

Educational Malpractice: A Cause of Action in Search of a Theory

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I. INTRODUCTION

In the past decade there has been a widespread and growing dissatisfaction with the performance of American public schools.¹

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1. While the forums for the expression of this public mood have ranged from school board meetings to popular news magazines, from the halls of Congress to scholarly journals, the message has remained the same—dissatisfaction. *See, e.g., Suing for Not Learning*, TIME, Mar. 3, 1975, at 73; Saxe, *Malpractice in the Classrooms*, Newsday, Nov. 30, 1976, at 49, col. 1; *Suing the Teacher*, NEWSWEEK, Oct. 3, 1977, at 101; Baratz & Hartle, *Malpractice in the Schools*, PROGRESSIVE, June, 1977, at 33-34; Hentoff, *Who's to Blame? The Politics of Educational Malpractice*, LEARNING, Oct. 1977, at 40; 124 CONG. REC. S14862 (daily ed. Sept. 11, 1978) (remarks of Sen. Proxmire); Stull, *Why Johnny Can't Read—His Own Diploma*, 10 PAC. L.J. 647 (1979).

In 1978 CBS News broadcast a three-part documentary on the poor academic performance of American public school students, "Is Anyone Out There Learning?" A pool conducted in conjunction with the programs revealed a general public belief that the schools were incompetent. For example, of those polled 41% responded that their children were receiving a poorer education than they themselves had received. While there was also a feeling that the permissiveness of society and the influence of television were responsible for the country's educational problems, the schools were specifically indicted for inept teaching, poor discipline, and unnecessarily lenient promotion policies. *See* 124 CONG. REC. S14862 (daily ed. Sept. 11, 1978).

Some states have taken action to correct the perceived educational inadequacies. *See* note 298 *infra*. In New York, for example, a commission was appointed to study and report on the quality, cost, and financing of elementary and secondary education in the state and to make recommendations for improving the schools in all of these areas. *See* NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK

In part, this disenchantment may stem from an unarticulated opposition to the schools' having adopted, albeit under the imperative of judicial mandate, a social corrective, as opposed to educative, role.² Some of the most vehement attacks upon the competency and quality of public education, however, have arisen from those very groups which are allegedly most benefited by the schools' change in functional emphasis.³ In either case, the schools remain under attack.

A particularly effective appeal in this attack has been the call for "accountability" in education.⁴ While considerable disagreement exists over what is meant by "accountability" and to whom the schools should be accountable,⁵ state legislators, local school boards, community groups, and even teachers themselves have all declared (not surprisingly) that they are in favor of "accountability."⁶

This demand for accountability is especially powerful when linked with legitimate public concern for the problem of "func-

STATE, THE FLEISCHMANN REPORT ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK STATE (1973) [hereinafter cited as FLEISCHMANN REPORT]. The result of the study, however, was to adopt a system of minimum competency testing. These tests are to evaluate each student's proficiency in reading, writing, and mathematics. A student is required to pass the tests before being permitted to graduate from high school. See N.Y. Times, Jan. 30, 1979, § A, at 19, col. 2-3; *id.*, Jan. 28, 1979, § D, at 12, col. 1. Regarding the theoretical and practical shortcomings of minimum competency tests, see notes 294-305 *infra* and accompanying text.

For a comparative perspective on the problem, see Owen, *Tort Liability in German School Law*, 20 LAW & CONTEMP. PROB. 72 (1955); Whincup, *What Should be Taught in School?*, 127 NEW L.J. 1020 (1977) (United Kingdom).

2. See, e.g., Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974). See generally Wilkinson, Goss v. Lopez: *The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25; K. ALEXANDER (ed.), SCHOOL LAW (1980).

3. E.g., San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

4. See, e.g., Sugarman, *Accountability through the Courts*, 82 SCHOOL REV. 233 (1974); Levin, *A Conceptual Framework for Accountability in Education*, *id.*, at 363; Aaron, *Evaluation and Accountability*, in NEW HORIZONS IN READING 558 (1976); L. STRAIN, ACCOUNTABILITY IN READING INSTRUCTION (1976).

The origins of the "accountability" movement may be traced to President Nixon's often expressed position that educators should be held responsible for their performance. See L. BROWDER, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AN ADMINISTRATOR'S HANDBOOK ON EDUCATIONAL ACCOUNTABILITY 10 (1975); R. STICKLAND, J. PHILLIPS & W. PHILLIPS, AVOIDING TEACHER MALPRACTICE: A PRACTICAL LEGAL HANDBOOK FOR THE TEACHING PROFESSIONAL 63 (1976).

5. See Bettinhaus & Miller, *Reactions to State Accountability Programs*, in A DISSEMINATION SYSTEM FOR STATE ACCOUNTABILITY PROGRAMS 5-12 (Cooperative Accountability Project 1973).

6. But see Hentoff, *supra* note 1, at 43 (teacher unionization seen as a means for avoiding accountability).

tional illiteracy."⁷ Given consistently declining scores on nationally standardized tests, it would appear that more and more pupils are learning less and less. Allegedly, "it is not uncommon today for a student enrolled in a public school to move through the system without acquiring basic skills such as the ability to read and write."⁸

One by-product of this growing number of uneducated graduates has been a burgeoning legal literature on the subject of educational malpractice.⁹ Taken as a whole this body of legal commentary manifests two striking characteristics. First of all, it is vastly disproportionate to the number of actually decided cases. While there are numerous law review articles, notes, and comments in the educational malpractice area, there have been but a handful of decisions, only three of which are fully reported.¹⁰

7. See Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U.L. REV. 27 (1979); Note, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U.L. REV. 293 (1978). Exactly what constitutes "functional illiteracy" is subject to some debate. The New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education defined a "functional literate" as a person able to read materials at a tenth to twelfth grade reading level. One unable to read at that level was, thus, by definition "functionally illiterate." 2 FLEISCHMANN REPORT, *supra* note 1, at 10. Among the materials that the Fleischmann Commission felt a "functional literate" should be able to read and comprehend were driving manuals, "how to" instructions for home repair projects, and the income tax directions. Some, including second year law students enrolled in Tax I, may find this an unreasonably rigorous standard of functional literacy.

8. Comment, *Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction*, 58 N.C. L. REV. 561 (1980).

9. E.g., Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORD. URB. L.J. 117 (1979); Note, *Donohue v. Copiague Union Free School District: New York Chooses Not to Recognize "Educational Malpractice,"* 43 ALB. L. REV. 339 (1979); Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA L.J. 383 (1978); Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U. L. REV. 641 (1978); Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976); Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U. L. REV. 27 (1979); Comment, *supra* note 8.

10. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Hoffman v. Board of Educ., 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); Donohue v. Copiague Union Free School Dist., 95 Misc. 2d 1, 408 N.Y.S.2d 584 (1977), *aff'd*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979). The unreported decisions are McNeil v. Board of Educ., No. L-17207-74 (Super. Ct. Law Div. N.J. May 31, 1974), *reported in* Elson, *supra* note 9, at n.4; Garrett v. School Bd. of Broward County, No. 77-8703 (Cir. Ct. Fla. Dec. 5, 1977), *reported in* 10 EDUC. L. BULL. 475 (1977), and Doe v. Board of Educ., No. 48277 (Cir. Ct. Montgomery County Md. July 6, 1979), *reported in* Comment, *supra* note 8, at nn. 1 & 3.

