Edison Schools and the Privatization of K-12 Public Education: A Legal and Policy Analysis

Lewis D. Solomon*
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Abstract

This Article examines the private takeover of the management of K-12 publicly funded schools. It focuses on one particular educational management organization, Edison Schools. This Article examines the situation in Philadelphia’s public schools and the efforts of a local school reform commission to revitalize K-12 education. It goes on to look into the personalities of those who started and today run Edison Schools, analyze Edison Schools financial position, and discuss the structured educational approach Edison Schools uses in its schools. This Article addresses the policy considerations behind the efforts to privatize public schools. It concludes that while Edison Schools does not currently turn a profit, the Edison Model could revolutionize K-12 education.

KEYWORDS: education, K-12 education, public schools, publicly funded schools, educational management organizations, privatization, for-profit education

*Danielle Rynczak, J.D., Florida State University College of Law, 2002, and Matthew C. Franker, second year law student at the George Washington University Law School, assisted in researching and writing this Article. Without the extraordinary efforts of Matthew A. Mantel, Reference Librarian, the Jacob Burns Law Library, the George Washington University Law School, this Article could not have come to fruition.
EDISON SCHOOLS AND THE PRIVATIZATION OF K-12 PUBLIC EDUCATION: A LEGAL AND POLICY ANALYSIS

Lewis D. Solomon*

If you were asked to advise today's leaders, what do you think is the greatest single problem facing the United States today?

I don't have any doubt: The greatest problem facing our country is the breaking down into two classes, those who have and those who have not. The growing differences between the incomes of the skilled and the less skilled, the educated and the uneducated, pose a very real danger. If that widening rift continues, we're going to be in terrible trouble. The idea of having a class of people who never communicate with their neighbors—those very neighbors who assume the responsibility for providing their basic needs—is extremely unpleasant and discouraging. And it cannot last. We'll have a civil war. We really cannot remain a democratic, open society that is divided into two classes. In the long run, that's the greatest single danger. And the only way I see to resolve that problem is to improve the quality of education.1

INTRODUCTION

Over the fifteen years following the 1983 publication of the landmark study, A Nation at Risk,2 more than six million Americans dropped out of high school. Of those who remained in school, ten million students reached the twelfth grade unable to read at a basic level, more than twenty million were unable to do basic math, and nearly twenty-five million were unfamiliar with the essentials

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of American history. In the most recent Third International Mathematics and Science Study, which compared half a million students in over forty-one countries at three grade levels, American twelfth graders were so inadequate on their math and science exams, that only students from Cyprus and South Africa scored lower. In short, many American high school graduates are barely able to communicate, orally or in writing, they are deficient in mathematics, ill-informed about United States history, and lack good work habits.

The numbers are even more astonishing in urban areas where minority students drop out or slip through the cracks of an educational system on the brink of its demise. As America's inner cities deteriorate, the parents of children living in poor neighborhoods are further disadvantaged in the kind of education their offspring receive. Inner city public schools are shamefully deficient and are marked by low academic performance, increased violence, high dropout rates, and demoralized students and teachers. Poor physical conditions, inadequate supplies, non-existent technology, transient students, poorly qualified teachers who quickly burn out, and highly qualified instructors who move on, also characterize many urban schools in low income areas. We have re-created a dual school system, separate and unequal. A widening chasm exists between good and bad schools, between those students who receive an adequate education and those who emerge from school barely able to read and write. Low income, minority children go to worse schools, have less expected of them, and are taught by less motivated and less knowledgeable teachers. As a result, an enormous achievement gap exists between white and Asian-Americans on one hand, and African-Americans and Latinos on the other. These gaps are reflective of those that have developed between high performing schools and low achieving schools; between those people who are educated and those who are not; and between those students who complete high school and those who drop out.

This crisis in American K-12 public education, marked by dissatisfaction with student outcomes and perennially underperforming

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7. See, e.g., William C. Symonds et al., For-Profit Schools, BUS. WK., Feb. 7, 2000, at 72.
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schools, led, in part, to increased focus on accountability and the passage of the No Child Left Behind Act of 2001. This Act, the most extensive reform of the Elementary and Secondary Education Act of 1965, increases federal K-12 funding, mandates student testing in math and reading every year in grades three through eight, and allows parents to transfer children from failing public schools to other public schools run by their present systems or to charter schools within the same district. It also led to an increased willingness to explore other alternatives, including solutions previously considered radical, such as the privatization of K-12 education.

Most generally, privatization involves the transfer of public funds to the private sector, and the provision of services by private enterprises that were once provided by the public sector. It connotes a shift in the control of public resources and an alteration in the structures through which public funds are spent.

Privatization through outsourcing in K-12 public education is not new. For-profit firms have long supplied books, crayons, computers, tutoring, and counseling services. School districts have long contracted out transportation, custodial, and food services to achieve greater cost efficiencies. What is new is the use of business firms to manage a school, a group of schools, or even an entire school system.

In the 1990s, school boards began contracting out instructional services. For-profit educational management organizations ("EMOs") began to compete directly with public school bureaucracies. At the same time, many states allowed the formation of publicly-funded charter schools that operate with more flexibility than traditional public schools.

This Essay examines the private takeover of the management of K-12 publicly funded schools. Under this management model, private enterprises replace the administrators who had previously


been appointed by local school boards. These private firms contract with charter boards or districts to operate one or more schools. Public sources provide funding for the delivery of services under a specific set of guidelines. EMOs receive authority to manage a school, set the curriculum, sponsor professional development, and, sometimes, staff the school and set performance incentives.

This Essay focuses on one particular EMO, Edison Schools, Inc. ("Edison"). A publicly held corporation with a highly visible profile, Edison is the nation's largest private manager of public and charter schools. The firm operates 150 schools in twenty-three states and the District of Columbia, and educates 80,000 students. This Essay attempts to answer key questions regarding the quest to privatize K-12 public education. Specifically, can for-profit schools raise student achievement, streamline educational bureaucracies, retain talented teachers and administrators, be more responsive to consumers, achieve cost savings, and be profitable?

Part II of this Essay examines the situation in Philadelphia's public schools and the efforts of a local school reform commission to revitalize K-12 education. Part III looks into the personalities of those who started and today run Edison. Who are they and why did they create a business to privatize public schools? Who are the key players in Edison's management team? Part IV analyzes Edison's financial position. Edison seeks to create efficiencies by centralizing business services, curricular design, and teacher training. Yet, will the firm remain financially viable? Will it become profitable and eventually achieve profits comparable to other, traditional investment returns? Part V discusses the structured educational approach Edison uses in its schools. Is Edison improving test scores and helping children learn? Part VI addresses the policy considerations—the pros and cons behind the efforts to privatize public schools. Will privatization force public schools to rethink their approaches and devise more efficient management arrangements and more effective instructional practices? Can privatization help meet the needs of low income, minority families whose offspring are currently caught in failing schools that merely serve as warehouses for these children?

10. Edison Sch., Inc., FORM 10-Q/A, at 6-7a (Nov. 14, 2002). How Edison counts the number of schools it operates is not straightforward. If one building houses K-8 grades, Edison counts it as two schools—an elementary and a middle school, even if there is only one principal. Edison Sch., Inc., Prospectus 48 (Nov. 10, 1999) [hereinafter Prospectus]; see Diana B. Henriques & Jacques Steinberg, Woes for Company Running Schools, N.Y. Times, May 14, 2002, at A1.
I. The Philadelphia Story: The Quest to Privatize K-12 Education

Philadelphia, the nation's seventh largest school district, is one of many cities in the United States desperately struggling to find the answers to staggering academic underperformance. Philadelphia schools are so ineffective that roughly fifty percent of high school students drop out, and its schools fail to adequately educate seventy percent of those students who do remain to graduate. Frustrated by an educational system that could neither retain students nor properly instruct those who remained, the Pennsylvania legislature enacted Act 46 ("Act") in 1998, allowing the state to take over a fiscally distressed school district. The Act permits the Pennsylvania Secretary of Education, after declaring a school district to be distressed, to establish a five-member school reform commission having broad authority to remake the district almost completely as it sees fit.

To determine whether Philadelphia's school district should be revamped, former Pennsylvania Governor Tom Ridge awarded a $2.7 million contract to Edison on August 1, 2001 to study the Philadelphia schools, and, specifically, to: 1) examine the district's academic performance and finances; and 2) recommend structural changes. After two months of research, Edison reported that the School District of Philadelphia is facing grave academic and fiscal crises, with two-thirds of its schools failing and a significant and

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13. 24 PA. CONS. STAT. § 6-691 (1998). As amended in October 2001, the Pennsylvania Governor would name four of the five school reform commission members. Two would serve initial seven-year terms, one an initial five-year term, and one an initial three-year term. Previously, a new state administration could replace a governor's appointees. The city's mayor would appoint one commissioner to an initial three-year term. Id. § 6-696(a)-(b). The amendments clarify that the commission could enter into contracts with private for profit and nonprofit providers to operate the individual schools. Id. § 6-696(i). Through the Education Empowerment Act of 2000, Pennsylvania required the state's twelve lowest-performing school districts to craft empowerment plans under supervision of the Department of Education; the state would takeover any district (subject to two exceptions) not meeting academic achievement goals in three years. Id. § 17-1703-B.

Not unexpectedly, Edison recommended selecting a number of schools for immediate and intensive intervention. These schools were to be operated by approved organizations in conjunction with an independent school management company, or by an independent school management company alone.

Because Edison concluded that an entrenched, ineffective bureaucracy represented a key obstacle to successful change, the report advised the streamlining and restructuring of the district’s organization. One option indicated by Edison, the use of a private management firm, could strengthen the central office’s management capabilities.

Edison also called for decreasing the number of instructional and non-instructional personnel, reducing administrative overhead by outsourcing custodial work, lowering the cost of benefits, and minimizing procurement costs. In short, Edison saw the need to put new solutions in place to improve the Philadelphia schools immediately. The report left the conclusion that the status quo seemed far riskier than some type of change in district operations.

Immediately after the report’s issuance on November 1, 2001, Pennsylvania Governor Mark S. Schweiker, who had succeeded Ridge upon his appointment to Director of Homeland Security for the Bush Administration, sought a restructuring of the school district’s central office under a new management team that would be rewarded for results and held accountable for failure.

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15. Report to the Governor, supra note 12, at 2. The Report estimated that the Philadelphia school district would have an operating deficit of $150 million in 2001-02 that would grow to more than $300 million by 2005-06. Id. at 55. Educational performance of the district was similarly abysmal. The Report noted that fifty-eight percent of Philadelphia students had Pennsylvania test scores in the lowest quartile, compared with twenty-four percent in the rest of the state, and that only thirteen percent of eleventh graders were capable of reading a newspaper with seventy-five percent comprehension. Id. at 13.

16. Id. at 5-6, 32. The Report recommended that these schools undergo a complete restructuring of all instructional programs and operating procedures.

17. Id. at 40. The Report was particularly critical of the district’s administration, noting that turf battles were prevalent due to severely overlapping areas of authority, and that the district lost the benefits of scale by its failure to implement a uniform curriculum and IT.

18. Id. at 7, 39-47. The Report strongly emphasized the need for Philadelphia to embark on a large scale reform of its finances, education programs, organizational structure, and governance. Id. at 79.


backed Edison, specifically recommending that the school district enter into a six-year, $101 million contract that gave the firm managerial control over the beleaguered district. Schweiker also wanted as many as sixty partnership schools, each run by a community group in conjunction with a qualified educational management firm, or by a qualified educational management entity alone.\textsuperscript{21}

Edison sought to run the district's central administration and to be the lead provider, running forty-five of the partnership schools.\textsuperscript{22} The idea of relinquishing control of both district management and a number of schools to a for-profit enterprise such as Edison, however, was met with vociferous opposition.

Hundreds of protestors, including school administrators, teachers, union leaders, parents, students, and community activists, opposed the privatization of Philadelphia's schools.\textsuperscript{23} Motivated by the fear that the firm would cut jobs as a cost saving measure, administrators, teachers, union leaders, and non-instructional personnel opposed Edison's takeover of the district's management. Parents felt threatened by Edison because they feared losing control over their schools. Some felt that Edison would ignore their concerns, and that a private firm would not be held accountable if it did not fulfill its promises of educational improvement.

Adult protestors, tacitly encouraged by City Hall, took to the streets during the negotiations between Governor Schweiker and Philadelphia Mayor John F. Street. In late November 2001, protestors blocked streets, snarled rush hour traffic, and waved signs in an effort to stop privatization, calling the proposed plan a rape.\textsuperscript{24}

Schweiker's proposal included plans to implement a five-member School Reform Commission, to increase budgeting efficiencies, to focus spending on the poorest performing schools, to implement performance pay for principals and students, and to conduct a fundamental restructuring of district management.


\textsuperscript{24} Susan Snyder, \textit{Hundreds Protest State Takeover of Philadelphia Schools}, \textit{PHILA. INQUIRER}, Nov. 29, 2001, at B1; \textit{All Things Considered} (National Public Radio broadcast, Nov. 30, 2001).
Students also protested. Hundreds walked out of classes and formed a human chain around the school administration building in hopes of keeping K-12 education public.\textsuperscript{25} They also protested outside City Hall and the State Office Building in Philadelphia.\textsuperscript{26}

Community activists joined in as well. The President of the Philadelphia chapter of the NAACP and members of the African-American Clergy of Philadelphia pledged to carry out acts of civil disobedience to voice their opposition to the state takeover.\textsuperscript{27} After promoting Edison as the best choice to manage the district's schools, Schweiker retreated in the face of mounting opposition, agreeing that the soon-to-be appointed school reform commission would manage the district's central office and pay all district employees directly. Edison would serve as a consultant and have a role in recruiting managers for the district, but without the power to hire and fire top central administrators, its main role would be to provide support to the commission as it implemented its reform plan.\textsuperscript{28} On December 21, 2001, after weeks of highly publicized, tumultuous negotiations and only hours before the state imposed deadline for the troubled public school system, Schweiker and Street finally reached a compromise regarding how much money was needed to run the district and the composition of the reform commission.\textsuperscript{29} As a result of their deal, the state agreed to spend an additional $83 million on Philadelphia schools in the 2003 fiscal year, and, in turn, the city would add an additional $45 million to the school district's multi-billion dollar budget. Although the Act specified a five-member commission with only one member chosen

\textsuperscript{25} All Things Considered, supra note 24.

\textsuperscript{26} Susan Snyder, Philadelphia Officials Agree to Provide More Funds for Schools, PHILA. INQUIRER, Dec. 19, 2001, at A1 (describing how the Philadelphia police estimated the crowd at the student protest to be well over 1,000 people, chanting slogans such as "We're not for sale!").

\textsuperscript{27} Kathleen Brady Shea, Ministers Vow to Fight For Schools, PHILA. INQUIRER, Dec. 3, 2001, at B1 (describing how the protesters, led by Reverend Vernal E. Simms, Sr., blocked traffic on a busy road and planned numerous other disturbances).


by the mayor, the Governor agreed to allow Street to appoint a second member to give Philadelphia a greater voice on the commission.\textsuperscript{30}

Once the state takeover had been agreed to, the nature of the debate switched to the role that Edison would play in the district’s transformation. Schweiker’s solution to Philadelphia’s public education crisis focused on the privatization of the most at-risk schools, with Edison independently operating as many as forty-five schools. Although expected to be a proxy for Schweiker, the Philadelphia School Reform Commission (“Commission”), led by Schweiker-appointee James E. Nevels, declared from the outset that there would be competition for management contracts and that Edison would receive no deferential treatment.\textsuperscript{31}

The Commission demonstrated its professed expression of independence by carving out a significantly smaller role for Edison than that envisaged by both the Governor and Edison. The Commission rejected awarding Edison the proposed six-year, $101 million contract that would have given the company management control over the district’s central administration as well as operational responsibility for forty-five schools, as originally envisioned by Schweiker. The Commission, instead, awarded eleven firms, including Edison, a significant role in improving the district, from


school safety and teacher recruitment to student retention and food services.\textsuperscript{32}

The Commission similarly rejected giving Edison a contract to operate forty-five schools on site. Instead, on April 17, 2002, when the Commission chose to privatize forty-two out of seventy low-performing schools, it awarded only twenty to Edison, with the remainder being split among two other for-profit education management firms, Chancellor-Beacon Academies, Inc. and Victory Schools, Inc., two universities, Temple University and the University of Pennsylvania, and two non-profit organizations, Universal Companies and Foundations, Inc.\textsuperscript{33}

Despite these deviations from Schweiker’s initial proposal, Edison remains the predominant player in Philadelphia’s reform efforts. With $40 million in new financing in hand to implement its largest contract to date,\textsuperscript{34} the success of Edison’s efforts rests upon the firm’s ability to pacify local opposition and institute the re-


forms necessary to breathe new life into the moribund school district. Other states across America are watching as events unfold, and may potentially take similar action, producing tremendous growth opportunities for Edison and other EMOs.

II. EDISON’S FOUNDERS AND ITS CURRENT KEY EXECUTIVES

H. Christopher Whittle, the founder of Edison, was not a student who slipped through the cracks of a poor educational system, illiterate, and unable to get by. Viewed by some as a ruthless self-promoter, Whittle has been compared to characters such as Jay Gatsby and has been called a prophet, a visionary, and even the devil.\(^{35}\) According to one commentator, he had avowedly set out not just to make money, but to shape the minds of new generations through information and education.\(^{36}\) Whittle is a bold entrepreneur who has profited from controversial ideas, earning him the ear of investors and the scorn of those within the education establishment.\(^{37}\)

Whittle received his undergraduate degree from the University of Tennessee in 1969 and started his business career with the creation of a campus guide called *Knoxville in a Nutshell* with classmate Phillip Moffitt.\(^{38}\) Soon afterwards, they purchased *Esquire* magazine which was headquartered in New York. Whittle and Moffitt, unknown in the New York area, heralded their arrival in 1979 with a full-page advertisement in the New York Times explaining “Why We Bought *Esquire*” and featuring a picture of the two shaggy-haired entrepreneurs. No one in New York publishing had ever heard of them, and the city’s literary establishment regarded them as suspect, dubbing them “Whiffle and Moppet.”\(^{39}\) *Esquire* subsequently flourished and, in 1986, Whittle sold his interest to Moffitt. In the transaction Whittle took the other Knoxville-based businesses the two owned, and gave them the new moniker of Whittle Communications L.P. Two years later, he sold half of Whittle Communications to Warner Communications (soon to be known as

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37. *60 Minutes* (CBS television broadcast, Nov. 14, 1999).
Time Warner, now AOL Time Warner) for $185 million, with Whittle personally receiving $40 million.  

The entrepreneurial Whittle did not stop there. He built a lavish, $55 million headquarters, Whittlesburg, covering two city blocks in Knoxville and modeled after Thomas Jefferson’s campus at the University of Virginia. He created one of the most controversial business ideas marketed to public schools—television with commercials in the classroom. By bringing advertisers directly to students, Channel One, launched in 1989, implemented Whittle’s vision of a classroom television news service that airs educational programs reaching middle and high schools around the country. Parents, students, and educators generally had no problem with the information content, however, as with a regular television station, the programming was funded by advertisements. Segments of programs were sandwiched in between commercials by advertisers who paid dearly for the opportunity to market their teen-oriented products to a captive target audience. The education establishment and others regarded marketing to children in the classroom as the Avery depth of crassness, resulting in a serious, stubborn image problem for both Channel One and Whittle.

By creating other forms of ingenious content as a means to convey advertising, Whittle ultimately built Whittle Communications into a business generating hundreds of million of dollars in annual revenues. The firm’s secondary revenue generator, Special Reports magazine, provided information along with pharmaceutical advertisements to patients in physicians’ waiting rooms. Later, Whittle Communications expanded by launching the Medical News Network, a continuing education service for physicians and waiting room patients sponsored by pharmaceutical companies. Unable to generate the hoped-for revenue streams, and burdened by extravagant overhead expenses, mounting bank debt, and hemorrhaging cash, the Whittle Communications empire, consisting of Channel One, Special Reports, and Medical News Network, as well

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41. Conant, supra note 35, at 208; Stewart, supra note 36, at 71-72.
43. 60 Minutes, supra note 37.
44. Conant, supra note 35, at 206-07.
45. Id. at 207, 244.
as Whittlesburg, collapsed. By the mid 1990s, it was dismantled and sold along with many of Whittle's personal assets to meet his own liabilities.\textsuperscript{46}

As a result of the meteoric rise and subsequent demise of Whittle Communications, many who know Whittle came to regard him as an overly optimistic idealist who deludes himself on how successful his business ideas were, are, and will be. As one journalist put it, "Chris Whittle's greatest strength is his ability to delude himself and those around him. That is his genius."\textsuperscript{47} Another concluded, "[h]e exaggerates reality. . . [promising] more than he can deliver."\textsuperscript{48}

Today, Whittle has one remaining enterprise, Edison (originally known as the Edison Project), which he founded in 1992.\textsuperscript{49} Whittle named the company after Thomas Edison because he believed the idea of for-profit education to be as revolutionary as the light bulb.\textsuperscript{50} Because his former business failures have, in part, been blamed on Whittle spreading himself too thin, Whittle promises that he will devote the rest of his career to making Edison a success.\textsuperscript{51} Although Whittle is the founder of Edison and currently serves as the firm's Chief Executive Officer and President, as well as a member of its board of directors, Whittle did not want Edison to be viewed as simply another one of his ingenious commercial propositions.\textsuperscript{52} Consequently, he assembled a respected management team to surmount his lack of a background in education and his unproven fitness as a reformer of K-12 public schools. Two Whittle hires, Benno C. Schmidt, Jr. and John E. Chubb, are noteworthy.

Whittle began by luring Schmidt from the presidency of Yale University, where he had served for six years, with the promise of building a national network of high-tech private schools.\textsuperscript{53} In April 1992, he hired Schmidt as President and Chief Executive Officer,

\textsuperscript{46} Id. at 245-46; The Education of Chris Whittle, PSYCHOL. TODAY, Sept. 1, 1997, at 31-32. The demise of Whittle Communications is chronicled in Stewart, supra note 36, at 66.

\textsuperscript{47} Conant, supra note 35, at 207; see Henriques, supra note 38, at B1.

\textsuperscript{48} Henriques, supra note 38, at B1.

\textsuperscript{49} PROSPECTUS, supra note 10, at 27.

\textsuperscript{50} 60 Minutes, supra note 37.

\textsuperscript{51} Conant, supra note 35, at 207.

\textsuperscript{52} James Traub, Has Benno Schmidt Learned His Lesson?, 47 NEW YORK, Oct. 31, 1994, at 53.

\textsuperscript{53} Id. at 52-53.
to develop Edison’s curriculum and plan the firm’s growth.\textsuperscript{54} Later, Whittle took over the role of President (from March 1997 through July 2002), and of CEO (since July 1998), after Schmidt had switched to Chairman of the Board of Directors beginning in March 1997. Although far removed from elementary or secondary schools, Schmidt brought instant credibility to the Edison Project as well as considerable administrative experience and fundraising skills. His star-studded resume includes a clerkship with U.S. Supreme Court Chief Justice Earl Warren, seventeen years at Columbia Law School, culminating in the deanship of that law school, and then one of the finest perches in academic administration, the presidency of Yale. He had demonstrated formidable fundraising talents both at Columbia Law School and Yale.\textsuperscript{55} Shaped by his own experiences of being educated in the country’s most elite private schools, Schmidt argued for an idealistic curriculum, such as teaching Greek to students.\textsuperscript{56}

The other members of Edison’s management team counterbalanced Schmidt’s ivory tower expectations with more practical perspectives. Whittle hired John E. Chubb, Ph.D., who now serves as Edison’s Chief Education Officer and Executive Vice President.\textsuperscript{57} Overseeing Edison’s curriculum, instruction and assessment since 1992, Chubb began his career teaching at Stanford University. In addition to serving as a senior fellow at the Brookings Institute, Chubb is a noted author of books on educational reform, including his co-authored work, \textit{Politics, Markets, and America’s Schools}, where he advocated parental choice and competition among schools as tools needed to break the bureaucratic and parochial obstacles to improving America’s K-12 public schools.\textsuperscript{58}

Over the course of three years of extensive research and debate (from 1992 to 1995), Edison developed, under Schmidt’s leader-


\textsuperscript{57} \textit{EDISON SCH., INC.}, \textit{FORM 10-K/A}, at 4, 23 (Oct. 2, 2002) [hereinafter \textit{FORM 10-K/A}, 10/2/02]; \textit{PROSPECTUS}, \textit{supra} note 10, at 56.

\textsuperscript{58} \textit{JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA’S SCHOOLS} 85-234 (1990).
ship, the innovative synthesis for its curriculum and school design. The design team, consisting of approximately thirty full-time professional employees and numerous outside consultants, education researchers, curriculum developers, teachers, principals, administrators, and specialists in technology, school finance, and management, introduced a range of perspectives on improving K-12 education. They recommended revamping a number of elements, including curriculum, instruction, assessment, professional development, and school organization, and they sought to assemble the best empirical evidence of the impact of potential reforms.

Originally, Whittle envisioned the Edison Project opening hundreds of its own private schools at a multi-billion dollar cost. Realizing that capital costs for such an endeavor were too high, Whittle and Schmidt refashioned Edison into a for-profit manager of public and charter schools.

By early 1995, with its core team having developed the model for Edison's educational approach and the firm having raised sufficient capital, Edison embarked on a plan to manage schools over a three-year span. In the fall of 1995, Edison began by managing four elementary schools, three public schools in Sherman, Texas, Wichita, Kansas, and Mount Clemens, Michigan and one charter school in Boston, the Boston Renaissance Charter School. The autumn of 1996 saw the firm running middle schools in each of the original four sites and elementary schools in Colorado Springs, Colorado, Dade County, Florida, Worcester, Massachusetts, and

59. PROSPECTUS, supra note 10, at 43.

60. Edison's core design team that led its research and development effort consisted of: Chubb, Sylvia L. Peters, a celebrated inner-city school principal; Nancy Hechinger, a leading innovator in education-technology; two prominent editors, Dominique Browning, formerly of Newsweek, and Lee Eisenberg, formerly of Esquire; Daniel Biederman, president of the two largest business improvement districts in New York City; and Chester E. Finn, Jr., former assistant U.S. Secretary of Education and scholar critical of the public school establishment. John E. Chubb, Lessons in School Reform from the Edison Project, in NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION 86-122 (Diane Ravitch & Joseph P. Viteritti eds., 1997).


63. Chubb, supra note 60, at 89.
Lansing, Michigan. In 1997, it added middle schools to its elementary schools in Lansing, Michigan and Worcester, Massachusetts, a high school to its schools in Mount Clemens, Michigan, and new schools in Chula Vista, California, Colorado Springs, Colorado, Wichita, Kansas, Detroit and Flint, Michigan, Duluth, Minnesota, and San Antonio, Texas.\(^6^4\)

The management team Whittle assembled has experienced little turnover. Schmidt and Chubb remain with Edison, but the firm’s management team has also become somewhat more diverse. Manuel J. Rivera, who served as superintendent of the Rochester, New York public schools from 1991 to 1994, joined Edison as Executive Vice President and Director of Schools in 1994.\(^6^5\) From 1998 to 2002, he served as Edison’s Executive Vice President for Development. Reverend Floyd H. Flake, a Democratic member of the United States House of Representatives (1986-97), served as President of Edison Charter Schools from May 2000 to September 2002 (and as a consultant to the firm thereafter) and as an Edison director since 2000. Flake is a highly successful clergyman, the senior pastor of the Allen African Methodist Episcopal Church in Queens, New York (since 1976), President of Wilberforce University (since July 2002), and a senior fellow at the Manhattan Institute for Social and Economic Policy.\(^6^6\) The financial inexperience which characterized the management team during Whittle’s first endeavor, Whittle Communications, however, remains manifest at Edison. Edison’s executives and staff members have proven unable to counterbalance Whittle’s demonstrated failings at tasks such


\(^6^6\). Edison Sch., Inc., Form 14A, at 5 (Oct. 28, 2002) [hereinafter Form 14A, 10/28/02]; Form 10-K/A, 10/2/02, supra note 57, at 23.
as careful cash-flow analysis. Almost none of his recruits had much, if any, comparable experience at other big companies.67

Over the past ten years, Whittle and Schmidt have achieved one goal: they have attracted the attention of education leaders. Edison has become a lightning rod in the stormy national debate over school reform.68 A key part of for-profit education, however, is the profit. Now that Edison has rapidly acquired school management contracts, culminating in the contract to operate twenty Philadelphia schools, what are the firm’s financial results?

**III. CAN K-12 FOR-PROFIT EDUCATION BE PROFITABLE?**

The centerpiece of the privatization of K-12 public schools is the profit motive. Edison seeks to turn the management of public and charter schools into a profit-making enterprise. Yet, perhaps what the critics feared most has not materialized: Edison has never earned a profit and has, in fact, sustained net operating losses in every fiscal quarter since it began operations.69 In its 1999 prospectus, issued shortly before its initial public offering, the firm candidly stated: “We have not yet demonstrated that public schools can be profitably managed by private companies and we are not certain when we will be profitable, if at all.”70

Despite increasing revenues from $38.6 million in the fiscal year 1997 to $375.8 million in fiscal year 2001,71 Edison lost $50.6 million and $38.5 million in fiscal years 2000 and 2001, respectively.72 Although its revenues reached $465 million, Edison lost $86 mil-

67. Henriques, supra note 38, at C1. Beginning in July 2002, Charles J. Delaney, an Edison director who had served on the board as the representative of UBS Capital Americas since July 1999, assumed the role of vice chairman, sharing the office of the CEO with Whittle. Delaney replaced former CFO Adam Field as the key officer responsible for financial and accounting. Delaney seemingly brings a new, strong senior management presence with more ability to challenge Whittle than Field seemed to do. Form 14A, 10/28/02, supra note 66, at 5; Think Equity Partners, Edison Sch., Inc. 2 (Aug. 2, 2002).

68. Henriques, supra note 38, at C1.

69. Edison Sch., Inc., Form 10-Q, at 16 (Nov. 14, 2002) [hereinafter Form 10-Q, 11/14/02].

70. Prospectus, supra note 10, at 9.

71. Id. at 97; see Edison Sch., Inc., Form 10-K, at 27 (Sept. 26, 2001) [hereinafter Form 10-K, 9/26/01].

lion in fiscal year 2002. The firm’s aggregate deficits since November 1996 have exceeded more than a quarter of a billion dollars, totaling $276.3 million as of September 30, 2002.

Edison met these losses mainly by issuing new shares of common stock. Prior to going public in November 1999, the firm sold shares of convertible preferred stock to venture capital investors and to others backing the company. Venture capital financing enabled Edison to begin acquiring public school takeover and charter school contracts. Not only did Edison receive $110 million from its November 10, 1999 initial public offering, but subsequently it also raised additional working capital in two secondary offerings in August 2000 and March 2001, netting $71 million and $81 million, respectively.

Edison has also relied heavily on debt financing to meet its capital needs. For instance, in November 2001, Edison established a $35 million asset based, revolving credit facility with Merrill Lynch Mortgage Capital, Inc. (“MLMCI”). This line of credit was collateralized by certain Edison accounts receivable, basically fees from management agreements owed by clients, to be sold or contributed to a wholly-owned special purpose company, Edison Receivables Company, LLC (“Edison Receivables”), which could draw on the credit line. The terms included: interest at the London Interbank Offered Rate (“LIBOR”) interest rate plus 350 basis points (or

73. Form 10-K/A, 10/2/02, supra note 57, at 4, 23; Press Release, Edison Schools, Inc., Edison Schools Reports 35% Rise in 4th Quarter Net Revenues to $137.8 million (Sept. 5, 2002).
76. Form 10-K, 9/26/01, supra note 71, at 36. Edison also received $41.7 million from two private placements of its stock in July 1999.
77. Id.
about six percent at that time), net worth and debt level covenants described as not too restrictive, and a no earnings covenant.

Despite its gloomy financial past, many financial analysts predict that Edison can and will make money. They premise this conclusion on two fundamental business concepts: economies of scale and cost efficiencies. The more contracts Edison enters into with public and charter schools, as well as with public authorities taking over school districts, the more revenues it will generate. As revenues increase, many of its costs remain the same. As the venture expands, the cost for Edison to educate each student declines because costs, such as curricular development and other central overhead expenses (including facility coordination, purchasing, business services, student assessment, and financial reporting), are spread among more and more pupils. In other words, standardizing administrative and support services for a large number of schools reduces the per-student cost of these services. Cost efficiencies exist. The firm will pay lower prices for its inputs by pooling purchasing, curricular research, and information technology even if its schools are in different geographical areas. As Edison increases the number of students it serves, these cost efficiencies and the resulting economies of scale raise the chances of its achieving profitability. Thus, a critical mass of schools will provide the requisite economies of scale (barring unexpected expenditures such as litigation, lobbying, and public relations expenses) that, when coupled with the expected cost savings, will allow the enterprise to reach profitability.

The unfolding Philadelphia story in the second half of 2001 and the early part of 2002 made security analysts optimistic about Edison’s long-term financial prospects. Edison had hoped to enter into a contract to manage forty-five Philadelphia schools, thereby gaining 37,500 students. Assuming the Philadelphia School Reform Commission would pay Edison the same amount that the school district spent educating students (estimated between $8,000 and $9,000 annually), a contract of this magnitude would have represented over $290 million in annual revenues.

82. Id.; see Credit Suisse First Boston, Edison Schools, Inc. 3 (Apr. 9, 2001) (noting that the annual revenue potential would be from $245 to $320 million if
The potential nationwide market for education management organizations is huge. In addition to the firm's prospects in Philadelphia, security analysts calculate that of the 90,000 K-12 schools in the United States, the lowest quartile, approximately 22,000, are failing schools. These represent Edison's primary target market. Although Edison currently serves only .15 percent of the K-12 market, Philadelphia may be the first of many failing school districts that look to Edison, the only national company with requisite experience, infrastructure, and capital, to run large numbers of these schools. Penetrating the failing school market increases the likelihood that Edison will receive a larger portion of the approximately $300 billion the United States spends annually on K-12 public education, thereby significantly aiding the firm's quest for profitability.

In contrast to Edison's financial woes, another publicly held education management firm, Nobel Learning Communities, Inc., has been, and currently is, profitable. The success of this firm, admittedly smaller than Edison, indicates that, if costs can be controlled, it is possible for Edison's business model to succeed, at least if success is measured in terms of achieving profitability rather than by gaining a "sufficient" rate of return on capital, the measure a traditional business would use.

The problem thus far seems to be implementing cost-cutting measures because a key element of Edison's strategy centers on reducing its central office expenses below those of large, urban school districts. Edison's administrative, curriculum, and develop-

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83. BEAR, STEARNS & CO., INC., supra note 72, at 4.
84. Id. It is also uncertain whether a brand name—the Edison model—works in education. To establish a brand identity, Edison must rely on quality control and similarity from site to site based on standard operating procedures. Some experts believe a need exists to adapt to local conditions. Even within the same geographical market, what people value about education varies widely. For instance, some want a school to nurture a child's individuality, others want a school to facilitate a child's functioning in groups. Andrew Cassel, Edison School's Rise, Potential Fall, PHILA. INQUIRER, May 17, 2002, at C1. Despite these concerns, a huge market exists for a first mover, such as Edison.
85. JEFFERIES & CO., INC., EDISON SCHOOLS, INC. 8 (June 5, 2002).
86. NOBEL LEARNING CMTYS., INC., FORM 10-K, at 17 (Sept. 28, 2001); see Theodore Spencer, A Tale of Two Education Stocks, FORTUNE, Jan. 22, 2001, at 144; William C. Symonds, Edison: How Big a Blow for School Choice?, BUS. WK., June 3, 2002, at 44 (detailing how Nobel currently operates 174 schools serving 25,000 students; its revenues are $160 million).
ment expenses currently equal about fifteen percent of its net revenues, a staggering percentage considering that its curriculum is already developed and that its business model depends in part on removing the layers of bureaucracy and cost inefficiencies that so plague public school districts. In the future, Whittle hopes to reduce the firm’s administrative costs to seven to eight percent of its revenues, leaving an operating profit margin of seven to eight percent. The administrative costs of managing numerous schools, however, with a private bureaucracy in place of the public ones, remain stubbornly high. For instance, in fiscal year 2002, Edison added 107 new headquarters employees, a substantial increase in staff for its school operations, education divisions, and central office administration, in order to enhance its legal, contracting, and financial reporting functions. In the summer of 2002, however, the firm fired about sixty (15.6 percent) of the 385 employees who worked at its headquarters with a view to reducing its central office expenses by over ten percent in fiscal year 2003, as compared with fiscal year 2002.

The optimistic scenario—that by becoming bigger and more efficient, Edison’s revenues will grow faster than its expenses—has its skeptics. Commentators blame Edison’s high costs on everything from the firm’s extensive investment in its new schools under management—approximately $1.5 million per school (with start-up costs of $2,500 per student at each new school to purchase computers, implement the Edison curriculum, and train teachers)

87. Form 10-K/A, 10/2/02, supra note 57, at 29 (providing the Fiscal Year 2002 Statement of Operations Data; actual percentage is 15.3 percent); see Henriques, supra note 38, at C1; William C. Symonds, Edison: Pass, Not Fail, Bus. Wk., July 9, 2001, at 70.

88. Whittle hopes to spend seventy-nine percent of revenues on the classroom, six percent on capital costs, eight percent on administrative costs, leaving a seven percent profit margin (meaning Edison must cut its administrative expenses as a percent of revenue by more than fifty percent). Mathews, supra note 42, at E1; Symonds, supra note 7, at 64; see Symonds, supra note 87, at 70 (noting that Edison budgeted seven percent on administrative expenses versus twenty-seven percent at the average school district.)

89. Form 10-K/A, 10/02/02, supra note 57, at 33 (citing $7.5 million in expenses relating to SEC inquiry and its sales and marketing activities in Philadelphia).

90. David Evans, Edison Has Cut 15.6% of Jobs at Headquarters, BLOOMBERG NEWS, Aug. 21, 2002; Press Release, Edison Schools, Inc., Edison Schools Concludes Headquarters Reengineering (Aug. 21, 2002).


while the revenue it receives is fixed, to its executive salaries and marketing expenditures, to, as previously noted, a lack of business, particularly financial, acumen among its top executives.

Leaving aside Edison's central office expenses, schools generally have high variable costs. As the firm grows, it must continuously add teachers, administrators, and support staff. These high on site, labor-intensive expenses make it difficult for Edison to reduce marginal costs to the degree necessary to attain profitability.

In order to decrease expenses, a typical Edison school has few specialists, such as special education experts. Instead, Edison teachers assume as many of these functions as possible. The company maintains, however, that it makes special education staff available at its schools to provide a full range of services, including additional support in regular classrooms and self-contained classrooms for students with greater needs. John E. Chubb candidly admits that:

[t]his program has been perhaps the most difficult innovation that Edison has implemented, for it is not easy to get all school staff members—and not just special education staff members—to take responsibility for special education students and to know how to serve them. . . . All [Edison sites] have found responsible inclusion a serious challenge.

Critics have charged that Edison discourages the enrollment of students with disabilities or discipline problems who require extensive services because these services make such students considerably more costly to educate.

94. See supra note 67 and accompanying text; see also Henriques, supra note 38, at C1.
96. Form 10-K/A, 10/2/02, supra note 57, at 7.
98. See, e.g., Nancy J. Zollers & Arun K. Ramanathan, For-Profit Charter Schools and Students with Disabilities: The Sordid Side of the Business of Schooling, 80 Phi Delta Kappan 297, 298 (1998). In the fall of 1997, Edison's Boston Renaissance Charter School was cited for violating the rights of a student with disabilities, leading to a finding of non-compliance with Section 504 of the Rehabilitation Act of 1973. The finding stemmed from numerous mistakes the school made in providing educational services to a kindergarten student with a disability. See generally Peggy Farber, The Edison Project Scores—and Stumbles—in Boston, 79 Phi Delta Kappan 506.
Other possible labor cost-saving measures, which must be balanced against the firm's desire to meet its students' educational needs and foster academic achievement, include reducing the number of teachers, using cheaper teachers (by hiring part-time instructors, younger, less experienced teachers, or, if state laws give it flexibility, hiring without concern to meeting certification requirements), or increasing class sizes. The development of educational technology to reduce the labor-intensive nature of K-12 education represents another possibility.

Four financial concerns raise further questions about the long-term viability of Edison's business model. First, some Edison management agreements provide for a fee based on the average per pupil amount the district spends on all its public school students (K-12), rather than the average expenditure for the type of school Edison operates. Typically, this amount is higher than the amount a district spends on K-8 students because districts generally spend less per pupil on elementary students and more per pupil on secondary students. Edison is able to achieve cost savings by focusing on educating elementary, not secondary, students who do not require specialized courses, facilities, and equipment.

Realizing the gap in what it currently offers school districts and other public authorities, one part of the firm's strategy focuses on opening Edison high schools in districts where the firm operates elementary and middle schools. Edison candidly admits, however, that it has limited experience operating high schools, and its complete high school curriculum, school design, and operating plan are not fully tested.

Second, private donations subsidize some Edison schools. In the 2001-02 school year, for example, philanthropic entities supported


99. Form 10-K, 9/26/01, supra note 71, at 42; Edison Sch., Inc., Form 10-Q, at 24-25 (May 17, 2002); see Henriquez & Steinberg, supra note 74, at A1 (noting that Edison's claims of doing more with less at elementary schools were not entirely accurate).

100. Form 10-K/A, 10/2/02, supra note 57, at 3; Form 10-Q, 11/14/02, supra note 69, at 18.
eleven of the 133 Edison schools.101 These charitable contributions, which went directly to the firm's school board or charter board clients, not to Edison, generally fund those expenses that the firm previously made without adequately considering the possibility of a payback on their expenditures, for example, the initial capital investment in curriculum, technology, and the facilities upgrade requisite to opening new schools. Edison also relies on philanthropy in geographical areas where public sector per-pupil expenditures make it difficult for the company to achieve a satisfactory financial performance. In particular, all of its schools in California have been supported by charitable giving.102 These donations, while helpful in defraying the substantial sums Edison invests when starting to manage a new school, raise questions about the firm's business model as well as its ability to be weaned away from such support.

Generally speaking, Edison receives (and spends) more funds than a district spends on educating similar students. Many educational reformers say schools serving mostly students from low-income families need more funding than those serving more affluent families. Schools in inner city areas typically have fewer resources, such as libraries and access to technology. Therefore, the need for Edison to bolster school resources is greater.103

Edison strives to turn around poorly performing schools—something local school boards have long neglected to do. Although Edison contracts with school districts, charter boards, and other public authorities to run schools and thus receives public sector funding, this funding is rarely enough. Most of the contracts Edison receives are for a district's worst performing schools—dys-

101. Form 10-K/A, 10/2/02, supra note 57, at 38; see Bear, Stearns & Co., Inc., supra note 72, at 99; Henriques & Steinberg, supra note 74, at A1. For example, Edison entered into an agreement with a client, seemingly the Clark County (Las Vegas), Nevada School District, obligating the firm to raise $10.5 million in unrestricted philanthropic funds to be distributed over a two year period ending on June 30, 2003. Form 10-K/A, 10/2/02, supra note 57, at 38. To fulfill the contract, Edison has provided $2.2 million of its own funds. Charles Forelle, Flunked by Investors, Edison Schools Scorns Talk of Failure, Wall St. J., Oct. 22, 2002, at B1; see Form 10-Q, 11/14/02, supra note 69, at 16.

102. Form 10-K/A, 10/2/02, supra note 57, at 36. The D2F2 Foundation, funded by Donald and Doris Fisher, founders of The Gap, intends to provide up to $22.5 million to Edison schools, primarily in California. Of this amount, $9 million has already been paid and used in Edison schools. Id.; see Schrag, supra note 35, at 20; Somini Sengupta, Edison Project Gets Aid To Open New Schools, N.Y. Times, May 27, 1998, at A4.

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functional places serving disproportionately large numbers of poor kids that superintendents would just as soon get rid of and that, in many cases, could not do much worse.\textsuperscript{104} Prior to the summer of 2002, Edison pumped money into these hopelessly inadequate schools, providing up-to-date technology, putting computers in the homes of each student above the second grade, and offering teachers extensive professional development.\textsuperscript{105} Edison also provides students with daily structured reading classes, plus art, music, and Spanish instruction beginning in kindergarten, educational benefits not previously offered in these schools.\textsuperscript{106}

Third, charter schools pose a special challenge for Edison. The charter schools run by the firm are generally starting from scratch. These schools require a facility that is not typically provided by public authorities. Because a charter board generally lacks the requisite resources to obtain the financing for its facility and start-up costs, Edison has advanced or lent funds or guaranteed the debt of various charter schools it manages. Thus, Edison's charter school financing provides the seed money for new business. By September 30, 2002, however, Edison had lent its charter schools $84.9 million, a considerable increase from the $13.9 million that it had provided through June 1999. Furthermore, about $19.9 million is not secured by any collateral or is subordinated to a senior lender.\textsuperscript{107} Some financing arrangements extend beyond the current term of the firm's management agreements and may continue even if these contracts are terminated. If not repaid, these loans could cause the firm serious financial difficulty, further adversely affecting its financial results and its precarious financial position.\textsuperscript{108}

In addition to providing loans or guarantees, Edison also entered into long-term leases for facilities occupied by its charter school clients. Some of the lease terms exceed the initial term of the firm's management agreements and, thus, Edison's obligations to make lease payments continue even if its management agreements are terminated or not renewed. Edison's total rental exposure ex-

\textsuperscript{104} Schrag, supra note 35, at 20.

