Reconsidering Educational Liability: Property-Owners as Litigants, Constructive Trust as Remedy

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I. INTRODUCTION

A half century ago, the Supreme Court handed down what was arguably its most important Constitutional decision ever. A young African-American schoolgirl sued her local school board, charging that the racial segregation of its schools violated her civil rights. The Supreme Court’s decision—vindicating Ms. Brown’s complaint against her school board1—shaped the way the public, the media, and the legal community thought about the law for the next five decades. It is somewhat ironic, then, that in the years since, outside of the arena of unconstitutional racial discrimination,2 suits against schools, school boards, and educational institutions have been so remarkably unsuccessful.

The most striking failure of suits against educational authorities is in the area of so-called “educational liability.”3 Educational liability is a theoretical cause of action based upon the notion that educational institutions—such as schools, school boards, and state governing bodies—should be held responsible for failing to properly educate public school students.4 Such suits have been filed in many districts in many states,5 under many theories of law.6 To date, courts have universally sided against recognizing educational liability as a

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3. Predictably, scholars studying educational liability generate particular terms to describe the cause of action. I use the term educational liability, but in the literature the same cause of action occasionally appears under the name “educational malpractice.” See, e.g., Deborah D. Dye, Note, Educational Malpractice: A Cause of Action That Failed To Pass the Test, 90 W. VA. L. REV 499 (1988). Because “malpractice” invokes the professional malpractice theory discussed infra, I use the broader term “liability.”
4. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1048 (5th ed. 1984); Dye, supra note 3, at 499 (“‘Educational malpractice,’ which focuses on the quality of education, is the failure to adequately educate a student and includes the improper or inadequate instruction, testing, placement, or counseling of a child.”)
5. See infra Part II.
6. See infra Part II.
cause of action.7

This Note proposes a novel conceptualization of educational liability along two lines. First, rather than contemplating the liability of educational institutions to students, I argue that courts should embrace the liability of educational institutions to local property-owners. The proper plaintiff in a suit for educational liability should be a class composed of property-owners, not students or parents. Second, I argue that educational liability suits should embrace a particular remedy known as the constructive trust. An established instrument of remedial law, the constructive trust approach offers significant advantages over previously suggested remedies.

This Note is motivated by two interrelated considerations. The first is the striking disconnect between the judiciary’s refusal to recognize educational liability as a cause of action8 and the esteem accorded educational liability in the legal academy.9 In part, this disconnect is related to the second motivation for this Note: Educational liability arguably offers one of the best policy solutions to the serious problems facing American schools.10

7. See e.g., D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981); Smith v. Almeda County Soc. Serv., 90 Cal. App. 3d 929 (1979); Peter W. v. San Francisco Unified Sch. Dist., 60 Cal. App. 3d 814 (1976); Tubell v. Dade County Pub. Sch., 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); Rich v. Kentucky Country Day, Inc., 793 S.W.2d 832 (Ky. Ct. App. 1990); Hunter v. Bd. of Educ., 439 A.2d 582 (Md. 1982); Torres v. Little Flower Children’s Serv., 474 N.E.2d 223 (N.Y. 1984); Hoffman v. Bd. of Educ., 400 N.E.2d 317 (N.Y. 1979); Donohue v. Copiaigue Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979); Agostine v. School Dist. of Phila., 527 A.2d 193 (Pa. Commw. Ct. 1987). But cf B.M. v. State, 649 P.2d 425 (Mont. 1982) (recognizing that negligent or improper placement may be actionable). The factual circumstances of B.M are so limited that this decision has not provided a basis for successful educational liability suits (the plaintiff was improperly placed in a special education class). Moreover, on appeal after remand, the plaintiff admitted to suffering no real damage. See B.M., 698 P.2d at 400. Courts have, of course, declared educational institutions inadequate in other instances. Two examples stand out. First, courts have found the financing of entire school systems inadequate and ordered structural reforms. Second, courts have ordered school districts to reimburse parents for the costs of seeking private accommodations for disabled children when those districts failed to meet their obligations under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§ 1400-1485 (1997). These types of actions are substantially different from educational liability as I discuss it. Educational liability suits aim to recover damages for poor education, while IDEA suits seek to recover for the costs that the school district was legally obligated to bear in the first place. The extensive school finance litigation is also distinct from educational liability, since it focuses on the means by which schools are funded rather than the outcomes they produce. A school district could operate under a perfectly constitutional financing regime, but nevertheless be vulnerable to an educational liability suit based on the failure of a student or class of students to achieve a certain cognitive level.

8. See supra note 7.


10. It is hardly necessary to provide support for the notion that America’s schools do not perform up to their potential. “For many years, urban public schools nationwide have failed to educate millions of their students adequately in basic skills.” Gershom M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 TEX. L. REV. 777, 787-88 (1987). Neither is it necessary to provide a formal argument as to why one should care. Schools serve economic, political and social
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Indeed, while courts refuse to recognize educational liability as a valid cause of action, scholars offer it up as a broad solution to America's educational problems. Perhaps the threat of litigation would increase the concern school boards, principals, and teachers have for the progress of their students. Consumers of food and medicine are safer because producers worry about the threat of litigation; perhaps students, consumers of education, would be similarly better off.

If educational liability offers such profound hope for schools, then it is of vital importance to design a suit in such a way that a court would be willing to recognize the cause of action. That is this Note's fundamental goal. As argued in Part II, previous attempts to construct educational liability as a valid cause of action have proven inadequate. Part III presents the basic scheme of a property-owner suit for educational liability. Part IV presents the seven advantages this approach possesses in comparison to traditional forms of educational liability. Part V discusses the potential limitations of the proffered approach. Part VI is a summariz of the rationale for and promise of a property-owner suit for educational liability.

II. PREVIOUS ATTEMPTS AT AND THEORIES OF EDUCATIONAL LIABILITY

This Part presents the various theories of educational liability that have been offered by litigants and by academics: negligence tort, contract, constitutional, and professional liability. As Sections A through D will show, each of these theories suffers from particular limitations. Section E argues that the purposes of great import. See id.

