL. & CIV. RTS. L. REV. 129, 145 (2007) (mentioning the “importance of public schools in preparing and socializing their pupils—both politically and culturally—as future United States citizens”).

17.

[T]he punitive and overzealous tools and approaches of the modern criminal justice system have seeped into our schools, serving to remove children from mainstream educational environments and funnel them onto a one-way path toward prison. These various policies, collectively referred to as the school-to-prison pipeline, push children out of school and hasten their entry into the juvenile, and eventually the criminal, justice system, where prison is the end of the road.

SCHOOL-TO-PRISON PIPELINE, *supra* note 5.

discipline belongs within a conversation about academic attainment and the achievement gap faced by black and Latino students. School discipline is an essential factor contributing to this achievement gap, and until this problem is addressed, the achievement gap will not close.

This Note discusses the phenomenon of violence and disruption within inner-city schools and what can be done to solve that problem. Parts II and III provide a history of some litigation efforts that resulted in greater educational equity for all students, specifically, school desegregation litigation and school finance litigation. Part IV examines school discipline in general, its importance in the educational process, and the difficulties that inner-city schools face in maintaining environments that are conducive to learning. This Part explains some of the methods currently used in inner-city schools for behavioral control and details their shortcomings, drawing upon the school-to-prison pipeline concept to argue that our schools are not providing our students with healthy models of behavioral control. Part V proposes a litigation strategy to address the problem of urban school violence that utilizes other strategies that have previously found success in the area of education reform.

II. COURT INVOLVEMENT IN SCHOOL DESEGREGATION

The United States Supreme Court in *Brown v. Board of Education*¹⁸ declared that state-imposed segregation of public schools violates the Equal Protection Clause¹⁹ of the U.S. Constitution.²⁰ A year later, the Court reheard the case²¹ and ordered that public schools desegregate.²² To enforce this desegregation mandate, the Supreme Court empowered federal district courts to hold school districts accountable for creating

18. 347 U.S. 483, 495 (1954).

19. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

20.

We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Brown, 347 U.S. at 495.

21. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). The Supreme Court decided that reargument was necessary because the “great variety of local conditions” at play presented “problems of considerable complexity,” which required the “assistance of the parties in formulating decrees.” *Brown*, 347 U.S. at 495.

22. *Brown*, 349 U.S. at 300 (“[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling.”).

plans²³ that would lead to desegregated school districts.²⁴ The district courts were also given authority to evaluate the adequacy of proposed plans²⁵ and to retain jurisdiction over these cases while such plans were implemented.²⁶ Following this decision, numerous plaintiffs brought cases asking the federal district courts to enforce this ruling against local school districts.²⁷

An example of one such case is *Swann v. Charlotte-Mecklenburg Board of Education*.²⁸ In this case, the Supreme Court upheld the district court's authority to impose a desegregation plan upon the Charlotte-Mecklenburg school system.²⁹ In the course of exercising this authority, the district court (1) ordered the school district to "come forward with a plan for both faculty and student desegregation";³⁰ (2) held the school district's initial proposed plan to be unacceptable and appointed an education administrator to develop a plan of his own;³¹ and (3) reviewed the different proposed plans and selected the plan it deemed best suited to achieve the objective of desegregation.³² In affirming the actions of the district court, the Supreme Court stated that "[i]n default by the school

23.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

Brown, 349 U.S. at 299.

24.

Brown II was a call for the dismantling of well-entrenched dual systems [of education] tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Green v. Cnty. Sch. Bd., 391 U.S. 430, 437-38 (1968).

25. *Brown*, 349 U.S. at 301.

26. *Id.*

27. *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974); *NAACP v. Lansing Bd. of Educ.*, 429 F. Supp. 583 (W.D. Mich. 1976); *Keyes v. Sch. Dist. No. One*, 303 F. Supp. 279 (D. Colo. 1969); *Garrett v. Faubus*, 323 S.W.2d 877 (1959); *People ex rel. Lynch v. San Diego Unified Sch. Dist.*, 19 Cal. App. 3d 252 (1971).

28. 402 U.S. 1 (1971).

29. *Id.* at 32.

30. *Id.* at 7.

31. *Id.* at 8.

32. *Id.* at 10.

authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy.”³³

Swann is exemplary of the many desegregation cases that took place throughout the country, which were characterized by certain key similarities.³⁴ First, the plaintiffs’ complaints in all these cases were founded on the same legal authority, the Equal Protection Clause of the Constitution and the Supreme Court’s rulings in *Brown I* and *Brown II*.³⁵ Second, the defendants in these suits were all local school districts. The Supreme Court’s order in *Brown II* had charged local districts with desegregation,³⁶ so where segregated conditions persisted, plaintiffs sought to hold these districts accountable for their failure.³⁷ Third, the forums were all federal district courts.³⁸ Fourth, the district courts took an active role by ordering school boards to develop plans to address desegregation,³⁹ evaluating those plans,⁴⁰ appointing experts to develop plans where those proffered by the school districts were held unacceptable,⁴¹ and ultimately selecting the plans to be implemented.⁴² In addition, these courts typically retained jurisdiction over the cases while the selected plans were implemented to ensure that the objective of desegregation was in fact accomplished.⁴³ These cases form a strong

33. *Id.* at 16. The Court further stated that “[i]f school authorities fail in their affirmative obligations under [*Brown* and *Green*], judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad” *Id.* at 15.

34. *See, e.g.,* *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968); *Dowell v. Bd. of Educ.*, 338 F. Supp. 1256 (W.D. Okla. 1972).

35. *Dowell*, 338 F. Supp. at 1271.

36. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

37. *Green*, 391 U.S. 430; *Dowell*, 338 F. Supp. 1256.

38. This is because *Brown II* remanded these cases to the federal district courts in which they had started. *Brown*, 349 U.S. at 299. These cases originated in federal district courts, which had subject matter jurisdiction based on the federal question presented, namely, the Fourteenth Amendment violation. 28 U.S.C. § 1331 (2006).

39. *Green*, 391 U.S. at 439 (“The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.”).

40.

The obligation of the district courts . . . is to assess the effectiveness of a proposed plan in achieving desegregation. . . . It is incumbent upon the district court to weigh . . . the facts at hand and . . . any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system “at the earliest practicable date,” then the plan may be said to provide effective relief.

Id.

41. *Dowell*, 338 F. Supp. at 1259.

42. *Id.* at 1269 (“[The court] . . . must select the plan that promises realistically to work *now*.”).

43. “[W]hatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.” *Green*, 391

precedent for the involvement of courts in complex issues of educational access.⁴⁴

III. SCHOOL FINANCE AND PERSISTENT INEQUITIES

Despite the efforts made in cases like *Brown* and *Swann* to desegregate schools, public schools across this country remained segregated by race.⁴⁵ The persistence of segregation caused advocates for equal educational opportunity to take their battle in a new direction: school finance reform.⁴⁶ Because local property taxation formed the predominant funding source for public schools,⁴⁷ great disparities in school funding existed between

U.S. at 439.

44. The legacy of these desegregation cases has been somewhat tarnished by a shift in public opinion that now generally disfavors busing, one of the remedies commonly ordered for the purposes of desegregation in such cases. *See infra* note 128; *see also* *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 30–31 (1971) (holding that district courts may require school districts to “employ bus transportation as one tool of school desegregation” as long as the time and distance of travel would not “risk the health of the children or significantly impinge on the educational process”). As I will discuss, however, these negative evaluations are limited to busing as a specific remedy and should not be viewed as undermining the court’s ability to address educational problems by ordering districts to create plans for improvement. *See infra* note 128.

