Des Moines!"—and he spoke of other middle-sized and smaller urban districts, county districts, and suburban districts elsewhere in the nation "where the obstacles are of an order of far lesser magnitude," he said, and the resistance less intractable. "You've seen the heart of segregation in New York. But when you look for possible solutions, you have got to start by looking elsewhere."

I have continued to revisit schools in the South Bronx. P.S. 30, the school where Louis Bedrock works, is one to which I keep returning because I know children who attend the school and good things take place in their classes every day, no matter what the overarching obstacles their teachers face. But when it comes to contemplating strategies for breaking down the hypersegregation of our public schools, New York City and its metropolitan community do not provide the sense of possibility that is still discernible in other sections of the nation where the structural arrangements that perpetuate the isolation of black and Hispanic children do not seem so firmly set in stone or where, at least, some of the apertures between the stones that Orfield looks for may more easily be found.

There are integrated schools in New York City and its suburbs; and, in some districts near the city, multiracial education is defended strongly by communities of parents. But the overall scale of racial isolation in New York is so extreme that it is hard to build political optimism on these relatively few exceptions. In order to believe that we or those who follow after us can ever hope to build the force to "take this thing apart," in Orfield's words, I think he's right in saying that we need to start by looking elsewhere.

CHAPTER 10

A National Horror Hidden in Plain View: Why Not a National Response?

At the age of 73, Roger Wilkins is a tall and thoughtful man of slender build, with white-gray hair and deep and generous brown eyes. One of the most enduringly respected figures in the older generation of black intellectuals, Wilkins has served our nation in a number of distinguished roles. Assistant attorney general of the United States under Lyndon Johnson, a prize-winning editorial writer at The Washington Post, the first black editorial board member of The New York Times and, later, first black columnist for that newspaper, he is now a professor of history and American culture at George Mason University.

"Any serious effort to reopen the debate about desegregation," Wilkins told me when we met in Washington to talk about the current climate of opinion on this issue among those who have the power to affect the policies of government, "is going to be enormously more difficult than the dismantling of apartheid in the South. Apartheid of that

ra was so gross and open in its manifestations that it was nsustainable within the age that followed World War II. But just as legal segregation in the South was a huge na-ional horror hidden in plain view, so too the massive deso-ation of the intellect and spirits and the human futures of hese millions of young people in their neighborhoods of overty is yet another national horror hidden in plain view; nd it is so enormous and it has its ganglia implanted so pro-oundly in the culture as we know it that we're going to have o build another movement if we hope to make it visible."

Choosing his words deliberately, Wilkins spoke of vhat he termed "the small-minded triumphalism" of con-emporary political leaders who grew up in "isolated worlds f white male privilege" and have, as a result, "inadequate ducation for the responsibilities they hold." He learned rom his own experience, he said, "that integrated educa-ion creates better citizens for a democracy. In an increas-ngly diverse society and an increasingly connected world, t is more important than it ever was."

Wilkins himself, after beginning school in Missouri, hen completing elementary school and the first year of ju-ior high in Harlem, moved with his mother to Grand Rapids, Michigan, where he attended an almost totally vhite high school. In the beginning, he told me, he felt iso-ated socially—"it was, at first," he said, "excruciatingly ard." Then, however, "I started making friends" and found that I was popular" among the other students and, n an interesting side note I have heard from others who ave faced this situation, "I benefited from the stereotypes vhite teachers may have held about black students, the xpectation that we were not very bright, by doing good vork academically, surpassing what my teachers thought hat I could do." He subsequently won admission to the Jniversity of Michigan and received his law degree at Michigan as well.

"The point is this: Yes, it was hard, but there was wonderful two-way learning going on between me and my classmates. I learned the greatest lesson of my life during those years: that whites were not 'a master race,' and not all devils either, but that they were ordinary people like myself. It gave me an ease around white people that made the rest of my life possible. . . .

"I'm still not completely at ease among white people," he went on. "When you walk into the centers of white dominance, no matter what you've done in life, you feel like an outsider. But what my high school education did successfully was to teach me to function effectively in that environment. I don't think I could possibly have done this if I had not had that kind of education."

Wilkins told me he had served for several years as a member of the Washington, D.C., Board of Education and recalled the anguish he had felt at graduation ceremonies when he recognized how few of those who had enrolled as freshmen in the city's schools were still enrolled as seniors and were qualified to win diplomas. "I used to feel sick at graduations when I saw how many of the ninth grade students had been lost in those four years. It was like seeing an army regiment returning from a war." Americans, he said, "look at these young black people who have fallen by the way and think, 'They're just not up to it. If they'd just pull up their socks, they could be Colin Powell too.' 'Why not?' they ask. 'We have a full-opportunity society today' and one, by the way, in which 'these blacks have extra opportunities. . . .' "

He said that when he speaks of the effects of racial isolation on these students, he commonly encounters a familiar answer from white people whom he meets in social situations. He quoted a woman in New York who said, "You know, we tried the integration thing, but it was just *so* difficult!"