11. See McJessy, supra note 9, at 1769 ("Courts have been markedly reluctant to entertain claims against educational institutions . . . ").
12. See Ratner, supra note 10, at 778 ("[P]ublic policy is not self-enforcing. For its requirements to be enforceable, they must be given the power of law."); Stephen D. Sugarman, Accountability Through the Courts, 82 SCH. REV. 233, 235 (1974); Alice J. Klein, Note, Educational Malpractice: A Lesson in Professional Accountability, 32 B.C. L. REV. 899 (1991). McJessy wrote:

Commentators resoundingly endorse the propriety of educational liability claims because of the benefits they believe would result from allowing such actions. A theory of educational liability acceptable to the courts could serve as a method for instigating reform within educational institutions . . . [P]ermitting educational liability actions against school authorities would . . . make them more accountable for their actions to those who they serve. McJessy, supra note 9, at 1771-72.
13. Ex-United States Secretary of Education William F. Bennet is quoted saying that "[t]here are greater, more certain and more immediate penalties in this country for serving up a single rotten hamburger than for furnishing a thousand schoolchildren with a rotten education." See id.
14. McJessy summarizes:

Based on the extensive litigation in this area, it appears that tort, statutory, and state and federal constitutional theories for imposing educational liability are unlikely to meet with wide success. Tort and statutory claims have almost uniformly failed. Although claims based on state constitutional protections have achieved limited success, these claims are not likely to have wide appeal because the terms of state constitutions vary from state to state and, therefore, an interpretation of one state's constitution may be difficult to apply to another state's
most important reason these causes of action have been rejected is that they
suffer from three common flaws: an institutional dynamic which leads to a lack
of long-term commitment by plaintiffs; a requirement that courts explore the
"educational production function" of an individual student; and a remedy that
would require cash-strapped school systems to pay funds to individual students
and families.

A. Tort Theory (Negligence)

The most common form of the educational liability cause of action relies
on the tort theory of negligence. To succeed under a negligence theory, the
plaintiff in any civil suit must first prove that the defendant owed her a duty of
care, that the defendant breached said duty, and that the breach caused the
plaintiff's injury. Typically, educational liability litigants have failed to con-
vince courts that educational authorities owe students any cognizable legal
duty.

The classic case of Peter W. v. San Francisco Unified School District, in
which an illiterate young man of otherwise normal intelligence sued his San
Francisco school board over the failure of his schools properly to educate him,
established this precedent. The plaintiff—a recent high school graduate—
claimed that his school board had negligently failed to provide adequate edu-
ation. At trial, the case was dismissed. The court of appeals affirmed, finding

constititution.

Id. at 1783.
15. See Dye, supra note 3, at 499.
17. See McJessy, supra note 9, at 1775.
18. See Dye, supra note 3, at 501. In contrast to the treatment received in the courts, the tort theory
has been embraced in the scholarly literature. See, e.g., Terrance P. Collingsworth, Applying Negligence
Doctrine to the Teaching Profession, 11 J.L. & EDUC. 479 (1982); Elson, supra note 9; W. F. Foster,
C. Parker, Educational Malpractice: A Tort Is Born, 39 Clev. St. L. Rev. 301 (1991); Joan Blackburn,
Comment, Educational Liability: When Can Johnny Sue?, 7 Fordham Urb. L.J. 117 (1978); Laurie S.
Jamieson, Note, Educational Malpractice: A Lesson in Professional Accountability, 32 B.C. L. Rev.
899 (1991); Daryl A. Nelson, Comment, Educational Negligence: A Student's Cause of Action for Incompetent
Academic Instruction, 58 N.C. L. Rev. 561 (1980); Edward J. Wallison, Jr., Note, Nonliability for Negligence
in the Public Schools—"Educational Malpractice" from Peter W. to Hoffman, 55 Notre Dame
L. Rev. 814 (1980); Kimberly A. Wilkins, Note, Educational Malpractice: A Cause of Action in Need of
a Call for Action, 22 Val. U. L. Rev. 427 (1988); Nancy L. Woods, Comment, Educational Mal
Calavenna, Comment, Educational Malpractice, 64 U. Det. L. Rev. 717 (1987); Michael A. Magone,
the "novel—and troublesome—question [of] whether a person who claims to have been inadequately
educated, while a student in a public school system, may state a cause of action in tort against the public
authorities who operate and administer the system"); see also id. at 821-22.
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that the defendants had no legal duty of care and that a lack of educational achievement was not an “injury” within the meaning of tort law.

A New York case decided two years later, Donohue v. Copiague Union Free School District, reached a similar result. The plaintiff in Donohue was a student at a high school operated by the defendant, a New York school district. Although he received several failing grades, he was permitted to graduate. Justice Damiani rejected the plaintiff’s claim that the defendant “owed a duty of care to: ‘teach the several and varied subjects to the plaintiff; ascertain his learning capacity and ability; and correctly and properly test him . . . .’” The New York court relied upon the “comprehensive and well-reasoned opinion” of the Peter W. court.

As the Peter W. and Donohue cases illustrate, one special problem of the negligence tort model of educational liability is that it requires courts to find that litigants have suffered a legal injury. Courts have been reluctant to do so largely because in these cases litigants were arguing that they have suffered damages that were inherently speculative and derived from notions of expectancy. That is, plaintiffs must argue that they were damaged because the value of their human capital would have been worth $X_1$, where in fact it is now worth $X_2$, where $X_1 > X_2$. Under tort law, such speculative damages are not recoverable.