45. This is not to say that the plans imposed by district courts in these cases were unsuccessful; on the contrary, evidence shows that these plans were so successful that “by 1972–1973, 91.3% of southern schools were desegregated.” Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1603 (2003) [hereinafter Chemerinsky, *Segregation and Resegregation*]. However, Chemerinsky has argued that later decisions of the Supreme Court directly caused the resegregation that public schools have seen since the early 1970s. *Id.* at 1601. Today, public schools across the country are sharply segregated.

Most black and Latino students in the United States attend schools that are de facto segregated. In 2000, over 70% of all black and Latino students attended predominately minority schools, a higher percentage than thirty years earlier. “Latino and Black students comprise 80% of the student population in extreme poverty schools (90 to 100% poor),” and more than 60% of black and Latino students attend high-poverty schools, compared with 18% of white students.

Rebell, *supra* note 2, at 1473 (quoting GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 21 (2005), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality>).

46. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

47. The tradition of local funding of schools in the United States is strong. As far back as 1647, communities enacted rules requiring that schools be financially supported by members of the communities in which such schools were located. ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 8 (1992). By the end of the nineteenth century, most states required that local property taxes be the exclusive funding source for schools. *Id.* at 10. The tradition of local control over public schools, both in terms of financing and decision making, has been one of the largest challenges to federal efforts to equalize the educational experiences of children in this country. *See, e.g.*, *Rodriguez*, 411 U.S. at 49–50 (discussing the merit of “local control” over education as a rationale for upholding a school funding formula that resulted in unequal educational spending across

communities. Property-rich districts were able to generate substantial revenues based upon their high property values, whereas property-poor districts raised substantially less.⁴⁸ Disparate revenues meant disparate amounts spent to educate each individual child.⁴⁹

Litigants drew upon the strategies utilized in school desegregation cases to challenge these funding formulas in court.⁵⁰ As opposed to the desegregation cases, there was no Supreme Court order that plaintiffs could rely upon for their cause of action.⁵¹ However, these plaintiffs interpreted the holding of *Brown I* to mean that the Equal Protection Clause required some measure of equality in public schooling,⁵² so they used the Fourteenth Amendment as the basis for their claims.⁵³ Specifically, plaintiffs argued that public school finance schemes, with their “substantial dependence on local property taxes and resultant wide disparities in school revenue, violate[d] the equal protection clause of the Fourteenth Amendment.”⁵⁴

Based upon the Supreme Court’s equal protection jurisprudence, litigants had to establish one of two threshold issues before benefiting from strict scrutiny review of the school finance plans.⁵⁵ They either had to

districts of varying average wealth). However, over the last half century, the federal government has made various inroads that lay a foundation for an increased federal role in education. For a detailed discussion of the increasing federal role in education, see Daniel S. Greenspahn, Note, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case Out of Education*, 59 S.C. L. REV. 755 (2008).

48. In fact, disparities in property wealth between various districts were often so pronounced that property-rich districts could levy a low property tax rate and still raise substantially more revenue than property-poor districts could raise when taxing themselves at a much higher rate. For example, in the 1968–69 academic year, the average assessed property value per student in the Emery Unified School District in the state of California was \$100,187; this allowed the citizens of that community to spend \$2,223 per student by taxing themselves at a rate of \$2.57 per \$100 of assessed valuation. *Serrano*, 487 P.2d at 1252 n.15. In that same year, the average assessed property value per student in Newark Unified School District—located in the same county as Emery Unified—was \$6,048. *Id.* With this tax base, taxing itself at \$5.65 per \$100—more than double the tax rate of Emery Unified—Newark Unified was able to generate only \$616 per student, about a quarter of that spent per student in Emery Unified. *Id.*

49. *Id.* at 1252–53.

50. See *supra* notes 19–20 and accompanying text.

51. See *supra* note 22 and accompanying text.

52. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); see *supra* note 20 and accompanying text.

53. *Serrano*, 487 P.2d at 1244.

54. *Id.*

55. Strict scrutiny is the most exacting standard of constitutional review under the Equal Protection Clause, requiring the state to prove “not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.” *Serrano*, 487 P.2d at 1249 (citation omitted). In bringing equal protection challenges to school finance schemes, it was important for plaintiffs to persuade courts that strict scrutiny was the appropriate standard of review. The alternative, rational basis review, is a much more lenient standard that requires only “that

prove that wealth was a “suspect” classification⁵⁶ or that education was a “fundamental” right.⁵⁷ One case in which the plaintiffs’ equal protection argument was successful was *Serrano v. Priest*.⁵⁸ In this case, the court held that the plaintiff class was a suspect class for equal protection purposes⁵⁹ and that education was a fundamental right.⁶⁰ The court applied strict scrutiny to its review of the school financing system, ultimately holding that the system, as structured, was not “necessary to achieve a compelling state interest.”⁶¹

However, the Supreme Court effectively closed the door on this litigation strategy⁶² in *San Antonio Independent School District v. Rodriguez*,⁶³ holding that education could not be considered a fundamental right because “[e]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution. . . . [nor is it] implicitly so protected.”⁶⁴ Furthermore, the Court held that the plaintiff class did not merit qualification as a suspect class.⁶⁵ Based upon these holdings, the

distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.” *Id.*

56. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 375 (1971); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

57. A “fundamental right” is one characterized as “among the rights and liberties protected by the Constitution.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). *See also* *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 92 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

58. 487 P.2d 1241 (Cal. 1971).

59. *Id.* at 1249–55.

60. “We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest.’” *Id.* at 1258.

61. *Id.* at 1259–60.

62. Some have argued that, rather than completely closing the door to school finance litigation under the Equal Protection Clause, *Rodriguez* requires some minimum level of education for all students that could be vindicated under the Equal Protection Clause (and that the quality of education received by the plaintiffs in *Rodriguez* was simply not poor enough to trigger this base requirement). *See, e.g.*, Greenspahn, *supra* note 47, at 768–69. Greenspahn argues that the door left open by *Rodriguez* could be a viable means by which to get the Supreme Court to reevaluate its holding that education is not a fundamental right. *Id.* at 769–73. This possibility certainly has promise. However, in the context of school finance reform up to the present day, *Rodriguez* did effectively close the door on federal education litigation under the Equal Protection Clause because plaintiffs have stopped using this legal argument as a basis for their claims. *See infra* text accompanying notes 66–67. For these reasons, *Rodriguez* was and remains an important decision in guiding the types of education litigation that are likely to be successful.

63. 411 U.S. 1 (1973).

64. *Id.* at 35.

65. *Id.* at 28. The court stated:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Court analyzed the school finance system under rational basis analysis,⁶⁶ ultimately holding that the current finance scheme, supported largely by local property taxes, was a rational means by which the state could achieve its stated goal of encouraging local participation in schools.⁶⁷

Based upon the holding in *Rodriguez*, plaintiffs seeking to equalize school finance formulas looked for a different legal hook upon which to hang their argument, and they found it in the education clauses of state constitutions.⁶⁸ This approach characterized the “second wave” of school finance reform, in which plaintiffs argued that disparate educational spending violated states’ constitutional guarantees to provide an education for all citizens.⁶⁹ These lawsuits stumbled on one major issue: some courts found that the language of their state constitutions providing for “thorough” or “efficient” systems of education did not imply a need for strict *equity* in educational opportunity.⁷⁰

Opposition to demands for equity gave rise to the third wave of school finance reform, focused not on equity of per-pupil expenditures but on adequacy of the overall schooling experience for students.⁷¹ While first- and second-wave litigation focused exclusively on the inputs of education—money—“adequacy” focused on the inputs, process, and outputs of an education.⁷² Proponents of this framework argued that it was not enough to give all students equal amounts of money, because although per-pupil spending had grown, student achievement had not.⁷³ One scholar

Id. For a contrasting view, see Chemerinsky, *Deconstitutionalization of Education*, *supra* note 1, at 133 (“The enforcement of basic constitutional rights in schools fits exactly within the areas where the *Carolene Products* footnote justifies heightened review because the infringement of fundamental rights secured by the Bill of Rights, as well as a ‘discrete and insular minority exist.’”).