In a conversation of more than two hours, Wilkins spoke of the immense complexity of trying to bring these issues back into the national attention. "Here's the thing that I believe," he said. "Racist beliefs are so profound and the supportive structures have now been in place so long that after an upheaval like the one we lived through 40 years ago, it leaves the nation morally exhausted" with "a huge desire not to be obliged to think of it again." And yet, he said, "the nation *must* be asked to think of it again" and, looking directly in my eyes, Wilkins went on, "I hope you won't allow yourself to be deflected from expressing this, or any other damn thing that you please in this regard, because these issues need to be raised forcefully. These things need to be said."

What stayed in my mind in the days that followed were his words about "the ganglia implanted so profoundly in the culture as we know it," as he had described "the massive desolation of the intellect and spirits . . . of these millions of young people"—"a national horror hidden in plain view," as he had said. If it was a national horror, whether hidden in plain view or, as others may believe, too obvious to be concealed but clearly seen yet somehow "disallowed" at the same time, why was there no national response?

Some, I suppose, would argue that the education bill enacted in the first years of the Bush administration, No Child Left Behind, with its emphasis on national accountability procedures, nationally authorized instructional techniques, and nationally standardized examinations constitutes "a national response" of sorts. But this was a response, as we have seen, that did not bring the power of the federal government to bear on lessening inequities in funding or in infrastructure between wealthier and more impoverished districts, nor did it even indirectly touch on the apparently forbidden question of intensifying racial isolation.

On the opposite side of the political divide, most of the struggles being carried out by advocates for children of low income, whether they addressed inequity alone or in rare cases spoke of racial isolation also, were specific to one state or district and did not address these issues on a scope that challenged and indicted our behavior and our policies as an entire nation. What Wilkins recognized to be a national calamity was being addressed instead as an injustice that was caused by the particulars of politics and funding practices at local levels, with the moral obligations of the nation as a whole almost entirely shunted out of view.

In order to understand the reasons why this has been so and why attorneys who try to defend the interests of low-income and minority children in the courts have stepped back from the national arena and have limited their efforts to the state and district levels, we may briefly look at a decisive episode of legal history that took place starting slightly more than 30 years ago. I have described some of this history in Savage Inequalities, published in 1991, but it may help to recapitulate one portion of it here.

The date that experts in school finance generally pinpoint is March 21, 1973, the day on which the U.S. Supreme Court overruled the judgment of a district court in Texas that had found the inequalities of education finance in that state to be unconstitutional. A class action suit had been filed five years earlier by a resident of San Antonio named Demetrio Rodriguez and by other parents on behalf of their own children, who were students in the city's Edgewood district, which was very poor and 96 percent nonwhite. Although Edgewood residents paid one of the highest property tax rates in the area, the district could raise only $37 for each pupil because of the low value of its property. Even with assistance granted by the state, Edgewood ended up with only $231 for each child. Alamo Heights, meanwhile,

ne richest section of the city but incorporated as a separate chooling district, was able to spend $543 on each pupil. Alamo Heights, then as now, was a predominantly white istrict.

Late in 1971, a three-judge federal district court in San ntonio had held that Texas was in violation of the equal rotection clause of the U.S. Constitution. "Any mild qualizing effects" from state aid, said the court, "do not enefit the poorest districts."

It is this decision that was then appealed to the upreme Court. The majority opinion of the high court, hich reversed the lower court's decision, noted that, in rder to bring to bear "strict scrutiny" upon the case, it ust first establish that there had been "absolute depriva- on" of a "fundamental interest" of the Edgewood chil- ren. Justice Lewis Powell wrote that education is not "a ndamental interest" inasmuch as education "is not among ne rights afforded explicit protection under our Federal onstitution." Nor, he wrote, did he believe that "absolute eprivation" was at stake. "The argument here," he said, is not that the children in districts having relatively low as- essable property values are receiving no public education; ather, it is that they are receiving a poorer quality educa- on than that available to children in districts having more ssessable wealth." In cases where wealth is involved, he aid, "the Equal Protection Clause does not require ab- olute equality. . . ."

Attorneys for Rodriguez and the other plaintiffs, Pow- ll wrote, argued "that education is itself a fundamental ersonal right because it is essential to the exercise of First mendment freedoms and to intelligent use of the right to ote. [They argued also] that the right to speak is mean- ngless unless the speaker is capable of articulating his houghts intelligently and persuasively. . . . [A] similar line f reasoning is pursued with respect to the right to vote.

"Yet we have never presumed to possess either the ability or the authority to guarantee . . . the most *effective* speech or the most *informed* electoral choice." Even if it were conceded, he wrote, that "some identifiable quantum of education" is a prerequisite to exercise of speech and voting rights, "we have no indication . . . that the [Texas funding] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary" to enjoy a "full participation in the political process."

