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—Preamble, NLG Constitution

editor's preface

The Supreme Court is likely to soon make 2013 a landmark year in the history of American race relations—the year the Supreme Court declared victory in the war against racism and shut the courthouse door to some of the most gallant and heroic still battling on its frontlines. I wrote in the preface to our Fall 2009 issue (66-3) that the Roberts Court, pursuing a grandiose long-term vision, had begun chipping away at some of the cases representing major progressive victories won during and around the civil rights era. One of these cases was *Brown v. Board of Education*, whose social purpose—abating racism through the racial integration of American public schools—the Roberts Court sought to undermine with its regressive ruling in 2007's *Parents Involved in Community Schools v. Seattle School District No. 1.* With this decision we got a full delineation of the new racism—"colorblindness." "Color-blind" is the term Justice John Marshall Harlan used to describe the Constitution in his dissent in *Plessy v. Ferguson*. He used it as a stinging rebuke to his racist brethren on the Court who had just voted to uphold a system of legal apartheid in the post-reconstruction south. The word means something different now.

With his controlling opinion in *Parents Involved*, Chief Justice John G. Roberts, Jr. sought to preserve racial hierarchy by appropriating the language of the civil rights movement and accusing integrationists of promoting racial discrimination. He employed language that implied a legal and moral equivalence between the racists who'd used the law to discriminate against non-whites and proponents of diversity using race-conscious means to integrate public schools. "The way to stop discrimination on the basis of race," said Roberts in an opinion striking down attempts by local communities to bring races together in the classroom, "is to stop discriminating on the basis of race."

As a young man Roberts had clerked for Chief Justice William H. Rehnquist. When Rehnquist was himself a clerk, he urged his boss, Justice Robert H. Jackson, to vote for the segregationist side in *Brown*. "I think *Plessy v. Ferguson* was right and should be affirmed," wrote Rehnquist in a memo to Jackson. Soon

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DAVID GESPASS

BRIEF OF *AMICUS CURIAE* IN *SHELBY COUNTY, ALABAMA V. ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.*

Statement of interest of *amicus curiae*[1]

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary national bar association, with a mandate to advocate for the protection of constitutional, human, and civil rights. As one of the non-governmental organizations selected to officially represent the American people at the founding of the United Nations in 1945, its members helped draft the Universal Declaration of Human Rights. Members have brought such cases as *Hansberry v. Lee*, 311 U.S. 32 (1940), which struck down segregationist Jim Crow laws in Chicago and *Dombrowski v. Pister*, 380 U.S. 479 (1965), halting discriminatory and retaliatory state court criminal proceedings against civil rights activists in the South.

The Lawyers Guild is also a member organization of the International Association of Democratic Lawyers, which enjoys consultative status with the United Nations Economic and Social Council. Through its International Committee, it is actively engaged in promoting and developing international peace and human rights through law.

Summary of argument

Amicus National Lawyers Guild writes to underscore the obligation of this Court not to arrogate to itself the job of the legislature, especially in the face of overwhelming evidence supporting the legitimacy of Congress's decision to extend the constitutionally crucial role of Section 5 of the Voting Rights Act and the Constitutional authority of an elected Congress to evaluate evidence presented to it. Substituting its own opinion for that of elected officials who heard testimony would immeasurably harm the very system of checks and balances that are the cornerstone of our democracy and would, in fact, bring discredit on the Court and engender widespread distrust of its motives. The Court lacks the authority to substitute its judgment for the measured findings of elected officials that racism still runs rampant in this land and that covered

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jurisdictions remain appropriate subjects of the greater attention the Voting Rights Act imposes when that attention places minimal burdens on them.

Those burdens are particularly slight as compared to the evil they are intended to address. At stake in the issue at hand is the so-called preclearance provision of a statute—nearly half a century old— that has held jurisdictions accountable when they try to enact racist electoral practices. Such practices effectively deprive victims of overt past discrimination equality in the exercise of the most fundamental right of citizenship.

In this case, both the district court and the court of appeals upheld the constitutionality of Section 5. In rejecting Shelby County's challenge, Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit, writing for the majority, ruled that Congress appropriately extended the protections of the preclearance requirement in 2006 for 25 more years, finding that judicial deference to Congress was warranted after an exhaustive review of the record, "given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance." Shelby County, Ala. v. Holder, 679 F.3d 848, 873 (D.C. Cir. 2012).

This case affords the Court the opportunity to step back to acknowledge and adhere to the principles of a fair government envisioned in 1787 by the founders: three separate, distinct and coequal branches of government with overlapping but separate spheres of authority, created to prevent abuse of power and ensure the protection of individual freedoms. While the specific legal and moral imperative of eliminating racism within our society is an imposing one, members of the Court are also duty-bound to exercise judicial deference to the lawmakers whose exhaustive fact-finding formed the basis for their decision.

Moreover, *amicus* wishes to elaborate on the treaty obligations the United States has undertaken and which Congress has implemented by extending Section 5. These obligations exist both under the norms of international law and by the mandate of Article VI of the Constitution, which makes those treaty obligations "the supreme Law of the Land." Compliance with treaty obligations constitutes an additional compelling governmental interest in enactment of this statute.

Argument

A reversal in this case would represent the Court's intervention in a way that would undermine our society's commitment to ensuring that vestiges of racism are not afforded the opportunity to blossom and grow. The record in this case indicates the enduring presence of racial discrimination in Shelby County, the very kind of prejudice that Section 5 of the Voting Rights Act has been relied upon to curtail for nearly half a century.

The district court noted the likelihood that, of the hundreds of violations of Section 5 that have taken place in recent years, many had the intent or effect of curtailing the electoral power of African- Americans and other excluded peoples. This is exemplified by the case brought by the Justice Department against the City of Calera in Shelby County, resolved by consent decree, *United States v. City of Calera, Alabama*, No. CV-08-BE-1982-S (N.D. Ala. Oct. 29, 2008), which alleged multiple Section 5 violations but did not explicitly allege racial disparity. One of the underlying facts, however, was that, following an unauthorized change in Calera's election law, the city's lone African-American councilor lost an election. When the change was voided to redress the Section 5 violation, he was reelected. It is telling that Shelby County is seeking this remedy rather than the simpler and less costly remedy of meeting its obligations for ten years and being excused from further coverage.

I. This court must not waver from the country's commitment to eradicate racism

Certain facts regarding this matter cannot be in dispute. The United States has a shameful history of discrimination against, and oppression of, African-Americans, Native peoples, and other persons of color dating back centuries prior to the adoption of the Constitution. The first enslaved Africans came to the Americas as early as 1502 and, with the establishment of a British colony in Virginia in 1607, the trade came to what is now part of the United States.[2] The contempt in which indigenous people were held by our founders is embodied in the Declaration of Independence, which lists as one of the grievances against King George III that he "endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages." Declaration of Independence (U.S. 1776).

Following the Civil War and the passage of the Thirteenth Amendment, the situation for African-Americans in the deep south—the center of areas subject to section 5—hardly improved. *See e.g.*, Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008) (concentrating on the post-bellum oppression of African-Americans in Alabama, where Shelby County is located, and which persisted unabated up to World War II).

This sordid history need not be recounted at length, but it should not be forgotten and this Court must consider its present effects. Indeed, this Court has found each prior extension of the Act to be warranted. *Georgia v. United States*, 411 U.S. 526 (1973), *City of Rome v. United States*, 446 U.S. 156, 100 (1980), and *Lopez v. Monterey County*, 525 U.S. 266 (1998). The district court and the court of appeals have both detailed the extensive investigation

undertaken by Congress before it passed the latest extension in addition to the mountain of evidence supporting its decision. Because others, including the two lower courts here, have thoughtfully explored why it is the province of Congress to make such a determination, amicus restricts itself only to brief commentary without recounting all the testimony and evidence that led Congress to its decision.

II. Judicial deference should be afforded to legislative factfinding

Since this Court decided *Marbury v. Madison*, 5 U.S. 137 (1803), the federal courts have been unwilling fact finders, preferring to remain true to their constitutional jurisdiction and decide matters of law. Federal courts have deferred to Congress and state legislatures in findings of fact. And, indeed, legislatures have resources and time to dedicate to the process of collecting and evaluating information necessary to take action. Members of Congress and other legislatures may engage in a range of activities to assemble their facts, including consulting "staff, friends and constituents," and educating themselves "by reviewing past legislation or even by reading a novel or watching television." Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty,"* 46 Hastings L. J. 1723, 1743 (1995).

Here, testimony was presented to Congress and its Members weighed in on such issues as the credibility and persuasiveness of the witnesses it heard. Its members were popularly elected and, therefore, reflect the popular will. While this Court has the duty to determine when the popular will infringes on fundamental individual rights, it should be a rare case where it voids a law within the specific constitutional domain of Congress. Voiding a law raises the specter of the judiciary being viewed as an overtly partisan political body. The Court should make every effort to ensure that it is viewed as an independent branch of government divorced from politics and as a neutral arbiter of constitutional interpretation.

Further, let us suppose, without acknowledging, that the dissent below reasonably interpreted the evidence before Congress. That does not mean that the majority opinion and the district court's opinion were unreasonable and, if both sides are reasonable, that necessarily means that the courts should defer to Congress. Even if the evidence before Congress admits to differing interpretations and even if Congress did not have direct proof of ongoing problems in covered jurisdictions, but only inferred the need for continuing coverage, it acted within its constitutional prerogative.

The evidence before Congress, even if only circumstantial (*amicus* would argue it is more than that) was extensive. A defendant in a criminal case can be convicted with only circumstantial evidence. *Holland v. United States*, 348 U.S. 121 (1954) ("circumstantial evidence is intrinsically no different

from testimonial evidence"). Some scholars have written that circumstantial evidence is more credible than direct evidence. *See e.g.*, William Paley, *The Principles of Moral and Political Philosophy* 551 (1785) ("well-authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords. Circumstances cannot lie"). Surely Congress can implement legislation fulfilling its Constitutional duty under the Thirteenth and Fourteenth Amendments based upon similar evidence.

Moreover, winning the right not just to testify but to have one's experiences taken seriously by the law was a critical advance in the civil rights struggle in this country. *See e.g.*, Cong. Globe, 39th Cong., 1st Sess. 157 (1866) (report of the Judiciary Committee that Congress had the Constitutional power to allow African Americans as witnesses in state courts and recommending that the House do so). With efforts to protect racial equality finally gaining majoritarian support in the political branches, it would be cruel irony indeed if this Court were to substitute its factual beliefs for the considered judgment of Congress, informed as it was by the testimony of experts and constituents.

III. CERD and ICCPR impose a constitutional requirement on the U.S. to undertake efforts to eliminate racism

Given the unquestioned history of discrimination, particularly in the states subject to the preclearance provisions of Section 5, and the embarrassment it has caused the United States around the world, principles of international and treaty law must be given due consideration in this Court's analysis. Because its treaty obligations are the "supreme Law of the Land," this is not merely a matter of international law, but of constitutional requirements as well. U.S. Const. Art. VI. In addition, It should be noted that "a decent respect for the opinions of mankind" and the submission of what we do and why to a "candid world" are integral to our history and inscribed in one of the two foundational documents that gave birth to this nation. Declaration of Independence (U.S. 1776).

The United Nations Charter is a treaty entered into and ratified by the United States. Indeed, the United States played a leading role in establishing the United Nations. The Charter provides that one of the raisons d'être of the United Nations is "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." United Nations Charter Art. 1(3), 59 Stat. 1031, T.S. No. 993, entered into force Oct. 24, 1945. Congress's efforts to insure the fundamental right of African- Americans and other citizens of color to engage meaningfully in the electoral process is therefore both a response to a treaty obligation and a constitutional mandate.

Accordingly, the government has a compelling, indeed constitutionally compelling, interest in enforcing the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. . . .
>
> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, Art 1(4), Art. 2(2). CERD's purpose is to insure "adequate advancement of certain racial or ethnic groups or individuals requiring such protection," so as to afford them "equal enjoyment or exercise of human rights and fundamental freedoms." CERD Art. 1 § 4. While it is true that special measures should only be utilized for as long as they are needed, which is the issue here, the right to vote is "precious" and "fundamental," so such measures are particularly important and any error should be on the side of insuring equal access to the polls. *See Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 670 (1966). As this Court has sagely observed: "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). If there is any area in which the courts should tread carefully, it is in regard to the threat of disenfranchisement of citizens exercising this fundamental right.

The U.S. government likewise expressed its view that actions aimed at rectifying past discrimination are consistent with its treaty obligations when it ratified the International Covenant on Civil and Political Rights (ICCPR), G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. That convention prohibits discrimination or distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Because the text of the covenant did not specifically sanction corrective measures, the United States adopted an understanding to the effect that it would make distinctions if *rationally related* to a legitimate govern-

ment objective. 138 Cong. Rec. 8068 (1992). That is to say, the government's understanding of its treaty obligation under the ICCPR is that only a rational basis is required for such corrective action.[3] And that treaty obligation is the "supreme Law of the Land." U.S. Const. Art. 6.

Although the United States adopted a number of reservations, understandings and declarations when it ratified the CERD, it never disavowed the need to take corrective action to remedy past discrimination. Congress reserved the right not to follow Article 4, which forbids racist speech, and Article 7, which requires that "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination. . ." 140 Cong. Rec. 14326 (1994). It did not, however, preclude measures necessary to address the legacy of discrimination that has plagued the union since before its birth. It is clear that the United States has undertaken treaty obligations that endorse measures taken for the purpose of achieving genuine equality. Again, such measures are especially crucial when it comes to voting, because the failure to remedy the problem there makes it impossible to remedy the problem anywhere.

Admittedly, our jurisprudence holds that non-self-executing treaties, like the CERD, require enabling legislation to have the force of law under U.S. CONST., Art, VI. *See e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 252 (1984) (holding that no enabling legislation was required to give the Warsaw Convention, a self-executing treaty, the force of law); *see also, Cook v. United States*, 288 U.S. 102, 119 (1933). However, these cases hold that non-self-executing treaties are distinct only because they need enabling legislation to be enforceable in domestic courts. Nowhere is it said that non-self-executing treaties are without meaning—a position which, if adopted, would wreak havoc with international relations as it would render any ratification of a non-self-executing treaty meaningless. At a bare minimum, these human rights treaties serve as persuasive articulation of the compelling government interest in genuine equality which clearly cannot be achieved in any area if not protected in the electoral sphere; and in turn, compliance with our declarations of commitment to these high principles is a compelling state interest. Abandonment of such principles should be inconceivable. In fact, Section 5 be would have been seen as enabling legislation enacted pursuant to the CERD had it been originally been passed by Congress prior to the United States ratifying the treaty. The latest extension of Section 5, passed after the United States ratified the CERD, in addition to the myriad other reasons articulated by the district and circuit court opinions, should be so understood.

Assuming that the extension of the Voting Rights Act should be congruent and proportional to the problem it seeks to correct, that congruence and

proportionality still must balance the overriding importance of the right to vote against the relatively minimal burdens placed upon states and their subdivisions to obtain preclearance. *See* 679 F.3d at 868 (observing that the process of obtaining preclearance is "routine and efficient"); 811 F. Supp. at 501 (noting the "minimal administrative cost" related to compliance).[4]

More than overwhelming those minimal burdens, Congress (and others) have properly determined that the effects of a racist past remain with us, particularly in covered jurisdictions. Jefferson County, Alabama, which is contiguous to Shelby County,[5] has recently admitted that it has failed to abide by a 30-year-old consent decree intended to remedy race and gender discrimination in hiring of county and that discriminatory practices have continued.[6]

Far less has been enough to sustain legislative action in other settings. For example, there is no evidence anywhere in the country that people voting illegally in person have affected the outcome of any election, yet this Court has previously found that laws requiring voters to provide photo identification before being allowed to cast ballots are constitutional. *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008). By contrast, 15,000 pages of evidence, carefully weighed by Congress led it to the conclusion that discrimination persists in the electoral arena and adversely affects people of color, particularly in the jurisdictions covered by Sec. 5. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b), 120 Stat. 577 (2006). This Court cannot consistently find that the Indiana legislature acted constitutionally in Crawford and that Congress exceeded its authority here.

In light of a history of hundreds of years of oppression and disenfranchisement, the continuing incidents of such disenfranchisement, the slight burden on covered jurisdictions to meet their obligations under Section 5 of the Voting Rights Act, the fundamental nature of the right involved, the constitutional burdens assumed by the United States by its treaty obligations and the international understanding of the importance of rectifying past racial discrimination, the reasons Congress has found for extending the Act are more than sufficient to justify its decision.

Conclusion

For the foregoing reasons, *amicus curiae* respectfully urges this Honorable Court to affirm the decision below.