\textsuperscript{105} See Chubb, supra note 60, at 114 (explaining the Edison Project's investment plan which heavily funds the launch and development of new schools).

\textsuperscript{106} Id. (listing capital investments designed to bolster school development).

\textsuperscript{107} See Form 10-Q, 11/14/02, supra note 69, at 7; Prospectus, supra note 10, at 14; see also Henriches & Steinberg, supra note 74, at A1; Megan E. Mulligan, School Daze, Forbes, Dec. 24, 2001, at 124 (noting that Edison has also guaranteed $21.8 million in loans to charter boards and has provided $500,000 in cash as collateral for charter board loans).

\textsuperscript{108} Form 10-Q, 11/14/02, supra note 69, at 19; see Wyatt, supra note 91, at B1.
ceeds $48 million. To obtain funds to finance initiatives beyond fiscal year 2003, Edison must refinance the obligations owed to it by helping its existing charter school clients obtain tax exempt bonds or bank financing to repay loans and advances to the firm. Rather than providing credit support itself, it must attempt to secure this type of financing from other sources for new charter clients before schools are opened. In addition, because non-charter, contract business is less-capital intensive, requiring no investments in real estate construction or acquisition, but only renovation, Edison will likely focus more on gaining management agreements with public schools.

Finally, Edison derives all of its revenue from public sources. A decline in funding of K-12 education resulting from budgetary constraints would adversely affect the firm.

These problems, coupled with the Philadelphia School Reform Commission’s decision to award only twenty schools to Edison when as many as forty-five were expected, severely damaged investor trust and confidence in the firm. The final blow came on May 14, 2002, when the U.S. Securities and Exchange Commission (“SEC”) issued a cease-and-desist order requiring Edison to change its revenue reporting to only count those revenues actually received by the company.

Following a February 13, 2002 Bloomberg News Service report, the SEC began an investigation into Edison’s disclosure of

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109. Form 10-Q, 11/14/02, supra note 69, at 8 (estimating that Edison’s future lease obligations amount to $48.7 million over the next twenty years).
110. See Form 10-K/A, 10/2/02, supra note 57, at 47; see also Yvette Shields, Deal in Focus: Chicago Charter School System Offers $16M of Triple-B Bonds, Bond Buyer, June 5, 2002, at 32; Press Release, Edison Schools, Inc., Edison Schools Reports First Quarter Results with Year-over-Year Improvement (Nov. 14, 2002). In addition, the No Child Left Behind Act of 2002 provides credit enhancement initiatives to assist with charter school facility acquisition, construction, and renovation. Pub. L. No. 107-110, §§ 5221-5231, 115 Stat. 1425 (2002).
112. Form 10-Q, 11/14/02, supra note 69, at 23.
its past revenue reporting and the adequacy of its financial controls. The inquiry revolved around Edison’s practice of counting as revenue funds that certain school districts continued to pay directly to teachers and companies that provide school-related services on Edison’s behalf, without actually transferring the funds through Edison. Although this practice did not affect the firm’s bottom line, as expenses not directly incurred were also counted, it altered the percentage of Edison’s losses relative to its revenue, thereby hiding some of the company’s underlying financial weakness. Despite Edison’s insistence that this practice was legitimate and in accordance with generally accepted accounting principles, a swift negative reaction hit Edison’s stock price following the release of the Bloomberg report and then the SEC’s order.\(^\text{116}\) Investors were skittish about companies with disclosure and accounting problems in the wake of the unfolding financial scandals at Enron, WorldCom, and other companies. This was particularly the case for a company such as Edison whose stock, in the absence of earnings, was almost entirely dependent upon rapid revenue growth.

The SEC’s cease-and-desist order focused on Edison’s disclosure improprieties.\(^\text{117}\) The order concluded:

Edison has filed reports with the Commission that have not disclosed certain information regarding Edison’s business operations. Specifically, Edison has not disclosed that a portion of its reported revenues included payments that did not reach Edison and were made by school districts to teachers and other providers of services in Edison’s schools.\(^\text{118}\)

Under the SEC cease-and-desist order, Edison agreed to reclassify prior revenues for fiscal years 1998-2001 and the first two quarters of fiscal year 2002. These changes reflect a net revenue amount that excludes certain school district expenses, including teachers’ salaries and non-instruction services such as facilities maintenance and transportation (so-called “buy back services”), where the districts retained a level of control over expenditures


\(^{118}\) Id.
sufficient that Edison could not be considered the primary obligor on the contracts. The company promised that in the future it would report revenues from these contracts on a net basis. In most Edison contracts, however, the firm is liable for salaries and other expenses and it will continue to report its gross revenues from these arrangements.

Although the SEC settlement caused Edison’s stock price to plummet, the firm did not admit any wrongdoing and the SEC did not impose any fines or penalties. In addition to improving its public disclosures by distinguishing those costs paid directly by Edison from those costs paid by local school districts, Edison agreed to enhance its internal audit system by appointing a director of internal audit who will report periodically to the audit committee of the firm’s board, not to its senior management. Although Edison escaped the SEC relatively unscathed, it is now subject to ten class action lawsuits by shareholders alleging that some of Edison’s public disclosures regarding its financial condition were materially false and misleading in that the firm’s revenue reporting practices allegedly improperly inflated its total revenues and artificially boosted the price of its stock.

The firm’s lack of profitability, coupled with the SEC’s cease-and-desist order and growing skepticism whether Edison’s business model is capable of ever turning a profit, caused a precipitous decline in the firm’s stock. From a January 2002 high of more than $21 per share, its stock plummeted to fourteen cents per share on October 10, 2002 only to rebound to $1.62 by the end of 2002. It also became apparent that the company would need $30-$40 million to keep its commitment to manage twenty Philadelphia schools as well as open and/or expand other new schools across the country. With the equity market closed due to the collapse in the price of its stock, the prospects of securing sufficient debt financing to undertake the firm’s continued expansion seemed

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119. See Kim, supra note 116, at A8.
121. FORM 10-K/A, 10/2/02, supra note 57, at 20-21, 77; FORM 10-Q, 11/14/02, supra note 69, at 8.
daunting, but Whittle was able to piece together a deal to keep its plans on track and the company afloat.

On July 31, 2002, the November 2001 revolving credit agreement with MLMCI was amended to add School Services LLC (a newly formed entity organized by Leeds Weld and Co. and the Adler Group) as an additional lender, to increase the line of credit from $35 million to $55 million and to extend the term of the agreement (and the line of credit provided) to June 30, 2003 (and subsequently to July 15, 2003). This line of credit bears interest at LIBOR plus seven percent (or, at Edison’s option, prime plus 4.5 percent) and is collateralized by accounts receivable held by Edison Receivables. The agreement required Edison to observe certain financial covenants and restrictions, including a maximum consolidated debt-to-equity ratio. On July 31, 2002, Edison also entered into a separate Credit and Security Agreement with School Services, giving the firm the right to borrow $10 million, at twelve percent interest, collateralized by certain real property owned by two wholly owned Edison subsidiaries. It also entered into a revolving loan for up to $10 million with School Services at twelve percent interest, secured by notes payable from charter schools and other indebtedness to Edison and substantially all the firm’s other assets, except accounts receivable sold to Edison Receivables. The facility matures on June 30, 2004 and is subject to significant prepayment obligations. The agreement requires the company to observe certain financial covenants and restrictions, including a debt-equity ratio and a minimum earnings before interest, taxes, depreciation, and amortization requirement for fiscal year 2003.

The School Services lenders also received warrants to buy about 10.7 million newly issued Edison shares at $1 per share. If Merrill Lynch and School Services exercise all the warrants given to them, they will jointly own the largest block of Edison stock.

Despite being forced to grant warrants for a seventeen percent stake in the company, accept financing at interest rates indicative

124. See Form 10-K/A, 10/2/02, supra note 57, at 36.
125. Id.
127. See Form 10-K/A, 10/2/02, supra note 57, at 36.
128. Id.
of an unprofitable, failing firm, and pledge all of its assets, the capital infusion will allow Edison to implement its Philadelphia expansion plan, open two new schools in Kansas City, Missouri and Indianapolis, Indiana, and expand twelve existing Edison schools in various cities.  

Stepping back from the details of Edison's rocky financial situation in 2002, the good news is that its problems appear to relate more to poor execution than to a failed business model. Genuine concerns certainly exist, however, Edison's financial and managerial difficulties appear solvable. Edison has been able to grow rapidly based on what appears to be a successful educational product. Edison can help secure its long-term future by consolidating its gains, maintaining and improving the quality of the education it provides, and implementing efficiency savings through cost controls—especially through staff cuts and expense reductions at its headquarters.

Furthermore, Edison will pursue seven strategies. First, it will curtail its previous rapid expansion strategy, focusing instead on profitability and the termination (or renegotiation) of unprofitable management contracts. Second, unless funding exists to provide a means of payback, it will curtail giving students home computers, a practice which accounts for about half of its on site capital spending. This step will reduce its start-up capital expenditures from the historical $2,500 level to $1,500 (or even less) per student. Third, it will seek to refinance the funds it has lent to the charter schools it manages. Fourth, the firm will expand its summer school operations and begin offering after-school and tutoring services. Fifth, it will market its management services to other failing school districts which are subject to state takeovers. If the takeover model proves successful in Philadelphia, it may offer an attractive solution for other states. Edison must avoid, however, the dangers of extensive reliance on large, new contracts and the possibility of strong opposition to its management operations accompanied by

129. Edison undertook a 2002-03 school expansion program in twelve locations—Washington, D.C.; Atlanta, Georgia; Albany, the Bronx, Buffalo, Tonawanda, and Rochester, New York; Philadelphia and Phoenixville, Pennsylvania; Milwaukee, Wisconsin; and two schools in Dayton, Ohio. Edison Schools Announces Twelve Expansions and Two New School Openings, P.R. Newswire, May 23, 2002.


131. Form 10-K/A, 10/2/02, supra note 57, at 15; Form 10-Q, 11/14/02, supra note 69, at 15; Edison Schools to Expand Supplemental Services, N.Y. Times, Nov. 19, 2002, at C4.
adverse publicity. Sixth, it may strive to establish clusters of schools within the same district to facilitate the sharing of local services, such as custodians and maintenance personnel. This approach will also enable the company to capitalize on its relationship with a district and its knowledge of the market. Seventh, rather than taking over the management of schools, Edison, through its Affiliates Division, will use its intellectual capital to market consulting services, such as an achievement management system, a benchmark assessment system to generate monthly data on students, and professional development programs designed to help principals become better administrators and show teachers how to better manage their classrooms, all shepherded by an achievement advisor. The division will offer Edison’s capabilities to some 6,600 small and medium-size school districts, with 1,000 to 10,000 students. Under the consulting arrangements, a district would continue to operate schools, but would pay fees and royalties to Edison for access to its capabilities, thus helping the firm meet the costs of running its headquarters and allowing it to capitalize on its research and development efforts.

First and foremost, if Edison demonstrates achievement gains at the schools it runs, it will improve its chances of attaining more management and consulting contracts, thus enhancing its financial position. The greater the academic improvement, the more accepting the public will become. If achievement scores demonstrate the firm’s success, public sentiment will likely encourage more school districts, charter boards, and public authorities to enter into contracts with Edison. As one brokerage firm stated, in explaining achievement test scores as one of the most quantifiable and identifiable ways of measuring the firm’s financial value, “academic achievement will drive financial results . . . . Thus, the logic is quite simple: Edison schools are outperforming; the public is gaining respect; more clients will surface; the business should grow. One need not attend an Edison school to appreciate that simple logic.”

132. See Form 10-K/A, 10/2/02, supra note 57, at 15; Jay Mathews, Putting a For-Profit Company to the Test, Wash. Post, Apr. 30, 2002, at A9; Jacques Steinberg, For-Profit School Venture Has Yet to Turn a Profit, N.Y. Times, Apr. 8, 2002, at A17.
133. Form 10-K/A, 10/2/02, supra note 57, at 14-15; Blanche Fraser, Vice President for Development, Edison Schools, Inc., Statement at the Progressive Policy Institute, Education Forum (Sept. 13, 2002) (on file with author).
IV. IS PRIVATE SCHOOL MANAGEMENT HELPING STUDENTS?

All of the schools Edison manages are structured under the Edison Model, offering a coherent vision of school design, curriculum, and pedagogy. The model integrates proven best practices with leaps in technology and school organization. According to John E. Chubb, it attempts to bring together in a single, comprehensive school design those wide-ranging factors shown consistently to influence student achievement and school performance. The factors include not only the obvious education variables—curriculum, instruction, and assessment—but also more general factors such as organization, leadership, management, technology, culture, and community.135 The model provides for the organization of a school based on academies, houses, and teams.136 A school consists of segments—small schools-within-a school, called academies—where two or three age/grade levels are grouped together. Each academy consists of three houses of one hundred to one hundred eighty students similar in age and grade levels. Students remain within a house until they graduate from an academy. In these houses, teachers typically follow the same students for several years. Edison believes this organization ensures that students are better known by their teachers, helps foster student-teacher relationships and encourages teachers to feel more ongoing responsibility for individual students.137 A team of four to six teachers leads each house and works with students at each level of the house in the core academic program. Additional teachers supplement the team with subjects such as art, music, and physical fitness.138

Detailed and demanding student academic standards guide the Edison curriculum, specifying what students should know and be able to do at the end of each school year in twenty fields of study.139 Edison offers a rich and ambitious140 curriculum consisting of five domains: 1) humanities and the arts; 2) mathematics and science; 3) character and ethics; 4) health and physical fitness; and

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135. Chubb, supra note 93, at 91.
137. Form 10-K/A, 10/2/02, supra note 57, at 7.
138. Id.; Office of Evaluation & Research, supra note 136, at 3; Chubb, supra note 97, at 215.
139. Form 10-K/A, 10/2/02, supra note 57, at 6.
140. Chubb, supra note 97, at 215.
5) practical arts and skills. Edison employs an interdisciplinary approach with lessons based on projects or real life problems requiring students to delve into different disciplines. The firm’s instruction methods are derived from systematic, empirical research. Its elementary schools use a K-5 reading program, “Success for All,” developed and refined by researchers at Johns Hopkins University. Its schools generally use K-12 mathematics programs developed by the University of Chicago School Mathematics Project and science programs developed by some of the nation’s leading organizations of science educators. Edison also has built its educational program around a set of democratic and universal core values designed to promote discipline, strong character, and a positive learning environment with students receiving ethical learning instruction. All students at each grade level take a fine arts or music class daily.

The Edison Model dramatically alters the school day and year (in those schools that choose to adopt this part of its program) in order to provide more class time for students. The extra time permits a focus on fundamentals while still providing a curriculum rich in the arts and humanities. As a result of this emphasis on time in the classroom, the school day, after the first year of a school’s operation, is sixty to 120 minutes longer than the average school day—seven hours for students in kindergarten through grade two, eight hours for students beginning in third grade. Often the school day does not end until 4 p.m. The school year is, on average, 200 days—about twenty days longer than the traditional public school year. This additional time spent in the classroom, if maintained over the course of a child’s schooling from kindergarten through the twelfth grade, amounts to an additional four years of instruction.

The model integrates technology into its learning environment as a productivity tool that facilitates writing, research, analysis, and

142. Id. at 6-7.
143. Chubb, supra note 60, at 111. For a critical assessment of the “Success for All” program, see Stanley Pogrow, At Odds-Success for All is a Failure, 83 PHI DELTA KAPPAN 463 (2002).
144. Form 10-K/A, 10/2/02, supra note 57, at 6; Chubb, supra note 93, at 91.
145. Form 10-K/A, 10/2/02, supra note 57, at 7; Office of Evaluation & Research, supra note 136, at 4-5; Chubb, supra note 97, at 217, 225.
146. Office of Evaluation & Research, supra note 136, at 4; Chubb, supra note 97, at 217.
communication for students, teachers, and parents.\textsuperscript{147} In addition to generally giving each teacher a laptop computer, each Edison classroom has at least one computer for student use. Where funding permits, after the first year of a school’s operation, a computer and modem is made available for home use to each student in the third-grade or higher. Realizing that significant improvements in learning require closer collaborations between schools and families, an internet-based internal message, conference, and information system, called “The Common,” connects students, students’ families, teachers, and principals. Students use the network to email teachers and submit assignments electronically. The principal keeps an electronic bulletin board for announcements and suggestions by parents. Parents and teachers communicate via chat-room discussions and post data on e-bulletin boards.\textsuperscript{148}

Edison also uses traditional communication modes. Teachers meet with parents face-to-face, with the child in attendance, on a quarterly basis and also maintain communication via telephone.\textsuperscript{149} If there is sufficient space in a school, the principal maintains a Parent Center where family members can receive information on curriculum and school activities, so that parents feel encouraged to visit their child’s school and become more informed. The school often uses the Parent Center for meetings and workshops that keep parents involved with both the school and their children’s education.\textsuperscript{150}

To regularly monitor its students’ progress against its academic standards, Edison has developed a Quarterly Learning Contract (“QLC”).\textsuperscript{151} Each quarter, teachers prepare a report card, with traditional letter grades and extensive commentary, tracking each student’s progress against the firm’s annual academic standards and setting specific goals for each student. The contract represents a formal statement of future learning objectives agreed to by the school, the student, and the student’s parents, as well as a state-


\textsuperscript{148} \textit{Office of Evaluation & Research, supra} note 136, at 10; Chubb, \textit{supra} note 97, at 218; \textit{Form 10-K/A, 10/2/02, supra} note 57, at 7.

\textsuperscript{149} \textit{Office of Evaluation & Research, supra} note 136, at 10; Chubb, \textit{supra} note 97, at 230.

\textsuperscript{150} \textit{Office of Evaluation & Research, supra} note 136, at 11.

\textsuperscript{151} \textit{Form 10-K/A, 10/2/02, supra} note 57, at 7-8; \textit{Fourth Annual Report, supra} note 92, at 13-14; \textit{Office of Evaluation & Research, supra} note 136, at 7-8; Chubb, \textit{supra} note 97, at 217-25.
ment of the student's actual attainment of past expectations. Through the QLC, parents morally commit to monitor their children's progress and to help them achieve the specified goals.

Each Edison school interacts with its community in an effort to ensure that the educational program meets local priorities and concerns. About one-quarter of the curriculum is tailored by the school, utilizing community history and teacher inspired curricular adaptation. The school also enlists the cooperation of community social service agencies to help specific students. Moreover, the school itself becomes a hub of activity for the neighborhood with programs and services offered in the afternoons and evenings during the school year and throughout the summer.

The Edison Model has three stated objectives: first, to raise each student's academic achievement to the highest level possible; second, to increase parent involvement and satisfaction to levels consistent with educational excellence; and third, to improve school climate so as to foster greater learning. School districts, charter boards, and other public authorities that contract with Edison, however, look to objective standards in measuring success. Most often these public bodies want to see improvement in the students' standardized achievement test scores in basic skills. Results are also measured in terms of parental satisfaction.

A. Raising Academic Achievement

Although most Edison schools show a positive academic achievements trend, controversy exists concerning the magnitude of the gains and the methodology to be used in making assessments. To resolve questions raised by studies issued by (or funded by) privatization opponents, Edison commissioned the RAND Corporation in 2000 to conduct a three-year independent evaluation of student achievement outcomes at Edison schools.  

152. Office of Evaluation & Research, supra note 136, at 8-9, 11.


National teachers' unions offer studies critical of the academic performance of Edison students. A 1998 report by the American Federation of Teachers ("AFT") based on an analysis of test scores, concluded that some Edison Schools fell behind comparable public schools, while only a few came out dramatically ahead. Overall, the flat or negative comparative trends indicated to AFT that Edison was not showing substantive gains across its schools.155 A subsequent AFT report, issued in 2000, provided a second overview of the performance of Edison schools. Once again, AFT found that Edison students did not perform better than students in comparable, traditional public schools in the same district (or state). The overall conclusion was that "Edison schools do as well or worse than comparable schools; occasionally they do better."156 Edison opponents have prepared other unfavorable comparisons of the firm's schools with measures of statewide achievement.157

Public authorities in desperate need of assistance with chronically under performing schools contract with Edison. Typically, the schools which Edison manages average a thirty-four percent proficiency rate on the criterion-referenced tests that measure the ability of students to meet specified standards, compared with schools in the same district that average a forty-six percent proficiency.158 These numbers reflect the nature of many Edison schools. School districts (or state authorities) often turn to privatization as a measure of last resort for desperately failing schools.159 Edison seeks to bring these academically underachieving schools up to more acceptable levels.


158. FOURTH ANNUAL REPORT, supra note 92, at 14.

159. Id. at 15.
Edison maintains that its schools should be judged by the trend of assessment scores rather than by the actual percentages of students attaining state specification on criterion-referenced tests. Edison argues that the actual percentages do not accurately present the progress achieved in those schools where virtually no students attained state norms before Edison was contracted. In other words, because of the previous low performance of the schools which Edison generally gets to manage, the firm wants its schools assessed on their rates of improvement, not by a skewed comparison with other schools in the same district (or state). These considerations also make comparisons of progress between Edison and similar district schools complicated since the factors that led the district to contract with Edison initially are not likely to be replicated in those schools that the district continues to control.

Thus, one of the nation's most renowned education scholars concluded that since Edison is typically invited to administer schools that are in trouble, comparisons of Edison schools to state or national norms are likely to underestimate Edison school effects. This result is augmented by Edison's claim that the competition it creates with district run schools improves those schools as well since the district schools must adopt industry-best practices in an attempt to maintain enrollment.

Using the firm's methodology, positive academic achievement is evident in most Edison schools. In fact, the company has achieved substantial student academic achievement at its schools, leading one expert to conclude that "the weight of the evidence, though not definitive, generally supports Edison claims that they are providing more effective schools than are otherwise available to the students in the communities they serve."

Overall, eighty-four percent of the schools managed by Edison achieve better results than they did when they were run by the public sector, while only eleven percent (eight schools) registered lower levels of performance since contracting with Edison.

160. Id. at 16-17. In the school year 2000-01, ninety percent of schools opened with students who achieved below the average of their respective home districts. Chubb, supra note 93, at 105-06.

161. FOURTH ANNUAL REPORT, supra note 92, at 16-17.

162. PETER E. PETERSON, A GUIDE TO RECENT STUDIES OF SCHOOL EFFECTIVENESS 6 (1998).

163. Id. at 2, 7.

164. FOURTH ANNUAL REPORT, supra note 92, at 17-18. Edison frankly admits its failures. For example, third and fourth grade students at the Woodland B. Edison's Classical Academy in Kansas City, Missouri, lost an average of thirteen percentage points from 2000 to 2001 on the Missouri Assessment Program, while fourth graders
From the 1995-96 school year through the 2000-01 school year, students increased their criterion-referenced test scores by an annual average of six percent.\textsuperscript{165} For the 2000-01 school year, the average gain on criterion-reference tests was seven percentage points, one point higher than the average gain from 1995 to 2001.\textsuperscript{166} Moreover, this gain is at the proficient level, or higher, indicating that an ever-increasing number of Edison students are passing or even exceeding their state's standards. The firm also has sharply reduced the number of students failing state standards. From 1995 to 2001, Edison schools reduced the failure rate on criterion-referenced tests by an average of six percentage points per year. In the 2000-01 school year, Edison schools reduced failure rates an average of more than nine percentage points per school.\textsuperscript{167}

Edison has also demonstrated impressive gains on norm-referenced tests, such as the Stanford Achievement Test or the Iowa Test of Basic Skills, that measure performance on a percentile basis against students taking the test nationally. The average beginning scores for Edison schools were in the thirty second percentile on these tests, compared to a forty fifth national percentile rank for the schools in the same district.\textsuperscript{168} From the 1995-96 school year through the 2000-01 school year, Edison students, on average, gained five percentiles per year on national norm-referenced

\textsuperscript{165} FORM 10-K/A, 10/2/02, supra note 57, at 5, 16; FOURTH ANNUAL REPORT, supra note 92, at 20. Critics fault Edison's methodology for combining test results from different testing companies. Steinberg & Henriques, supra note 164, at A10.

\textsuperscript{166} FORM 10-K/A, 10/2/02, supra note 57, at 16; FOURTH ANNUAL REPORT, supra note 92, at 20-21.

\textsuperscript{167} FORM 10-K/A, 10/2/02, supra note 57, at 16; FOURTH ANNUAL REPORT, supra note 92, at 20.

\textsuperscript{168} FORM 10-K, 9/26/01, supra note 71, at 7, 16-17; FOURTH ANNUAL REPORT, supra note 92, at 21. A report commissioned by the National Education Association, hardly an Edison advocate, stated that students in Edison schools are generally showing academic achievement gains consistent with grade level advancement on norm-referenced tests. GARY MIRON & BROOKS APPELGATE, AN EVALUATION OF STUDENT ACHIEVEMENT IN EDISON SCHOOLS OPENED IN 1995 AND 1996, at xxii (2000) (on file with author).
Increasing student achievement five percentiles a year, twenty percentiles over four years, is the difference between many students not graduating from high school with few going to college, and virtually all graduating from high school and many going to college. As Edison schools raise the levels of academic achievement, "they are changing the lives of large numbers of students." 171

Once again, privatization opponents dispute these positive trends. A study of ten schools Edison opened in 1995, funded by the National Education Association ("NEA"), found "that students in [these] schools...—while they often start at levels below national norms and district averages—progress at rates comparable in other district schools." 172 This conclusion drew a sharp rejoinder from Edison which focused on the study's methodological infirmities. Edison countered by asserting that the study's:

ultimate judgment of "trends" on state tests uses an "odds-ratios" statistical model that requires test scores to be truncated to simple pass-or-fail dichotomies. This statistical simplification literally throws away all information about student progress everywhere along the achievement scale except the point of passing or failing. This is a serious problem for low-achieving schools which often make their initial progress by moving students out of the lowest performance categories and into "partially proficient" categories, just short of passing. According to the...pass-or-fail scheme a school that placed every student in the category just below passing would get equal performance scores. This measure is egregiously unfair, not to mention hopelessly inaccurate. It is a plain bias against finding success in schools working with traditionally low performing students. 173

Stepping back from the methodological quandaries, Edison's success, based on the positive trends and the improvement in test

169. FORM 10-K/A, 10/2/02, supra note 57, at 5, 15.
170. FOURTH ANNUAL REPORT, supra note 92, at 22; see Press Release, Edison Schools, Inc., Edison Hosts Investor Update, Announces "Life-Changing" Test-Score Results (June 18, 2002) (quoting John Chubb, "These are life-changing improvements... . . . . These improved scores mean improved opportunities for children to lead fulfilling lives.").
171. MIRON & APPLEGATE, supra note 168, at xxiv.
172. EDISON SCH., INC., UNION-Sponsored Study Provides Predictably Biased Evaluation of Edison Schools (2001). Edison critiqued the report for including only ten of 113 schools in the study and for omitting the 1999-2000 school year (the most recent year for which data were available), when that data indicated great improvement in the schools studied. These factors, coupled with the study's omission of any trend data, led Edison's Chief Operating Officer, Christopher Cerf, to state that the report was literally a sham.
173. FOURTH ANNUAL REPORT, supra note 92, at 22-23.
scores, means more when its school population is compared to the national school population. In the 2000-01 school year, sixty-four percent of Edison students were African-American, and another seventeen percent were Latino. Economically disadvantaged students, represented by the proxy of those receiving free or reduced-price lunches, comprised seventy percent of Edison students during the same academic year. Edison schools generally have succeeded with economically disadvantaged students and those of color, who have traditionally lagged in academic achievement and have languished in a public school system unable to meet their needs and unreceptive to change. Thus, Edison is making strides in its schools to close the minority achievement gap.

Beyond the aggregate statistics and trends, academic achievement gains at some Edison schools are noteworthy. In the 2000-01 school year, the student population at the Dodge-Edison Elementary School in Wichita, Kansas consisted mostly of students from low-income families, with sixty-eight percent eligible for free or reduced-price lunches. From Spring 1998 to Spring 2001, second graders at this school increased their reading scores by over forty percent while fifth grade results jumped by thirty-five percent. Math scores also increased during this time period, by more than twenty-nine percent among second graders and nearly ten percent for fifth grade students. Even an NEA commissioned study concluded, "...the gains made by students enrolled in Dodge-Edison are both substantial and positive."

Three Edison elementary schools in Baltimore, Maryland also demonstrated great success in their second year of operation. After a difficult first year that saw scores at two of the schools decline, the firm received much criticism, despite its successes at a third. At one school, Furman-Templeton Elementary School, no third-grader during Edison's first year passed the Maryland School

174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
179. MIRON & APPELGATE, supra note 168, at xiv, 63-78; cf. AM. FED'N OF TEACHERS, supra note 155, at 47-55; AM. FED'N OF TEACHERS, supra note 156, at 31 ("Based on state assessments, however, reading performance at Dodge-Edison is the same or lower than comparable schools, showing little progress since 1996. Math performance is below average for comparable schools and shows no progress since 1996.").
181. Id.; see FOURTH ANNUAL REPORT, supra note 92, at 63-65.
Performance Assessment Program tests, and fifth grade scores declined in every subject. In the second year of Edison operation, the three schools, all of which are nearly one-hundred percent African-American and two of which have more than eighty-five percent of students receiving free and reduced-price lunches, posted astounding gains across all grade levels.

Scores at Montebello Elementary, which had posted extraordinary gains in the 2000-01 school year, fell slightly to the ninetieth percentile (down from the ninety-fifth percentile) in reading and to the ninety-fourth percentile in math. Overall, the school raised its scores twenty-three percentage points per year over the two years among groups of students in all grade levels and subjects.

The Furman-Templeton Elementary posted a one-year first grade math increase from the twenty-third percentile to the seventy-fourth percentile in the Comprehensive Test of Basic Skills; while scores at Gilmore Elementary increased from the fifteenth to the forty-ninth percentile. Even on a comparable basis, the results are impressive. On the math portion of the Maryland Function Test, forty-four percent of the sixth graders at the three Edison schools passed compared to eleven percent in the Baltimore City Public School system. In reading, seventy percent of Edison sixth graders met the requirements compared to sixty-three percent of sixth graders district wide.

Despite these impressive test scores in the three Baltimore schools, Edison remained a focal point of controversy, reflecting smoldering tensions between the firm and the school board following the State Board of Education’s decision to take three of the lowest-performing elementary schools out of the district’s control and place them under Edison management. One Baltimore City school board member even accused Edison of recruiting the best students from Baltimore to its three schools and trying to send back “difficult and expensive students to other district schools.”

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183. Id.
188. Liz Bowie, City Board Quashes Expansion for Edison, Balt. Sun, June 12, 2002, at B3.
In other instances, the Edison schools have shown mixed test results. Henry E. S. Reeves Elementary School, located in an economically depressed area of Miami, Florida, has demonstrated a positive trend line. From the Spring of 1999 to the Spring of 2001, the performance of fifth grade students on the Florida Comprehensive Assessment Test increased at the top three levels by twelve percent; however, fourth graders only showed a two percent gain during the same time period. An NEA-funded study rated the school's performance as "mixed," with some improvements for Edison students but "the gains made by Reeves on the [criterion-referenced tests]—are similar to those made by the district and state groups." Moreover, in the 2000-01 school year, on a comparison basis, Reeves' students, eighty percent of whom were African-American, never exhibited an academic advantage in reading or mathematics over students in the program offered by the regular Miami-Dade County Public Schools.

The Boston Renaissance Charter School, one of Edison's first schools, demonstrated similarly mixed results, leading the NEA-funded researchers to conclude that the school "does not differ substantially from other district schools." Academic gains were, however, achieved at this school where for the 2000-01 school year, African-Americans and Latinos comprised, respectively, seventy-eight percent and thirteen percent of the student body. From the Spring of 1998 to the Spring of 2000, the percentage of fourth grade students achieving proficient or advanced levels on the Massachusetts Comprehensive Assessment System increased by one percent in English language arts and twelve percent in mathematics; the percentage of eighth graders scoring at these levels rose eleven and nine percent, respectively. In 2001, sixty-nine percent of the school's eighth graders failed a statewide math test, exceeding the fifty-four percent failure rate in the Boston school district. In English, twenty-two percent of the eight graders failed

189. Fourth Annual Report, supra note 92, at 49.  
193. Miron & Applegate, supra note 168, at 120; see Am. Fed'n of Teachers, supra note 156, at 90-120 (rating the school's performance as "mixed"). Likewise, the 1998 AFT study concluded, "it is still achieving at about the level of other schools serving low income students that are not participating in the Edison program." Am. Fed'n of Teachers, supra note 155, at 84.  
195. Id.
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compared with twenty percent district wide.\textsuperscript{196} Although the school's gains on the state's tests exceeded those of the district from 1996 to 2001, the charter board decided to reduce its relationship with Edison, citing an unusual governance arrangement (with teachers and administrators accountable to both the board and Edison) and a desire to pursue an independent educational path.\textsuperscript{197} Thus, it left Edison to provide only special education and professional development services.

Even if Edison has not yet raised academic achievement, a questionable conclusion, the substantial changes it makes will likely benefit students' academic performances in the long-term. In the 2000-01 school year, attendance rates reached ninety-four percent at Edison schools, compared to ninety-two percent for public schools nationally.\textsuperscript{198} By significantly increasing the number of computers available to students, Edison has given dramatically greater access to information. Since opening its first schools in 1995, Edison has placed 12,299 computers in its classrooms and has given an astounding 29,728 computers to students' families for home use.\textsuperscript{199} These technological investments in its schools, students, and families, although not contributing to the firm, facilitate learning and are helping to close the "digital divide" affecting the poor and minority communities where Edison mainly operates.

B. Increasing Parental Satisfaction and Involvement

Edison schools enjoy "high" parental satisfaction. In a 2000-01 school year survey prepared for Edison by an independent market research firm, and covering all the firm's schools then in operation, a majority (fifty-four percent) of parents rated Edison schools an A, another thirty-three percent rated the schools a B, for a total of eighty-seven percent of parents giving Edison schools an A or a B.\textsuperscript{200} In comparison, parents in traditional public schools rated

\textsuperscript{198} \textit{Fourth Annual Report}, supra note 92, at 27.
\textsuperscript{199} Id. at 10-11. This is in addition to the 3,985 laptops that Edison has given to teachers in its schools, increasing their ability to communicate with parents and to integrate computer skills into classroom activities.
\textsuperscript{200} \textit{Form 10-K/A}, 10/2/02, supra note 57, at 14 (stating that, for the 2001-02 school year, over fifty percent of the parents of Edison students gave its schools grades of A or A-); \textit{Fourth Annual Report}, supra note 92, at 24-25; see Susan Snyder, \textit{Is Edison The Answer? Nationwide, Consultant Averages a "B,"} \textit{Phil. In-
their schools, on average, a B-. According to the same market research firm, only 40.3 percent of parents with students in U.S. public schools for the 1999-2001 school years gave a grade of A or A-. The level of parental satisfaction at Edison schools, the equivalent of a B+ ranking (3.4 on a 4.0 scale), significantly exceeds the average parental ranking of 2.6 on a 4.0 scale for public schools.

Parental satisfaction is also reflected in an Edison’s student mobility (or school leaving) rate of twelve percent, far below the national average of seventeen percent. This is significant because the rate is traditionally higher in economically disadvantaged areas, such as those generally served by Edison.

Compared to public schools, Edison parents are not only more satisfied, but also more involved, thereby demonstrating how active parents can be in their children’s education when given multiple opportunities to participate. As previously discussed, the Edison Model provides for more interaction between the school and home environments, particularly through the use of computer technology and the implementation of quarterly parent-teacher meetings. Where funding permits, the distribution of a computer to every family of students in the third grade and above keynotes Edison’s emphasis on parental involvement. Parents are also encouraged to share accountability for their children’s academic performance by co-signing the QLC. Nearly all parents, some ninety-four percent, attend scheduled meetings with teachers. In addition, many parents participated in educational workshops and seminars designed to instruct them on how to help their children learn effectively. Because the learning process continues beyond the school day, parent involvement in a child’s education is crucial. By promoting more parent participation, Edison may facilitate increases in academic achievement, raise school attendance, and decrease drop-out rates even as the firm expands its operation of high schools.

Quirer, Mar. 31, 2002, at A1 (stating that “Edison’s greatest strength is perhaps parental satisfaction.”).

201. Fourth Annual Report, supra note 92, at 25.
204. Id. at 27.
206. See Form 10-K/A, 10/2/02, supra note 57, at 8.
207. Chubb, supra note 97, at 230 (reporting that ninety-four percent of parents attended QLC meetings in 1997).
C. Improving School Climate

The school environment has dramatically improved in Edison schools. Even a report commissioned by the NEA concluded, "[o]verall, the academic climate of the Edison schools is positive and the classroom culture promotes learning . . . . Most Edison Schools are safe, orderly, and energized . . . ."209 Increased and consistent enforcement of discipline through an insistence on appropriate student conduct and the implementation of rules governing student speech and attire instills a sense of safety and pride in Edison schools.

Teachers working at Edison schools overwhelmingly report positive experiences. As one elementary school teacher noted, "I think becoming an Edison teacher has been one of the most exciting things in my career. I am so glad I took the risk."210 Sixty-six percent of Edison teachers rate their school an A or B; turnover at Edison schools has decreased to a median rate of seventeen percent, only slightly above the public school average of fourteen percent.211 The longer Edison operates a school, the greater the enthusiasm teachers express about working for Edison.212 Also, teachers with more experience were happier teaching at Edison schools, and experienced teachers who had taught for more than seven years were the most enthusiastic about working in an Edison school.213 The results may be surprising because Edison demands more of its teachers because both the school day and school year are longer. Higher morale has lead to greater enthusiasm in the classroom, more effort applied at work, and decreased turnover.

The enhanced satisfaction and higher morale among Edison instructors may be attributed to the fact that Edison "recreates" schools. Edison contracts to manage poorly performing public schools and turns them into safe and orderly places. Teachers are enthusiastic about the cohesive curriculum and school design, the increased access to technology and other resources, and the professional support they receive.214 As one teacher put it:

I feel extremely fortunate to have had the opportunity to start and to work at this Edison school. Imagine! I have become very computer literate, have my own laptop computer and a class-

209. Cookson et al., supra note 153, at 3.
210. Id. at 29.
212. Cookson et al., supra note 153, at 34.
213. Id.
214. Id.
room filled with equipment, materials, and curriculum books for every subject. I have been trained in every subject area and have also become a trainer for reading and science. I am a part of a school design that not only consists of weekly training but sharing meetings with my grade level co-workers and also meetings that coordinate my teaching efforts with those teachers in my house.\textsuperscript{215}

Teachers point to the extensive professional development, the opportunity to work in teams, and the career ladder Edison provides. The firm invests heavily in the professional development of its teachers, enabling them to continue to develop their skills as educators on an ongoing basis. Edison typically offers its teaching staff two weeks of training before a new school opens and additional training during a school’s first year. In those schools with longer days, teachers generally receive two free periods each day for their own professional development. Each year they also receive at least three days to continue their professional development through various modes, including national and regional conferences related to the Edison curriculum and school design, ongoing site support, and national meetings and conferences providing training in specialized school leadership roles.\textsuperscript{216} The high quality of professional development Edison teachers receive, one study found, motivates them to a considerable extent.\textsuperscript{217}

The Edison Model encourages teachers to work together in teams, thereby reducing their isolation.\textsuperscript{218} As one veteran teacher stated, “Never have I felt so much a part of a team.”\textsuperscript{219} Certain teachers, designated as the “lead teacher,” assume responsibility for a team’s management and serve on a school-wide management

\textsuperscript{215} Id. at 28. One study found that the overall structure of the Edison design motivates and satisfies teachers to a “moderate extent.” Laura Ann Miller, The Impact of the Edison Design on Teachers and Their Perception of Its Impact on Improved Student Achievement Over Time 109 (2000) (unpublished Ed.D. dissertation, University of LaVerne, LaVerne, California) (on file with author) (reporting ninety-two completed surveys from teachers currently working in three Edison schools in California). This study also found that teachers in their third and fourth years at an Edison school find the Edison school design more motivating that first year teachers. Id. at 110-11, 115, 148, 158.

\textsuperscript{216} FORM 10-K/A, 10/2/02, supra note 57, at 6; FOURTH ANNUAL REPORT, supra note 92, at 12-13; OFFICE OF EVALUATION & RESEARCH, supra note 136, at 9; Chubb, supra note 97, at 216, 226.

\textsuperscript{217} Miller, supra note 215, at 121-22, 149, 150. Teachers with more experience in an Edison school were more satisfied with their professional development opportunities than new teachers. Id. at 124.

\textsuperscript{218} COOKSON ET AL., supra note 153, at 35.

\textsuperscript{219} Id. at 30.
team, enabling them to participate in their school’s management. These teachers are also awarded with higher salary in many of the schools where Edison controls payroll. Daily professional development time enables teachers to work and plan as a team and provide peer tutoring for team members.

Edison teachers are particularly pleased with the implementation of a career ladder approach that allows truly outstanding teachers to receive promotions and pay increases, instead of the “flat career” trajectory that typifies K-12 public schools. The firm offers a four-level career program—resident, teacher, senior teacher, lead teacher—for teacher advancement—which promotes the best to positions of greater responsibility, professional fulfillment, and compensation, while removing the weakest from the classroom.

Edison teachers also benefit from strong, experienced principals, who are not afraid to fire non-performing teachers. Edison principals monitor the hiring and assessment of teachers and strive to retain only productive instructors. Principals are held accountable for school performance in three areas: student academic achievement, financial management, and community satisfaction. Each principal is appraised and compensated based on her progress.

220. Chubb, supra note 97, at 225.
221. Cookson et al., supra note 153, at 36, 41. One study found, however, that career ladder opportunities only provided “moderate” scores for motivation and satisfaction. Miller, supra note 215, at 118, 163.
222. Form 10-K/A, 10/2/02, supra note 57, at 8; Office of Evaluation & Research, supra note 136, at 8.
223. Cookson et al., supra note 153, at 37. For-profit firms manage instructional and administrative personnel more effectively by reconstituting their schools with teachers and principals who buy into a particular model and who opt as a team to do something differently. Beyond adequate funding, skilled onsite management, and dedicated teachers, the entire school community—administrators, instructional, and non-instructional staff—ought to share a common vision. Edison has ideally sought complete control over the teachers and principals at its schools. It reasons that successful schools rest on successful cultures, staffed by people with similar educational philosophies. This approach works for Edison-run independent charter schools, where the firm recruits its teachers. In a school (or schools) Edison manages for a district (or a state authority), the firm generally operates with unionized teachers under a collective bargaining agreement, modified in various areas, such as length of the school day and year, compensation, and methods of evaluation. Typically, each teacher is guaranteed employment in the district, but not necessarily in an Edison school. If a teacher wants to stay at that school, she goes through an interview process with Edison with the firm having the choice whether to offer a position at that site. For teachers, the risks of participation are low. If they do not like the Edison experience, they are guaranteed their seniority and position in the district. Chubb, supra note 60, at 112.
against these accountability criteria.\textsuperscript{224} Edison exerts its leadership by holding principals accountable and replacing those who do not meet its standards.\textsuperscript{225}

Overall, Edison schools are meeting their objectives. Despite mixed or even negative test results at some Edison schools, generally the evidence supports Edison's assertions of a significant positive trend in academic achievement. Other beneficial elements include the building of stronger relationship between parents and teachers and an improved school environment.

V. POLICY CONSIDERATIONS

There is no dispute that America's public schools are failing, especially inner-city schools. What should be done to improve K-12 education, however, is widely debated.\textsuperscript{226} Teachers' unions and administrators want to reward failure with additional funds for more teachers, programs, and specialists, without a corresponding increase in accountability. To a large degree, the public sector's solution has been to pump more money into schools, with few, if any, results to show for the increased per pupil expenditures. Many school districts, such as Philadelphia, are turning to new alternatives in order to revitalize their education systems. Edison, the forerunner in for-profit education, is sparking heated discussions in communities considering alternatives to failing public schools. Simply put, this debate revolves around a single question: should we put our faith in market-based reforms, such as privatization, or continue to look to K-12 education as a public sector monopoly? After presenting various arguments, this Section concludes that the introduction of EMOs, such as Edison, into the school marketplace will impact education in a positive direction by promoting competition that ultimately will prove beneficial for students.

A. Arguments Against For-Profit K-12

Contrary to popular belief, business has a long history of involvement in K-12 education. Profits have been made from the sale of books, curricular materials, equipment, technology, and testing programs. As private enterprises expand their operations into direct involvement with the education of students by taking over the management of K-12 schools, concern has arisen about

\begin{footnotesize}
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\item \textsuperscript{224} Form 10-K/A, 10/2/02, \textit{supra} note 57, at 8.
\item \textsuperscript{225} \textit{Cookson et al.}, \textit{supra} note 153, at 35, 37.
\item \textsuperscript{226} See, e.g., Symonds, \textit{supra} note 103, at 66.
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the transformation of an institution seen as serving as the "public good"—a civilizing, democratizing force which promotes social harmony, equality and tolerance, and creates a sense of community—into an institution that creates and reproduces the prevailing capitalistic, consumer-oriented culture. In addition to this public school ideology, opponents of EMOs maintain that parents will not make sound educational decisions for their children and that for-profit firms will be unresponsive to parents' and community concerns.