In any case, said Justice Powell in a passage that anticipates much of the debate still taking place today, "experts are divided" on the question of the role of money in determining the quality of education. Indeed, he said, "one of the hottest sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education."

Justice Thurgood Marshall, in his long dissent, challenged the notion that an interest, to be seen as "fundamental," had to be "explicitly or implicitly guaranteed" within the Constitution. Thus, he said, although the right to procreate, the right to vote, and the right to criminal appeal are not guaranteed, "these interests have nonetheless been afforded special judicial consideration . . . because they are, to some extent, interrelated with constitutional guarantees." Education, Marshall said, was also such a "related interest" because it "directly affects the ability of a child to exercise his First Amendment interests both as a source and as a receiver of information and ideas. . . ."

Marshall also challenged the distinction, made by Justice Powell, between "absolute" and "relative" degrees of deprivation, as well as Powell's judgment that the Texas funding scheme, because it had increased the funds available to local districts, now provided children in these districts with the "minimum" required. "The Equal Protection Clause is not addressed to . . . minimal sufficiency," said

Marshall, but to equity; and he cited the words of *Brown* to the effect that education, "where the State has undertaken to provide it, is a right which must be made available to all on equal terms."

On Justice Powell's observation that some experts questioned the connection between spending and the quality of education, Marshall answered almost with derision: It is, he said, "an inescapable fact that if one district has more funds available per pupil than another district," it "will have greater choice" in what it offers to its children. If "financing variations are so insignificant" to quality, he wrote, "it is difficult to understand why a number of our country's wealthiest school districts," which, he noted, had no obligation to support the Texas funding scheme, had "nevertheless zealously pursued its cause before this Court"—a reference to amicus briefs that affluent Bloomfield Hills, Grosse Point, and Beverly Hills had introduced in their support of the defendants.

Nonetheless, the court's majority turned down the suit—the vote was five to four—and in a single word, "reversed," Justice Powell ended any expectations that the children of the Edgewood schools would now be given the same quality of education as the children in more affluent school districts. From that point on, with few exceptions, legal efforts to reduce or to abolish inequalities in education were restricted to state levels.

Since that era, legal actions have been brought in 45 of the 50 states under the constitutions of those states. In 27 states, courts have ruled in favor of the plaintiffs. In 18 states, courts have ruled in favor of defendants. Even, however, in those cases in which victories were gained by plaintiffs, less than half these states have taken action in compliance with court orders or with court-mandated settlements that have brought sustained relief to children in

poor districts. Under persistent pressure from attorneys, some of these states have brought a nearly level playing field to education finance; but the overall rate of progress has been fitful, and the victories often short-lived and generally incomplete, and even after all these years of litigation unacceptable inequities remain the norm in the majority of states.

According to the Education Trust, a politically moderate advocacy institute in Washington that has reviewed the recent trends in education finance, "the top 25 percent of school districts in terms of child poverty . . . receive less funding than the bottom 25 percent." In 31 states, districts with the highest percentage of minority children also receive less funding per pupil than do districts with the fewest minority children.

These, moreover, are what are known as "unadjusted numbers." In their calculation, no consideration has been given to the greater needs of children of low income. (The sole adjustments that the Education Trust has made in this case are for local differences in costs that districts must incur for purchasing supplies and services and for costs of educating children who have disabilities.) When we *do* make an adjustment for the extra costs of educating children of low income, using a standard cost-adjustment factor that the federal government has codified, the inequalities become still more apparent. Thirty-five out of 48 states spend less on students in school districts with the highest numbers of minority children than on students in the districts with the fewest children of minorities.* Nationwide, the average differential is about $1,100 for each child. In some states—New York,

*These numbers exclude the District of Columbia, Hawaii, and Tennessee, in the first two instances because they operate as single districts, in the third because minority data is not made available by Tennessee.

exas, Illinois, and Kansas for example—the differential is onsiderably larger. In New York, the most unequal state for hildren of minorities, it is close to $2,200 for each child, nd when New York City is compared to its immediately urrounding affluent white suburbs, as we've noted, the differential soars a great deal higher.

When children are shortchanged financially, of course, he individual per-pupil penalty that they incur is greatly nagnified because a child is not educated individually but n a class of 20, 25, or 30 or more children. Using a classroom size of 25, the Education Trust observes, a typical class of children of low income in Virginia receives some $36,000 less than does a classroom in a district with the fewest numbers of poor children. In Arizona, a typical class of children of low income receives $29,000 less than does a class of nonpoor children, in Texas $23,000 less, in Pennsylvania $33,000 less, in Illinois nearly $62,000 less, in New York some $65,000 less. If we look at an entire school, rather than a single class, these differences are magnified again. A high-poverty elementary school that holds about 400 students in New York receives more than $1 million less per year than schools of the same size in districts with the fewest numbers of poor children.