Dated: February 1, 2013

NOTES

1. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the *amicus curiae* states that no

counsel for a party authored this brief in whole or in part, and that no person other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

2. *Amicus* trusts this history is sufficiently well documented that the Court will take judicial notice of it.
3. *Amicus* understands that this Court may have imposed a somewhat more rigorous standard, requiring that the law must be "congruent and proportional" to the evil sought to be corrected, perhaps without regard to the ICCPR and our government's understanding of the extent of what could be done to correct this particular evil.
4. In fact, the burdens imposed by Sec. 5 are so minimal that the oxymoronic "retroactive preclearance" of changes is routine.
5. In relatively recent years, many whites fled from Jefferson to Shelby County because of the increased African-American population and the concomitant increase in black electoral power.
6. The contempt hearing took place in December 2012 and no ruling has yet been made. Reports, however, reflect the county's admissions. *See e.g.*, Kyle Whitmire, *Bowman says Jefferson County Still Has Discriminatory Hiring, Voices Confidence In County Manager To Fix Problem*, AL.COM, Dec. 10, 2012 ("Several career categories at the county still showed statistically significant bias against women and minorities, witnesses from both sides said"); Kent Faulk, *Jefferson County Commission President David Carrington Agrees County Hasn't Lived Up To Employment Practices Consent Decree*, AL.COM, Dec. 5, 2012 (reporting that white County Commission president David Carrington acknowledged the failure of the county to comply with the requirements of the consent decree and needed to correct certain hiring practices); Barnett Wright, *Jefferson County Commission Warned In Memo To Follow Consent Decree*, BIRMINGHAM NEWS, Feb. 24, 2012 (reporting on a memo written by a member of the county attorney's office warning Commissioner Jimmie Stephens that his decisions to lay off lower paid African-American employees rather than higher-paid white employees would be "very difficult to explain").

Brett DeGroff

BOOK REVIEW: *THE NEW JIM CROW*

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness,* New York: The New Press, 2010. 290 pp.

The policies of mass incarceration have failed as badly as any embarked on in this country. Michelle Alexander's *The New Jim Crow* details those failures from the historic roots of the policies through their misguided modern manifestations. The book shows the perverse financial incentives for law enforcement agencies to incarcerate massive numbers of low-level offenders, discusses unconscionably long sentences which keep people in prison for decades, and examines post-release policies which are creating an undercaste that is detrimental to those within it as well as without. These facts are indisputable. This book presents sound reasons for dismantling these failed policies.

However, *The New Jim Crow* goes on to conclude that the sum of the policies of mass incarceration is a system of racial control. In so doing, the book attempts to shift the conversation about mass incarceration from one of statistics and straightforward policy toward one of racial control and domination. However, as Alexander herself points out, to the extent that an ulterior motive can be said to underlie the policies of mass incarceration, the point is to make race the "organizing principle of American politics." Ironically, by arguing that the debate about mass incarceration should focus first on race, the book seems to unwittingly fall into the very trap it exposes.

Much in *The New Jim Crow* is indisputable. The book discusses how in 1982 President Reagan announced the War on Drugs.[1] Federal expenditures for fighting drug trafficking exploded,[2] while spending on drug treatment and prevention dramatically declined.[3] At the same time inner-city economies were collapsing as manufacturing jobs left the country and unemployment climbed. As crack cocaine flooded into American cities, violence climbed and the government's response was to ratchet up "law and order rhetoric" and continue to turn away from treatment.

In 1986 federal mandatory minimum sentences for crack cocaine distribution were enacted.[4] Predictably, incarceration rates soared with more than 2 million behind bars by 2000.[5] Between 1985 and 2000, two-thirds of the

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increase in the federal prison population and half the increase in state prison populations were attributable to drug offenses. *The New Jim Crow* reports that, "Approximately a half-million people are in prison or jail for a drug offense today, compared to an estimated 41,100 in 1980. . . . Drug arrests have tripled since 1980."[6] By 2007, the total number of people in American jails or prisons or on probation or parole was more than 7 million.[7]

The New Jim Crow discusses not only how sentencing policy has kept drug offenders in prison much longer than can be defended on policy grounds, but how financial incentives for police have flooded citizens into the system on the front end. Between collecting cash and property through forfeitures and federal dollars tied to focusing on fighting the War on Drugs, local police departments have been incentivized to quantify their success in terms which have nothing to do with elimating the causes and consequences of drug abuse. Since 1970 police had been able to seize some assets associated with drug trafficking.[8] However, in 1984 Congress amended federal law to allow state and local agencies to keep up to 80 percent of the proceeds of seized assets.[9] For departments with no control over money coming into their budgets, the possibility of deriving "revenue" from enforcement activities has an obvious attraction. The book reports that from 1988 to 1992, task forces funded with federal money seized more than $1 billion in assets.[10] In 1988 Congress revised federal aid to state agencies to enlist them in the War on Drugs.[11] The book argues that the millions of federal dollars have gone to paramilitary style task forces and stopping drugs as they move across highways.[12] These efforts generally rope in low-level and easily replaceable participants in a criminal drug organization. The book points out that the normal rhetoric of the War on Drugs, that it targets "kingpins," does not jibe with law enforcement's wholesale pursuit of street dealing local offenders.

But the damage of these policies goes far beyond mass incarceration itself. As Alexander puts it, once a citizen is convicted of a felony they are "ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits."[13] In 2008, while 2.3 million Americans resided in prisons and jails, another 5.1 million were on probation or parole.[14] Even for those who escape lengthy prison sentences, the "collateral consequences" of a conviction can shape the rest of their lives. As an initial matter, the label of "felon" is enough to disqualify someone from consideration for many jobs. Most job applications ask whether the applicant has been convicted of a crime. Prospective employers can easily sift these applications out of a pile without looking any further.

For those fortunate enough to find work, an entirely separate set of barriers stands between them and a peaceful, productive lifestyle. The combination

of being barred from public housing,[15] and restricted from living with other felons can seriously limit the housing options of someone who comes from a neighborhood where significant percentages of residents have criminal records. This can result in a "spatial mismatch" between home and work that puts miles in between them.[16] Combine this with a revoked or suspended driver's license and the options of getting to work might be limited to spending hours navigating public transportation and/or spending a significant portion of wages just on commuting.[17]

Maybe worst of all, former prisoners face obstacles to voting which range from outright bans to bureaucratic nightmares. Forty-eight states and the District of Columbia do not allow prisoners to vote.[18] Most states do not allow parolees to vote. And many states continue to deny the right to vote for a period of years or even for life after a former prisoner completes his or her sentence.[19] Even after a disenfranchised ex-convict becomes eligible to vote, most states require him or her to pay fines, court costs or fees. Additionally, former prisoners may be required to submit fatiguing amounts of paperwork to multiple agencies.[20] All of this is complicated by some of the factors discussed above such as paying large portions of wages and spending inordinate amounts of time just on a commute. Given the myriad obstacles, many never make it to the polls even if they are eligible. As *The New Jim Crow* puts it, for many, the "debt to society is never paid."[21]

That all of this disproportionately impacts African Americans is an undeniable fact. The book points out that in 2000, African Americans made up 80 to 90 percent of drug offenders sent to prison in seven states.[22] *The New Jim Crow* also states that, "In at least fifteen states, blacks are admitted to prison on drug charges at a rate from twenty to fifty-seven times greater than that of white men."[23] Also, three-fourths of drug offenders imprisoned for drug offenses have been African American or Latino.[24] The book slices the statistics several ways, citing several authorities.

After decades of fighting the War on Drugs, drug abuse and drug-related crime remain in our communities. The policies of the War on Drugs, which have become the policies of mass incarceration, make no sense. Whether they were mistakes, political ploys, or fearful overreactions, the evidence is now indisputable that these policies have not resulted in stopping drug abuse or drug related violence in our country.

But this is not the main point of *The New Jim Crow.* Rather, the book argues that the policies of the mass incarceration have resulted in a "racial caste system."[25] The book asserts that the genesis of American racism was a as a means to justify slavery and extermination of Native Americans.[26] Settlers who had an interest in these goals also used the idea of white supremacy to enlist poor whites who otherwise had nothing to gain to those ends.[27] This

dynamic played out through the era of slavery, and then again through the first Jim Crow era. However, as Jim Crow faded away, overt racism faded out of the political mainstream in favor of the coded rhetoric of the Republican Party's "Southern Strategy." The book cites convincing evidence that conservatives employed this "Southern Strategy," using "law and order rhetoric" to capitalize on racism for electoral gain in the late 1960s. The result was that "race eclipsed class as the organizing principle of American politics, and by 1972, attitudes on racial issues rather than socioeconomic status were the primary determinant of voters' political self-identification."[28] Those behind the "Southern Strategy" weren't particularly interested in racial issues. But these issues divided their political opponents and enabled them to gain and maintain power.

The New Jim Crow attempts to tie all of these threads together to argue that today's War on Drugs and its policies of mass incarceration are nothing more than another iteration of a system of racial control like slavery and Jim Crow segregation. The book argues that one who would assert that the criminal justice system "is not run by a bunch of racists" is simply an "apologist."[29] Further, the criminal and civil sanctions of the criminal justice system are "now used to control and oppress."[30]

The book lays out an ambitious reform agenda which includes reforming financial incentives to enforcement agencies, ending racial profiling, creating a culture of partnership between police and communities, establishing equivalent funding for public defenders and prosecutors, repealing mandatory minimum sentencing schemes, establishing meaningful reentry programs, shifting focus from incarceration and toward treatment, and more.[31] But pursuing these reforms isn't enough, Alexander argues. Mass incarceration isn't about failed policies, but rather "a deeply flawed public consensus, one that is indifferent, at best to the experience of poor people of color."[32] Without "overturning the public consensus" which gave rise to mass incarceration policies, reforms will be short-lived because "[t]he caste system will reemerge in a new form."[33]

The New Jim Crow goes on to argue against color-blindness and claims to pursue Martin Luther King Jr.'s goals in so doing. The book points out that King argued that "indifference to the plight of other races" supports institutionalized bigotry.[34] The book argues that "racial indifference and blindness—far more than racial hostility—form the sturdy foundation for all racial caste systems."[35]

But here, *The New Jim Crow* conflates indifference toward individuals of other races with indifference to the race of other individuals. King rightly identified the former as a key to perpetuating bigotry. The latter was King's

dream. The book quotes King's observation that "some men are segregationists merely for reasons of political expediency and political gain" while others are "inflicted by a terrible blindness."[36] King said when "neighborly concern [is limited to] tribe, race, class or nation" the result is that "one does not really mind what happens to the people outside his group."[37]

Perhaps *The New Jim Crow* goes wrong by ignoring these distinctions. Those who have used "law and order rhetoric" as racial code toward their own political gain, depended on those who were indifferent toward those they perceived as different than themselves. When people stop being indifferent toward individuals of other races, and start being indifferent toward the race of other individuals, the only value to "law and order rhetoric" and the policies of mass incarceration is their value as policies of crime prevention. As the book convincingly explains, the policies of mass incarceration have very little weight in this regard. Which presents the question, how should progressives approach reforming these failed policies?

One choice would be to frame the debate in policy terms and talk about what works in preventing crime and drug abuse. In this debate, the far right of the political spectrum should see a chance to shrink government and cut spending. In this debate, local prosecutors and law enforcement agencies can be enlisted as allies in rebuilding the communities they live and work in. In this debate, much less political capital must be spent because both sides win by making the right choice. In this debate, a policy debate about the best ways to control crime and drug abuse, the failed policies of mass incarceration don't have a chance.

Another choice would be to frame the debate in terms of race and talk about mass incarceration as a system of racial control. In this debate, the far right of the political spectrum is painted as an oppressive, racist regime. In this debate, prosecutors and police who are generally popular with voters are painted as racist villains. In this debate, a political war is required. In this debate, the outcome does not depend on the strength of policy positions, but on political power. In this debate, the outcome is uncertain.

I suspect *The New Jim Crow*'s answer is that the circumstance I describe will never occur. The book says "to aspire to colorblindness is to aspire to a state of being in which you are not capable of seeing racial difference—a practical impossibility for most of us."[38] Maybe the circumstances for a debate about mass incarceration on pure policy grounds will simply never arise. The book laments watching the inhumane treatment of a man being arrested on the very night President Obama was elected to his first term. Notwithstanding our election and reelection of President Obama, maybe racial differences are simply too great to ever make the politics of this debate happen without a fight—except that it has already happened.

Little effort is required to see evidence that contemporary politics make this a propitious time for a level-headed policy debate. Popular media has explored the senselessness of policies like mandatory minimums, bringing these issues into the mainstream.[39] The powerful chairman of the Senate Judiciary Committee, Patrick Leahy of Vermont, recently called for an end to mandatory minimum sentences and publically remarked that he hoped the federal government would shy away from enforcing marijuana laws where states have decriminalized the drug.[40] The American Bar Association has released a report advocating for reclassifying many drug offenses as civil infractions.[41] Most telling, some of the most extreme elements of the conservative movement have rallied around a "Right on Crime" campaign. Newt Gingrich, Ed Meese, and Grover Norquist, among others, have set out to lead the way on lowering prison populations and paving the way for successful reentry.[42]

This is not to say that change will be easy. Nor to deny that uneven application of criminal punishment is anything other than wholly unjust. Rather, the point is that American society has moved away from indifference toward those of other races and toward indifference toward race. Obviously, racism persists. But, it is no longer the organizing principle of our politics. The far right of American politics today has chosen tax policy and the size and scope of government as it organizing principles. That makes the politics of the moment perfect for mass incarceration reform to be a bi-partisan issue where everyone can win. As a purely political and strategic matter, it just makes more sense to make the debate about the policies of mass incarceration about those policies rather than race.

It's easy to see the War on Drugs and mass incarceration as issues of race. *The New Jim Crow* may be right that making these issues about race was the intent of some architects of these policies from their very inception. But, if what progressives want is to end these policies, then we should seize the politics of the moment and concentrate on the complete lack of merit to these policies rather than sidetracking the discussion toward race. After all, if *The New Jim Crow* is right, turning the discussion toward race is what these policies have been about all along.

NOTES

1. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) 49.
2. Over four years FBI antidrug funding increased from $8 million to $95 million. Over 10 years Department of Defense antidrug allocations increased from $33 million to $1,042 million and DEA antidrug spending increased from $86 million to $1,026 million. *Id*. at 49.
3. Over three years funding for the National Institute on Drug Abuse decreased from $274 million to $57 million and antidrug funds allocated to the Department of Education decreased from $14 million to $3 million. *Id*. at 50.
4. *Id*. at 53.

5. *Id*. at 58.
6. *Id*. at 60
7. *Id*. at 60
8. *Id*. at 78. "The [Comprehensive Drug Abuse Prevention and Control Act] included a civil forfeiture provision authorizing the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs."
9. *Id*. at 78-79
10. *Id*. at 79
11. *Id*. at 73
12. *Id*.
13. *Id*. at 94
14. *Id*.
15. *Id*. at 144
16. *Id*. at 150
17. *Id*. at 151
18. *Id*. at 158
19. *Id*.
20. *Id*. at 159
21. *Id*. at 163
22. *Id*. at 98
23. *Id*.
24. *Id*.
25. *Id*. at 3
26. *Id*. at 23.
27. *Id*. at 25.
28. *Id*. at 47.
29. *Id*. at 183.
30. *Id*. at 188
31. *Id*. at 232-233.
32. *Id*. at 233.
33. *Id*. at 234
34. *Id*. at 242
35. *Id*.
36. *Id*., *citing* MARTIN LUTHER KING JR., STRENGTH TO LOVE (1963), 45-48.
37. *Id.*
38. *Id*. at 243
39. http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html
40. http://stopthedrugwar.org/chronicle/2013/jan/21/senate_judiciary_chair_end_manda; http://www.washingtontimes.com/news/2013/jan/16/leahy-abolish-mandatory-minimum-sentences/.
41. http://www.abajournal.com/news/article/decriminalizing_minor_offenses_could_help_indigent_defense_crisis_aba_commi/
42. http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html.

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Neda N. Brisport

RACISM & POWER: THE INACCESSIBILITY OF OPPORTUNITY IN THE EDUCATIONAL SYSTEM IN THE UNITED STATES

President Obama began his letter regarding the Reauthorization of the Elementary and Secondary Education Act with this very poignant statement: "Every child in America deserves a world-class education."[1] Although the Constitution does not directly address the notion of education, the federal government and judiciary have made it clear through legislation and case law that the United States of America values education and that we should care for all of our children. The question is whether only selected children are getting a "world-class education," while others are being deprived of their mental nutrition and tools for success.

Education as opportunity, opportunity as success, success as power

Robert Maynard Hutchins, a prominent lawyer, teacher and educational philosopher has been quoted as saying that "a liberal education... frees a person from the prison-house of his class, race, time, place, background, family, and even his nation."[2] Education surely gives a person freedom if from an early age it imbues a child with the ambition to set goals and affords the confidence that success is deserved and goals attainable. School is often the only place where children are able to explore what it is they want to do in their lives and that provides them with the resources and support system to follow through with those goals. For most children, school is the first formal introduction to their own potential and the potential of their future. Regardless of where children are coming from, an education is supposed to give them the tools to *choose* where they are going. Unfortunately, not all children are given the same tools—and this may ultimately determine their fates.