B. Contract Theory

While courts have recognized that a cause of action might be based on contract theory, no such claim has been successful. One author has recently suggested contract theory as the solution to the persistent failure of tort and

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22. See id. at 821.
23. See id. at 825.
25. See id. at 31.
26. See id.
27. Id.
28. Id. at 33.
29. See id. at 35; Peter W. v San Francisco Unified Sch. Dist., 60 Cal. App. 3d 814, 826.
30. This is speculative because there is no certainty that the plaintiff would have achieved the higher level of human capital. His assertion merely speculates about what level of human capital he would have achieved absent the tortious action of the defendant.
31. Consider the following explanation regarding speculative damages:
[A] plaintiff cannot recover damages by proving only that the defendant has unlawfully violated some duty owing to the plaintiff, leaving the trier of fact to speculate as to the damages; he must go further and prove the nature and extent of the damage suffered and that the breach of duty was the legal cause of that damage. Leaving either of these damage questions to speculation on the part of the trier of fact will prevent recovery . . . .
Funston, supra note 9, at 776; 22 AM. JUR. 2D DAMAGES § 487 (1988) (citations omitted).
33. See Dye, supra note 3, at 500.
other educational liability causes of action.\textsuperscript{34}

Those who turn to contract law do it in part because they perceive that broad changes in forms of educational organization will make contract theory a more viable basis for educational liability.\textsuperscript{35} As private school voucher programs, charter schools and public school choice programs proliferate, American education seems to be taking on a market-oriented character.\textsuperscript{36} And when students choose their school from among various options it is more viable to assert that there has been offer and acceptance, as required to prove breach of contract. There is also a certain desperation evinced in the contractual educational liability literature: the belief that contract represents the last hope for the cause of action.\textsuperscript{37}

The main limitation of this model of educational liability, other than that it has been rejected by the courts, is that it is only appropriate in a limited context: in settings where school choice, charter schools or voucher plans arguably create contractual obligations on the part of school systems effectively to educate pupils.\textsuperscript{38} Moreover, contractually-based educational liability suits would force courts to analyze language in school documents to determine the extent to which contractual obligations were in force. This is an inherently factual question. Factfinders might find for plaintiffs in answering this question. But they might not. However, even if factfinders initially found for the plaintiffs, school systems could easily deflect subsequent contractual educational liability suits by avoiding the pronouncements and policy systems likely to give rise to such liability. Perversely, by recognizing this form of educational liability courts could deter school systems from embracing school choice regimes. To a true education reformer, this would be an unpalatable result.

\textsuperscript{34} See McJessy, \textit{supra} note 9, at 1784 ("[C]ontract law is an appropriate framework for litigating educational liability claims.").

\textsuperscript{35} See id. at 1784 ("[T]he emerging student-school relationship is one particularly amenable to an application of contract principles.").

\textsuperscript{36} See id. at 1786.

\textsuperscript{37} See id. at 1784 ("[C]ourts have so widely rejected other theories of educational liability that contract law may provide the last hope for potential plaintiffs."). As this Note suggests, there is another option.

\textsuperscript{38} See McJessy, \textit{supra} note 9, at 1798-99: Contract actions against public schools are rare because of the apparent difficulty in drafting a complaint that adequately sets forth the requisite elements of a binding contract so as to survive a motion for summary judgment. . . . [M]andatory attendance laws that require public schools to accept any student who enrolls and that compel students to attend school make it difficult to establish any sort of offer and acceptance. Scholarly supporters of contract-based educational liability offer several arguments to extend such suits from these special contexts to the broader, more significant context of public schools. For example, one author asserts that a student's decision to attend public school represents the acceptance of a standing offer, for which an agreement to abide by the rules of the school system constitutes consideration. See McJessy, \textit{supra} note 9, at 1799. This argument is a stretch and is unlikely to be accepted by any court.
C. Constitutional and Statutory Theories

A third theory of educational liability is one based on various provisions of state constitutions. The plaintiff in Donohue argued, in part, that the New York State Constitution imposed a legal duty upon educators to provide a minimum level of education. The plaintiff—a high school graduate—claimed that he lacked even a rudimentary ability to comprehend written English, preventing him from completing an application for employment. The plaintiff asserted that the role his teachers played—by not giving him failing grades, evaluating his ability, and providing adequate resources—amounted to a breach of the constitutional mandate to “provide . . . schools” to “educate[]” the children of New York.

The Donohue court rejected the plaintiff’s cause of action, finding that the only duty imposed by the constitution was on the legislature to provide adequate resources for the education of students. “This general directive,” the court wrote, “was never intended to impose a duty flowing directly from a local school district to individual pupils to ensure that each pupil receives a minimum level of education, the breach of which duty would entitle a pupil to compensatory damages.” Perhaps the Donohue court’s rejection of a constitutionally based educational liability model should not be cause to abandon the constitutional model. One commentator has argued that such a suit might be more successful where the language of the text of a state constitution is more favorable than New York’s. However, as even that commentator admits, courts have rejected educational liability theories grounded upon constitutions more friendly than New York’s.

Litigants can also assert a statutory theory of educational liability, related to the constitutional theory. “Under this theory, the complainant looks to the statutory scheme governing the school system to establish liability where the school authorities have failed to comply with a particular law or laws.” Courts resist this theory, however, because it is too unstructured and because the statutes do not, on their face, appear to impose liability or provide for damages.
D. Professional Liability

A fourth form of educational liability is based on a legal analogy between teachers and professionals such as doctors and lawyers. Under this theory, educators owe their “patients/clients” the same duty as would be owed by other professionals. Implicitly, courts have rejected this theory in holding that there was no legal duty on the part of educators to assure a particular result.49 However, my research suggests that no court has explicitly rejected the notion that teachers are professionals and should be held to a professional duty of care.

Teaching, however, differs substantially from lawyering and doctoring. “Teachers, for example, are not able to fix their own hours, they do not rely on their reputations to attract clients, and their education (excluding a teacher in a higher education) is not as specialized in one area.”50 Another distinction between teachers, doctors and lawyers is that teachers, unlike professionals, do not have long-term relationships with their “clients” (as students change teachers after a single eight-month period). These differences are significant enough that no court is likely to hold teachers to the professional standard of care.51

E. Common Limitations

These models of educational liability share three flaws. First, each suffers because litigants do not have the sort of long-term interest needed to sustain a suit. Second, each requires the courts to consider the complicated question of exactly what explains student failure, something they are loath to do. Third and most importantly, each forces courts to award damages to litigants from already cash-strapped school systems, an outcome courts have difficulty imposing.