Second, the commentary is uniformly enthusiastic for the recognition of some form of judicial remedy for a failure to educate. Malpractice in other professions has been found to be legally compensable; so, it is reasoned, malpractice in education should be treated no differently.¹¹

The idea is that the educator (individually, collectively, or institutionally)¹² has some legal obligation to carry out the function of

11. The argument seems to be that, since malpractice actions are increasing in other professions, it is simply anomalous that educators shouldn't be subjected to such litigation too. See, e.g., Note, *Donohue v. Copiague Union Free School District: New York Chooses Not to Recognize "Educational Malpractice,"* 43 ALB. L. REV. 339, 358 (1979). As can readily be seen this is not a particularly compelling piece of logic, requiring as it does several critical assumptions of both fact and policy. Moreover, there is some reason for doubting the efficacy or desirability of judicial intervention in other professional malpractice areas. See notes 245 & 283-85 *infra* and accompanying text. So, the argument may cut in just the opposite direction from that intended by the proponents of a cause of action for educational malpractice. See generally W. PROSSER, *THE LAW OF TORTS* 161-66 (4th ed. 1971); T. ROADY & W. ANDERSEN (eds.), *PROFESSIONAL NEGLIGENCE* (1960).

Perhaps a more persuasive analogy would be to products liability. There, in response to societal demand, the courts eventually fashioned a new cause of action. Initially, recognition of the new liability was based on a variety of theories: negligence, warranty, fraud, misrepresentation, and nuisance. But today the products liability cause of action is almost universally accepted. See W. PROSSER, *THE LAW OF TORTS* 641-82 (4th ed. 1971). At most, however, all the products liability analogy stands for is that the law of torts is evolutionary. It offers no guidance as to when or why a new tort should be recognized and, thus, is of limited utility in determining whether educational malpractice is an appropriate candidate for such recognition.

12. The named defendants in educational malpractice actions are usually the local school board and its officials, rather than individual teachers. In medical malpractice actions, however, to which educational malpractice advocates often refer, see note 11 *supra*, individual physicians are often named. Moreover, in many of the examples of educational malpractice given by these advocates, it is the conduct of an individual instructor that allegedly causes the harm suffered by the malpractice victim; see, e.g., Elson, *supra* note 9, at 648, 659 & 667. No logical reason exists, therefore, for precluding individual teacher liability. But see note 272 *infra*.

Whatever the teacher's liability, the local school district would be liable, either for improper hiring, see *RESTATEMENT (SECOND) OF TORTS* § 308 (1965), or under the doctrine of *respondeat superior*, see W. PROSSER, *supra* note 11, at 458-91. See also Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 1 J. L. & EDUC. 109 (1972).

In the reported cases, see note 10 *supra*, the doctrine of governmental immunity has not been an issue, and it is assumed for purposes of this article that educational malpractice actions will not be barred by immunity. For discussion of the doctrine in the context of education, see Annot., 33 A.L.R.3d 703 (1970) (modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher education); 38 A.L.R.3d 480 (1971) (immunity of private schools and institutions of higher learning from liability in tort). See also Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755, 766-67, 769 (1976).

The modern trend has been toward the abrogation of governmental and related immunities. K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 25.04, at 554-57 (1976). Generally, this abrogation has been accomplished by legislation, although in some jurisdictions it has been conditioned on the availability of insurance; see, e.g., WASH. REV. CODE ANN. § 4.96 (Supp. 1977) (waiving tort immunity of all

academic instruction in such a manner as to impart some minimal level of competence in basic subjects to the student.¹³ Identifying

state's political subdivisions); VT. STAT. ANN. tit. 29, § 1403 (1959) (waiver of immunity to extent of policy). But in some states the doctrine of governmental immunity has been abolished by judicial action, *e.g.*, *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

The United States Supreme Court has itself accelerated this trend, significantly for the purpose of this article, in decisions rejecting immunity for school officials for the violation of students' civil rights. For example, in *Wood v. Strickland*, 420 U.S. 308 (1975), the Court observed, "[I]mmunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* at 320 (footnote omitted). See also Comment, *Immunity of Teachers, School Board Members, and School Districts for Suit Under Section 1983 of Civil Rights Act*, 1976 U. ILL. L. F. 1129; Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 SO. CAL. L. REV. 1322 (1976). See generally B. FEIN, *SIGNIFICANT DECISIONS OF THE SUPREME COURT, 1978-1979 TERM* 12-16, 98-105 (1980).

Only a few states, however, have statutorily provided for direct actions against school districts for damages caused by their boards, officers, agents, or employees. Ripps, *The Tort Liability of the Classroom Teacher*, 9 AKRON L. REV. 19, 20 (1975).

13. Actually, the claims of educational malpractice that have so far been urged upon the courts reveal that the cause of action envisioned might be broader than the statement in the text suggests. In some instances the allegation has been that it was educational malpractice to push a student through school on the basis of merely social promotions, allowing that student to graduate though deficient in basic skills. *E.g.*, *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). In other cases, just the opposite has been contended; educational malpractice has been seen in a failure to advance a student to a level of instruction which he was capable of comprehending. *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

A basic and continuing confusion exists as to whether the essence of educational malpractice consists of misfeasance—the improper performance of the educative function—or of nonfeasance—the omission of the performance. Compare Note, *supra* note 11, at 339, with Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORD URB. L. J. 117, 119 n.12. In fact, the distinction is not particularly helpful in analyzing claims of educational malpractice. See *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 388-89, 410 N.Y.S.2d 99, 118 (1978) (Damiani, J., dissenting). See also note 56 *infra*.

Nor are these the only disagreements among those who would have the courts recognize a cause of action for educational malpractice. In discussing the elements of educational malpractice, its proponents sometimes seem to mean that the schools are teaching the wrong subjects. See, *e.g.*, Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755, 801-02 (1976). At other times, they appear to mean that the schools are adopting the wrong pedagogical strategies. See, *e.g.*, Elson, *supra* note 9, at 746-54. Thus, it is unclear whether the schools are to be held liable for teaching an improper curriculum, albeit effectively, or for teaching appropriate subjects but utilizing methods that fail to convey those subjects adequately—or for both.

As will be suggested, see notes 287 & 288 *infra* and accompanying text, this amorphous nature of the proposed cause of action is an argument against its recognition by the courts.

the source of that obligation, however, has presented both commentators and counsel for the inadequately educated plaintiffs with great difficulty. To overcome this obstacle, they have generated a number of alternative theories of recovery. Some writers, analogizing the public schools to mental hospitals, have argued that a student who is forcibly confined to a classroom without being offered adequate instruction (treatment) is unconstitutionally deprived of liberty without due process of law.¹⁴ Others, alleging the existence of a contract either between the student and the school or between the taxpayers and the school system, of which the student would be a third-party beneficiary, have suggested a contract-based theory of recovery.¹⁵ A third view has been that, at least where the student has received report cards showing satisfactory progress, an action for intentional misrepresentation may lie.¹⁶ The most popular theory has been that, through either misfeasance or nonfeasance, the failure to educate constitutes some form of professional negligence which is remediable under traditional tort principles.¹⁷ So far, none of these theories has been successful in actual litigation.¹⁸

This article will examine the present case law on educational malpractice. It will then analyze each of the principal theoretical bases that have been advanced to support an educational malpractice cause of action: contract, misrepresentation, constitutional right, and negligence.¹⁹ It is the article's thesis that, for one reason or another, each of these theories is logically unsound and inadequate to support the desired cause of action. In each case, the theory advanced either proceeds from an inapposite analogy or requires an unjustified extension or distortion of present doctrine. Moreover, even if a legally sufficient justification for recognizing a cause of action for educational malpractice could be found, compelling considerations of public policy argue against such recognition. These considerations will be surveyed in the

14. Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORD. URB. L. J. 117, 121 (1979); Note, *supra* note 11, at 356-57.

15. Note, *supra* note 11, at 357; Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA L.J. 383, 401 (1978).

16. Comment, *supra* note 8, at 561, n.2; see also *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 827, 131 Cal. Rptr. 854, 862-63 (1976).