Much lip service is given to education without a lot of concrete support. As children, we always heard things like "education is power" and "your future is bright" on television and for some of us, in our schools. As adults, we hear politicians make promises about education reform and allotting more funding for public education.

Our founding fathers understood the value of public education in creating a functioning democracy. Thomas Jefferson said, "I have indeed two great

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measures at heart, without which no republic can maintain itself in strength. (1) That of general education, to enable every man to judge for himself what will secure or endanger his freedom. (2) To divide every county into hundreds, of such size that all the children of each will be within reach of a central school in it."[3] Nevertheless, the Constitution does not mention education anywhere.[4] The Supreme Court has supported the notion that education is not a fundamentally protected right.[5] It is clear that public schooling falls under the umbrella of the Tenth Amendment, leaving it to the states to decide how to set up their school systems, what curriculum to teach in each district, how to divide resources and so on.[6] Recent legislation is headed in the right direction.[7] However, it is evident that there are still some people who are given opportunities while others are denied them. For those denied, their growth and ability to share in the power that is held by those who *have* been handed such opportunity is naturally hindered.

Opportunity leads to success and success often leads to power. However, gaining power requires that you be a part of a certain select alliance, one whose doors are only open to the current power holders—the majority race. This is not to say that being born white automatically affords a person power, but that there are certain privileges, advantages and opportunities which open the doors to attaining power. In an effort to prevent those who are unwelcome—the minority races—from attaining a seat at the power table, the majority purposefully denies them the initial opportunity through the educational system. The imposition of various obstacles—insufficient funding for education, scarcity of human and material resources, and the absence of programs geared towards success in certain poverty-ridden minority areas—are ways of reducing competition for scarce resources and preventing minority populations from sharing power.

The fact that African-American children in impoverished neighborhoods are not receiving the same education as white children in more affluent neighborhoods is not an accident—it is *purposeful* and *deliberate*. This article will take us through the history of the education system in the United States as well as the litigation and legislation surrounding education to provide a clear understanding of how far we have come in the advancement of equal educational opportunity. We will find that in order to get to where we need to be, we must completely restructure our current system on all levels and redistribute our attention in order to ensure that *all* children in the United States have open doors to proper education, opportunity, success and ultimately to power.

Legislation surrounding education: How far have we come?

Despite the lack of a constitutional requirement, President Jimmy Carter established the current United States Department of Education with the Depart-

ment of Education Organization Act in 1979.[8] "The Department's mission is to serve America's students—*to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access."*[9] That mission statement in itself acknowledges the fact that in order to be able to compete in the world, a student needs to be given the proper tools—"educational excellence"—necessary to achieve success.

It's worth noting that the mission of the Office of Civil Rights (OCR), also established in 1979,[10] is to "ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."[11] OCR "serves student populations facing discrimination and the advocates and institutions promoting systemic solutions to civil rights problems."[12] In serving as an advocate for students' civil rights, OCR enforces several Federal civil rights laws that prohibit discrimination in schools that receive funding from the Department of Education.[13] These laws include Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[14] This agency established itself as an important tool to promote education and equality, yet it is clear that on the ground-level much needs to be done to implement these ideals in our schools. OCR offers a remedy to those students who are lucky enough to be chosen to have their discrimination cases heard. It does not address the indirect discrimination or subconscious efforts at keeping minority students from gaining a seat at the table in the future. While there will most likely always be a need for OCR, another tool is needed to address the larger underlying problem of deliberate and yet indirect discrimination and racism in our education system.

Congress has passed numerous statutes dating back to 1963 that reflect an unfulfilled commitment to equal educational opportunity.[15] Title VI of the Civil Rights Act of 1964—which prohibits discrimination based on race, color, sex, religion or national origin in programs receiving federal financial assistance, including employment, education, and the use of public accommodations and facilities—was a milestone in civil rights legislation, as it established the beginning of Congress' awareness of the impact of race on education.[16] It set the stage for the introduction of the Elementary and Secondary Education Act of 1965, which provided federal funds to improve the educational opportunities of low income students.[17] Next, the Equal Educational Opportunities Act of 1974 provided that all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, or national origin, and no state may deny such equal educational opportunity on these bases.[18]

Most recently, former President George W. Bush signed the No Child Left Behind Act (NCLB) of 2001.[19] Its goal is to "close the achievement gap with accountability, flexibility, and choice, so that no child is left behind."[20] It describes the achievement gap as being "between minority and non-minority

students, and between disadvantaged children and their more advantaged peers."[21] NCLB requires all states to bring all students to levels of proficiency on state-developed tests by 2013–2014 and further requires all students to make Adequate Yearly Progress (AYP) on all specified state standards.[22] On its face, NCLB appears to be a step toward providing opportunity for those children who have consistently been denied it. However, with its emphasis on success paired with a refusal to provide any tools to attain it, No Child Left Behind became another opportunity for the privileged majority to claim that exploited minorities were given a chance to succeed but that they simply could not.

NCLB focuses on the notion of "accountability" and really takes a paternalistic approach to education. Rather than encouraging the culture and collaborative environment for learning and growth which precedes success and power, it punishes failure. This is made evident by the consequences facing a school that fails to meet the goals set by NCLB. If a school fails to make AYP for two consecutive years, it is required to develop a plan for improvement and notify parents of the status.[23] There is no mention of ways to consult on a plan for improvement or providing tools and resources in order to attain such an improvement. Rather, the burden is placed on the "failing" school to develop a plan and then notify the parents after the fact.

Students attending schools that have failed to make AYP for three consecutive years must be provided supplemental services such as tutoring and are allowed to transfer to another school.[24] Here, the tutoring that is being provided is useful and necessary so long as a dedicated effort is made. Allowing children to transfer to another school seems to be another opportunity for those with financial means—usually white middle-class children—to be taken out of urban schools and placed in either private or suburban education. This, of course, only worsens the problems with equal educational opportunity and race relations in our schools and reduces the chances for success of those unable to transfer.

If a school fails for four consecutive years, corrective action, such as replacing staff or offering public school choice, will be implemented to improve the school.[25] Again, there is no mention of repairing or assisting a failing school, only exodus and abandonment. This only exacerbates socioeconomic and racial segregation.

If the school fails for five consecutive years, restructuring must take place, such as conversion to a charter school, state takeover, or staff restructuring. It is also possible for the school district to lose federal funding.[26] Thus, if a school is not meeting the goals set by NCLB, even if it is not being given the tools to meet them, it is at risk of losing funding which puts it in an even bleaker situation with even higher chances of failure. As if anticipating fail-

ure, NCLB focuses on punishment rather than on providing the means and resources for improvement. There seems to be an underlying threat in each of these years without supplying a plan for improvement. It is impossible to adequately address the problem of a crumbling educational system while ignoring the pervasive problems that are commonly faced by children in these "failing" schools—poor nutrition, crime-ridden neighborhoods, destructive family situations and lack of active parenting—which inevitably affect the students' performance. Rather than providing a constructive and holistic approach to improvement and opportunity, No Child Left Behind seeks to address this complex issue with a narrow mathematical equation leaving the "failing" school without the essential key to pave a path for improvement: money. With this approach, a "failing" school is doomed to make its failure permanent. The issue of funding will be discussed in further detail later.

No Child Left Behind reveals that racism is prevalent even at the government level, and that it directly impacts African-American and other minority children in impoverished areas in the United States. If the students fail, the school fails, and then is at risk of being deprived of the necessary financial assistance to compete and succeed in the future. The student's opportunity for advancement stops there. It is certainly not accidental that the same care and resources provided to schools in middle and upper class areas is not provided to lower class areas. The fact that the issue is colored by race can no longer be ignored. Notwithstanding all this, NCLB remains an important piece of Congressional action that should be studied to build upon its strengths and remedy its flaws. More recent legislation has sought to do just that.

On March 13, 2011 President Obama signed a reauthorization of the Elementary and Secondary Education Act (ESEA) of 1965.[27] It provides a "Blueprint for Reform" which delineates four specific goals: *"*(1) Improving teacher and principal effectiveness; (2) Providing information to families to help them evaluate and improve their children's schools; (3) Implementing college- and career-ready standards; and (4) Improving student learning and achievement in America's lowest-performing schools by providing intensive support and effective interventions."[28] These are all very worthy goals to set and shift the focus from accountability to positive reformation. A day later, President Obama said: "I want every child in this country to head back to school in the fall knowing that their education is America's priority….Let's fix No Child Left Behind."[29] Arne Duncan went gone on to say that the new "proposal will offer schools and districts much more flexibility in addressing achievement gaps, but we will impose a much tighter definition of success….Simply stated, if schools boost overall proficiency but leave one subgroup behind—that is not good enough. They need a plan that ensures that every child is being served."[30] This new effort towards equal educational

opportunity is certainly a step in the right direction. However, in order to ensure that the goals of this new act are met, the root of the problem—the underlying racism and fear on the part of the majority that keeps minorities in an inferior position with regard to opportunity—must be addressed to better meet the goal of offering every child in America a world class education.[31] A key point of consideration here is that without adequate funding, these goals cannot possibly be met.

Three major state sponsored efforts reflect the underlying racism, whether unconscious or deliberate, mentioned throughout this paper. Those are housing patterns, the breakdown of school districts and, finally, school funding. These three areas are interrelated and directly impact one another. Housing patterns determine how school districts are constituted and where the lines are drawn between neighborhoods. This directly impacts a child's opportunity for learning when they are not given a choice of which school they may attend. Similarly, in considering housing patterns and the breakdown of school districts, the fiscal resources allocated to various districts is a great determinative factor in the tools available for one school of limited means to scholastically compete with another of greater means. It is important to look at the historical background that established these policies to show that there was a purposeful and deliberate effort to keep those with limited means away from those with greater means and that this effort still persists today.

There is undoubtedly a connection between housing segregation and school segregation. It has been said that "housing policy is school policy."[32] In many urban areas or inner cities throughout the United States, the housing patterns are hypersegregated, meaning that racial minorities such as African-Americans are residing in extreme racial isolation, and this naturally results in school enrollments reflecting the racial compositions of the neighborhoods where they live.[33] This hypersegregation is a result of efforts in the latter part of the twentieth century to establish a "separate but equal" system of private services with regard to African-Americans.[34] It is evident in all things that for every cause there is an effect, for every action there is a reaction. This can be applied even to social phenomena—nothing is purely accidental. Everything, including institutionalized racism, is a result of some action that was taken at some point in the past that is still lingering in the present, though perhaps in a different form. Racially charged housing patterns are a direct result of *de facto* and *de jure* discrimination that began with the institution of slavery.

The establishment of segregated neighborhoods north of the Mason-Dixon line began with the great migration of African-American families from rural areas in the South to urban industrial centers, often referred to as "from field to factory," starting after the First World War and continuing after the Second World War.[35] African-Americans were leaving the violence and direct racism

that was prevalent in the South in hopes of attaining a new life in the North.[36] Local ordinances in various areas in the South prohibited African-Americans from occupying property outside designated locations where "colored people" were allowed to live.[37] The Supreme Court later held in *Buchanan v. Warley* that these racial zoning ordinances violated the Due Process Clause of the Fourteenth Amendment.[38] After *Buchanan*, property owners turned to private covenants—endorsed by a 1926 decision, *Corrigan v. Buckley*,[39] that prevented conveyance to racial minorities.[40] These restrictive covenants achieved what states and local governments were no longer legally allowed to pursue, the perpetuation of segregated housing patterns.[41] The increasing popularity of restrictive covenants spread the pattern of racially charged zoning and housing patterns, which led to the more recent phenomenon of whites moving to the suburbs, leaving African-Americans in the inner city.[42] Subsequently, jobs were being moved from the cities to the suburbs, making them inaccessible to inner city residents and also causing the city lose much of its tax base.[43] This accelerated the impoverishment of large urban areas and affected the resources of the public schools.[44]

Although the notion of "separate but equal" found in *Plessy v. Ferguson*[45] was refuted in the landmark case of *Brown v. Board of Education*—finding that in primary education, separate was inherently *unequal*—racial separation was deeply rooted, blooming periodically into new variants on old forms of discrimination.[46] In *Brown*, the Supreme Court held that segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.[47] When *Brown* was decided, housing patterns in urban areas were already segregated as a result of restrictive covenants and other discriminatory practices.[48] At that time, white families who lived in the cities were moving to the surrounding suburbs since the economy was doing well and there were federal subsidy programs such as Veterans Administration and Federal Housing Authority loans that assisted them.[49] As a result of state and federally sponsored racially discriminatory policies, black families were excluded from suburban areas and were consequently forced to remain in the cities.[50] African-Americans were deliberately denied the opportunity to "participate in one of the largest wealth producing programs in the history of the United States: single family, suburban homes subsidized by federally insured mortgages."[51] This "white flight" continued and resulted in the aforementioned movement of white people fleeing to the suburbs and African-Americans remaining in the cities.[52]

Housing patterns have a direct impact on the lines drawn for school districts and therefore it is a natural consequence that racially segregated neighborhoods result in racially segregated schools. School districts are determined and overseen by local or state governments and have jurisdiction over

public schools in their respective areas. The idea of school districts is very closely intertwined with the concept of school funding and we will discuss them together. The purpose of school funding is often held to be providing for or funding an "adequate education" although that standard has not been universally defined.[53] Public school funding comes from federal, state and local sources, he latter contributing most.[54] Some of the federal sources, such as the No Child Left Behind Act, have already been discussed.[55]

When school districts are deprived of sufficient funding, their chances for success plummet. Human resources such as quality and quantity of teachers are adversely impacted. Teachers with the best qualifications will most often seek jobs in districts that offer better pay and benefits. When funding is cut from the districts that need it most, they are unlikely to attract the best qualified educators. When budgets are limited, class sizes often increase, thereby diminishing teachers' ability to provide individualized attention and learning. Curriculum is negatively impacted because there is not enough money for supplies, classroom maintenance, professional development for teachers, and other necessities. Hope for improvement fades. Goals shift. Schools simply attempt to get the children through the minimally required steps to pass the grades without any hope for "more" because "more" has been taken off of the table.

The history of school funding has been described as occurring in three or four "waves."[56] The first wave resulted from the California Supreme Court decision in *Serrano v. Priest*[57] in 1971, which held California's education funding system, relying on local property taxes, unconstitutional under the Fourteenth Amendment.[58] The first wave also includes *San Antonio Ind. Sch. Dist. v. Rodriguez,*[59] where the Court ruled that education was not a fundamental right under the Fourteenth Amendment.[60] Overall, the first wave deals with equal protection under the Fourteenth Amendment.[61]

The second wave made school funding a state issue. Some states went on to follow the *Rodriguez* standards while others followed the equal protection clauses in their state constitutions, which were held to be more extensive than the Supreme Court's Fourteenth Amendment jurisprudence.[62] The third wave focused on education clauses in state constitutions as opposed to the equal protection clauses.[63] This is what brought on the notion of "adequate education" that survives today.[64] The fourth wave is where we are now—this period focuses on accountability and the No Child Left Behind Act.[65] In this fourth wave, funding is used as a threat—if success is not attained, funding will be denied while, again, adequate tools are not provided.

By synthesizing the history and current state of housing patterns that affect school districts and, consequently, that affect the funding available for those

districts, we can see clearly that these three mechanisms were and continue to be used as a method for the deliberate ostracism of African-American and other minorities residing in poor neighborhoods. Historically, African-Americans were pushed into these undesirable neighborhoods, invisible lines of school districts were drawn around them and then they were deprived of the proper fiscal resources necessary to succeed. Although there has been significant progress through legislation and federal case law, these measures have not afforded equal educational opportunity to everyone. The foundations that were set historically and the fears that still remain for some in giving up a certain amount of power or resources in order to allow others who have traditionally been deprived of those resources a chance to succeed.

Conclusion: There is no threat—create a seat at the table

Looking at the legislative history and current legal status of race and education, it is clear that we have not achieved equal educational opportunity because a deliberate effort has been made to keep a substantial population from gaining access. This does not mean that the ideal is unattainable. It *does* mean that some effort needs to be made to understand *why* it is that despite all the social and legal measures, and the self-congratulation they induce, we are still in a place where African-Americans are not getting the same educational opportunities—the primary tool for attaining success and power—as whites. Is racial equality a *threat* to power in the United States? It is certainly true that in order to give power to someone else, those who currently hold power will need to relinquish some of their own. That is, America will at last need to rid itself of white privilege. For America's dominant racial group, the choice is between doing what's right and doing what's most self-aggrandizing. Dean Martha Minow of Harvard Law School reports that "integration involves the creation of a community of relationships among people who view one another as valuable, who take pride in one another's contributions, and who appreciate differences and know that commonalities and synergies outweigh any extra efforts that bridging differences may require."[66] She goes on to say that "in integrated communities, people's differences become a resource."[67] It is precisely this change in mentality that is necessary to overcome the fears latent in the white majority of creating an environment where we see ourselves as a collective rather than as individuals constantly in competition. Racial dominance needs to be eradicated. An integrated community, of the kind Minow describes, should be the ultimate goal.