66. *Rodriguez*, 411 U.S. at 40.

67. *Id.* at 40, 55. Government programs stand a much greater chance of being upheld when scrutinized under the rational basis test than the strict scrutiny test, because rational basis “requires *only* that the State’s system be shown to bear some rational relationship to legitimate state purposes.” *Id.* at 40 (emphasis added).

68. The authority to administer a system of public schooling was reserved to the states by the Tenth Amendment. Margaret E. Goertz, *State Education Policy in the New Millennium*, in *THE STATE OF THE STATES* 141, 141 (Carl E. Van Horn ed., 2006). Although not all state constitutions originally provided for systems of public education, “[t]oday all states have constitutional provisions related to free public education.” ODDEN & PICUS, *supra* note 47, at 9. For examples of education provisions from state constitutions, see *infra* note 118.

69. Christopher Roellke, Preston Green & Erica H. Zielewski, *School Finance Litigation: The Promises and Limitations of the Third Wave*, 79 *PEABODY J. EDUC.* 104, 106 (2004).

70. *Id.* at 115.

71. Goertz, *supra* note 68, at 162–63.

72. Nicola A. Alexander, *Exploring the Changing Face of Adequacy*, 79 *PEABODY J. EDUC.* 81, 81 (2004).

73. Caroline Minter Hoxby, *Are Efficiency and Equity in School Finance Substitutes or Complements?*, 10 *J. ECON. PERSP.* 51, 53 (1996).

studying the issue noted that the “current ‘predicament’ of school finance is a failure of productivity rather than a failure of spending.”⁷⁴ School finance is no longer concerned exclusively with how much money to give to schools, but rather how the amount and *use* of funds affects student achievement.⁷⁵ Ultimately, school finance litigation raised overall per-pupil expenditures and resulted in some equalization in spending between poor and wealthy districts;⁷⁶ however, true equity was not achieved, and disparities between districts persist.⁷⁷

IV. SCHOOL DISCIPLINE TODAY: THE SCHOOL-TO-PRISON PIPELINE

This history has created the present reality of public education in America. School districts are segregated by race and wealth, and schools in urban, property-poor districts are attended by majority black and Latino students and receive less money to spend per pupil than schools in property-rich districts serving predominantly white and Asian students.⁷⁸ This situation has been decried by countless scholars, teachers, and politicians.⁷⁹ In addition to these problems of segregation and unequal financing, urban schools serving black and Latino students are also

74. *Id.* This point is central to the debate over whether money matters in public education. Eric Hanushek has been one of the most prolific scholars arguing that money does not matter. This controversial thesis posits that “[t]here is no systematic relationship between school expenditures and student performance.” See Eric A. Hanushek, *When School Finance “Reform” May Not be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991). In their study of finance reform and student achievement in New Jersey, Coate and VanderHoff came to a similar conclusion, finding “no evidence of a positive effect of expenditures on student performance in New Jersey public high schools in urban school districts with smaller per capita tax bases.” Douglas Coate & James VanderHoff, *Public School Spending and Student Achievement: The Case of New Jersey*, 19 CATO J. 85, 98 (1999). However, many take the opposing side in this discussion, arguing that money plays a critical role in the differential achievement levels of students in poor and wealthy districts. See, e.g., Greenspahn, *supra* note 47, at 766–67. While the debate over whether money matters is beyond the scope of this Note, it is relevant to the larger issues of educational inequity that form the basis for this discussion on student behavior.

75. ODDEN & PICUS, *supra* note 47, at 1.

76. Between 1971 and 1981, twenty-eight states reformed their school finance systems, education revenues rose by one-third, and state funding increased from an average of 40% to an average of 49%. Margaret E. Goertz, *The Finance of American Public Education: Challenges of Equity, Adequacy, and Efficiency*, in HANDBOOK OF EDUCATIONAL POLICY 31, 33–34 (Gregory J. Cizek ed., 1999). Increases in state contributions to educational spending had some equalizing effect, because these funds were diverted disproportionately to districts with low revenues from property taxes; however, this was not sufficient to overcome funding disparities. *Id.* at 34.

77. See Chemerinsky, *Segregation and Resegregation*, *supra* note 45, at 1599 (“By any measure, predominately minority schools are not equal in their resources or their quality.”).

78. See *supra* note 7.

79. See, e.g., Chemerinsky, *Segregation and Resegregation*, *supra* note 45; Chemerinsky, *Separate and Unequal*, *supra* note 1; Rebell, *supra* note 2; Ryan, *supra* note 3.

lagging in achievement.⁸⁰ While these issues have received much attention and are the focus of varied reform efforts, another related concern, the disparity between these school districts in terms of school climate and school violence, has received little to no attention.⁸¹ This is not to say that school violence has not received attention.⁸² Rather, what is overlooked is the difference between schools attended by predominantly white and Asian students and those schools attended by predominantly black and Latino students.⁸³ Differences exist in terms of the frequency of behavioral disruptions; the frequency and nature of disciplinary measures taken; and

80. This phenomenon, known as the “achievement gap,” reveals that across the country, black and Latino students are achieving at consistently lower levels than white and Asian students; that black and Latino students arrive at school already behind their white and Asian counterparts; and that during their years of public schooling, black and Latino students, as a whole, are never able to close this gap in achievement relative to their white and Asian peers. *See, e.g., Racial Disparities, supra* note 7. The achievement gap is one of the most pressing issues facing our nation. While specific discussion of this issue is beyond the scope of this Note, reference will be made to the role of school disciplinary issues in the overall disparity in student achievement between black and Latino students and their white and Asian counterparts.

81. There are a number of reasons that could explain why school climate and disruptions have not gained widespread attention. The first relates to the very segregated nature of public schools—the reality of the educational experience of most black and Latino students living in the city is invisible to the more politically powerful white families living in suburban areas. *See supra* note 45. Not only are schools segregated, but school districts are segregated as well, which means that affluent white parents have no occasion to observe or interact with the reality of schooling in large public school districts. Another possible reason is latent racism and low expectations. People in positions of power may believe that the unruly behavior exhibited by students in urban schools is “in their nature” and thus excuse their failure of action by assuming that students in urban schools will naturally behave in an inappropriate manner. *See infra* note 83. Yet another possible reason is the concerted focus on quantifiable student achievement, notably after the passage of the No Child Left Behind Act. *See infra* note 128. Conversations in the current era of accountability and high-stakes testing often discount the importance of any other factor in schooling aside from measurable achievement gains.

82. To be sure, in the wake of the Columbine school shootings of 1999, and various other widely publicized events of school violence since that time, the issue of school violence has become more prominent in national discussion. *See supra* note 11.