First, opponents of privatization offer a nostalgic, rather idealistic vision of the "public good," centered on the notion of a common democratic culture.227 As one commentator put it, "[t]o deploy public funds away from public education and toward privatized schemes is a betrayal of the democratic public interest. ... The mission of public education is serving the social good."228 and the development of "social power and insight."229 Others stated:

[p]ublic education is a social commitment that transcends individual interest and corporate gain . . . . It means that, as a human service, education is grounded in a belief in human dignity that transcends the values and behaviors associated with markets. It means public education cannot be squeezed to fit the market model and still meet the needs of a just society.230

Public education is viewed as a "public good"—one that invests in young persons the hope that they will become knowledgeable, productive, and civil adults, with a concern not only for themselves or even for their society, but also for the welfare of the planet and for posterity. Such education is best removed from the marketplace, which is necessarily bent on producing monetary profit over a relatively brief period of time.231 In other words, public schools

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229. Id. (quoting JOHN DEWEY, THE SCHOOL AND SOCIETY 18 (1915)).


promote cultural unity, while privatization, at least so the argument runs, facilitates social fragmentation by undermining America's shared civic culture, which is based on a common set of values, basic knowledge, respect for the rule of law, and active participation in the democratic governance.

Critics of privatization fear a commercial culture will replace civic values and democratic principles with the language of the market replacing the language of democracy. Education would then become less of a force for social improvement and more of a source of shareholder benefit. This idealized conception confuses the purpose of public education by overemphasizing the "public"—socialization into America's civic culture—with "education"—giving students the intellectual tools they need to be functional, productive members of that society.

Privatization is also seen as an attempt to erode the strength of public authority and the trust in government to address pressing social concerns, such as the corrosive impact of poverty. Anti-privatization advocates view the spread of EMOs as part of a widespread effort to undermine the capacity of American "public institutions to carry out important social functions."

These notions of the public sphere—education as a force for progress and civic virtues—a common core culture that will raise the capacity for citizenship and participation in society—encounter several harsh realities. America's neighborhood schools are stratified by race and income so that the demographics requisite to the common school experience no longer exist. Public schools keep the children of poor parents trapped in neighborhood inner-city schools. These schools are unable to meet the challenge of providing inner-city students with a sound education, universally acknowledged as the way to a better life. Many lack a mastery of the basics (reading, writing, math, history, and science) as well as a sense of punctuality and discipline. A need exists for K-12 schools to effectively educate students in the academic basics, the solid tried and true educational practices, while maintaining orderly classrooms and enforcing socially acceptable codes of behavior. To fill this void, enter for-profit (as well as an array of non-profit) schools.

Opponents of privatization are suspicious of (and even hostile to) anyone trying to make a profit from America's supposedly

233. Gardner, supra note 231, at 44.
egalitarian K-12 education system. Those with this mindset find it hard to accept shareholders seeking a return on their investment as legitimate stakeholders in their children's education. For-profit EMOs are seen as putting their bottom line ahead of solid educational practices, concerned more with making money for their shareholders by cutting costs than attaining improvements in students' reading and math skills. Education entrepreneurs will, at least the argument goes, exploit children to maximize profits by hiring inexpensive teachers, offering low quality cafeteria meals, ignoring special needs children, and using huckster-type advertising to attract more revenues. In short, any savings extracted from the current system should benefit students, not shareholders or corporate executives.

There are two answers to these allegations. Student achievement and the ability of EMOs to make profits are linked. Chubb has noted that the tension between generating profits for shareholders and spending funds in schools "can be a healthy one. In a number of critical ways, the pressure to make profits has forced . . . [Edison] to improve the service it offers communities, not compromise it." The need to achieve equilibrium between the interests of Edison's shareholders and its students is "a delicate balance [Edison threads] every day . . . ." Whittle has stated, "[w]e understand that our number one concern should be that we run good schools for kids. If we don't do that, we're not going to be in business, and in many respects, that's the whole point of this, is that kind of accountability makes us run good schools."

The most successful education management firms will enable their students to learn the most at the lowest cost. Absent corruption or one-sided contracts, for-profit firms will (and must) be held accountable by the school districts, charter boards, or other public authorities that will not renew their contracts if they do not deliver on their promises. Parents who select Edison's independent charter schools operating outside local district control may, if dissatisf

234. See, e.g., Jonathan Kozol, Kids As Commodities: The Folly of For-Profit Schools, 84 Bus. Soc'y Rev. 16 (1993); Kozol, supra note 231, at 272. See generally Jonathan Kozol, Savage Inequalities: Children in America's Schools (1991) (illustrating such practices); Phyllis Vine, To Market, To Market... The School Business Sells Kids Short, Nation, Sept. 8, 1997, at 11 (describing political and business motivations behind the Edison and charter school movements).

235. Chubb, supra note 105, at 113.

fied, remove their children from an Edison school. Other Edison parents may also select other educational arrangements. In sum, if for-profit firms cut costs to the detriment of quality, they will ultimately lose customers, whereas, if they spend to increase quality, they may go out of business.

Public authorities, whether school reform commissions, school districts, or charter boards, must focus on the contracting process to harness competitive forces in the public interest. Public bodies need to attract a reasonable number of bidders who are required to conform to a set of specifications. Contracts must set rigorous obligations, including accounting for expenditures and meeting measurable educational performance outcomes, both the quantitative indicators (scores on standardized and customized tests) and the qualitative factors (student and parent perceptions about the school climate), with success rewarded and failure penalized. Contracts also need to ensure that students receive a learning experience beyond simply raising test scores (in other words, make EMOs more than teach the test) and that those who need extra attention to succeed receive costly instruction. Contracts must contain termination provisions with costs and responsibilities clearly delineated. For example, on termination what happens to computers and other equipment an EMO has installed? Contracts must require financial guarantees from EMOs. Public bodies must be prepared to fire for-profit firms that fail to meet contractual educational performance and other specified standards. Conversely, an agreement must allow an EMO to terminate a contract if it does not receive the required payments or if the public body fails to adhere to the firm’s recommendations for personnel or other contractual matters. Contracts must also contain termination provisions with clearly delineated costs and responsibilities.

Second, critics of for-profit firms maintain that low-income, disadvantaged, uneducated parents are not capable of making sound educational decisions, thereby jeopardizing their children’s futures. They assert that many of these parents do not understand school “quality,” including issues such as teaching methods, curriculum, and administrative policies. Thus, a number of parents might

237. Chubb, supra note 93, at 90, 96; see Whittle, supra note 236.
239. See, e.g., ASHER ET AL., supra note 227, at 15-16.
fail to inform themselves about these criteria or base their decisions on "incorrect" criteria, such as race or ethnic composition, or other factors considered inappropriate by the education elite. These critics, therefore, feel that educational choices must be left to the experts, school administrators, and government agencies.

The empirical data, however, indicates that poor parents with limited formal education do choose schools based on rational grounds, such as teacher quality, school resources, and academic achievement rates. Parents want "good" (i.e., soundly performing) schools for their children where they will acquire basic skills in an environment emphasizing discipline, yet staffed by teachers sensitive to their children's needs. In sum, parents do not need the well-meaning help provided by school administrators and government agencies in making sound educational decisions for their children.

Third, critics assert that EMOs will not be responsive to parent and community concerns. Elected or appointed public officials are viewed as more sensitive to community needs than the white, faceless, far-off executives of for-profit firms. Parents and politicians also fear losing control over local schools. Privatization would, in other words, threaten to diminish community or parental power and reduce the community's role in directing the management and operations of the school district.

Once again, reality conflicts with an idealistic vision. The number of public school districts in the United States has declined significantly from more than 119,000 in 1937 to fewer than 15,000 today. As parents and community members grow more distant from educational decision makers, whether local school boards or (increasingly) state administrative bodies, the spiraling bureaucracy lessens the ability of parents to influence educational decisions, basically rendering citizens powerless to affect school policy. If parents are dissatisfied with their children's education, they must "initiate a complex political dynamic (influence the school board, affect the outcome of a local election, initiate a court battle) against great odds to induce providers to change." In contrast,

the competitive delivery of education services may enable parents to short-circuit the current, rather cumbersome process of change.

B. Arguments in Favor of Privatization

Forty years ago, Milton Friedman argued that public schools, monopolistic, inefficient, and sluggish, were inherently incapable of reforming themselves.244 Viewing a governmental monopoly in the delivery of education as promoting waste, curtailing innovation, and facilitating mediocre performance, stagnant in the form and content of instruction, as well as indifferent to the needs of children and parents, he called for opening K-12 education to market forces. By enhancing efficiency and performance, competition would elevate the overall level of educational quality in schools and stimulate public schools to reform themselves or risk oblivion.

From a slightly different angle, public choice theorists also saw the need for outside catalysts to bring about change.245 They premised their conclusions on the assumption that the current system primarily serves the needs of its bureaucrats, specifically, the education establishment consisting of teachers' unions and school administrators. With these bureaucracies having no incentive to improve and being incapable of reforming themselves, only private enterprise could achieve innovation. A market-oriented approach would, unless sabotaged by rigid regulation, produce a much wider range of alternatives. Furthermore, for-profit firms would be held accountable by external standards (profitability) and would be far more likely to be output (results-oriented) driven.

In a widely read, influential book, Politics, Markets and America's Schools,246 published in 1990, two social scientists, Chubb and Terry M. Moe, called for the establishment of an educational marketplace where schools would compete for students. Anticipating the charter school movement of the 1990s, they recommended a variety of loosely regulated, publicly-funded schools. They also advocated allowing parents to use public funds to send their children to private schools. Most importantly, they main-

244. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962). Friedman argues that education could be delivered more efficiently through vouchers given to parents as they would give schools incentive to develop better educational programs and would involve parents as participants. Friedman also argues that socialization goals would be attained to a greater extent, as schools would not be as segregated by wealth (or race).


246. CHUBB & MOE, supra note 58, at 189.
tained that competition would undermine the public sector's bureaucratic education monopoly, introducing innovation, increasing quality, and reducing costs. The fiscal pain brought about by the loss of students to charter schools and for-profit managers would force public systems to quickly adapt to parents' needs. A customer-driven educational system would weed out substandard schools far more quickly than relying on change in the traditional public system. In place of an educational system captured by public sector bureaucracies, competition would create incentives for innovation, facilitate research and development, and give parents real options while promoting effective teaching and learning, especially for inner-city students.

Increased competition in K-12 education has fostered innovation in teaching and learning. For example, Edison has introduced innovative ideas and offers educational advantages for its students: a longer school day and year, art or music every day, a foreign language beginning in kindergarten, a computer for home use. These developments and others by Edison have led to the creation of an alternative model for public school operations—a model that has thus far demonstrated considerable success.

According to privatization proponents, competition will also generate more research and development, thereby increasing innovative and more effective learning tools for K-12 students. As EMOs strive to offer the "best" education, they will invest more money in research and development. Today, less than .03 percent of our nation's public school expenditures is invested in K-12 educational research and development. In contrast, some for-profit firms spend one-hundred times that percentage amount. Furthermore, beyond the dollars expended, most publicly funded K-12 research and development is currently undertaken by university-based researchers with their own academic agendas. Relatively little application (development) occurs to take this research into practice.

In addition to research and development focused on the classroom, for example, student achievement, curriculum, instruction, technology, and assessment, for-profit firms will likely direct funds to previously under-researched areas, such as school management and organization systems (for example, asking whether teams with

247. See supra notes 138-148 and accompanying text.
249. Id.
senior teachers accountable for supervision and evaluation are more effective than administrators who supervise and evaluate). EMOs could also research compensation arrangements, including the pros and cons of merit pay, school-wide performance bonuses and increased pay for math and science teachers who are in short supply but high demand.

Not all experts, however, see competition as promoting innovation across the board. These dissenters see competition, specifically, the widespread management of K-12 schools by for-profit firms, as facilitating innovation in organization, not in classroom practice. These theorists, who move from the premise that economic markets are producer-oriented, not consumer-oriented, perceive standardizing tendencies resulting from competition and consumer choice. Providers are seen as shaping consumer preferences through marketing campaigns. Furthermore, the choices of parents as consumers may limit curricular options with innovation being a low priority for many parents. Rather, most parents will choose the school that produces the education they value, typically, academic achievement and discipline. EMOs may limit experimentation as well as research and development efforts in response to what parents consider a real school characterized by orderly behavior and high test scores as the uniform goals for students.

Beyond these theoretical arguments, pioneering empirical studies have concluded that competition increases public school productivity. Assuming test scores serve as a reasonable measure of education output, some argue that educational productivity rises if parents have more choice among diverse educational options. School choice can take the form of private schools (for-profit and non-profit), charter schools, vouchers for private schools, and in metropolitan areas with many school districts, parents moving to another town within the same area. By comparing test scores in areas with and without choice, these studies indicate that in areas where there is competition, the public schools are more effective.


Public schools facing the most severe competition raised student test scores more than schools facing little or no competition. The gains were particularly dramatic for African-American and Latino students in these schools. Faced with competition, public schools improved by focusing time and attention on students, unifying the work of instructional personnel, and replacing teachers who would not cooperate with the program.

What seems clear is that competition from EMOs, such as Edison, has advanced the reform agenda within public school systems by shaking-up entrenched practices. It places pressure on public schools to change, to raise curriculum standards, and to operate more efficiently. A review of forty-one empirical studies testing the impact of competition on a variety of outcomes, including academic test scores, graduation/attainment, expenditures/efficiency, and teacher quality, concluded that a sizable majority of the studies report beneficial effects of competition across all outcomes.252

Competition opens the opportunity for reformers within the public school system to introduce (or at least, gain a hearing) for new approaches and programs.253 Competition will help convince local politicians and school administrators that an alternative way of addressing perceived problems exists. Public officials will be challenged to explore (and hopefully implement) educational models that may not require massive new funding, but yet have the potential to invigorate stagnant public education systems.

With more diverse schools and a multiplicity of potential schools to teach at, competition enables teachers to choose where and how they want to teach. Privatization will help introduce new school managers and teaching methods into the education marketplace. With these options, instructors will be able to pick and choose which program best matches their teaching styles, thereby promoting greater job satisfaction, and, ideally, resulting in greater enthusiasm and enhanced classroom performance. Although some teachers do not want to work longer hours and more days, describing the Edison approach as "discouraging and overwhelming,"254

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253. See, e.g., Matthew Miller, Why Not Give Edison Schools a Chance?, S A N D I E G O U N I O N-T R I B., Apr. 1, 2002, at B6 (noting the statement of West Covina, California, Superintendent of Schools Steve Fish that Edison's example "has moved my reform agenda ahead four or five years here."); see Snyder, supra note 200, at A1.

talented teachers will receive more freedom, greater professionalism, and higher compensation.\textsuperscript{255}

Competition will offer low-income, inner-city families the same opportunities afforded to the middle-class suburbanites. Edison has been criticized for profiteering from poor students. As one commentator wrote, "[a]t bottom, what's most questionable about Edison—and what the critics most dislike—is simply the idea that somebody is trying to turn public education into a profit-making enterprise and that it tries to do that primarily on the backs of the poorest and neediest kids."\textsuperscript{256}

Most students enrolled in Edison schools are children of color from low-income families. Over eighty percent of Edison's students, nationwide, are from minority groups, with sixty-four percent of its students being African-American and seventeen percent being Latino. Seventy percent of the students at the average Edison school receive free or reduced-cost lunches, a proxy roughly corresponding to some degree of poverty.\textsuperscript{257}

All of Edison's schools offer the same educational benefits. Parents appear happy with the fact that Edison improves the learning environment by increasing academic standards, raising test scores, and improving discipline and security at its schools.\textsuperscript{258} It also introduces technology into poor communities, offering parents home computers training and internet access.\textsuperscript{259} Edison schools also work with communities offering programs that match neighborhood needs. Therefore, children are not only getting more attention and better services that level the playing field but parents and the community at large are also enhanced by the introduction of Edison schools.

The quest to provide low-income, minority families with the opportunity to send their children to effective schools where they can attain at least a basic education encounters two major obstacles—a child's home and her community and peers.\textsuperscript{260} Some parents do


\textsuperscript{256} Schrag, supra note 35, at 23.

\textsuperscript{257} Chubb, supra note 93, at 92.

\textsuperscript{258} See supra notes 200-208 and accompanying text.

\textsuperscript{259} See supra notes 148, 206 and accompanying text.

\textsuperscript{260} See, e.g., Paul D. Houston, Making Watches or Making Music, 76 Phi Delta Kappan 133, 134 (1994); Christopher Jencks & Meredith Phillips, America's Next Achievement Test, 9 Am. Prospect 47 (1998); James Traub, What No School Can Do,
not exert much effort to advance their children's educational attainment. Where parents have little or no post-high school education, their homes are often devoid of cultural advantages gained by an emphasis on the importance of education in a child's life. When parents never read to their children, books do not gain much respect. A lack of interest in educational achievement on the part of parents filters down to their children who find their natural curiosity squashed. Children spend the vast majority of time (perhaps as much as ninety percent) from birth to age eighteen outside of school, and only about ten percent in school. The difficulties students bring to school have a significant impact on their education. These difficulties, ranging from broken homes to drugs, family decomposition, crime, chaotic neighborhoods, and tawdry values promoted by entertainment, are hard to overcome. It is difficult for any type of education reforms to overcome the ways parents raise their children and these pervasive, corrosive social forces.

**CONCLUSION**

For-profit education, on its face, may seem contradictory. All jurisdictions in the United States provide children with a free, universal twelve-year education. For some, a for-profit corporation offering K-12 education seems like an inherently bad concept. Ironically, Edison's for-profit educational model has not produced a profit, yet it has improved education. Despite incurring losses every year since it began managing schools in 1995, Edison has increased students' standardized test scores, offered more opportunities for parents to get involved, and improved teacher morale. To their credit, Whittle, Schmidt, and Chubb have revolutionized K-12 education through the Edison Model.

Edison's successes have the public school establishment—the teachers' unions and administrators—worried. They oppose the large-scale reformation of K-12 education necessary to induce competition into a moribund system, and are particularly hostile to methods of doing so that are embedded with a profit motive. Beyond philosophic and policy arguments supporting education as a public function, their self-interest is blatant. They have a direct fi-

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N.Y. TIMES, Jan. 16, 2000, § 6 (magazine), at 52; see also Brent Staples, Fighting the Culture of Poverty in a Worst-Case School, N.Y. TIMES, Mar. 4, 2002, at A20 (summarizing the harsh reality Edison met in taking over nine out of ten Chester Upland, Pennsylvania schools, and in particular the Chester High School).

nancial stake in continuance of the public school monopoly that pays money for showing up and rewards seniority, rather than achievement by students or teachers. Blind attachment to the public sector as the solution for the ills afflicting America's K-12 education system reflects an elitist, anti-business, pro-government bias, and a misguided devotion to traditional ways of doing things.

In the future, public sentiment may shift in a more pragmatic, less ideological direction—to a greater focus on what works, not the source of the solution. The U.S. may open itself to market-oriented educational reforms. As public schools continue to fail our youth, privatization may help chart a new course for America's public schools and offer hope for inner-city youth. The system can change through the use of market forces coupled with rigorous, contractual standards of accountability and greater parental involvement. The coming decades may witness an economic and social transformation potentially impacting millions of lives.
INTRODUCTION

Lawsuits challenging New York State's public elementary and secondary school funding formulas have followed, in several respects, the school finance litigation trends in other state and federal courts. The most notable linkage lies with New York plaintiffs' incorporation of doctrinal developments from successful litigation attacking public school funding systems in other states. As this Article demonstrates, the first New York school finance case, Board of Education, Levittown Union Free District v. Nyquist1 ("Levittown") commenced after victorious public school funding cases in California, Serrano v. Priest,2 and New Jersey, Robinson v. Cahill.3

The Serrano and Robinson cases provided a useful litigation blueprint for raising legal challenges to state public elementary and secondary school funding systems based largely upon "equity" principles and arguments.4 Equity-based challenges in school finance litigation rely primarily upon state constitutional equality or equal protection provisions.5 The most typical equity argument raised by plaintiffs is that a state public school funding system,

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1. See generally 439 N.E.2d 359 (N.Y. 1982).
2. 487 P.2d 1241, 1266 (Cal. 1971).
4. See Serrano, 487 P.2d at 1252 (discussing plaintiff's argument "that there is a correlation between a district's per pupil assessed valuation and the wealth of its residents"); see also Robinson, 303 A.2d at 291-93 (discussing state statutes' creation of an equitable school system).
5. Serrano, 487 P.2d at 1249-55; Robinson, 303 A.2d at 288-98.
which relies largely upon local property taxes, is inherently unfair or impermissibly disadvantages poorer school districts.\footnote{6} Plaintiffs also frequently point to specific provisions within state financing practices benefiting wealthier public school districts at the expense of allocating more funds to poorer districts.\footnote{7}

Although the \textit{Levittown} litigation was eventually unsuccessful,\footnote{8} in 1989, school finance reform advocates and interest groups were encouraged by three successful cases in Montana,\footnote{9} Kentucky,\footnote{10} and Texas.\footnote{11} These cases provided a related, but newer, legal argument revolving around a theory of “adequacy” to challenge state public elementary and secondary school finance practices.\footnote{12} Adequacy-based challenges revolve around the interpretation of education articles or guarantees found in respective state constitutions whereby plaintiffs argue that children in poorer school districts are deprived of a legally “adequate” level of education.\footnote{13} Plaintiffs frequently cite numerous inadequacies in education services, such as school facilities, lack of textbooks and qualified teachers, inferior computers, etc., to bolster claims that a state fails to meet its burden of providing an adequate public education to all school children in a given state.\footnote{14} Consequently, plaintiffs commonly assert that more state funding needs to be diverted to poorer school districts to address any inadequacy.\footnote{15}

Both the development in the 1989 cases and the New York Court of Appeals’ recognition in \textit{Levittown} that they could entertain future claims of a “gross and glaring inadequacy” in public education currently provides New York education finance reform groups with a new angle from which to challenge the state’s public school funding formulas.\footnote{16} 

\footnote{6. See, e.g., \textit{Robinson}, 303 A.2d at 293 (discussing New Jersey’s school system).} \footnote{7. Professional educators often refer to this as an “input” problem whereby money is considered one of the key input variables resulting in improved educational services or “outputs” within a school district. \textit{Id.} at 277.} \footnote{8. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 369-70 (N.Y. 1982).} \footnote{9. Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 685 (Mont. 1989).} \footnote{10. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215-16 (Ky. 1989).} \footnote{11. Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 498-99 (Tex. 1991).} \footnote{12. Rose, 790 S.W.2d at 219; Helena Elementary Sch. Dist. No. 1, 769 P.2d at 690; Kirby, 804 S.W.2d at 496-97.} \footnote{13. Rose, 790 S.W.2d at 190-96; Helena Elementary Sch. Dist. No. 1, 769 P.2d at 688-90; Kirby, 804 S.W.2d at 495-98.} \footnote{14. See, e.g., \textit{Rose}, 790 S.W.2d at 198 (discussing the disparity between school districts in poor and affluent neighborhoods).} \footnote{15. See, e.g., \textit{Kirby}, 804 S.W.2d at 496-97 (stating that inequality will be solved only by diverting more funds to poor school districts).} \footnote{16. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982).}
Part I of this Article evaluates the influence of federal courts’ school finance cases on the New York school finance groups’ decision to litigate in the New York courts. Particular attention is paid to the holding, rationale, judgment, and legal claims of interest groups in relevant school finance cases decided by the United States District Court and the United States Supreme Court in San Antonio Independent School District v. Rodriguez,17 which effectively closed the federal courts’ door to school finance claims.

Part II analyzes the importance of other states’ legal precedents in school finance cases as a factor influencing interest groups in New York to challenge the state’s public education funding formulas.

Part III discusses in detail the progression of public elementary and secondary school funding formula litigation in New York, beginning with Levittown, up to the most recent case, Campaign for Fiscal Equities, Inc. v. State of New York.18 The discussion focuses on the legal arguments raised by various interest group-plaintiffs and traces the development of those arguments to school finance cases in other states. Finally, the conclusion highlights the potential course of school finance reform in New York State.

I. Federal School Finance Cases

The equity ideas upon which the first public school finance cases relied upon begins in some respects with the decision handed down by the United States Supreme Court in Brown v. Board of Education.19 During the 1950s, “Jim Crow segregation” laws discriminated against African-Americans in places of public accommodation, including public schools.20 During the early 1950s, a number of African-American students in Delaware, Kansas, South Carolina, and Virginia, through their legal representatives—the National Association for the Advancement of Colored Persons (“NAACP”)—filed suit in order to racially integrate public schools using the argument that segregated schools violate the Equal Protection Clause of the United States Constitution.21 A three-judge panel of the United States District Court denied the relief sought by the plaintiffs, relying on the “separate but equal”
doctrine established in 1896 by the Supreme Court in *Plessy v. Ferguson.*

All four state cases made their way to the United States Supreme Court and were heard together. In delivering the unanimous opinion of the United States Supreme Court, Chief Justice Earl Warren began by recognizing both the importance of public education to society and trial evidence demonstrating inequality in facilities, curricula, and salaries of teachers between African-American schools and white schools. The Court determined that segregation of public schools based upon racial classifications violates the Equal Protection Clause. It is generally understood that *Brown* served as a catalyst for many civil rights cases, including education reform litigation involving school finance in state and federal judiciaries.

In the summer of 1968, Demitro Rodriguez and a group of other Mexican-American parents—whose children attended elementary and secondary schools in the Edgewood Independent School District (an urban school district in San Antonio, Texas)—filed a lawsuit in the United States District Court for the Western District of Texas against the Board of Education, the Commissioner of Education, the Attorney General of Texas, the Bexar County Board of Trustees, and seven local school districts in the San Antonio metropolitan area. At trial, a great deal of evidence was introduced surrounding the Texas system of school finance, the foundation of which was traced back to the late nineteenth century.

The Texas Constitution provides for the establishment of a system of free schools. The constitution was amended in 1883 to empower local school districts to levy *ad valorem* real property taxes with the consent of local taxpayers for the maintenance of the free system of public schools. Locally raised funds were supplemented by revenue from the Available School Fund, a state-run program funded through a state *ad valorem* property tax and other state taxes. The Texas legislature responded in 1947 to growing disparities in the value of assessable property between local dis-

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22. 163 U.S. 537, 540 (1896).
24. *Id.* at 493-94.
25. *Id.* at 495.
27. *Id.* at 6-14.
29. *Id.* art. VII, § 3; *Rodriguez*, 411 U.S. at 6-7.
They appointed an eighteen-member committee composed of legislators and educators, to explore alternative systems used in other states and to propose a funding scheme guaranteeing minimum educational services to each child in Texas that would overcome interdistrict disparities in taxable resources. The efforts of the committee resulted in the enactment of the Gilmer-Aikin bills establishing the Texas Minimum Foundations School Program, which was the system challenged by the plaintiffs in Rodriguez.

The Texas program provided for local and state contributions to a fund earmarked for teacher salaries, operating expenses, and transportation costs. The State, which supplied funds from its general revenue, financed approximately eighty percent of the program’s cost, while the local school districts, acting as a single unit, financed the remaining twenty percent. The latter’s share, referred to as the Local Fund Assignment, was apportioned among the school districts under a complex formula designed to reflect the relative local real property纳税能力 of each district.

The plaintiffs challenged this system on the ground that it violated the Equal Protection Clause of the United States Constitution by discriminating against school children residing in poorer districts, while favoring those residing in more affluent districts.

At trial, the petitioners compared their neighborhood, the Edgewood Independent School District (one of the poorest in the San Antonio area), with the Alamo Heights Independent School District (one of the most affluent in that area). Approximately 22,000 students, of which ninety percent were Mexican-American, were enrolled in twenty-five elementary and secondary schools within Edgewood Independent School District at the time of the trial. The average assessed property value per pupil was $5,960 and the median family income was $4,686. As a result, Edgewood district taxpayers contributed only twenty-six dollars per pupil for the 1967-68 school year.

31. Id. at 9.
32. Id.
35. Id.
36. Id.
37. Id. at 10.
38. Id. at 69.
39. Id.
40. Id. at 11-12.
41. Id. at 12.
42. Id.
On the other hand, approximately 5,000 students, who were primarily white, attended the six elementary and secondary schools within Alamo Heights Independent School District.\textsuperscript{43} Only approximately eighteen percent of the student population was of Mexican-American descent.\textsuperscript{44} The average assessed property value per pupil at that time exceeded $49,000 and the median family income was approximately $8,001.\textsuperscript{45} As a result, the district contributed $333 to the education of each child for the 1967-68 school year, which was $307 more than the Edgewood District.\textsuperscript{46}

The plaintiffs relied upon an affidavit submitted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute; Professor Berke is a well-known advocate of school finance reform.\textsuperscript{47} His affidavit was based upon a survey of ten percent of the school districts in Texas and it demonstrated: 1) that a positive correlation existed between the wealth of school districts, measured in terms of their assessable real property wealth per pupil, and their levels of education expenditures per pupil; and 2) that a positive correlation existed between the wealth of each district and the personal wealth of its residents.\textsuperscript{48}

In December 1971, the United States District Court for the Western District of Texas rendered its judgment in a per curiam opinion using a standard of strict scrutiny to judge the Texas school funding system.\textsuperscript{49} The court found that personal wealth represents a suspect classification under the Equal Protection Clause of the United States Constitution, and furthermore, that education is a fundamental right guaranteed by the United States Constitution.\textsuperscript{50} Consequently, the court determined, in light of the evidence submitted at trial, that the Texas school finance system operated to the disadvantage of school children residing in poorer districts and interfered with the exercise of the fundamental right to receive an education.\textsuperscript{51}

After the court rendered its judgment, the State of Texas appealed to the United States Supreme Court, which issued a writ of

\begin{footnotesize}
43. Id. at 12-13.
44. Id.
45. Id. at 13.
46. Id.
47. Id. at 25.
48. Id. at 26.
49. Id. at 6.
50. Id. at 18.
51. Id.
\end{footnotesize}
certiorari and heard oral arguments on October 12, 1972.\textsuperscript{52} It should be noted that the Attorney General and other public officials from a number of other states filed amicus curiae briefs because they feared the prospects of similar lawsuits in their own states, and urged the Supreme Court to reverse the decision of the lower court.\textsuperscript{53} Several interest groups—the American Civil Liberties Union ("ACLU"), the NAACP Legal Defense and Education Fund, and the National Education Association—filed amicus curiae briefs urging the Supreme Court to affirm the decision of the district court.\textsuperscript{54}

The Supreme Court on March 21, 1973, in an opinion by Justice Lewis Powell, held that it was not a proper case in which to examine a state’s laws under standards of strict scrutiny because the plaintiffs had not shown that the Texas system discriminated against any definable class of "poor" people and, thus, was not shown to discriminate against any suspect classification.\textsuperscript{55} Additionally, the Court found that the Texas system did not interfere with the exercise of any fundamental right protected by the United States Constitution, because education does not represent such a right and the case involved the issues of local taxation, fiscal planning, education policy, and federalism; issues beyond the Court’s proper scope of authority.\textsuperscript{56} Consequently, the Court used the less stringent standard of deferential scrutiny in judging whether the Texas school funding system constitutional.\textsuperscript{57}

With respect to the assertion that the Texas system discriminated against some "suspect classification," the Supreme Court noted that this case contained "no definitive description of the classifying facts or delineation of the disfavored class."\textsuperscript{58} The Supreme Court reasoned that only those whose income falls below the poverty level might constitute a suspect classification.\textsuperscript{59} Since the plaintiffs, however, made no effort to demonstrate that the Texas system operated to the peculiar disadvantage of any class fairly definable as indigent or as composed of persons whose incomes were beneath any designated poverty level, the Court could not find the exis-
tence of a suspect class. Furthermore, the plaintiffs failed to demonstrate that a "lack of personal resources had occasioned an absolute deprivation of the desired benefit," i.e., education.

In considering the plaintiffs' fundamental right argument, the Court noted its belief, as previously articulated in its decision in Brown, that education represents one of the most important services provided by the various states. The Court added that the importance of a service provided by the various states does not determine whether it represents a fundamental right protected by the United States Constitution, and at no time had the Court recognized education as such a right. Consequently, the Court opined that it could not be said that the Texas system of school finance interfered with the exercise of a "fundamental right" guaranteed by the United States Constitution.

Finally, the Court concluded that the case represented "a direct attack on the [manner] in which Texas [chose] to raise and disburse state and local tax revenues." The Court believed that it was "asked to condemn the State's judgment in conferring on [its] political subdivisions the power to tax local property to supply revenue for local interests." This political question represents an area in which the Court has traditionally deferred to states' legislatures. Therefore, the Supreme Court determined that the Rodriguez case did not represent a proper case in which to strictly scrutinize a state's laws.

Hence, the Court utilized the standard of deferential scrutiny in its examination of the constitutionality of the system established under the Texas Minimum Foundations School Program. Under this standard, the Texas system bore a rational relation to two interrelated "legitimate governmental interests": 1) ensure a basic education for every child in Texas; and 2) permit and encourage a large measure of local voter participation in and control over each district's schools. The Supreme Court reversed the decision of

60. Id. at 25.
61. Id. at 23.
62. Id. at 29 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
63. Id. at 35.
64. Id. at 37.
65. Id. at 40.
66. Id.
67. Id.
68. Id. at 44.
69. See id. at 41-44 (refusing to apply strict judicial scrutiny because these were matters that the legislature was more familiar with).
70. Id. at 49.
the district court and determined the system established under the Texas Minimum Foundations School Program was constitutional.\textsuperscript{71}

The \textit{Rodriguez} decision closed the federal courts to school finance challenges based upon the Equal Protection Clause of the United States Constitution and, consequently, shifted the public school finance litigation's emphasis to state government.\textsuperscript{72} School finance equity advocates who wished to litigate had to turn their efforts to state courts and use equal protection provisions or education clauses of state constitutions.

In stressing the influence of federal school finance litigation on New York cases, Daniel P. Levitt, lead counsel of the Levittown and Reform Education Finance Inequities Today ("REFIT") coalitions in New York's education funding cases, emphasized that the groups studied the progression of the \textit{Rodriguez, Serrano,} and \textit{Robinson} cases because they were seen as seminal test cases for school finance litigation.\textsuperscript{73} Levitt stated:

the idea for commencing the Levittown litigation actually began in an advanced seminar on constitutional litigation at Columbia Law School in 1974 whereby the class drafted model pleadings for a school finance case as an academic exercise. The Rodriguez decision had come down a year earlier and we [the class] were well aware of the procedural and doctrinal implications for future school finance litigation.\textsuperscript{74}

The Campaign for Fiscal Equities ("CFE") coalition also stressed that their decision to commence a public school finance suit in New York State court was due to the unfavorable (to school finance reformers) decision rendered in \textit{Rodriquez} as well as successful state cases in Montana, Kentucky, and Texas.\textsuperscript{75} Jessica Garcia of CFE noted "we view the federal courts as mostly closed to substantive school finance claims, but we include a federal claim

\textsuperscript{71} Id. at 55.

\textsuperscript{72} \textsc{United States Supreme Court Education Cases} 248-59 (Steve McEllistrem ed., 10th ed. 2002). The United States Supreme Court, however, still decides cases affecting public schooling, such as ones involving school prayer and free speech. \textit{E.g.,} \textit{Good News Club v. Milford Cent. Sch.}, 533 U.S. 98, 102 (2001) (discussing whether a denial of the use of school grounds for after school use was a free speech violation); \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290, 294-95 (2000) (discussing whether student led prayers prior to football games are a violation of the Establishment Clause).

\textsuperscript{73} Interview with Daniel P. Levitt, Lead Counsel, Levittown Coalition, in Scarsdale, N.Y. (June 27, 2001) (emphasis added).

\textsuperscript{74} Id.

\textsuperscript{75} Telephone interview with Jessica Garcia, Outreach Coordinator, Campaign for Fiscal Equity, Inc. (June 25, 2001).
under Title VI to preserve a federal right of appeal in the event of an unfavorable decision by the New York Court of Appeals. Thus, the *Levittown* and *Campaign for Fiscal Equities* litigations in New York have been directly influenced by the Supreme Court decision in *Rodriquez*.

II. DEVELOPMENT OF LEGAL DOCTRINE IN STATE SCHOOL FINANCE LITIGATION

This Part analyzes legal precedents established in key school finance cases in California, New Jersey, Montana, Kentucky, and Texas. These cases/states are chosen because the California and New Jersey litigants were the first to use equity-based legal claims successfully, while the Montana, Kentucky, and Texas litigants were the first to use adequacy-based legal claims successfully. Analysis of these cases is followed by a detailed evaluation of school finance cases in New York.

Legal challenges to public school finance systems have been an active area of state court litigation since 1971, when plaintiffs successfully challenged California’s public school funding system in *Serrano v. Priest*. The litigants, a group of parents of school children in the Baldwin Park school district in Los Angeles County, claimed that the state aid portion of the local property tax-based school finance system violated the United States Constitution’s Fourteenth Amendment Equal Protection Clause and the California State Constitution’s provision requiring that “all laws of a general nature have uniform operation.” The parents submitted evidence demonstrating that, despite paying a tax rate less than one-half of that of Baldwin Park, Beverly Hills residents were able to spend twice as many dollars per student as were the residents of Baldwin Park and, consequently, Beverly Hills schools provided a superior education.

The California Supreme Court held that education is a fundamental right and that children residing in California’s poorer districts represented a “suspect” class under the Equal Protection Clause. The court agreed with the plaintiffs’ position by conclud-

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76. Id.
78. Telephone interview with Jessica Garcia, *supra* note 75.
80. CAL. CONST. art. IV, § 16.
81. Serrano, 487 P.2d at 1248.
82. Id. at 1258.
83. Id. at 1250-52.
ing that the State’s reliance on local property taxes to fund public education produced significant per-pupil expenditure disparities between school districts and resulted in real property wealth as the primary determinant of the quality of a child’s education. Consequently, the court applied a standard of “strict judicial scrutiny” requiring the state to demonstrate that the funding system furthered a compelling governmental interest; because the court found no such interest, however, it declared the California school funding system unconstitutional.

School finance reform advocates in other states understandably were optimistic about the possibility of achieving funding policy changes through equity-based litigation after the Serrano decision, and filed at least thirty similar equal protection based claims against public education funding systems in various state trial courts in the subsequent eighteen months. The Serrano plaintiffs’ success also fueled the attempt by reformers to use the United States Supreme Court to challenge the Texas public school funding system in the Rodriguez case.

The highest courts in most states have heard and decided an important school finance case since the Serrano decision, including Robinson v. Cahill in New Jersey, decided approximately two weeks after Rodriguez in 1971. The cities of Jersey City, Patterson, Plainfield, and East Orange challenged the constitutionality of the state’s school funding system, which permitted wide variations in per-pupil expenditures from district to district.

The Robinson plaintiffs alleged that wealth-based disparities deprived city students of a “thorough and efficient” education in violation of the New Jersey Constitution that required the state legislature to “provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eigh-

84. Id. at 1263.
85. Id.
87. 303 A.2d 273, 295-98 (N.J. 1973) (holding that New Jersey’s existing system of financing schools was unconstitutional).
88. Evans et al., supra note 86, at 11; Douglas Reed, Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism, 32 Law & Soc. Rev. 176, 176-77 (1998). By 1999, thirty-six state high courts have rendered a decision in a school finance case and at least forty-three states have rendered some decision in the lower courts. Evans et al., supra note 86, at 11; Reed, supra, at 176-77.
89. Robinson, 303 A.2d at 276.
The New Jersey Supreme Court ruled that the state funding system was unconstitutional. It interpreted the wide disparities in per-pupil expenditures as violating the state constitutional based-requirement that all students be provided equal educational opportunity, which the court viewed as critical to the effective preparation of children for citizenship and for the workforce. The Robinson decision restored equity proponents' optimism that state court litigation could mandate public school finance reform.

This renewed optimism was also apparent in New York State when the Levittown School District and twenty-six other school districts spending less than the state average on public education challenged the state funding system as unconstitutional. The Levittown plaintiffs adopted the arguments of the Serrano litigants, claiming that the New York State system impermissibly allowed school expenditures to vary with property wealth, which, in turn, affected the educational opportunity available to students. Even though the New York Court of Appeals rejected the plaintiffs' equity arguments, reform advocates continued to use the New York courts to challenge the state funding system.

The general state trend in school funding litigation after Serrano and Robinson and prior to 1989 primarily focused on the use of state constitutional guarantees of equality to challenge school funding practices. Plaintiffs mostly used equity-based arguments by claiming that state financing systems, relying heavily upon revenues from local property taxes, discriminated against students in low-wealth property districts because of the relatively lower values of taxable property per student. State courts, however, consistently required a clear showing by plaintiffs that either a use of wealth classifications for the distribution of state educational funds

90. Id. at 285; see N.J. CONST. art. VIII, § 4.
91. Robinson, 303 A.2d at 295.
92. Id. at 294 (quoting Landis v. Ashworth, 31 A. 1017 (N.J. 1895)).
95. Id. at 361-62.
96. Id. at 366.
automatically was discriminatory and, therefore, more deserving of heightened judicial scrutiny, or that the finance system in question was not reasonably related to a legitimate state function.99 The state court equity-based cases after Robinson had mixed results for plaintiffs because of the substantial evidentiary burden of proving government sponsored educational discrimination and the difficulty in establishing a precise standard defining legal equity.

A new trend in state court school finance litigation emerged after 1989 and was led by important state court decisions in Montana, Kentucky, and Texas.100 The Montana State Supreme Court, in Helena Elementary School District No. 1 v. State of Montana, adjudicated a class-action lawsuit challenging the constitutionality of the Montana system of school finance.101 During the 1985-88 school year, Montana used a foundation system to fund local schools whereby the State provided funds for basic operations.102 Most local school districts, however, had budgets that exceeded the funds provided under the state foundation system and thus, were forced to generate supplemental revenue through local real property taxation.103 Since many property-poor local school districts were unable to generate a sufficient amount of supplemental revenue, they allegedly were unable to provide their students with an adequate education mandated by the Montana Constitution.104

The Montana Supreme Court, on February 1, 1989, relying upon the Education Clause of the Montana Constitution, delivered its unanimous opinion that "equality of educational opportunity is guaranteed to each person of the state."105 The court subsequently ruled that the State's foundation system failed to provide sufficient funds to achieve even a minimal level of quality, and that it had failed to provide a system of public education where each student could enjoy the equal educational opportunity guaranteed under the Education Clause of the Montana Constitution.106

The Kentucky Supreme Court, in Rose v. Council For Better Education Inc., heard a similar class action lawsuit challenging the

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99. Id. at 574-76.
102. Id. at 686.
103. Id.
104. Id. at 687-89.
106. Helena Elementary Sch. Dist. No. 1, 769 P.2d at 690.
constitutionality of the school finance system that used a combination of state funds, federal funds, and district revenue generated through local real property taxation to satisfy the mandate of the Kentucky Constitution. On June 8, 1989, the Kentucky Supreme Court held that all Kentucky school children have the right to an adequate education under the Kentucky Constitution. The court found that Kentucky's school finance system violated the state constitutional right of children residing within many property-poor local school districts because they were not receiving an education of adequate quality, especially compared to the education provided by wealthier districts.

The Texas Supreme Court, in Edgewood Independent School District v. Kirby, also heard a similar class action lawsuit. By the mid-1980s, there existed an even larger real property wealth gap between certain districts than during the Rodriguez litigation. On October 2, 1989, the Supreme Court of Texas ruled that the Education Clause of the Texas Constitution mandates that the Texas State Legislature provide an "efficient" system of free public schools and that the legislature had failed to meet this obligation.

These state cases are important because the plaintiffs successfully raised questions as to whether the respective state was "adequately" fulfilling its obligation under the education provisions of its constitution, rather than using equality arguments as the plaintiffs did in the Serrano and Robinson cases. This adequacy-based argument focuses on the quality of education, in contrast to the equality of funding, provided to children in poor districts and can be used to demonstrate that inadequate educational services violate a state's constitutional obligation to provide for a basic or sound education to its citizens. It also incorporates an attack on state funding systems relying heavily upon local property tax-based

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107. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189 (Ky. 1989). The constitutional mandate was that the Kentucky General Assembly shall "provide an efficient system of common schools throughout the state." Id.
108. Id. at 206, 212.
109. Id. at 215.
112. Tex. Const. art. VII, § 1; Kirby, 804 S.W.2d at 498.
113. Rose, 790 S.W.2d at 215-16; Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 685-86 (Mont. 1989); Kirby, 804 S.W.2d at 498-99.
114. Rose, 790 S.W.2d at 215-16; Helena Elementary Sch. Dist. No. 1, 769 P.2d at 690; Kirby, 804 S.W.2d at 498-99.
financing primarily because plaintiffs have been able to establish that states do not provide poor districts with proper levels of funding to achieve an adequate level or quality of education.\textsuperscript{115} In a sense, the adequacy argument focuses on the outcomes of allegedly inequitable funding of education as opposed to exclusively arguing that the funding, per se, is inequitable.\textsuperscript{116} The adequacy argument also avoids plaintiff groups' reliance on the federal equal protection doctrine, avoiding the difficulty and courts' apparent reluctance to precisely define equity.\textsuperscript{117}

Most state court litigation throughout the 1990s has been shifting away from equity-based legal doctrine to an adequacy-based legal doctrine because of the plaintiffs' successes in Kentucky, Montana, and Texas, and the ostensibly more well-received legal claims. Plaintiffs launched a broader attack on a variety of educational practices, including funding issues, with a higher degree of success.\textsuperscript{118} Post-Levittown school finance litigation by reform groups in New York State has followed this trend of moving away from the direct use of equity arguments towards the use of more promising adequacy arguments.