Nationwide, the percentage of minority students in public schools is growing and is predicted to become larger than the percentage of white students by 2023.[68] It is clear that change is inevitable. It is in the interest of every American to embrace the diversity that is unique to this nation and strive to become a beacon of unity, acceptance, and goodwill. How is that achieved? Like

anything else, the solution is complex. But if we begin to place more value on collective equal opportunity and less on individualism, we will be more willing to make the changes necessary to arrive at the appropriate solution.

A feasible plan to restructure the system to ensure equal educational opportunity for all children in the United States first requires a raising of consciousness around the idea that equal educational opportunity is in the best interest of our nation as a whole. It will mean more prosperity, a more enlightened social and political order, and an overall higher quality of life. The next step should be a bona fide, good faith attempt to enact legal measures to racially and socioeconomically integrate our schools. When suburban whites realize the common interest we all share in improving our public schools, we'll be closer to President Obama's goal of ensuring that every child gets that "world-class education."[69] It is clear that "linking the fates of poor children with those from more affluent families"[70] will ensure that the schools that are shared by both the poor and affluent are given more resources. With resources will come greater hopes of success.

Several factors play a part in this: "[I]in a political system dominated by whites, black students needed to be in the same school with white students to have equal opportunities."[71] This is because in our current setting, "urban school systems lack families with political clout."[72] One of the reasons that suburban schools, private schools, and those public schools that are in affluent neighborhoods are able to gather the proper resources for the success of their children is that they have the money or clout to push the school's administration to do things in their favor. In urban school systems, even if the parents attempt to push for better teachers, curriculum or other such things, they are often disregarded because they do not carry the necessary political weight to make themselves heard and compel change. For this reason, their children are treated as if less important than those attending affluent schools.

Parents of all children, of all races and classes, need to get involved, both as guardians of their children's education and agents of political change. There are damaging racist stereotypes being perpetuated about poor African-American parents—that they aren't as attentive or solicitous of their children's education. Such lies wreak tremendous harm. In more impoverished areas, parents of all races can be made to feel that they do not have a voice as to how their children are educated. This is why it is especially important for that community leaders and school administrators be made to engage the parents of all children and invite them to play a larger part.

School district lines should not be drawn so inflexibly between neighborhoods. Families should be offered options for their children beyond their neighborhood schools.[73] Also, districts should allow for more flexibility

in admitting students who live outside the districts as a means of attracting students of diverse backgrounds. One successful method of doing this is by establishing more magnet schools. Magnet schools are "public elementary schools, public secondary schools, public elementary education centers, or public secondary education centers that offer a special curriculum capable of attracting substantial numbers of students of different racial backgrounds."[74] The goals of magnet schools align with the goal of eradicating discrimination against minority children by providing exceptional educational opportunities and learning for all. More of these schools should be generated within our public school systems. They are examples of schools where children from all backgrounds are given a chance to succeed—and actually do.

Having more flexible lines between school districts and having an increase in successfully executed magnet schools will result in such improvements as better universal curriculum for all students, more quality teachers, smaller class sizes, and better conditions in classrooms. Resources will be more evenly distributed, thus leading to a more feasible vision of equal educational opportunity.

Finally, once a kind of genuine racial and socioeconomic integration has been achieved, school administrations should make every possible effort to promote diversity within schools through socializing activities like sports, band, clubs and so on. It is not enough to simply throw people of different backgrounds together. Diversity is more than just a visual image. It is something we must believe in and feel attached to. James Baldwin advised us in 1963, "The price of the liberation of the white people is the liberation of the blacks—the total liberation, in the cities, in the towns, before the law and *in the mind*."[75] Such liberation should start at the gates of opportunity, in our schools.

NOTES)

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5. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
6. U.S. CONST., amend, X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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Jeanne Mirer

RIGHT-TO-WORK LAWS: HISTORY AND FIGHTBACK

Introduction

Human Rights Day, December 10, is supposed to be a day to celebrate human rights. But in 2012 Michigan Governor Rick Snyder and his fellow Republicans spent the day attacking them in Michigan and betraying the state's proud tradition of organized labor.

On December 10, 2012, Michigan's Republicans succeeded in passing "right-to-work" legislation, effectively gutting the human right to form and join unions to protect workers' interests, as provided in section 23.4 of the Universal Declaration of Human Rights.

This passage of right-to-work in Michigan is another blow to the labor movement, whose ranks have been under attack for so many years that the unionized percentage of the workforce is lower today than it was in 1916. Unions and workers should be responding to this fact with a sense of urgency. This article will provide a short history of the right-to-work provision in the National Labor Relations Act, explain what it does, discuss prior challenges, and offer several arguments as to why these laws must be considered illegal. Hopefully these arguments will be useful in the fightback against them.

The original National Labor Relations Act of 1935

The National Labor Relations Act (NLRA) of 1935 (the Wagner Act) unreservedly supported unionization and promoted the benefits of collective bargaining as the policy of the United States. Section 1 of the law declared:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment and interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the

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> friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees….
>
> It is hereby declared to be the policy of the United States to eliminate the causes of substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.[1]

The authors of the original NLRA understood the fundamental truth that without equality of bargaining power workers would never be able to negotiate fairly with employers. And without full freedom to organize, workers would never achieve equality of bargaining power. They further understood the economic instability which results from the inequality between rich and poor.

In the first years of the Act, the National Labor Relations Board (NLRB), which enforces the NLRA, required employer neutrality (actually silence) in the face of union organizing drives and allowed for the "closed shop" under which all members of the workplace had to become and remain union members in order to remain employed. From 1935 until the passage of the Taft-Hartley amendments to the NRLA in 1947 there was a meteoric rise in unionization rates throughout the United States, as unions won over 80 percent of the elections for which they petitioned.[2]

The Taft-Hartley amendments: The new right *not* to join a union

Employers, who did not want workers to have equality of bargaining power, organized to undercut the protections of the law. Using the emerging anti-communism of the Cold War, they were successful in their attacks on the labor movement, and particularly successful against unions led by Communists or socialists. A Republican Congress passed the Taft-Hartley Act amending the NLRA over President Harry Truman's veto in 1947.

The Taft-Hartley amendments, however, did not change the declaration of policy in favor of equality of bargaining power, or collective bargaining. Instead, they introduced the basis for turning the law against workers and the labor movement: they created an internal tension within the law, between realizing the collective rights of workers to protect their interests by forming and joining trade unions with equality of bargaining power, and the individual's right not to act in concert with anyone. This undermined the solidarity of the unions.

The Taft-Hartley amendments declared the right of workers to join or not to join unions. It became an unfair labor practice under section 8(a)(3) for employers to encourage or discourage union membership. Union leaders had to

sign non-communist affidavits, and neutrality was abrogated since employers now had the right "express their opinions" against unions during organizing drives. Secondary boycotts were banned. Most importantly for purposes of this article, the Taft-Hartley amendments outlawed "closed shops" and limited "union shops"[3] to those states where it was lawful to require union membership as a condition of employment.[4] Closed and union shops were outlawed in all right-to-work states, despite the proviso in 8(a)(3) of the Act which permitted collective agreements to include clauses which required an employee to be or become a member of the union as a condition of employment, otherwise known as union security clauses.[5]

States that passed laws prohibiting such union security clauses in collective bargaining agreements became known as "right-to-work" states. However, nothing about these laws gives anyone the right to work.

Racism and anti-communism played a key role in the passage of these laws. One of the early proponents of these laws, Vance Muse, was a racist right-wing leader of the Christian American Association. Prior to his "right-to-work" efforts he opposed women's rights, child labor laws, racial integration and Franklin Roosevelt's New Deal programs. Using support of business leaders he railed against unions and union security clauses with blatant appeals to racism. He is reported to have said of closed or union shops: "From now on white women and white men will be forced into organizations with Black African apes who they will have to call brother or lose their jobs." Appeals to racism were effective, and by the end of 1947 fourteen states had passed right-to-work laws.[6] Another supporter of right-to-work laws was Fred Koch, the father of David and Charles Koch and a supporter of the John Birch Society.

Right-to-work laws were opposed by such leaders as Martin Luther King, Jr., who said:

> In our glorious fight for civil rights, we must guard against being fooled by false slogans, such as 'right to work.' It is a law to rob us of our civil rights and job rights. Its purpose is to destroy labor unions and the freedom of collective bargaining by which unions have improved wages and working conditions of everyone…. Wherever these laws have been passed, wages are lower, job opportunities are fewer and there are no civil rights.[7]

Right-to-work laws undermine equality of bargaining power and promote income inequality

In right-to-work states, when a union is certified as the exclusive bargaining representative of all the workers in a workplace, the union owes a duty of fair representation to all the employees, and is required to negotiate on behalf of all workers, as well as accept and adjust worker grievances under the contract. Paying union dues is voluntary, yet union and non-union members alike enjoy the benefits of the union contract.

This encourages people to be "free riders" because they get the benefits of union membership without paying for them. The resultant decrease in membership leads to depletion of union coffers and resources. Unions need resources to service members and those covered by the collective bargaining agreement, as well as to ensure that workers have a meaningful voice in the workplace. Without resources, the union cannot pay the costs of processing grievances to arbitration when the collective bargaining is violated; cannot build a strike fund to insulate workers from harm should they need to strike; cannot engage in public relations campaigns in support of their contract demands; and cannot organize more workers in the industry into the union, thus promoting the type of wage stabilization which accompanies "union density." When the union loses resources, it soon loses power at the bargaining table and workers lose the equality of bargaining power the NLRA was designed to achieve.

This weakening of the union leads into a downward spiral where the union members who have voluntarily joined and paid dues logically question whether they are getting anything in return for their dues. Sooner or later the workers see no reason to belong to a very weak union which does not have the power to protect their interests. The result is either a move to decertify the union or representation by a union which by virtue of having no power cannot stand up for the workers

This result is, of course, what management wants. This is why business interests are so heavily invested in promoting right-to-work laws throughout the country and why union leaders refer to these laws as "right-to-work-for-less" laws.

The initial legal challenge to right-to-work laws

Legal challenges to right-to-work laws began in the late 1940s, after several states had adopted constitutional provisions which prohibited union security clauses. In 1949 the Supreme Court in *Lincoln Federal Labor Union No 19129 v. Northwestern Iron and Metal Co. et al.*[8] held that these right-to-work laws were constitutional. The Taft-Hartley amendments which said the same thing were found constitutional by extension.

Unions challenged these laws on a number of grounds: (1) that these laws abridged freedom of speech, assembly and the right to petition; (2) that they conflicted with Art. I, § 10, of the United States Constitution, insofar as they impaired the obligation of contracts made prior to their enactment; (3) that they denied equal protection of the laws and (4) that they denied due process by interfering with liberty of contract. Each of these arguments failed. Ultimately the decision characterized the right-to-work laws as anti-discrimination laws to ensure workers belonging to unions and those who did not were

treated equally with regard to their right to obtain and retain a job. Although the unions raised concerns that the laws negatively impacted their equality of bargaining power and the right of self-organization for stability of wages stated in the declaration of policy in the NLRA, the Court was unpersuaded. The opinion, written by Justice Black, did not even mention the NLRA or the Taft-Hartley amendments. Indeed, with respect to the due process and liberty to contract arguments the Court stated:

> There was a period in which labor union members who wanted to get and hold jobs were the victims of widespread employer discrimination practices. Contracts between employers and their employees were used by employers to accomplish this antiunion employment discrimination. Before hiring workers, employers required them to sign agreements stating that the workers were not and would not become labor union members. Such anti-union practices were so obnoxious to workers that they gave these required agreements the name of 'yellow dog contracts.' This hostility of workers also prompted passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts.[9]

The Court's reasoning was that if it was possible to ban yellow dog contracts, it was just as legal to ban discrimination against those who do not want to join a union.

The concurring opinion of Justice Frankfurter gives perhaps more insight into the Court's rationale for agreeing to uphold right-to-work laws. Frankfurter based his concurrence on the perceived great strength of organized labor:

> It is urged that the compromise which this legislation embodies is no compromise at all because fatal to the survival of organized labor. But can it be said that the legislators and the people of Arizona, Nebraska, and North Carolina could not in reason be skeptical of organized labor's insistence upon the necessity to its strength of power to compel rather than to persuade the allegiance of its reluctant members? In the past fifty years the total number of employed, counting salaried workers and the self-employed but not farmers or farm laborers, has not quite trebled, while total union membership has increased more than thirty-three times; at the time of the open-shop drive following the First World War, the ratio of organized to unorganized non-agricultural workers was about one to nine, and now it is almost one to three. However necessitous may have been the circumstances of unions in 1898 or even in 1923, its status in 1948 precludes constitutional condemnation of a legislative judgment, whatever we may think of it, that the need of this type of regulation outweighs its detriments.[10]

Whatever misgivings the Court may have had, at least Justice Frankfurter did not see right-to-work laws as the death knell of unions which had grown strong through militancy and support from the NLRB.

The International Labor Organization takes no position on union security but refuses to put the right to join a union on equal footing with the "right" not to join

In 1948 and 1949, the International Labor Organization (ILO)[11] in Geneva adopted two conventions which protected the right to organize and promote

collective bargaining. These conventions, 87[12] and 98[13] respectively, are silent on the question of union security. This is because the employer members of the ILO wanted the International Labor Conference (ILC) (the policy making body of the ILO) to include the language similar to the Taft-Hartley amendments regarding a worker's right not to join a union.

The report of the ILC states with respect to this issue:

> The Employers' members observed that freedom of association should be guaranteed in its negative aspect—freedom not to join—as well as in the positive aspect—freedom to establish organizations and to join them. In their opinion, the form of the international regulations should be left to be determined by the next session of the Conference. The regulations should state clearly that no employer or worker should be forced to join an industrial organization against his will. Such coercion would be contrary to the principles stated in the Convention concerning freedom of association. Consequently, Governments should take a clear decision, first, whether they intended to limit the freedom of an individual to refrain from joining any particular organization, and secondly, whether they intended to impose on the interested parties the obligation to bargain collectively, or whether they would limit all intervention to the simple fact of facilitating the conclusion for collective agreements.[14]

Moreover, several employers' members emphasized the point that not only should the international regulations expressly guarantee the liberty not to join, but they should also fully safeguard freedom of expression and provide clearly that no compulsion to organize could be exercised in regard to either workers or employers.

The workers' members pointed out that the right to organize and the right not to organize could not be placed on a footing of equality, and therefore, opposed any inclusion in the international regulations of a clause specially guaranteeing the right not to join. The international regulations, as emphasized by the French Workers' member, were intended primarily to make the principle of freedom of association effective by guaranteeing to those concerned the right to establish organizations freely and allowing them to function freely, an essential condition of collective bargaining.

The result was that Conventions 87 and 98 do not include any language about the right not to join a union. The ILO decided not to issue any convention on the issue of union security clauses, but left the matter to the member states.

Developments in the law since the 1949 challenge to right-to-work laws

Since *Lincoln Federal Union*, there have been no substantive challenges to right-to-work laws. Most challenges which have been filed raised questions of "preemption" where the right-to-work laws appeared to apply to Federal

enclaves in States which are not covered by right-to-work laws, or seeking to exempt workers in Federal enclaves, or where it was claimed the language in the statute went beyond what 14(b) prohibits.

In 1974, in *Ficek v. International Brotherhood of Boilermakers,*[15] the North Dakota Supreme Court addressed the question of whether an "agency shop" provision in a collective bargaining agreement violated the North Dakota right-to-work law. Agency shop agreements require workers who do not want to join a union in a unionized workplace to pay an "agency fee" designed to cover the union's cost of representation and administering the contract in their favor, so as not to be "free-riders." The fees are limited to the initiation fees and the equivalent to union dues. Although the State Attorney General in North Dakota had interpreted the right-to-work law, which was silent on the question of any fees to allow agency shop agreements, the Court, after considering cases from other states which had similar right-to-work laws, found North Dakota's law to prohibit agency shop agreements, viewing them as tantamount to requiring union membership.[16]

Developments in the facts and law since Taft-Hartley recognized right-to-work laws requires these laws to be considered illegal

The full impact of Taft-Hartley was not felt immediately, but the assault on unions in the United States has been unrelenting since at least the 1970s and the advent of neo-liberal globalization, which has among its pillars de-unionization and casualization of work. In many instances, especially when the NLRB had a majority of Republican appointees, the NLRB issued decisions which have elevated the individual rights of workers not to join unions over the collective needs for solidarity of the workers, using those portions of the Taft-Hartley amendments which introduced those individualist notions into the NLRA. Those offering "union avoidance services" have become very wealthy. Managements do not fear committing unfair labor practices given the limited remedies available to workers.