83. Some have expressed disagreement with the concept that urban schools attended by predominately minority students are disproportionately violent. *See, e.g., Evelyn Nieves, An Inner-City Perspective on High School Violence*, N.Y. TIMES, Mar. 18, 2001, at 12 (arguing that urban schools suffer from inflated perceptions of violence, the reporter quoted a student as saying, “I heard on the news that violence is more likely to happen in a school like ours I don’t agree with that. What happened in Santee or Columbine won’t happen here. We don’t want to sabotage ourselves. And we’ve got enough to worry about in our lives already.”). There is definite value in this perspective. First, it is important to undermine stereotypes, often held by suburban parents, that inner-city schools are places plagued by violence where nothing of value takes place. It is also valuable to highlight the successes of such schools, both to promote the self-esteem of their students and to share best practices with other schools. However, while positive anecdotes are essential to affirming the value of urban schools and dispelling overgeneralized rumors, it is nevertheless true that urban schools suffer from more disruption and lost instructional time than suburban schools, and it is this identified problem that this Note seeks to address.

the impact of these disparities on overall school climate, student safety, and student achievement.⁸⁴

Student behavior is “an extremely important issue facing schools”⁸⁵ because “[d]isciplinary problems, ranging from minor misbehavior to outright violence, inhibit classroom learning and place students at risk.”⁸⁶ Misbehavior detracts from the objectives of education⁸⁷ and takes away classroom time meant for learning;⁸⁸ the loss of instructional time is particularly significant given its obvious relationship with student achievement.⁸⁹ Schools suffering from high rates of violence and disruptive behavior also have more difficulty retaining qualified teachers, who prefer teaching in environments that are pleasant and free from violence.⁹⁰ In addition, schools perform an important socialization function for students, teaching them how to interact with others in a productive manner and what it means to be an adult in society.⁹¹ Schools plagued by frequent behavioral disruptions and violence may normalize

84. Of course, this isn't to say that the issue of violence in poor, urban schools has gone completely unnoticed. *See, e.g.*, Ryan, *supra* note 3, at 294 (“[P]oor urban schools . . . are often located in unsafe neighborhoods and experience levels of violence that exceed those of their suburban counterparts.”). However, these passing references to disciplinary issues are generally made in the context of a discussion on student achievement or school segregation; rarely does a discussion of a school's climate occupy the focus of a discussion as a possible reason for disappointing student achievement. It is this focus that is taken with this Note.

85. Suvall, *supra* note 14, at 548.

86. *Id.* at 548–49.

87. *See* SCHOOL-TO-PRISON PIPELINE, *supra* note 5 (“It goes without saying that students cannot learn if the school environment is not safe.”).

88. “[I]n order to obtain a meaningful educational opportunity, low-income and minority children need qualified teachers, adequate facilities, lower class sizes, [and] *more time on task.*” Rebell, *supra* note 2, at 1487 (emphasis added).

89. Understandably, the greater time a teacher must devote to disciplinary issues, the less time that teacher has to devote to instruction.

90. *See infra* note 98 and accompanying text. The inability to recruit and retain high-quality teachers—defined by such indicators as advanced degrees and years of experience—is another area in which student behavior and student achievement correlate strongly. The ability of high-quality teachers to produce achievement in students finds support in both research and common sense. Schools that fail to recruit and retain educated, experienced teachers (and are therefore left with inexperienced teachers with lesser educations) face yet another barrier to student achievement. *See, e.g.*, *Racial Disparities*, *supra* note 7, at 606 (reporting that teachers in majority-minority schools “often do not have the training and support needed to foster a positive climate for students and, consequently, resort to degrading and abusive treatment”).

91. Indeed, socialization—indoctrinating students with the beliefs and values deemed necessary to produce citizens capable of participating in democratic society—was originally seen as a major purpose of schooling, much more so than instructing discrete academic concepts. *See, e.g.*, *Serrano v. Priest*, 487 P.2d 1241, 1259 (Cal. 1971) (“The influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up.” (citation omitted)). The socializing effect of schooling remains a critical component of public education, although focus on high stakes academic testing has largely removed focus from this goal.

violence and antisocial behavior more than they teach students how to behave productively.⁹²

Given the importance of a positive school climate for the education of students, it is troubling that incidents of disruption vary greatly between schools and school districts, with some students subjected to disciplinary disruptions far more often than others.⁹³ Those students attending schools with “moderate to high levels of school violence see their performance particularly inhibited. They are less likely to graduate from high school or attend a four-year college, even after controlling for a range of student and school characteristics.”⁹⁴ Schools with higher-than-average levels of violence tend to be urban schools attended by majority black and Latino students. Michael Heise has noted that “[u]rban public school teachers report spending more time on classroom discipline than their nonurban counterparts” and that urban schools face greater problems relating to weapons possession than suburban schools.⁹⁵

A study conducted by Fordham University on the New York City Public Schools (NYCPS) has concluded that there is an inverse correlation between the resources enjoyed by a school and its frequency of behavioral disruptions: the greater the resources of a school, the fewer behavior problems arise.⁹⁶ Analyzing educational resources, behavioral indicators, and demographic information of NYCPS, the study found that schools with resources such as high-quality teachers, well-functioning libraries, and extracurricular activities see fewer incidents of negative behavioral events.⁹⁷ Researchers also found that these resources were allocated

92. SCHOOL-TO-PRISON PIPELINE, *supra* note 5.

93. *See, e.g., Racial Disparities*, *supra* note 7, at 605–06 (“Schools primarily comprised of minority students are more often overcrowded with large class sizes and lack the resources such as guidance counselors, social workers, and conflict resolution programs to discipline constructively, and administrators more often suspend and expel students. . . . The high frequency and extremity of disciplinary measures increases student alienation from schools and forces young students onto a track that has a high probability of leading to incarceration.”).

94. Suvall, *supra* note 14, at 549.

95. Heise, *supra* note 10, at 2423–24.

96. MICHAEL ESKENAZI, GILLIAN EDDINS & JOHN M. BEAM, NAT’L CTR. FOR SCHS. & CMTYS., EQUITY OR EXCLUSION: THE DYNAMICS OF RESOURCES, DEMOGRAPHICS, AND BEHAVIOR IN THE NEW YORK CITY PUBLIC SCHOOLS 1–2 (2003). *See also* SCHOOL-TO-PRISON PIPELINE, *supra* note 5, at 4 ([T]here are direct correlations between inputs and outputs in schools. Specifically, fewer resources and attention to students yield poor educational achievement and poor behavioral outcomes. . . . Many schools that are labeled as “failing” or even “dangerous” simply do not receive the inputs they need to promote a healthy, sustainable educational environment. (footnote omitted)).

97. ESKENAZI, EDDINS & BEAM, *supra* note 96, at 12. The following variables were considered among educational resources: teacher qualifications; library and computer resources; course offerings (measured by the percentage of students enrolled in a “five-unit sequential course” offered by the state); and extracurricular activities and other enrichment. Behavior was measured by the following

disproportionately within the school district, with more resources diverted to schools serving predominantly white and Asian students than to schools serving predominantly black and Latino students.⁹⁸

One response that urban schools have taken in trying to handle problematic behaviors are so-called “zero tolerance” policies.⁹⁹ These policies take a very hard line against misbehavior, often removing students from the school environment through suspensions or expulsions as consequences for misbehavior.¹⁰⁰ There are a number of problems with this approach. First, removing students from the school is a temporary solution that does nothing to help the troubled student learn how to behave in a more appropriate fashion—it isolates the student and stigmatizes him, making it even more difficult for him to reenter the school community in a positive way.¹⁰¹ In addition, removing students from school temporarily or permanently has an obvious negative impact on achievement because of lost classroom time and the disruption of their education.¹⁰² Second, some argue that these policies undermine the school culture by making it overly

factors: attendance; percentage of students repeating ninth grade (the only grade for which New York releases such data); dropout rate; disciplinary actions; and percentage of students in special education. Demographics were measured by student race, racial composition of school enrollments, and concentration of student poverty. *Id.*

98. *Id.* at 1. One of the strongest correlations found in the study was between high-quality teachers (measured by the education, credentials, and experience of the teachers) and positive behavior. *Id.* at 15. From this correlation, the authors of the study argued that the positive impact of qualified teachers on student behavior is significant. The authors argued that because such teachers are more often found in schools serving white and Asian students, this allocation of resources was one contributing factor to the disparity between school climates. *Id.* It is important to note a related explanation not discussed by the authors, but noted by Ryan, *supra* note 3, at 294: “[T]eachers and administrators tend to choose schools that have pleasant and supportive environments.” That teachers may choose their schools based upon the climate and behavior of the students is further indication of the critical importance of developing a positive school culture, so that schools serving the lowest-performing students can recruit and retain excellent teachers.