\section*{III. New York School Finance Cases}

Different interest group coalitions advocating greater school finance equity since 1974 initiated legal challenges to New York State's school funding formula in the state courts. The involved interest groups are the Levittown Group, REFIT, and the Campaign for Fiscal Equity.

\textbf{A. Board of Education, Levittown Union Free School District v. Nyquist}

A coalition of twenty-seven local school districts throughout the state, led by the Levittown district, filed a cause of action in New York State Supreme Court, Nassau County, in 1974, and argued significant differentials in district per pupil property wealth resulted in unacceptable differences in per pupil expenditures, thereby violating the Equal Protection Clause and Education Arti-

\begin{itemize}
  \item \textsuperscript{115} Rose, 790 S.W.2d at 228-29; Helena Elementary Sch. Dist. No. 1, 769 P.2d at 688-89; Kirby, 804 S.W.2d at 497-98.
  \item \textsuperscript{116} Rose, 790 S.W.2d at 196-99; Helena Elementary Sch. Dist. No. 1, 769 P.2d at 687-89; Kirby, 804 S.W.2d at 495-96.
  \item \textsuperscript{117} E.g., Rose, 790 S.W.2d at 201; Helena Elementary Sch. Dist. No. 1, 769 P.2d at 685.
\end{itemize}
cle of the New York State Constitution. In particular, the school districts claimed that the New York school finance system was unconstitutional because the system discriminated against students in low real property-wealth districts by making the allocation of educational resources largely a function of the local real property wealth of the school districts. The plaintiffs stressed the randomness of local property wealth distribution as the primary factor determining allocation of the state's public education funds.

Prior to the commencement of the trial, local boards of education, resident taxpayers, and students in New York City, Buffalo, Rochester, and Syracuse, together with a host of local parent-teacher associations in the City of New York, joined the lawsuit. Without objection by any of the original parties, they joined as intervenor-plaintiffs on the grounds that the issues raised by the original plaintiffs did not address the unique problems faced by urban school systems. The intervenor-plaintiffs, however, relied generally on the same legal basis as the original plaintiffs.

At the time of trial, the New York school finance system consisted of a combination of state aid, federal funds, and local revenue generated by local real property taxation. The New York State Legislature provided each local school district with a uniform, minimum per-pupil grant purportedly to ensure that a basic education was provided to every student attending a public school within the State. This grant amounted to $1,885 per pupil during the 1974-75 school year.

A key piece of evidence submitted at trial by the original plaintiffs was a detailed report prepared by two expert witnesses, Joel S. Berke, a school finance expert whose affidavit comprised the heart of the plaintiffs' case in Rodriguez, and Jay H. Moskowitz, who used a large volume of official New York State education finance data. Berke and Moskowitz first demonstrated the existence of a substantial disparity among New York's 708 local school districts

120. Id. at 610.
121. Id.
122. Id. at 608.
123. Id. at 619-20.
124. Id. at 608.
125. Id. at 614.
126. Id. at 613.
127. Id. at 615.
in the distribution of taxable real property.\textsuperscript{129} There existed more than $412,000 worth of taxable real property per student in the richest district.\textsuperscript{130} In contrast, there existed less than $9,000 worth of real taxable property per student in the poorest district.\textsuperscript{131} Berke and Moskowitz also found the variation in taxable wealth per student during the year 1974-75 ranged from more than $86,000 to less than $21,000 (a ratio of approximately four-to-one) when considering only the median eighty percent of all districts above the ten percent and below the ninety percent per pupils pending.\textsuperscript{132}

Other evidence in Berke and Moskowitz's report demonstrated a very strong correlation between the assessed value of the real property contained within each local school district and the amount of education funds expended per student by each district.\textsuperscript{133} While the highest spending local school district in New York raised $4,200 through local real property taxation, the lowest spending district raised less than $1,000 per student during the 1974-75 school year.\textsuperscript{134}

Moreover, Berke and Moskowitz established that the real property wealth of each local school district was linked directly to the per-pupil education expenditures of each district.\textsuperscript{135} In other words, the wealthier districts exhibited greater per-pupil education expenditures, while the poorer districts exhibited smaller per-pupil education expenditures. Berke and Moskowitz contended that this correlation was "direct, positive, and significant."\textsuperscript{136} They stopped short, however, of arguing that interdistrict disparities in property value caused or brought about interdistrict disparities in per-pupil education expenditures.\textsuperscript{137}

Finally, the report concluded that the interdistrict disparities in per-pupil education expenditures had a "regular, direct, and discriminatory impact upon the educational opportunities afforded to the various public school children" within the State of New York.\textsuperscript{138} While those children residing in property-rich local school districts received an education of a comparatively higher quality,
those residing in property-poor local school districts received an education of a comparatively lower quality. Berke and Moskowitz found, for instance, a strong positive correlation between a local school district’s per-pupil education expenditures and its ability to attract teachers and professional staff members with superior qualifications.

The remainder of the original plaintiffs’ case consisted of lengthy testimony given by various administrators, teachers, parents, and students from many of the twenty-seven local school districts that filed the lawsuit. The purpose of such testimony, according to the lead counsel, was to put a “human face” on the statistics reported by Berke and Moskowitz. The plaintiffs also offered testimony by the superintendents of a number of property-rich local school districts, such as Great Neck and Scarsdale, in order to demonstrate the educational benefits associated with greater per pupil expenditures. Finally, the plaintiffs offered a number of plans to eliminate the inequities existing within the system, that could be exacted by the state legislature.

Therefore, according to the plaintiffs, because property-poor local school districts were less able to generate local revenue through local real property taxation than were property-rich local school districts, the education of students residing in property-poor districts was not equivalent to that of students residing in property-rich districts. This inequality was in violation of the Equal Protection Clauses of the New York Constitution and the United States Constitution, as well as the Education Article of the New York Constitution.

Intervenor-plaintiffs representing four big city school districts—Buffalo, New York, Rochester, and Syracuse—underscored the special concerns of large urban districts. They argued that citizens’ greater demands for increased municipal services prevented the cities from funding education more fully, and that a school finance system that fails to compensate for this municipal overbur-

139. Id. at 33-35.
140. Id. at 33-34.
141. Id. at 35.
142. Interview with Daniel P. Levitt, supra note 73.
143. Berke et al., supra note 128, at 35.
144. Id. at 38-39.
145. Id. at 33-35.
146. Id. at 39-41.
147. Id. at 35-41.
den was unequal and, therefore, unconstitutional.\textsuperscript{148} The cities' central position was that the state aid formula overstated the ability of urban districts to support education from local real property tax revenues because the state ignored the differences between large urban districts and non-urban ones in fiscal capacity, educational needs, and school operating costs.\textsuperscript{149}

The intervenor-plaintiffs presented four overburdens unique to large urban districts in New York that allegedly constrained the ability of such districts to finance public schools:

1. The Municipal Services Overburden

Due to the great needs of urban populations for police, fire, sanitation, and welfare services, which impose a massive burden on the fiscal resources of major cities, urban school districts are unable to devote a high percentage of their revenue towards education. These service requirements are necessary given the nature of large cities and do not simply represent the "tastes" of their residents.

2. The Cost Overburden

Due to higher teacher salaries and higher costs of operation, the costs of education are unavoidably higher in large cities than in other non-urban districts. The urban tax dollar, therefore, buys fewer educational services than does the suburban tax dollar.

3. The Absenteeism Overburden

The formula utilized by the State in measuring fiscal capacity and distributing education funds counts students by attendance instead of enrollment. This system penalizes urban school districts due to the greater rates of absenteeism that typically exist within such districts. The effect of this system is to reduce the amount of aid received by urban school districts at the same time that greater absenteeism raises remedial services costs.

4. The Education Overburden

Despite the higher concentration within urban school districts of students with special needs, such as handicapped and non-English-speaking students, who are far more expensive to educate than typical students, urban school districts receive lower per-pupil aid to meet these needs than do other local school districts.\textsuperscript{150}

\textsuperscript{149} Berke et al., supra note 128, at 38-39.
\textsuperscript{150} Id. at 38-39.
In essence, the cities contended that the state aid system was discriminatory because it did not give any consideration to the unique overburdens faced by cities.\textsuperscript{151}

In response, the State attempted to demonstrate the constitutionality of the New York school finance system despite its acknowledged imperfections.\textsuperscript{152} First, the State argued that the education aid formulas were an inappropriate subject for judicial consideration because educational funding must be balanced against the State's many other needs and interests, such as health and public protection.\textsuperscript{153} The State contended that such balancing is an appropriate subject only for legislative and executive decisions.\textsuperscript{154}

Moreover, the State argued that it had met its constitutional responsibility by providing public schools with adequate levels of state aid, including more than three billion dollars during the 1974-75 school year.\textsuperscript{155} The State argued that no specific level of achievement is guaranteed to any student under the Education Article of the New York State Constitution.\textsuperscript{156} The Education Article guarantees only a basic minimum standard for education, a standard that New York had met under any reasonable financial measure.\textsuperscript{157} At the time, the $1,885 foundation guarantee level was approximately equal to the average per-pupil expenditure for all fifty states within the United States.\textsuperscript{158}

The State also argued the school finance system had reduced significantly the disparities in local real property tax resources among local school districts.\textsuperscript{159} The system functioned to provide a greater amount of aid to poorer districts and to close the gap between the per-pupil education expenditures of districts at the tenth percentile of wealth to about one-half that of the districts at the ninetieth percentile of wealth.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{151} Id. at 38-41.
\item \textsuperscript{152} Id. at 41-42.
\item \textsuperscript{153} Id. at 41.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{159} Berke et al., supra note 128, at 41-42.
\item \textsuperscript{160} Id. at 42.
\end{itemize}
Finally, the State relied upon the testimony of a number of state legislators and school superintendents to demonstrate a rational basis for the maintenance and operation of the New York school finance system. The State argued that the system sought to preserve local control of education while providing a minimum level of state educational funding.

On June 23, 1978, presiding New York State Supreme Court Justice, L. Kingsley Smith, delivered his decision. Using the rational means test, Justice Smith found that the State failed to demonstrate a compelling governmental interest in maintaining the New York school finance system and that the original plaintiffs had established a violation under both the Equal Protection Clause and the Education Article of the New York Constitution. Justice Smith, moreover, determined that the intervenor-plaintiffs, representing the four large cities outside of New York City, had established a violation by the state officers under the Equal Protection Clause of the United States Constitution. The judge placed great weight on the compelling nature of the claimants' evidence and the critical importance of providing education to New York's children.

Following the trial court's decision, the State appealed to the Appellate Division of the New York Supreme Court, which allowed the State the opportunity to improve the factual record on which the New York Court of Appeals would eventually decide the case. The Appellate Division reasoned that because the original trial had taken place over the course of nearly four years, a number of subsequent hearings and stipulation submissions were required in order to ensure the record accurately reflected the situation on appeal, especially since a number of reforms had been implemented through legislation.

On October 26, 1981, the Appellate Division handed down its unanimous decision modifying the trial court's judgment. The Appellate Division refused to utilize the standard of strict scrutiny

161. Id.
162. Id.
163. Id.
164. Id. at 48.
166. Id. at 612-16.
167. BERKE ET AL., supra note 128, at 42. It is important to note that the Appellate Division is a finder of fact as well as of law, which allowed the State to add to the factual record.
168. Id. at 42-43.
169. Id. at 43.
against the State, and employed the less stringent intermediate scrutiny standard in determining the validity of the New York system of school finance.\textsuperscript{170} The court found the original plaintiffs had, despite the reforms enacted during the interim, established violations under both the Equal Protection Clause and the Education Article of the New York Constitution.\textsuperscript{171} The court, however, determined the intervenor-plaintiffs had failed to establish a violation under the Equal Protection Clause of the United States Constitution.\textsuperscript{172} Subsequently, the State and the intervenor-plaintiffs appealed to the New York Court of Appeals.\textsuperscript{173}

Attorney General Robert Abrams argued the case for the State and Daniel P. Levitt, Edward H. Rosenthal, and Miriam R. Best argued the case for the original plaintiffs.\textsuperscript{174} The Public Education Association, the Educational Priorities Panel, and the New York Civil Liberties Union filed amicus curiae briefs in support of the original plaintiffs' claim with the Court of Appeals.\textsuperscript{175} The Council of Churches for the City of New York, the NAACP Legal Defense and Educational Fund, and the New York Metropolitan Council of the American Jewish Congress also filed a joint-brief.\textsuperscript{176} A joint amicus brief, supporting the State's contentions, was also filed on behalf of eighty-five suburban local school districts and the New York State Senate majority leader.\textsuperscript{177}

Judge Hugh R. Jones delivered the opinion of the Court of Appeals on June 23, 1982 and noted, "No claim is advanced in this case . . . by either the original plaintiffs or the intervenors that the educational facilities or services provided in the school districts that they represent fall below the statewide minimum standard of educational quality and quantity fixed by the Board of Regents."\textsuperscript{178} The lack of such a claim, according to the court, was the fatal flaw in the plaintiffs' case.\textsuperscript{179}

Relative to the claims advanced by the original plaintiffs and intervenor-plaintiffs, the court first addressed the argument that the New York school finance system violated the Equal Protection

\textsuperscript{170} Id. at 47.
\textsuperscript{171} Id. at 48.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 43.
\textsuperscript{175} BERKE ET AL., supra note 128, at 43.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Nyquist, 408 N.Y.S.2d at 647-48; BERKE ET AL., supra note 128, at 47-48.
\textsuperscript{179} BERKE ET AL., supra note 128, at 48.
Clause of the United States Constitution. Judge Jones noted that the United States Supreme Court in Rodriguez had ruled that in adjudicating such a claim the least stringent judicial standard of deferential scrutiny should be used in assessing the legality of any state’s school funding system. The New York Court of Appeals determined that New York did provide a minimum level of funding to each local school district and allowed for the maintenance of local control over education, which constituted a legitimate governmental interest. Thus, applying the standard of deferential scrutiny, the court rejected the notion the New York system of school finance violated the Equal Protection Clause of the United States Constitution.

The Court of Appeals responded, relative to the intervenor-plaintiffs’ argument about the municipal overburden problem, that the inequalities existing in large cities are the result of intrinsic demographic, economic, and political factors not attributable to the action or inaction of the New York State Legislature. Judge Jones, quoting the Supreme Court of the State of New York, added:

“It is beyond the power of the court . . . to determine whether the appropriations of the intervenor-plaintiffs have been wisely directed or reasonable applied, or whether their budgets are fairly divided in terms of priority of need between the competing services, such as police, fire, health, housing and transportation, and it is, equally, beyond the power of this court to determine whether the resources of the intervenor-plaintiffs can otherwise be employed so that their educational needs can be met.”

Therefore, the court rejected the claim advanced by the intervenor-plaintiffs with respect to the Equal Protection Clause of the United States Constitution.

The Court of Appeals next addressed the claims of the original plaintiffs and the intervenor-plaintiffs, that the New York school finance system violated the Equal Protection Clause of the New

180. Id. at 46.
181. Id. at 48.
182. Id.
183. Id.
York Constitution. Relying upon the logic utilized by the United States Supreme Court in deciding Rodriguez, the New York Court of Appeals again used the less stringent deferential scrutiny standard and reasoned that:

[the circumstances that public education is unquestionably high on the list of priorities of governmental concern and responsibility ... does not automatically entitle it to classification as a “fundamental constitutional right” triggering a higher standard of judicial review for the purposes of equal protection analysis.]

Based on this standard, the court determined that the State had demonstrated a rational basis for the maintenance of a program fulfilling a legitimate governmental interest; thereby, rejecting the claim that the New York system of school finance violated the Equal Protection Clause of the New York State Constitution.

Regarding the claim advanced by the original and intervenor-plaintiffs that the school finance system violated the education article of the New York Constitution, the Court of Appeals ruled that:

[the] constitutional language ... makes no reference to any requirement that the education to be made available be equal or substantially equal in every district, [nor does it include] any provision either that districts choosing to provide opportunities beyond those that other districts might elect or be able to offer be foreclosed from doing so, [or any provision] that local control of education, to the extent that a more extensive program were locally desired and provided, be abolished.

Based upon this reasoning, the court concluded that the only requirement placed upon the state legislature under the Education Article is to provide for the maintenance and support of a system of free public schools; a requirement the state legislature clearly met.

The New York Court of Appeals left its doors open for possible future legal challenges by noting that proof of a “gross and glaring inadequacy” in the education system might give the court cause to mandate higher priorities for public funds to education. Additionally, the majority attributed significance to the absence of a claim by plaintiffs that educational services in the state fell below a

187. Nyquist, 439 N.E.2d at 365-66; Berke et al., supra note 128, at 47.
188. Nyquist, 439 N.E.2d at 365-66; Berke et al., supra note 128, at 50.
189. Nyquist, 439 N.E.2d at 365; Berke et al., supra note 128, at 49.
190. Nyquist, 439 N.E.2d at 368.
192. Id. at 48.
minimum standard of quality fixed by the Board of Regents.\textsuperscript{193} Although the court rejected plaintiffs' equity-based arguments under the Equal Protection doctrine, it expressly recognized that New York courts legitimately could entertain adequacy-based legal arguments.\textsuperscript{194}

B. The 1995 Cases

The New York Court of Appeal's recognition of the state's obligation to provide an adequate education in the 1982 \textit{Levittown} decision, and the successes of school finance litigation in Kentucky, Montana, and Texas in 1989, prompted several additional lawsuits by school finance reformers in New York.\textsuperscript{195} The plaintiffs in more recent New York cases differ from the \textit{Levittown} litigants by incorporating and focusing legal arguments around claims the State is failing to meet its burden under the state constitution of providing an adequate level of public elementary and secondary education.\textsuperscript{196}

Daniel P. Levitt, lead counsel and litigator for the Levittown and REFIT coalitions, noted that the Reform Educational Financing Inequities Today litigation raised, in essence, many of the same claims made in \textit{Levittown}.\textsuperscript{197} He remarked, "the big difference, however, was that REFIT was making the argument the State public school finance system created a 'gross and glaring inadequacy' between school districts and, therefore, violated the standard announced in \textit{Levittown}."\textsuperscript{198}

The Campaign for Fiscal Equities coalition, on the other hand, has been influenced by plaintiffs' successes in Kentucky, Montana, and Texas.\textsuperscript{199} Jessica Garcia of CFE stressed that the organization carefully tracks national trends in school finance cases, and that the plaintiffs' successes were "extremely" influential in CFE's decision to commence litigation and in shaping its legal claims.\textsuperscript{200} As shown below, the CFE coalition has emphasized many of the adequacy-based arguments found in suits from other states.

\textsuperscript{193} Id.
\textsuperscript{194} Id. at 51.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Interview with Daniel P. Levitt, \textit{supra} note 73.
\textsuperscript{199} Telephone interview with Jessica Garcia, \textit{supra} note 75.
\textsuperscript{200} Id.
In response to several post-Levittown lawsuits, the New York Court of Appeals issued three decisions in June 1995 concerning the State’s public school finance system: *City of New York v. State of New York*; Reform Educational Financing Inequities Today (R.E.F.I.T.) *v. Cuomo* (“REFIT”); and *Campaign for Fiscal Equity, Inc. v. State of New York.* The plaintiffs in *City of New York* were the New York City Mayor, Board of Education, and boards of several city community school districts who sought issuance of an injunction against the State on behalf of the city’s school children. The plaintiffs alleged that the State school finance system: 1) denied New York City school children their educational rights guaranteed by the Education Article of the New York Constitution by producing a gross and glaring inadequacy with respect to public education within the city; 2) provided separate and unequal treatment for the public schools within the city in violation of the Equal Protection Clauses of the New York and the United States Constitutions; and 3) disadvantaged New York City schoolchildren who were members of racial and ethnic minorities in violation of Title VI of the Civil Rights Act of 1964.

At trial, the State moved for dismissal on the grounds of sovereign immunity, claiming that a state cannot be sued by one of its political subdivisions. The State’s motion was granted and the court dismissed the lawsuit without ruling on the substantive merits of the plaintiffs’ arguments. The City of New York appealed the decision to the Appellate Division, which affirmed the Supreme Court ruling. The City of New York subsequently appealed to the New York Court of Appeals and advanced several arguments. First, the City asserted that the *Levittown* decision constitutes a controlling precedent in favor of the City’s capacity to sue because the New York Court of Appeals allowed school districts to sue the State. The Court of Appeals, however, responded that *Levittown* does not represent a controlling precedent favoring the City’s capacity

202. 655 N.E.2d at 647.
204. City of N.Y., 655 N.E.2d at 650.
206. See City of N.Y., 655 N.E.2d at 649, 651-53 (discussing the court’s response to the State’s argument that a municipality cannot sue its state).
207. Id. at 651.
208. Id.
209. Id.
210. Id. at 652.
to sue the State because the opinion did not address specifically sovereign immunity, as it was not raised by the State as a defense.\textsuperscript{211} The Court of Appeals added that, in the absence of express authority to bring the specific action in question, the plaintiff must establish intent on the part of the state legislature to confer such capacity by inference, which the City failed to due in this case.\textsuperscript{212}

The City also argued that a municipality’s lack of capacity to sue under the doctrine of sovereign immunity applies only to statutory restrictions on a municipality’s power and state-mandated expenditures.\textsuperscript{213} The Court of Appeals responded that this contention ignored long-established precedent by which the lack of capacity to sue doctrine was extended to a wide range of state actions that have various adverse impacts upon municipal governing bodies and their constituents.\textsuperscript{214}

Finally, the City of New York argued it should be allowed to sue the State because of challenged legislation adversely affecting New York City’s proprietary interests in the State’s funding formulas.\textsuperscript{215} The court replied that the City failed to point to any specific fund in which they were entitled to a proprietary interest and sought only a greater portion of the general State funds than the state legislature chose to appropriate for public education.\textsuperscript{216}

Judge Levine of the New York Court of Appeals concluded that a state could not be sued by one of its political subdivisions.\textsuperscript{217} This general incapacity of a municipality to sue flows from the notion that a state’s political subdivisions are created by the state for the convenient administration of the state’s governmental policies.\textsuperscript{218} As purely creatures or agents of the state, the court continued, a political subdivision may not contest the actions of its creator affecting them in their governmental capacity or on behalf of its inhabitants.\textsuperscript{219} Therefore, the Court of Appeals upheld the decisions of the Supreme Court and the Appellate Division, which dismissed the City’s action based on the doctrine of sovereign immunity, con-

\begin{flushright}
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 653.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 654.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id. at 651.
\textsuperscript{219} Id. at 651-52.
\end{flushright}
tending that the plaintiffs failed to establish claims falling within any recognized exceptions to the doctrine.\textsuperscript{220}

In Reform Educational Financing Inequities Today (R.E.F.I.T.) v. Cuomo, a coalition of taxpayers, parents, students, principals, and superintendents in sixty-one low-wealth suburban school districts throughout the state filed suit in New York State Supreme Court against the State of New York.\textsuperscript{221} The plaintiffs specifically alleged that the New York public school finance system violated the Education Article of the New York State Constitution and the Equal Protection Clauses of the New York State and United States Constitutions.\textsuperscript{222}

The plaintiffs' primary argument was that the New York State school finance system had changed so drastically since the Court of Appeals delivered its Levittown decision that there developed a gross and glaring inadequacy of education funding within certain property-poor local school districts.\textsuperscript{223} Levitt, the lead litigator for REFIT, stressed that the driving force behind the commencement of litigation was the "feeling among school superintendents and boards in low-wealth districts that things had gotten much worse than they were when Levittown was decided and elected officials in Albany were paralyzed to reform the system."\textsuperscript{224}

REFIT contended that the disparity among a number of local school districts within Suffolk County with respect to real property wealth allegedly had grown from approximately 17-1 to approximately 330-1 in the years after the Levittown decision.\textsuperscript{225} Furthermore, the plaintiffs asserted that the disparity among these local school districts with respect to per pupil education expenditures ranged from approximately $7,000 to approximately $43,000.\textsuperscript{226}

The Supreme Court, however, responded that disparities among certain local school districts with respect to per-pupil education expenditures were not solely the result of interdistrict disparities with respect to real property wealth.\textsuperscript{227} The court found other factors had contributed to the alleged gross and glaring inadequacy of education funding such as a significant increase in non-English speak-

\textsuperscript{220} Id. at 654.
\textsuperscript{222} Id. at 969-70.
\textsuperscript{223} Id. at 970.
\textsuperscript{224} Interview with Daniel P. Levitt, supra note 73.
\textsuperscript{225} Cuomo, 578 N.Y.S.2d at 971-72.
\textsuperscript{226} Id. at 972.
\textsuperscript{227} Id.
ing students, a proliferation of expensive State mandates, and the disproportionate impact of recently reduced State appropriation on the budgets of property-poor local school districts.\textsuperscript{228} The New York State Supreme Court dismissed the lawsuit for failure to state a cause of action because the plaintiffs did not specifically allege that the quality of the education provided to the students residing within property-poor local school districts fell below a minimum standard.\textsuperscript{229}

The plaintiffs appealed the decision to the Appellate Division, which affirmed the decision of the trial court and added that the New York school finance system was constitutional.\textsuperscript{230} The plaintiffs subsequently appealed to the New York Court of Appeals where Levitt again argued the case for \textit{REFIT}.\textsuperscript{231} The Puerto Rican Legal Defense and Education Fund, the Campaign for Fiscal Equality, Inc., the plaintiffs in the \textit{City of New York} case, the American Civil Liberties Union, and the New York State Association of Small City School Districts filed amicus curiae briefs in support of the plaintiffs.\textsuperscript{232}

The New York Court of Appeals echoed the \textit{Levittown} rationale and rejected the plaintiffs’ equal protection argument because the court reasoned that the desire to maintain local control of education was a sufficient rational justification for the state school funding system.\textsuperscript{233} The court, however, refused to endorse the Appellate Division’s determination that the school aid formula was per se constitutional.\textsuperscript{234} The Court of Appeals limited its holding to the specifics of the case and directly noted, as it had in the \textit{Levittown} ruling, that evidence of gross and glaring inadequacies in the state’s provisions of a sound education to children could support a court declaration of unconstitutionality.\textsuperscript{235}

An important aspect of the \textit{REFIT} case, similar to \textit{Levittown}, was the plaintiffs’ use, and the Court of Appeal’s consideration, of the Education Article of the New York State Constitution which mandates: “the legislature shall provide for the maintenance and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{228} Id. \\
\item \textsuperscript{229} Id. at 976. \\
\item \textsuperscript{232} Id. \\
\item \textsuperscript{233} Id. at 648-49. \\
\item \textsuperscript{234} Id. at 649. \\
\item \textsuperscript{235} Id. at 648.
\end{enumerate}
\end{footnotesize}
support of a system of free common schools, wherein all the children of this state may be educated.\textsuperscript{236} The \textit{REFIT} plaintiffs claimed that substantial spending disparities between property-rich and property-poor districts per pupil constituted a violation of the Education Article.\textsuperscript{237} The court responded that the claim of extreme spending disparities alone could not satisfy the "gross and glaring inadequacy" standard established in \textit{Levittown}.\textsuperscript{238} The Court of Appeals reasoned that although the state constitution's Education Article required the state legislature to provide a state system of free schools and an adequate education to the state's children, the constitution did not expressly mandate equal educational opportunity.\textsuperscript{239} Acknowledging the gross spending disparities between school districts in the state, the court opined that such disparities did not establish students in low-wealth and urban districts were receiving less than a "sound basic education" in violation of the New York State Constitution.\textsuperscript{240} Consequently, all claims against the State of New York were dismissed in the \textit{REFIT} case.\textsuperscript{241}

The \textit{Campaign for Fiscal Equity v. State of New York} was initiated in New York State Supreme Court by a coalition of fourteen of New York City's thirty-two community school districts, individual citizens, various parent advocacy groups, and New York City public school students and their parents, against the State of New York, the New York State Senate Majority Leader, and the Assembly Minority Leader.\textsuperscript{242} The plaintiffs alleged that the State school finance system violated the Education Article,\textsuperscript{243} the Anti-discrimination Clause and the Equal Protection Clause of the New York Constitution,\textsuperscript{244} the Equal Protection Clause of the United States Constitution,\textsuperscript{245} and Title VI of the Federal Civil Rights Act of 1964.\textsuperscript{246}

At trial, the defendants brought a motion to dismiss the claims contending certain plaintiffs lacked standing to sue and that the plaintiffs' complaint failed to state a cause of action that could be

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\item[236.] N.Y. Const. art. XI, § 1.
\item[237.] Cuomo, 655 N.E.2d at 649.
\item[238.] \textit{Id.} at 648-49.
\item[239.] \textit{Id.} at 648.
\item[240.] \textit{Id.}
\item[241.] \textit{Id.} at 649.
\item[242.] Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 663 (N.Y. 1995).
\item[243.] N.Y. Const. art. XI, § 1.
\item[244.] \textit{Id.} art. 1, § 11.
\item[245.] U.S. Const. amend. XIV.
\end{enumerate}
\end{footnotesize}
adjudicated properly. The Supreme Court granted the defendants’ motion in part by dismissing all claims asserted by the local school districts based on sovereign immunity precedent, which prevents any municipal subdivision from suing the state. The court also dismissed the equal protection claims and Title VI claims filed by CFE and the individual parents and students for failure to state a cause of action. The court ruled, however, that the plaintiffs’ complaint raised prima facie claims under the Education Article and Anti-Discrimination Clause of the New York Constitution as well as under Title VI’s implementing regulations.

The plaintiffs appealed and the Appellate Division modified the order of the Supreme Court by granting the State’s motion to dismiss. The Appellate Division ruled that the plaintiffs’ argument—that reduced resources have interfered with the opportunity of New York City public school students to receive a minimally adequate education—embodied a theory almost identical to the one advanced and ultimately rejected by the Court of Appeals in Levittown. Furthermore, the Appellate Division ruled that Title VI’s prohibition against methods of administration that disadvantage racial and ethnic minorities was not violated by the State’s education aid to the New York City school system.

The CFE coalition subsequently appealed the Appellate Division decision’s regarding claims under the Education Article and the Equal Protection Clause of the New York Constitution, the Equal Protection Clause of the United States Constitution, and Title VI of the Civil Rights Act of 1964 to the New York Court of Appeals. The plaintiffs did not appeal the decision of the Appellate Division with respect to the anti-discrimination clause of the New York Constitution. Michael A. Rebell, lead counsel and Executive Director of the CFE coalition, argued the case for the plaintiffs. The American Civil Liberties Union and the New York State Association of Small City School Districts, filed briefs of amicus curiae in support of the position of the plaintiffs.

248. Id.
249. Id.
250. Id.
251. Id.
252. Id.
253. Id. at 663-64.
254. Id.
255. Id. at 664 n.2.
256. Id. at 663.
257. Id.
The Court of Appeals first addressed the issue of whether the plaintiffs properly stated a cause of action under the Education Article by claiming that the State’s school finance system deprived public school students within New York City of a sound basic education. The Education Article, according to the Court of Appeals, requires the State to offer all of its students the opportunity to receive a sound basic education which: “should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.” The court found that the plaintiffs’ complaint relied upon the minimum statewide educational standards established by the Board of Regents and the Commissioner of Education and, therefore, the plaintiffs properly stated a cause of action under the Education Article. The court reinstated the plaintiffs’ Education Article claim.

The court, however, could not adjudicate the merits of plaintiffs’ arguments because there was no factual record developed by the lower courts, but it did articulate a standard for assessing whether the State has met its constitutional obligation as follows:

If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation ... The trial court will have to evaluate whether the children in plaintiffs’ districts are in fact being provided the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors ... In order to succeed in the specific context of this case, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education.

The Court of Appeals addressed the allegations advanced by the plaintiffs that the State school finance system violated the Equal Protection Clauses of the New York and the United States Constitutions. Although the court recognized that the financial circumstances of the school districts might have changed during the course of the case, the court dismissed the allegations because its

258. Id. at 664-68.
259. Id. at 666.
260. Id. at 666-67.
261. Id. at 667-68.
262. Id. at 666-67.
263. Id. at 668-69.
interpretation of the equal protection arguments had not changed since *Levittown*.264

Finally, the Court of Appeals dealt with the plaintiffs' claims that the state school finance system violated Title VI of the Civil Rights Act of 1964 and its implementing regulations, which provide that, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."265 The court concluded the instant complaint contained no showing of intentional discrimination and, as a result, the plaintiffs' Title VI claim was dismissed.266

The implementing regulations, nonetheless, contained within Title VI provide that recipients of federal funding may not utilize methods of administration that disadvantage individuals because of their race, color, or national origin.267 A successful claim under Title VI's implementing regulations need only demonstrate discriminatory *effect*, as opposed to discriminatory intent, and establish that the challenged practice disadvantages individuals belonging to a racial minority group and that the practice is not adequately justified.268

Once a prima facie case is established, the burden of proof shifts to the defendant, who must demonstrate that a legitimate nondiscriminatory basis exists for maintaining the challenged practice.269 If the defendant is able to meet its burden and shows that the challenged practice is justified or necessary, the plaintiff still has the opportunity to prevail by demonstrating that less discriminatory alternatives exist.270 Accordingly, the Court of Appeals found such a prima facie case in plaintiffs' allegations and reinstated the plaintiffs' claim that the State school finance system violated the implementing regulations contained within Title VI of the Civil Rights Act.271

In reviewing the court's reasoning in school finance cases, it is apparent that the New York Court of Appeals currently refuses to

264. *See id.* (finding that case law requires intentional discrimination to constitute an equal protection violation).
266. *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 669.
267. *Id.*
268. *Id.*
269. *Id.* at 670.
270. *Id.*
271. *Id.* at 670-71.
entertain equity-based claims under equal protection doctrine. It has, however, accepted the validity of adequacy-based challenges to the State's education system and to funding formulas as the arguments relate to achieving a sound basic education mandated by the state constitution's education article.

The plaintiffs' claims were litigated at a trial that commenced on October 12, 1999 in New York State Supreme Court. On January 9, 2001, Judge Leland DeGrasse rendered his opinion declaring the State's school funding system unconstitutional because it deprived New York City school children of a "sound basic education" guaranteed in the state constitution. In particular, Judge DeGrasse held: 1) the State failed to ensure that New York City's public schools received adequate funding to afford its students the "sound basic education" guaranteed by the education article of the New York Constitution; and 2) the State's funding mechanisms had an adverse and disparate impact upon New York City's minority public school students in violation of the implementing regulations of Title VI of the federal Civil Rights Act.

Regarding the plaintiffs' Education Article claim, the court emphasized that differences in spending among school districts do not, standing alone, establish that students in the lower-spending districts receive less than a "sound basic education" in violation of the Education Article. Nonetheless, the "sound basic education" standard mandated by the Education Article of the State Constitution consists of the foundation students need to become productive citizens capable of civic engagement and sustaining gainful employment. Judge DeGrasse also stressed that children are entitled to at least minimally adequate physical facilities and classrooms providing enough light, space, heat, and air to permit children to learn.

272. See id. at 666-67 (discussing adequacy arguments instead of equity arguments in analyzing equal protection arguments).
273. Id.
276. See id. (stating that "the school financing system also violated federal civil rights law because it disproportionately hurt minority students").
278. Id. at 485-86.
279. Id. at 501.
Applying the "sound basic education" standard to the facts of the case, Judge DeGrasse found: 1) the quality of New York City's public school teachers, as measured by the number of uncertified teachers teaching in New York City public schools, teachers' scores on certification examinations, and the quality of teachers' undergraduate education, in the aggregate, was inadequate;280 2) a substantial number of school facilities required major infrastructure repair and many more were plagued by overcrowding, poor wiring, pock-marked plaster and peeling paint, inadequate climate control, and other deficiencies;281 3) there was a causal link between New York City's poor school facilities and the performance of students;282 4) instruments of learning such as desks, chairs, pencils, and reasonably current textbooks were minimally adequate;283 and 5) evaluative examinations indicated New York City's schools were not imparting the requisite minimum educational skills are indicative of a sound basic education.284

Consequently, Judge DeGrasse held that the State is primarily responsible for the persistence of such educational inadequacies.285 He also emphasized that the school aid distribution system is unnecessarily complex and opaque and is based on an array of often conflicting formulas and grant categories as understood by only a handful of officers in State government.286 He found, moreover, that the evidence at trial demonstrated that the formulas do not operate neutrally to allocate school funds, but rather, are manipulated to conform to political budget agreements reached by the Governor, the Speaker of the Assembly, and the Senate Majority Leader.287 Based on these findings, Judge DeGrasse concluded the State failed to ensure New York City's public schools received adequate funding to afford students the "sound basic education" guaranteed by the Education Article of the New York State Constitution.288

Relative to the plaintiffs' Title VI claim, the court agreed that money is a crucial determinant of educational quality, and receipt of less state educational funding per pupil by minority students is
an adverse, disparate impact as contemplated by Title VI regulations. The court found that comparisons of New York City's funding with average school district funding in the rest of the State can be an accurate and legitimate indicator of a disparate impact based on race because seventy-three percent of the State's overall minority student population reside in the City of New York and eighty-four percent of the city's public school children are members of minority groups.

Judge DeGrasse also placed emphasis on the fact that New York City receives less funding per pupil, on average, than other districts in the rest of the State. The court found that from 1994-95 to 1999-2000, New York City consistently received less total state aid than its percentage share of total enrolled students. During those years, New York City had approximately thirty-seven percent of the State's enrolled students, yet received a percentage of total state aid ranging from 33.98 percent to 35.65 percent. Judge DeGrassee concluded that these figures are also clear evidence of disparate impact.

The State advanced several broad justifications for the distribution of public elementary and secondary school aid. First, the State argued that the school funding formula is redistributive in nature and since New York City is a relatively affluent school district it should not expect a percentage of state funding to exactly match the percentage of school children in the State attending New York City schools. Second, the State asserted that a funding formula based upon each district's average attendance, rather than enrollment, is related to the State's legitimate objectives of encouraging districts to maintain high attendance while discouraging inflation of enrollment figures. Next, the State contended that distributing transportation and building aid on a reimbursement basis is fiscally prudent since school districts must first demonstrate a local financial commitment of facility construction. Finally, New York asserted that the funding formulas take student need into account.

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289. Id. at 541.
290. Id. at 542.
291. See id. at 542, 543 n.46 (discussing New York City's per pupil spending).
292. Id. at 543.
293. Id.
294. Id.
295. Id. at 547.
296. Id.
297. Id.
298. Id.
In response to the State’s assertions, the court found redistribution, when properly implemented, can be a valid goal for state school aid, but the State’s measure of wealth is inaccurate because it does not account for differences in regional costs and, therefore, the measure does not further a substantial legitimate purpose. Additionally, Judge DeGrasse held that the basing of school funding on districts’ average attendance is unnecessarily punitive in directing state aid away from districts with large numbers of at-risk students. The court reasoned that the State neither quantified the effects of building and transportation aid, nor established how the system of reimbursement is related to classroom education. Consequently, the court found unpersuasive the State’s justifications for the adverse disparate racial impact caused by the distribution of state aid, and concluded that the plaintiffs established a violation of the relevant Title VI implementing regulations.

On the appropriate remedy issue, Judge DeGrasse ruled that the New York State Legislature, rather than the courts, would be given the first opportunity to reform public school financing system which failed to provide the opportunity for a sound basic education to New York City public school students and had an unjustified disparate impact on minority students in violation of federal law. The court reasoned that the New York State Legislature is in a better position to gauge the effects of reform on the state as a whole, and is better positioned to work with the governor in reforming the current educational system.

In response to Judge DeGrasse’s decision, Governor George E. Pataki announced, one week after the ruling, his intention to direct the State Attorney General to appeal the decision to the Appellate Division of the New York State Supreme Court. The Governor’s announcement was made despite his calls for revamping the State’s school funding system in his January 3, 2001, State of the State address. The State filed its appellate brief with the Su-

299. *Id.* at 548.
300. *Id.* at 548-49.
301. *Id.* at 549.
302. *Id.*
303. *Id.* at 549-50.
304. *Id.*
preme Court, Appellate Division on August 13, 2001, and the State and plaintiffs presented oral arguments on October 25, 2001.307

On appeal, the State argued that the plaintiffs failed to meet their burden of demonstrating that: 1) students in urban school districts are not receiving a “sound basic education”; and 2) the education funding formula utilized by the State is the cause of this problem.308 First, addressing the issue whether New York City students are receiving a “sound basic education,” the State argued that the “State of New York ranks third in the nation in education spending, and that the New York City Board of Education […] has more money per pupil than nearly any other urban school district in the entire nation.”309 Moreover, the State argued that New York City schools receive less funding overall than schools in several other districts throughout the State because the city does not contribute its fair share to its own public schools and because some of the Board of Education’s resources are wasted through mismanagement and fraud.310 The State, therefore, cannot be held accountable for such shortcomings.

Additionally, while the State conceded that the plaintiffs demonstrated several pressing concerns facing schools in New York City, the education available in the city’s schools, nonetheless, exceeds the constitutional standard of a “sound basic education.”311 The State noted that the city’s schools have one of the lowest pupil-teacher ratios among large school districts throughout the nation, and according to the city’s own evaluation system, nearly all of its teachers are rated as “satisfactory” or better.312 The city’s educational materials and supplies rank at or near the “exemplary” level and “[s]chool facilities are in fair condition or better, and are sufficient to permit children to learn, as required by the Education Article.”313

The State next relied on the performance of the New York City students themselves pointing to statistics showing that “[ninety-two] percent of the City’s eleventh-graders demonstrate graduation

308. Brief for Defendants-Appellant’s at 2, 6, Campaign for Fiscal Equity, Inc. (No. 93-111070).
309. Id. at 1.
310. Id.
311. Id. at 3.
312. Id.
313. Id.
competency in basic skills” and that New York City students “score near or above the national average in tests [that compare] their achievement in reading and math to other students across the United States.”314 The State thus characterizes the New York City school system, despite its many documented flaws, as one of the best large urban public school systems in the nation.315

The State asserted that the trial court simply ignored such factors.316 “Instead, the trial court measured the constitutional adequacy of New York City’s schools, [especially] the quality of its teachers, against the resources and performance of wealthy” suburban schools in neighboring districts, despite the fact that the Court of Appeals has twice held, in both Levittown and REFIT, that this type of comparative evidence has no relevance to an Education Article claim.317

In addressing the question of whether any failure to provide a constitutionally adequate education was caused by the State’s education funding mechanism, the State argued that the trial court ignored three key factors.318 The court failed to adequately examine: 1) whether the total funding available to New York City’s schools was “sufficient to provide a sound basic education, (even if it was not actually being used to that effect)”; 2) “whether available resources are squandered due to local mismanagement and corruption”; or 3) “whether any shortfall in funding is attributable to the City’s failure to make an adequate local contribution.”319 Instead, the trial court held that such factors were not germane to the inquiry because the responsibility to provide a constitutionally adequate education rests squarely with the State.320

The State contended, however, that had the trial court adequately examined these factors, the answer to the question of whether any failure to provide a constitutionally adequate education was caused by the State’s education funding mechanism would have been an emphatic “no.”321 The State points to statistics showing that “New York City spends more than almost all other urban school districts across the country—$9,500 per student (based on Fiscal Year 2000 data)—and that “[many] schools in New York

314. Id.
315. Id.
316. Id.
317. Id.
318. Id. at 3-4.
319. Id.
320. Id. at 4.
321. Id.
City, including those in Community School District [ ] 2 and local Catholic schools, provide excellent education with significantly less funding." 322 Moreover, even if these resources are not adequate, the blame for such insufficiency rests squarely with New York City and its Board of Education and not with the State’s funding formula. 323

Finally, the State noted that, since the present "lawsuit was commenced, the State Legislature has dramatically increased education funding for New York City on its own accord." 324 On the other hand, New York City has "dramatically decreased the proportion of the cost of public education [ ] that it absorbs." 325 "At the same time, the [New York City Board of Education] has wasted vast sums of money through mismanagement and corruption." 326

In its reply, CFE disputed the State’s depiction of the quality of the education available to New York City school children. 327 In order to illustrate the State’s failure to provide a constitutionally adequate education, CFE examined the group of New York City students scheduled to graduate high school in 1999. 328 CFE contended that only "[sixty percent] of the Class of 1999 who entered the ninth grade would receive a high school diploma." 329 Of those receiving diplomas, many will take as many as seven years to do so and most will find that they are unprepared for the demands of citizenship or a productive workplace. 330

CFE next examined the conditions under which the members of the Class of 1999 were forced to learn. “In 1988, when the Class of 1999 was in second grade, the system was short 100,000 seats.” 331 The state legislature, in fact, declared that New York City’s schools “were in such ‘deplorable physical condition’ that they were ‘a serious impediment to learning.’” 332 “In 1995, when the Class of 1999 was in ninth grade, a blue-ribbon commission [declared that the New York City school system was in] a state of ‘imminent calamity’

322. Id.
323. Id.
324. Id.
325. Id. at 4-5.
326. Id. at 5.
328. Id.
329. Id.
330. Id.
331. Id. at 2.
332. Id.
and described overcrowded schools that lacked adequate heat, light and air.\textsuperscript{333}

According to the CFE, unprepared and unqualified teachers taught the Class of 1999.\textsuperscript{334} "When the Class of 1999 was in elementary school, at least one in ten teachers lacked the minimum credentials required for certification by the State [and] one of four elementary teachers had failed the basic teacher competency exam at least once."\textsuperscript{335} "As [these students] moved [up] through junior and senior high school, [they were] taught by at least 1,500 uncertified math and science teachers, [compared with] only a handful of uncertified teachers in the rest of the state."\textsuperscript{336} "More than [forty] percent of the math teachers, [thirty-seven] percent of the biology teachers, and [twenty-four] percent of the chemistry teachers failed the certification tests in their subject matter at least once."\textsuperscript{337}

Finally, CFE focused on other substantial inadequacies within the New York City school system.\textsuperscript{338} For several years, many schools lacked up-to-date textbooks, libraries, a sufficient number of computers together with enough teachers who understood how to use them, and a sufficient supply of basic classroom necessities, such as pencils and paper.\textsuperscript{339} Overall, the "Class of 1999 suffered a collective and cumulative denial of adequate resources, collective because the multiple inadequacies reinforced each other and cumulative because the inadequacies continued year after year, with the effects snowballing."\textsuperscript{340}

The consequences of these inadequacies, according to the CFE, were devastating.\textsuperscript{341} "When the Class of 1999 took its first standardized literacy test in the third grade, [approximately] one-third of the class, [or about] 20,000 children, was judged to be functionally illiterate."\textsuperscript{342} "By the time the Class reached junior high school, it ranked last in the state in social studies and science competence."\textsuperscript{343} "In 1999, just one-half of the members of the Class of 1999 that entered the ninth grade graduated on time."\textsuperscript{344} By way

\begin{itemize}
  \item \textsuperscript{333} \textit{Id.}
  \item \textsuperscript{334} \textit{Id.}
  \item \textsuperscript{335} \textit{Id.}
  \item \textsuperscript{336} \textit{Id.} at 2-3.
  \item \textsuperscript{337} \textit{Id.} at 3.
  \item \textsuperscript{338} \textit{Id.} at 4.
  \item \textsuperscript{339} \textit{Id.}
  \item \textsuperscript{340} \textit{Id.}
  \item \textsuperscript{341} \textit{Id.} at 4-5.
  \item \textsuperscript{342} \textit{Id.} at 4.
  \item \textsuperscript{343} \textit{Id.} at 4-5.
  \item \textsuperscript{344} \textit{Id.} at 5.
\end{itemize}
of comparison, more than eighty percent graduated on time in the rest of the State. By the year 2002, when the Class of 1999 is no longer eligible for free education, [CFE projected that] only another [ten] percent will have graduated."