17. E.g., Comment, *supra* note 8, at 564-86; Elson, *supra* note 9, at 693-768.

18. See note 10 *supra*.

19. Still other possible theories of recovery that have been advanced are an intentional tort action similar to intentional infliction of emotional distress or, where available, a petition for mandamus. Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755, 781-82 (intentional tort), 789-90 (mandamus) (1976). However, because either of these avenues of recovery, if available at all, could be pursued in only a very limited number of situations, they will not be considered further in this article.

concluding section of this article together with their implications for future judicial developments in this area.²⁰

20. The scope of this article is limited to a consideration of the various theoretical bases advanced to support a cause of action for educational malpractice in academic instruction and counselling of students enrolled in elementary and secondary public schools. Issues arising in the context of private education, where contract may play a more important role, are not discussed. *See, e.g.*, *Pietro v. St. Joseph's School*, 48 U.S.L.W. 2229 (N.Y. Sup. Ct. Suffolk County, Sept. 21, 1979) (dismissal of educational malpractice claim against private school by trial court, but recognizing that a parent might be entitled to recover tuition if the school breached an express contractual agreement with the parent that the student would attain a certain proficiency level after completing a specified curriculum). *See generally* Comment, *supra* note 19, at 801-03; Annot., 38 A.L.R.3d 480 (1971). Also not addressed are questions of liability presented in claims against institutions, public or private, of higher education. *See* *Lowenthal v. Vanderbilt Univ.*, No. A-8525 (Ch. Nashville, Tenn., Aug. 15, 1977) (university breached contractual obligation by its failure to provide necessary faculty and funding to continue doctoral program); *Ianniello v. University of Bridgeport*, No. 10009 (C.P. Conn., June 7, 1977) (denying recovery of tuition for an unsatisfying class); *Trustees of Columbia Univ. v. Jacobsen*, 31 N.J. 221, 156 A.2d 251 (1959) (affirming dismissal of misrepresentation claim against university for failure to inculcate truth and wisdom), *cert. denied*, 363 U.S. 808 (1960). *See generally* Russell, *Goal Accountability in Higher Education: Towards a Comprehensive Legal Conception of the University*, 7 J. L. & EDUC. 507 (1978); Note, *Consumer Protection and Higher Education—Student Suits Against Schools*, 37 OHIO ST. L.J. 608 (1976); Annot., 86 A.L.R.2d 489 (1962).

The tort liability of public educators for physical injuries to elementary or secondary school pupils is also beyond the scope of this article. It should be noted, however, that in many of these cases liability has been found to arise from negligent instruction. *See, e.g.*, *Matteuci v. High School Dist.*, 4 Ill. App. 3d 710, 281 N.E.2d 383 (1972) (physical injuries resulting from negligent instruction in the use of dangerous machinery); *Engel v. Gosper*, 71 N.J. Super. 573, 177 A.2d 595 (1962) (death caused by negligent instruction in the use of rockets); *La Valley v. Stanford*, 272 App. Div. 183, 70 N.Y.S.2d 460 (1947) (physical injuries received in boxing match after physical education teacher failed to instruct in defensive measures); *Gardner v. State*, 281 N.Y. 212, 22 N.E.2d 344 (1939) (physical injuries sustained in gym class resulting from negligent instruction in customary gymnastic techniques). *See generally* Ripps, *supra* note 12; Drowatsky, *On the Firing Line: Negligence in Physical Education*, 6 J. L. & EDUC. 481 (1977); Comment, 19 WASHBURN L. J. 189 (1979); Comment, 19 SANTA CLARA L. REV. 1125 (1979). The cases are collected in Annot., 35 A.L.R.3d 758 (1971) (tort liability of public schools for accidents associated with chemistry experiments, shopwork, and manual or vocational training); Annot., 36 A.L.R.3d 361 (1971) (tort liability of public schools for accidents occurring in physical education classes); Annot., 38 A.L.R.3d 830 (1971) (tort liability of public schools for injuries resulting from lack or insufficiency of supervision). In the educational malpractice actions, however, these cases have invariably been construed as limited to their facts, holding only that public school authorities have a duty to exercise reasonable care for the *physical safety* of students under their supervision. *See, e.g.*, *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 821, 131 Cal. Rptr. 854, 858 (1976).

Finally, this article does not attempt to address the related question of the public schools' duty to meet the educational needs of "special students." *See, e.g.*, *Gary W. v. State*, 437 F. Supp. 1209 (E.D. La. 1976) (ordering plans for appropriate

II. THE CASE LAW

To date, the courts have been uniform in their reluctance to recognize a cause of action for educational malpractice, no matter on what theory the claim has been predicated.²¹ In *Peter W. v. San Francisco Unified School District*, the California appellate court unanimously affirmed the trial court's dismissal of the suit for failure to state a cause of action.²² Relying on public policy, the New York Court of Appeals, although accepting the possibility that such a cause might be properly pleaded, rejected a similar action in *Donohue v. Copiague Union Free School District*.²³ And in *Hoffman v. Board of Education* the same New York Court of Appeals refused to permit recovery in a case that might easily have been distinguished from the two earlier educational malpractice suits.²⁴

Peter W. was the first and perhaps most widely publicized suit for non-learning. The plaintiff had attended the elementary and secondary schools operated by the defendant district. Although recently graduated from high school, he alleged that the district and its employees had negligently failed to provide him with adequate instruction, guidance, counseling, and supervision in basic academic skills, such as reading and writing. His teachers had instead, he maintained, allowed him to pass from one grade level to another even though they knew or should have known that he lacked the skills requisite for such advancement. As a result, he had been permitted to graduate from high school even though unable to read beyond the eighth grade level. This reading disability, plaintiff claimed, rendered him unable to gain meaningful employment, and he sought to recover general damages for this "permanent disability,"²⁵ as well as special damages incurred as the cost of compensatory tutoring. The school district's liability for these damages was, according to the plaintiff, the product of

education for mentally retarded, physically handicapped, and delinquent children as required by a due process right to adequate treatment); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (excluding "special students" from school violates due process). See generally Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974).

21. See Annot., 1 A.L.R.4th 1139 (1980) (tort liability of public schools and institutions of higher learning for educational malpractice). The paucity of decisional guidance in this area may be suggested by the fact that this annotation, the American Law Report's first on the subject, is but four pages in length.

22. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

23. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979), *aff'g* 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978), *aff'g* 95 Misc. 2d 1, 408 N.Y.S.2d 584 (1977).

24. 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979), *rev'g* 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978).

25. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 818, 131 Cal. Rptr. 854, 856 (1976).

either its negligence or its misrepresentation of his level of academic achievement.

As to the negligence claim, the court concluded that there was no duty of care on the part of the school district or its employees toward the plaintiff on which to base a negligence cause of action. This conclusion being "dispositive" of the negligence action,²⁶ the court did not address other negligence issues presented by the plaintiff's pleading. It did, however, indicate by way of dicta that it entertained serious doubt as to whether a workable standard of care could ever be conceived to apply to such an action. It also questioned whether the plaintiff had suffered any injury within the meaning of the law of negligence; and, even if injury had been sustained, it suggested there was an insufficient causal link between the defendant's negligence, if any, and the plaintiff's disability.²⁷

The court's discussion of the legal question of the existence of a duty owed by the defendant to the plaintiff was inextricably linked with its consideration of broader issues of public policy. "[I]t should be recognized," the court wrote, "that 'duty' is not sacrosanct in itself, but only an expression of *the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.*"²⁸ Ironically, the court found support for its position in *Rowland v. Christian*, the pathbreaking California Supreme Court decision that had rejected the common law categories to determine the legal duties owed by owners and occupiers of land to those who came upon that land.²⁹ Language in *Rowland* had stated the "fundamental principle" of tort liability that "all persons are required to use ordinary care to prevent others being injured by their conduct" *except* where a departure from this principle was "clearly supported by public policy."³⁰ Taking this as its starting point, the *Peter W.* court then proceeded to identify those policy factors pertinent to a determination of duty:

The social utility of the activity out of which the injury arises, compared

26. *Id.* at 825, 131 Cal. Rptr. at 861.