In several states, moreover, the funding gap for children of color is a great deal larger than the gap for children of low income. "The minority funding gap in California, for example, is almost twice the size of the shortfall for low-income students," notes the Education Trust. Other states that have "a significantly larger funding gap for minority children" than for children of low income include Colorado, Kansas, Nebraska, Texas, and Wisconsin. "The minority funding gap in Wisconsin is almost three times larger" than the gap for children of low income.

"Knowledge of the funding gap and its fundamental unfairness is not new," the Education Trust observes, and

the policies required to abolish this inequity "are relatively straightforward and well known." Despite this knowledge, however, "we've actually *lost* ground since the Education Trust began issuing this annual funding gap report." While many states have reduced their gap since 1997, "at the aggregate national level . . . the funding gap got worse."

The Education Trust also substantiates a further problem we have noted in the case of New York City. "The inequitable distribution of resources . . . between districts" is often equally "pervasive *within* districts." This is because most districts simply give their schools the money that they need to pay the teachers they are able to employ. "Since high-poverty . . . schools tend to employ a disproportionate number of inexperienced, low-paid teachers, these schools end up getting much less money per student" than do schools in wealthier communities of the same districts.

Inequitable support of public schools, notes Kevin Carey, author of the two most recent studies by the Education Trust, is such a persistent problem "that it has acquired an . . . air of inevitability. Politicians come and go, blue-ribbon commissions are formed and eventually disband, lawsuits are filed only to embark on a seemingly endless journey of decision and appeal. . . ." The problem "has gone on so long," says Carey, "that some states have come perilously close to accepting this as the natural order of things."

Even more troubling in some respects, attorneys in most of the states where cases are now pending have been forced, as a result of legal precedents and in order to subdue political resistance on the part of wealthy districts, to renounce the goal of fully equal education and to ask the courts to give poor children not the same high level of resources offered by the wealthiest white districts but merely "sufficient" funding to achieve the standards now demanded of them by the state. Michael Rebell, a brilliant

legal strategist who is the director of the New York City–based Campaign for Fiscal Equity, has spoken with me at length about the logic of renouncing equity as an objective and, instead, pursuing what is now described as "adequate provision" and defining "adequacy" at a level corresponding to the various particulars of state accountability requirements. Since the standards now imposed by New York State are relatively high, an "adequate education" by this definition would, while not achieving equity, at least come a lot closer to that goal than what is now provided in the schools that children like Pineapple and Alliyah have attended.

The important victories that the Campaign for Fiscal Equity has won in court, although they have not yet been implemented by the state, appear to most observers in New York to vindicate this strategy. At the same time, Rebell is frank in recognizing what this strategy cannot achieve. "We really came to the decision that if we could get . . . an adequate education in every school—to get there is such a huge battle," he told The New York Times in 2004—"maybe in 20 years, if we ever get that, somebody else can say that they want to go for equity. But that's not our battle."

Rebell and his associates deal with reality as it exists, not as they wish that it might be. They are trying "to move society an inch," as one member of their legal team put it to me bluntly, "when it needs to be moved a mile." It may be that they will end up moving it a lot more than "an inch" if legislative leaders in New York should someday act in a responsible compliance with the rulings of the court. Every inch they gain, in any case, is worth the effort it requires to achieve it.

Still, the consequences of *Rodriguez* cast their shadow upon even the most valiant efforts that attorneys at state levels undertake. In part, this is because the wording of the

educational provisions in state constitutions tends to vary greatly and compels attorneys in the several states to figure out a multiplicity of strategies in order to address these variations. Then, too, there is the sheer expenditure of time and energy required by the duplication of these efforts in state after state in which the ethical argument attorneys ultimately hope to make is basically the same. And, finally, no matter what the state in which a case takes place, the most important disadvantage advocates for equal education or for adequate education have to face is that attorneys are unable to incorporate within their pleadings legal claims deriving from the U.S. Constitution—the only constitution that has truly elevated moral standing in the eyes of most Americans—and cannot, as a consequence, defend the rights of children in these cases *as Americans*. But for a single vote by any one of the four Supreme Court justices appointed by President Richard Nixon in the years from 1969 to 1972, none of the subsequent cases brought in 45 state courts would have been necessary.

Efforts to return the focus of this struggle from the local courts and legislative bodies to the federal level, not through further litigation but through legislative processes, have been attempted in the past few years by several members of Congress. The leadership has come, in large part, from black members of the U.S. House of Representatives.