"The history of the Class of 1999 [illustrates] overwhelming support for the trial court’s finding that the [quality of the] ‘education provided to New York City students . . . falls well below the minimum constitutional standard.’ The gross inadequacies plaguing the New York City school system are directly attributable to the unmitigated failure of the state education funding mechanism.

On June 25, 2002, the Appellate Division, First Department, issued a ruling reversing the decision of the trial court. Judge Lerner delivered the opinion of the court. Beginning with basic principles, Judge Lerner stated that, while the “sound basic education” standard pronounced by the Court of Appeals requires the State to provide a minimally adequate educational opportunity, it does not guarantee some higher, largely unspecified level of education. Instead, children are entitled to physical facilities and classrooms that provide sufficient light, space, heat, and air so as to permit children to learn. In addition, children must be given access to minimally adequate instrumentalities of learning, such as desks, chairs, pencils, and reasonably up-to-date textbooks. Finally, children are entitled to minimally adequate teaching of basic curricula, such as reading, writing, arithmetic, science, and social studies, by personnel that are adequately trained to teach those subjects.

Judge Lerner then focused the court’s analysis to the issue of minimally adequate facilities. Although there was evidence that some schools lack science laboratories, music rooms, or gymnasium, the plaintiffs failed to demonstrate that these conditions were so pervasive as to constitute a system-wide failure. Moreover, the
plaintiffs certainly failed to demonstrate the existence of a failure that was caused by the educational funding system or of one that can be cured only by way of reforming the system.357

Furthermore, the evidence at trial established that class sizes for kindergarten through the eighth grade average between 23.8 and 28.72 students per class.358 While experts testified that student performance is superior in a class of twenty or fewer children, there was no indication that students could not learn in classes consisting of more than twenty pupils.359 The plaintiffs, in fact, conceded that the city's Catholic schools outperform the city's public schools despite having larger classes.360 Thus, the trial court's holding that classes consisting of greater than twenty students is unconstitutional is unsupported and erroneous.361

Judge Lerner next turned attention to the issue of minimally adequate instrumentalities of learning.362 The plaintiffs conceded that recent increases in funding have alleviated the shortage of textbooks and were able to offer only anecdotal evidence regarding alleged shortages of chalk, paper, desks, chairs, and laboratory supplies.363 Although the average number of books per student in the city's schools lags behind the rest of the State, and the State allocates only $4 per student for library materials, such factors do not demonstrate the city's libraries are inadequate.364 Moreover, the plaintiffs' assertion the books are inadequate with regard to quality was based solely on certain superintendents' opinions that most of the books were antiquated and did not address multicultural themes.365 Judge Lerner rejected such a standard, holding that a library consisting of classics does not deprive students of a sound basic education.366

He then addressed the issue of minimally adequate teachers. The trial court held that teachers in the city's public schools were unqualified based predominantly on a comparison with teachers in the rest of the state on teacher certification status, scores on certification tests, experience, turnover rate, quality of the institutions

357. Id. at 140.
358. Id.
359. Id.
360. Id.
361. Id.
362. Id. at 140-41.
363. Id.
364. Id. at 141.
365. Id.
366. Id.
the teachers themselves attended, and the percentage of teachers holding a Master's Degree or higher. Judge Lerner, however, held that the city's teachers cannot be deemed inadequate simply because they have lower qualifications than teachers in the rest of the state.

The focus was then shifted to the issue of student performance. The trial court relied primarily upon poor student performance on standardized tests such as Regents Exams and on the determination of a City University of New York Task Force that most graduates of city high schools need remediation in one or more basic skills in holding that students in the city's schools were being deprived of a sound basic education. Judge Lerner, however, ruled that a minimally adequate education consists only of those skills necessary to enable students to become productive civic participants capable of voting and serving on a jury, not to qualify them for advanced college courses or even attendance at an institution of higher education.

Finally, the plaintiffs' case was addressed as a whole. In order to prevail in this case, the plaintiffs would have to demonstrate a causal link between the present funding system and any proven failure to provide a minimally adequate educational opportunity. Judge Lerner, however, characterized the plaintiffs' position as a form of res ipsa loquitur—the fact that thirty percent of city students drop out and an additional ten percent obtain only a GED, must mean the funding mechanism utilized by the State has deprived city students of a sound basic education. Under the correct constitutional standard, however, "the State must [simply] offer all [students] the opportunity of a sound basic education." The State is under no obligation to ensure students actually receive such. "[T]he mere fact that some students do not achieve a sound basic education does not [by itself demonstrate] that the State has defaulted on its obligation . . . as the State [cannot] be

367. Id.
368. Id. at 142.
369. Id. at 142-43.
370. Id. at 142.
371. Id. at 142-43.
372. Id. at 143-48.
373. Id. at 144.
374. Id. at 143.
375. Id.
376. Id.
faulted when students fail to avail themselves of the opportunities [provided]."\textsuperscript{377}

Judge Lerner held, therefore, that the plaintiffs failed to demonstrate that students in New York City's schools were not being provided with the opportunity to receive a sound basic education.\textsuperscript{378} Moreover, the plaintiffs failed to demonstrate that any failure on the part of the city's students to receive a minimally adequate educational opportunity is the result of the funding mechanism utilized by the State.\textsuperscript{379} As a result, the decision of the trial court was reversed.

The plaintiffs represented by the Campaign for Fiscal Equity coalition filed a Notice of Appeal with the New York Court of Appeals on July 22, 2002, citing a major issue of the state constitutional interpretation thereby requesting an appellate review as a matter of right.\textsuperscript{380} Under procedural rules of the Court of Appeals, the plaintiff's brief was due by September 20, 2002 and the State's reply brief due by November 4, 2002, with oral arguments potentially occurring as early as the winter of 2003.\textsuperscript{381}

\section*{C. Other School Finance Cases Originating in New York}

In \textit{Algier Ceaser, Jr. v. George E. Pataki}, a group of thirty-three students and their parents or guardians filed a class action lawsuit in the United States District Court for the Southern District of New York against New York Governor George Pataki and other state officials and entities on behalf of approximately 80,000 students attending "high-minority public schools" (defined as schools with over eighty percent minority enrollment) across New York, excluding New York City.\textsuperscript{382} The plaintiffs alleged a violation of regulations enacted under Title VI of the Civil Rights Act of 1964 and sought injunctive relief to remedy the "unlawful discrimination that pervades the education that New York State officials are providing" to the proposed class.\textsuperscript{383}

The plaintiffs cite, in support of their complaint, data published by the State Education Department showing the academic achieve-

\textsuperscript{377} Id.
\textsuperscript{378} Id. at 144.
\textsuperscript{379} Id.
\textsuperscript{380} Plaintiffs-Appellants' Opening Brief at 1-6, 9-10, Campaign For Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995) (No. 93-111070).
\textsuperscript{381} N.Y. CT. APP. R. 500.4, 500.5, 500.7.
\textsuperscript{383} Id.
ment of students in high-minority public schools in New York State, excluding New York City, is much lower than students in other non-minority schools across the State.\(^{384}\) The data showed great disparities in student performance on several state-administered standardized exams, in the awarding of Regents Diplomas, and in dropout rates.\(^{385}\) The plaintiffs further alleged high-minority schools have fewer educational resources than other schools due to the methods of administration the State has utilized in its operation of its school system, which have disparately effected students in high minority schools.\(^{386}\)

According to the plaintiffs, such methods of administration include the discriminatory manner in which the State complies with and enforces: 1) teacher certification; 2) remedial instruction; 3) access to suitable and appropriate buildings and grounds; 4) access to appropriate libraries; 5) the opportunity to take Regents courses and to earn Regents diplomas; and 6) monitoring of educational services.\(^{387}\) With this lawsuit, the plaintiffs seek to enjoin these methods of administration.\(^{388}\)

In response to the plaintiffs’ complaint, the State filed a motion to dismiss for failure to state a claim upon which relief can be granted.\(^{389}\) On August 14, 2000, United States District Court Judge McKenna issued a Memorandum and Order denying the defendants’ motion.\(^{390}\) Section 601 of Title VI of the Civil Rights Act of 1964 “prohibits any recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally funded program.”\(^{391}\) The Civil Rights Act also prohibits only intentional discrimination, but does bar actions that disparately impact upon minorities.\(^{392}\) Title VI, however, delegates the authority to federal agencies to enact regulations incorporating a disparate impact standard.\(^{393}\) In their complaint, the plaintiffs relied upon a regulation enacted by the former Department of Housing, Education and Welfare, the predecessor to the current Department of Education.\(^{394}\)

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384. Id.
385. Id.
386. Id. at *2.
387. Id.
388. Id.
389. Id. at *1.
390. Id.
393. Id.
394. Id. at *3.
Plaintiffs need only plead sufficient allegations to put the defendants on notice of what they intend to prove at trial to survive a motion to dismiss.\textsuperscript{395} In this case, Judge McKenna ruled that the plaintiffs satisfied this burden and that the defendants’ motion to dismiss was denied.\textsuperscript{396} The trial, thus, moved forward, the conclusion to which has yet to be reached.

In \textit{Amber Paynter v. State of New York}, a group of fifteen students in the Rochester City School District ("RCSD") and their parents or guardians filed a lawsuit in New York State Supreme Court, individually and on behalf of approximately 37,000 other students in the RCSD.\textsuperscript{397} The suit was filed against New York State and several state officers and entities, alleging that students are being deprived of a sound basic education, in violation of the New York Constitution, in light of the concentration of poor and minority students within the Rochester City School District.\textsuperscript{398} Moreover, the plaintiffs alleged an intentional discrimination under Title VI of the Civil Rights Act of 1964,\textsuperscript{399} a disparate impact claim under regulations implementing Title VI,\textsuperscript{400} and a claim for violation of those regulations under 42 U.S.C. § 1983.\textsuperscript{401}

The plaintiffs sought declaratory and injunctive relief to enjoin the State to provide them with constitutionally adequate education, educational opportunities on par with those provided to students in the other school districts in Monroe County, a racially diverse learning environment not characterized by high concentrations of poverty, and an educational system that does not impose a racially disparate impact.\textsuperscript{402} In response, the State filed a motion to dismiss all claims.\textsuperscript{403} The Supreme Court granted the State's motion in part, dismissing the cause of action under the Education Article, but not the cause of action alleging an intentional discrimination claim under Title VI of the Civil Rights Act of 1964, the disparate impact claim under regulations implementing Title VI, and a 42 U.S.C. § 1983 claim for violation of those regulations.\textsuperscript{404}

\begin{itemize}
  \item[395.] Id. at *4.
  \item[396.] Id.
  \item[398.] Id.
  \item[400.] 34 C.F.R. § 100.3(b)(2) (2000).
  \item[401.] Paynter, 735 N.Y.S.2d at 340.
  \item[402.] Id.
  \item[403.] Id.
  \item[404.] Id.
\end{itemize}
The plaintiffs appealed the ruling to the Appellate Division, Fourth Department, and the State cross-appealed. The State contended that the lower court erred in not dismissing the plaintiffs' complaint in its entirety. The plaintiffs contended that the cause of action under the Education Article should be reinstated. On December 21, 2001, the Appellate Division issued its ruling.

With respect to their Education Article claim, the court noted that the plaintiffs do not challenge the sufficiency of State funding, nor do they challenge the adequacy of the educational services and facilities being provided. Instead, the court explained that the plaintiffs focus solely on the “wholesale academic future” of the students in the RCSD, which they attribute to the high concentration of poor and minority students within the district as well as the system of public education mandating that students attend schools only within the district in which they live.

The plaintiffs went on to allege that but for this residency requirement, the demographics of RCSD would be greatly different, the quality of education would be far better, and they would receive the sound basic education they are entitled to under the Education Article. They argued that they stated a viable cause of action under the Education Article by virtue of their allegations of “wholesale academic failure” alone.

The Appellate Division, however, disagreed. Academic failure as measured by students’ performance on standardized tests does not, by itself, represent a constitutional violation. Academic failure may be the result of a variety of causes that are beyond the scope of State control. A constitutional violation arises only when such academic failure is the result of the State’s failure to provide for the maintenance and support of the public school system. The obligation imposed upon the State under the Education Article is satisfied as long as the physical facilities and edu-

405. Id.
406. Id. at 340-41.
407. Id. at 341.
408. Id. at 337.
409. Id. at 337.
410. Id.
411. Id.
412. Id.
413. Id.
414. Id.
415. Id.
416. Id.
cational resources made available under the current system are adequate to provide students with the opportunity to obtain a sound basic education. In light of the plaintiffs' failure to allege that minimally adequate educational services and facilities were provided in the RCSD by the State, they failed to state a claim under the Education Article for which relief can be granted.

The Appellate Division next addressed the plaintiffs' additional claims. Under the regulations established by the United States Department of Education, programs that receive federal funds are prohibited from using methods of administration that impose a disparate impact upon individuals because of their race, color, or national origin. This proscription applies to determinations regarding the types of services, financial aid, or facilities that are provided under such programs or the class of individuals to whom such services are to be provided.

The Appellate Division rejected the plaintiffs' claim that the residency-based system of education provided for under New York Education Law section 3202 has exacted a racially disparate impact upon the students in the RCSD. Moreover, even assuming, arguendo, such a system does have a racially disparate impact, the Appellate Division held that it did not violate 34 C.F.R. section 100.3(b)(2) as long as it is uniformly applied because the State has a substantial interest in imposing bona fide residency requirements in order to maintain the quality of local public schools. Thus, because the plaintiffs failed to allege that Education Law section 3202 is not being uniformly applied, they did not state a cause of action under 34 C.F.R. section 100.3(b)(2) for which relief can be granted. Therefore, the decision of the Supreme Court was modified and the Appellate Division granted the State's Motion to Dismiss in its entirety.

In March of 2001, the New York Civil Liberties Union ("N.Y.C.L.U.") filed a class action lawsuit, New York Civil Liberties Union v. State of New York, in the Supreme Court in Albany.

417. Id.
418. Id. at 343-44.
419. Id. at 344.
420. Id.
421. Id.
422. N.Y. EDUC. LAW § 3202 (McKinney 2003).
423. Paynter, 735 N.Y.S.2d at 344.
424. Id.
425. Id.
426. Id. at 344-45.
County against New York State and several State officers and enti-
ties on behalf of parents and children in "failing schools" through-
out the State. Building on the decisions in Campaign for Fiscal
Equity and relying upon the Education Article of the New York
Constitution, this is a school-based litigation that seeks to supple-
ment the remedy requested in Campaign for Fiscal Equity and
seeks judicial supervision of a school by school analysis of the roots
of failure and the particular remedies for each failing school to be
provided by the State.

A substantial number of students, the plaintiffs argue, in each of
these "failing schools" are unable to perform at the minimum stan-
dards established by the New York State Department of Education
on standardized tests in the areas of reading, writing and math.
These "failing schools" tend to generally possess some or all of the
following characteristics: a highly transient teaching staff, unquali-
fied teachers, textbooks and computers that are inadequate in both
quality and quantity, crumbling facilities, overcrowding, inade-
quate focus on the core-curriculum, poor administrative leadership,
class sizes far too large for the many "high need" children in the
classes, no sense of community, inability to involve parents in
school activities, and insufficient programs for art, music, and
athletics.

The plaintiffs also assert student performance in these "failing
schools" is terrible. A large number of students read below
grade level and many fail to perform well enough on standardized
tests in reading, writing, and math to demonstrate even basic skill
levels. Students at the high school level rarely receive Regents
diplomas, as most are suspended or drop out at a staggering rate.

The plaintiffs charge that the New York State Department of
Education is keenly aware these schools are failing. Nonetheless, the State has failed to take adequate measures to remedy the
deficiencies plaguing these "failing schools." Those students

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2001) (No. 01-1778).
428. Id. at 1-4; see Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 661-65
(N.Y. 1995).
429. Brief for New York Civil Liberties Union at 68, NYCLU (No. 01-1778).
430. Id. at 140.
431. Id. at 3-4, 27.
432. See id. 29-30, 88-91 (discussing programs to remedy the significant amount of
students reading below level and students substandard performance on tests).
433. Id. at 199-200.
434. Id. at 191-92.
435. See id. at 193-200 (discussing the states remedy to inferior education).
who, by reason of race, residency or economic status, are consigned to these failing schools are being denied the opportunity to receive a "sound basic education." These students, according to the plaintiffs, are at serious risk of failing to acquire the basic skills necessary to become productive citizens capable of civic engagement and of sustaining competitive employment. As of the writing of this Article, the trial has yet to take place.

CONCLUSION

The Unites States Supreme Court decision in Rodriguez, in effect, forced public school finance reformers to litigate their claims against state education funding schemes in state courts. Efforts of reform-minded plaintiffs in state courts resulted in two distinct litigation and doctrinal trends—equity and adequacy. Although equity theory showed some promise in the earlier state cases of Serrano and Robinson, legal challenges based on arguments for greater equity proved difficult to substantiate because the courts were not willing to hold states to substantial or strict scrutiny standards for their public elementary and secondary school funding systems. The New York Court of Appeals in Levittown particularly emphasized that the State is only required to provide a sound basic education, not to provide an equitable distribution of funding to public schools. Consequently, equity-based legal arguments resulted in few litigation victories in other states and have been de-emphasized by New York school finance reform plaintiffs.

Successful litigation in Montana, Kentucky, and Texas, however, has demonstrated the efficacy of adequacy-based legal arguments and offered renewed and real hope of litigation success for plaintiffs challenging state public school financing systems. Adequacy theory in school finance litigation is predicated on the use of state constitutional provisions requiring a state to provide a minimally adequate public education to its schoolchildren. Plaintiffs have been able to convince state high courts that poor educational outputs, such as high failing percentages on statewide tests and high

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436. See id. at 6 (discussing the inadequacies and disadvantages that these students encounter).
437. Id.
438. Supra notes 26-76 and accompanying text.
439. Supra notes 79-93 and accompanying text.
440. Supra notes 79-93 and accompanying text.
441. Supra notes 94-96 and accompanying text.
dropout rates, and lack of sufficient education tools including textbooks, classrooms, and teachers, together constitute a failure of a state to meet its constitutional burden of providing adequate public education.

Accordingly, adequacy theory offers a potentially greater chance of success to the plaintiffs in the Campaign for Fiscal Equity case because plaintiffs have little difficulty citing numerous shortcomings of the public schools, especially in poor urban districts, to support their arguments that the state is failing to provide a sound, basic education. This litigation strategy cleverly avoids the problem of focusing too much attention upon only the levels or equity of funding New York is providing to public education, instead emphasizing the numerous inadequacies of public elementary and secondary schools which are exacerbated by lack of sufficient state funding. The remaining difficult legal challenge is convincing the New York Court of Appeals that the daunting problems of poor public schools establishes a “gross and glaring inadequacy” and, consequently, a failure of the state to provide a sound basic education as required by the state constitution.
EXPANDING LATINO PARTICIPATION IN THE LEGAL PROFESSION: STRATEGIES FOR INCREASING LATINO LAW SCHOOL ENROLLMENTS

William Malpica* 
and Mauricio A. España**

INTRODUCTION

Increasing minority representation in the legal profession has concerned the bar since the civil rights movement. Yet the numbers remain appallingly low. In 1999, William G. Paul, the former President of the American Bar Association, noted that while thirty percent of Americans were members of racial or ethnic minorities, a full ninety-two percent of the nation’s lawyers were white. He predicted that, if current trends continue, the legal profession’s ethnic mix would fall even further behind in the next fifty years. Three years later, the gap has already widened. Minorities now

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constitute twenty-five percent of the total population,\(^3\) yet they make up only 7.5 percent of entire legal profession.\(^4\) Even several Presidents of the United States have weighed in on the need for diversity. As far back as 1963, President John F. Kennedy summoned the nation’s lawyers to combat racism and increase diversity.\(^5\) In 1996, President William J. Clinton created an Advisory Commission on Educational Excellence for Hispanic Americans that “[called] upon the nation to improve education for Hispanic Americans.”\(^6\) In 1999, President Clinton called upon the nation’s lawyers to help America’s poor and minorities share in modern American prosperity and urged the legal profession to take steps to diversify the profession.\(^7\)

Latino representation is particularly alarming. Although Latinos constitute 12.5 percent of the American population, and have become the largest minority group in the United States,\(^8\) they represent only 2.2 percent of the nation’s lawyers.\(^9\) Moreover, Latino representation is, in fact, decreasing. In 1998, while Latinos comprised 11.7 percent of the total population, they represented 2.49 percent of the nation’s lawyers.\(^10\) The number of Latinos enrolled in the first year of law school—the focus of this Essay—has risen steadily since the 1960s, but remains dismal. The number of Latino first-year law students as a proportion of the total first-year population went from 1.1 percent in 1969-70, to roughly three percent

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5. Id. at 1.


7. Clinton Issues Call To Nation’s Lawyers, 222 N.Y. L.J., July 21, 1999, at 2. In response to the President’s call, a number of proposals have surfaced. ABA Head, supra note 2, at 2. The ABA plans to create a scholarship fund to help more racial and ethnic minorities go to law school. Id. More than $300,000 has been pledged to the fund, which the group hopes will reach $1 million during the first year. Id. The ABA will also organize a group of law school deans to examine diversity in law schools by looking at admission tests. Id.


during the 1980s. Currently, Latinos make up approximately 5.8 percent of all students in American Bar Association ("ABA") accredited law schools and 8.4 percent of total law school applicants.

The benefits of increased participation in the legal profession are undisputed. A lack of lawyers limits the group’s ability to advocate for its interests, and otherwise denies that group full political power. Additionally, cultural and linguistic barriers often inhibit Latinos from consulting non-Latino lawyers, limiting access to vital legal services and, to the extent Latino entrepreneurs fail to seek services, limiting the community’s economic growth. In addition, a legal career is generally a ticket out of the lower class. As such, a law school education can be a tool for socioeconomic change. An increase in the number of Latino lawyers can have a multiplier effect, enhancing upward mobility for Latinos generally by exposing more Latino children to professional role models.

Participation in the legal profession as an attorney is ultimately dependent upon admission to the bar. Before crossing that finish line, future lawyers must overcome a series of hurdles including law school admission, retention, graduation, and bar passage. In addition, true participation in the profession requires gainful employment as an attorney.

This Essay explores how Latinos have fared in the law school admissions process—a hurdle that the group has yet to overcome—and evaluates current efforts to bolster Latino enrollment. Part I

12. REPORT TO INCREASE DIVERSITY, supra note 4, at 51. It is fair to mention that Latinos' enrollment rate has increased since 1990. Compare J.D. DEGREES 1984-2001, supra note 1, with AM. BAR ASS'N, MINORITY ENROLLMENT 1971-2001 (2002), at http://www.abanet.org/legaled/statistics/minstats.html (last visited May 15, 2003). This increase, however, is not significant when considering that since that time Latinos have become the largest minority. CENSUS, HISPANIC POPULATION, supra note 3, at 1.
13. For example, in addition to being a prerequisite for judicial appointments, a law degree is a common background for election to legislative office. Mary Kay Lundwall, Increasing Diversity In Law Schools And The Legal Profession: A New Approach, 14 CHICANO-LATINO L. REV. 147, 148 (1994). Government administrative and regulatory agencies are also staffed with decision makers that often are law school graduates. Id.
14. Id. at 148.
16. Id.
17. Holley & Kleven, supra note 11, at 304-05.
18. REPORT TO INCREASE DIVERSITY, supra note 4, at 49.
examines the underlying conditions that contribute to low Latino enrollment in law schools. This Section reveals the primary obstacles to Latino admissions: the limited pool of eligible Latino college graduates and current law school admissions policies that emphasize Law School Admission Test ("LSAT") scores and grade point averages.

Part II reviews a sampling of responses to low Latino law school enrollment and concludes that the most effective strategies for increasing Latino law school enrollments are those that specifically aim to expand the pool of Latino applicants. To do so, potential law students must be identified early in their academic careers and armed with the tools to help them graduate high school and college with adequate credentials to gain admission to law school. In addition, interested parties must actively lobby law schools to rework the traditional admissions criteria.

Finally, Part III describes a new effort initiated by the Author to address the problem in light of the recommendations contained in this Essay.

I. OBSTACLES TO PARTICIPATION

A. Low High School and College Attainment Rates Limit the Pool of Eligible Candidates

"A college degree is virtually a universal prerequisite now to entry into all ABA accredited law schools." Accordingly, the first obstacle to overcome in increasing Latino law school enrollment is to expand the relatively small pool of Latino college graduates. In 1994, a study by Professor Michael A. Olivas provided a detailed analysis of the shortage of Latinos in the legal community and demonstrated that, despite an increasing Latino population, high school and college completion rates had declined. Unfortunately, this trend continues to progress with Latinos entering college at higher rates, but graduating in relatively very small numbers.

19. The list of described programs is not intended to be an inventory of all such programs in existence; rather, it presents a survey of representative programs, particularly those described in articles published in law journals and legal periodicals.


Although high school graduation rates for Latinos have gone through significant changes in the last two decades, they remain significantly low.\textsuperscript{23} Between 1985 to 1998, the high school graduation rate for Latinos dropped from 62.9 percent to approximately fifty-four percent.\textsuperscript{24} According to the most recent statistics, however, the graduation rate of Latinos had risen to 64.1 percent by the year 2000.\textsuperscript{25} Nevertheless, Latinos' graduation rates are disproportionately low when compared to performance by other groups.\textsuperscript{26} The comparable rates for whites were 83.6 percent in 1985, 82.5 percent in 1990, and 82.4 percent in 2000.\textsuperscript{27} The rates for African-Americans were 75.6 percent in 1985, seventy-seven percent in 1990, and seventy-seven percent in 2000.\textsuperscript{28} While only a small fraction of white adults (4.7 percent) have fewer than nine years of schooling today, a full 48.9 percent of adult Latinos have failed to reach even this minimal level.\textsuperscript{29}

Even among those who graduate from high school, Latinos attend college at lower rates.\textsuperscript{30} In 1990, twenty-nine percent of La-

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\textsuperscript{23} See infra notes 24-29 and accompanying text.


\textsuperscript{26} See infra notes 27-29 and accompanying text.


\textsuperscript{28} Id. at A-25.


Latino high school graduates went to college—a decrease from the 1980 level of 29.8 percent. Yet in 1990, 39.4 percent of white graduates attended college, up from 31.8 percent in 1980. As of the year 2000, the statistics have relatively improved. In 2000, 36.5 percent of Latino high school graduates attended college, a significant increase from the 1990 percentage. Even this improved rate, however, remains low compared to 43.2 percent of white graduates. Thus, while total Latino college enrollments have increased significantly, from 443,000 to 1,232,000 in the years between 1980 and 2000, their numbers as a percentage of total college enrollments only increased from 4.3 percent to 9.6 percent. The impact of this increase is lessened when considered alongside several factors. First, between 1990 and 2000, the Latino population increased by a staggering 57.9 percent. Second, Latinos attend two-year and community colleges and enroll in college as part-time students at a greater rate than any other comparable group. Third, although Latinos are entering college in higher numbers, their graduation rates remain very low.

Naturally, to the extent that Latinos obtain college degrees in lower numbers, it is expected to find fewer Latinos in law school. Latinos comprise about 12.5 percent of the populace, yet consti-

34. Id.
35. Id.
38. Fry, supra note 22, at 3-5, 21. In the category of eighteen to twenty-four year old college students, forty percent of Latino students attend two year institutions compared to about twenty-five percent of white and twenty-nine percent of African-American students in that age group. Id. at 21. Moreover, almost eighty-five percent of white college students in this same age category are enrolled full-time in college, compared to seventy-five percent of Latino students. Id.
39. Id. at 9.
Comparing Latino college graduates with the proportion of Latinos in the population illustrates the primary—if not the single greatest—obstacle to law school admission, that there is a significantly sparse number of Latinos who are even eligible to apply to law school.

B. Law School Admissions Policies Emphasize Certain Predictive Criteria that Exacerbate the Problem

The disproportionately low college graduation rate among Latinos is not the only obstacle to law school enrollment. The criteria currently used by law school admissions officers represents another major hurdle for Latino representation. Although Latinos apply to law school in proportionately greater numbers than other groups, law schools admit them at a lower rate due to these policies. Professors Holley and Kleven concluded that “the admission[s] process operates to screen out [Latinos] at disproportionately high rates.” Whether or not these disparities reveal an inherent unfairness, they support the call for more careful scrutiny of those criteria.

1. The Admissions Criteria

Most law schools improperly rely primarily on the Law School Admission Test and undergraduate grade point average (“UGPA”)

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42. See Holley & Kleven, supra note 11, at 306-07 (noting the small number of college graduates in the Latino community).
43. At least one commentator has found that the primary reason for this under-representation in law schools is attributable to current admission practices, and particularly to the heavy emphasis on the LSAT. E.g., Eulius Simien, The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action, 12 T. MARSHALL L. REV. 359, 370-71 (1987) (discussing affirmative action’s accomplishments and downfalls in the last fifteen to twenty years).
44. See Holley & Kleven, supra note 11, at 307-08. From 1995 to 2000, Latinos’ application rate went from 5,761—7.5 percent of the total applicants, to 6,219—8.3 percent of total applicants, while Latinos account for 12.5 percent of the population. Report to Increase Diversity, supra note 4, at 68.
46. Holley & Kleven, supra note 11, at 308.
47. Holley and Kleven assert that the numbers “demand[ ] a closer look than the legal hierarchy has given it. Such disparities raise a suspicion of unfairness and is a barrier directly within the control of the legal profession.” Id. at 309.
to make admissions decisions.\textsuperscript{48} Admissions officers have grown more dependent on these measures, especially the LSAT, as a result of the steep rise in law school applications.\textsuperscript{49} The LSAT, which was originally used to merely exclude those who were thought incapable of the rigors of law school and, therefore, a tool for reducing first year attrition, is now used to choose among those who are considered capable.\textsuperscript{50} Regrettably, most schools have instituted a policy of automatically rejecting students whose scores fall below a predetermined cut-off.\textsuperscript{51} Under these circumstances, law school admissions officers, not bar examiners, control the selection of future lawyers.\textsuperscript{52}

\textbf{2. Questioning the Validity of These Criteria}

The traditional admissions criteria have been criticized as poor predictors of minority success in law school.\textsuperscript{53} Arguing that the measures are racially biased, some critics point to evidence that, even if the LSAT and UGPA are predictive of both first year

\begin{itemize}
\item \textsuperscript{48} Susan E. Brown \& Eduardo Marenco, Jr., Law School Admissions Study 15-25 (1980) (discussing the LSAT's original intended purpose and how it is misused by law schools by relying too heavily on it for admission's purposes); Lani Guinier, From the Lessons of Admitting Students of Color, Law Schools Can Learn How to Fix the Rules for Everyone, \textit{Legal Times}, Sept. 16, 2002, at 58 (discussing law schools obsessive use of LSAT scores as a primary admission tool); Holley \& Kleven, \textit{supra} note 11, at 308-09; Kate Schott, Officials Debate Withholding LSAT Scores, \textit{Chi. Daily L. Bull.}, Jan. 17, 2003, at 3 (discussing the LSAC's initiative to withhold LSAT scores from law schools that use the scores improperly by basing admission almost solely on them); Simien, \textit{supra} note 43, at 371; Interview with Gloria Rivera, Assistant Dean of Admissions, St. John's University School of Law, in New York, N.Y. (Feb. 6, 2003).
\item \textsuperscript{49} See Brown \& Marenco, \textit{supra} note 48, at 16 (discussing the LSAT's development); Simien, \textit{supra} note 43, at 373.
\item \textsuperscript{50} Brown \& Marenco, \textit{supra} note 48, at 16. Originally, the LSAT was an effective predictor of students who would do better first year. \textit{Id.} This use, however, was effective until the 1960s when applications were not high. \textit{Id.} In 1973, for the first time in history, “every accredited law school denied admission to applicants who it considered qualified for the practice of law.” Simien, \textit{supra} note 43, at 374.
\item \textsuperscript{51} Simien, \textit{supra} note 43, at 374. Even admissions officers echo that sentiment. Interview with Gloria Rivera, \textit{supra} note 48.
\item \textsuperscript{52} Simien, \textit{supra} note 43, at 371 (citing former ABA President Chesterfield Smith).
\item \textsuperscript{53} Michael A. Olivas, Higher Education Admissions and the Search for One Important Thing, 21 U. Ark. Little Rock L. Rev. 993, 997 (1999) (discussing a study of admission criteria and asserting that the LSAT is a not an effective indicator of law school success); Cathaleen A. Roach, A River Runs Through It: Tapping Into the Informational Stream to Move Students from Isolation to Autonomy, 36 Ariz. L. Rev. 667, 676-77 (1994) (stating that “traditional index numbers” such as the UGPA and LSAT cannot be credible indicators of law school success unless they are considered in connection with student’s propensity for isolation).\end{itemize}
grades and overall performance in law school, they fail to account for the fact that Latinos and other minorities, as a group, experience a greater improvement in their grades during the course of law school as compared to white students. Such improvement by Latinos during the second and third years in law school reveals that the traditional criteria actually underpredict Latino students' performance in law school overall. Instead, Latino performance is ultimately best weighed by law school graduation and bar passage, rather than performance during first year alone.

Even the use of graduation rates to assess the predictive value of the LSAT and UGPA is misplaced to the extent that they compare the law school graduation rates of minority students to those of white students. Although white and minority students with high scores may graduate in comparably high numbers, many of the minorities who fail to graduate do so for reasons that the admissions criteria cannot measure or even take into account, such as financial troubles or a greater difficulty in adjusting to the non-academic elements of the law school environment. The Council on Legal Educational Opportunity ("CLEO") Program's success illustrates this point. CLEO reports that over seventy percent of the students, all of whom had scores substantially lower than the general law school population, who participated in their program between 1968 and 1979 had graduated by 1979.

Some commentators have concluded that, of the two measurements, the LSAT has a far greater negative impact on Latino admissions. Professors Holley and Kleven found that, compared to

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54. Guinier, supra note 48, at 59 (stating that Latino students tend to excel in certain key areas, such as leadership, professional success, and contribution to the community); Holley & Kleven, supra note 11, at 315; Donald Powers, Differential Trends in Law Grades of Minority and Nonminority Law Students, 76 J. Educ. Psychol. 488, 490-91, 498-99 (1984) ("[T]he differential improvements of minority students [by the end of their studies] would seem to provide further justification for admitting minority and other disadvantaged students with lower admission credentials.").

55. Holley & Kleven, supra note 11, at 316.

56. Id. at 315.

57. Id.

58. Andrea A. Curcio, A Better Bar: Why and How the Existing Bar Exam Should Change, 81 Neb. L. Rev. 363, 391-92 (2002). Professor Curcio goes further and asserts that Latinos' lower bar passage rate can also be explained by the fact that the bar is very similar to the LSAT and, thus, she advocates a reform of the bar exam. Id. at 391-93; Holley & Kleven, supra note 11, at 315; Roach, supra note 53, at 675-76.

59. See infra Part II.C.2.a, for a discussion of CLEO.

60. Simien, supra note 43, at 384.

61. Brown & Marenco, supra note 48, at 18; see Guinier, supra note 48, at 59; William C. Kidder, Comment, Does the LSAT Mirror or Magnify Racial and Ethnic
the exclusive use of the LSAT, Latino enrollments would double if admissions were based instead on the exclusive use of UGPA. The company that administers the LSAT, the Law School Admission Council ("LSAC"), and many schools that primarily rely on the LSAT for admission, maintain that the test is not biased in favor of white test takers and, instead, is a good predictor of law school success. Their conclusions have been hotly contested. Critics note that the subject matter of LSAT questions, like those of standardized tests generally, contain inherent cultural biases in favor of majority test takers.

There is also evidence that the LSAT favors wealthy test takers. At least one study has demonstrated that "not only do the wealthy do better than the poor on the LSAT, but the wealthy also do better than the middle class on the test." If the LSAT was, in fact, biased against poorer students, Latinos would be among the

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**Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students, 89 Cal. L. Rev. 1055, 1074-76 (2001) (discussing the impact the LSAT has on African-American and Asian-Pacific Americans).**

62. Using data compiled in a 1976 study, Holley and Kleven found that, for the population sampled, if LSAT scores were used exclusively to determine admission (and all applicants scoring 550 in old system were admitted), only 0.4 percent of the total admittees would have been Latino. If the decisions had been based solely on UGPA (and all applicants scoring 3.00 were admitted), however, Latino admission rates would increase substantially to a full one percent. Holley & Kleven, supra note 11, at 310.

63. Simien, supra note 43, at 371; see Kidder, supra note 61, at 1073-75 (providing an analysis of LSAT score discrepancies between white and minority students of similar academic backgrounds).

64. LSAC conducted a study in 1980 to verify the predictive capabilities of the LSAT and to respond to charges that the LSAT was racially biased. Simien, supra note 43, at 382. The study concluded that there was no "significant difference in the correlation of the LSAT scores and first year averages of white and minority candidates." Id. Ed Haggerty, spokesman for the Law School Admission Council, and Dean David E. Van Zandt, Dean of Northwestern University School of Law, explicitly stated that the LSAT scores were designed and are used to predict first year grades and that it is a vital step in their admission process. Schott, supra note 48, at 3.


68. Simien, supra note 43, at 375.
most affected. According to the most recent data from the United States Census Bureau, although Latinos represent 12.5 percent of the total population, they comprise 21.4 percent of the poor.\textsuperscript{69} Additionally, critics note that LSAT scores may be affected by test coaching, which is expensive or otherwise unavailable to lower income students.\textsuperscript{70}

Moreover, critics contend that even if the LSAT is not biased against Latinos and other minorities, it is a weak predictor of law school success in general for white students and non-white alike.\textsuperscript{71} “Nationwide the LSAT is [nine] percent better than random [selection] in predicting first-year law school grades, and this is what the test is [supposed to be] best at predicting.”\textsuperscript{72} Essentially, the LSAT gauges an individual’s intellectual qualities, such as analyzing and manipulating abstract legal concepts.\textsuperscript{73} One expert test taker noted that the LSAT merely measures how well a student takes the LSAT—and little else and that, in fact, it “fails to admit the best students.”\textsuperscript{74}

There is even evidence that the LSAT correlates negatively with many of the attributes of an effective lawyer. Many commentators claim that the criteria not only “bear no meaningful relationship


\textsuperscript{70} Simien, supra note 43, at 383; Wong, supra note 67, at 232-34.

\textsuperscript{71} Holley & Kleven, supra note 11, at 315-17 (discussing a 1981 Columbia Law School study showing a significantly lower correlation between “LSAT scores and law school grades for whites and minorities separately than for the sample group as a whole.”).

\textsuperscript{72} Guinier, supra note 48, at 59.

\textsuperscript{73} Simien, supra note 43, at 384.

\textsuperscript{74} Kevin McMullin, Building a Better Legal Population; Schools Shouldn’t Rely so Heavily on Test Scores in Admissions, Tex. Law., Nov. 23, 1998, at 22. Kevin McMullin has been an instructor for The Princeton Review, a New York based test-training company, since 1993 and is currently director of their public relations. Id. Mr. McMullin has publicly expressed his concerns over the unreasonable emphasis placed on the LSAT:

Imagine a student who dedicated years of study to challenging undergraduate courses. She could spark intelligent discussion in the classroom. She could be the kind of leader on her campus who motivates other students around her to excel. She could volunteer in the community, perhaps interning at a firm that offers free legal aid to recent immigrants. Her letters of recommendation could be shining, her academic record impeccable and her yearning to bring her passion to law school unwavering. Most people would agree that she would make a welcome addition to any law school.

But if she doesn’t fill in enough bubbles correctly during the LSAT, her chances of admission change dramatically.

Id.
to intellectual merit,"' but also "may [in fact] be inversely related to important nonintellectual traits which are also necessary for competent performance in the law."' The critics claim that Latinos and other minorities who enter the profession outperform their white counterparts on the basis of factors that are central to the legal profession, such as leadership, professional success, public interest, and contribution to the community.76 Whether or not the LSAT and the UGPA are adequate indicators of the capacity to succeed in law school or not, the effect that these admissions practices have had on Latino applicants is inescapable. Part II surveys several responses to the problem.

II. RESPONDING TO THE PROBLEM

A. Lobby for the Continuance of Threatened
Affirmative Action Policies

With the struggle for civil rights as a backdrop, many schools in the late 1960s attempted to increase minority enrollment; unfortunately, they found that the existing criteria posed a significant obstacle to admittance for many minority candidates.77 In response, some schools initiated affirmative action programs to set aside a specified number of seats for minority students.78 Attacked as "reverse discrimination,"79 these policies sparked immediate debate over their constitutionality.80 The debate reached the United States Supreme Court in 1978.81 In Regents of the University of California v. Bakke,82 the Court held that strict racial quotas for professional school admissions were unconstitutional.83 The Court,

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76. Guinier, supra note 48, at 59.
77. Lundwall, supra note 13, at 149; see supra Part I.B.
78. Id. at 149-52.
79. "Reverse discrimination" is commonly used to refer to an alleged "[t]ype of discrimination in which majority groups are purportedly discriminated against in favor of minority groups, usually via affirmative action programs." BLACK'S LAW DICTIONARY 1319 (6th ed. 1990). This claim has been primarily used by white applicants who were denied admission to programs because they did not meet the qualifying standards. E.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) (holding the use of quotas based on race as unconstitutional).
80. Lundwall, supra note 13, at 149.
81. Bakke, 438 U.S. at 265.
82. Id.
83. Id. at 289.
however, upheld the use of race as one element in a range of factors a university may consider in attaining the goal of a diverse student body.\(^{84}\)

Recently, even this limited use of race in the admissions process has come under attack. In 1995, the Regents of the University of California voted to end affirmative action programs at all University of California campuses.\(^{85}\) Soon thereafter, in 1996, the United States Court of Appeals for the Fifth Circuit, in *Hopwood v. Texas*, prohibited the use of racial preferences by public schools in Texas.\(^{86}\) That same year, a California ballot initiative, Proposition 209, banned the use of race as a factor in admissions to colleges and graduate schools in that state.\(^{87}\) The Supreme Court refused to block or hear a challenge to Proposition 209.\(^{88}\) Due to these developments, local schools reported drastic reductions in minority enrollment.\(^{89}\)

For instance, at the University of California at Berkeley School of Law, the number of African-American students admitted fell from seventy-five in 1996 to fifteen in 1997.\(^{90}\) At the University of Texas School of Law that same year, the number fell from sixty-five to eleven.\(^{91}\) The Center for Individual Rights, the organization that represented the plaintiffs in *Hopwood*, struck again in 1997 by filing federal suits against the University of Washington School of Law, and the University of Michigan, and its corresponding law school.\(^{92}\) In Washington, citizens followed suit by passing Initiative 200, which banned affirmative action for higher education, public contracting, and hiring.\(^{93}\) In contrast, the United States Court of

\(^{84}\) Id. at 314.