27. *Id.* at 824, 131 Cal. Rptr. 860-61.

28. *Id.*, 131 Cal. Rptr. at 860, *quoting* *Dillon v. Legg*, 68 Cal. 2d 728, 734, 69 Cal. Rptr. 72, 76, 441 P.2d 912, 916 (1968), *quoting* W. PROSSER, *THE LAW OF TORTS* 332-33 (3d ed. 1964) (emphasis added in *Peter W.*). *See also* W. PROSSER, *supra* note 11, at 325-26.

29. 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

30. *Id.* at 112, 70 Cal. Rptr. at 100, 443 P.2d at 564.

with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; . . . [and] in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget . . . are . . . factors which play a role in the determination of duty.³¹

Examining allegations of educational malpractice in light of these factors, the court concluded that the very context out of which such suits would arise was an argument against allowing the cause of action.

Rightly or wrongly, but widely, [those persons and agencies who administer the academic phases of the public educational process] are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey.³²

In such an atmosphere, to hold school districts, administrators, and teachers to an actionable duty of care in the discharge of their academic functions would, in the court's judgment, expose educators to countless tort claims, both real and feigned, brought by disaffected students and parents. The ultimate consequences, in terms of time and money, would burden public education beyond calculation.

The court recognized that tort law is an evolutionary phenomenon and that, from time to time, new areas of liability have been sanctioned.³³ But it noted that in those areas

the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework. . . . This is simply not true of wrongful conduct and injuries allegedly involved in educational malfeasance. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, cause, or injury.³⁴

31. 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859, *quoting* *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 8-9, 31 Cal. Rptr. 847, 851 (1963).

32. *Id.* at 825, 131 Cal. Rptr. 861.

33. *See, e.g.*, *State Rubbish Collectors Ass'n v. Silizino*, 38 Cal. 2d 330, 240 P.2d 282 (1952) (intentional infliction of mental distress); *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968) (negligent infliction of emotional distress upon a third party observer); *Rowland v. Christian*, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968) (rejection of common law categories for determination of legal duty of owners and occupiers of land); *Tarasoff v. Regents of University of California*, 13 Cal. 3d 177, 118 Cal. Rptr. 129, 529 P.2d 553 (1974) (psychotherapist's duty to warn one endangered by physician's patient).

34. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 860. Interestingly, the court chose to characterize the plaintiff's claim as one involving malfeasance—the performance of an act wholly wrongful and unlawful. Generally, educational malpractice claims have been framed in terms of misfeasance or nonfeasance, rather than malfeasance. *See* note 13 *supra*.

Turning to the plaintiff's cause of action for misrepresentation, the court found that any claim of negligent misrepresentation had been disposed of by its prior analysis of the negligence cause of action.³⁵ As for intentional misrepresentation, the court held that plaintiff's pleading was procedurally insufficient under California law, because it failed to allege any facts showing the requisite element of reliance upon the asserted misrepresentation.³⁶ Again, however, considerations of public policy were central to the court's analysis of the plaintiff's case.

An even more candid reliance upon public policy as a basis for rejecting a cause of action for educational malpractice is to be found in *Donohue v. Copiague Union Free School District*.³⁷ In an opinion remarkable for its brevity, the New York Court of Appeals conceded the possibility that "within the strictures of a traditional negligence or malpractice action, a complaint sounding in 'educational malpractice' may be formally pleaded."³⁸ But the court continued that, even if such a cause could be legally framed, it should be rejected on public policy grounds alone. The court was persuaded that the lack of judicial expertise in matters of educational policy, coupled with the undue burden that would be placed on the courts by recognizing a cause of action for educational malpractice, counseled against permitting such suits.³⁹ Nor could the court overlook the availability of alternative administrative procedures that allowed public school students or their parents to enlist the aid of the State Commissioner of Education to vindicate their educative rights.⁴⁰

In *Donohue* the plaintiff had attended for four years the high school operated by the defendant school district. Although the plaintiff had received failing grades in several subjects, and was unable to read, write, or comprehend simple English, he was allowed to graduate. Alleging that the district had breached its

As this appears to be the only reference to malfeasance in all of the educational malpractice cases and commentary, it may have been nothing more than a slip of the judicial pen.

35. *Id.* at 827, 131 Cal. Rptr. at 862.

36. *Id.*, 131 Cal. Rptr. at 863. See also 3 B. WITKIN CALIFORNIA PROCEDURE §§ 573-74 (2d ed. 1971).

37. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979), *aff'g* 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978), *aff'g* 95 Misc. 2d 1, 408 N.Y.S.2d 584 (1977).

38. *Id.* at 442, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377.

39. *Id.*, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

40. *Id.* at 443, 391 N.E.2d at 1355, 418 N.Y.S.2d at 378.

duty to educate him by failing to test, evaluate, and teach him in such a manner as to identify and remedy his ignorant condition, the plaintiff claimed \$5,000,000 in damages.

The trial court dismissed the *Donohue* suit for failure to state a cause of action.⁴¹ In a long and well-reasoned opinion, the intermediate appellate court, relying heavily upon *Peter W.*, affirmed the dismissal.⁴² The majority's principal point was the absence of any legal duty to educate which the defendant school district might be said to have breached.⁴³ In response to Donohue's suggestion that the state constitution itself imposed such a duty,⁴⁴ the court noted that the provision of the constitution relied upon by the plaintiff was clearly and specifically addressed to the state legislature, mandating the creation and maintenance of a system of public education. Such language, the court held, was never intended to create and impose a duty on local school districts to insure that each individual pupil receive a minimal level of education.⁴⁵ Moreover, even if such a duty could be said to exist, the court indicated that a suit for educational malpractice must fail because "the failure of educational achievement cannot be characterized as an 'injury'"⁴⁶ And, even were a duty to be found to exist and even were there to be an injury within the meaning of tort law, establishing a causal connection between the breach of the duty and the injury suffered would be so speculative, if not impossible, as to argue against the judiciary's entertaining suits for educational malpractice.⁴⁷

On appeal, the New York Court of Appeals sustained, summarily dismissing plaintiff's assertion of a constitutionally created duty to educate.⁴⁸ Indeed, far from supporting the plaintiff's case,

41. 95 Misc. 2d 1, 408 N.Y.S.2d 584 (1977).

42. 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978).

43. Only three of the four sitting judges of the Appellate Division, Second Department, joined in the opinion of the court. Dissenting, Mr. Justice Suozzi would have recognized the cause of action, thus permitting the plaintiff to proceed to the trier of fact. *Id.* at 44, 407 N.Y.S.2d at 884 (Suozzi, J., dissenting). Justice Suozzi, thereby, became the first judge in America to go on record as favoring a cause of action for educational malpractice. It should be noted, however, that Mr. Justice Suozzi was careful to emphasize that he did not find any causal link to have been established. He simply would have permitted the plaintiff the task of proving such a causal relationship in order to recover.

44. The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

N.Y. CONST. art. XI, § 1.

45. *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874, 880.

46. *Id.*

47. *Id.* at 42, 407 N.Y.S.2d at 881.

48. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

the court found that the state constitution created a presumption against recognizing such causes of action. The purpose of the sections cited by the plaintiff was, held the court, "to make all matters pertaining to the general school system of the state within the authority and control of the department of education and to remove the same so far as practicable and possible from controversies in the courts."⁴⁹

The courts' extreme reluctance to recognize a cause of action for educational malpractice, even in an arguably distinguishable case, was illustrated by *Hoffman v. Board of Education*,⁵⁰ handed down by the New York Court of Appeals only six months after its decision in *Donohue*. According to the court's own statement of the facts in *Hoffman*, the plaintiff, Daniel Hoffman, had since early childhood suffered from a serious speech defect of perhaps psychosomatic origin owing to the death of his father during the plaintiff's infancy. In September, 1956, Daniel was enrolled in kindergarten in the New York City school system. Shortly thereafter, he had been tested by a certified clinical psychologist. Although plaintiff's speech defect made this testing difficult, the examining psychologist placed the plaintiff's intelligence quotient (I.Q.) at seventy-four (74). Seventy-five (75) had been established by the New York City Board of Education as the lower limit demarcating children of normal intelligence from retarded children. On this basis, Daniel was placed in a class for Children of Retarded Mental Development (CRMD). The examining psychologist had been uncertain of his findings, however, and in his report had specified that Daniel (1) should receive speech therapy and (2) should be "re-evaluated"⁵¹ within two years so that a

49. *Id.* at 443, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378, quoting *Bullock v. Cooley*, 225 N.Y. 566, 576-77, 122 N.E. 630, 633 (1919).

50. 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979), *rev'g* 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978).

51. The exact meaning of the psychologist's recommendation of "re-evaluation" was a source of disagreement not only between the plaintiff and the Board of Education but also between the members of the Supreme Court, Appellate Division. The Board took the position that, through daily observation, it had been continuously re-evaluating the plaintiff and, thus, had complied with the psychologist's recommendation. The psychologist, who testified for the plaintiff, stated that he had meant that the child should be retested within two years and that this had been standard procedure in such cases. The appellate majority, on the basis of the expert testimony offered by both sides, adopted the position urged by the plaintiff, *i.e.* that intelligence is determined only by I.Q. testing. *Hoffman v. Board of Educ.*, 64 App. Div. 2d at 377, 410 N.Y.S.2d at 107 (1978). Mr. Justice Martuscello, however, found the examining psychologist's testimony so "incredible"

more accurate estimation of his intellectual abilities could be made. No such retesting was ever undertaken. Daniel was placed in classes for mentally retarded children, where he remained until he was seventeen years old. At age seventeen he was transferred to an Occupational Training Center for the retarded, where, at his mother's request, he was finally given a second intelligence test. His composite score was ninety-four (94). He was then advised that he could no longer continue with his vocational training because, being of normal intelligence, he was unqualified.

Hoffman then commenced an action against the New York Board of Education, alleging that it had been negligent in its failure to retest his intelligence. This negligence had caused him to be misclassified and improperly enrolled in the CRMD program which, Hoffman alleged, had severely injured his emotional and intellectual well-being and had reduced his ability to obtain employment. At trial, the jury awarded him damages in the amount of \$750,000.

A closely divided appellate court affirmed the trial judgment as to liability, although it reversed the judgment as to damages and would have required the plaintiff either to consent to a reduction of the award to \$500,000 or to retry the issue of damages.⁵² The thrust of the majority opinion was that the Board of Education's failure to retest the plaintiff, in accordance with its own psychologist's recommendation, was an affirmative act of negligence and, therefore, actionable.

Despite a variety of bases on which *Hoffman* might have been distinguished from *Donohue*, the New York Court of Appeals reversed.⁵³ At a very simple level the complexity and difficulty of the issues presented in *Hoffman* was manifested by the fact that the intermediate appellate court, the very same court that had decided *Donohue*, divided three to two in affirming liability.⁵⁴

that it should be discounted as a matter of law. In dissent, therefore, he adopted the argument advanced by the Board, i.e. that the words "retest" and "re-evaluate" were words of art with different meanings and, thus, that the Board had complied with the psychologist's recommendation to "re-evaluate" the plaintiff within two years. *Id.* at 381, 410 N.Y.S.2d at 111. Because it reversed for failure to state a cause of action, the Court of Appeals did not address this issue. *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

52. *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978).

53. *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

54. While the Supreme Court, Appellate Division, Second Department, did decide both *Donohue* and *Hoffman*, the two cases were not heard by the same panel of judges. Only one member of the court that decided *Donohue* sat in *Hoffman*, Mr. Justice Damiani, and his position in the latter case was consistent with that which he had taken in the former. In *Donohue*, Mr. Justice Damiani had been the spokesman for the court in denying plaintiff's cause of action. In *Hoffman*, he dis-

This was, in turn reversed by a four to three decision of the Court of Appeals.⁵⁵ A four-to-three reversal of a three-to-two decision stands in marked contrast to the virtual unanimity of the courts in true educational malpractice cases. This result strongly suggests that reasonable minds might find *Hoffman* distinguishable from those cases.

In contrast to *Peter W.* and *Donohue*, the plaintiff's complaint in *Hoffman* was not that the board had failed to take steps to detect and correct his academic deficiencies but that it had committed affirmative acts of negligence.⁵⁶ Also distinguishing *Hoffman* from *Donohue* and *Peter W.* was the fact that in *Hoffman* the school authorities had violated their own rules requiring retesting. In *Donohue* and *Peter W.* the plaintiffs' claims failed, at least in part, because of an inability to identify any legal duty that the school authorities had breached. On the one hand, neither judicial decision nor legislative provision could be found establishing a duty to educate; on the other hand, it was necessary to permit a certain discretion to the educators' professional judgment in determining what pedagogical strategies to adopt and when and whether to advance a student. In *Hoffman*, however, it was not within the Board's discretion to prevent its own psychologist's recommendations from being carried out. Violation of clear, self-

sented "because it is the public policy of this State that no cause of action exists to recover for so-called educational malpractice." *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 387, 410 N.Y.S.2d 99, 117 (1978). Indeed, Mr. Justice Damiani's hands-off approach may represent the extreme position of judicial deference in suits against the schools. Where educators are charged with negligence, Justice Damiani would apparently deny recovery automatically. As a matter of law, the difficulty with this approach is that it overlooks the negligent supervision cases. See note 20 *supra*. The other dissenter in *Hoffman*, Mr. Justice Martruscello, did not endorse Justice Damiani's theory but rather disagreed with the majority on the facts. See note 51 *supra*.

55. Two members of the Court of Appeals, Justices Fuchsberg and Wachtler, who voted to deny the cause of action in *Donohue* would have sustained Hoffman's right to recover. The third dissenter in *Hoffman*, Mr. Justice Meyer, did not participate in *Donohue*. *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 129, 400 N.E.2d 317, 321, 424 N.Y.S.2d 376, 380 (1979).