The first shared problem is institutional. Because all of these proffered models lead to suits by current or recent students against educational institutions, there is a temporal issue. These sorts of litigants may feel they were shortchanged by their schools, but as they get further from the school setting (and are now perhaps working, raising a family, etc.) their desire to continue lengthy and tedious litigation may fade. This dynamic may explain one case, in which a litigant obtained a favorable legal ruling on appeal but confessed that she had suffered no real damage when the case was returned on remand to the trial level.52

50. Dye, supra note 3, at 505.
52. See B.M. v. State, 698 P.2d 399, 425 (Mont. 1985). The plaintiff, represented by her foster mother, sued her school board. Her case was dismissed at trial on the ground that the state was entitled to sovereign immunity. In 1982, the plaintiff won on appeal and the case was sent back to the trial court
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The second weakness of the suggested models of educational liability is that they require courts to delve into the so-called "educational production function." To find for plaintiffs in these cases, courts would need to conclude that the plaintiffs: (1) were somehow harmed; (2) were harmed by their educational authorities; and (3) the extent to which their injuries are the result of educational malpractice (so as to calculate a damage award). It is an impossibility to ask courts to specify the contribution of a school (as opposed to innate student aptitude, family background, community poverty, etc.) to the failure of a student to develop basic cognitive skills. If one adds to this mix the disensus as to the most effective teaching methods, the challenge facing courts becomes even greater. This problem—specifying the impact of bad schooling on the educational production function—has been recognized by judges.

The third and perhaps most overriding limitation of existing theories of educational liability as a cause of action is that they would require courts to order cash-strapped school districts to pay judgments to successful plaintiffs. Contemplating the situation in which a twenty-something unemployed person receives a sizable sum that cuts into the education of young children, the reluctance of courts is understandable. Courts typically use this policy concern as a reason for failing to recognize the legal duty required for a tort of negli-

53. But cf. McJessy, supra note 9, at 1812 ("[C]ourts already 'review many aspects of school administration including desegregation, finance, curriculum,' and disciplinary practices.").
54. See Peter W. v. San Francisco Unified Sch. Dist., 60 Cal. App. 3d 814, 817 (1976): The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. . . . Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

The courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods. That judicial interference would be the inevitable result of the recognition of a legal duty of care is clear from the fact that in presenting their case, plaintiffs would of necessity call upon jurors to decide whether they should have been taught one subject instead of another, or whether one teaching method was more appropriate than another, or whether certain tests should have been administered or test results interpreted in one way rather than another, and so on ad infinitum.

See also Dye, supra note 3, at 507 ("[T]he problem [is] proving proximate cause: there are so many factors outside the educator's control that could be the cause of the child's inability to learn."). The difficulty of specifying the relationship between inputs and outputs in the educational production function would cause particular problems for courts in evaluating expert evidence. See id. at 506 ("[N]ot only laymen, but also educators, disagree on the appropriate philosophies and methods of teaching. Therefore, an expert could easily be located to support each side's case.").
This same concern mediates against recognizing a contract-based cause of action.

III. THE SCHEME: PROPERTY-OWNERS VS. COMMUNITY EDUCATIONAL INSTITUTIONS

This Note proposes a profound reconstitution of the educational liability cause of action. Specifically, there is a need for a reformulation of educational liability suits along two lines: the identity of the party better serving as plaintiff and the requested form of relief. Along the first line, this Note suggests that a superior model for the cause of action would consist of suits filed by the class of individuals who hold residential assets in the community tied to a particular school or educational authority via local and state laws. Along the second line, plaintiffs should request that courts impose a constructive trust rather than granting monetary relief.

A. Property-Owners As Plaintiffs

Property ownership can be thought of as an asset investment, much like a savings account or a stock certificate. By engaging in behavior which undermines the potential human capital of students, educational authorities and educators directly attack the value of property-owners' assets. The link between property values and school quality is well established. In cities across the country, high real estate prices are attributable to good schools. See Peter W. v. San Francisco Unified Sch. Dist., 60 Cal. App. 3d 814, 817 (1976) ("To hold [schools] to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims real or imagined of disaffected students and parents in countless numbers."); Dye, supra note 3, at 502, 509 ("[O]ne cannot ignore the fact that the time and expense involved with such litigation would invariably take away from the quality of education if a cause of action is recognized."); McJessy, supra note 9, at 1813 ("[L]arge monetary awards against educational institutions could destroy their fiscal integrity."). But cf: Donohue, 64 A.D. 29, 42 (N.Y. App. Div. 1978), aff'd, 391 N.E.2d 1352 (N.Y. 1979) (Suozzi, J., dissenting):

The fear of a floor of litigation, perhaps much of it without merit, and the possible difficulty in framing an appropriate measure of damages, are similarly unpersuasive grounds for dismissing the instant cause of action. Fear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our courts where damages are difficult to assess. See, e.g., Tina Cassidy, School Ratings Another Tool for Buyers, The Boston Globe, Oct. 3, 1999, at H1 (describing how the "high price of homes [in Brookline] is attributed to location and schools" and how "houses near the best elementary schools still tend to cost more"). These commonsense beliefs of real estate agents are confirmed in the economics literature. See, e.g., Charles T. Clotfelter, The Effect of School Desegregation on Housing Prices, 57 Rev. Econ. & Stat. 446, 447 (1975):

Since public school quality is an attribute of housing not produced in the market, its coefficient in a regression of housing price on housing attributes is an indication of its effect on the demand for housing. . . . Studies have included public school variables in equations explaining housing prices; measures of school quality like achievement test scores and expenditures per pupil have consistently been found to have a positive effect on prices . . . . (citing S. Mayo, An Econometric Model of Residential Location (1971) (unpublished Ph.D. dissertation, Harvard University) (on file with Harvard University Library); J.F. Kain & J. Quigley, Measuring the
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Educational liability should be reformulated as a suit by property-owners against local school authorities, such as school boards and other administrative agencies. To be clear, no single student would sue a school or school board for failing to educate her properly. Instead, property-owners would sue school boards for tortiously reducing the value of their property by failing to educate students in the relevant local school (that is, the school to which residents of a property would be assigned under the local school district’s residential assignment scheme).