\(^{85}\) Lucy Hodges, *Not Simply a Black and White Issue; There is Nothing Wrong with an Admissions Policy that Favours Minorities if it is Properly Targeted, Says Lucy Hodges*, *INDEP.*, Nov. 16, 1995, at 14; Paul Craig Roberts, *Quotas a Bad Idea Whose Time Has Gone*, *BUS. Wk.*, Sept. 11, 1995, at 23.

\(^{86}\) *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996).


\(^{89}\) James Traub, *The Class of Prop. 209*, *N.Y. TIMES*, May 2, 1999, § 6 (Magazine), at 44.

\(^{90}\) Cotts, *supra* note 87, at A13.

\(^{91}\) Id. In response to *Hopwood*, the Texas legislature enacted the Texas Ten Percent Plan, which guaranteed the top ten percent of Texas high school students admission to the University of Texas and Texas A&M. *Id.*


Appeals for the Sixth Circuit, in response to the University of Michigan litigation, held that the use of race as one of many factors in processing admissions to the University of Michigan’s Law School was constitutional. The Supreme Court subsequently granted certiorari and the case was argued on April 1, 2003. Given the uncertain future of these affirmative action policies, the need to open alternative avenues to bolster Latino enrollment is now greater than ever.

B. Advocate for Change in Admissions Criteria

The relatively low correlation between the LSAT/UGPA and law school grades suggests that many applicants, including Latinos, who are denied admission due to low scores may, in fact, be better suited than applicants who are admitted. Nevertheless, even though many law schools concede the criteria’s flaws, they are reluctant to abandon them, given the importance placed upon them by U.S. News & World Report magazine in compiling its all-important annual ranking of law schools.

Even if the LSAT and UGPA were perfect predictors of the capacity to excel in law school, their systematic tendency to screen out capable Latino candidates at a greater rate than they screen out capable whites makes the near-exclusive use of these criteria.

96. But see Barbara Bader Aldave, Hopwood v. Texas; Much Ado About Nothing?, TEX. LAW., Nov. 11, 1996, at 43 (arguing that Hopwood is not a legitimate threat to affirmative action policies).
97. See supra notes 48-76 and accompanying text.
98. See Gunier, supra note 48, at 59 (discussing how Latinos may, in fact, become better lawyers); Holley & Kleven, supra note 11, at 309. In fact, both the LSAC and ABA caution law schools against excessive reliance on the LSAT in admissions decisions. Simien, supra note 43, at 390.
99. See Schott, supra note 48, at 3 (discussing the point of views from several law school deans in regards to the use of the LSAT in the admissions process).
101. Brown & Marenco, supra note 48, at 18; Guinier, supra note 48, at 59; Holley & Kleven, supra note 11, at 310; Kidder, supra note 61, at 1073-76; Simien, supra note 43, at 371.
difficult to justify. Instead, admissions officers should revisit the
goals underlying the law school admissions process. The selection
process' legitimate goal is to produce competent lawyers who will
meet the current service needs of the society.\textsuperscript{102} Unfortunately,
these current criteria do not best serve this function. They ignore a
host of other traits that are equally valuable, if not more so, to
lawyering including: motivation, perseverance, interpersonal sensi-
tivity, character integrity, and social responsibility.\textsuperscript{103} The current
need for legal services in Latino communities is also a legitimate
reason to modify the criteria in a way to allow admission of other-
wise qualified Latino lawyers.\textsuperscript{104}

The use of factors other than the potential for academic success
is nothing new to law school admissions decisions. Among other
things, schools often consider factors such as an applicant's
hometown, specific legal interests, and work experience.\textsuperscript{105} State
schools often have different admissions standards for in-state and
out-of-state residents.\textsuperscript{106} Many schools even afford special prefer-
ences to offspring of faculty, alumni, and donors.\textsuperscript{107}

Fortunately, at least one law school has seen it fit to reform its
admissions policies. After minority enrollments plummeted in the
face of \textit{Hopwood}—as much as eighty-five percent for some ethnic
groups—the University of Texas School of Law re-evaluated its ad-
missions policies.\textsuperscript{108} For the first time ever, the school interviewed
its applicants. The school considered leadership skills, community
service, success in overcoming adversity, and socioeconomic factors
in determining admission. At the same time, the school de-empha-
sized the LSAT and the UGPA as factors in admissions. As a re-
result, African-American and Mexican-American acceptances at the
law school for 1998-99 were up from the previous year, though still
below pre-\textit{Hopwood} levels.\textsuperscript{109}

\textsuperscript{102} BROWN & MARENCO, supra note 48, at 15-16; Holley & Kleven, supra note 11,
at 318.
\textsuperscript{103} Simien, supra note 43, at 384.
\textsuperscript{104} As professors at a predominantly minority law school, Holley and Kleven have
found that minority graduates are more likely than non-minority graduates to serve
these minority communities. Holley & Kleven, supra note 11, at 318.
\textsuperscript{105} ABA-LSAC Official Guide, supra note 20, at 11; Simien, supra note 43, at
390.
\textsuperscript{106} ABA-LSAC Official Guide, supra note 20, at 11; Simien, supra note 43, at
390.
\textsuperscript{107} ABA-LSAC Official Guide, supra note 20, at 11; Simien, supra note 43, at
390.
\textsuperscript{108} McMullin, supra note 74, at 22.
\textsuperscript{109} The pressure on schools to change their admissions policies can come from bar
associations. A number of Southern minority bar groups have recently joined to de-
Supporters of the traditional criteria may suggest that to the extent that the current admissions criteria are, in fact, related to success in the first year of law school, admitting students who fail to meet those criteria should ultimately decrease the number of students who graduate. On the contrary, a study commissioned by LSAC demonstrates that it is not necessarily true that students admitted with inferior scores will fail at a greater rate than do the students admitted under the current criteria.

C. Help Ensure that Current Latino Applicants Meet Existing Admissions Criteria

In the meantime, while they advocate for fair admissions policies, interested parties may help to bolster enrollments now by ensuring that those who are in the final stages of the admissions process make it to the starting line.

1. Commercial LSAT Preparation

Given the role that the LSAT plays in the admissions process, one important key to increased Latino enrollments lies in improving candidate LSAT scores. While evidence shows that commercial preparation courses can improve candidates' scores,\(^\text{112}\) the high cost of commercial preparation, nearly $4,000,\(^\text{113}\) is a significant impediment for many economically disadvantaged students. As such, develop a proposal to encourage law schools to consider factors other than academic record and admissions test scores for some of their admission offers. Opinion Inadmissible; Newton's Law, supra note 100, at 3. The proposal would require schools to report to the American Bar Association, which monitors and accredits law schools, the numeric factors for only seventy-five percent of their admittees. Id. Proponents assert that this would free the schools to consider factors such as leadership and community service for the other twenty-five percent of admittees. Id.

110. See supra notes 53-55 and accompanying text.


112. According to Kaplan Test Centers, students who participate in their course improve their LSAT scores, on average, by 7.2 points. Telephone interview with Catherine Exa, Director of Public Relations, Kaplan Test Centers (May 8, 2000).

113. Kaplan Test Centers charge from $159 for a basic do-it-yourself course to $3,999 that includes the classroom course and thirty-five hours of private tutoring. Kaplan Website, at http://www.kaptest.com/repository/templates/Lev3InitDroplet.jhtml?_lev3Parent=www/KapTest/docs/repository/content/Law/LSAT (last visited May 15, 2003).
commercial LSAT preparation course providers can play a vital role in increasing Latino enrollments by making their services available to these students.114

The Minority Legal Scholarship Program, a partnership between Texas Appleseed, a nonprofit organization of bar and civic leaders that pursues public-interest issues, and Kaplan Educational Centers, was launched in 1998 and quickly showed results.115 Just one year later, sixty-one students participated in a thirty-hour Kaplan LSAT preparation course.116 At the commencement of the program, more than half of the students who participated had previously scored below 140 on the LSAT, "a [score] that would have barred them from admission to most Texas law schools."117 After completing the program, eighty-two percent of the students who took the test scored higher than 140, fourteen students showed significant improvement by raising their scores by double-digits, ranging from ten to twenty-two points, and four students scored in the 160 range.118

Nonprofit organizations can also provide alternative programs to prepare students for the LSAT. For example, the Puerto Rican Legal Defense and Education Fund ("PRLDEF") operates a six-week LSAT preparation seminar for students who are unable to afford the costs of the commercial courses and who meet specific income qualifications.119 PRLDEF also provides its participants with on-site application advisement and assigns them to practicing attorney mentors.120

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114. Id. Commercial course providers such as Princeton Review and Kaplan Test Centers do provide discounted rates on a case by case basis for students who demonstrate financial need.


116. Id.


118. Id.

119. Interview with Ileana Infante, Director of Education Programs, Puerto Rican Legal Defense and Education Fund, in New York, N.Y. (Feb. 7, 2003). Moreover, those familiar with the course argue that, because it is designed for, and attracts Latino and minority students, its value is independent of its price-accessibility because it provides unique support and encouragement. Interview with Jenny Rivera, Professor of Law, City University of New York School of Law, in New York, N.Y. (Feb. 6, 2003).

120. Interview with Ileana Infante, supra note 119; Interview with Jenny Rivera, supra note 119.
While LSAT coaching provides critical support for those students who are in a position to benefit from it, nevertheless, its effect is limited by the size of the existing pool of eligible Latino candidates that are interested in law school and will actually take the test.\textsuperscript{121} Additionally, LSAT coaching alone will not prepare otherwise poorly educated students for success on the LSAT.

2. Pre-Start Programs

Among the most common approaches to ensuring that those who are admitted ultimately enroll is the pre-start program. Many law schools and other institutions provide academic support services to assist already admitted students who may be at risk of failing because of inadequate preparation or lack of confidence.\textsuperscript{122} Some pre-start programs are designed as conditional admissions devices\textsuperscript{123} and are thus particularly important in the context of increasing enrollments. Pre-start programs are usually offered in the summer before regular fall classes and can span from two days to two months.\textsuperscript{124}

\textit{a. Council on Legal Education}

One of the oldest and most successful pre-start programs is the Pre-Law Summer Institute sponsored by the Council on Legal Ed-

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\textsuperscript{121} See \textit{Report to Increase Diversity}, \textit{supra} note 4, at 68 (providing a data table of law school applicants from 1995 to 2000 and their credentials).

\textsuperscript{122} Lundwall, \textit{supra} note 13, at 150.

\textsuperscript{123} Id. at 151.

\textsuperscript{124} As a summer associate at Mayer, Brown, Rowe & Maw ("MBR&M"), William Malpica, facilitated the creation of an annual orientation incoming for entering Latino law students from the New York City area in 2000. The brainchild of Ileana Infante, and now a joint project of PRLDEF and MBR&M, the day-long seminar features workshops by Latino law students, professors, and other experts, who have included Professor Jenny Rivera, Professor Solangel Maldonado, Professor Tanya Hernández, Steven Cordero, and Kenneth Padilla, geared to surviving the first year of law school. The program, approaching its fifth year, utilizes materials from the Fordham Academic Enrichment Program and the Academic Success Program at Brooklyn Law School. MBR&M donates space, meals, and other conference services. In addition to the panelists, the program has benefited from the help of the members of a volunteer committee, including Neysa Alsina, Dean Nitza Escalera, Mauricio España, Linda Feldman, Ileana Infante, Roberto Lebron, Jason Otaño, Sonji Patrick, Jose Perez, Gloria Yolanda Rivera, Sandra Rodriguez, and Patricia Yanez. The workshops conclude with a reception where participants meet practicing lawyers, judges, and other members of the New York City legal community and local Latino bar associations, including the Puerto Rican Bar Association, the Hispanic National Bar Association, and the Dominican Bar Association. Later, PRLDEF matches participants with mentors from its attorney network of bar volunteers. \textit{Program Will Help Latino Law Students}, 228 N.Y. L.J., Aug. 8, 2002, News, at 2.
ucation. CLEO institutes are six-week residential programs that target economically and educationally disadvantaged students. CLEO is both a head-start program and an admissions program. It functions as a head-start program by introducing admitted students to the law school environment, teaching methods, and faculty. Law schools use CLEO as an admissions program by conditioning admission to law school on the successful completion of the program. The program has been successful in preparing students for law school for over twenty-five years. Although CLEO is funded in part by federal grants, students must pay a $2,000 fee to participate. Low income, first generation college graduates, however, are eligible for tuition assistance to cover tuition, books, a living stipend, and some travel expenses for the duration of the program that would require only a payment of $200. The CLEO program incorporates many of the program components discussed below.

b. New York Legal Education Opportunity Program

The New York State Unified Court System has recently launched a new pre-start program similar to CLEO. A rigorous six-week residential program, the New York Legal Education Opportunity Program ("NYLEO") is designed to improve participant's analytical, writing, and basic law school study skills through instruction in first-year law school core courses. In addition, NYLEO provides students training in legal research, writing, and

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127. Lundwall, supra note 13, at 151.

128. Id.

129. Id.

130. See supra notes 59-59 and accompanying text (regarding the CLEO graduation rate).


132. American Bar Association, supra note 131; CLEO Scholars, supra note 126.

133. American Bar Association, supra note 131; see infra Part II.D.

analysis. Students will also visit courts in session and meet legal professionals including members of the judiciary.

The program will be provided free of charge at the New York State Judicial Institute, the court system’s newly created judicial education and training center located on the campus of the Pace University School of Law. It will also cover all expenses, including courses, textbooks, dormitory, meals, and access to law school library and computer facilities.

The program’s stated mission is “to promote diversity within the legal community by improving the probability of academic success for minority, low income and educationally disadvantaged” individuals who will be attending law school. To be eligible to participate, students must, among other things, receive their college degree by the start of the summer program, be accepted or have an application pending at a New York law school, and agree to attend a New York law school in the fall.

c. The Fordham University School of Law

A number of law schools also provide pre-start support. The Fordham University School of Law operates a seven-week program for admitted students during the summer prior to first year of classes. The Academic Enrichment Program (“AEP”) is coordinated by the school’s dean of student affairs and run by an adjunct

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136. Id.

137. Id.

138. Id.


140. N.Y. STATE JUDICIAL INST., supra note 135. For more information, contact NYLEO toll free at 866-877-3121 or at nyleo@courts.state.ny.us.


142. A number of schools run similar programs, including the Academic Success Program at Brooklyn Law School, the Third World Orientation Program at CUNY Law School, and the Minority Student Program at Rutgers Law School. Telephone interview with Linda Feldman, Director of Educational Services, Brooklyn Law School (July 13, 1999); Interview with Kenneth Padilla, Director of Minority Student Program, Rutgers Law School, in New York, N.Y. (Aug. 10, 2002); Interview with Jenny Rivera, supra note 119.
manager.\textsuperscript{143} In addition to the general immersion course, which is open to all students, AEP is offered to self-identified “disadvantaged” students.\textsuperscript{144} The program combines school professors and current students as faculty and covers basic topics including legal writing, case briefing, and time management, all in an effort to equip participants with the tools necessary to survive the first year.\textsuperscript{145} The program also provides students with simulated class sessions to introduce students to the unique nature of the law school class format.\textsuperscript{146} Since students are able to meet their peers, upper-class students, and faculty before classes begin,\textsuperscript{147} the program operates as an effective tool to combat the isolation encountered by many minority students in law school.

d. Limitations of Pre-Start Programs

While pre-start programs have undoubtedly assisted many Latino students in obtaining law degrees, they are not designed to increase the pool of qualified minority applicants.\textsuperscript{148} Instead, they focus on assisting already admitted students for the demands of law school.\textsuperscript{149} The next Section considers existing efforts to increase the pool by actively encouraging students to consider careers in the law.

D. Recruit Greater Numbers of Potentially Successful Candidates and Prepare Them to Succeed

If Latino enrollment in the legal community is to be increased, a greater number of Latino students must be encouraged to consider law. It is also important to ensure that those who apply possess the

\textsuperscript{143} Interview with Nitza M. Escalera, Assistant Dean of Student Affairs, Fordham University School of Law, in New York, N.Y. (Aug. 29, 2002); E-mail from Cynthia Juco, Assistant Director of Student Affairs, Fordham University School of Law, to Mauricio España, Cooper Editor, \textit{Fordham Urban Law Journal} (Apr. 4, 2003, 09:16:06 EST) (on file with author).

\textsuperscript{144} Interview with Nitza M. Escalera, \textit{supra} note 143; E-mail from Cynthia Juco to Mauricio España, \textit{supra} note 143.

\textsuperscript{145} Interview with Nitza M. Escalera, \textit{supra} note 143; E-mail from Cynthia Juco to Mauricio España, \textit{supra} note 143.

\textsuperscript{146} Interview with Nitza M. Escalera, \textit{supra} note 143; E-mail from Cynthia Juco to Mauricio España, \textit{supra} note 143.

\textsuperscript{147} Interview with Nitza M. Escalera, \textit{supra} note 143; E-mail from Cynthia Juco to Mauricio España, \textit{supra} note 143.

\textsuperscript{148} See Lundwall, \textit{supra} note 13, at 151 (discussing the purpose of pre-start programs).

\textsuperscript{149} \textit{Id.}
qualifications necessary to attain admission to law school. This latter proposition requires that advocates resist the temptation to merely target those who are most likely to successfully apply to law school in the future. On the contrary, to increase the numbers of applicants, the legal community must reach beyond these “sure bets” and identify and motivate students who have yet to fully realize their academic potential, while they still have the time to do so.

“[M]any talented minority students fail to seriously consider legal careers because they lack reliable information about the demands of law school and the legal profession, and confidence in their own abilities.” The problem, however, extends beyond the mere lack of information and confidence. As a result of the continuous pattern of poverty and a lack of professional role models, many talented minority students are the first members of their families to graduate from college. Undoubtedly, this alone is a great achievement, but often these individuals are capable of much greater feats.

This subpart samples existing efforts that serve as models of recruitment and preparation strategies. The programs highlight the various components that have proven effective in the effort to enhance enrollments, including pre-law advisement, academic support, mentorship, test preparation, and the demystification of the profession.

1. Law Student Associations

Law students are uniquely positioned to recruit future law students. Latino students at most law schools have organized Latin American Law Student Associations (“LALSA”). The LALSA

150. For example, in 1990 (of those who had both LSAT scores and grade point averages on file) only twenty-nine percent of Latino applicants had both an LSAT score in the forty-eighth percentile and a grade point average of 3.0 or above. Lundwall, supra note 13, at 152 (citing LAW SCH. ADMISSION SERVS., MINORITY PARTICIPATION IN LEGAL EDUCATION AND THE PROFESSION: A COMPENDIUM OF DATA 21 (1990)).

151. Interview with Jenny Rivera, supra note 119.

152. Lundwall, supra note 13, at 153.

153. Id.

154. Id.

155. Id.

156. See, e.g., Boston College School of Law, Latin American Law Students Association, at http://216.239.33.100/search?q=cache:tg8LXJcaIhUC:www.bc.edu/bc_org/avp/law/st_org/lalsa/+LALSA&hl=en&ie=UTF-8 (last visited May 15, 2003); Boston University School of Law, Latin American Law Students Association, at http://216.239.33.100/search?q=cache:Kz-Isk9WXDAC:people.bu.edu/lalsa/+LALSA&hl=
at the Fordham University School of Law conducts a recruitment program to reach out to local colleges and high schools.\textsuperscript{157} Members of the association make presentations at area high schools and colleges aimed at demystifying the process of applying to law school.\textsuperscript{158} The very act of presenting Latino role models helps prospective applicants to envision themselves in the position of law student.

The Fordham LALSA also arranges special visits to the law school for those students interested in learning more.\textsuperscript{159} Each visit includes a combination of a tour of the school, attendance in live class, and meetings with admissions and financial aid officers.\textsuperscript{160} The organization also schedules annual recruiting workshops at the school.\textsuperscript{161} Finally, LALSA members have teamed up with the school’s admissions department in order to provide a Latino presence at Law Fairs where the school recruits potential candidates.\textsuperscript{162}

2. National Minority Law Recruitment Month

The Law School Admissions Council, in 1998, unveiled a grant program designed to increase the recruitment of minority law students.\textsuperscript{163} The program provides law schools with a $1,000 grant in exchange for hosting an event during the month of February—the program’s designated National Minority Law Recruitment Month—which targets potential minority law students.\textsuperscript{164}

\textsuperscript{157} Interview with Eric Medina, President, Fordham Latin American Law Student Association, at Fordham University School of Law, in New York, N.Y. (Apr. 15, 2003); Interviews with Oscar Tobar, Chair of Recruitment, Fordham Latin American Law Student Association, at the Fordham University School of Law, in New York, N.Y. (Sept.- May 2000); Interview with Aimée Pérez Valentín, Chair of Recruitment, Fordham Latin American Law Student Association, at the Fordham University School of Law, in New York, N.Y. (Feb. 26, 2003).

\textsuperscript{158} Interview with Eric Medina, \textit{supra} note 157; Interviews with Oscar Tobar, \textit{supra} note 157; Interview with Aimée Pérez Valentín, \textit{supra} note 157.

\textsuperscript{159} Interview with Eric Medina, \textit{supra} note 157; Interviews with Oscar Tobar, \textit{supra} note 157; Interview with Aimée Pérez Valentín, \textit{supra} note 157.

\textsuperscript{160} Interview with Eric Medina, \textit{supra} note 157; Interviews with Oscar Tobar, \textit{supra} note 157; Interview with Aimée Pérez Valentín, \textit{supra} note 157.

\textsuperscript{161} Interview with Eric Medina, \textit{supra} note 157; Interviews with Oscar Tobar, \textit{supra} note 157; Interview with Aimée Pérez Valentín, \textit{supra} note 157.

\textsuperscript{162} Interview with Eric Medina, \textit{supra} note 157; Interviews with Oscar Tobar, \textit{supra} note 157; Interview with Aimée Pérez Valentín, \textit{supra} note 157.


\textsuperscript{164} \textit{Id.}
The program's first participants were the University of Pennsylvania School of Law and the Temple University School of Law, which planned joint activities to expose high school and early college students to careers in the law. Through the "Pathways to Law School Forum," the universities expected to reach approximately fifty local high school and college students over a three-year period. Their effort included historical presentations about minority lawyers including their contributions to the field. College admissions officers also discussed what colleges seek in prospective students. The students met with current law students and witnessed a mock law school class. Additionally, the program matched students with local minority attorneys who acted as mentors on an indefinite basis. Many schools continue to carry out this process within their perspective communities.

3. Law Introduction Programs

Programs aimed at fostering an interest in the law among high school students play a special role. While these programs may not, by design, actively groom future lawyers, by providing disadvantaged and minority youth with an early introduction to the law and to potential mentors, they may have the potential effect of increasing the pool of Latino law school candidates.


166. Gulino, supra note 163, at 5.

167. Id.

168. Id.

169. Id.

170. Id.

171. See supra note 165 and accompanying text.
a. Street Law, Inc.

Street Law, Inc. is a nonprofit organization dedicated to improving the lives of young people through law-related education. By providing model teaching texts and materials, the organization “makes it simple for teachers in inner-city schools to motivate students to consider topics in the law and, potentially, even careers in the law.” The program is geared towards providing substantive information about law and democracy and promotes problem solving, critical thinking, and communication skills. In addition, the program facilitates mock trials and legal internships with partner organizations.

b. Justice Resource Center

The Justice Resource Center is a public-private venture established in 1988. The Martin Luther King Justice Resource Center (“Center”), has partnered with the Association of the Bar of the City of New York, numerous law firms, corporate law departments, non-profit organizations, and many others to expose minority students to the law, legal institutions and process, and the values on which they are based.

The Center administers numerous specially-tailored programs based in over a dozen New York City Public Schools, each designed to meet the needs of the school’s unique student population as well as to benefit from locally available resources. For example, as part of the Academy of Criminal Justice, students from Martin Luther King High School attend law and forensic science classes at neighboring John Jay College of Criminal Justice.

173. Interview with J.C. Polanco, Teacher, Truman High School, in the Bronx, N.Y. (Apr. 15, 2002). J.C. Polanco is also an evening student at the Fordham University School of Law and a member of the advisory board of the PRLDEF High School Initiative. See infra Part III.
174. Quigley, supra note 172, at 1443.
178. Interviews with Debra Lesser, supra note 177.
179. Filling the Pipeline, supra note 176, at 39.
One of the cornerstones of the Center’s programming is its Attorney Mentor Program, which pairs each participating high school with a New York City law firm. Participating lawyers visit students in their classes and, in addition, the students visit the lawyers at the firm.

Mentoring sessions are informal, ranging from discussion of current events to classroom and pre-law subjects and can be effective, particularly in cases where mentors take a personal interest in their assigned students. "We have had relationships where mentor lawyers take their mentees to visit colleges[,] . . . tutored kids on the SATs[,] and some who paid for the SAT courses."

The program also conducts an annual citywide Moot Court Competition, co-sponsored by the Fordham University School of Law. Lawyers from each of the over fifty mentor firms serve as coaches for participants from the firm’s assigned school.

Finally, the programs’ experience-based learning features are supplemented by a comprehensive academic component: each participating student is enrolled in law-related courses in each grade from ninth to twelfth and law concepts are also wove into other parts of their curriculum.

c. DuPont Legal Department

The private sector, particularly in-house counsel and law firms, can play a central role in reaching Latino students in high school and beyond. "[F]rustrated by the scarcity of minority attorneys and legal assistants," the DuPont corporate law department formed a "Pipeline Committee." This committee composed of DuPont’s attorneys, legal assistants, and legal secretaries—minorities and nonminorities—identifies potential future minority lawyers, particularly African-Americans and Latinos, and helps them to obtain the education and tools needed to enter college and ulti-

180. Id.
181. Id.
182. Interviews with Debra Lesser, supra note 177.
183. Filling the Pipeline, supra note 176, at 38.
184. Id.
185. Interviews with Debra Lesser, supra note 177.
186. Id.; see Filling the Pipeline, supra note 176, at 38.
187. Stacey Mobley, Priming the Pipeline to Diversity in the Legal Profession, 19 ACCA DOCKET 79, 80 (2001). Mobley cited two primary challenges resulting in the low representation of minority lawyers: the lack of legal role models for young minority children and the negative image of lawyers projected in the media. Id. at 82.
188. Id.
mately apply to law school. The committee’s efforts are specifically targeted to middle school and high school students and are designed to provide legal-professional role models and mentors, and assist participants in mastering the skills, including communication, reasoning, reading, and computer technology skills, necessary to enter the legal profession.

4. Academic Institutes

a. The Western Washington University and Gonzaga Law School Models

"Academic institutes" are programs that recruit students and provide them with comprehensive support to ensure their success as candidates. They are costly and, thus, not very common. Two schools, one undergraduate, Western Washington University, and one law school, Gonzaga University School of Law, have developed effective programs to identify viable college candidates and prepare them for law school admission. In addition to the comprehensive nature of these programs, they are effective because they identify students early in their college years.

In 1991, Western Washington University developed "The Law and Diversity Program" in response to the need to diversify the legal profession. The two-year intensive program is open to any person who has a strong interest in issues of law, diversity and access to the legal field for underrepresented groups. The program seeks and recruits "non-traditional" students, individuals who lack

189. Id.
190. Id. at 83. Although DuPont initially established only two programs, a mock trial program to expose many children to different types of legal careers and a computer skills training program to address what the Committee considered a primary problem faced by minority pre-law students, DuPont compiled a comprehensive menu and discussion of specific programs, including: pre-law clubs, summer law camps/schools, mock trial teams, debate teams, participation in school career days, participation in “Take Our Daughters to Work Day,” job shadowing, internships, “Law Day” presentations, computer skills training, presentation/communication skills training, and outreach presentations at minority job fairs. Id. at 83-86. Significantly, they also sponsor the American Corporate Counsel Association’s Pipeline Kit, which provides a road map of existing and model community outreach programs for use by private institutions interested in encouraging minority youth to consider careers in corporate law. Id. at 80, 89.
191. See infra notes 192-246 and accompanying text.
the traditional academic law school admission indicators, such as an above-average UGPA and LSAT scores, but demonstrate their potential to succeed in law school in other ways.194

Gonzaga University School of Law developed a six-week summer program ("Summer Fellowship") intended to persuade undergraduate minority students to enter the legal profession.195 In 1990, the school operated a program for twenty-eight students selected from colleges around the country.196 Students were selected based on undergraduate grade point averages, letters of recommendation, personal statements, and other factors as were considered relevant on a case by case basis.197 The program covered the students' expenses including tuition, room, board, and transportation.198

i. Curriculum

During their junior and senior years of college, the Law and Diversity program participants partake in a two-year, interdisciplinary course of study.199 The students are introduced to a variety of courses that are specifically chosen to provide them with the knowledge and skills necessary to face and conquer the challenges of law school.200 The curriculum focuses on all the essential skills for the study of law, including reading, writing, research, and analytical and verbal skills.201 Among other things, the course introduces students to the workings of the American legal system in order to provide them with a familiarity of legal concepts and terminology, and to help them understand the law in a larger social, historical, and political context.202

The Summer Fellowship offers a similar, although less extensive curriculum. It provides students with an introduction to the key lawyering skills: analysis, research, and writing.203 The Gonzaga faculty noted that, unlike many other programs, their focus is on excellence, not survival.204 Students are also introduced to legal

194. Bannai & Eaton, supra note 192, at 824.
195. Lundwall, supra note 13, at 153.
196. Id. at 155.
197. Id. at 154-55.
198. Id. at 155.
199. Bannai & Eaton, supra note 192, at 825; Law & Diversity Program, supra note 11.
200. Bannai & Eaton, supra note 192, at 826.
201. Law & Diversity Program, supra note 11.
202. Id.
203. Lundwall, supra note 13, at 155.
204. Id. at 153.
history, the court systems, and the general philosophies that underpin the American legal system.\textsuperscript{205}

The programs also offer students an introduction to the law school classroom environment.\textsuperscript{206} For instance, at the Summer Fellowship, instructors expose students to the rigors of the first-year of law school by giving them extensive cases to read and brief.\textsuperscript{207} Instructors expect students to fully participate in classroom discussions in the same manner as first-year law students.\textsuperscript{208} Instructors also assign weekly research papers that are graded.\textsuperscript{209} In the end, the participants receive a final grade from both their weekly research papers and essay-type exams.\textsuperscript{210}

\textbf{ii. Internships}

The two-year Law and Diversity program also offers each student an internship during her last quarter of the program.\textsuperscript{211} The internship provides the participants with an opportunity to practice in a work environment the skills that they have acquired at the institute.\textsuperscript{212} This internship also exposes the student to legal work that they might want to continue on after law school.\textsuperscript{213}

\textbf{iii. Pre-Law Advisement and LSAT Preparation}

Both programs also assist students in navigating through the law school application process.\textsuperscript{214} At the Summer Fellowship, the director privately meets with every student to discuss their career goals, to evaluate their transcripts, and to make suggestions about their law school choices.\textsuperscript{215} Both programs provide participants

\begin{footnotesize}
Many minority head start programs send a subtle message of inferiority to students when they focus on "survival tips." The assumption underlying support programs is often internalized by students as a prediction of failure. From the first day, we wanted our program to emphasize the student's status as a scholar within a community of scholars.

\textit{Id.} at 153-54.
205. \textit{Id.} at 155.
206. \textit{Id.} at 156.
207. \textit{Id.}
208. \textit{Id.}
209. \textit{Id.}
210. \textit{Id.} Administrators noted that "all students expressed surprise (and some dismay) over the workload. Yet not a single student in either summer session dropped out of the program." \textit{Id.}
211. Bannai & Eaton, \textit{supra} note 192, at 827.
212. \textit{Id.}
213. \textit{Id.}
\end{footnotesize}
with the opportunity to meet with admissions and financial aid personnel, and attend classes with current law students.\textsuperscript{216} Student participants are also introduced to basic law school admissions resources, including LSAT materials, law school catalogs, law fairs, and fee waivers.\textsuperscript{217} Law and Diversity arranges for commercial LSAT preparation course providers to make their courses available to participants at a reduced cost.\textsuperscript{218} The program reported “marked improvement in LSAT scores as a result of these courses.”\textsuperscript{219} For instance, the students’ mean score improved as much as nine points.\textsuperscript{220}

iv. Support Network

The students in these programs often “face [ ] a wide range of financial, personal, and academic issues arising out of their unique and sometimes difficult socio-economic circumstances.”\textsuperscript{221} These issues are significant because they are a constant threat to their academic performance.\textsuperscript{222} “[T]o help students learn to cope with adversity while achieving academic success[,] . . . [p]rogram faculty members make themselves available to students on a continuous basis.”\textsuperscript{223} The Law and Diversity program recruits other departments within the university, such as, the Counseling Center, the Financial Aid Office, and the Registrar to provide a comprehensive safety net for their students.\textsuperscript{224} It also raises funds to provide emergency loans, scholarships, and other financial assistance.\textsuperscript{225} At the Summer Fellowship, current law students are on hand to monitor reactions to the program and offer praise and encouragement.\textsuperscript{226} Students in both programs provide each other with personal and academic support.\textsuperscript{227}

\textsuperscript{216} Bannai & Eaton, \textit{supra} note 192, at 830; Lundwall, \textit{supra} note 13, at 153, 157.
\textsuperscript{217} Bannai & Eaton, \textit{supra} note 192, at 830; Lundwall, \textit{supra} note 13, at 156-57.
\textsuperscript{218} Bannai & Eaton, \textit{supra} note 192, at 831.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 832. “Some students struggled daily to find enough money on which to live. Some dealt with parenting and other family issues. Many of the students had to develop confidence in their own abilities after years of feeling marginalized and isolated in other academic settings.” Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 832; Lundwall, \textit{supra} note 13, at 156.
\textsuperscript{224} Bannai & Eaton, \textit{supra} note 192, at 832.
\textsuperscript{225} Id.
\textsuperscript{226} Lundwall, \textit{supra} note 13, at 156.
\textsuperscript{227} Bannai & Eaton, \textit{supra} note 192, at 826; Lundwall, \textit{supra} note 13, at 156.
v. Role Modeling

Both programs seek to provide the participants with strong role models and realistic introductions to the type of work done by attorneys.\textsuperscript{228} Summer Fellowship administrators found that most participants had no prior personal contact with attorneys and held narrow perceptions of the legal profession based primarily on television.\textsuperscript{229} The Fellowship, therefore, schedules a series of sessions with prominent minority judges, practitioners, and scholars.\textsuperscript{230} Additionally, students shadow their mentors at a legal services office, appellate courts, an office of the Internal Revenue Service, and the state legislature.\textsuperscript{231} Mentors give talks to the group covering major areas, including their personal backgrounds, present employment, obstacles they had overcome, and their plans for the future.\textsuperscript{232}

vi. Outcomes

As of 1997, of the twenty-nine students who participated in the 1991-92 Law and Diversity session, sixteen students applied to law school, and twelve of those students were admitted.\textsuperscript{233} Of the twelve students admitted to law school, two have graduated, seven are in good academic standing in ABA accredited law schools, two are expected to enter law school this fall, and one withdrew during the first year due to personal and academic difficulties.\textsuperscript{234} The Summer Fellowship also reported encouraging, if not quantifiable results.\textsuperscript{235} The program notes that it achieved its primary goal of providing a positive legal experience and demystifying the process of applying to law school.\textsuperscript{236} In both programs, all students, even those who decided that law school was not the right path for them, gained a new sense of self-confidence.\textsuperscript{237} Significant accomplishments included acquiring valuable skills that can be applied in a wide range of settings, as well as becoming better able to assume leadership positions within their own communities.\textsuperscript{238} For

\textsuperscript{228} Bannai & Eaton, supra note 192, at 822; Lundwall, supra note 13, at 156.
\textsuperscript{229} Lundwall, supra note 13, at 156.
\textsuperscript{230} Id.
\textsuperscript{231} Id. at 157.
\textsuperscript{232} Id.
\textsuperscript{233} Bannai & Eaton, supra note 192, at 833.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 835; Lundwall, supra note 13, at 158.
\textsuperscript{236} Lundwall, supra note 13, at 158.
\textsuperscript{237} Bannai & Eaton, supra note 192, at 835; Lundwall, supra note 13, at 158.
\textsuperscript{238} Bannai & Eaton, supra note 192, at 835.
many of these students, simply acquiring a college degree was a significant achievement.\textsuperscript{239}

\textit{b. Virginia State Bar Initiative: School-to-College Program}

The Virginia State Bar has recently established a new initiative aimed at high school students similar to the Western Washington and Gonzaga models described above which target college students.\textsuperscript{240} The School-to-College Program, which provides minority high school students with a comprehensive introduction to the American judicial and legal system in order to encourage them to attend college and law school.\textsuperscript{241} The program, held on a local law school campus, incorporates a faculty comprised of law school professors, judges, and visiting guest lecturers.\textsuperscript{242} Bar association members act as teaching assistants and student mentors.\textsuperscript{243} In addition to classes, the course curriculum includes mock trials, research and writing competitions, test preparation, and field trips.\textsuperscript{244}

Students also receive free access to a specially tailored SAT preparation course and access to online test preparation resources, lawyer-donated frequent flyer miles, food and lodging to enable students to visit colleges and universities, and counseling by professional college counselors and trained volunteer attorney mentors.\textsuperscript{245} Finally, each student is paired with a lawyer mentor who will assist the student through high school, college, and law school.\textsuperscript{246} Since the program remains in its early stages, it has not generated much material regarding its success rates.

\textbf{III. The PRLDEF High School Initiative: Proof that Anyone Can Do Something}

In light of the glaringly disproportionate number of Latinos admitted to law school, a group of recent law school graduates set out to contribute to a solution. Their result was a program that would identify a small number of ambitious Latino high school students

\textsuperscript{239} Id. at 832.
\textsuperscript{241} \textit{Virginia Millennium Diversity Initiative School-To-College Program}, \textit{supra} note 240.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
interested in the law and assist them as they strive to graduate high school, enter college, and explore the legal profession.  

To assist in the formation and implementation of the program, the organizers have established an advisory board comprised of distinguished New York-area attorneys in private and public practice, elected and appointed officials, professors and deans, judges, a high-school teacher, two law students, and one college student. In March 2002, the Puerto Rican Legal Defense and Education Fund agreed to adopt the initiative and conduct the program as a project of its education division. The advisory board is currently working with PRLDEF to identify funding sources and launch a test pilot program.

The pilot will target New York City high school sophomores and provide participants with three principal forms of assistance: free access to commercial SAT preparation; academic advisement including supplemental pre-college counseling and intensive writing workshops; and first-hand exposure to law schools and legal workplaces via visits to law schools, law firms, courtrooms, legal aid offices, non-profits, and government agencies. In addition, each advisor will adopt one participating student for one-on-one mentoring support.

The effort is carefully designed according to the recommendations advanced in this Essay. First, the group will identify high school sophomores, not college students or law school applicants. In this way, the group aims to demystify the profession and inspire young people who might not yet be focused on academic excellence to do so early enough to create college admission opportunities. Second, to increase the future pool of Latino applicants, the group will solely target economically disadvantaged youth. It will not target students from wealthier families, who are more likely to have access to financial resources, mentors, and information, and who generally have a better opportunity to realize their academic potential. Finally, the group will provide essential academic sup-

247. The planning for the project began in 1999 by William Malpica, two of his Fordham University School of Law classmates, Jim Montes and Silvia Duarte, and another friend, Laura Gonzalez.

248. The current board consists of Herb Barbot, Esq.; Silvia Duarte, Esq.; Dean Nitza Escalera, Esq.; Robert Klingon, Esq.; William Malpica, Esq.; New York State Supreme Court Justice Ruben Andres Martino; Ron Mazariegos, Esq.; Jim Montes, Esq.; Kenneth Padilla, Esq.; New York State Supreme Court Justice Eduardo Padro; José Luis Perez, Esq.; J.C. Polanco; Kim Ramos; Professor Jenny Rivera, esq.; Gloria Yolanda Rivera, Esq.; Yasmin Soto; New York City Civil Court Judge Analisa Torres; and Patricia Yanez.
port to ensure that the participants ultimately possess the qualifications necessary to successfully compete for law school admission.

CONCLUSION

Poor Latino representation in law school—and ultimately the profession—can be traced primarily to the limited pool of eligible Latino college graduates and current law school admissions policies. Efforts to increase Latino enrollment in law school must expand that pool of candidates. As such, we must reach beyond those Latinos who graduate college and apply to law school; academic talent must be mined at lower education levels and nurtured over a period of years in order to produce more qualified Latino candidates. Additionally, unless the existing admissions criteria are modified, meaningful progress will remain an elusive goal. Finally, the role of Latino lawyers and law students cannot be overemphasized—we must be willing to lead the effort to increase our own representation.

The PRLDEF High School Initiative is a response to Presidents’ and the legal and Latino community’s demand that Latino participation in the legal profession be increased. It considers and incorporates all the vital factors that hinder Latino youth from becoming lawyers, discussed above. This initiative is unique for two reasons. First, it takes into consideration the fact that by the time many Latino students realize they desire to attend law school, they are significantly behind in terms of grades and preparation. In response to this concern, the PRLDEF Initiative targets high school sophomores who still have the opportunity to prepare themselves for the long path ahead, that begins with finishing high school and getting into a competitive college.

The second factor that makes the PRLDEF Initiative groundbreaking is that it is all encompassing and long term based. By providing free access to SAT preparation, academic advisement, and exposure to the profession over a period of time, the proposal is geared to insure that each participant gets the necessary support and guidance to complete high school, enter college and compete for law school admission. This is significant because, as the statistics have shown, Latino students encounter many obstacles—financial, familial, and cultural—that lead to their low high school, college, and law school graduation rates, even though they enroll in high numbers.

Although many universities and organizations have attempted to remedy these factors in innovative ways, the PRLDEF Initiative
stands to make a significant contribution towards increasing the pool of Latino candidates. It has taken all these programs as models and built upon and improved them.
THE USA PATRIOT ACT: CIVIL LIBERTIES, THE MEDIA, AND PUBLIC OPINION

Lisa Finnegan Abdolian*
and Harold Takooshian**

The new millennium was not yet one year old when it was rocked by the terrorist attack of September 11, 2001. The attack was unprecedented in many ways; it was immense, unexpected, cunning, ferocious, and devastating. For millions of Americans, it portended a grim new world order for the days ahead, where even the most secure society might be penetrated and devastated by a small band of determined zealots.1 The anthrax deaths later that September only added to people's feelings of vulnerability.2 It is no wonder that barely six weeks later, on October 26, 2001, President George W. Bush quickly signed into law3 the USA PATRIOT Act4—by all measures one of the most sweeping and controversial acts in United States history,5 intended to dramatically increase government powers of investigation and enforcement, many would argue at the expense of individual liberties.6 The complex and daring 342-page Act had been hastily passed by overwhelming majorities in the U.S. Senate (98-1)7 and House (357-66),8 without public

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6. Id.

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hearings or debate,\(^9\) even though the Act resembled portions of the Antiterrorism Act of 1996,\(^{10}\) which had already been ruled unconstitutional by federal courts.\(^{11}\)

More than a year-and-a-half later, how does the U.S. mass media and the public regard this federal anti-terrorism legislation and its abridgement of traditional liberties? This three-part Essay offers an interdisciplinary examination of: (I) the legal provisions of the USA PATRIOT Act;\(^{12}\) (II) the distinct shift in U.S. media reporting on this legislation over time;\(^{13}\) and (III) in-depth public opinion findings on people’s mixed views of post-9/11 civil liberties.\(^{14}\)

I. The USA PATRIOT Act

Under the pretense of enhancing national security, the USA PATRIOT Act concentrates increased new powers in the executive branch of government, while decreasing judicial oversight.\(^{15}\) These measures included:

A. Creation of a New Crime

Section 802 of the Act creates a new federal crime of “domestic terrorism,”\(^{16}\) which includes any dangerous acts that “appear to be intended ... to influence the policy of a government by intimidation or coercion.”\(^{17}\) Broadly applied, this could be used to silence any political dissent critical of government policies.\(^{18}\)

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12. See infra Part I.

13. See infra Part II.

14. See infra Part III.

15. See Evans, supra note 5, at 976.


17. Id.

B. Diminished Due Process for Immigrants

Section 411 of the Act expands the term "engage in terrorist activity" to include any use of a weapon, as well as such nonviolent acts as fund-raising for suspect organizations. Moreover, it allows for the detention or removal of non-citizens with little or no judicial review. The U.S. Attorney General and Secretary of State can claim a domestic group to be a terrorist organization, and deport any non-citizen members.

C. Diminished Privacy

The Act severely curtails the right to privacy at several turns, including broadening the grounds for increased surveillance and wiretap authority, sneak-and-peek searches, tracking Internet usage, and accessing private records.

D. Lowering Standards of Probable Cause

Section 215 of the Act reduces the traditional Fourth Amendment requirements for probable cause, as previously interpreted by the Foreign Intelligence Surveillance Act of 1978 ("FISA").

E. Sharing of Intelligence

Section 203 of the Act now permits unprecedented sharing of sensitive information across several independent agencies, including the FBI, CIA, INS, and other state and federal agencies.