99. Zero tolerance policies are those in which students identified as “problem children” are removed from their schools by suspensions and expulsions. SCHOOL-TO-PRISON PIPELINE, *supra* note 5. An example of schools implementing such a policy is the “Impact Schools” in New York City. These are schools that have been recognized as having high levels of crime and violence. Impact schools are “flood[ed] . . . with police officers and surveillance equipment. As a result, an alarming number of students are removed from their schools and placed in suspension centers, alternative schools, and juvenile detention facilities.” *Id.* See also *Racial Disparities*, *supra* note 7, at 605 (describing the “overuse of exclusionary school discipline in schools with fewer resources and higher concentrations of students from lower socioeconomic backgrounds”).

100. SCHOOL-TO-PRISON PIPELINE, *supra* note 5.

101. *Id.*

102. “This kind of wholesale exclusion from the educational process does nothing to teach children positive behavior. Moreover, taking children out of school for even a few days disrupts their education and often escalates poor behavior by removing them from a structured environment and giving them increased time and opportunity to get into trouble.” *Id.* at 3.

punitive.¹⁰³ Another consequence of excessive punishment noted in many zero tolerance policies is that minor infractions are met with discipline almost as severe as that meted out for serious misbehavior. This is problematic for four reasons. First, it may obscure the distinction between severe and minor misbehavior, preventing students from understanding the gravity of serious infractions. Second, most students will occasionally display minor behavioral problems, but by treating these all as serious incidents, schools sweep most or all students into the category of “behavior problems.”¹⁰⁴ Third, studies have shown that where such disciplinary systems are in place, they tend to treat black students disproportionately harshly.¹⁰⁵ Fourth, these policies create a culture of policing behavior within schools that is reactive—the schools attempt to respond to problematic behavior, but do little, if anything, to address the root causes of this behavior or attempt to address these issues before problems arise. Other problems associated with zero tolerance policies involve high rates of transfer to disciplinary schools¹⁰⁶ and high rates of referral to the juvenile justice system.¹⁰⁷

103. *Racial Disparities*, *supra* note 7, at 606.

104. This is a particularly significant consequence when disciplining children. As school-age children are in the process of forming their identities, finding themselves labeled as “problematic” could cause children to self identify as “bad kids,” causing them to further misbehave in order to live up to this label. *See* SCHOOL-TO-PRISON PIPELINE, *supra* note 5, at 10 (“[M]any of these policies not only label children as criminals, but they also encourage children to lose hope, making it more likely that they will wind up behind bars.”).

105. SCHOOL-TO-PRISON PIPELINE, *supra* note 5. In addition, “studies show that African-American students are far more likely than their white peers to be suspended, expelled, or arrested for the *same kind* of conduct at school,” which further exacerbates the differential educational experience these groups of students are having, and further exacerbates the achievement gap. *Id.* at 7. *See also Racial Disparities*, *supra* note 7, at 606 (For minority youth in particular, the public school system has become an entry point into the juvenile justice system. Racial disparities in suspension, expulsion, and arrest rates in schools contribute to disproportionately high dropout rates and referrals to the justice system for minority youth. . . . In 2002–03, Black students in Chicago Public Schools (CPS) constituted 51 percent of total enrollment but 76 percent of suspensions, almost 78 percent of expulsions, and 77 percent of arrests in schools during the same period. (footnotes omitted)); NAACP *Legal Defense Fund Advocates for Safe Schools in NYC*, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/issues.aspx?issue=3> (last visited Feb. 15, 2010) (“[I]n 2004 African Americans represented only 17% of public school enrollment nationwide but account for 37% of suspensions. In New York State, black students are expelled at four times the rate of white students.”).

106. Transferring a student to a disciplinary school can be problematic for a few reasons. First, this is yet another disruption in the academic career of a student. Second, grouping together students who have exhibited problematic behavior can result in normalizing inappropriate behavior because students see it all around them. *See, e.g.*, SCHOOL-TO-PRISON PIPELINE, *supra* note 5, at 5 (“When kids are removed from school, they end up in inferior settings such as suspension centers, alternative schools, and juvenile prisons—places where meaningful educational services are practically nonexistent and students with histories of behavioral problems can negatively influence one another.”).

107. *See* SCHOOL-TO-PRISON PIPELINE, *supra* note 5.

Zero tolerance policies have resulted in significant referrals of students to the juvenile justice system and have produced a phenomenon characterized as the “school-to-prison pipeline.”¹⁰⁸ This concept refers to disciplinary policies within public schools that “push children out of school and hasten their entry into the juvenile, and eventually the criminal, justice system, where prison is the end of the road.”¹⁰⁹ The distressingly high numbers of young black and Latino men confined in prison speaks to the severity of this situation. As a society, we simply cannot allow this situation to continue; to that end, the next section explains a litigation strategy that parents and advocates could use to successfully challenge the rampant violence in their students’ schools.

V. PROPOSAL

*“[O]ne . . . young man said . . . in [his] old school he fought because he was expected to. Now he doesn’t fight, because it’s not tolerated.”*¹¹⁰

One approach that could be helpful in bringing more control and discipline to our public school systems is empowering parents and advocates to bring lawsuits to cure the violent and chaotic environments in their children’s schools.¹¹¹ This type of litigation can successfully draw on the foundation laid by both school desegregation cases¹¹² and school finance cases.¹¹³ As was the case for school finance litigation, there is no

108. *Id.* See also *Racial Disparities*, *supra* note 7, at 606 (discussing a study that documented the “destructive school culture and punitive school disciplinary measures that contribute to [the school-to-prison] pipeline”).

109. See *SCHOOL-TO-PRISON PIPELINE*, *supra* note 5, at 2.

110. *Meet the Press*, *supra* note 1. The quote comes from Mr. Gingrich, who was relaying a conversation that he had with a student in the School District of Philadelphia. The student was describing his behavior at his old school and how his behavior had changed since his school was converted into a charter school by Mastery Charter. *Id.*

111. It is true that some scholars question the appropriateness of the role of courts in education reform. See, e.g., Heise, *supra* note 10, at 2418 (arguing that “*Brown*’s legacy does not bode well for future litigation efforts seeking to enhance the equal educational opportunity doctrine” because such issues have “changed over the decades in ways that make them even less amenable to litigation”). However, others have argued powerfully for the critical role of courts in insisting upon equality of educational opportunity for all children. See, e.g., Chemerinsky, *Segregation and Resegregation*, *supra* note 45, at 1600 (“Desegregation will not occur without judicial action.”). This Note takes the position that the courts are critical in ensuring that all students are receiving the full and fair benefit of the education guaranteed to them by state constitutions. See *infra* note 141 and accompanying text.