U.S. Representative Chaka Fattah, for example, who represents a Philadelphia district, introduced a bill four years ago that uses the language of accountability and standards for a purpose that the Bush administration certainly did not intend. If the federal government can hold a district or a state "accountable" for demonstrating high performance by its students on their standardized exams,

according to the reasoning of Mr. Fattah, the federal government should also have the power to hold states accountable for making sure that children in all districts are provided with the resources they need to *meet* these high demands. Isolating several elements of "educational necessities"—among them, "safe facilities," "updated libraries," and "small classes"—the congressman's bill requires that the states provide "comparable educational services" to "all school districts" and comply with all court orders that may already exist to this effect or suffer the penalty of losing a portion of their federal funds. Where states fail to comply with these requirements, they would need to demonstrate that they are making "adequate yearly progress" toward the stipulations of the bill; and, if they fail to make such progress in a given period of time, the bill provides "a cause of action" in the federal courts "for students and parents aggrieved by violations of the bill."

Congressman Fattah's bill, which he reintroduced in 2003, and again in 2005, represents an almost precise reversal of the notion that our teachers, principals, and schools need to be held to certain state and federal standards and be made to suffer "sanctions" when those standards are not met. And it is a reversal, too, of the demand that principals show "adequate progress" in complying with those school improvement plans that we have seen, even when their classes may be packed with 30 or more students and their teachers lack sufficient textbooks or, at secondary levels, do not even have the science laboratories needed to teach courses on which students will be tested.

Establishing "a cause of action" in the federal courts is the item in the congressman's proposal that returns us to the questions raised, and obstacle created, in *Rodriguez*. If Congressman Fattah's bill, or a new incarnation of this bill, were ever to be approved by Congress and enacted into law, it would admittedly not force the federal government

to spend more money to redress inequities within a given state but it would represent an instrument by which the power of the federal government could be employed to force a state to make more equitable distribution of the resources it presently commands. A nearly identical Senate version of this bill, introduced by Connecticut Senator Christopher Dodd in 2001 as an amendment to another legislative motion, received the votes of 42 members of the Senate, an intriguing and, to some of us, tantalizing bit of evidence that more than a few of our elected leaders are prepared to countenance the use of federal power to redress some of the consequences of *Rodriguez*.

In a considerably more sweeping effort to address the long-abiding consequences of the Texas case, Congressman Jesse Jackson Jr., who represents a district in Chicago, has proposed a constitutional amendment that would guarantee the right to public education "of an equally high quality" to every American child and has introduced a resolution in the U.S. House of Representatives to this effect. Jackson's amendment, introduced in March 2003, would establish education as "a fundamental human right" under the U.S. Constitution and, as he described its purpose to me, would essentially strike down *Rodriguez* and defend the education rights of children that are not defended by the high court's present readings of the equal protection clause of the Fourteenth Amendment. "Today," he said, "we have a 'states' rights education system'—50 states, 3,067 counties, 95,000 public schools in 15,000 locally controlled districts in which 50 million children go to separate and unequal public schools. We need the assistance of the Constitution to correct this. Until we have it, 'savage inequalities,' to use your words, will not be an aberration in the system—it will *be* 'the system' as it stands."

In spite of the complexity of reasons for the patchwork system of school funding that exists today, much of

which derives from policies and practices devised nearly a century ago, Congressman Jackson is persuaded that our nation's racial history provides the clearest lens by which to understand why this archaic system has not been subjected to the radical revision that fair-mindedness would seemingly demand. Both race and class, in his belief, are at the heart of these inequities, but he is convinced that race, in the long run, is the commanding factor. In speaking of the perennial refusal of state legislative bodies to provide resources needed by low-income districts even when a legislature is so ordered by a court, Jackson evoked the words of Dr. King about "a promissory note" for which the payment keeps on coming back "marked 'insufficient funds,' " and he observed that "insufficient funds" is the familiar explanation heard from governors and legislative leaders when they fail to act on court decisions that would bring relief to overwhelmingly minority school districts.

"The entire present system in its structural irrationality needs to be rooted out"—" 'root *and* branch,' " he said, while walking around a wide mahogany table in the conference room in which we talked in order to stand directly over me as I wrote down his words—"and there is no way that this is going to be done but by the passage of a constitutional amendment."

The congressman observed, as well, that "if the nation ever *wants* to end the segregated status of our public schools, this amendment means it could, and can," because the amendment, in his belief, "would also strike down *Milliken,*" the 1974 decision that created massive obstacles to the enforced participation of the suburbs in desegregation orders. (This is a point on which some legal scholars disagree with Mr. Jackson, but Orfield argues that the congressman may be correct if it could be proven that "an equally high quality of education," Jackson's words in the

proposed amendment, "cannot be achieved under conditions of apartheid," which, he says, "might introduce a legal basis for compelling the participation of the suburbs.") Although, in describing his amendment, Jackson spoke in terms of "human rights" for all our children, rather than of "civil rights" for black and Hispanic children in particular, the amendment nonetheless, he argued, "would advance both integration and equality"—"and *yes,*" the congressman continued, "if the parents of black students want their children to be educated in an integrated public school, society does have to make that option possible. . . ."