56. In analyzing educational malpractice claims, however, distinctions between misfeasance and nonfeasance may not be as helpful as they at first appear. See note 13 *supra*. As dissenting Justice Damiani pointed out, the act of omitting the retest could be seen as nonfeasance, whereas in *Donohue* the allegedly ineffective reading instruction could be characterized as misfeasance. Nevertheless, it was on this ground that the majority of the Supreme Court, Appellate Division, and the three dissenting members of the Court of Appeals would have distinguished *Hoffman* from *Donohue*. In point of fact, the complaints in both cases, and in *Peter W.* as well, alleged acts both of omission and commission.

imposed guidelines presents a stronger case for the finding of duty and breach than was present in either *Donohue* or *Peter W.* Moreover, in *Donohue* and *Peter W.*, any failure on the part of the educational authorities to provide a positive program to remedy the plaintiffs' ignorance left the plaintiffs no worse off than they had been. Classifying Daniel as mentally retarded, however, imposed new and crippling burdens upon him. Thus, it could be argued, in *Hoffman* the duty, breach, causation, and injury were all much clearer than in the earlier educational malpractice cases.⁵⁷

It may even be incorrect to conceptualize *Hoffman* as an educational malpractice case. Arguably it is more closely analogous to those cases imposing liability upon school authorities in the context of remedial or special education programs.⁵⁸ Furthermore, if *Hoffman* is seen as an educational malpractice case, considerations of public policy do not argue as strongly against the imposition of liability. The precedential impact of recognizing liability on the facts in *Hoffman* would have been quite restricted, assuming the probable infrequency of such misclassification.⁵⁹

In spite of all such considerations, however, the New York Court of Appeals dismissed Hoffman's suit for failure to state a cause of action, simply reiterating its position in *Donohue* that a cause of action for educational malpractice, "although quite possibly cognizable under traditional notions of tort law, should not, as a matter of public policy, be entertained by the courts . . ."⁶⁰ The majority explicitly conceded that, even were it to accept the distinctions drawn by the lower courts it would not have decided the case any differently.⁶¹

The adamant refusal of the judiciary to countenance a cause of action for educational malpractice contrasts sharply with the enthusiasm of law review critics and commentators for recognizing such an action.⁶² On grounds both of law and policy, however, the courts' deference appears to be well-taken.

57. See Diamond, *Education Law*, 29 SYRACUSE L. REV. 103, 147-52 (1978).

58. See Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U. L. REV. 27, 32 (1979); see also note 20 *supra*.

59. Of course, automatic promotion could be conceptualized as a form of misclassification. But the injury resulting from positive misclassification, as opposed to the negative misclassification in *Hoffman*, is considerably more speculative. See notes 190-98 *infra* and accompanying text.

60. *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 126, 400 N.E.2d 317, 319, 424 N.Y.S.2d 376, 378 (1979).

61. *Id.* at 126, 400 N.E.2d at 319, 424 N.Y.S.2d at 379.

62. See notes 8 & 9 *supra*.

III. ALTERNATIVE THEORIES OF EDUCATIONAL MALPRACTICE LIABILITY

As the preceding discussion suggests, those who have sued for educational malpractice have generally sought to hold educators liable on a negligence theory, although misrepresentation has also been pleaded. The lack of success that these claims have experienced has led others to attempt to construct a rationale for educational malpractice liability based either upon a contractual relationship or a constitutional right. Closer analysis, however, will reveal that each of these theories is unsatisfactory. Judicial rejection of educational malpractice claims, therefore, has been legally sound.

Contract

Of those theories advanced to support an educational malpractice cause of action, perhaps the most easily dealt with is that based on contract. The contractual relationship between student and school has previously been recognized in suits against private colleges and universities,⁶³ and some proponents of a cause of action for educational malpractice have contended that, although more plausible in the private school context, "[a] contract approach in a suit for failure to learn because of teacher negligence or incompetence may have several advantages over a tort approach" even in the public school context.⁶⁴ Among the perceived advantages are: (1) the unavailability in contract of various defenses that might bar recovery in tort; (2) the fact that governmental immunity would be less likely to preclude recovery in contract than in tort; (3) the generally longer statutes of limitations applicable to contract actions;⁶⁵ and (4) the wholly specula-

63. See note 20 *supra*; see also Note, *supra* note 15, at 401.

64. Comment, *supra* note 19, at 788. In point of fact, since tort liability has been extended to virtually every type of contract misfeasance in the performance of which may injure the promisee, the educational malpractice plaintiff would have the option of suing in both tort and contract. See W. PROSSER, *supra* note 11, at 617 nn. 47-56.

65. The period for bringing suit allowed by the statute of limitations might actually prove longer under a tort theory, however. Assuming that a cause of action for educational malpractice were to be recognized, both *Peter W.* and *Donohue* demonstrate that the plaintiff might not become aware of his injury until after graduation from high school. By analogy to the medical malpractice actions, the appropriate rule would seem to be that the statute of limitations governing a tort suit should not begin to run until the date of discovery of the injury. See, e.g., *Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974) (defective tubal ligation). The stat-

tive possibility that courts would be more receptive to allowing recovery for loss of an expectancy than they have so far proven to be in suits based upon negligence theories.⁶⁶

Among the more obvious defects of any contract-based theory of recovery is the total absence of any bargained-for exchange. Most jurisdictions require some negotiation for consideration.⁶⁷ But, at least in the case of elementary school students, attendance cannot constitute consideration because it is compulsory.⁶⁸ The school, on the other hand, cannot refuse to accept the student.⁶⁹

Alternatively, an educational malpractice plaintiff might plead promissory estoppel,⁷⁰ arguing that, in reliance upon the public school's implicit promise of non-negligent teaching, he or she surrendered the opportunity of attending a private school. Such a plaintiff, however, would then have the burden of proving by a preponderance of the evidence that he or she would and could

ute of limitations governing a contract action would begin to run from the moment of breach.

66. From the point of view of those concerned with the impact upon public education of recognizing a cause of action for educational malpractice, contract-based claims would have an additional advantage: the damage awards would be considerably smaller than in tort. Under a contract theory, for example, damages should be limited to the amount of benefit denied by the teacher, *e.g.*, payment for remedial instruction. Under a tort theory, plaintiff's recovery could be much broader, *e.g.*, loss of future earnings. Needless to say, this is not an "advantage" widely proclaimed by the proponents of an educational malpractice cause of action.

67. See E. MURPHY & R. SPEIDEL, *STUDIES IN CONTRACT LAW* 338-84 (2d ed. 1977).

68. See K. ALEXANDER, *supra* note 2, at 254-317. Every state except Alabama has a compulsory education statute. From time to time these statutes have been challenged by religious groups on the ground that compulsory attendance violates their First Amendment right to the free exercise of their religion. The courts have consistently rejected these challenges and sustained the constitutionality of compulsory education. See, *e.g.*, *Rice v. Commonwealth*, 188 Va. 224, 49 S.E.2d 342 (1948); *State v. Hershberger*, 103 Ohio App. 188, 144 N.E.2d 693 (1955). In *Wisconsin v. Yoder*, 406 U.S. 205 (1974), an exception was created for the children of the Amish, a tightly knit religious society of long history which permits its children to attend public schools through the eighth grade but prefers to and does provide vocational training at home after that point. Nothing in the *Yoder* opinion, however, can be read as calling into question the continued validity of the general principle that state-compelled school attendance is constitutionally permissible. But cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state-compelled attendance at public schools held violative of due process). For further discussion of the compulsory education system, see Note, *The Right to an Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 799-803 (1975); Comment, *The Rights of Children: A Trust Model, A Child's Rights in the Compulsory Education System*, 46 FORD. L. REV. 669, 694-713 (1978). See also notes 157 & 158 *infra* and accompanying text.

69. *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), *modifying*, 334 F. Supp. 1257 (E.D. Pa. 1971) (school cannot constitutionally exclude children, even though "uneducable").

70. See E. MURPHY & R. SPEIDEL, *supra* note 67, at 384-424.

have sought private education. The anomalous result would be to make recovery in educational malpractice claims available only to the children of relatively wealthy families (not generally the kind of plaintiffs most education reformers have in mind).⁷¹

The tenuous nature of the contract theories is demonstrated by the fact that recovery under such a theory must rest upon an implied term of an implied contract. To be sure, under the doctrine of quasi-contract, courts have on occasion implied the existence of a contractual obligation.⁷² Also courts have found certain terms implied in some contracts,⁷³ but those decisions have all involved negotiated contracts, not contracts implied-in-law. In the educational malpractice context, however, the court would first have to imply a contract either between the teacher and the student or between the school district and the student. Then it would have to find that an implied term of this implied contract was a promise of adequate and effective instruction. The willingness of judges to engage in such contractual bootstrapping is at least subject to doubt.