112. See *supra* Part II.

113. See *supra* Part III.

Supreme Court order that plaintiffs can use as a basis for their claims.¹¹⁴ In addition, the effect of the *Rodriguez*¹¹⁵ holding has been to eliminate the Equal Protection Clause as a plausible basis for obtaining equal educational opportunity for all students.¹¹⁶ For these reasons, litigants will be required to proceed in a similar manner as the plaintiffs in the second and third waves of school finance reform litigation. They must challenge the system of public education in state courts and use state constitutions as their legal framework.¹¹⁷ Specifically, plaintiffs can argue that violence and disruption is so omnipresent within certain public school districts that it amounts to a violation of the state's guarantee, as memorialized in the state constitution, to provide an education for all citizens.¹¹⁸

School finance litigation also bears important lessons for how such a claim should be phrased. The second wave of school finance litigation failed because courts were unwilling to hold that the education provisions in state constitutions required strict *equity* of educational experiences.¹¹⁹ The third wave of litigation achieved much more success by arguing that education need not be equal for all students, but that it must be *adequate* for all students.¹²⁰ Therefore, litigants should argue not that all schools must be equally violence free, but that schools with rampant violence cannot provide the bare minimum they are constitutionally required to provide, adequate education for their students.

While the remedy sought by plaintiffs in school violence cases is likely to have the same or similar elements as the remedies sought by plaintiffs

114. See *supra* notes 22, 51 and accompanying text.

115. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

116. See *supra* notes 62–67 and accompanying text.

117. See *supra* text accompanying note 68.

118. See *supra* note 68. Nearly all states have provisions for public education in their constitutions. The following are examples from selected states. Pennsylvania: “The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.” PA. CONST. art. III, § 14. Missouri: “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.” MO. CONST. art. IX, § 1(a). Wisconsin: “The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable” WIS. CONST. art. X, § 3. Given the differing language of these constitutional provisions, litigation efforts in each state will need to be tailored to the specific constitutional language at issue, identifying the types of guarantees made (for example, in Pennsylvania, that the education will be “thorough” and “efficient”) and how the lack of effective school discipline in certain districts undermines that guarantee. See *supra* text accompanying note 70 (discussing how courts interpreted this language in school finance cases).

119. See *supra* text accompanying note 70.

120. See *supra* text accompanying notes 71–72.

in school finance cases,¹²¹ it would likely be more complicated.¹²² Plaintiffs in this type of litigation would seek three things: first, a declaration that violence, chaos, and disruption in challenged school districts is so omnipresent that it amounts to a denial of the students' constitutional right to an education; second, an order demanding that the school district create a plan to improve school control and culture district-wide; and third, a commitment by the court to retain jurisdiction over the case while such a plan is implemented. This portion of the litigation strategy has a foundation in school desegregation cases.¹²³ In these cases, courts took an active role. They ordered segregated districts to create plans for desegregation;¹²⁴ they appointed experts to create alternative plans where district plans were unsatisfactory;¹²⁵ they selected the plan to be implemented;¹²⁶ and they retained jurisdiction over cases while such plans were put into effect.¹²⁷ Here, courts could require school districts to submit plans for improving their management of student behavior in schools across the district to remedy the problems of school violence.¹²⁸ The

121. In *Serrano v. Priest*, for example, plaintiffs were seeking the following relief:

(1) a declaration that the present financing system is unconstitutional; (2) an order directing defendants to reallocate school funds in order to remedy this invalidity; and (3) an adjudication that the trial court retain jurisdiction of the action so that it may restructure the system if defendants and the state Legislature fail to act within a reasonable time.

487 P.2d 1241, 1245 (Cal. 1971). In a lawsuit over school violence, plaintiffs would likely seek the same three elements in their prayer for relief: a declaration that the present system of managing schools is unconstitutional, an order directing defendant school districts to prepare plans to remedy this problem, and continuing jurisdiction for the court so that it might oversee implementation of such a plan.

122. Creating a plan to improve school disciplinary management would likely be more complicated than reapportioning percentages of public school funds to create greater spending equality between districts, because it involves more qualitative analysis and study.

123. See *supra* Part II.

124. See *supra* text accompanying note 30.

125. See *supra* text accompanying note 31.

126. See *supra* text accompanying note 32.

127. See *supra* note 43 and accompanying text.

128. Anchoring such plans in the legacy of school desegregation may present a challenge. Busing, a remedy often utilized in school desegregation plans (in which students were sent on buses to schools other than their neighborhood school for the purposes of desegregation), has come under fire in the last two decades. See, e.g., Davison M. Douglas, *Swann Song for the Busing Era*, 3 GREEN BAG 1, 2–3 (1999); Lino A. Graglia, *The Busing Disaster*, 2 KAN. J.L. & PUB. POL'Y 13, 18 (1992). That desegregation plans featuring busing have received such criticism may cause some to conclude that any type of education plan overseen by a court is inappropriate and unlikely to work. Such a fear is misdirected when applied to the ability and competence of courts to order and oversee education plans generally, because the criticism has been directed at busing *specifically* as a desegregation remedy, rather than court oversight of such plans generally. John Vickerstaff outlined the most common complaints with busing: parents were unhappy that their children spent several hours on school buses every day; busing programs were very expensive; after being bused to predominately white schools, the achievement levels of black students often did not change; parental involvement in schools was

content of such plans would vary depending upon local needs and circumstances;¹²⁹ however, important components to consider would be instruction on positive behavior¹³⁰ and data collection of disruptive or violent incidents.¹³¹

made more difficult when children were attending schools far away from their homes; busing contributed to “white flight” from districts using this remedy, which resulted in further residential segregation; and parents worried that busing may give black students a feeling of inferiority or undermine the continuity of black neighborhoods. John M. Vickerstaff, *Getting Off the Bus: Why Many Black Parents Oppose Busing*, 27 J.L. & EDUC. 155, 159–161 (1998). Clearly, the arguments against busing are numerous and varied. However, these arguments militate against using *busing* as a remedy; they do not speak to the ability of courts to order and oversee education remedies as a general matter. That this particular remedy was unsuccessful does not preclude the possibility that other court-ordered remedies could give rise to greater educational experiences for students in urban school districts.

129. The exact contents of such a plan are beyond the scope of this Note. However, insofar as this Note takes issue with certain approaches to controlling student behavior that are currently being used in urban schools, *see supra* Part IV, it is appropriate to mention a few of the pedagogically validated approaches to teaching positive behavior and controlling violence in students. The majority of these draw on the theory that teaching students “positive behavior” and holding them accountable to these standards is effective in leading students to make positive choices and control their own behavior. For specific examples, see SCHOOL-TO-PRISON PIPELINE, *supra* note 5, at 10 (“Social services-based truancy intervention programs, peer mediation, after school programs, intensive guidance counseling, and conflict resolution programs are just a few examples of the kind of efforts that have proven successful.”).

130. One particular model that has experienced success is called Positive Behavior Support (PBS). *Racial Disparities*, *supra* note 7, at 616.

[PBS] teaches shared norms and expectations for behavior. PBS policies have been implemented successfully in schools in Illinois, Maryland, and other states with sharp decreases in suspension rates and office referrals. For example, at Springfield High School in Illinois, after implementing PBS programming, out-of-school suspensions decreased by 38 percent, reclaiming 180 school days that would have been lost to suspensions. In addition, after Lincoln Elementary School in Chicago Heights, Illinois, implemented PBS programming, “the number of students sent to an administrator’s office for fighting dropped by half over the course of a year.” At another elementary school, Mark Twain Primary School in Kankakee, Illinois, annual “disciplinary referrals decreased dramatically, from 268 before PBS [implementation] compared to 38 [after PBS implementation].”