As a result of the USA PATRIOT Act, more than 1,200 immigrants in the United States were taken into custody and detained

19. § 411(a), 115 Stat. at 345; see CHANG, supra note 18, at 3.
20. § 411(a), 115 Stat. at 345; see CHANG, supra note 18, at 7.
22. § 411(a), 115 Stat. at 347; see Herman, supra note 21, at 1.
27. Id. (allowing the FBI, under § 215 to now obtain personal records by certifying that they are sought for an investigation to prevent terrorism; the FBI need not suspect the person holding the records of any wrongdoing). See CHANG, supra note 18, at 4-5.
28. 50 U.S.C. § 1801 (2003). FISA had required that the government specify in its court order that "there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power." CHANG, supra note 18, at 4.
29. § 203 (a), (b), (d), 115 Stat. at 278-81.
for an extended period without being charged with committing a terrorist act.\textsuperscript{30} In response to criticisms of this policy, Attorney General John Ashcroft tersely replied: "Let the terrorists among us be warned . . . if you overstay your visas even by one day, we will arrest you."\textsuperscript{31} Moreover, because habeas proceedings are civil rather than criminal,\textsuperscript{32} the government has no obligation under the Sixth Amendment to provide non-citizens with free counsel in such proceedings.\textsuperscript{33}

The USA PATRIOT Act of 2001 goes far beyond the Antiterrorism Act of 1996, enacted in the wake of the 1995 Oklahoma bombing, which legal critics at that time termed "one of the worst assaults on the Constitution in decades."\textsuperscript{34} Despite the mounting criticism from the American Civil Liberties Union and other pro-liberty lobbies, the federal momentum continues to move away from individual rights, with public discussions of a Terrorism Information and Prevention System ("TIPS") Program\textsuperscript{35} to encourage people to report each other's suspicious activities to the government,\textsuperscript{36} and even use torture to extract useful information from some detainees.\textsuperscript{37} Compared to most other nations today, America has certainly prided itself as a nation of laws, liberty, and due process, which have "made America the envy of the world, inspiring other nations' freedom movements for over 200 years."\textsuperscript{38} One must, therefore, wonder how the American public and its mass media are reacting to this current anti-liberty trend embodied in the USA PATRIOT Act and other U.S. anti-terrorism legislation.

\textsuperscript{30} CTR. FOR CONSTITUTIONAL RIGHTS, THE STATE OF CIVIL LIBERTIES, ONE YEAR LATER 3 (2002).
\textsuperscript{34} JAMES X. DEMPSEY & DAVID COLE, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 2 (2002).
\textsuperscript{36} Id.
\textsuperscript{37} Is Torture Ever Justified in the Fight Against Terrorism?, ECONOMIST, Jan. 11, 2003, at 9; Nat Hentoff, The American Way of Torture, VILL. VOICE, Feb. 11, 2003, at 27. American intelligence agents have been accused of torturing captured suspected terrorists. Accusations of torture include: forcing suspects to kneel or stand for hours wearing black hoods or painted goggles, sometimes in awkward or painful positions; depriving suspects of medication or sleep through the constant bombardment of bright lights; and the transfer of prisoners to countries with a history of brutality, such as Egypt. Id.
II. THE MASS MEDIA

Historically, during troubled times, the American public has turned to the mass media for information and solace.39 Trusted reporters such as Edward R. Murrow and Walter Cronkite informed the nation that Nazi Germany had fallen to Allied troops,40 that President John F. Kennedy had been assassinated,41 and that the Vietnam War was not as “winnable” as predicted.42

A. The Media’s Coverage of September 11

On September 11, 2001, many Americans turned to TV news to learn about the largest terrorist attack on U.S. soil in history. On September 12, a CBS news survey showed that ninety-eight percent of those polled said they were following the news about the attacks.43 A few weeks later, attention to the news had not waned. A survey conducted the last week of September 2001, found that ninety-five percent of respondents were following news about the attacks; eighty-five percent of them very closely.44 Most of those polled said they were thrilled with the manner in which the press handled the coverage.45 The news in the days following the attacks was straightforward, with facts outnumbering opinions and few anonymous sources cited.46 A poll taken the week of the attacks revealed that eighty-nine percent rated the media’s coverage as good or excellent.47 In November, polls showed

39. See infra notes 40-42 and accompanying text.
41. See All Things Considered: Walter Cronkite Remembers the Day President Kennedy Was Assassinated (NPR radio broadcast, Nov. 22, 2002).
42. See generally NEIL SHEEHAN, THE PENTAGON PAPERS (1971).
44. Katherine Guckenberger, Rising to the Occasion, PUB. PERSP., July/Aug. 2002, at 31 (discussing the results of a survey conducted by the Kaiser Family Foundation/ Harvard School of Public Health between September 28-October 1, 2001).
45. See infra note 47 and accompanying text.
46. See Guckenberger, supra note 44, at 31. The Project for Excellence in Journalism (“PEJ”), a think tank affiliated with the Columbia University Graduate School of Journalism, found that major news organizations devoted seventy-five percent of their coverage to factual reporting; forty-five percent of the coverage cited four or more sources, seventy-six percent of whom were named. Opinion accounted for just nine percent of coverage. Id.
47. See id. (discussing a survey conducted by the Pew Research Center that found that eighty-nine percent of people who participated in a poll taken September 13-17, 2001 rated the media’s coverage of terrorism as good (thirty-three percent) or excellent (fifty-six percent)).
the public’s opinion of the media had increased for the first time in sixteen years.\textsuperscript{48}

But how did the American media handle the events that unfolded days and months after the crisis? It is difficult to maintain objectivity in the best of times. When the world we all knew came tumbling down with such well-known American symbols as the World Trade Center and the Pentagon, American reporters found it difficult to resist the chest-puffing patriotism that enveloped the nation.\textsuperscript{49}

Many commentators, including members of the media itself, say the press has failed to do its job as the guardian of democracy.\textsuperscript{50} Very few news reports filled in the basic blanks—the who, what, where, when, and why—about U.S. policy, the USA PATRIOT Act, and the government’s insistence on the need for secrecy and more power. Very few news reports discussed the dangers involved in pushing aside civil liberties during a national crisis. In fact, most stories about the country’s response were positive.\textsuperscript{51} The military strikes were reported as necessary and effective, and the USA PATRIOT Act was hailed as a unified nation’s quick response to the terrorist strike.\textsuperscript{52} Some of the more troubling aspects of the legislation received little or no scrutiny by the media until months after it became law.\textsuperscript{53}

According to John MacArthur, publisher of \textit{Harper’s Magazine} and author of a book on censorship in the Gulf War, the Septem-

\textsuperscript{48} See id. (citing findings from a Pew Research Center Survey conducted November 13-19, 2001).


\textsuperscript{51} See Guckenberger, supra note 44, at 34 (citing a Project for Excellence in Journalism study that found that eighty percent of news stories in September 2001, were all or mostly pro-American).

\textsuperscript{52} See, e.g., Justin Smith, \textit{Patriot Act Doesn’t Create Police State}, \textsc{Auburn Plainsman Online}, available at http://www.theplainsman.com/vnews/display.v/ART/2003/03/06/3e66d019e3290 (last visited May 15, 2003).

\textsuperscript{53} See infra Part II.B.
ber 11 attacks had a depressing impact on the institution of the free press in the United States:54

There isn't even the spirit any more that was in Vietnam, of skepticism, and the sense that the patriotic thing to do is to tell the American people the truth and to try to be impartial and not to be the cat's paw of the government. But when I say this on TV the reaction is overwhelming; there is tremendous hostility to the free press in this country.55

The bulk of the stories about the attacks and their aftermath had pro-American slants. A Project for Excellence in Journalism survey found eighty percent of coverage was pro-American in September, a figure that did not dip below seventy-one percent by the year's end.56 Those polled shortly after 9/11, however, said they did not believe the media should become a mouthpiece for the Bush Administration.57 A November poll revealed that fifty-two percent believed reporters should dig to get all the facts and seventy-three percent preferred news coverage that portrayed more than the pro-American point of view.58

The troubling element of the coverage was not the patriotic slant, however, but the media's decision to suppress debate over sensitive topics, like the "why's" behind the terrorist attacks, the history of U.S. policy in the Middle East, and the long-term impact of the government's new powers. Even newsman Dan Rather fell victim to the times, weeping with talk show host David Letterman a few days after the attacks and pledging: "George Bush is the President... Wherever he wants me to line up, just tell me where."59

Looking back, some veteran news people in the U.S. said they regret allowing their emotions to dictate their reports. Nearly a year after his Letterman appearance, Rather had a different per-


55. Id.

56. Guckenberger, supra note 44, at 34 (citing the Project for Excellence in Journalism study).

57. Id.

58. Id.

perspective about lining up behind the President. At a September 9, 2002 forum, he berated reporters for couching the news in patriotism. Rather said, "The height of patriotism is asking the tough questions... We haven't been patriotic enough... It is our responsibility to knock on doors every day and ask what's going on in there even if it makes us unpopular."

At the same forum, CNN's Aaron Brown said that reporters need to focus on protecting basic human and civil rights—the very ones that are highlighted in the USA PATRIOT Act. He recalled the internment camps that held Japanese Americans during World War II and worried that lack of oversight could lead to similar national embarrassments: "We need to raise questions about the [Afghan] detainees, how they are being treated and about due process, and we need to follow these stories... This is the nature of our role in a free society."

Not all agree, of course. William McGowan, author of *Coloring the News, How Crusading for Diversity has Corrupted American Journalism*, wrote a column in the right-leaning *National Review* bashing the press for being partially responsible for the attacks. He believes the media continues to protect would-be terrorists living in the U.S.:

[A] reflexive, pro-diversity newsroom climate survives, especially with respect to post-9/11 coverage of Arab- and Muslim-Americans, who have become the objects du jure [sic] of journalistic piety and skittishness. Although many Muslim-Americans are appalled by the terrorist attack, a larger proportion than has been admitted have expressed approval.

**B. The Media's Coverage of the USA PATRIOT Act**

In the climate of fear and jingoism that followed the September 11 attacks, the media deemed it best to provide the public with positive stories about the government and its strategies for oppos-

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60. Press Release, supra note 50.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
67. Id.
68. Id.
ing terrorism. The deconstructing of a document titled the USA PATRIOT Act so soon after such a horrendous attack on American soil must have seemed unthinkable. Most mainstream media simply reported that the legislation had passed.69 There was little debate about the PATRIOT Act’s provisions during a time when even a member of Congress would provoke cries of heresy70 by questioning the President’s request for additional powers to catch the evil-doers.

Stories about the PATRIOT Act’s progress in the House and Senate made it to page one in large media outlets, including The New York Times71 and The Washington Post.72 The three major news networks barely mentioned the new law. When the legislation was signed by the President, most stories in major newspapers focused on the positive aspects of the bill.73

In fact, shortly after its passage, some members of the press questioned whether the legislation went far enough to protect Americans.74 On November 25, 2001 National Public Radio (“NPR”), a well-known liberal-leaning media outlet, broadcast a program debating “whether the USA PATRIOT Act will be enough for law enforcement officials to protect against future terrorist activity.”75

During the NPR program, broadcaster Barbara Bradley listed some of the new powers granted to the FBI, including the ability to implement roving wiretaps and perform nationwide searches for terrorists, and explained that the program’s guest “national security expert” believed many of the new powers given to the FBI were “long overdue.”76 Without mentioning the PATRIOT Act’s poten-

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73. See, e.g., Frank James, Visa Process to Allow More Time For Background Checks, CHI. TRIB., Nov. 1, 2001, at 8N.
74. See infra text accompanying note 75.
75. Weekend All Things Considered (NPR radio broadcast, Nov. 25, 2001). On October 30, 2001, however, NPR did broadcast a show where a Justice Department official described provisions of the PATRIOT Act and a civil liberties advocate explained his concerns. All Things Considered (NPR radio broadcast, Oct. 20, 2001).
76. All Things Considered, supra note 75.
tial problems, NPR reported that security experts believed that while the Act is flawed because its usage is still partially tied to the courts, the "current climate of anxiety" the Act creates might be even more effective than the legislation itself.\textsuperscript{77}

It wasn't until months after its passage that reporters took a hard look at the new law and began to question what its provisions meant.\textsuperscript{78} It did so after organizations, such as banks, libraries, and universities began to complain about the law.\textsuperscript{79} The media proliferated coverage of breaches in civil liberties based on these complaints.\textsuperscript{80} These stories also provided insight into how Americans were guarding against the prospect of too much governmental infringement.\textsuperscript{81}

An NPR story that aired on November 8, 2002—more than a year after the attacks—focused on how the FBI confiscated computers in a library in Patterson, New Jersey, shortly after September 2001.\textsuperscript{82} The story was straightforward with several highlighted opinions about racial profiling.\textsuperscript{83} The most telling aspect was the librarian's response to the FBI's visit: "They had partitioned a hard drive, and you can do that and sort of, like track things more easily, but we undid that. I mean we have people who have the expertise who could say, 'Well, wait a second. What did they do to this hard drive?'"\textsuperscript{84}

As the press turned its attention to civil liberties and the USA PATRIOT Act, it tended to return to its left- or right-leaning slants. The Miami Herald reported that the PATRIOT Act "remained shrouded in mystery."\textsuperscript{85} Newsday wrote a series of articles called "Taking Liberties" about the government's new policy of secrecy and how immigrants were suffering under provisions of the PATRIOT Act.\textsuperscript{86} A column in the Los Angeles Times noted that the "new anti-terrorism legislation fosters a sense of insecurity."\textsuperscript{87}

\begin{itemize}
    \item \textsuperscript{77} Id.
    \item \textsuperscript{78} See infra notes 86-89 and accompanying text.
    \item \textsuperscript{79} See, e.g., infra note 82 and accompanying text.
    \item \textsuperscript{80} See, e.g., infra note 82 and accompanying text.
    \item \textsuperscript{81} See, e.g., infra note 82 and accompanying text.
    \item \textsuperscript{82} Weekend All Things Considered: Patterson, N.J. Library Receives Visit From the FBI Post-Sept. 11 (NPR radio broadcast, Nov. 8, 2002).
    \item \textsuperscript{83} Id.
    \item \textsuperscript{84} Id.
    \item \textsuperscript{85} Frank Davies, USA Patriot Act Remains Shrouded in Mystery, MIAMI HERALD, Sept. 10, 2002, at 13A.
    \item \textsuperscript{86} See, e.g., John Riley, Taking Liberties, Part 4: Held Without Charge, NEWSDAY, Sept. 18, 2002, at 6.
    \item \textsuperscript{87} Patt Morrison, New Anti-Terrorism Legislation Fosters a Sense of Insecurity, L.A. TIMES, Nov. 26, 2002, at B3.
\end{itemize}
The *San Jose Mercury News* wrote about how the new law "tarnishes American ideals." And *The New York Times* observed that the Bush administration has been "exhibiting a penchant for secrecy that has been striking to historians, legal experts and lawmakers of both parties."89

Cautioning that the government was abusing its powers without enhancing protection, *The Nation* wrote:

> The War on terror must be aggressive, but it must be smart. The government needs to adopt measures that reflect our core values and that meaningfully promote security. It needs to explain how its tactics achieve both goals. It should not squander its own credibility with measures that undermine our nation's guiding principals but do little to make us safer.90

At the same time, conservatives charged that questioning the government's motives as it wages a war against terrorism is akin to asking for another strike on American soil.91

In the summer of 2002, city councils throughout the country began to boycott the PATRIOT Act claiming they would not comply with its provisions and would not assist the federal government in enforcing the Act.92

Several conservative media outlets clung to the patriotism theme when discussing municipalities' rejection of the Act. *The O'Reilly Factor*’s Bill O'Reilly told Cambridge City Council member Brian Murphy that the city’s decision not to cooperate with the PATRIOT Act was unpatriotic and dangerous.93 Murphy explained that citizens of Cambridge were concerned because “this was passed in the wake of the heinous attacks of September 11 . . . and was done without a lot of debate, without a lot of discussion.”94 O'Reilly’s response was: “So it looks to me like you’re hysterical in Cambridge, not an uncommon thing for that town . . . and you may be seditious, that you may be undermining this government.”95 O'Reilly added, “You’re basically taking steps that could lead to

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91. See, e.g., infra note 96 and accompanying text.
92. See, e.g., infra text accompanying notes 94 & 99 and accompanying text.
93. *The O'Reilly Factor* (FOX News television broadcast, July 1, 2002).
94. Id.
95. Id.
anarchy if every municipality did the same thing. And you’re leaving all Americans vulnerable to this . . . [Y]ou’re protesting and you’re undermining the government.” Murphy responded:

We are absolutely patriotic. But our patriotism doesn’t derive from a law that tries to cram the word “patriot” into its title so that it can wrap itself in the flag, but rather a patriotism . . . that derives from the Constitution and the Bill of Rights and the civil liberties that have really made this country . . . the greatest nation there is.97

O’Reilly answered, “You’re protesting and you’re undermining the government and you don’t even know if anybody’s rights are being violated.”98

A similar interchange occurred on another conservative television program, Hannity & Colmes, this time with Hope Marston, a member of the Eugene, Oregon City Council, the fifteenth city to reject the PATRIOT Act.99 After Marston explained why her municipality voted against the PATRIOT Act (“people . . . are concerned about liberty and protecting our Bill of Rights”),100 Sean Hannity berated her and the city council for passing a resolution that is “meaningless.”101 “Hope, you know, you may have forgotten, but America got attacked on Sept. 11. You may have forgotten all of this. There are people plotting and planning and scheming right now in America . . . And you’re creating hysteria where there need not be hysteria.”102

An article in the conservative National Review Online hailed the success of the PATRIOT Act and complained that other Western nations had not followed suit.103

Reeling off the success of the discovery of Al-Qaeda cells in New York, Michigan, and Oregon, the United States has put the emboldening PATRIOT Act to excellent use. . . . Though the U.S. has enacted new laws such as the PATRIOT Act to combat terrorism, the other nations of the West have not followed our necessary lead.104

[96. Id. 
97. Id. 
98. Id. 
100. Id. 
101. Id. 
102. Id. 
104. Id.]
III. PUBLIC OPINION

How does the public regard the continued protection of individual rights, after this greatest terrorist attack in U.S. history? This has naturally been a topic of intense and thorough media reporting in the United States, and worldwide. Yet media coverage, even at its very best, is no substitute for a systematic and objective survey of the public's opinion on this issue.

In the uneasy months following the WTC attack, an interdisciplinary team of researchers at Fordham University designed and conducted a survey of public opinions on terrorism, with several distinct objectives: 1) to question a representative sample of adults in Greater New York, including those in the vicinity of Ground Zero in New York; 2) to apply a previously standardized twenty point scale of general attitudes toward terrorism to compare with public opinions prior to 2001; and 3) to develop and use two new scales to precisely measure attitudes toward al-Qaeda terrorism in particular, and toward security versus individual liberties in the United States.

A. Assessing Attitudes Toward Terrorism

Traditional media polls are often faulted for reporting inconsistent, rapidly shifting, or labile findings—in part because they are typically report simple percentages of response to single questions. In contrast, this survey was designed to be a psychometric-quality


107. See generally Herbert J. Gans, Deciding What's News (1979). Most sociologists of the mass media, like Gans, describe all mass media as inherently selective, and all journalists heavily, if unconsciously, affected by dominant cultural values in their selection and description of facts they report. For a post-9-11 extension of this view, see generally Herbert J. Gans, Democracy and the News (2003) [hereinafter Democracy and the News].

108. The Authors thank several researchers who cooperated in carefully collecting surveys: Farhad Abdolian, Monica E. Beck, Ciara Bergman, Houri Geudelekian, Despina Kolokithias, Angel Lopez, Elizabeth Lopez-Yang, Meghan L. Stone, Zina Trost, and Meagan E. Winn.

survey, assessing people's attitudes by statistically combining items into total scores on more stable multi-item scales.\textsuperscript{110} Such scales aim to be more valid and reliable\textsuperscript{111} than single items, thus better able to chart public views across times and across places.\textsuperscript{112}

The survey form consisted of thirty-six self-report items yielding biodata on each respondent, and scores on four twenty-point scales, in which a high score indicated one's high (a) authoritarianism; (b) acceptance of terrorism in general; (c) acceptance of al-Qaeda in particular; and (d) preference for individual liberties over security needs.

This was an intercept survey, in which respondents were stopped in person during their daily activities, and asked them to give their frank opinions on the anonymous one-sheet survey form.\textsuperscript{113} Most of these 309 respondents were approached in the streets or parks around Ground Zero, and others in office buildings, train stations, or public areas in Greater New York. Despite the rapid pace and incivility of the New York City streets,\textsuperscript{114} almost half of all those approached agreed to complete the survey. Demographically, these 309 proved to be a diverse and representative group across most categories.\textsuperscript{115}

\textsuperscript{110} See Anne Anastasi \& Susana Urbina, Psychological Testing 49-54 (1997).

\textsuperscript{111} Valid or accurate in assessing what they intend to assess. Reliable or stable in their assessment of an attitude. Indeed, a psychometric analysis of the data in this survey found all three brief scales proved internally reliable measures, based on their Cronbach's alpha scores: Terrorism alpha = .75; al-Qaeda alpha = .69; and Liberties alpha = .76. Alpha values can vary from 0 up to 1.0, with higher values indicating more reliable scales.

\textsuperscript{112} Though U.S. researchers have devised many scales to assess political attitudes (such as alienation, leadership, and values), few are on the topic of political violence, and none on the topic of terrorism. See generally John P. Robinson et al., Measures of Political Attitudes (1999); see also W.F. Velicer et al., A Measurement Model for Measuring Attitudes Toward Violence, 15 Personality \& Soc. Psych. Bull. 349, 349-64 (1989).

\textsuperscript{113} See infra App. A.


\textsuperscript{115} The 309 respondents were a demographically diverse group. They were fifty-four percent women, and varied in age from fourteen to seventy-five, with a mean of 33.5 years. In ethnicity, fourteen percent described themselves as Hispanic, fourteen percent as African-American, four percent as Asian, sixty-two percent as non-Hispanic Whites, and six percent as other. In religion, seventy-seven percent described themselves as Christian, eleven percent as Jewish, eleven percent as none, zero percent were Moslems, and one percent were other. In rating their degree of religiosity from "none" to "highly religious," survey respondents ranged from eight percent "none" to ten percent "highly religious"; the mean fell right in the middle, at 4.5 on the 0-9 scale. In education, their highest level was one percent elementary school,
In the course of charting public opinion, an objective survey can occasionally reveal some unexpected patterns in public sentiment. This was certainly the case here, as a few surprises emerged from our findings.

B. Findings

Terrorism? How do people regard the use of terrorism in general? When asked in a single item if the killing of innocent civilians to achieve a political goal is ever a “morally acceptable” tactic, a clear ninety percent majority said “No” (never, or rarely), and virtually zero percent said “often.” Yet this clarity blurs when the moral acceptance is gauged by a more detailed five-item scale. On this zero to twenty-point scale, the mean score of 309 people was not zero, but 6.8 on the 0-20 terrorism scale, indicating some acceptance of terrorism as a political tactic. Moreover, individuals’ scores on the 0-20 scale ranged widely, from zero (eleven percent) up to nineteen or twenty (three percent), revealing a spectrum of attitudes toward terrorism, from abhorrence through acceptance, and even advocacy among a few of us. Surprisingly, this terrorism mean of 6.8 after the 2001 terrorist attack was almost unchanged from the mean of 6.5 among ninety college students in 1993. People in 2002, however, were far more willing to complete a survey of their views on terrorism, compared with people in the early 1990s, who often recoiled upon simple mention of the violent topic. Overall, we found people were not uniformly op-

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116. The survey concisely defined terrorism as “the use of violence against civilians to achieve a political goal,” a definition adapted from Burton Leiser, Liberty, Justice and Morals 393 (1986).
117. See infra Tbl. 1.
118. See infra Tbl. 1.
119. U.S. Attitudes, supra note 109, at 83-87. The identical twenty point terrorism scale used here was used by in 1993. Id.
120. Id. at 86. The 1993 survey by Takooshian and Verdi found the topic of terrorism to be so abhorrent that it repelled many people, making “this survey especially challenging; respondents seem uncomfortable with questions on terrorism, despite the anonymity of the survey. This sampling has been a problem, and more representative data must be collected.” Id. In contrast, in 2002, people were far more willing, even eager, to express their own views on terrorism.
posed to terrorism, and some Americans were accepting or even supportive of it. Their views of terrorism as a political tactic are best described as mixed, leaning toward nonacceptance.

Al-Qaeda? How do people regard al-Qaeda in particular? On a zero to twenty-point scale measuring “support for al-Qaeda,” people’s views again averaged not zero, but 5.4, with another wide spectrum of views from total abhorrence of al-Qaeda (twelve percent scored zero points, or zero tolerance of al-Qaeda) through acceptance of al-Qaeda (three percent scores 15-16 points), though no clear support for al-Qaeda (zero percent scored 17-20 points. Twenty points would signify complete acceptance). Surprisingly, inspection of the scale’s five items finds one where a fifty-three percent majority of people agree that al-Qaeda terrorists “have some legitimate basis for their anger at the U.S. and its citizens.” People’s overall attitudes toward al-Qaeda terrorism are again best described as mixed, leaning toward non-acceptance.

Individual Liberties? Where do people stand when asked to sacrifice individual liberties for greater national security? People again varied widely, from totally pro-security (four percent scored zero points, signifying the reluctance to give up any civil liberties) up to totally pro-liberty (three percent scored twenty points, signaling they would sacrifice it all for a feeling of safety). People’s overall views averaged 9.5 on the individual liberties scale, very near the mid-point of ten on this zero to twenty-point scale, indicating that public views could not be more mixed. A closer examination of the distribution of views in Figure 1 shows over fifty percent of people clustered in the mid-range of seven to thirteen points, indicating mixed feelings for most respondents. Sizable minorities strongly favored individual liberties (twelve percent scored sixteen or more), or favored security at the expense of liberties (sixteen percent scored four or less). Inspection of the five items also indicates variations among them. In favor of liberties, over fifty percent of respondents opposed the torture of terrorist suspects, and supported suspects’ right to an attorney. But in favor

121. See infra Tbl. 1.
122. See infra Tbl. 1.
123. See infra Tbl. 1.
124. See infra Tbl. 1.
125. See infra Tbl. 1.
126. See infra Tbl. 1.
127. See infra Tbl. 1.
128. Survey data on file with Authors.
129. See infra Tbl. 1.
of increased security, over fifty percent preferred profiling at airports, increased use of wiretaps, and the probing of suspects’ private files.  

Patterns? What sort of person is most likely to prefer individual liberties, as opposed to increased security? This is adumbrated by a detailed correlational analysis presented in Table 2. In their attitudes, people who are more supportive of individual liberties tend to be significantly less authoritarian in personality, more accepting of terrorism in general, and al-Qaeda in particular. In contrast, individual liberties were largely unrelated with one’s demographic categories—age, gender, educational level, being raised in the U.S. or overseas, number of grandparents born in the U.S., or comparing the ninety percent living in Greater New York with the ten percent visiting New York City or Ground Zero.

Put another way, those most supportive of tightened national security at the expense of individual liberties were significantly more authoritarian in personality, less sympathetic with terrorism in general, and al-Qaeda in particular. Interestingly, one’s higher self-reported degree of religiosity from zero (none) to nine (high) was a modest, but significant predictor of her desire for security above liberty, but not at all of her attitude toward terrorism or al-Qaeda. In line with past research, it seems that these sharp variations in views within the population are not so much “demographic” segments (such as age, gender, and education) as they are “psychographic” segments (based on life style, personality, and personal experiences).

The end of the survey invited respondents to add their written comments on a few items, and many did. Is terrorism a morally acceptable or effective tactic? What was the impact of September 11 on New York City? What is the impact of personally viewing Ground Zero? Any other comments? A global analysis of respondents’ written statements revealed further surprises. For one thing, some people exposed to terrorism while living outside the U.S. did

130. See infra Tbl. 1.
131. The Pearson product-moment correlation is calculated by a formula that precisely gauges the degree of relationship between two measures—from zero (none at all), .25 (low), .50 (moderate), .75 (high), to 1.00 (perfect). A negative correlation indicates a reverse relationship, in which a higher score on one factor means a lower score on the other. Low correlations are considered negligible unless “p <.05,” or there is less than a five percent probability that the correlation is due to pure chance, rather than a genuine connection between the two measures.
not necessarily abhor terrorism, but occasionally came to see it as a natural part of modern life, or even an acceptable "tit-for-tat" tactic for retribution. As an extreme example, two avowed Christians from the Middle East whose families had suffered at the hands of terrorists were among the six percent who scored above fifteen on the twenty-point terrorism scale; both described terrorism as an inevitable and sometimes effective tactic, which originated in people's hearts, and was likely out of control by any government policies. Another notable trend: only a minority of respondents described the 9/11 attack as purely negative in its impact on the United States or New York. A seventy-five percent majority said its impact was also positive in some ways—creating greater solidarity among Americans, strengthening Americans' fiber, or serving as an abrupt "wake-up call" for the nation.133 Another revelation was the ferocity of about ten percent of respondents' comments on individual liberties.134 At one extreme, some people voiced fears that the 9/11 attacks will succeed in turning the U.S. into an armed camp full of fear, anger, and suspicion.135 At the other extreme, people felt it was time to close tight the U.S. borders to immigration, to better empower investigators, or crack down on the intolerant enemies living among us, as well as overseas.136

CONCLUSION

Historically, during times of crisis, it has been natural for democratic nations, including the United States, to temporarily abridge individual liberties in ways that would never be considered in more halcyon times. Is the USA PATRIOT Act a temporary measure, or the signal for a lasting new world order to combat a faceless enemy in this new millennium? U.S. public policies continue to unfold with international events, such as the War in Iraq, tumult in the Far and Middle East, and potential "wars and rumors of war" with other unfriendly nations. The U.S. mass media have reported intense, mixed, volatile feelings going in many directions within the U.S. public today. In such times, public opinion polls have a special value in a democratic society, to precisely gauge and analyze

133. These phrases were extracted from the verbatim comments that some respondents wrote at the end of their surveys.
134. Fortunately, this split opinion among Americans is not "bimodal," with two groups clustered at the extremes; rather, this is a still a relatively flat normal distribution with most respondents clustered toward the center.
135. See supra note 133 and accompanying text.
136. See supra note 133 and accompanying text.
citizens' views. Such polls are best seen as a snapshot in time, as views continue to shift in tandem with world events. As of 2002, the public clearly is deeply divided in their views of terrorism, liberty, and related issues. This seemed the case on U.S. Election Day 2002, when the main story was not so much a Republican or Democratic victory so close to fifty percent, but rather the fifty percent itself—the clear split within the nation. When it comes to U.S. policy on terrorism, survey respondents of all sorts seem to expect "the other shoe to drop—be that a bio/chemical or nuclear attack—but this shoe will almost surely have dramatically different impacts on those pro-liberty or pro-security people among us. Media coverage of events is best accompanied by tracking polls, to chart how much and why the U.S. public is coalescing or further dividing on this important issue of individual liberties during crisis.


<table>
<thead>
<tr>
<th>Percent</th>
<th>0</th>
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<tr>
<td>Acceptable tactic? (0-4)</td>
<td>82</td>
<td>8</td>
<td>5</td>
<td>5</td>
<td>0</td>
<td>.3</td>
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<tr>
<td>Effective? (0-4)</td>
<td>41</td>
<td>21</td>
<td>19</td>
<td>11</td>
<td>8</td>
<td>1.2</td>
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<tr>
<td>Terrorists must be considered the enemy of civilized society, regardless of their motives. [r]</td>
<td>53</td>
<td>29</td>
<td>16</td>
<td>1</td>
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<tr>
<td>It is sometimes understandable if people resort to terrorism as their only way to be heard.</td>
<td>38</td>
<td>31</td>
<td>24</td>
<td>7</td>
<td>1.4</td>
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<tr>
<td>Only a cruel, cowardly group would resort to terrorism to achieve its goals. [r]</td>
<td>38</td>
<td>23</td>
<td>29</td>
<td>9</td>
<td>1.6</td>
<td></td>
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<tr>
<td>Most terrorists seem like disturbed people who would act violent even in an ideal society. [r]</td>
<td>23</td>
<td>30</td>
<td>33</td>
<td>13</td>
<td>1.9</td>
<td></td>
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<tr>
<td>Terrorism is sometimes morally justified.</td>
<td>51</td>
<td>28</td>
<td>16</td>
<td>4</td>
<td>1.0</td>
<td></td>
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<tr>
<td>Accept Terrorism (0-20).</td>
<td></td>
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<td>6.8</td>
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*In particular, about the 9-11 terrorists and their world-wide al-Qaeda network, I feel:*

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<td>they would have exploded nuclear weapons in New York City if they had the chance. [r]</td>
<td>56</td>
<td>26</td>
<td>14</td>
<td>4</td>
<td>1.0</td>
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<td>they have some legitimate basis for their anger at the United States and its citizens.</td>
<td>24</td>
<td>22</td>
<td>40</td>
<td>13</td>
<td>1.9</td>
<td></td>
</tr>
<tr>
<td>they are the enemy of all civilized people, including moderate Moslems. [r]</td>
<td>35</td>
<td>37</td>
<td>24</td>
<td>4</td>
<td>1.1</td>
<td></td>
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<tr>
<td>outside the U.S., the government should be aggressive to eliminate their network. [r]</td>
<td>48</td>
<td>33</td>
<td>17</td>
<td>3</td>
<td>0.8</td>
<td></td>
</tr>
<tr>
<td>inside the U.S., the government should be aggressive to eliminate their network. [r]</td>
<td>68</td>
<td>21</td>
<td>9</td>
<td>3</td>
<td>0.6</td>
<td></td>
</tr>
<tr>
<td>Accept al-Qaeda (0-20)</td>
<td></td>
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<td>5.4</td>
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*About the treatment of suspects in the United States, I feel the government should:*

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<tr>
<td>“profile” people at U.S. airports and elsewhere if this can increase public safety. [r]</td>
<td>34</td>
<td>31</td>
<td>25</td>
<td>9</td>
<td>1.3</td>
<td></td>
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<tr>
<td>probe the otherwise private files of U.S. students and workers from suspect nations. [r]</td>
<td>20</td>
<td>31</td>
<td>35</td>
<td>11</td>
<td>1.8</td>
<td></td>
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<tr>
<td>torture U.S. detainees linked with al-Qaeda if their information could save lives. [r]</td>
<td>19</td>
<td>18</td>
<td>33</td>
<td>28</td>
<td>2.3</td>
<td></td>
</tr>
<tr>
<td>expand its wiretaps of suspects in the U.S. [r]</td>
<td>31</td>
<td>31</td>
<td>28</td>
<td>9</td>
<td>1.4</td>
<td></td>
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<tr>
<td>ensure the right to an attorney and other legal rights of suspects in U.S. custody.</td>
<td>12</td>
<td>16</td>
<td>42</td>
<td>26</td>
<td>2.7</td>
<td></td>
</tr>
<tr>
<td>Favor civil liberties over security (0-20)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>9.5</td>
</tr>
</tbody>
</table>

*Notes: The four columns of numbers to the left indicate percentage of respondents who agreed with that view, from 0 (low) to 4 (high). The fifth column indicates the mean score for each item (0-4) or scale (0-20). Some items marked [r] are reverse-scored, so “disagree” is scored high for that item.
<table>
<thead>
<tr>
<th>Table 2</th>
<th>Intercorrelations of People’s Views and Biodata</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Liberties</td>
</tr>
<tr>
<td>2. Terrorism (0-20)</td>
<td>.39**</td>
</tr>
<tr>
<td>3. al-Qaeda (0-20)</td>
<td>.45**</td>
</tr>
<tr>
<td>4. Authoritarianism (0-20)</td>
<td>-.46**</td>
</tr>
<tr>
<td>5. T-accept (0-4)</td>
<td>.08</td>
</tr>
<tr>
<td>6. T-effective (0-4)</td>
<td>.18**</td>
</tr>
<tr>
<td>7. Ground Zero (number)</td>
<td>-.11</td>
</tr>
<tr>
<td>8. Age</td>
<td>-.13*</td>
</tr>
<tr>
<td>9. Gender (1=m, 2=f)]</td>
<td>.00</td>
</tr>
<tr>
<td>10. Raised in U.S. (N/Y)</td>
<td>.03</td>
</tr>
<tr>
<td>11. Grandparents (0-4)</td>
<td>.06</td>
</tr>
<tr>
<td>12. Education (1-5)</td>
<td>.07</td>
</tr>
<tr>
<td>13. Religiosity (0-9)</td>
<td>-.19**</td>
</tr>
<tr>
<td>14. Away (N/Y)</td>
<td>.08</td>
</tr>
</tbody>
</table>

Note: Pearson correlations were significant at p<.05 (*) or p<.01 (**).

Attitudes and biodata:
(1) LIBERTIES scale score, from 0 (national security) to 20 (individual liberties).
(2) TERRORISM scale score, from 0 (abhorrence) to 20 (support).
(3) AL-QAEDA scale score, from 0 (rejection) to 20 (support).
(4) AUTHORITARIAN personality scale score, from 0 (low) to 20 (high).
(5) T-Accept= One item on the acceptance of terrorism, from 0 (never) to 4 (often).
(6) T-EFFECT= One item on the effectiveness of terrorism, from 0 (never) to 4 (often).
(7) GROUND ZERO, number of times personally visited by respondent.
(8) AGE, in years.
(9) GENDER, 1 (male), 2 (female).
(10) RAISED IN U.S., 0 (No), 1 (Yes).
(11) GRANDPARENTS, the number born in the USA, from 0 to 4.
(12) EDUCATION, 1 (elementary school) to 5 (graduate degree).
(13) RELIGIOSITY compared to others, from 0 (none) to 9 (high).
(14) AWAY, living outside of the New York area, 0 (No), 1 (Yes).
APPENDIX A

POLITICAL OPINIONS SURVEY

Please give us your frank opinions in this anonymous survey. Answer each item by circling A (Agree strongly), a (agree), d (disagree), or D (Disagree strongly). There are no right or wrong answers, only your personal opinions. Save any comments for the end of the survey. For your free summary of the survey’s results next month, contact Fordham University at takoosh@aol.com. THANK YOU.

1. A a d D Human nature being what it is, there will always be war and conflict.
2. A a d D A few strong leaders could make this country better than all the laws and talk.
3. A a d D People cannot be trusted.
4. A a d D Most people who don’t get ahead just don’t have enough will power.
5. A a d D An insult to your honor should not be forgotten.

In recent history, all sorts of groups have used terrorism, “the use of violence against civilians to achieve a political goal.” These include religious groups, such as Christians in Ireland, Moslems, Jews, and Hindus in the East; national groups, such as Latins, Armenians, and Africans; and ideological groups, such as communists and fascists. Is terrorism “freedom-fighting?” Please answer these questions on terrorism in general:

1. A a d D Terrorists must be considered the enemy of civilized society, regardless of their motives.
2. A a d D It is sometimes understandable if people resort to terrorism as their only way to be heard.
3. A a d D Only a cruel, cowardly group would resort to terrorism to achieve its goals.
4. A a d D Most terrorists seem like disturbed people who would act violent even in an ideal society.
5. A a d D Terrorism is sometimes morally justified.

If terrorism involves “killing innocent civilians to achieve a political goal,” I feel this tactic:

a. is a morally acceptable tactic:
   0 never 0 rarely 0 occasionally 0 sometimes 0 often.

b. has been an effective tactic:
   0 never 0 rarely 0 occasionally 0 sometimes 0 often.

Add any comments on back.

In particular, about the 9/11 terrorists and their world-wide al-Qaeda network, I feel:

12. A a d D they would have exploded nuclear weapons in New York City if they had the chance.
13. A a d D they have some legitimate basis for their anger at the United States and its citizens.
14. A a d D they are the enemy of all civilized people, including moderate Moslems.
15. A a d D outside the U.S., the government should be aggressive to eliminate their network.
16. A a d D inside the U.S., the government should be aggressive to eliminate their network.

*About the treatment of suspects in the United States, I feel the government should:*

17. A a d D “profile” people at U.S. airports and elsewhere if this can increase public safety.

18. A a d D probe the otherwise private files of U.S. students and workers from suspect nations.

19. A a d D torture U.S. detainees linked with al-Qaeda if their information could save lives.

20. A a d D expand its wiretaps of suspects in the U.S.

21. A a d D ensure the right to an attorney and other legal rights of suspects in U.S. custody.

22. Since 9-11-01, I have felt more:
   a. A a d D fearful or anxious
   b. A a d D angry
   c. A a d D suspicious of strangers
   d. A a d D spiritual
   e. A a d D proud to be an American

23. Since 9-11-01, I have:
   a. A a d D reduced my air travel
   b. A a d D acted more alert in public
   c. A a d D stayed at home more
   d. A a d D gone out more to support the economy
   e. A a d D displayed the U.S. flag more

24. About the 9-11-01 attack, I would say its impact on New York City really has been:
   - none
   - mainly negative
   - both negative and positive
   - mainly positive.

   *Any comments on back.*

25. I have personally visited and seen Ground Zero. □ no □ yes, ___ time(s).
   If yes, what was its immediate or long-term impact on you?
   Add any comments on back.

26. My age: ___.

27. My gender: □ M □ F.

28. The country where I was raised: _________.

29. Of my four grandparents, the number born in the U.S. is (circle one):
   - 0
   - 1
   - 2
   - 3
   - 4

30. My education:
   - Keyword school
   - High school
   - Some college
   - College graduate
   - Graduate school
31. My ethnicity:
   □ Hispanic
   □ White
   □ African-American
   □ Asian
   □ Other: ________________________.

32. My religion:
   □ Moslem
   □ Christian
   □ Jewish
   □ None
   □ Other: ________________________.

33. I would say my degree of religiosity is (circle #):
   (less) 0 1 2 3 4 5 6 7 8 9 (more)

34. I live in the New York area:
   □ Yes  □ No, in: ________________________.

35. (Optional) Which words would you use to describe individual terrorists today? Put an N beside words you feel are never true, an A beside those you think are always true of terrorists. Leave blank all the other words you think might apply to some terrorists but not others:

   _ Rational _ Mature
   _ Dedicated _ Immature
   _ Cruel _ Sincere
   _ Idealistic _ Mentally disturbed
   _ Strong _ Self-sacrificing
   _ Clever _ Malcontent
   _ Fanatic _ Selfish
   _ Sensible _ Selfless
   _ Calculating _ Thrill-seeking
   _ Cowardly _ Sadistic
   _ Misguided _ Brainwashed
   _ Effective

Any additional comments (optional):
. . . .11. An acceptable or effective tactic?

. . . .24. 9-11 impact on New York City?

. . . .25. Impact of seeing Ground Zero?

36. Any further comments on terrorism, 9-11, its impact, this survey...?
THE IMPACT OF 9/11 AND ITS AFTERMATH ON SUBSTANCE USE AND PSYCHOLOGICAL FUNCTIONING: AN OVERVIEW

Patrick B. Johnson* and Linda Richter**

Like Pearl Harbor six decades previously, the tragic events of September 11, 2001 transformed this nation. In some respects, however, because the events occurred in the electronic age, and in the nation's capitol and its largest city, these events seemed to possess greater immediacy and possibly greater short- and long-range consequences as well. This Essay provides a brief summary and evaluation of findings on the mental health and substance abuse consequences of the events of 9/11 throughout the nation and in our cities. It also presents new data obtained from clients who entered substance abuse treatment in New York and other cities either before 9/11 or during a six-month period following the events. This Essay concludes with a discussion of how best to interpret these various research findings.

Two general types of data have been used to explore the nature and extent of the consequences of the 9/11 tragedy. The first approach utilized retrospective reports either from interviews with randomly selected respondents¹ or from interviews with respondents who either represented groups with some specialized respon-

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sibility for addressing the consequences (for example, government officials charged with providing social services) or who represented specific vulnerable populations (for example, drug addicts or children). In each instance, these reports only contained data collected post-9/11 in which respondents were asked to report on their reactions at the time of the attacks or in their aftermath.

The second type of approach looked at data collection systems that had been in place before 9/11 and continued collecting information afterward. Some of this ongoing research data enabled researchers to compare the responses of the same individuals before and after the terrorist attacks. Other studies enabled researchers to compare the responses of different people before and after the terrorist attacks. The Authors' research on the characteristics of clients entering substance abuse treatment facilities pre- and post-9/11 falls into this latter category.

The results of the various retrospective studies suggest both the specific, localized effects, as well as the more widespread, national effects of the events of 9/11. For example, a telephone survey conducted by the Rand Corporation in the days immediately following the attacks found that while ninety percent of the 560 adults interviewed had one or more symptoms of stress to some degree, forty-four percent reported "one or more substantial symptoms." Included among these stress symptoms were sleeplessness, night-
mares, an inability to concentrate, and irritability. These researchers also reported that although the effects were widespread, "the people we surveyed who were closest to New York had the highest rate of substantial stress reactions." 

Similarly, a telephone survey of Manhattan residents directed by researchers at the New York Academy of Medicine found increased levels of self-reported alcohol, tobacco, and marijuana use. While the increase in marijuana use was relatively small (3.2 percent), larger increases were reported for smoking (9.7 percent), and alcohol use (28.8 percent). Interestingly, symptoms of post-traumatic stress disorder were associated with increases in marijuana use and cigarette smoking, while symptoms of depression were associated with increases in the use of each of the three substances.

Retrospective reports by current or former users of heroin and cocaine from a qualitative investigation designed to determine the impact of 9/11 events on this vulnerable population indicated that they also reported serious emotional turmoil, including anger, anxiety, and sadness. In contrast to the increases in substance use observed in the telephone survey, reports of lowered drug use were as commonly observed as reports of increased use among those interviewed by Dr. Weiss and her colleagues. This suggests that the effects of the attacks may have been more varied with regard to individual substance use behavior.