This suit would be based on the classic idea that every person owes a legal duty of care—that of the ordinary, reasonable person—to avoid damaging the property of others. Breaches of said duty are recoverable in courts of equity. Because particular decisions and broad patterns of behavior which undermine educational outcomes in school systems also damage the residential assets of local property-owners, property-owners should have standing to seek recovery for the damages caused by such breaches.

A property-owner-based model of educational liability would focus on the “big decisions.” The individual teachers’ failure to assign homework would have only a minuscule effect on the property values of an area. For one thing, such lack of effort is difficult to observe by potential purchasers. Therefore, its negative effects on community property values would be minimal. Even if there were some effect, it would be small for any individual property-owner, and unlikely to induce proactive litigation by any party (since the marginal cost of initiating litigation would not exceed the marginal cost in terms of reduced property values for any individual). In contrast, a persistent pattern of minimal homework might have a demonstrable effect on property values. A school- or district-wide policy which permitted such a state of affairs would be a perfect target for a property-owner suit for educational liability. Similarly, the failure of a school system to adopt a particular type of educational program (for example, magnet schools) that has enhanced property values in similarly situated communities, would be actionable under the reformulated cause of action proposed by this Note. It would be up to the plaintiff property-owners to show, using sophisticated econometric evidence, to what extent a particular school board policy damaged their property values.

B. Constructive Trust As Remedy

Rather than requesting monetary relief, educational liability plaintiffs should request that courts impose a constructive trust on the relationship between the property-owner plaintiff and the educational authority defendant.

The constructive trust is a well-established instrument of remedial law; it is essentially a way of imposing the fiduciary obligations of a trustee on a wrong-doer who was never formally made a trustee. Despite its title, it actually has nothing to do with trust law per se. Courts impose constructive trusts in cases far outside of the boundaries of trusts, estates and wealth transmission, under circumstances where one party has acquired power over the property of another. They do so because they feel the language and outcomes of trust law are particularly appropriate in remediying a certain inequitable state of affairs.

The language of trust complements litigation by property-owners against school boards quite well. By conceiving of local educational authorities as trustees, the constructive trust recognizes the imbalance of power between property-owners in middle and lower class areas and the governmental agents whose actions (or inaction) substantially affect property values. While local educational authorities make decisions that profoundly affect the value of residential assets with impunity, the political lever by which property-owners can influence the composition of school boards is available only occasionally in the election cycle. Even where property-owners are able to change the composition of school boards, that does not guarantee their interests will be considered.

The essential element of the constructive trust remedy is that it would require that the defeated defendant contribute not to the individual plaintiff, but rather to the trust itself. In other words, courts would order the constructive trustee—the local educational authority—to take appropriate action to restore the value of the trust corpus. This could mean reversing a decision (say, a vote against offering advanced placement classes) that unquestionably diminished the value of the residential assets held by property-owners. What it would not mean (unless the trustee had appropriated trust resources for personal use) is

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59. See 76 AM. JUR. 2d TRUSTS § 200 (1992) (describing the constructive trust and citing cases).

60. See id. (noting that constructive trusts are “sometimes referred to as a legal fiction, or a fiction of equity, and sometimes . . . as a ‘trust ex maleficio’”) (citations omitted).

61. Cf Robert P. Faulkner, Judicial Deference to University Decisions Not To Grant Degrees, Certificates and Credit—the Fiduciary Alternative, 40 SYRACUSE L. REV. 837, 866 (“As a means of policing delegated trust and unequal bargaining partners, fiduciary theory more realistically depicts the relation between individual and institution than contract theory, which presumes a freedom among the parties that is in fact absent.”). This analogy is not as strong in the case of upper class property-owners, who frequently send their children to private schools, thereby breaking the link between property values and school quality.

62. One might argue that this is in fact what goes on across the country. School boards recognize that property-owners could always sell their assets and relocate to a better school system. Property-owners would tend to do so where the marginal benefit of such a change (that is, the expected difference in return on residential assets in two distinct educational districts) exceeds the marginal cost of a change (defined as the transaction cost of moving). To the extent that there is a difference between the transaction cost of a move and the marginal benefit of a move, that difference may be "captured" by rent-seeking actors in the educational marketplace. School boards could use that difference to pad their office staffs, inflate their salaries, and do other such things that increase their utility at the expense of the education of students. Thus, one could even envision a suit based on the charge of "unjust enrichment," in which the defendant local educational authority is charged with appropriating this net transactions cost for self-aggrandizing purposes.
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that the constructive trustee would pay an out-of-pocket surcharge to the constructive beneficiaries.

IV. ADVANTAGES OF EDUCATIONAL LIABILITY SUITS BY PROPERTY-OWNERS

This Part describes the implications of adopting the property-owner/constructive trust approach to educational liability. It explains the seven reasons why such a model is superior to previously attempted and theorized forms of educational liability.

A. Superior Institutional Commitment

The first advantage of this reformulated educational liability cause of action is institutional. In traditional forms of educational liability, the plaintiff is often done with his or her schooling by the time a suit is filed. While the prospect of monetary recovery might lead a plaintiff to maintain the high level of emotional and temporal commitment needed to pursue litigation through the complex maze of American courts, such commitment is sure to wear out. Particularly as the ex-student gets a job or progresses on to higher education (or remedial education), his or her interest in pursuing educational liability may shrink.

In contrast, property-owners always have an interest in maximizing the value of their property. If a local educational authority damages the residential assets of property-owners, those owners have an incentive to fight in the courts until they obtain relief. Even if the ownership of particular parcels changes during the course of litigation, the new owners still have an incentive to pick up where the former owners left off. The result is likely to be stronger commitment on the part of the plaintiff to potentially lengthy litigation.