Id. (footnotes omitted) (quoting Press Release, Barack Obama, U.S. Senator, Obama, Durbin, Hare Introduce Bill to Improve Student Behavior in Schools (Oct. 2, 2007), available at <http://www.pbisillinois.org/Downloads/LegUpdate/ObamaRelease1007.pdf>).

131. *See* ESKENAZI, EDDINS & BEAM, *supra* note 96, at 5 (recommending that school districts “[c]ollect and disseminate better-detailed data on disciplinary actions against students”). In connection with data collection, another possible avenue to reduce school violence could be amending the No Child Left Behind Act (NCLB) to include a focus on incidents of school violence and disruption. NCLB is a piece of K-12 education legislation that was signed into law by President George W. Bush in 2001. Its statement of purpose contains the following, in part: “The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” 20 U.S.C. § 6301 (2006). The main focus of this act is setting benchmarks for academic gains for all students and collecting data to measure the progress of students toward these benchmarks. *See* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 933 (2004). NCLB has unquestionably impacted the priorities of school districts—the federal mandate that school districts focus on measurable academic gains, coupled with

There are a number of reasons that this strategy has promise. First, it preserves local control.¹³² While this may seem counterintuitive because some degree of control is removed to the courts, school districts will retain the ability to formulate plans that meet their specific needs.¹³³ Being geographically widespread and segregated by race and socioeconomic status,¹³⁴ different school districts have distinct challenges. This reality requires that local districts be able to create systems that respond to the needs of their students, rather than having systems imposed upon them that may not be well suited to their needs. Second, this system provides oversight. Many large school districts provide data on violent and disruptive incidents within their schools, generally available on their websites.¹³⁵ However, there is no overseeing body reviewing these numbers, setting goals for schools, or holding schools to any standards. Each individual school is largely left alone to deal—or more often, not deal—with the disruptions that are occurring. It is clear from the data that

punitive sanctions for failure to meet benchmarks of progress, has captured the attention of teachers and administrators in every school in the country. *Id.* Amending NCLB to include data about student behavior could have beneficial effects. First, it would compile data, disaggregated by district, of school violence nationwide, so that lawmakers could finally view the reality of violence in urban public schools. Second, the requirement of reporting such data could force school districts to pay more attention to the importance of school safety and culture. In addition, this would add a level of accountability by creating oversight. However, many of the results of NCLB have been criticized. *See, e.g.,* Liz Hollingworth, *Unintended Educational and Social Consequences of the No Child Left Behind Act*, 12 J. GENDER RACE & JUST. 311, 311–12 (2009); Craig Livermore & Michael Lewchuk, *Centralized Standards and Decentralized Competition: Suggested Revisions for No Child Left Behind to Create Greater Educational Responsiveness Toward Disempowered Minority Groups*, 33 SETON HALL LEGIS. J. 433, 435–37 (2009). Some have argued that NCLB has contributed to the phenomenon of school “pushouts,” situations in which schools encourage students to drop out or transfer to other schools in order to exclude low-performing students from the school’s testing data. *See* Davin Rosborough, Note, *Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH. U. L. REV. 663, 670–72 (2010). At this time, given the many unexpected negative consequences of NCLB and its inability to respond to the unique demands of local school districts, this approach is likely not the best remedy to address school violence.

132. *See supra* note 47 for a discussion of the tradition of local control over public schooling.

133. Recognition of the unique ability of local school districts to develop remedies targeted to their circumstances has been a hallmark of judicial involvement in school reform since *Brown I*. *See supra* note 23 and accompanying text for the Court’s elucidation of this principle.

134. *See supra* note 45 and accompanying text.

135. This information is targeted to parents, to allow them to see the environment in which their children are learning. However, this is not enough to improve school culture. Many parents are unaware that such data exist or are unable to access the websites. Even if parents were aware of the disruption within their students’ schools, their options would remain few. To send their children to a different school would require a great deal of time as well as knowledge of and experience with the bureaucracy of a large public school system. Also, because of the segregation and decreased funding from which urban school districts suffer, it is likely that any other neighborhood school within an urban public school district would suffer from challenges similar to those facing the student’s current school.

these schools are not doing enough,¹³⁶ and having oversight in place will finally put the necessary pressure on schools to improve.

Plaintiffs would face a number of challenges in pursuing this strategy. The first is judicial reluctance to become involved in what is seen as a policy matter.¹³⁷ Courts tend to avoid policy issues because many judges believe that they lack the resources to make policy decisions and also believe that these decisions are more appropriately left to the political branches of government.¹³⁸ However, the approach discussed avoids both of these pitfalls. Courts will not be required to exceed their institutional knowledge to create policy, because they are leaving to school districts the responsibility for creating their own, tailored school improvement plans.¹³⁹ For the same reason, this does not violate the separation of powers by usurping the policy-making function to the judiciary; local school districts, whose management is subject to political checks, will be responsible for creating and implementing these plans.¹⁴⁰

A second reason that courts may be hesitant to issue the type of injunctive relief discussed is that it is more complicated to enforce and will consume more judicial resources than an award for money damages.¹⁴¹ This is a legitimate concern, but it is addressed by past

136. *See supra* Part IV.

137. *See supra* Part II.

138. *See supra* Part II. However, this assumption has been debated. Michael Rebell has argued that “empirical analyses have demonstrated that the courts have proved capable of evaluating complex social science evidence and of formulating effective remedial decrees” in education litigation. Rebell, *supra* note 2, at 1470.

139. It is, of course, true that requiring a school district to create a plan to improve student behavior is policy making, insofar as it involves reprioritizing issues for a school district and placing student behavior as a top priority. However, this is a policy move that courts are capable of and competent to make. Insisting that school districts prioritize this issue is less meddling in policy than a necessary conclusion based on the facts and the applicable law.

140. There is an argument that this approach interferes with the political branches of government, because local, elected school boards will focus on a priority set by the courts, not by the people who elected them. It may be said that this unfairly causes local elected officials to be blamed for the actions of the courts and penalized by being voted out of office, when some state judges are exempt from such process. However, it is important to keep in mind that these local school districts are violating state constitutions by failing to provide an adequate education for students. Even if members of the community are upset by the involvement of the courts, as many were during the years of school desegregation, this cannot undermine the responsibility of the courts to ensure that students’ constitutional rights are protected.

141. It is important to recognize that money damages would be an inappropriate remedy. As discussed in Parts III and IV, urban schools serving black and Latino students are already underfunded, and this lack of funding has been correlated with behavioral problems. Resources such as extracurricular activities and additional guidance counselors have been shown to have a positive impact on student behavior, and such schools often lack these resources. *See supra* notes 97 and 98. In short, these schools need more money, not less. Financial sanctions would undermine the ability of such school districts to manage the behavior of students and would jeopardize their chief purpose of

educational rulings such as *Swann*.¹⁴² The ability of courts to order and oversee complex educational remedies in the past is a strong precedent upon which courts can build to provide injunctive relief for parents whose children are suffering in poorly managed schools.

Some scholars have argued that litigation is an inappropriate vehicle for educational reform.¹⁴³ However, despite the many reasons suggested to explain why litigation is an imperfect reform approach,¹⁴⁴ there is a clear reason why judicial involvement is essential in this situation: the political process has failed the students attending violent urban schools.¹⁴⁵ That there is no political will to address this problem¹⁴⁶ is evident because it has existed untreated for many years. In fact, those with political power have interests that directly oppose those of students attending low-performing urban schools.¹⁴⁷

effectively teaching all students. In addition, an award of money damages would do little for the recipient, who would still be forced to attend a low-performing school plagued by violence.