Congressman Jackson's resolution has been given only scant attention by observers in the world of education policy and in the mainstream press. "Unfortunately," notes William Taylor, one of the veteran lawyers who has litigated race and education cases through the years, "the state of our public and political discourse nowadays is such that anything like this tends to be ridiculed." This, he believes, is why a number of people he has spoken with in Washington "tend to view the resolution skeptically."

Other advocates and intellectuals, however, whether or not they support the resolution, do support the view that equal education ought to be regarded as a national entitlement and ought to be protected under federal law. Any notion that a child's education is essentially a state and local matter "is increasingly so out of line with the realities of our society as to be obsolete," as civil rights attorney Theodore Shaw expressed this to me in his office at the NAACP Legal Defense Fund in New York. "The whole idea of 'state and local control' has come to be a good deal less convincing in the past few years," he said, "now that the federal government has grown involved in public education at a level of specific stipulations it has never dared to touch upon before." In spite of the restrictive readings given to

the Fourteenth Amendment in the decades since *Rodriguez*—"an historically ignorant decision," as he worded it—Shaw noted that most Americans are unaware that children have no constitutional protection where equality of education is at stake. The notion that education is not a protected right under the U.S. Constitution comes as a surprise to the majority of citizens, he said. "Most Americans believe that education is a fundamental right and when you tell them that it's not, they say, 'It *should* be.' "

The argument will certainly be made that it would take unusually courageous leadership, as well as a long period of years, if not of decades, to create a groundswell of informed opinion to support either a legislative act or an amendment that might finally create a clear-cut federal obligation to protect the interests of all children in receiving equally high qualities of education. And even if a constitutional amendment should someday be passed and ratified, the enforcement of its terms would still depend upon the disposition of the federal courts to implement it and of the states and local districts to comply with its demands. Yet winning even piecemeal vindication for low-income children through the courts at local levels has already proved to be a slow and grinding process and, in those cases where a victory is finally achieved, the courts too frequently seem powerless to cut through the resistance of executive and legislative branches of state governments.

It has taken over 30 years of litigation to achieve a genuinely substantial victory for children in poor districts of New Jersey. In Ohio, more than a decade since a suit was filed to achieve a similar objective, courts have now determined four times that the system of school finance is in violation of the constitution of that state, and still the governor and legislature have defied these rulings with impunity.

The victory in the New York City case, which was filed initially in 1993, took a decade to achieve and, even

then, the court allowed the governor and legislative branch an additional year in which to remedy the constitutional violation it had found. A year later, in 2004, the state's deadline came and went without the governor and legislature taking action on this ruling. A panel of three distinguished jurists was subsequently appointed by the court to specify exactly how much added money New York State must spend to meet its obligations under the state's constitution, and the trial judge embodied these specific numbers in a new court order to the state, which set another deadline for compliance by June 2005. The state again ignored the deadline and has, for a second time, appealed the ruling to a higher court, which is unlikely to arrive at a decision before late 2005 or winter of 2006, after which there will be another level of appeal, which may well extend the case into the year 2007.

If New York should someday, at long last, be forced to live up to the constitutional requirements it has defied for all these years, a new generation of New York City children will receive a higher quality of education, but this cannot compensate the students who were children when this case was filed, since their years of childhood have since been taken from them and can never be restored. Even when courts decree, after long years of litigation, that an entire generation of low-income children in a state has been denied the education that the constitution of the state required all along, they do not grant the victims reparations.

In the California case, attorneys for the plaintiffs came to an agreement with the state in August 2004 that brings only a modest gain to children in poor districts. Some $140 million was assigned to buy instructional materials aligned with the state standards and $50 million to meet infrastructure needs. If the state keeps faith with this agreement, another $800 million will be spent between 2005 and 2009 for emergency repairs to public schools and to develop a

"facilities inspection" program. The settlement also specifies that students now attending schools with shortened academic years, like Fremont High, will be provided with the 180 days of school that presently are given to the vast majority of children in the state, but not before the year 2012. The agreement does not mandate funds for the construction of new schools, raising the qualifications of instructors, or reducing class size in the schools as they now stand. It does, however, stipulate that every child from now on ought to be allowed to have a textbook and to be provided with a desk and chair.

The settlement, says Michael Kirst, a well-known education scholar and a former president of the California Board of Education, "gets them [that is, the students in low-funded schools] from the basement to the first floor, but there are two more floors to go. . . ." More skeptical observers who have noted the historic tendency of governmental leaders to retreat from minimal commitments to low-income children once a case like this is settled out of court are not as confident that students in the kinds of schools we've visited will likely even get out of that metaphoric basement in the years while they're still children.