One might question this advantage, at least when comparing this Note's model of educational liability with the negligence/tort approach. The benefits to any individual property-owner (in terms of high property values) from a suit based on the model suggested in this Note might be quite small in comparison to the millions of dollars a tort plaintiff could recover. Moreover, the tort plaintiff would realize his or her monetary return immediately, whereas the benefits for a property-owner would only be realized at the time of sale. With low individual returns, finally, property-owners might face a collective action problem. One way to counter this objection is to point to the plaintiff's bar. Motivated by fees that judges could choose to award, entrepreneurial plaintiffs' lawyers would help classes of aggrieved property-owners overcome the collective action problem they face. Since judges might object to awarding large fees, however, this objection may still have some force. A second response is

63. See supra Section II.E (describing the institutional failings of past theories of educational liability).
to point to public advocacy groups, which could conceivably serve as another motivator of class action litigation. Since the property-owner suit is more likely to succeed than tort action, not-for-profit organizations interested in improving education could turn to it as a way of seeking reform in the courts. In the end, it may be necessary to recognize a trade-off: The tort model is more likely to encourage litigation because of the greater reward it promises to an individual, while the property-owner model is likely to encourage a deeper, longer-lasting commitment to litigation once it is filed.

B. Reduction of Concern over Speculative Injury and Facilitation of the Use of More Precise Statistical Methods To Identify the Extent of Injury

One of the limitations of past attempts at and theories of educational liability is that courts were reluctant to find that there was injury in a legal sense.\textsuperscript{64} Courts will not impose liability in tort when such a judgment would require them to speculate about what the plaintiff might have achieved absent some educational injury.

The relevant advantage of the property-owner model is that the injury is by no means speculative. Where property values fall because schools fail to educate students, the damage is clear. It is true that some property-owners might seek to obtain recovery for what their property might have been worth had local educational authorities taken a different course of action. Courts should resist granting anything more than equitable relief in such cases.

The non-speculative nature of injury to property assets would be most vivid where two neighboring school districts adopted different approaches to certain matters of educational policy or established different regimes for implementing similar policies, and one district experienced a relative decline in property values.

Another limitation on past forms of educational liability is that they asked courts to delve into the complex workings of the so-called educational production function.\textsuperscript{65} Because so many variables go into the educational production function, it is impossible for courts to assess the specific contribution of, say, bad teaching, to a student's level of human capital. At a more basic level, there is no certain agreement about how to measure human capital. Any individual standardized test is subject to criticism. Without a reliable indicator of the level at which a student operates, how could courts be expected to assess damages?

The variables that determine property values are far fewer in number. Moreover, property values are easily measured: there is only one indicator of value—price at sale/appraisal. More significantly, while the many determinants of human capital formation make it impossible to compare two students across

\begin{itemize}
  \item \textsuperscript{64} See supra Section II.A.
  \item \textsuperscript{65} See discussion supra Section II.E.
\end{itemize}
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different school systems in order to determine if one has been the victim of educational malpractice (or even to compare a student to the mean student in another district), it is easy to compare property values in two communities as a way of evaluating whether one has been the victim of negligence on the part of its local educational authority.

Property values have a further advantage, from a statistical perspective, in that they are available for an extended period of time. In litigation where outcomes could rely on reconstructing the specific point at which educational institutions took a wrong turn, the availability of a “time series” is very important. This would facilitate the use of “event studies,” now a tool of financial economists commonly used in shareholder litigation.66

Given these superior aspects of property values as opposed to levels of student achievement as an indicator of school system negligence, courts should have much less trouble identifying when and how injury occurs.

C. Ease in Recognizing a Legal Duty

A third benefit to the property-owner model of educational liability is that it offers courts the chance to find a legal duty in the established principles of common law. Past attempts at and theories of educational liability have asked courts to struggle through constitutional, statutory,67 and unfounded tort theories as to why educators owe any particular students a legal duty. The basic duty not to damage tortiously another’s property is the only duty courts would have to find in the model of educational liability proposed by this Note.

In many cases, courts have rejected the existence of a legal duty on policy grounds. Because the property-owner/constructive trust approach avoids many of the policy objections to the educational liability case of action, courts ought to be less reluctant to hold educational institutions to a legal duty.

D. Money Goes Back into the System, Not to the Plaintiff

The single most important advantage of the model of educational liability proposed in this Note is that it does not require defendant school systems to pay monetary damages to plaintiffs. Because plaintiffs request the imposition of a constructive trust rather than a monetary award, the reformulated educational liability suit avoids the objection offered by countless courts and commentators that allowing suits against educational authorities would perversely undermine school quality by draining resources from already cash-strapped


67. Courts have also repeatedly found that statutory and constitutional pronouncements on education represented gratuitous gifts to communities, rather than attempts to construct legal duties. Because the reformulated property owner suit for educational liability does not draw any support from statutes, but rather merely from the common law, it avoids this objection.
schools.\footnote{68}{See discussion supra Section II.E.}

In most cases, courts would probably use structural injunctions to order the constructive trustee school systems to restore the damaged residential assets of the constructive beneficiary property-owners.\footnote{69}{See discussion infra Section IV.F.} Even where a court finds that injunctive relief would inadequately restore the lost value of the constructive beneficiaries’ residential assets, whatever monetary award it issues would be placed back in the constructive “trust corpus.” In other words, it would be placed back in the school system, where it would presumably increase the value of aggrieved parties’ residential assets.

\section*{E. Focus on Big Decisions, Not on Little Ones}

Courts reject educational liability in part because they are worried that they will be asked to review and decide upon the day-to-day management of classrooms. When a particular aggrieved student sues, such minute analysis is necessary. Did the school system falter by not failing the student in a particular class or on a particular exam? Would spending extra time on one particular unit have prevented the alleged injury to the plaintiff student? Courts rightly resist any cause of action that would force them to answer such questions.