This variability is also highlighted in studies where pre- and post-9/11 retrospective data was available. For example, another qualitative investigation interviewed street-recruited samples of heroin and cocaine users between July and November of 2001. Comparisons of the data taken pre- and post-9/11 in the Bronx and Harlem revealed no differences in the average number of days per month

\[9. \text{Id. at 1508.} \]
\[10. \text{Id. at 1511.} \]
\[11. \text{David Vlahov et al., Increased Use of Cigarettes, Alcohol, and Marijuana Among Manhattan, New York, Residents After the September 11th Terrorist Attacks, 155 J. Epidemiology 988, 988 (2002).} \]
\[12. \text{Id.} \]
\[13. \text{Id.} \]
\[14. \text{Weiss et al., supra note 1, at 392.} \]
\[15. \text{Vlahov et al., supra note 11, at 991.} \]
\[16. \text{Weiss et al., supra note 1, at 392.} \]
\[17. \text{See Factor et al., supra note 5, at 404 ("Recently, rates of cigarette, alcohol, and marijuana use increased among the general population of Manhattan after the events of September 11, 2001.").} \]
\[18. \text{Id.} \]
that respondents sniffed cocaine, snorted heroin, or smoked crack or marijuana. Similarly, no differences were observed in the proportions of daily users of drugs in the groups interviewed before and after 9/11.

Another approach to investigating the mental health and substance abuse consequences of the 9/11 terrorist attacks was to compare clients entering substance abuse treatment facilities in the six months before and the six months following these events. This investigation was based on data from the Drug Evaluation Network System ("DENS"), a real-time data collection system designed to assess substance-abusing clients at treatment admission in order to monitor national drug use trends and treatment utilization patterns. The system is currently operating in drug and alcohol treatment programs around the country. This analysis examined data collected in New York, Chicago, Philadelphia, and Miami.

Overall comparisons of alcohol use (frequency of use and frequency of intoxication in the past thirty days) did not reveal any differences between clients entering treatment in the three months before 9/11, and those entering in the three months following 9/11. Psychiatric symptoms were also assessed and revealed that clients who entered substance abuse treatment in the three-month period following the events of 9/11 generally reported being less anxious than those who entered before that date. To determine whether increases in alcohol use might be found in New York City because of its proximity to the attacks, comparisons were made within each city of those entering treatment in the three months before and after the attacks. Once again, regardless of the city involved, no differences were observed in alcohol use rates between those entering treatment prior to 9/11 and those entering afterward.

Results from the DENS study presented at the College for the Prevention of Drug Dependence meeting also failed to find significant differences in the clients' overall drug use profiles. Results

19. Id.
20. Id.
22. Id.
23. Id.
24. Kendig et al., supra note 2.
25. Perrine et al., supra note 5.
26. Id.
27. Johnson et al., supra note 7, at 26.
28. Id. at 25.
29. Factor et al., supra note 5, at 407; Carise et al., supra note 6.
indicated, however, that among those presented for admission after 9/11, there appeared to be an increased proportion of individuals who had been drug-free for a relatively short time. This suggests that among abstinent drug users, the attacks may have precipitated relapses among those most recently free of drugs. At the same time, overall psychiatric composite scores were lower among those clients entering treatment after 9/11 than those entering before this time. Finally, most counselors at substance abuse treatment facilities who were questioned about the substance use patterns of clients before and after 9/11 reported an increase in alcohol and drug use after September 11. These reports occurred, of course, despite the fact that actual client intake profiles in the DENS system demonstrated little change in the drug use profiles of clients entering the treatment facilities before 9/11 and those entering after 9/11.

Research by Dr. Perrine and his associates also found no statistically significant increase in substance use after September 11, 2001. The results of this research are particularly compelling because they are based on responses of the same individuals who reported on their own daily alcohol use as part of a two-year investigation. In this study, 120 respondents who lived approximately 300 miles north of Ground Zero in Vermont reported each day on their mood, stress levels, and the number of alcoholic drinks consumed between May 23, 2001 and December 30, 2001.

Data collected from eighty-six respondents who drank alcohol revealed that anger, stress, and sadness ratings all increased dramatically on September 11. At the same time, “[n]o significant elevation of alcohol consumption was observed on either September 11, or on the days following the attack.” Results also revealed that anger ratings remained elevated for females for fourteen days and for males for forty-one days following the at-

30. Weiss et al., supra note 1, at 401.
31. See id. (noting that the evidence of release among former users was restricted to those who had most recently stopped using).
32. Carise et al., supra note 6.
33. Id.
34. Kendig et al., supra note 6.
35. Perrine et al., supra note 5.
36. Id.
37. Id.
38. Id.
39. Id.
tacks, while sadness ratings remained elevated for thirty-seven days for males and for sixty-three days for females.40

In preparing this Essay, the DENS data system was used to analyze the composite drug use scores of clients entering substance abuse treatment in New York City, Chicago, and Los Angeles. These three cities were chosen for three reasons. First, they represent the three largest cities in the nation. Second, each represents a distinct geographic area of the country, the Northeast, Midwest, and West. Third, each represents a different distance from the events of 9/11. While New York City was directly and dramatically affected by the attacks, Chicago and Los Angeles, because of their distance from these events, were less directly affected.

In these analyses, the Authors compared the drug and alcohol use and psychological profiles of clients entering treatment in four, three-month time periods: March 11-June 10, 2001 ("T1"), June 11-September 10, 2001 ("T2"), September 11, 2001-December 10, 2001 ("T3"), and December 11, 2001-March 10, 2002 ("T4"). Drug and alcohol use and levels of psychological disturbance were assessed with composite scores derived from the Addiction Severity Index, the most frequently used admission assessment tool currently in use.41 Composite scores are derived from client responses to a series of individual items.42 Scores range from 0, indicating no problems, to 1, indicating the highest problem level.43

The first analysis was a regression in which the impacts of city, time period, and their interaction were used to predict individual client drug use scores. The findings revealed a significant interaction between city and time period (b=-.21, t=-4.05, p<.001). To illuminate its meaning, a series of one-way analyses of variance ("ANOVAs") were conducted in which time periods were used to predict drug use scores in each city. Figure 1 presents the pattern of results by city. For New York, the analysis revealed that there was a significant increase in drug use scores between T1 and T3. For Chicago, the analysis revealed a significant reduction in composite drug use scores between T1, T2, T3, and T4. For Los Angeles, results revealed a significant reduction between T1 and T4.

40. Id.
42. Id. at 27.
43. See id. at 28.
Taken together, these findings suggest that while clients entering substance abuse treatment in New York City in the three-month period following 9/11 appeared with elevated drug use profiles, this was not true of clients entering in Chicago or Los Angeles. Moreover, while there was a general trend in Chicago and Los Angeles for clients entering treatment in the fourth time period, between December 10, 2001 and March 10, 2002, to possess less elevated drug composite profiles, a similar reduction was not observed among clients entering treatment in New York City.

Analyses of the alcohol use composite scores, in contrast, revealed no combined effect (interaction) of city and time period. Instead, independent effects of city and time period were observed. Results indicated that clients entering treatment in New York City possessed higher alcohol composite scores (Mean=.32) than clients entering in Chicago (Mean=.29) or Los Angeles (Mean=.24). The scores of Chicago clients were significantly higher than those of Los Angeles clients. In addition, clients entering treatment during T4 (December 11, 2001 to March 10, 2002) possessed significantly lower scores than clients entering during T2 or T3.

Analyses of psychological disturbance scores revealed no significant interaction of city together with time period, but only an impact of time period. Figure 2 provides a graph of this effect. Subsequent analysis of this effect revealed a general downward trend in psychological disturbance. The only significant difference between time periods in psychological disturbance was observed between T1 and T4.

It should be clear from the above presentation that, with respect to the impact of the 9/11 events on substance abuse and psychological functioning, the findings are far from clear and consistent. Rather it would seem that while studies generally indicate increases in psychological distress following the attacks, their impact on alcohol and drug use was more variable. Of course, it is possible that substance-abusing individuals who were extremely distressed were unable to take upon themselves the emotionally difficult task of seeking substance abuse treatment, producing a potential selection bias in the DENS sample.

Nevertheless, while the results of some studies suggested that the attacks were associated with increases in substance use and psychological disturbance, others suggested little or no impact. This does not indicate that the attacks had little impact, but rather that there were individuals who coped differently with the emotional distress caused by these events. The variability of these findings strongly
suggests that people responded in distinct and sometimes idiosyncratic ways. While it might seem self-evident, in light of cultural biases or preconceptions, that individuals would turn to alcohol and drugs to medicate their feelings of distress and discomfort, there are many possible responses. Some may have increased the frequency of their drinking or prescription drug use in the days following the events of 9/11. Others, however, may have stopped drinking, begun attending religious services more regularly, or decided to volunteer to assist others in coping with the aftermath.

Finally, the variability in the findings may also have been due, in part, to the different data collection methods employed, the different time periods during which data were collected, or the different samples from which data were collected. On the one hand, the findings of Dr. Perrine and his colleagues, which indicated no increase in alcohol use post-9/11, were part of a larger, ongoing investigation in which people responded about their alcohol use and emotional states on a daily basis. His data indicated sharp increases in anger and depression, but no change in alcohol consumption. On the other hand, the findings of Dr. Vlahov and Dr. Schuster and their colleagues were based on single time responses to telephone surveys conducted shortly after the attacks. In these surveys, it was probably clear to many respondents that they were being questioned about the impact of 9/11 on their lives. Accordingly, some may have responded in a way that indicated that their lives had been affected and they overestimated changes in their alcohol use. It is possible that the apparent increase in drug use may reflect the respondents' attempts to validate their distress and solidarity with the victims and their families rather than a statement of fact.

The findings of Dr. Kendig and her colleagues provide some support for this position. While counselors in substance abuse treatment facilities found that people who entered treatment after 9/11 were drinking and using drugs more than those who entered treatment before 9/11, the actual client profiles did not generally support this contention. The counselors' perceptions were apparently not based on reality. They may have been based on

44. See Perrine et al., supra note 5 (conducting a two year longitudinal study of 120 subjects who live 300 or more miles north of Ground Zero on daily alcohol consumption and mood between May 23, 2001 and December 30, 2001).
45. Id.
46. Vlahov et al., supra note 11, at 988-89.
47. Kendig et al., supra note 2.
48. Id.
perceptions that were influenced by the distress they felt during this time and the general belief that people were more likely to drink and consume drugs during this period.

In any event, it is important to understand that crisis produces many responses. Even if humans are cut from the same cloth, that cloth has been tailored to suit different cultural fashions. This appears to have been true in society's responses to what is arguably the most devastating single-day crisis in the history of this nation. Some individuals collapsed momentarily, while others made courageous decisions and responded heroically. Most people just coped in their individual ways. Others, however, experience personal, but often distinctly different, short- and long-term consequences. These unique and varied responses show the individuality as well as the multiplicity of society.
Figure 1
Drug Use Composite Score by City and Time Period Relative to 9/11

Figure 2
Psychological Disturbance Composite Score by Time Period Relative to 9/11
LIFE, LIBERTY, AND THE PURSUIT OF TERRORISTS:
AN IN-DEPTH ANALYSIS OF THE GOVERNMENT’S RIGHT TO CLASSIFY UNITED STATES CITIZENS SUSPECTED OF TERRORISM AS ENEMY COMBATANTS AND TRY THOSE ENEMY COMBATANTS BY MILITARY COMMISSION

Amanda Schaffer*

INTRODUCTION

The September 11, 2001 terrorist attacks drastically changed attitudes about personal freedom.1 Fear that a terrorist could strike at anytime, anyplace made individuals more willing to put up with inconveniences, such as longer lines at airport security and baggage checks in subway stations.2 This fear drove the government to implement measures that it believed would help track down terrorists and prevent future attacks.3 One such measure, promulgated by President George W. Bush, is the Military Order of November 13, 2001: “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”4 Those subject to the order can be “detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”5

Section two of the order defines the non-citizens subject to the order.6 Any non-U.S. citizen is subject to the order where:

[T]here is reason to believe that such individual, at the relevant times, is or was a member of the organization known as al

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5. Id.
6. Id. at 57,834.
Qaida; has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order.

This order details procedures for handling such non-citizens suspected of terrorism.\(^7\)

While the order does not specifically give the government the right to try citizens by military commissions,\(^8\) deeming a citizen an enemy combatant\(^9\) gives the government the authority to try him in this manner.\(^10\) An individual who is considered an enemy combatant can be detained for the duration of an armed conflict under the laws and customs of war,\(^11\) not under the domestic criminal laws.\(^12\) President Bush has declared that two U.S. citizens, Yaser Esam Hamdi and Jose Padilla, are enemy combatants, and they are currently being held in military prisons.\(^13\) It has not yet been determined what the fate of Hamdi and Padilla will be.\(^14\) They could be held and not tried at all, they could be tried by military commissions, like their non-citizen colleagues, or they could be tried in criminal court.\(^15\) This Comment will explore the government’s right to treat citizens as enemy combatants and whether their trials should be by military commissions or by the non-military criminal justice system.

Part I of this Comment gives background information and explains the source of the government’s right to determine enemy

\(^7\) Id.
\(^8\) Id.
\(^9\) See discussion infra Part I.
\(^10\) See Ex parte Quirin, 317 U.S. 1, 35 (1942) (holding that there is “a class of unlawful belligerents” not entitled to be treated as prisoners of war and who can be tried and punished by military commission).
\(^11\) See id. at 48. To determine the laws and customs of war, the Court looked to Article 15 of the Articles of War, 10 U.S.C. §§ 1471-1593 (repealed); Liszt, Das Volkerrecht § 58(B)4 (12 ed. 1925); 2 Oppenheim, International Law § 225 (6th ed. 1940); Coleman Phillipson, International Law and the Great War 208 (1915); J.M. Spaight, Air Power and War Rights 283 (1924); J.M. Spaight, War Rights on Land 110 (1911); War Office, Gr. Brit., Manual of Military Law §§ 445, 449 (1929); see infra Part I.B.
\(^12\) See Quirin, 317 U.S. at 48.
\(^14\) See discussion infra Part I.C.
\(^15\) See discussion infra Part II.
combatant status and to use military commissions. Part I also describes the distinctions between a military trial and a regular criminal trial and explains the status of the Hamdi and Padilla cases. Part II explains why the government wants to use military commissions to try terrorists and the advantages of these commissions over regular criminal proceedings. Additionally, Part II analyzes the distinctions between citizens and non-citizens and examines the constitutionality of declaring citizens enemy combatants. Part II also discusses how terrorists differ from other types of criminals and how those differences justify disparate treatment. Part III of this Comment proposes a solution and determines that the government does have the right to treat citizens as enemy combatants. Part III also argues that military commissions should try these enemy combatants, however, there must be a structured judicial proceeding to determine whether an individual is actually an enemy combatant.16

I. ORIGINS OF THE GOVERNMENT'S RIGHT TO USE MILITARY COMMISSIONS AND TO DETERMINE ENEMY COMBATANT STATUS

A. Prior Use of Military Commissions

The United States has made use of military tribunals since the country's inception.17 The government used the commissions during the Revolutionary War, the Mexican Wars, and the Civil War.18 The Supreme Court in Ex parte Quirin and Application of Yamashita, declared that it is constitutional to try foreign belligerents in military trials.19

Citizens also have been tried by military commissions in the past.20 After the surrender and occupation of Germany and Japan in 1945, military tribunals tried U.S. citizens for ordinary criminal
activity in the occupied territories.\textsuperscript{21} The Supreme Court upheld the jurisdiction of these tribunals.\textsuperscript{22} Additionally, in \textit{Madsen v. Kinsella}, the Supreme Court upheld the jurisdiction of a military commission to try a U.S. citizen for murdering her husband, a U.S. serviceman.\textsuperscript{23} Finally, in \textit{Quirin}, the Supreme Court upheld the trial by military commission of a person presumed to be a U.S. citizen.\textsuperscript{24}

1. \textit{Ex parte Quirin}

In \textit{Ex Parte Quirin}, German saboteurs trained to use explosives, secret writings, and other terrorist tactics landed in the United States during World War II.\textsuperscript{25} They came ashore while it was dark, got rid of their German uniforms and changed into civilian clothing with the intent to destroy U.S. facilities that contributed to the war effort.\textsuperscript{26} President Franklin D. Roosevelt set up military commissions to try non-citizens during wartime who were charged with committing or attempting to commit, "sabotage, espionage, hostile or warlike acts, or violations of the laws of war."\textsuperscript{27} The Supreme Court held that these military commissions were constitutional, stating:

\begin{quote}
[A]n enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.\textsuperscript{28}
\end{quote}

In \textit{Quirin}, the defendants argued that their trial should be in civilian court because those courts were open and functioning and

\begin{itemize}
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Madsen v. Kinsella, 343 U.S. 341, 362 (1952).
\item \textsuperscript{24} \textit{Quirin}, 317 U.S. at 48.
\item \textsuperscript{25} Id. at 21.
\item \textsuperscript{26} Id.
\item \textsuperscript{28} \textit{Quirin}, 317 U.S. at 31. Under the Geneva Convention, recognized prisoners of war have to be charged or repatriated at the end of a conflict, and they are expected to give only their name, rank, and number when questioned. Thom Shanker & Katharine Q. Seelye, \textit{Word for Word/The Geneva Conventions; Who Is a Prisoner of War? You Could Look It Up. Maybe}, \textit{N.Y. TIMES}, Mar. 10, 2002, § 4, at 9.
\end{itemize}
therefore not precluded from hearing their case; the Supreme Court rejected that claim. The Court held:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.

Citizenship, therefore, is not an escape from enemy combatant status or treatment.

2. Application of Yamashita

In Application of Yamashita, the Supreme Court again allowed the use of military tribunals to try the Japanese commander of the Philippines, General Tomoyuki Yamashita, who had massacred civilians and prisoners of war and destroyed property without cause or military necessity. In Yamashita, the Court held that the military commission was lawful, despite its creation after the cessation of hostilities between the United States and Japan.

The reasoning behind Yamashita helps support the constitutionality of Congress' authorization of military commissions to remedy the terror produced by war crimes, "regardless of whether there are ongoing hostilities at the time of trial." This applies to terrorism because often the acts of war that a terrorist engages in are sporadic and do not necessarily occur in one triable offense.

30. Quirin, 317 U.S. at 37-38. The Hague Convention is one of a number of international conventions that address different legal issues and attempt to standardize procedures between nations. Black's Law Dictionary 717 (7th ed. 1999). The laws of war are the body of rules and principles observed by civilized nations for the regulation of matters inherent or incidental to the conduct of a public war, such as the relations of neutrals and belligerents, blockades, captures, prizes, truces and armistices, capitulations, prisoners, and declarations of war and peace. Id. at 895.
31. In re Yamashita, 327 U.S. 1, 14 (1946); Clemmons, supra note 17, at 28.
32. Yamashita, 327 U.S. at 11; Torruella, supra note 27, at 674.
34. Id.
3. The Constitution and Other Sources of Authority

The authority for military commissions comes mainly from Articles I and II of the Constitution. Article I gives Congress the power to "provide for the common Defense" and to "declare War ... and make Rules concerning Captures on Land and Water." Article II gives the President "executive Power" and makes him the "Commander in Chief of the Army and Navy." Additionally, Congress, in Article 15 of the Articles of War, provided that "military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." Article 21 of the Uniform Code of Military Justice (which is materially identical to Article 15) provides:

[T]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.

B. Differences Between a Military Trial and a Regular Criminal Trial

A panel of military officers makes up a military tribunal and tries "both fact and law." In the military proceeding, there is no right to a trial by jury. Military commissions do not use the traditional rules of evidence. Instead, evidence is admitted if "in the opinion of the Presiding Officer, the evidence would have probative value

37. Id. art. I, § 8, cl. 11.
38. Id. art. II, § 1, cl. 1.
39. Id. art. II, § 2, cl. 1.
43. DEP'T OF DEF., supra note 42, at 1-3.
44. Id. at 8-9.
45. Id. at 9. The presiding officer is designated by the appointing authority to preside over the proceedings of that commission. Id. at 3. The presiding officer is a military officer who is a judge advocate in any of the United States Armed Forces. Id. The primary responsibilities of the presiding officer are to admit or exclude evidence at trial, close proceedings, ensure the decorum of the proceedings, act upon any con-
to a reasonable person.”

This allows the commission to hear evidence that would be inadmissible as hearsay in a non-military criminal trial.

Further, in a regular criminal court, the jury must unanimously agree to convict, whereas in a military proceeding two-thirds of the panel must agree to convict.

An additional distinction between a military trial and a regular criminal proceeding is that in a military trial the accused is not free to select whomever he wants as his attorney. He can:

- Select a Military Officer who is a judge advocate of any United States armed force . . .
- The accused may also retain the services of a civilian attorney of the Accused’s own choosing . . . provided that attorney . . . has been determined to be eligible for access to information classified at the level SECRET or higher.

This civilian attorney will not necessarily be present at closed commission proceedings. A proceeding can be deemed closed by the presiding officer of the commission on his “own initiative or based upon a presentation . . . by either the prosecution or the defense.” Closing a proceeding could “include a decision to exclude the Accused, Civilian Defense Counsel, or any other person . . . from any trial proceeding or portion thereof.”

C. The Accused Citizen Terrorists: Padilla, Hamdi, and Lindh

1. Jose Padilla

Jose Padilla is thirty-one years old and was born in Brooklyn, New York. Padilla, who converted to Islam in 1992, was arrested

46. Id. at 9.
47. Clemmons, supra note 17, at 29.
48. DEP’T OF DEF., supra note 42, at 13. With the exception of cases where the death penalty would be imposed; in those cases a unanimous vote is needed to convict. Id.
49. Id. at 5.
50. Id.
51. Id.
52. Id. at 8. Grounds for closure include the protection of information classified or classifiable under Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) “Classified National Security Information”; the physical safety of participants in commission proceedings; safety of national security interests. DEP’T OF DEF., supra note 42, at 8.
53. DEP’T OF DEF., supra note 42, at 8.
in Chicago on May 8, 2002 after arriving on a flight from Pakistan via Zurich. Padilla is currently being held in a military prison in Charleston, South Carolina. He is known as the “dirty bomber” and is accused of planning to build and detonate a radioactive bomb in the United States. Padilla had been under surveillance by U.S. intelligence for at least five weeks before being taken into custody. Padilla allegedly lied to U.S. authorities, claiming he had never been to Afghanistan, and he did not give a clear explanation as to why he was carrying $10,000 in cash in his suitcase. Padilla had been under surveillance by U.S. intelligence for at least five weeks before being taken into custody. Padilla allegedly lied to U.S. authorities, claiming he had never been to Afghanistan, and he did not give a clear explanation as to why he was carrying $10,000 in cash in his suitcase. The “Mobbs Declaration,” drafted by Michael Mobbs an official in the Department of Defense, states the reasons for Padilla’s detention and enemy combatant status. Only part of the declaration has been released to the public, however. The government has declined to release the parts of the report it deemed to contain sensitive government information. The released part of the declaration “describes Padilla’s multiple contacts with senior al Qaeda officials while in Pakistan and Afghanistan and their alleged plan to have him return to the United States on a bombing mission.”

Attorneys for both Hamdi and Padilla filed petitions for a writ of habeas corpus, claiming that their detention is unlawful. The government claims that neither individual has the right to file a habeas petition. The government also contends that the President’s authority as the Commander-in-Chief of the military to classify someone as an enemy combatant in wartime cannot be challenged.

On December 4, 2002, a District Court for the Southern District of New York ruled that Padilla has a right to meet with his attorney and to offer evidence to contest the government’s allegation that
he is associated with al Qaeda. The court also stated that the
President does have the right to detain unlawful combatants, re-
gardless of U.S. citizenship. This ruling is being challenged by the
government, which does not want Padilla to have access to his
attorney.

2. Yaser Esam Hamdi

Yaser Esam Hamdi, a twenty-two-year-old Louisiana-born citi-
zen who moved to Saudi Arabia when he was a toddler, was ar-
rested in Afghanistan while allegedly armed and fighting for the
Taliban. The government initially transferred Hamdi to Guanta-
namo Bay, Cuba. After the government realized Hamdi was a
citizen, however, it sent him to a naval brig in Norfolk, Virginia.

On January 8, 2003 the United States Court of Appeals for the
Fourth Circuit in Richmond, Virginia, said that it was improper for
courts to probe too deeply into the detention of Hamdi. The
court held that a wartime president can indefinitely detain a
United States citizen captured as an enemy combatant on the bat-
tlefield and deny that person access to a lawyer. The court addi-
tionally held, "[t]he safeguards that all Americans have come to
expect in criminal prosecutions do not translate neatly to the arena
of armed conflict. In fact, if deference is not exercised with respect
to military judgments in the field, it is difficult to see where defer-
ence would ever obtain." Since Hamdi was undisputedly present
in a zone of active combat operations, he does not have the right to
an in depth review of the facts underlying his seizure.

3. John Walker Lindh

The third U.S. citizen captured as a terrorist suspect is John
Walker Lindh, twenty-one, who served as a Taliban militia member

67. Benjamin Weiser, Threats and Responses: The Courts; Judge Says Man Can
Meet With Lawyer to Challenge Detention as Enemy Plotter, N.Y. TIMES, Dec. 5, 2002,
at A1.

68. Id.

69. Benjamin Weiser, Threats and Responses: The Courts; Judge is Angered by

70. Frederick N. Egler, Jr., Terrorism and the Rule of Law, 18 LAW. J. 4, 4 (2002).

71. Hamblett, supra note 56, at 1.

72. Egler, supra note 70, at 4.

73. Neil A. Lewis, Threats and Responses: The Courts; Detention Upheld in Com-

74. Id.

75. Id.

76. Id.
in Afghanistan from August to November 2001.\footnote{77} He pled guilty to supplying services to the Taliban and carrying an explosive during the commission of a felony.\footnote{78} Despite his terrorist activities, he has not been declared an enemy combatant.\footnote{79} The government has not offered a concrete reason as to why Lindh is not an enemy combatant, while Padilla and Hamdi are. As part of Lindh’s plea bargain, however, he agreed to cooperate in the government’s al Qaeda investigation;\footnote{80} critics suggest that his cooperation is the reason for his non-enemy combatant status.\footnote{81}

II. Advantages of a Military Trial, Problems With a Criminal Trial

A. Arguments Against Trying Accused Terrorists in Non-Military Courts

Trying suspected terrorists in civilian courts raises various concerns. These include the physical security of the courthouse and the participants in the trial, and the ability to protect classified information, including “intelligence sources and methods whose compromise could facilitate future terrorist acts.”\footnote{82} Even if a trial were kept confidential and closed to the press and public, the government could not risk a defendant passing classified information to other terrorists, or risk the defendant later using the information himself.\footnote{83}

Additionally, in a non-military court, the accused could escape conviction on a technicality or a jurisdictional issue.\footnote{84} The relaxed evidentiary rules of military courts are more likely to prevent this from happening. According to some prosecutors, the government is also concerned that allowing a terrorist suspect to have un-

\footnote{77} Neil, supra note 13, at 2. Lindh was captured in Afghanistan on December 2 or 3, 2001. He was interrogated by the FBI on December 9th and 10th, 2001. During questioning, Lindh said that he had trained in explosives and firearms at a terrorist camp run by al Qaeda, had fought shoulder-to-shoulder with the Taliban before he was captured, had met with Osama bin Laden, and knew that bin Laden had ordered suicide attacks against the United States. Katharine Q. Seelye, A Nation Challenged: The American Captive American Charged as a Terrorist Makes First Appearance in Court, N.Y. TIMES, Jan. 25, 2002, at A1.

\footnote{78} Neil, supra note 13, at 2.

\footnote{79} Id.

\footnote{80} Id.

\footnote{81} Id.

\footnote{82} Task Force Recommendations, supra note 21, at 15.

\footnote{83} Id. at 14-15.

\footnote{84} See Crona & Richardson, supra note 33, at 371-74.
restricted contact with a lawyer could impede an investigation. For example, a lawyer could tell his client to remain silent and not give information to the government. This information could be vital to the war effort and prevent future terrorist activities. Frequently, prisoners relent over time; the longer they go without access to counsel the more likely they are to reveal information and cooperate. The interest in preventing mass murder by terrorists, some argue, is more important than the interest in applying the *Miranda* rule to the questioning of terrorist suspects.

1. The President’s Rationale

The President’s order to try al Qaeda suspects with military commissions explains:

[T]he September 11 attacks created a state of armed conflict between the United States and al Qaeda, that al Qaeda has both the capability and intention to undertake further terrorist attacks against the United States that could result in mass deaths and injuries . . . and that al Qaeda’s actions may place at risk the continuity of the operations of the U.S. government.

The President, therefore, has decided to use military commissions to try non-citizen al Qaeda suspects; to allow for the effective conduct of military operations and as a means to prevent future terrorist attacks.

a. Support for the Presidential Order

Several military and legal scholars support the President’s order. Major General Michael J. Nardotti, a retired Judge Advocate General of the Army, stated that military commissions were needed to address “legitimate concerns for public and individual safety, the compromise of sensitive intelligence, and due regard for the practical necessity to use as evidence information obtained in

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86. See Crona & Richardson, *supra* note 33, at 386-87.
87. *Id.*
88. *Id.*
89. *Id.* at 386.
91. *Id.*
92. *Id.*
the course of military operation rather than through traditional law enforcement means." Ruth Wedgwood, a professor of law at Yale University and member of the United Nations Human Rights Committee, stated that an "open trial would permit al Qaeda members to scrutinize the trial record to see what the government knows about their operating methods." 

B. Constitutional Rights: Citizens, Non-Citizens, and Enemy Combatants

1. The Fifth Amendment

Citizens normally are afforded all the rights guaranteed in the United States Constitution. Included in the Constitution, the Fifth Amendment requires due process of law and states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . nor be deprived of life, liberty, or property, without due process of law . . . .

A terrorist act is potentially a capital offense, and a military trial would not include a presentment or indictment to a grand jury. Therefore, a citizen could argue that trial by a military commission would violate Fifth Amendment rights.

Further, a citizen could claim that a determination of enemy combatant status, without any sort of trial, deprives him of due process, because enemy combatants are held in prison until the government decides to release them.

The government can respond by asserting that because this is a time of public danger, the lack of presentment or indictment to a grand jury is acceptable. The government can also argue that due process is not violated because enemy combatant status is factually based. Additionally, the government could argue that a
military commission would not necessarily deprive an individual of due process because there are numerous procedures in place to ensure that the proceeding is fair. These procedures include a presumption of innocence and proof beyond a reasonable doubt.

2. *The Sixth Amendment*

The Sixth Amendment describes the rights of the accused and states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

As an enemy combatant, an individual may be held for extended periods of time without access to counsel. If a military commission tries an enemy combatant, he will not be tried by an impartial jury. Additionally, the presiding officer of the commission has the right to close the proceeding at any time, removing it from public view. A military commission also places a restriction on whom the accused may choose to represent him.

3. *Case Law and Commentary*

Case law and the Supreme Court’s interpretation favor the government’s position. In *Quirin*, the Supreme Court allowed the use of military commissions to try enemy combatants, and held that these commissions did not violate the Fifth and Sixth Amendments. The Supreme Court held:

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article . . . § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have

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102. *See infra* note 103 and accompanying text.
103. DEP’T OF DEF., supra note 42, at 2.
104. U.S. CONST. amend. VI.
105. *See supra* text accompanying note 74.
107. DEP’T OF DEF., supra note 42, at 2.
108. *Id.; see supra* Part I.B.
extended the right to demand a jury to trials by military commission . . . . 110

Additionally, not all crimes must be tried by a jury. For example, “petty offenses triable at common law without a jury” need not receive a jury trial, and criminal contempt cases where at common law a jury was not required also do not need to be tried by a jury. 111

The mere fact that an individual is tried by the military does not mean that his trial will be unfair. 112 Professor Lawrence Tribe, a constitutional law expert, argues, “there is nothing to suggest that civilian juries in wartime will be any more fair than military tribunals,” and that military tribunals could be “less vulnerable to the emotional pressures and prejudices which could tempt a civilian jury to convict a person who was factually innocent.” 113 Individuals tried before tribunals are still represented by counsel, are still presumed innocent, and still must be proven guilty beyond a reasonable doubt. 114

a. “War” Absent a Formal Declaration by Congress

A citizen could argue that because the war on terrorism is not a declared war, 115 military commissions should not be used. Both Congress and the Supreme Court have recognized, however, that a formal declaration of war is not necessary for a state of war to exist. 116 The government has argued that “whether a state of armed conflict exists to which the laws of war apply is a political question for the President, not the courts to decide.” 117 These tribunals have been used in other situations where there was no declared war, such as the Civil War and the Indian Wars. 118

Further, the Fourth Circuit, in Hamdi v. Rumsfeld, has recently held that “[t]he unconventional aspects of the present struggle do not make its stakes any less grave” or lessen the military’s author-

110. Id.
111. See id.
112. See infra notes 113-114 and accompanying text.
114. DEP’T OF DEF., supra note 42, at 2.
115. A declared war defines the enemy as another state and its nationals, and marks a clear beginning and end to the conflict with a legal act or instrument marking its conclusion. Task Force Recommendations, supra note 21, at 10.
116. Id. at 11; see infra text accompanying notes 117-121.
118. Task Force Recommendations, supra note 21, at 11.
ity to hold enemy combatants. Additionally, Article 21 does not specify that there must be a declared war in order for military commissions to be used. Finally, in *Talbot v. Seeman*, the Supreme Court recognized the ability of Congress to declare a “partial war” targeted at a specific type of enemy aggression even if we are not at war with an enemy nation in the traditional sense.

**b. Extrapolation of the President's Order to Citizens**

A citizen can point out that the President’s order is directed at non-citizens, and, therefore, citizens should not be tried by military commissions and should not be declared enemy combatants. A joint Congressional resolution, enacted on September 18, 2001, however, authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001...” The President could, therefore, include military commissions under “necessary and appropriate force.”

Additionally, Congress has accepted that the President’s Commander-in-Chief powers during wartime include authorizing the detention of enemy belligerents. The provisions of 10 U.S.C. § 956(5) support the “expenditure of funds for the detention of ‘prisoners of war’ and persons—such as enemy combatants—‘similar to prisoners of war,’” indicating Congress’ understanding that the military can capture and hold enemy combatants, including citizens, during wartime.

A citizen could argue that a declaration that he is an enemy combatant violates 18 U.S.C. § 4001(a). This statute “prohibits the detention of a United States citizen without a specific authorization.

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119. *Id.* at 9 (citing Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002)).
120. See Respondent’s Reply Brief at 9, *Padilla* (No. 02 Civ. 4445).
121. Talbot v. Seeman, 5 U.S. 1, 28 (1801). *Talbot* involved a ship that was taken during 1799 when the United States and France were in a state of partial war. The Court deliberated over whether it was lawful to take a ship at this time. *Id.*; see Crona & Richardson, *supra* note 33, at 360.
124. *Id.* at 11.
126. *Id.* at 17.
127. See infra notes 128-130 and accompanying text.
by an act of Congress.128 The legislative history of this statute indicates Congress’ intention to repeal the Emergency Detention Act, which allowed the “detention of each person as to whom there is reasonable ground to believe that such persons will engage in, or probably will conspire with others to engage in acts of espionage or of sabotage.”129 This suggests that the government does not have the right to detain citizens like the two that are currently being considered enemy combatants.130

The government can counter this argument by claiming that § 4001(a) does not apply to enemy combatants during times of war.131 This statute was specifically placed in Title 18, which pertains to “Crimes and Criminal Procedure,” instead of Title 10 or 50, which govern the “Armed Forces” and “War and National Defense.”132 Additionally, if this statute did apply in wartime, a citizen could never be classified as an enemy combatant regardless of his actions.133 This would directly contradict the holding in Quirin, declaring that citizens can be considered enemy combatants.134 Also, § 4001(a) does not apply to detentions “pursuant to an Act of Congress,” and in this case, Congress has given the President support for “all necessary and appropriate force.”135

Another way for a citizen to challenge the government’s authority to declare him an enemy combatant is to rely upon the Posse Comitatus Act, 18 U.S.C. § 1385.136 This Act, created to prevent abuses by the military,137 prohibits the military from involvement in civilian law enforcement.138 Declaring a suspected terrorist an enemy combatant and holding him in a military prison seemingly violates this Act.139 The government can argue, however, that the

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129. Id. at 7.
130. Id.
131. See Respondent’s Reply Brief at 18, Padilla (No. 02 Civ. 4445).
132. Id.
133. Id. at 19.
134. Id.
135. Id. at 20.
137. Id.
139. See supra notes 136-138 and accompanying text.
act is directed at civilian law enforcement and, therefore, should not apply to the military matter of detention of enemy combatants.\textsuperscript{140} It is "the exercise of a core military function to safeguard the national security in a time of war."\textsuperscript{141}

Citizens can also argue that the U.S. government has protested the use of military tribunals to try its citizens in other countries, yet they are considering the use of these tribunals within their own country.\textsuperscript{142} The government can respond, however, that as long as reasonable procedural safeguards are in place, military commissions can be mechanisms for a fair trial and do not violate due process, and that the foreign commissions they oppose are not as fairly constructed.\textsuperscript{143}

\section*{C. Treating Terrorists Differently from Other Types of Criminals}

Terrorists involved with al Qaeda could have information that, if exposed in a regular criminal proceeding, could threaten national security.\textsuperscript{144} The Pentagon and other intelligence agencies are unwilling to allow suspects access to certain witnesses and evidence that could compromise this security.\textsuperscript{145} The government argues that it has a justified interest in keeping terrorists in isolation and under interrogation.\textsuperscript{146} Without access to witnesses, however, a suspect in the regular criminal justice system would be deprived of his Sixth Amendment right to seek witnesses that could exonerate him.\textsuperscript{147}

The criminal justice system is designed to "err on the side of letting the guilty go free rather than convicting the innocent."\textsuperscript{148} Arguably, this is not a good method for dealing with a terrorist linked to a network such as al Qaeda and the September 11th attacks.

Another problem with a criminal trial is that potential jurors could fear that conviction of the suspect would place their lives in

\begin{thebibliography}{99}
\bibitem{140} See Respondent's Reply Brief at 21, \textit{Padilla} (No. 02 Civ. 4445).
\bibitem{141} \textit{Id.}
\bibitem{142} Task Force Recommendations, \textit{supra} note 21, at 15.
\bibitem{143} \textit{Id.}
\bibitem{144} \textit{See supra} Part II.A.
\bibitem{145} \textit{See supra} Part II.A.
\bibitem{147} \textit{Id.}
\bibitem{148} Clemmons, \textit{supra} note 17, at 31 (citing Crona & Richardson, \textit{supra} note 33, at 379).
\end{thebibliography}
danger. Additionally, a public trial would not keep sensitive information secure and could "disclose methods and sources to the enemy." As to the different evidence rules, the normal rules of evidence could make it difficult for the court to learn the truth. The introduction of hearsay gives the tribunal more information, and the more information the tribunal has, the more credible its decision will be.

Another advantage of military tribunals is that the proceedings take less time. This faster process is necessary because terrorism is an ongoing threat. "Trials to the court are shorter than jury trials by at least one-half." This speed is exemplified by the difference in trial length between the first World Trade Center bombing trial and the *Yamashita* case. The World Trade Center case involving 207 witnesses took over five months (from November 1993 to March 1994) while the *Yamashita* case heard 286 witnesses and 3,000 pages of testimony in a little more than five weeks.

Citizens accused of terrorism are not being tried by military tribunals for ordinary criminal activity. Their behavior can be construed as violations of the laws of war, therefore, it is legitimate to try them by military commissions. They acted under the direction of al Qaeda while in civilian clothing, and they committed acts of aggression against innocent, noncombatant civilians and their property, thus violating the laws of war. While al Qaeda is not an independent state, the laws of war also apply to non-state actors, such as insurgents. In fact, al Qaeda itself claims they are waging a *jihad* against the United States.

Further, terrorist acts transcend ordinary criminal acts and, therefore, terrorists should not be tried by the criminal justice system. Spencer Crona, a Denver attorney and writer of an award-

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149. *Id.*
150. *Id.*
151. *Id.*
152. *See id.*
153. *See infra* notes 155-156 and accompanying text.
159. *See id.* at 12.
160. *Id.*
161. *See Crona & Richardson, supra* note 33, at 351.
162. *Id.* at 354.
winning essay on international law, and Neal Richardson, a Deputy District Attorney for Denver who has written about constitutional issues, feel that "terrorism is not a social problem susceptible to civilian intervention and law enforcement, but a military threat and menace to our civilization appropriate for military repulsion."163

Finally, as noted above, some believe that terrorists need to be detained as enemy combatants for the duration of the armed conflict to ensure that they do not aid the enemy and gather additional intelligence that would hurt the U.S. war effort.164 They are not being held for punishment purposes.165 Therefore, they are not being punished without due process merely because they are being detained in a military prison.166

III. MILITARY TRIBUNALS: IF THEY ARE FAIR, THEY ARE APPROPRIATE

A. Specific Steps to Ensure Fairness

The United States must take into account the implications of its actions on future circumstances. If we try our own citizens with military commissions, what is to prevent other countries from trying U.S. citizens this way? The government must therefore ensure that these commissions are fair and give defendants a presumption of innocence.

These tribunals should only be used when there is a compelling security interest at stake.167 It is important to ensure that those tried by military commissions are given a "full and fair trial."168 Some principles that could ensure fairness include an independent and impartial tribunal with proceedings open to the press and the public, except for specific and compelling reasons,169 and the following rights for the defendant: presumption of innocence; prompt notice of charges; trial without undue delay; to be present; to examine, or have examined, the witnesses against him; to the free

163. Id. at 357.
165. Id.
166. See supra notes 164-165 and accompanying text.
168. Id. at 18.
169. Id.
assistance of an interpreter; and not to be compelled to testify against himself or confess guilt.170

B. A Better System to Determine if a Citizen is an Enemy Combatant

While the courts have traditionally given great deference to "the President's wartime detention decisions," there must be some system of review to determine enemy combatant status.171 Otherwise, certain citizens will live in fear that they could be picked up off the street and declared an enemy combatant at the whim of the President.172 While the country is in a state of increased fear and anger and is more willing to accept the detention of citizens, there must be a fair system of review to ensure that the government has good cause in declaring that an individual is an enemy combatant.173

Because of national security issues, the government should have the right to declare someone an enemy combatant and detain him for the duration of the armed conflict.174 If a citizen is legitimately declared an enemy combatant, the President's Executive Order should apply and a military commission should try him. The current standard of review to determine enemy combatant status, however, is not enough.175 A procedural system needs to be in place to make certain that individuals are not unfairly deemed enemy combatants. A set standard of review to determine enemy combatant status will give U.S. citizens fair warning of the consequences of terrorist acts.

The process for determining enemy combatant status will need to be top secret to guarantee that sensitive information is not released.176 It could be comprised of a panel of three to five judges nominated by the President and approved with the advice and consent of the Senate, similar to the way in which Supreme Court justices are appointed.177 The defendant will have the right to have the attorney of his choice, as long as the attorney can pass security

170. Id. Principles taken from Article 14 of the International Covenant on Civil and Political Rights. Id.
172. See discussion supra Part III.A.
173. See discussion supra Part III.A.
175. See discussion supra Part I.C.
176. See discussion supra Part I.C.
177. U.S. CONST. art. II, § 2, cl. 2.
clearance. The standard of review will be probable cause and the evidentiary rules will be similar to that of a grand jury proceeding, where hearsay is admissible. This is necessary because of the difficulty in establishing these cases, and because witnesses may also be terrorists who are unlikely to cooperate or who are out of the country. The standard of “beyond a reasonable doubt” is too high for cases such as these. Although it should be ensured that civil rights of the accused are not violated, the standard cannot be so high that it is impossible for the government to make its case. The decision of this special court will be final and will not be subject to review, ensuring that the case is not held up by way of lengthy and expensive appeals.\textsuperscript{178}

Claiming that someone is an enemy combatant when he is innocent could destroy that person’s life, and contravenes the constitutional principles we hold dear. The approach suggested in this Comment would decrease the chances of that happening. While it is possible that some innocent people could slip through cracks in the system and be declared enemy combatants without merit, the minimal risk is warranted considering the large-scale destruction of life and property that terrorists affect.\textsuperscript{179} Blackstone, in a commentary on the terrorists of his era, said:

Lastly, the crime of piracy, or robbery and depredation upon the high seas, is an offence [sic] against the universal law of society; a pirate being, according to Sir Edward Coke, \textit{hostis humani generis}. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defense, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.\textsuperscript{180}

The United States must defend itself against terrorism. One of our best defense mechanisms is the ability to detain terrorists, minimizing their ability to harm innocent civilians. Another important defense mechanism is the capacity to try terrorists by military commissions so they have swift trials designed to extract fact and are

\textsuperscript{178} Crona & Richardson, \textit{supra} note 33, at 395. This is in line with the Charter of the International Military Tribunal at Nuremberg which stated that the judgment of the tribunal was final and not reviewable. \textit{Id.}
\textsuperscript{179} \textit{Id.} at 406.
\textsuperscript{180} \textit{Id.} at 406-07 (quoting 4 William Blackstone, \textit{Commentaries} *71).
less likely to create a situation in which a terrorist is released on a technicality. These commissions are a much more effective and legally appropriate way to try and punish terrorists. Just as the U.S. military would not hand over our guns and tanks on the battlefield, so too should the legal system refuse to hand over our legal defense mechanisms and allow terrorists to roam the streets of our country while it is under attack.

181. Id. at 349.
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