Then too, apart from the delays that plaintiffs face in winning vindication through court actions in a given state, there is the question of the educational inequities *between* the separate states. If at some point in the future, children in all 50 states receive whatever version of an adequate education each state may determine to be suitable under its constitution, children in some states will still receive an education only "half as adequate" as children in another state with more resources. In Mississippi, at the present time, an equitable system merely at the level of the statewide average in per-pupil spending would provide all children with an education worth not quite $6,000 yearly. A

comparably equitable system in Connecticut would give the children of the state an education worth more than $11,000. Even with adjustments made for differences in local costs of operations, local costs for teachers' salaries, and other factors that distinguish one state from another, this remains a hopelessly outdated and inherently unequal way to educate a nation.

In spite of all the reservations I have stated here, I have done my best for more than 15 years to rally the support of friends and colleagues for these statewide cases. Whether or not these cases are successful, or success is long delayed, the legal actions in themselves have sometimes had the positive effect of heightening the public's consciousness of the extreme inequities of which some citizens may have been unaware. In the New York City case, the act of filing the suit, the evidence presented in the trial stage, the affirmative decision of the trial judge, then its reversal, then its affirmation in 2003, the decision of the trial judge to intervene directly in enforcement of this ruling, and the subsequent obstructive tactics of the state have attracted a great deal of press attention, much of which has been supportive of the plaintiffs' claims. Attorneys in the case have also waged a strong campaign to generate political engagement in the issues that the suit has raised among broad sectors of the New York population.

Without such efforts, legal actions on their own, as attorney Theodore Shaw observes, cannot create the ferment needed for a serious political upheaval, for "a movement," for "a mobilization," in the terms that Orfield has described; and Shaw insists upon the need for activism outside of the legal process and *preceding* it. "In the Montgomery bus boycott," he notes, "litigation didn't lead the movement. It

came afterwards and *served* it. . . . When lawyers think that they can lead a movement in their role as lawyers, they are doomed to failure, because courts themselves are socially reactionary institutions," and he said he meant "reactionary" in both of the common senses of that word. "Then, too, because the litigation process is so slow and so complex, it can turn activists into bystanders far too easily. Lawyers like Gandhi and Mandela can awaken and create a movement, but not in their role as lawyers. You need to create a climate of political momentum first. That, then, is the challenge."

Even when attorneys do try to reach out beyond the courts to build political support, it has been very hard to build a movement of dynamic national importance out of adequacy claims in a variety of separate states. "Adequacy" itself, as a political objective, is hardly a heart-stopping and exalted cry to battle. (One cannot imagine millions of young activists rising up in moral indignation in reaction to a banner asking "Adequacy Now!") And, although attorneys in these cases have established linkages with one another to develop strategies and advocate for common goals, most of this remains beneath the recognition of the public and has barely even percolated into the awareness of most of the liberals I meet in states in which these legal battles have been taking place.

Many progressives in these states have only the most general idea of what these cases are about, and in certain states in which these cases were, and are, most heatedly contested, even the teachers of the children in low-funded districts tend to have little or no knowledge of these legal actions and, even when they do have smatterings of knowledge, most of them evince no sense that great political determinations are at stake. Their level of affect is repeatedly, I find, far lower than that of the litigators in these cases. It is the same with parents of poor children in most of these states. We are a long way from Montgomery.

There is another aspect of these cases that cannot fail to remind us of how far the nation has retreated from the high ideals and purposes identified with *Brown*. As a result of the federal precedents that we have seen, as well as the combustible political realities in some of the most stridently divided metropolitan communities, lawyers for the plaintiffs rarely choose to speak at all of racial isolation. Indeed, the argument in almost all these cases rests implicitly upon the premise that the Warren Court was incorrect in its decision and that separate education can be rendered, if not equal, at least good enough to be sufficient for the children who attend school in a segregated system. If attorneys were to argue that the finding in *Brown v. Board of Education* was correct, it would be difficult to make the case that funding increments will bring sufficient gains to segregated children to be worth the court's consideration.

"I'm dealing with the de facto world of segregated schools," said Joseph Wayland, one of the two lead attorneys in the New York City case, during the course of an extremely candid conversation when I pressed him on this question. "Whatever damage segregation might or might not do, the premise of our case is that the state and city can provide sufficient resources so that students in a school, even if that school is segregated, can achieve a respectable level of success." Wayland made it clear that he regarded *Brown* with reverence and, indeed, he had alluded to it movingly in his initial statement to the court. "We stand before the court . . . ," he said, "because the effect of the constitutional wrong visited upon the children of New York City is no less insidious than the harm that the Supreme Court condemned in Brown against the Board of Education. . . . In 1999 we remain a house divided." Although "the line is no longer a line of state-sanctioned discrimination . . . ," he went on, it is nonetheless "a de facto line of color."

In reference to the termination of de jure segregation in the *Brown* decision, Wayland said, "The doors are open" now—in at least a legal sense—but they lead into schools where "far too many children" are denied necessities of education. "And so," he told the court, "a cruel hoax has been visited on our children."