Internationally, the law has developed since 1947. The right of workers to form and join trade unions to protect their interests is a universal human right recognized in both human rights and labor law and is binding on all states.[17]

Consider the following: The Universal Declaration of Human Rights requires all governments to work towards achieving the rights stated in the Declaration.

Article 23 of the Universal Declaration states:

(1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favorable remuneration ensuring for himself (and herself) and his (or her) family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his (or her) interests.

The right of everyone to form and join trade unions is for the purpose of protecting their interests. The "protection of interests" language in the declaration has substantive meaning. Trade unions must be treated under law in a manner which enables people who join together in trade unions to be actually able to protect their interests, so as to achieve such rights as favorable remuneration and conditions of work and ensure an existence worthy of human dignity.

The Universal Declaration was the basis for two Human Rights treaties which provide more specifics to rights contained in the Declaration. These treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). In 1992 the United States ratified the ICCPR. The United States has signed but not ratified the ICESCR.[18]

The ICCPR at Article 22 reiterates that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his (or her) interests. The only restrictions on the right are those which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Under the ICCPR, any restrictions on trade unions must be necessary to a democratic society. Necessity is a high bar. Trade unions are one of the major building blocks of a democratic society. As such there can be no necessity for this legislation which is aimed at weakening the ability of people to protect their interests by voting for a union.

The ICESCR has similar language. Article 8(a) ensures "the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests." The ICESCR also has that high bar for restrictions on organization of trade unions.

As human rights norms have developed, so have labor rights norms which protect the rights of unions, freedom of association and collective bargaining. As noted above, in 1948 and 1949 the ILO issued Conventions 87 and 98 respectively. These conventions protect the right to organize and to collective bargaining. The ICCPR and ICESCR at Article 22(3) and Article 8(3) integrate the provisions of ILO Convention 87 into these human rights treaties. This subsection states that no state that has ratified Convention 87

may pass legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Although the United States has not ratified either Convention 87 or 98, given their universality, they should be considered binding as customary international law. In fact, in 1998 the ILO issued the Declaration of Fundamental Principles and Rights at Work (FPRW) which gave special status to "core labor" standards which members of the ILO were bound to observe and report progress on to the ILO regardless of ratification. Conventions 87 and 98, the rights to organize and to collective bargaining, are part of the core labor standards with this special status. United States membership in the ILO requires compliance with these conventions.

Therefore, reading the ILO Convention 87 together with subsection 3 of Article 22 of the ICCPR and subsection 3 of the ICESCR, no state may be allowed to pass a law which prejudices the guarantees provided for in Convention 87. Right-to-work laws prejudice workers' rights under Convention 87 and the above-described human rights instruments.

Right-to-work laws prevent unions from fulfilling their duty to protect the interests of workers. Laws aimed at weakening trade unions so as to prevent them from protecting workers interests should therefore be considered illegal.

Conclusion

Republican-controlled state governments in both Michigan and Indiana passed right-to-work laws in 2012 despite massive protests. We are seeing a push for more state governments in northern industrial states, especially those with Republican governors and legislatures, to pass right-to-work laws. These laws are attacks on the right of workers to organize. They are being introduced at a time when the percentage of unionized workers is lower than it was in 1916. Justice Frankfurter's rationale for his concurrence is no longer viable. The statements of policy in the NLRA of promoting equality of bargaining power and collective bargaining have been undermined with increasing right-to-work laws. Unions need to evaluate the developments in the law, including international law, since the passage of Taft-Hartley and place challenging right-to-work laws in the context of a broader strategy of rebuilding the trade union movement, and to develop challenges to these laws.

NOTES

1. 29 U.S.C. §151 (1970).
2. *See*, Dale E. Good, *Some Effects of the Taft-Hartley Act,* 47 U Illinois Bulletin, Institute of Labor and Industrial Relations 22, n. 18, Oct. 1949.
3. A closed shop is a shop in which persons are required to join a particular union as a precondition to employment and to remain union members for the duration of their employment. It differs from a union shop, in which all workers, once employed, must

become union members within a specified period of time as a condition of their continued employment. In non-right-to-work states, union shops are allowed where members of the bargaining unit negotiate contracts with union shop clauses.

4. 29 U.S.C. §164 (b) (1958).
5. The proviso in section 8(a)(3) reads:
   That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization.
6. Until 2012 there were 24 states that established right-to-work by state constitution or legislation: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Most of them became right-to-work states before the 1970s. In 2012, Indiana and Michigan joined the ranks of right-to-work states bringing the total up to 26.
7. Martin Luther King, Jr., speaking on right-to-work laws in 1961.
8. 335 U.S. 525 (1949).
9. *Id*. at 537.
10. *Id*. at 538, 547-548.
11. The International Labor Organization (ILO) was created as a part of the Treaty of Versailles which ended World War I. The ILO adopted a structure that included representatives of government, business, and labor, allowing it to adopt international standards that would be accepted by everyone.
12. Convention 87 protects the right of freedom of association to form and join unions without restriction. It further guarantees *inter alia* the right of workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.
13. Convention 98 affords protection to workers against acts of anti-union discrimination, including unjust dismissals, suspension, transfer and demotion of workers by reason of their trade union membership; it affords protection to workers' and employers' organizations from acts of interference against each other and recognizes the collective bargaining rights of workers. The Convention requires member states to take appropriate measures to encourage and promote collective bargaining between workers' organizations and employers or employers' organizations and workers' organizations in order to regulate the terms and conditions of employment by means of collective agreements.
14. Third report of the Committee on Freedom of Association and Industrial Relations., Appendix XI at 489, Record of Proceedings, International Labour Conference (31st: 1948) *available at* http://www.ilo.org/public/libdoc/conventions/Fundamental_Conventions/Convention_no._87/87_English/09616(1948-31)Appendix_XI.pdf.
15. 219 N.W. 2d 860 (1974).
16. There are several cases which have whittled membership in unions to its "financial core." *See* NLRB v. General Motors Corp., 373 U.S. 734 (1963) and Communications Workers of America v. Beck 487 U.S. 735 (1988). In *Beck* the court defined the financial core to be those costs germane to collective bargaining, contract administration and grievance adjustment and did so for the purpose of saying that agency fees could not exceed that amount. The most recent Court decision representing a challenge to right-to-work laws was issued on January 17, 2013 in *Sweeney v. Daniels*, 2013 WL 209047 (N.D.Ind.). This case addressed a challenge to Indiana's right-to-work law passed in early 2012. The Indiana law outlawed any requirement that any worker be required to pay an agency fee. The case unsuccessfully raised equal protection challenge to the exemption of building

trades workers from the law. It deferred any state constitutional challenge to the state court.

17. The next section of this article is taken from a statement written by this author on behalf of the International Commission for Labor Rights (ICLR). The statement was sent to Michigan lawmakers when they were considering the Michigan right-to-work law in December 2012. The thrust of the argument is that it is important to challenge right-to-work laws in light of developments in international labor and human rights law.

18. Even though the United States has not ratified the ICESCR there are two reasons why the United States is bound by its provisions. (1) Under the doctrine of *pacta sunt servanda* a country which has signed a treaty is bound by its provisions until such time as it is repudiated (*see* Vienna Convention on the Law of Treaties) and (2) At present 160 countries have ratified this Covenant, such that the provisions are customary international law and binding regardless of ratification.

Customary international law is that law which is so widely accepted that the law is binding on all countries. *See* Sarei v. Rio Tinto 456 F.3d 1069 (9th Cir. 2006), in which the UN Convention on the Law of the Sea (UNCLOS), ratified by at least 149 countries, was considered customary international law.

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David W. Frank

INHUMAN VIOLENCE: INDIANA'S NINETEENTH CENTURY VIEW OF PHYSICAL PUNISHMENT IN PUBLIC SCHOOLS

I. The spirit of the law

> "Hence the spirit of the law is, and leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace."[1]

A. Stuart's rebellion

William Z. Stuart was never a progressive man. A former prosecutor, he quit a respectable public position mid-term due to dissatisfaction over pay. He joined an industrial company upon leaving and there helped the business dodge property taxes, duck extortion convictions, and disclaim liability for destroying animals including a horse, an ox, and an "old heifer." With Stuart's aid, the company also avoided paying damages for crushing a child's leg and killing a man.[2]

But Stuart refused to facilitate one particular injustice he found in the state of Indiana. The continued existence of physical punishment in public schools baffled him. "In one respect, the tendency of the rod is so evidently evil, that it might, perhaps, be arrested on the ground of public policy," Stuart, Indiana's thirteenth supreme court chief justice, wrote in 1853 before leaving to represent the Toledo, Wabash, and Western Railway Company. This opinion, along with a second he delivered later that year, remain the most humane positions the Indiana Supreme Court has ever taken on physical punishment in public schools. Calls for basic decency made more than 150 years ago in these two cases, *Cooper v. McJunkin*[3] and *Gardner v. State*,[4] remain unanswered.

In *Cooper*, Stuart attacked the "inhuman violence"and "inhuman beating"[5] of a student by his teacher. While the teacher protested that educators like himself must "moderately correct" children in an effort to maintain "the good government of the school," Stuart rebuked the use of physical punishment in public schools entirely more than a decade before any state in the nation enacted such a ban. Noting that "[t]he public seem to cling to despotism in

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the government of schools which has been discarded everywhere else,"[6] he set a standard for reviewing the legality of the punishment capable of criminalizing nearly any use of it. "[T]he cause must be sufficient, the instrument suitable to the purpose; the manner and extent of the correction, the part of the person to which it is applied, the temper in which it is inflicted, all should be distinguished with the kindness, prudence, and propriety which become the station."[7]

Six months later, the chief justice encouraged more active reform in *Gardner*. In this case, a teacher whipped, punched, beat, and kicked a student who had misspelled the word "commerce."[8] Although the conviction was reversed on a technicality,[9] Stuart took the opportunity to reiterate his doctrine that courts must "hold a strong and stern hand over teachers" so that "it becomes a matter of public policy to punish the offender."[10] The directive came with a warning. An unjust system of physical punishment, he said, "stimulate[s] the aggrieved to seek personal redress."[11] However, rather than heed the message of these opinions, Indiana's politicians and courts began to compile defenses against the humanitarian charge William Stuart led in 1853.

B. Indiana at a crossroads

Indiana today is one of only nineteen states inside one of the few industrialized democracies on earth still permitting physical punishment in public schools.[12] The only other U.S. states allowing the practice are concentrated in the South and are located nowhere in the Northeast, Pacifist West, and, with the exception of Indiana, the Midwest.[13] The retention of the punishment by these nineteen states keeps the U.S. outside a community of more than half the world's 195 nations banning this inhuman violence against children.[14]

More than 500 of the over 223,000 public school children in America suffering physical punishment each year are students in Indiana, according to the most recent comprehensive data on the punishment.[15] Although states in the southern United States implement the vast majority of these punishments, Indiana is currently the top non-Southern state for the practice. Indiana's use of physical punishment trailed only New Mexico and Ohio in the most recent data, but both of these states have since banned the practice. All other non-Southern states that allow physical punishment trailed Indiana in the annual number of schoolchildren struck, including Idaho (111), Kansas (50), Arizona (16), Colorado (8), and Wyoming (0).[16]

Indiana allows public school officials to physically punish children with a wide variety of violent acts. Officials may strike, slap, paddle, whip, and flick students. They may deliver blows to the legs, buttocks, arms, and faces of these children. They may use instruments including boards, belts, hands, switches, and extension cords. Due to Indiana's lax standard of oversight,

such violence is theoretically possible at all public schools in the state.[18] Indiana schools stand *in loco parentis* to the students and may take "*any action* that is reasonably necessary" to operate the school.[19] The ability to use this physical punishment is unlimited until a court finds a challenged variant of the violence unreasonable.[20] As shown below, it is a standard that rarely proves to be an obstacle for schools.

This article will discuss the state of the legal regime operating to sanction the dehumanizing violence Indiana public schools may exact upon children. Part II examines the statutes and policies that enable schools to wield this violence. Part III shows how courts base their sanctioning of this violence on a callous view of "reasonableness" and outdated opinions from the nineteenth century. Part IV looks at recent reform efforts encouraging Indiana to join the thirty-one other states and more than 100 countries that no longer strike children. Part V proposes an educational campaign to demonstrate the problems of physical punishment and a recalcitrant state that has shown no intention to change its stance without pressure from an engaged public.

II. Resorting to the rod

> "The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government . . ."[21]

A. The irresponsibility of current Indiana statute

Indiana statute provides students little protection from physical violence when the perpetrator is an employee of a public school corporation. Under state law, it is public school officials, and not children, who are afforded the greatest protection concerning acts of school-sanctioned violence supposedly provoked by student misbehavior.[22] This is true in cases of even the most minor offense, whether it be the utterance of a swear word[23] or public display of affection.[24]

The power Indiana law affords school officials to punish is awesome. The statute enabling corporal punishment "does not . . . [l]imit the right of the parent . . . to use reasonable corporal punishment while disciplining a child,"[25] and, significantly, school officials "(1) stand in relation of parents to the students of the school corporation, (2) have the right to take any disciplinary action necessary to promote school conduct . . . and (3) have qualified immunity with respect to a disciplinary action taken."[26]

The qualified immunity of schools officials who carry out physical punishment extends to nearly any act a given school corporation chooses not to prohibit. The act need only be reasonable and administered in good faith in the eyes of a court.[27] Employees are not even liable for an injury when they are considered to have acted reasonably under their respective school corporation policies.[28] Indiana absolves public school officials of liability

for pain, suffering, and bodily damage to children as long as the governing discipline policy is adequately vague.

Conversely, Indiana schoolchildren have no right to know for what specific reasons they may be subject to physical punishment. While school corporations must give "general publicity to the discipline rules within a school,"[29] this requirement "may not be construed technically and is satisfied if the school corporation makes a good faith effort to disseminate to students or parents generally the text or substance of a discipline rule."[30] Students, as a result, are put on notice that they may be beaten when the school communicates to parents—in such a manner and to such an extent that it chooses—the general thrust of the corporation's disciplinary rules.[31]

B. The reign of individual school policies

School corporations embracing physical punishment generally give few details about their policies' rationale or processes. Indiana statute, as indicated above, sets out few requirements for schools as long as a court deems the resulting discipline reasonable. Because of this, many of Indiana's 293 public school corporations say nothing more about the discipline than that they retain the option of using it. Common statements in school corporation policies acknowledge that physical punishment is one of many disciplinary "devices available,"[32] that it is a discipline enforceable by a "principal or his/her designee,"[33] or that is an instrument used to "ensure" a proper learning environment.[34]

Even the few school corporations that lay out some minimal rationale or procedure for their physical punishment policy tend not to place any real limitation on the punishment. The secondary schools of Crothersville Community Schools, for instance, may physically punish students with "spanks" or "swats" for a broad range of offenses including use of the "F-word," when "other reasonable disciplinary alternatives have failed," when "learning must be immediate," when "the well-being of others is jeopardized," or in lieu of suspension.[35] The student handbook describes the procedure for the punishment: "The principal can administer corporal punishment with either the classroom teacher or the administrative assistant serving as witness."[36] This type of administrative self-protection is a common feature of schools that provide some reasoning for their policy.[37] Blackford County Schools, for instance, mandates that, "The administering of corporal punishment must be by a teacher or principal in the presence of a school official who must be informed of the reason for the punishment beforehand in the presence of the student."[38] Clay Community Schools uses the same basic language.[39]

Again, however, most school corporations merely list physical punishment as a variety of optional disciplines for one of many offenses without provid-

ing any substantive explanation of how or why physical punishment will be inflicted upon students. For instance, the policy of the secondary schools of the Argos School Corporation states,

> Reprimand, corporal punishment, referral to special personnel in schools (counselor, principal), parent conferences, in-school suspension, detention, suspension, and expulsion are courses of action available to school personnel in dealing with pupils involved in school discipline problems . . . [A]ll of the above techniques may be used to deal with improper types of behavior.[40]

The student handbook of Rising Sun-Ohio County Community Schools likewise addresses physical punishment, pronouncing that "the following methods are among those forms considered as 'discipline': conferences, detention, reduction of grades, assigning additional work, restriction from extra-curricular activities, corporal punishment, and any other action that is reasonably necessary to carry out or prevent interference with an educational function or school purpose."[41]

Even more broadly, Barr-Reeve Community Schools permits any junior or senior high staff member to "take disciplinary action to ensure a safe, orderly, and effective educational environment" including actions ranging from a simple verbal warning to physical punishment.[42] Covington Community School Corporation allows physical punishment, along with other disciplines such as trash pick-up, for common offenses including failure to follow classroom directions, swearing, and public displays of affection.[43] The Carroll Consolidated School Corporation gives similar license to its secondary school staff: "A breach of discipline may result in reprimand, corporal punishment, probation, referral to special personnel in the school, parent conferences, detentions, night school, isolation, suspensions, expulsion, or any other consequence deemed necessary by the administration."[44] Randolph Central School Corporation's high school policy is less equivocal: "Disciplinary actions will include legal action, corporal punishment, in-school suspension, detention, out-of-school suspension, and expulsion."[45] Meanwhile, the school district of Martinsville simply asserts that an elementary "school principal or his/her designee has the authority, by law, to administer corporal punishment to students."[46]

Certain Indiana school corporations offer explanations of physical punishment procedures that are even more vague. Crawfordsville Community Schools, for example, allows physical punishment "as defined by local School Board policy," yet, confusingly, provides no such school board policy.[47] Mount Vernon Community Schools declares physical punishment to be an option in two of its elementary schools,[48] but does not provide for it at a third.[49] Parents of elementary school children at Wabash City Schools who do not wish for their children to be struck may "notify the building principal, in writing, of that desire" but are not informed of the effect of the communication.[50] Luck-

ily for Wabash City schoolchildren, however, "Striking any part of the head of the student is strictly forbidden."[51]

While school corporations word, frame, and excuse their policies regarding physical punishment differently, the effect is generally the same. Officials at these Indiana institutions may inflict severe physical pain on a child for the smallest of infractions while affording such a student little warning of a potential beating and no route to escape the suffering to be endured.