More fundamentally, the doctrine of quasi-contract was created to prevent unjust enrichment.⁷⁴ Its application to education would require a considerable leap of the judicial imagination, for neither the teacher nor the school district is unjustly enriched by a student's graduation lacking basic academic skills.

A slightly different contract theory on which a public school student suing for a failure to learn might rely is that of the third party beneficiary.⁷⁵ The contract of which the student would argue that he or she was the third party beneficiary might be either the contract between the teacher and the school district, an implied term of which was that the teacher would teach non-negligently, or an implied contract between the taxpayers and the school district (or the state), whereby the district promised to educate the students committed to its care. In either case, the stu-

71. See Comment, *supra* note 19, at 785.

72. See E. MURPHY & R. SPEIDEL, *supra* note 67, at 428-30.

73. *E.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962) (acceptance of employment to render legal services carries the implicit obligation to use such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of the professional service they undertake). See also Arthur Murray, Inc. v. Parris, 243 Ark. 441, 420 S.W.2d 518 (1967).

74. E. MURPHY & R. SPEIDEL, *supra* note 67, at 428-33.

75. *Id.* at 1335-1411.

dent as third party beneficiary of the contract would be entitled to recover for its breach. But the student would first have to show that the contracting parties had manifested an "intent to benefit" third parties,⁷⁶ a difficult, perhaps insurmountable burden.

Even if the student could establish that he or she was a third party for whose benefit the contract was made, relying on the contract between the teacher and the school district would present practical problems of recovery. Since the teacher's liability would be for breach of contract and not for a tortious act, the Board of Education probably would not be vicariously liable.⁷⁷ But, if liability were to rest upon the teacher alone, the likelihood of any substantial monetary recovery, given the pay scales of public school teachers, seems remote indeed. Of course, the student might be able to force the school district to dismiss the teacher, or a court might order specific performance of the teacher's contractual promise to teach non-negligently. But these are hardly the remedies that educational malpractice plaintiffs are seeking and will, in fact, do such plaintiffs no good at all where the plaintiffs have already graduated.⁷⁸

Different but equally grave legal difficulties would attend any attempt at third party enforcement of an implied contract between the school district (or the state) and the taxpayers. Most jurisdictions take the position that, where a governmental agency contracts to benefit the entire community, individuals do not have a right to enforce that contract.⁷⁹ It requires no feat of conceptual prowess to conclude that, even were there an implied contract between the school district and its taxpayers, it is a contract intended to benefit the entire community and not one on which the district intended to be liable to the third party beneficiaries of the contract.⁸⁰ Therefore, under the accepted rule, an individual stu-

76. RESTATEMENT (SECOND) OF CONTRACTS § 133, comment *d* at 288 (Tent. Drafts Nos. 1-7 1973).

77. See *id.*; see also Proehl, *Tort Liability for Teachers*, in T. ROADY & W. ANDERSEN, *supra* note 11, at 215-16.

78. See, e.g., Comment, *supra* note 19, at 758-60; Elson, *supra* note 9, at 642-47, 754-69.

79. See *Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928) (a member of the public may not maintain an action against a party that contracts with the city to furnish water to the fire hydrants, in the absence of an apparent intention on the part of the promisor to be liable to individual members of the public as well as to the city for any loss resulting from a breach of the contract). See also *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945); *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968). *Moch* was also relied upon in *Donohue* to deny the existence of any duty on the part of the school district under plaintiff's tort theory.

80. Of course, the question of whether a breaching promisor should be liable to third party beneficiaries is essentially a matter of policy.

[T]he determination whether in a specific case the defendant will be held

dent could not maintain an action to enforce the contract.

A final and perhaps fatal defect with contract-based theories of recovery for educational malpractice is that the law of contracts has historically been less flexible than the law of torts and less receptive to novel causes of action.⁸¹ Given the obstacles to bringing a contract-based action, educational malpractice plaintiffs must turn to other avenues of recovery.

Misrepresentation

A more promising approach for establishing a cause of action for educational malpractice would seem to be to argue that, by inaccurately representing a student's competence and educational progress, the school district or its teachers should be liable in damages for misrepresentation.⁸² The lower court in *Donohue* expressly declined to reach this issue,⁸³ and the *Peter W.* court dismissed plaintiff's intentional misrepresentation complaint as improperly pleaded, having failed to allege the requisite element of reliance upon the asserted misrepresentation.⁸⁴ This could be construed to the effect that a properly pleaded complaint would have survived.⁸⁵

liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

Lucas v. Hamm, 56 Cal. 2d 583, 588, 364 P.2d 685, 687, 15 Cal. Rptr. 821, 823 (1961), *cert. denied*, 368 U.S. 987 (1962). So, as with the determination of duty under a tort theory, resolution of the legal issues in educational malpractice claims must turn upon fundamental policy considerations. As will be suggested, those policy considerations are weighty against the recognition of a cause of action for educational malpractice under whatever legal theory; *see* notes 228-319 *infra* and accompanying text.

81. *See generally* G. GILMORE, *THE DEATH OF CONTRACT* (1974).

82. *See* Comment, *supra* note 19, at 782-84; Note, *supra* note 15, at 400-01; Comment, *supra* note 14, at 132-35. *See generally* SYRACUSE UNIV. RESEARCH CORP., *SUING THE SCHOOLS FOR FRAUD* (1973).

83. *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 40, 407 N.Y.S.2d 874, 881. The *Donohue* court failed to reach the issue of misrepresentation because the plaintiff did not plead it, and the plaintiff did not raise the issue for a very simple reason: He had received failing grades in several subjects and, thus, had knowledge of at least some of his academic deficiencies.

84. *See* note 36 *supra* and accompanying text.

85. *See, e.g.*, *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 44, 407 N.Y.S.2d 874, 885 (1978) (Suozzi, J., dissenting); Note, *supra* note 15, at 392; Note, *supra* note 11, at 358 n.125. *But see* note 100 *infra*.

Liability for educational malpractice might be established under either a negligent misrepresentation or an intentional misrepresentation theory. Once again, however, upon closer analysis difficulties abound in establishing liability under either theory.

In order to establish a cause of action for negligent misrepresentation, the educational malpractice plaintiff would have to show that the defendant was under a duty to provide accurate evaluations of a student's achievement, that the defendant had breached this duty by failing to take reasonable care to ascertain the truth as to the student's achievement and make that information available, and that this breach was causally related to some injury suffered by the plaintiff.⁸⁶ In states having statutes requiring school districts to keep parents and guardians informed of the educational progress of their children, the necessary duty could readily be found, since it cannot be assumed that the districts are mandated to misinform.⁸⁷ In those jurisdictions lacking such statutes, the duty can probably be implied from the student-teacher-parent relationship.⁸⁸ But, as with attempts to base a cause of action on an ordinary negligence theory, the plaintiff would have difficulty in establishing that he or she has suffered any injury cognizable by tort law.⁸⁹ And, even if such injury could be established, proof of causation would be an enormous stumbling block, for many factors extraneous to schooling are causes of any particular student's failure to learn.⁹⁰ Moreover, all of the defenses available in an ordinary negligence action, such as contributory negligence, would be good against a claim predicated on negligent misrepresentation. Finally, misrepresentations of opinion, as opposed to misrepresentations of fact, are generally not recognized as a basis for recovery.⁹¹ Given the extreme imprecision of grading, student progress reports, even including the granting of diplo-

86. W. PROSSER, *supra* note 11, at 684-86, 704-07.

87. See, e.g., CAL. EDUC. CODE § 10759 (West) (repealed 1975). Though repealed in 1975, § 10759 had been in force at the time of the acts complained of in *Peter W.*

88. "[W]here the representation, although itself gratuitous, is made in the course of the defendant's business or professional relations, the duty is usually found." W. PROSSER, *supra* note 11, at 706. The duty has also been found in a prospective contractual relationship; see *Ultramares v. Touche Corp.*, 255 N.Y. 170, 174 N.E. 441 (1931). Thus, linking the contractual theory with the misrepresentation theory could produce a finding of duty. The argument, however, would be as tenuous as it would be original.