The reformulated suit for educational liability proposed in this Note avoids this objection. As argued above, day-to-day affairs would have no significant impact on the value of residential assets. Courts would only be asked to review the “big” decisions and broad patterns of behavior. For example, courts might be asked to conclude that by not offering advanced placement classes school authorities damaged the residential assets of property-owners. A property-owner suit for educational liability would thus focus on the most important failings of school systems without crowding the courts with litigation concerning the intricacies of classroom instruction.

The natural tradeoff of focusing on the big decisions, however, is that educational liability suits (and threats thereof) cannot solve every problem facing school systems. To some extent, the problems of schools reflect external social and economic conditions and do not arise as a result of poor management by school boards. When school boards lack control over funding, they cannot be held to blame for the effects of low funding on student achievement and property values. Advocates for educational liability suits must accept that these suits are no panacea.

\section*{F. More Room for Injunctive Relief}
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Traditional models of educational liability leave only limited room for injunctive relief. When the plaintiff is a particular individual (or a class of individuals) who lacks competencies that her school arguably had a duty to provide, a court would not be able to order the school system to do anything that would provide such skills. The plaintiffs seek money damages, not an order that the school system provide remedial instruction for the student-plaintiff. In some cases, a current student could file suit, but by the time final judgment is reached, the chances that remedial instruction ordered by a court would affect the students’ educational outcome is minimal.

In contrast, a property-owner model of educational liability gives courts extensive leeway to utilize the structural injunction. Because value loss in real property is highly reversible, unlike the failure to gain human capital during one’s critical developmental years, courts could use structural injunctions to correct educational policies that lower property values. Indirectly, of course, this means better education for students in a region’s schools.

In California, for example, plaintiffs in a recent suit charged unconstitutional discrimination along racial lines by school districts that failed to provide advanced placement classes in minority schools. Reformulated as a property-owner educational liability action, this suit could call for the court to order the constructive trustee school systems to create an advanced placement program in the minority schools in order to improve the property values in the affected communities. Property-owners would benefit under such relief. In contrast, the plaintiffs in a traditional liability suit (fewer students) would not have the chance to benefit from court-ordered advanced placement classes.

G. Redistributive Potential

The educational liability action is particularly likely to help impoverished, lower-income property-owners. Wealthy property-owners have other avenues for affecting the quality of educational institutions. Not only can they afford alternative educational options (private and parochial schools, home schooling), they also have greater access to political authorities. For lower-income property-owners, these options are nonexistent. Educational liability litigation would help equalize the playing field.

70. See Ratner, supra note 10, at 810 (arguing that “equitable remedies will be much more direct and efficacious in eliminating substandard education for the large class of deprived students. Moreover, equitable remedies do not pose any significant threat to the public treasury. Equitable remedies, without damages, will suffice.”).

71. See V. Dion Haynes, Minorities Sue for Tougher Classes, CHIC. TRIB., Aug. 6, 1999, at 3.

72. See McJessy, supra note 9, at 1771-72 (“[I]t could provide political muscle for the minority of students who suffer from incompetent school authorities but cannot effectuate change through ordinary political processes.”).
V. POTENTIAL LIMITATIONS

This Part addresses five potential limitations to this model of the educational liability cause of action. First, it might be argued that this cause of action will not overcome the traditional common law rule of sovereign immunity. Second, some would argue that only well-off property-owners would have the incentive and wherewithal to sue under this cause of action. Third, it might be argued that recognizing this form of educational liability would undermine the well-meaning efforts of state authorities to integrate school systems. Fourth, some would argue that recognizing this cause of action would undermine innovation in the public schools as educational authorities would worry that their actions could reduce the value of locally-owned residential assets and thus expose them to liability. Finally, it might be argued that recognizing this form of liability would open the floodgates to litigation against local and municipal governments based on their actions with respect to any other locally-provided government service. For reasons discussed in this Part, none of these objections are persuasive. Courts should not use any of them to reject a property-owner/constructive trust action for educational liability.

A. Sovereign Immunity

One argument against the scheme of educational liability proposed in this Note is that it might fail due to the principle of sovereign immunity. Principals, teachers, counselors, and school boards, as constituent parts of the governmental authority, might be immune from civil prosecution. The traditional rule at common law is that municipal agencies (including school systems) cannot be held liable for torts unless a specific or particular legal duty was owed to the injured citizen.73

However, in most states statutes explicitly recognize that injured parties may recover from governmental authorities.74 "The general weakening of this doctrine among the states, either by legislation or by state constitutional amendment, has prevented it from eliminating all educational liability actions."75

Moreover, this counter-argument is more an argument against educational liability generally.76 Thus, it does not defeat the central assertion of this Note: a

74. See W. Va. CODE § 29-12A-40(c) (1986) (establishing that political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment).
75. McJessy, supra note 9, at 1777 (citations omitted).
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property-owner conception of educational liability is superior to all past approaches to the cause of action.

B. A Plaintiff Class Limited by Wealth

A second possible objection to this form of educational liability is that it would only serve the interests of well-off property-owners and thus, indirectly, only bring about educational advantages for wealthy children. Not so. In fact, as argued above, the property-owner model of educational liability offers profound redistributive benefits.

The logic of this objection is that many poor parents do not own their own property (and thus would have no standing to sue in a property-owner formulation of educational liability) or do not have the wherewithal to file a successful suit even if they do have standing to bring one. In response to the first element of this objection, this Note offers what is actually one of the most attractive elements of the reformulated suit for educational liability. Although poor parents may not own their residences, someone does. To some party, somewhere, these apartments and houses are assets. That party would have standing to sue. This means that the stereotypical "slumlord" and even states and the federal government (as owners of the residential assets of some public housing projects) would have both standing and an incentive to sue under this reformulated cause of action. The ironic fact that a relatively well-off owner of property in depressed communities would be suing to seek improvements in the schools that the tenants to his property attend defeats the argument that the poor would be left out of the cause of action proposed in this Note. Moreover, it offers some prospect of strengthening the ties of community between parties that at present do not perceive of their interests as being in line. In theory, then, the model of educational liability offered by this Note could become an engine of social capital.