C. Worse than dogs—Schoolchildren under Indiana Law

Indiana's corporal punishment statute provides no mandatory limit to or procedure for the infliction of physical punishment and pain on children in public schools. This policy conflicts with how the state generally treats human beings subjected to violence elsewhere. Touching a person in a "rude, insolent, or angry manner" satisfies the elements of a Class B misdemeanor battery.[52] A touch that causes bodily injury is a Class A misdemeanor.[53] Such battery is generally a felony where the perpetrator is over age 18 and the victim is under the age of 14.[54] However, when this felony materializes as "corporal" punishment in an Indiana schoolhouse, the crime[55] is absolved[56] as discipline.[57]

Educators have the power while standing in loco parentis to students to take "any action that is reasonably necessary"[58] to carry out an "educational function."[59] This policy in and of itself places few boundaries on violence.[60] An educational function by statutory definition means only that which a school does while "carrying out school purposes."[61] The statute reiterates the power of principals and their designees[62] to administer physical punishment when they deem it to be reasonably necessary.[63] This is a particularly great power for principals because principals are authorized to write student conduct codes for their schools and, hence, punish as they please under a system of governance they themselves create.[64]

In contrast to its near-silence on the disciplinary treatment of schoolchildren, Indiana law articulates clear standards for the physical protection of animals.[65] An Indiana anti-animal cruelty statute prohibits physical punishment to vertebrate animals it would otherwise allow if the abuse victim was a schoolchild.[66] Under this statute, a person who beats an animal by "unnecessarily or cruelly"[67] striking it in a manner to cause[68] "severe" pain or injury[69] is guilty of a Class A misdemeanor. The basic requirement that physical punishment be both (1) necessary and (2) avoid severe pain sets vertebrate animals apart from Indiana schoolchildren under the current legal regime.[70]

A person who strikes a vertebrate animal can only argue that the punishment was necessary for "reasonable training or disciplinary techniques."[71] This gives courts, and not the disciplinarians themselves, the primary re-

sponsibility of judging whether the purpose for which the punishment was initiated was justified. Because contact with the animal must be part of some defensible training method, any violence must be shown to be done for some demonstrable end. As a result, these factors lead courts to construe the right to physically discipline an animal more narrowly than the right to physically punish a schoolchild.[72]

Indiana's corporal punishment statute gives courts less latitude. They may only determine what, if any, process, a schoolchild facing physical punishment may receive and what, if any, measurable limit a school corporation must put on the amount of violence it inflicts upon the child. Unfortunately, courts continue to find that reasonable punishment allows the same level of damaging violence approved of in the nineteenth century.

III. A system of petty tyranny

> Such a system of petty tyranny cannot be watched too cautiously nor guarded too strictly. The tender age of the sufferers forbids that its slightest abuses should be tolerated."[73]

A. Federal court severity

Indiana children subjected to physical punishment in public schools have no judicial remedy outside of state courts. Rather than guard students from abuse, the federal system has exempted children from protection in favor of shielding schools. The refusal of federal courts to address this system of state-sanctioned violence strips children of judicial recourse in the face of very real threats of danger.

The U.S. Supreme Court laid a near-complete bar to student protection from the abuses of physical punishment in the leading federal case on the issue, 1977's *Ingraham v. Wright*.[74] Here, James Ingraham, an eighth-grader boy, and Roosevelt Andrews, a ninth-grader, sued Dade County, Florida school officials for cruel and unusual punishment and loss of liberty following their school's attempt to discipline them.[75] Because he had been "slow to respond to his teacher's instructions," Ingraham was hit more than twenty times so severely he suffered hematoma, required medical attention, and was kept out of school for several days.[76] A principal and two assistants inflicted a painful black and purple wound filled with "oozing" fluid[77] "that required Ingraham be prescribed cold compresses, a laxative, sleeping and pain-killing pills, and ten days of rest at home."[78] Andrews was struck by an assistant principal on the back, neck, wrist, backside, and arm so hard that it "once depriv[ed] him of the full use of his arm for a week."[79] The injuries required a medical prescription for the pain[80] and swelling[81] caused by the blows of his punishment.

The Court's reaction to these beatings had grave results for children required to attend Indiana public schools.[82] In its opinion, the majority took the

constitutionally implausible stance[83] that, "no matter how severe," physical punishment of schoolchildren cannot be "the subject of the protections afforded by the Eighth Amendment" nor serve as the basis for the contention of students that they are "constitutionally entitled to a hearing of any sort before beatings can be inflicted on them."[84] Instead, the *Ingraham* Court concluded that a student is afforded adequate process for excessive or wrongful punishment "as long as he can later recover damages."[85]

The Court's diminished view of children subsequently guided the most prominent Indiana federal court decision on the practice.[86] In 1986's *Cole v. Greenfield-Central Community Schools*, an emotionally handicapped elementary school student complained to the District Court of Southern Indiana that school officials had struck him three times and, in a separate incident, taped his mouth shut.[87] The discipline resulted from the plaintiff's "disruptive activities" in school, including hitting other students, rude behavior, and repeatedly interrupting class.[88]

The Indiana district court concluded that school officials did not violate the boy's due process rights under *Ingraham* because their actions were reasonable within the bounds of their common law privilege to punish students.[89] To support the stance that educators have the "general authority to impose corporal punishment upon students within their ward," the court relied upon Indiana state cases from 1963 and 1888.[90] The Indiana Supreme Court, in 1963's *Indiana State Personnel Board v. Jackson*,[91] found that a teacher had the right to whip a 14-year-old developmentally disabled girl institutionalized in a state facility because she had used abusive language in class.[92] In 1888's *Vanvactor v. State*[93] (discussed below and upheld as good law in 2008),[94] the state supreme court licensed the actions of a teacher who whipped a student "on the back part of his legs between his body and the knee-joints."[95] Drawing from the reasoning of these cases, the *Cole* Court was able to find in the case before it that, "Under these circumstances, the punishment was clearly not excessive given the plaintiff's precipitating conduct and thus was well within [a school official's] common law privilege."[96]

Because of federal courts' extreme view of physical punishment in schools, Indiana students are left to search for protection from state courts. The Indiana judiciary, however, offers no refuge from such punishment and gives little hope for recourse for abuse.

C. The lash of nineteenth century precedent

Nineteenth-century Indiana state cases of physical punishment in public schools are relevant as more than mere testaments to the violence schoolchildren have suffered in the past. They are important because in many instances they remain good law and continue to protect an expansive

arena of physical violence in which school officials may freely roam.[97] The result is a state court system that is rarely willing to stay the blows of the schoolmaster's rod.

In the first of three nineteenth century physical punishment cases recently cited as good law in Indiana,[98] 1879's *Danenhoffer v. State*, 11-year-old Henry Roell missed one day of school to serve as a pall-bearer.[99] He returned the following day but left early out of fear he might be whipped when he delivered his absence slip.[100] The boy's suspicions were correct. Despite pleas from the boy's father, the school superintendent whipped the boy the next day.[101] Nevertheless, the Indiana Supreme Court reversed the superintendent's assault and battery conviction, finding "no evidence in the record, as we read it, which tends to show that the boy, Henry Roell, was whipped by the appellant for any other cause or reason than his stubbornness . . . [n]or do we think the evidence tends to show that the boy was whipped by the appellant in anger or with much severity."[102] The boy, moreover, "deserved" to be whipped for his disobedience.[103]

Likewise, in the second of three nineteenth century state cases recently cited as good law,[104] 1888's *Vanvactor v. State*,[105] a teacher whipped[106] a student with a three-foot-long switch for obstinacy, stealing, and making "antic demonstrations."[107] Again reversing an educator's assault and battery conviction, the Indiana Supreme Court found that a child enrolled in the state's public schools cannot expect a "painless ceremony" of discipline because "[t]he legitimate object of chastisement is to inflict punishment by the pain which it causes, as well as the degradation which it implies."[108] Because the student had engaged in actions that warranted some punishment, the court found the student could not object to any punishment found reasonable by the court. "The statement of [the student] that [his teacher] laid on the blows hard, 'as if he was angry,' was, when explained and taken in connection with other evidence as stated, too trivial to materially conflict with the conclusion thus reached."[109]

The third nineteenth century case[110] recently cited as good law in Indiana,[111] 1894's *Marlsbary v. State*, solidified the cruel jurisprudence state courts carried into the 21st century. This jurisprudence continues to be based on a test of "reasonableness," which, in practice, provides no discernible standard by which to assess the propriety of physical punishment of schoolchildren. The facts and analysis of *Marlsbary* bear this out.[112] In the case, a school teacher was convicted of assault and battery after he "inflicted corporal punishment upon one of his pupils" who had broken some school rule unidentified by the court.[113] The Indiana Court of Appeals reversed the conviction, however, because "the offending pupil admitted the infraction" and the violence had been inflicted in an unspecified, though assuredly, "reasonable manner."[114]

Further, "In addition to the general presumption of innocence, [the teacher] had in his favor the presumption of having done his duty."[115]

The nineteenth century presumption that when school officials physically punish children they do so with reason and propriety continues into the 21st century. Courts still do not scrutinize the violence of officials or acknowledge the continued suffering of students. Pain is ignored and the perception of order is privileged. The cry of the student is merely a disturbance.

D. The sting of modern state cases

Indiana courts, in fact, stand on the precedent and reasoning of nineteenth century cases even today. Based on this outmoded thinking, the state judiciary continues to construe the concept of an educator's privilege to mean that great physical harm may be inflicted upon a student with little cause, explanation, or process. This regime of abuse, as shown above, was not created in a vacuum. It was shaped by the spirit of nineteenth century cases reflective of reactionary views toward children's rights common in the state today.[116]

The Indiana Supreme Court reestablished its diminished view of children in the 21st century in the state's leading case on the physical punishment of children. *Willis v. State* outlined the expansive power of parents and authorities standing *in loco parentis*, such as school officials, to beat children in their care. The subject of the case, 11-year-old J.J. Willis, had presented lash-shaped bruises inflicted by his mother[117] to a school nurse who, in turn, called child protective services.[118] The boy, afraid and in pain,[119] had come to her with a question: Is it abuse to be whipped with an extension cord?[120] Prosecutors asked the same question, the Indiana Supreme Court heard arguments, and, in 2008, returned an answer: No.[121] The court in *Willis* found, instead, that an adult, including a parent or public school official, with parental privilege over a child[122] may make a child endure severe physical punishment not excluding seven whippings with a belt or extension cord.[123] The punishment need only be "reasonable,"[124] the court said—thus declaring that whipping a child with an extension cord may, at times, be reasonable. The suffering J.J. Willis endured did not move the court. "We find nothing particularly degrading about this manner of punishment," it said.[125]

Pain or injury alone is not enough to sustain a conviction of child battery, according to the state supreme court.[126] Rather, such behavior is within the bounds of the parental privilege to discipline.[127] This position is significant in the case of students who suffer physical punishment because Indiana's aforementioned corporal punishment statute gives both parents and school officials the parental privilege to physically punish children. The law, explicitly, "does not . . . [l]imit the right of the parent, guardian, or custodian of a child to use reasonable corporal punishment while disciplining a child."[128] School officials

are granted the same, if not a greater, privilege because "school corporation personnel stand in relation of parents to the students of the school corporation . . . and have qualified immunity . . . if the action is taken in good faith and is reasonable."[129] The power granted to the parent to strike a child is thus the same power a public school assumes the moment a child walks through the doors of a schoolhouse.[130]

Again Indiana law more strongly ensures the humane treatment of quadrupeds than it does its own children. In *Price v. State*,[131] decided just one year after *Willis*, a man acknowledged whipping his pet dog about seven times.[132] As in *Willis*, the defendant claimed Indiana permitted the violence as a "reasonable" form of discipline.[133] Unlike in *Willis*, however, the punishment left no visible injuries on the victim's body.[134] However, the court rejected the defendant's argument.[135] It offered little explanation for its decision, but simply stated that "a person of ordinary intelligence would know that these actions are not 'reasonable' acts of discipline or training."[136]

The Indiana Court of Appeals again maintained this tradition authorizing the corporal punishment of schoolchildren in 2011. Despite acknowledging that a "protruding tongue" is a condition of Down syndrome,[137] the court in *Barocas v. State* sided with a teacher who took violent action against a 10-year-old student with the chromosomal disorder[138] who, as she often did, had her tongue sticking out of her mouth.[139] On the day of the incident, Barocas had grown tired of telling the girl to put her tongue back in her mouth and struck the girl on the tongue, causing her to "wail" and cry.[140] Despite this, the Indiana court reversed the teacher's battery conviction.[141] The court found the force Barocas used to be "reasonable."[142] Relying both on *Vanvactor*[143] and *Willis*,[144] the court found Barocas' behavior "cannot be characterized as cruel or excessive . . . nor was it egregious in any way."[145] Instead, the opinion criticized the prosecution for addressing the girl's cries of pain, because "the reasonableness of force in this context cannot be determined by the victim's reaction to it."[146] This is a curious statement for at least two reasons. First, the appeals court had decided only a few years before in the animal abuse case of *Price v. State* that where the defendant used "enough force to make the dog scream loudly," there was sufficient evidence to convict.[147] Therefore, if it is a dog and not a student who cries out in pain, such a cry is evidence of abuse. Second, the *Barocas* court's opinion relied on its 2008 school physical punishment case, *State v. Fettig*, which used the three nineteenth century cases discussed above to justify an educator's privilege to strike students.[148] In *Fettig*, the court excused the actions of a gym teacher who hit or grabbed the face of a student so hard that it caused the student to report the incident to the local police.[149] The child's reaction to the violence in this case did not move the court. "Having reviewed the longstanding precedents of [1879's]

Vanvactor, [1888's] *Danehoffer*, and [1894's] *Marlsbary*, we note that they demonstrate the ability of the judiciary to determine whether a teacher has acted within the bounds of her authority to discipline when striking a student. Considering the facts here . . . we conclude that the trial court did not abuse its discretion by dismissing the information charging Fettig with battery."[150] Therefore, the *Barocas* court justified its refusal to take into account the cries of student based on a nineteenth century view of the authority of a teacher to strike a student.

As evident from the state's case law, access to justice for Indiana schoolchildren facing physical punishment remains virtually unchanged since the 1800s. The state continues to give school officials the power to strike their students as long as the behavior can be construed as "reasonable." Securing this blanket cover for punishment is not difficult. Courts will interpret physical punishment as reasonable if such punishment was preceded by some perceived provocation by the student. As a consensus gathers against this violent tradition, Indiana must move forward with an educated policy of discipline that refuses to condone the acts of school officials who insist on attacking the children in their care.

IV. Striking down the ferule

> "It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government, only the resources of his intellect and heart. Such is the only policy worthy of the state, and of her otherwise enlightened and liberal institutions."[151]

A. Recent improvements and local reform

Reformers have made some progress in the past decades scaling back corporal punishment, a practice a near-consensus of interested parties in the medical,[152] psychological,[153] humanitarian,[154] civil rights,[155] and professional[156] communities consider to be as physically[157] and mentally[158] harmful to children as it is unnecessary[159] and morally inexcusable[160] in the suffering it causes.[161] The excuses for corporal punishment in schools, supported by nothing more than recitations presented as homespun wisdom or divine edict, may not withstand public scrutiny much longer.[162] The common defenses of "(1) anecdotal evidence—'I got hit when I was a kid and I turned out OK,' (2) conjecture—'If we stop hitting kids, there will be chaos in schools,' and (3) 'the Bible says so'" have been defeated[163] elsewhere.[164] Nevertheless, physical punishment remains available to disciplinarians in Indiana schools. This need not be the case, especially as many schools have already moved to voluntarily ban the practice.