142. See *supra* Part II.

143. See, e.g., Heise, *supra* note 10, at 2450 (arguing that “courts and lawsuits seem ill-equipped to shoulder th[e] task” of deciding cases of educational achievement). However, there is an equally strong contingent of researchers who argue that court involvement is not only helpful, but necessary, in obtaining equal educational opportunity for all students. See, e.g., Rebell, *supra* note 2, at 1467 (arguing that necessary educational reforms “cannot be achieved without the continued and expanded involvement of the courts in enforcing constitutional requirements for educational opportunity and educational adequacy”).

144. Commentators have argued that education litigation is ineffective for various reasons, including: that it introduces an adversary dynamic to a process that requires collaboration; it undermines local control and decision making in education; education policy is an uncertain area in which even experts are unable to agree as to appropriate reforms; and factors that play an important role in education, such as voluntary residential segregation, are outside the control of courts. Heise, *supra* note 10, at 2420–47.

145. “[T]here is no denying that the political branches, for all their rhetoric, have not succeeded in solving our educational shortcomings after decades of effort.” Rebell, *supra* note 2, at 1471 (internal quotation omitted).

146. See Chemerinsky, *Separate and Unequal*, *supra* note 1, at 1462 (“There has never been the political will to pursue equal educational opportunity. Since the 1960s, no president has devoted any attention to decreasing segregation or to equalizing school funding.”). Chemerinsky has also argued that “desegregation lacks sufficient national and local political support for elected officials to remedy the problem,” in part because “African Americans and Latinos lack adequate political power to achieve desegregation through the political process.” Chemerinsky, *Segregation and Resegregation*, *supra* note 45, at 1600. While this argument was made specifically about desegregation efforts, it applies with equal force to the issue of school violence. Because schools suffering from omnipresent violence and disruption are attended disproportionately by black and Latino students, the relative political powerlessness of these groups will similarly impede legislative will for reform.

147. Suburban parents are “increasingly important” stakeholders in education reform. Heise, *supra* note 10, at 2458. Because property values are tied closely to the perceived quality of suburban schools, parents have a financial incentive to protect their own local school systems, possibly to the detriment of urban school reform. *Id.* at 2460. “Another critical aspect of suburbanites’ role in education reform is that when they ‘perceive a threat’ to their interests—especially their public schools—they fight back, and they usually win.” *Id.* The significance of the political clout of suburban parents is that the schools attended by their children are generally not schools that are suffering from

VI. CONCLUSION

“[F]ew legal decisions penetrate more deeply into the nation’s collective conscious and reveal more about one’s thoughts about the courts’ proper role in our constitutional structure than *Brown*.”¹⁴⁸

Given the great disparities that exist in our public education system, many scholars have appropriately expressed concern about the legacy of *Brown*.¹⁴⁹ If our schools remain segregated,¹⁵⁰ if schools serving predominantly black and Latino students are persistently underfunded,¹⁵¹ if black and Latino students have lower achievement rates and higher dropout rates than white and Asian students,¹⁵² then what has become of the powerful statement that “separate but equal” is a violation of students’ constitutional rights?¹⁵³ These questions are important, and it is critical that scholars, politicians, and parents continue to push for the vision of equality that *Brown* promised. However, these concerns overlook one important legacy of that decision. *Brown* is a testament to the ability of the courts to make systemic changes in education that bring us ever closer to equality for all students.¹⁵⁴ The commonly held belief that education is a function of local government¹⁵⁵ obscures the role that the courts have played in every major educational policy shift in this century. Courts have declared segregated schools unconstitutional,¹⁵⁶ ordered that school

the type of widespread disruption that characterizes urban schools. This problem is largely invisible to these families. See *supra* note 81. Reform efforts that seek to divert attention and funding to problems unique to urban school districts are often opposed by suburban voters who know that such reforms will not benefit their own children.

148. Heise, *supra* note 10, at 2422.

149. See, e.g., David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994); Gerald N. Rosenberg, *Brown is Dead! Long Live Brown!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994).

150. See *supra* note 45.

151. See *supra* note 77 and accompanying text.

152. See *supra* notes 2, 3 and accompanying text.

153. See *supra* note 20 and accompanying text.

154.

Postdesegregation efforts to enhance equal educational opportunity through litigation—efforts that flow directly from *Brown*—evidence a significant and singular achievement. The *Brown* decision succeeded in stimulating a sustained effort—notably, but not exclusively, in the area of school finance litigation—to deploy the courts to help insure greater equal educational opportunity by supplying a necessary precedential foundation upon which successive efforts rest.

See Heise, *supra* note 10, at 2436.

155. See *supra* note 47.

156. See *supra* note 20 and accompanying text.

districts desegregate,¹⁵⁷ allowed women equal access to education,¹⁵⁸ required schools to admit the children of illegal immigrants,¹⁵⁹ equalized school funding formulas,¹⁶⁰ and issued a number of other significant decisions that have had the combined effect of making public education increasingly available to disadvantaged groups of students. These are changes that were essential, but they were changes that local school districts were not willing to make on their own. The legacy of *Brown* is intact as long as we recognize and harness the powerful potential of our courts to make the changes to the status quo of public education needed so desperately by those students with the least power to obtain them.

Education is the most important investment that society makes in an individual,¹⁶¹ and it is the foundation upon which one's success or failure will be built.¹⁶² Our public education system is currently failing thousands of black and Latino students in large urban districts.¹⁶³ The system as it now exists will result in nothing other than a permanent underclass of black and Latino citizens unless dramatic changes are made. It is important to recognize that a focus on student achievement need not and should not exclude the issue of student behavior, which is so inextricably entwined in student achievement and in the life prospects of students.¹⁶⁴ It is time that all American citizens look closely at the reality that so many of our students are facing when they go to school every day. At best, students have hours of instructional time wasted as inexperienced teachers struggle

157. See *supra* note 22 and accompanying text.

158. *United States v. Virginia*, 518 U.S. 515 (1996).

159. *Plyler v. Doe*, 457 U.S. 202 (1982).

160. See *supra* Part III.

161.

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.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

162. "Education is the number one factor in our future prosperity, it's the number one factor in national security and it's the number one factor in these young people having a decent future." *Meet the Press*, *supra* note 1 (Newt Gingrich).

163. See *supra* notes 1–5 and accompanying text.

164. See *supra* Part IV.

to put out the fires of student disruption, fighting, and other misbehavior; at worst, they are victimized by violence that may put their lives at risk.

It is essential that policy makers raise their expectations for these students.¹⁶⁵ Parents, teachers, policy makers, and courts should expect and demand that the quality of the school environment in urban schools serving black and Latino students is equal to that enjoyed by white and Asian students in suburban schools. Where the political system fails these students, courts need to provide parents with an opportunity to remedy the unconstitutional deprivation of education from which their students suffer. Only by insisting that states live up to their constitutional mandate to provide an adequate education to all students can we hope to finally break down the dual school systems under which our students succeed and fail.

*Michelle Parthum**

165. "It seems like no one has any expectations. The new racism, to me, is low expectations, where these kids are being told you can't be anything, you can't achieve something. They can, and we must make that happen." *Meet the Press*, *supra* note 1 (Al Sharpton).

* J.D. Candidate (2011), Washington University School of Law; B.A. English, Spanish (2005), University of Wisconsin-Madison; M.S. Education (2007), University of Pennsylvania. I thank my parents and the editors of the *Washington University Law Review*.