This same logic is a partial response to the concern that poor parents do not have the wherewithal to sue under the cause of action proposed in this Note. While poor parents might not be aware of their legal options, the owners of the property on which they live—who in many cases would be professional land owners—would be very likely to know the particular legal circumstances that

v. State, 649 P.2d 425, 427 (Mont. 1982) (rejecting the government’s claim that sovereign immunity bars an educational liability suit). In some states, sovereign immunity statutes may distinguish between suits filed on behalf of the entire citizenry (when immunity would apply) and those filed on behalf of individuals or discrete groups (when immunity would not apply). Traditional educational liability suits clearly fall under the latter category. The modified suit suggested in this Note does as well. It is not a suit on behalf of the entire population of the state. Rather, those classes of individual property-owners living in school districts which are poorly administered would serve as plaintiffs. In some sense, the viability of their cause of action depends upon there being non-aggrieved parties living in effectively run school districts (because the plaintiffs would need to be able to point to other districts in which property values were not damaged by the decisions that undermined the value of their own residential assets).
determine the value of their property (and thus the rent that they can charge). Furthermore, poor parents will be protected by the dense network of non-profit organizations, like the NAACP and the Urban League, that can help them overcome the initial costs of collective action.

C. Integrationist Concerns

A third concern with this Note's scheme is that would undermine existing efforts to integrate public schools. Would not a predominantly rich and white school system be liable under a property-owner educational liability suit for agreeing to accept buses from failing inner-city schools? After all, such a program might lower the property values in the well-off community.

This is a serious concern. However, it can be alleviated if courts make clear that school systems would not be held liable under property-owner educational liability if they are pursuing constitutional imperatives such as equal protection. But might such a guarantee of immunity gut the proposed cause of action by giving school systems a ready defense? Could not almost any educational policy—such as failing to offer advanced placement classes, to borrow an example from above—be couched in terms of defending a constitutional interest in equal protection? After all, those students who do not get to take the advanced placement classes might be worse off. Maybe the school system was trying to avoid harming poor students through excessive tracking. In the end, supporters of educational liability will have to rely on an essentially well-meaning and competent judiciary to strike a balance between immunizing school systems against actions based on efforts at constitutionally-mandated integration and allowing suits to challenge educational policy that negligently and genuinely damage property values.

D. Deterring Innovation

One can easily imagine a court invoking the tired metaphoric "chilling effect" to reject the educational liability cause of action outlined in this Note. The concern would be that any model of educational liability would lead to a chilling effect on innovation in schools. School systems might be so afraid of liability that they would not go out on a limb in pursuit of risky but potentially high-benefit educational outcomes.

77. Of course, a different argument against the scheme offered in this Note is that if it worked—that is, if it forced poor schools to improve and thus lifted the value of property in depressed communities—it could squeeze tenants who are able to pay rent precisely because the value of their property is so low. There are several answers to this objection. "Is this not a tough but desirable tradeoff?" is one. That is, if present tenants suffer but their children get a superior education, is not the iron logic of utility better served? Moreover, while all poor parents do not own their homes, some no doubt do. Because the value of their assets would increase, the tax base of the municipal governments in their communities would rise. This would afford such governments more resources to attend to the food and shelter needs of any tenants who lose their home as a result of higher rents.
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There are several answers to this concern. First, courts would not apply a strict liability standard to policies that damage the value of residential assets. After considering the evidence, courts could find that a reasonable person would have made the same decision (pursuing a risky but promising policy) and thereby absolve school systems of liability. Second, one might answer that a small chilling effect might not be that bad. Maybe traditional public schools are not the right place for experimentation. In the current educational climate, charter schools might be a much better place for innovation and experimentation. Perhaps public schools should concentrate on tried and true methods and only embrace new approaches when they have been appropriately vetted in charter schools and other educational alternatives.

E. The Floodgates of Litigation

A final concern with the model of educational liability proposed in this Note is that it might open the floodgates of litigation against local and municipal governments. The precedent established—that property-owners would have a valid cause of action against governments who take actions which reduce the value of their residential assets—might encourage suits against local government organs based on failure to provide quality roads, trash collection, and any number of things. This flood of litigation could overwhelm the courts and needlessly drain resources from school authorities.

There are two answers to this concern. First, school quality is special. Other than natural features (proximity to jobs, natural surroundings), nothing is as important in determining the relative value of residential assets as school quality. Courts could reject suits based on a failure to provide other types of services on the grounds that they do not severely influence property values. Second, even if there were a “flood” of litigation in the short term, in the long term municipal governments would adjust their behavior to avoid being sued. To the extent that this adjustment would mean increasingly standard levels of provision of municipal public goods (waste services, schools, etc.), the public interest would be served.

VI. CONCLUSION

This Note sketches a novel but promising avenue for future educational li-

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78. A charter school is a school formed by parents, teachers and community members in contract with a state or local educational authority. The school operates according to a founding charter, but outside of many state regulations.


80. See generally Cassidy, supra note 56, at H1 (describing the significance of school quality to potential home buyers).
ability suits. Past approaches—based on various legal theories but sharing the same underlying conception of plaintiff and remedy—have largely been unsuccessful. Each approach suffered from particular limitations, ranging from the need to show genuine injury (tort theory) to the possibility that it would chill choice-oriented reform (contract theory). The common limitations of these past theories call for a new formulation. This Note offers such a formulation, in which property-owners sue educational authorities in pursuit of the “constructive trust”.

The proposed scheme is radical, in that it has never been attempted and in some sense turns traditional visions of educational liability on their heads. The potential benefits of this scheme, however, are also radical. If educational liability represents a way of stimulating accountability in our educational system, a property-owner/constructive trust model is the best hope for success. Because of the importance of quality schooling, for our children and for our society, it is at least worth a try.