Statistics and news reports indicate public school officials in Indiana and across the country are increasingly less inclined to strike students. The total number of school children nationwide subjected to physical punish-

ment dropped dramatically from about 1,522,000 in 1976 to about 223,000 in 2006.[165] In Indiana, at least a fifth of public school corporations now voluntarily ban the practice,[166] including the state's three largest school corporations[167] in Indianapolis,[168] Fort Wayne,[169] and Evansville.[170] Some school corporations, such as Crown Point Community School System[171] and Culver Community School Corporation,[172] offer strong denunciations of the practice. "If any employee threatens to inflict, inflicts, or causes to inflict unnecessary, unreasonable, or inappropriate force upon a student, s/he may be subject to discipline by this School Board and possibly criminal assault charges or be reported to authorities for child abuse," the Crown Point school corporation policy states.[173] The Culver school corporation is similarly direct: "School Board policy defines corporal punishment as the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as means of discipline. Corporation personnel shall not threaten to inflict, or cause to be inflicted corporal punishment on any student."[174] Evansville's school corporation gives an extraordinarily reasonable explanation for its nonviolent policy: "Professional staff should not find it necessary to resort to physical force or violence to compel obedience. If all other means fail, staff members may always resort to removal of the student from the classroom or school through suspension or expulsion procedures."[175] Aside from outright bans, physical punishment is on the books but not in use in some counties. Physical punishment in such places has been described by school officials as an "outdated" remedy,[176] not used in over 15 years,[177] or banned by a standing administrative directive.[218]

Unfortunately, these progressive education policies remain in the minority in Indiana. They exist in spite of, not because of, the state's view of schools' right to discipline children.

B. Proposed action

Federal and Indiana state action to eliminate physical punishment in public schools has been courageous but ultimately unsuccessful. State bills to prohibit physical punishment were introduced by Indiana representative David Orentlicher[179] in 2005[180] and 2007.[181] The bills stated simply that, "School corporation personnel may not subject a student to corporal punishment."[182] In 2011, a federal bill to sever funds to school corporations that use corporal punishment was proposed by U.S. Representative Carolyn McCarthy.[183] Though neither the federal nor Indiana measures passed, the movement against the physical punishment of students had some recent successes when New Mexico and Ohio passed bans in 2011[184] and 2009,[185] respectively.

As shown above, Indiana public schools administer physical punishment to students in a capricious manner tolerable almost nowhere else in the state's

legal system. Furthermore, a professional consensus exists testifying to the practice's harmful effects and pedagogical irrelevance. It would seem, then, that the only factors preventing a ban in Indiana are the proliferation of misinformation surrounding the efficacy of physical punishment along with deeply held beliefs as to its propriety. An education campaign by interested legal, social, political, and religious groups could correct the former issue and address latter. Only after such a campaign could a state ban likely be successfully introduced. To say that a bill crafted just carefully enough would currently survive the Indiana legislative process would be to ignore past attempts at reform in the state. Recent successful bans elsewhere have stated the same message that failed bills in Indiana have: physical punishment should not be used in schools. The campaign to end corporal punishment in public schools must therefore not be simply a strategic one, but a moral one that raises public awareness in way that generates political action.

This article, then, can do no more than offer the simple and, understandably unsatisfying, solution that a ban on physical punishment in Indiana public schools requires convincing a sizeable portion of the public that the physical punishment of school children is as needless as it is barbaric. In 2013, no serious dispute can remain over this conclusion. The state now must choose how it will react.

V. Conclusion

Indiana's public school students continue to suffer due to the state's refusal to take up Chief Justice Stuart's prescription for a more just and peaceful society. Since he made the call more than 150 years ago, thousands of students have been abused by school officials otherwise charged to protect them.

This system cannot and need not continue. Indiana remains the only U.S. state in the Midwest and one of only a few outside the South to retain corporal punishment. Violence against children in public schools is simply not acceptable. Experts confirm its pedagogical worthlessness. An uncorrupted conscience cannot but flinch at its cruelty.

In view of the growing movement against the practice, it is likely only a matter of time before Indiana puts an end to this injustice. Doing so will take the determined efforts of reformers as well as an openness on the part of current proponents. It probably will not be long. But the choice of time at which it will end is Indiana's alone.

NOTES

1. Cooper v. McJunkin, 4 Ind. 292 (Ind. 1853)
2. *See* Minde C. Browning et al., *Biographical Sketches of the Indiana Supreme Court Justices,* 30 IND. L. REV. 328, 367, 383 (1997); JEROME L. WITHERED, HOOSIER JUSTICE:

A HISTORY OF THE SUPREME COURT IN INDIANA 121 (1998); Wabash Historical Society, Wabash Railroad History, http://wabashrhs.org/wabhist.html.

3. *Cooper*, 4 Ind. at 290.
4. Gardner v. State, 4 Ind. 632 (Ind. 1853).
5. *Cooper*, 4 Ind. at 291, 293.
6. *Cooper*, 4 Ind. at 291.
7. Cooper, 4 Ind. at 294.
8. *Gardner*, 4 Ind. at 633.
9. *Id*. at 633-34 (prosecution listed only initials of defendant's first and middle name, and not his full "Christian name," and could not yet declare under statute that it did not know his full Christian name and so cure the document).
10. *Id*. at 635.
11. *Id*.
12. Global Initiative to End All Corporal Punishment of Children, *Global Progress*, http://www.endcorporalpunishment.org/pages/frame.html (last accessed April 21, 2013); *see also* The Center for Effective Punishment, Discipline and the Law, http://www.stophitting.com/index.php?page=laws-main (last accessed April 21, 2013).
13. The Center for Effective Discipline, Discipline at School, http://www.stophitting.com/index.php?page=statesbanning. The only U.S. states other than Indiana permitting the practice are: Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming.
14. Global Initiative to End All Corporal Punishment of Children, *supra* note 12.
15. The Center for Effective Discipline, *supra* note 13.
16. *Id*. Southern educators struck the following number of children during the school year: Alabama—33,716; Arkansas—22,314; Florida—7,185; Georgia – 18,249; Kentucky – 2,209; Louisiana – 11,080; Missouri – 5,159; Mississippi – 38,131; North Carolina – 2,705; Oklahoma – 14,828; South Carolina – 1,409; Tennessee – 14,868; Texas – 49,197.
17. I.C. § 20-33-8-8(b)(1)
18. I.C. § 20-33-8-8(b)(2).
19. I.C. § 20-33-8-9(a)-(b) (emphasis added).
20. I.C. § 31-34-1-15(1).
21. *Cooper*, 4 Ind. at 291.
22. I.C. § 31-34-1-15(1) ("This chapter does not do any of the following: Limit the right of the parent, guardian, or custodian of a child to use reasonable corporal punishment while disciplining a child."); I.C. § 20-33-8-8(b) ("In all matters relating to the discipline and conduct of students, school corporation personnel: (1) stand in relation of parents to the students of the school corporation; (2) have the right to take any disciplinary action necessary to promote student conduct that conforms with an orderly and effective educational system, subject to this chapter; and (3) have qualified immunity with respect to a disciplinary action taken to promote student conduct under subdivision (2) if the action is taken in good faith and is reasonable.").
23. Crothersville Community Schools, Crothersville Junior-Senior High School 2010-2011 Student Handbook, Student Code of Conduct Disciplinary Levels, *available at* http://www.crothersville.k12.in.us/index.php?option=com_content&view=article&id=98&Itemid=91 ("Use of the 'F' word" subject to "1 day OSS [out of school suspension] or corporal punishment at the parent's discretion") (last accessed April 21, 2013).
24. Covington Community School Corporation, Covington Middle School, Covington Middle School Student Handbook 2012-2013 17, *available at* http://www.covington.k12.in.us/CMS/documents/ms_handbook.pdf (last accessed April 21, 2013).

25. *See, supra* note 22, (emphasis added). *See also* Kenneth M. Stroud, *The Teacher Privilege to use Corporal Punishment,* 11 IND. L. REV. 349, 358 (1978) ("Cases involving excessive force by parents on their children are relevant here because the Indiana Supreme court has stated that although the teacher does not have precisely the same right of corporal punishment as the parent in all respects, he does have the same right as far as the quantum of force permitted.").
26. *See supra* note 22.
27. I.C. § 20-33-8-8(a)(2)-(3).
28. I.C. § 34-13-3-3(20).
29. I.C. § 20-33-8-12(a)(2).
30. I.C. § 20-33-8-12(a)(2)(B).
31. Litigation reveals some of the ways these rules were being applied. *See*: Barocas v. State, 949 N.E.2d 1256-58 (Ind. Ct. App. 2011) (special education teacher hit student, a 10-year-old girl with Down syndrome, for not controlling her protruding tongue); Vanvactor v. State, 113 Ind. 276, 278 (Ind. 1888) ("Vanvactor [the teacher] thereupon struck [the student] nine sharp blows on the back part of his legs between his body and the knee joints."); Ingraham v. Wright, 430 U.S. 651, 657 (1977) (finding constitutional the physical punishment of a student who was "[o]n two occasions . . . struck on his arms, once depriving him of the full use of his arm for a week"); Cole v. Greenfield-Central Community Schools, 657 F. Supp. 56, 61 ("Mr. John [the school principal] then paddled the plaintiff on the buttocks (in the presence of a witness), striking him three times with a paddle (24" long and 3/8 " thick)"); Indiana State Personnel Board v. Jackson, 244 Ind. 321, 325 (teacher admitted "striking the patient [an institutionalized and developmentally disabled student] with his belt twice in the class room and again with his belt two or three times in the office.").
32. Argos Community Schools, Argos Elementary School 2012-2013 Student-Parent Handbook 33, *available at* http://www.argos.k12.in.us/elementary/handbook.pdf ("Some behavior is much more serious than other behavior and requires different approaches and clearly defined actions, reprimand, corporal punishment, probation, referral to special personnel in the schools, counselor, principal, parent conferences, detention, suspension, referral to special central office personnel (pupil personnel or psychological) and expulsion are devices available to school personnel in dealing with pupils involved in school discipline problems, but not necessarily limited to only these.") (last accessed April 21, 2013).
33. MSD of Martinsville, Centerton Elementary Student Handbook 2011-2012, Authority of School Officials, *available at* http://msdadmin.scican.net/firecrackers/ ("Indiana statutes delegate specific authority and responsibility to school officials concerning the control and discipline of students. A school principal or his/her designee has the authority, by law, to administer corporal punishment to students.") (last accessed April 21, 2013).
34. Barr-Reeve Community Schools, Barr-Reeve Middle/High School 2012-2013 Handbook 13-14, *available at* http://www.barr.k12.in.us/wp-content/uploads/2011/10/Student-Handbook2012-2013_M_HS.pdf ("Any administrative staff, teacher, or other school staff member who has students under the person's charge may take disciplinary action to ensure a safe, orderly, and effective educational environment. Such disciplinary action may include, but is not limited to, the following: Verbal warning; Student–Teacher conference; Parent–Teacher conference; Change in seating assignment; Learning Packet writing assignment; Assigning additional work; Lunch detention; Referral to counselor; Rearranging class schedules; Letter of apology; Corporal Punishment; Restricting or eliminating extra-curricular activities; Removal of a student from school-sponsored transportation; Under Indiana law, a principal may require any student 16 years of age or older who seeks to enroll in school following an expulsion involving an alternative program or evening school." The following pages list due process procedures for suspension and expulsion, but not corporal punishment.) (last accessed April 21, 2013).

35. *See* note 23, *supra*.
36. *Id*.
37. Anderson Community School Corporation, Student Rights and Responsibilities Handbook 2012-2013, *available at* http://www.acsc.net/images/departments/stdnt_serv/STUDENT_FORMS/2012_13StudentRightsHandbookJune2012.pdf (To its credit, this public school corporation provides perhaps the only detailed explanation of its physical punishment policy and procedures in the state.

    1. Definition: The moderate use of physical force or physical contact by a teacher or administrator as may be necessary to maintain discipline or to enforce school rules.

    2. Exemptions: The only students exempt from corporal punishment are those who have medical or psychological problems which makes use of such punishment inadvisable. Parents or guardians and students shall be informed of this policy and given the opportunity to request exemption. Such requests must be accompanied by appropriate documentation from a physician or psychologist of the need for such exemption. No other student may refuse to accept corporal punishment and such refusal may result in suspension from school, unless extenuating or mitigating circumstances are found to exist.

    3. Procedures: (a) The following persons may administer corporal punishment:

    (1.) Classroom teacher, (2.) Administrator or dean, or (3.) Teacher who witnessed the student misconduct.

    (b) Such punishment shall not be malicious or excessive.

    (c) The instrument used must be of wood and reasonably suited for the purpose for which it is intended. It must be smooth with no sharp edges or holes.

    (d) The paddling should never be given in front of other students.

    (e) Paddling should be administered to the buttocks only.

    (f) Any paddling shall be witnessed by another faculty member. The student will be informed in the presence of the witness specifically why the paddling is being administered.

    (g) Paddling administered to a female student by a male staff member shall be witnessed by a female staff member. Paddling administered to a male student by a female staff member shall be witnessed by a male staff member.

    (h) The person paddling a student shall promptly complete a corporal punishment report form and submit it to the principal.

    (i) The student's parents shall be notified in writing of the action taken.").

    Notably, Anderson schools never once implemented physical punishment in 2009, the most recent year the federal government collected data on the practice. Civil Rights Data Collection, 2009 District or School Reports, *available at* http://ocrdata.ed.gov/DistrictSchoolSearch (last visited Apr. 21, 2013).
38. Blackford County Schools, Blackford County Elementary Schools Student Handbook 2012-2013 15, *available at* http://www.bcs.k12.in.us/LinkClick.aspx?fileticket=BlUJs9VUPSY%3d&tabid=177&mid=1368 (last accessed April 21, 2013).
39. Clay Community Schools, Clay Community Schools Secondary Corporation Handbook 2012-2013 21, *available at* http://www.edline.net/pages/Clay_Community_Schools/Parents_Community/Student_Handbooks (last accessed April 21, 2013).
40. Argos School Corporation, Argos Community Jr-Sr High School 2011-2012 Handbook 122, *available at* http://www.argos.k12.in.us/handbook.pdf (emphasis added) (last accessed April 21, 2013).
41. Rising Sun-Ohio County Community Schools, 2012-2013 Student Handbook 40, *available at* http://www.risingsun.k12.in.us/media/FORMS/2012%202013%20Student%20Handbook.pdf (last accessed April 21, 2013).
42. *See supra* note 74.
43. *See supra* note 62.

44. Carroll Consolidated School Corporation, 2012–2013 Carroll Jr-Sr High School Handbook 42, *available at* http://www.thezonelive.com/SchoolStructure/IN_CarrollJrSrHS/handbook.pdf (last accessed April 21, 2013).
45. Randolph Central School Corporation, Winchester Community High School Student Handbook 2012-2013 11, *available at* http://wchs.rc.k12.in.us/index.php?option=com_docman&Itemid=5 (last accessed April 21, 2013).
46. *See supra* note 33.
47. Crawfordsville Community School Corporation, Crawfordsville High School Handbook 19, *available at* http://www.cville.k12.in.us/Cville/LinkClick.aspx?fileticket=i9lJtbyDGD0%3d&tabid=54 (last accessed April 21, 2013).
48. Mount Vernon Community Schools, McCordsville Elementary School 2012-2013 Handbook 32, *available at* http://mes.mvcsc.k12.in.us/students/student-handbook; Mount Vernon Community Schools, Fortville Elementary School 2012-2103 Handbook 28, available at http://fes.mvcsc.k12.in.us/students/student-handbook (last accessed April 21, 2013).
49. Mount Vernon Community Schools, Mt Comfort Elementary School 2012-2013 Handbook, *available at* http://mce.mvcsc.k12.in.us/students/student-handbook (last accessed April 21, 2013).
50. Wabash City Schools, Wabash Elementary Schools Handbook 36-37, *available at* http://165.139.24.252/images/stories/ADMIN/elementary%20handbook.pdf (last accessed April 21, 2013).
51. *Id*.
52. I.C. § 35-42-2-1(a).
53. I.C. § 35-42-2-1(a)(1)(A).
54. I.C. § 35-42-2-1(a)(2)(B).
55. I.C. § 31-34-1-15(1).
56. I.C. § 20-33-8-8(b)(1).
57. I.C. § 20-33-8-8(b)(2).
58. I.C. § 20-33-8-9(a)-(b).
59. *Id*.
60. Kenneth M. Stroud, *The Teacher Privilege to use Corporal Punishment*, 11 IND. L. REV. 349, 358 (1978) ("Cases involving excessive force by parents on their children are relevant here because the Indiana Supreme court has stated that although the teacher does not have precisely the same right of corporal punishment as the parent in all respects, he does have the same right as far as the quantum of force permitted.").
61. I.C. § 20-33-8-2.
62. I.C. § 20-33-8-1.
63. I.C. § 20-33-8-10.
64. *Id*.
65. Luis E. Chiesa, *Why is it a Crime to Stomp on a Goldfish? – Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 63 (2008) ("Under modern animal cruelty statutes, pet owners are generally not free to harm their animals. Furthermore, pet owners typically cannot consent to letting their animals be harmed by someone else. These propositions are at odds with a property-based conception of such laws.").
66. I.C. § 35-46-3-12(b).
67. I.C. § 35-46-3-0.5(2).
68. I.C. § 35-46-3-3 ("As used in this chapter, 'animal' does not include a human being.").
69. *Id*.
70. *See supra* note 63.
71. I.C. § 35-46-3-0.5(2).