Lawyers in similar cases elsewhere make allusions to *Brown v. Board of Education,* drawing a dotted line of sorts between the Warren Court's insistence on the damage done to children by their racial segregation and the contemporary emphasis on adequate provision for those segregated children. When they do this, they are paying homage to the morally commanding stature of that ruling while, in a sense, attempting to adapt its meanings, or at least its spirit, to the presentation of their cases. And yet the words of *Brown* defy such adaptation.

"We come then to the question presented," said the justices in *Brown* in words that bear repeating in this context. "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does. . . . In the field of public education, the doctrine of 'separate but equal' has no place." Yet separate but equal obviously *has* to have a place within these equity or adequacy cases. Given realities of politics and precedent, there is no other argument attorneys plausibly can make. Whether they ask for equal, adequate, high adequate, or basic minimal provision, they are asking for postmodern versions of the promise *Plessy* made and the next 60 years of history betrayed.

Like most advocates for children, I have celebrated the successes of these cases when the consequence of courtroom victories was to diminish even incrementally the inequalities faced by the children of poor districts. In

the New Jersey case, far more than incremental gains have been achieved. Up until 1997, the funding gap between high-poverty and successful, affluent districts was more than $1,000 for each pupil. By 2004, per-pupil spending in high-poverty districts had increased to $11,000, the same amount that was being spent, on average, in the schools that served the children of the privileged; and the state has also made available an additional $2,000 for each pupil in the poorest districts to support "at risk" and supplemental programs. Meanwhile, the state has instituted full-day kindergarten and a full-day, full-year pre-K program for all three- and four-year-olds in the low-income districts and is spending an initial allocation of $6 billion to replace or to update school buildings in these districts.

Still, it has taken a third of a century to win these victories for children in New Jersey; and meanwhile there is Illinois, Ohio, Pennsylvania, Michigan, Louisiana, Arizona, Oklahoma, and Virginia, and those many, many other states in which inequities go on and on. Now, too, in Kentucky, in which plaintiffs won a landmark adequacy case in 1989, lawyers are back in court because the legislature has refused to meet its obligation to low-income districts, one consequence of which we have observed in the dilapidated Russell School I visited in Lexington. In Texas, where another major victory was won in 1993, a court has recently found the finance system now in place unconstitutional once more because, despite a law that forces wealthy districts to share revenue from property taxes with poor districts, a cap on property taxes has reduced these revenues to the degree that poor and minority districts cannot provide their students with the equal education that the court decision calls for.

In Kansas too, where a much-celebrated victory was won in 1991, a court has now been forced to find the system of school funding, as it has evolved since 1991, to be

unconstitutional again. At this rate, and given the variety of ways in which state legislative bodies have been able to subvert and vitiate the consequences of these court decisions through the years, it might be another century before the promise made by *Plessy* may at last be realized in all 50 states.

These, then, are among the reasons why political initiatives that have any chance at all of redirecting policy discussion to the national dimensions of these questions seem to me to be deserving of more serious attention than they have received. As things stand today, the children in the schools we have examined in this book are not protected by their nation. Yet they are expected in school to perform at national standards, are graded on what are, in fact, no less than national exams that measure their success or failure according to nationally determined norms, are expected to vote someday in national elections, compete for earnings in a national job market and, because of their race and poverty, are far more likely than most other citizens to imperil their lives by serving in our nation's wars. The illegitimacy of the uneven social contract by which they are bound invites a more aggressive scrutiny than it can be accorded in the courts of separate states. These children are not citizens of Illinois, New York, or California. They are (most of them are, at least) the citizens of the United States; yet the flag that hangs above their classrooms and their schools does not defend their interest where it comes to preparation for adulthood in their nation, and the words of the pledge we ask them to recite can only mock their actual experience.

Many Americans, write Edwin Margolis and Stanley Moses in their book Elusive Quest, published in 1991, experience "a sense of shock and revulsion . . . when confronted with the reality that the American governmental system discriminates among the children of the wealthy and

the poor in the provision of resources for public schooling. . . . There is something about this system that violates basic American standards of decency and fair play in a way that goes beyond ordinary political arrangements and compromises." Certainly, they note, "many, especially in the more affluent and suburban areas, benefit from this arrangement and will continue to resist attempts to change the status quo. But few will defend it as representing the better side of American democracy."

Whether the issue is inequity alone or deepening resegregation or the labyrinthine intertwining of the two, it is well past the time for us to start the work that it will take to change this. If it takes "new turmoil to bring that about," in Time writer Jack White's words, if it takes people marching in the streets and other forms of adamant disruption of the governing civilities, if it takes more than litigation, more than legislation, and much more than resolutions introduced by members of the Congress, these are prices we should be prepared to pay. "We do not have the things you have," the third grade child named Alliyah told me when she wrote to ask if I would come and visit at her school in the South Bronx. "Can you help us?" America owes that little girl and millions like her a more honorable answer than they have received.