72. *See* Pt. III.
73. *Cooper*, 4 Ind. at 292.
74. *Ingraham*, 430 U.S. at 651.
75. *Id*. at 653-54.
76. *Id*. at 657.
77. Ingraham v. Wright, 498 F.2d 248, 256 (5th Cir. 1974).
78. Ingraham v. Wright, 525 F.2d 909, 911 (5th Cir. 1976) (en banc).
79. *Ingraham*, 430 U.S. at 657.
80. *Ingraham*, 525 F.2d at 911.
81. *Ingraham*, 498 F.2d at 257.
82. I.C. § 22-33-2-4 ("a student shall attend either: (1) a public school . . . or (2) another school taught in the English language"); I.C. § 22-33-2-27(a) ("It is unlawful for a parent to fail to ensure that the parent's child attends school as required under this chapter."); I.C. § 22-33-2-23(a) ("Each school attendance officer, sheriff, marshal, and police officer in Indiana may take into custody any child who: (1) is required to attend school under this chapter; and (2) is found [unaccompanied] during school hours . . .").
83. Lewis M. Wasserman, *Corporal Punishment in K-12 Public School Settings: Reconsideration of its Constitutional Dimensions Thirty Years after* Ingraham v. Wright, 26 TOURO L. REV. 1029, 1097-98 (2011) ("It is difficult to see how affording a student the minimal due process required by *Goss v. Lopez* [419 U.S. 565 (1975) (holding due process requires a student have a hearing prior to suspension)] would interfere with the efficiency of school operations when applied to situations where corporal punishment might result from students' misconduct . . . . [I]t must be little consolation to a student subjected to several corporal punishment to receive a post-deprivation hearing (in state court or otherwise), especially when the government action is constitutionally barred and the harm is irreparable.").
84. *Ingraham*, 430 U.S. at 683-684 (White, J., dissenting) (emphasis added).
85. *Id*. at 696 (White, J. dissenting).
86. *Cole*, 657 F. Supp. 56.
87. *Id*.
88. *Id*. at 58.
89. *Id*. at 59-62.
90. *Id*. at 60.
91. *Jackson,* 244 Ind. 321.
92. *Id;* Justice Arterburn described his reasoning in a concurrence: "A teacher has no choice in an orderly society but to exercise physical force in stopping and removing the recalcitrant pupil and inflicting corporal punishment, not only to the offending child for its benefit, but as an example to the other pupils. Such matters may not be delayed until there is time to talk and 'reason' with the pupil. . . . I might further add that I have serious doubts that a teacher confronted with such a situation and responsibility under the law for maintaining order and a respect for authority before a classroom of pupils, can be deprived by a 'rule' of the right to use physical force to eliminate such a disturbance." *Id*. at 336-37.
93. *Vanvactor*, 113 Ind. 276.
94. *Fettig*, 884 N.E.2d at 346.
95. *Vanvactor*, 113 Ind. at 278.
96. *Cole*, 657 F. Supp. at 61.
97. *Fettig*, 884 N.E.2d at 346 ("Having reviewed the longstanding precedents of *Vanvactor, Danehoffer*, and *Marlsbary,* we note that they demonstrate the ability of the judiciary to determine whether a teacher has acted within the bounds of her authority to discipline when striking a student.").

98. *Fettig*, 884 N.E.2d at 346.
99. Danehoffer v. State, 69 Ind. 295, 297 (Ind. 1879).
100. *Id*.
101. *Id*. at 297-98.
102. *Id*. at 298.
103. *Id*. at 299. ("The boy, Henry Roell, was disobedient to the reasonable commands of the teacher in charge of the school, of which he was a pupil, and he was insubordinate, in that he ran home when he was sent out of the school for another purpose. He deserved the punishment, and the appellant had the right, under the law, to administer it.").
104. *Vanvactor*, 113 Ind. 276 (cited in 2008 as good law by *Fettig*, 884 N.E.2d at 346).
105. *Id.*
106. *Id*. at 281 ("After consultation and mature deliberation, he decided to accept a whipping.").
107. *Id*. at 278 ("Accordingly, during the day Vanvactor provided a green switch for the occasion, which was about three feet long and forked near the middle, forming two limber prongs composed of twigs.").
108. *Id*. at 281 (emphasis added).
109. *Id*. at 282.
110. *Marlsbary*, 10 Ind. App 21.
111. *Fettig*, 884 N.E.2d at 346.
112. *Marlsbary*, 10 Ind. App at 21-22.
113. *Id*. at 22.
114. *Id.*
115. *Id.* (*citing Vanvactor*, 113 Ind. 276).
116. Jennifer Ann Drobac, *Jazzing Up Family Law: The First Annual Midwest Family Law Conference,* 42 IND. L. REV. 533, 535 (2009) (internal citations omitted) ("Arguably, Indiana law is both progressive and in some ways discriminatory, moralistic, and oppressive. For example, observers might argue that the 2003 Indiana same-sex adoption case, *In re the Adoption of M.M.G.C.* which permits same-sex, co-parent adoptions, evidences Indiana's innovative capabilities. On the other hand, the Indiana Supreme Court's 2008 decision in *Willis v. State*, permitting a child's whipping with a belt (or extension cord) by his mother, arguably showcases the law's more oppressively punitive features, at least toward children.").
117. Willis v. State, 866 N.E.2d 374, 375 (Ind. Ct. App. 2007).
118. *Willis*, 888 N.E.2d at 179.
119. *Willis*, 866 N.E.2d at 375.
120. *Willis*, 888 N.E.2d at 179 n.2.
121. *Id*. at 184.
122. *Id.*
123. *Id*. at 179-80.
124. *Id*. at 182 ("Thus, to sustain a conviction for battery where a claim of parental privilege has been asserted, the State must prove either (1) the force the parent used was unreasonable or (2) the parent's belief that such force was necessary to control her child and prevent misconduct was unreasonable.").
125. *Id*. at 183.
126. *Id.* at 184.
127. *Id*.
128. *See supra* note 60.
129. *Id*.

130. *See* note 22, *supra,* on Indiana's *in loco parentis* doctrine; *see also* note 82, *supra,* on mandatory school attendance.
131. Price v. State, 911 N.E. 2d 716 (Ind. Ct. App. 2009), trans. denied.
132. *Id*. at 718.
133. *Id*. at 719.
134. *Id*. at 718.
135. *Id*. at 720.
136. *Id*.
137. *Barocas*, 949, N.E. at 1257 n.4.
138. *Id*. at 1257-58.
139. *Id*. at 1257.
140. *Id*. at 1257-58.
141. *Id*. at 1261.
142. *Id*. at 1260.
143. *Barocas*, 949, N.E.at 1258.
144. *Id*. at 1258-60.
145. *Id*. at 1260 (quotes and citations omitted).
146. *Id*.
147. *Price*, 911 N.E. 2d at 720.
148. *Barocas*, 949 N.E. at 1260.
149. *Fettig*, 884 N.E.2d at 342-43.
150. *Id*. at 346
151. *Cooper*, 4 Ind. at 292-93.
152. *See AMA Takes Stand Against Corporal Punishment in Schools,* AP (June 20, 1985), *available at* http://www.apnewsarchive.com/1985/AMA-Takes-Stand-Against-Corporal-Punishment-In-Schools/id-4b40c16f85596ed1abbb6e2c4f5a9db7 (last accessed Apr. 21, 2013); American Academy of Pediatrics, Corporal Punishment in Schools (2010), *available at* http://www.healthychildren.org/English/ages-stages/gradeschool/school/Pages/Corporal-Punishment-in-Schools.aspx (last visited Apr. 21, 2013); Society for Adolescent Health and Medicine, Position Paper on Corporal Punishment in Schools, *available at* http://www.jahonline.org/article/S1054-139X(03)00042-9/fulltext (last accessed Apr. 21, 2013); American Academy of Child and Adolescent Psychiatry, Policy Statement on Corporal Punishment in Schools (1988), *available at* http://www.aacap.org/cs/root/policy_statements/corporal_punishment_in_schools (last accessed Apr. 21, 2013); American Academy of Family Physicians, *Corporal Punishment in Schools* (2012), *available at* http://www.aafp.org/online/en/home/policy/policies/c/corporalpunishment.html (last accessed Apr. 21, 2013); American Psychological Association, *Corporal Punishment* (1975), *available at* http://www.apa.org/about/policy/corporal-punishment.aspx (last visited Apr. 21, 2013).
153. Elizabeth Thompson Gerhoff, *Corporal Punishment by Parents and Associated Child and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BULL. 539 (2002) (reviewing 88 mental health studies on the practice over the past 62 years).
154. United Nations Convention on the Rights of the Child, Committee on the Rights of the Child, General Comment No. 13 at 23 (2011), *available at* http://www2.ohchr.org/english/bodies/crc/comments.htm ("The Committee emphasizes that the interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence. It cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity. An adult's judgment of a child's best interests cannot override the obligation to respect

all the child's rights under the Convention.") (last accessed Apr. 21, 2013); *see also* Declaration on Violence against Children, endorsed at the 8th World Assembly of the World Conference of Religions for Peace, Kyoto (2006), *available at* http://www.unicef.org/media/media_35485.html (last accessed Apr. 21, 2013).

155. National Association for the Advancement of Colored People (The Center for Effective Discipline, National Organizations that Oppose Corporal Punishment in Schools, *available at* http://www.stophitting.com/index.php?page=usorgs (last visited Apr. 21, 2013); Human Rights Watch and the American Civil Liberties Union, Impairing Education (2009), *available at* http://www.hrw.org/sites/default/files/reports/us0809webwcover_0.pdf .

156. American Bar Association Center on Children and the Law, Corporal Punishment in Child Care & Education Institutions (1985) ("Be it resolved, that the American Bar Association opposes the use of corporal punishment in institutions where children are cared for or educated and urges that state laws which permit such corporal punishment be amended accordingly."); National Education Association, Letter to the House Education and Labor Committee on Corporal Punishment in Schools (2010), *available at* http://www.nea.org/home/38946.htm ("NEA categorically opposes the use of corporal punishment as a school discipline technique. It's more than ineffective—it's harmful.") (emphasis added) (last accessed Apr. 21, 2013).

157. Society for Adolescent Health and Medicine, *supra*; *see also* Deanna Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42, U.C. DAVIS L. REV 1165, 1211 (2009).

158. Tracie O. Afifi,, et al., *Physical Punishment and Mental Disorders, Results from a Nationally Representative US Sample*, J. OF AM. ACAD. OF PEDIATRICS (2012), *available at* http://pediatrics.aappublications.org/content/130/2/184.long (last accessed Apr. 21, 2013); *see also* Sacks, *supra* note 157, at 1198 ("Over the past forty years, the vast majority of psychology and pediatric studies have concluded that corporal punishment is not ultimately efficacious and can cause serious harm to children and to society. The available scientific evidence indicates that corporal punishment is ineffective in the long term and counterproductive to the state's goals of maximizing students cognitive and academic potential and teaching children nonviolence, appropriate social behavior, and self-discipline. In addition, corporal punishment is associated with and believed to cause a variety of emotional and psychological injuries resulting in depression and substance abuse, among other problems. School corporal punishment is thus uniformly rejected by professional health care organizations and professional educational associations.").

159. U.S. Department of Education. Office of Special Programs, National Technical Assistance Center on Positive Behavioral Interventions and Supports (PBIS), *available at* http://www.pbis.org/school/default.aspx (last visited Apr. 21, 2013); *see also* The Center for Effective Discipline, School Corporal Punishment Alternatives, http://www.stophitting.com/index.php?page=alternatives (last accessed Apr. 21, 2013).

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166. Indiana Institute on Disability and Community of Indiana University, Time-Out, Seclusion, and Restraint in Indiana Public Schools: Analysis of Current Policies at 1, 7-8 (2008), *available at* http://www.in.gov/ipas/files/S__R_Final_Report_Full_IPAS_2-C.pdf (showing at least 59 of the state's 293 school corporations have banned physical punishment) (last accessed Apr. 21, 2013).
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168. Theodore Kim, *IPS Board Votes Down Paddle Policy*, INDIANAPOLIS STAR (May 25, 2004), *available at* Project No Spank, http://www.nospank.net/n-m18r.htm (last accessed Apr. 21, 2013).
169. Sarah Janssen, *Mother of Spanked EACS Boy Plans to Sue*, FORT WAYNE NEWS SENTINEL (Oct.7, 2010) *available at* http://www.news-sentinel.com/apps/pbcs.dll/article?AID=/20101007/NEWS/10070337 (last visited Apr. 21, 2013).
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171. Crown Point Community School System, Crown Point Elementary School Handbook 2012-2013 10, available at http://www.cps.k12.in.us/cms/lib03/IN01000800/Centricity/Domain/38/ElementaryHandbook12-13.pdf.
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173. Crown Point Community School System, *supra* note 171.
174. Culver Community School Corporation, *supra* note 172.
175. Evansville-Vanderburgh School Corporation, supra note 170.
176. *Paddling Becoming Less Popular at Indiana Schools,* AP (Dec. 5, 2009), *available at* http://www.journalgazette.net/apps/pbcs.dll/article?AID=/JG/20091205/NEWS07/912059980 (last accessed Apr. 21, 2013).
177. Carmen McCollem, *Some Area Schools Still Spank as Discipline*, TIMES OF N.W. IND. (Jan. 22, 2012), *available at* http://www.nwitimes.com/news/local/lake/gary/some-area-schools-still-spank-as-discipline/article_ddee089c-955b-5616-ba78-5b2c0dc19e9d.html (last accessed Apr. 21, 2013).
178. Id.
179. David Orentlicher is now a law professor at Indiana University Robert H. McKinney School of Law and an adjunct professor of medicine at Indiana School of Medicine, http://indylaw.indiana.edu/people/profile.cfm?Id=44 (last accessed Apr. 21, 2013).
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Roberts, leading a Court dominated by fellow right-wing ideologues, will cast his vote in a case that will determine the fate of one of the most popular and effective statutes passed during the civil rights movement—the Voting Rights Act.

The first three features in this issue deal with racism and the American legal system. David Gespass's *amicus curiae* brief on behalf of the Lawyers Guild in *Shelby Co. v. Holder*, the Voting Rights Act case the Court heard earlier this year and is at this moment preparing to decide, presents a number of vital arguments that the Court may not encounter elsewhere but that the Guild is inviting the justices to reckon with.

The second feature is the first of two reviews of Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. Its bold theses explain how by embodying Roberts's version of "colorblindness" the American criminal justice system has become the new mechanism for perpetuating a racial caste system. After months on the *New York Times* Bestseller List, this book has become a must-read and generated a vigorous debate among progressive legal activists. We're offering two distinct perspectives on the book. The first is from *NLGR* Managing Editor Brett DeGroff, a public defender whose work has made him intimately familiar with many of the causes and effects of the recent incarceration boom. The second, appearing in our next issue, will be from *NLGR* Articles Editor Richael Faithful, a civil rights attorney whose practice combats one of the evils described in *The New Jim Crow*: punitive post-release felon disenfranchisement.

The third feature, "Racism and Power" by Neda Brisport, is a reflection on the calamitous consequences of our failure to live up to the promise of *Brown v. Board of Education* and the importance of integrated schools as a necessary step toward racial equality.

Over the last few years a well-funded national political effort, led by plutocrats like David and Charles Koch, has sought to create a new Gilded Age, just as the Roberts Court, in cases like *Citizens United v. FEC* and *Walmart v. Dukes*, has sought to return our judiciary to the Social Darwinism of the Lochner era. Perhaps its most devastating tactic of late has been the passage of "right-to-work" laws. The nominal purpose of these laws is to provide workers with the "freedom" not to join trade unions. Their intended and demonstrable effect has been to fracture unions and atomize workers so that the latter become more docile and exploitable. Wisconsin and Michigan dealt punishing blows to their workers recently by passing such laws. In "Right-to-Work: History and Fightback," Jeanne Mirer provides a valuable service by explaining the history and context of these union-busting statutes.

David Frank's "Inhuman Violence" shines light on an issue little written about today—the barbaric yet continuing practice of corporal punishment in public schools. Focusing on Indiana, where nineteenth century laws and values still prevail on this issue and where, he argues, cruelty to animals is regarded as a more grievous offense than battering young children, Mr. Frank makes a compelling case for increased awareness and legal reform.

—Nathan Goetting, Editor in chief

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