89. See *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 823, 131 Cal. Rptr. 854, 860 (1976). Regarding the problem of establishing injury in an educational malpractice action, see also notes 190-98 *infra* and accompanying text.

90. For a fuller discussion of causation in educational malpractice, see notes 199-227 *infra* and accompanying text.

91. W. PROSSER, *supra* note 11, at 721.

mas, may be more accurately conceived of as expressions of opinion rather than as statements of fact.

Under certain circumstances an educational malpractice cause of action might lie for intentional misrepresentation.⁹² But those situations are likely to be extremely rare. Generally, therefore, the hurdles awaiting an educational malpractice plaintiff attempting to plead successfully an intentional misrepresentation claim will be even more difficult to surmount than those confronting a negligent misrepresentation complaint. In the first place, the plaintiff would have to prove an intent to deceive.⁹³ This might be the case where a teacher misrepresented a student's lack of ability to parents in order to preclude them from speaking to the school administrators. But a good faith error on the teacher's part in assessing the student's progress, while it might not avoid liability for negligent misrepresentation, would be sufficient to disprove any fraudulent intention.

Additionally, even where an intent to deceive is shown, educational malpractice plaintiffs will have to show (1) that they relied upon the educator's misrepresentations, (2) that they had a right to so rely, and (3) that the reliance was reasonable.⁹⁴ With respect to their reliance, the plaintiffs must demonstrate that, but for the misrepresentations, they would have changed their course of action.⁹⁵ Generally speaking, this would be done by showing that, had it not been for the misleading reports, the parents would have switched the student to a private school or provided private tutoring. But, as previously noted, allowing recovery on such a theory would permit relief only to those plaintiffs who need it least.⁹⁶ Moreover, as educational malpractice defendants are almost certain to point out, parents and guardians have or should have an opportunity to judge for themselves whether their child lacks even rudimentary reading and writing abilities, nor does such judgment require any particular expertise.⁹⁷ Therefore, even where there has been deceitful intent and a factual misrep-

92. See, e.g., Comment, *supra* note 19, at 782 (postulating various hypothetical fact situations which could give rise to an intentional misrepresentation action for educational malpractice).

93. W. PROSSER, *supra* note 11, at 706.

94. *Id.* at 714-15.

95. *Id.*

96. See note 80 *supra* and accompanying text.

97. Note the implication of this argument for the creation of a "professional" standard of care in any educational malpractice action based upon a negligence

resentation, it is likely to be found to be immaterial.⁹⁸

For these reasons, even those critical of the courts' present posture in this area concede that misrepresentation theory "is probably not significant in educational malpractice cases."⁹⁹ Besides, it is possible that the courts might refuse recognition to even a well-pleaded misrepresentation complaint for the same reasons of public policy on which they have relied in dismissing suits based on ordinary negligence theories.¹⁰⁰ After all, recognizing educational malpractice causes of action predicated on misrepresentation will not address the central concern of would-be educational reformers. Permitting recovery for misrepresentation, either negligent or intentional, will not render the public school system any better able to educate its students. At best, such awards would simply encourage the system to be more honest about its inability.¹⁰¹

Constitutional Right

As de Tocqueville observed, no major issue arises in American politics that does not eventually resolve itself into a constitutional controversy.¹⁰² It is not surprising, therefore, to find the advocates of a cause of action for educational malpractice turning to the Constitution, when defects are found in other of their theories.¹⁰³ This is particularly inviting because, if the violation of a

theory. For a discussion of the "standard of care" problems, see notes 167-89 *infra* and accompanying text.

98. See W. PROSSER, *supra* note 11, at 720-21.

99. Comment, *supra* note 14, at 132. In a suit against a private school, however, a claim of either negligent or intentional misrepresentation would be much more viable. Such a claim might be employed by parents in a suit to rescind their contract with the school or as a defense in a suit by the school for the non-payment of tuition.

100. In fact, the *Peter W.* court did refuse to entertain the plaintiff's suit for negligent misrepresentation by relying upon the same policy arguments it had employed to dismiss the negligence cause of action. See note 35 *supra* and accompanying text. In view of this, the court's refusal to address the intentional misrepresentation claim, because improperly pleaded, may not stand for the proposition that a properly pleaded action could withstand a motion to dismiss, as some have so confidently predicted. See note 85 *supra*. It may stand for that proposition, but it need not necessarily do so. Rather, if pressed, a court might reject a properly pleaded intentional misrepresentation suit on policy grounds.

101. See Comment, *supra* note 14, at 143-44; Note, *supra* note 15, at 400-01. Both the legal system and the school system should, of course, favor the promotion of honesty. But, when this benefit is balanced against the potential costs attendant upon the recognition of a cause of action for educational malpractice, see notes 268-92 *infra* and accompanying text, this may well be an instance in which honesty is not the best policy.

102. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283-86 (P. Bradley trans. 1945).

103. *E.g.*, Note, *supra* note 11, at 348; Comment, *supra* note 14, at 121-23; Note, *supra* note 15, at 401-03.

constitutional right could be found, it would render the educational authorities liable under 42 U.S.C. § 1983.¹⁰⁴ But, first, some constitutional right would have to be found. This task is rendered considerably more difficult by the fact that no less an authority than the United States Supreme Court has held that there is no federal constitutional right to an education.¹⁰⁵

In *San Antonio Independent School District v. Rodriguez*, the Supreme Court did indicate that, insofar as a state chose to provide public education, it must provide a minimally adequate education.¹⁰⁶ But reliance upon this dictum to establish liability under the Civil Rights Act would be misplaced. *Rodriguez* was a class action seeking to enforce the equal protection clause.¹⁰⁷ The minimum standard described in *Rodriguez*, thus, may not necessarily be available to enforcement by an individual student.¹⁰⁸ Moreover, *Rodriguez* itself stands for the proposition that the quality of instruction need not be absolutely equal. Finally, an examination of the facts in *Rodriguez* suggests that the acceptable level of education the Court had in mind was minimal indeed. For all these reasons, proponents of a cause of action for educational malpractice have not put much faith in equal protection ar-

104. 42 U.S.C. § 1983 (1976), a codification of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, states:

Every person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The scope of liability of public entities and public officials under section 1983 has been greatly expanded in recent years. See, e.g., *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), *Owen v. City of Independence*, 445 U.S. 622 (1980), *Maine v. Thiboutot*, — U.S. —, 100 S. Ct. 2502 (1980). This expansion of liability has been extended to school officials. See, e.g., *Wood v. Strickland*, 420 U.S. 308 (1975).

105. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). Several state courts, however, have found that a right to education is established, explicitly or implicitly, by their state constitutions. E.g., *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973); *In re Downey*, 72 Misc. 2d 772, 340 N.Y.S.2d 687 (Fam. Ct. 1973); *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), cert. denied, 432 U.S. 907 (1977); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977). The existence of such state-established rights, however, do not effect liability under 42 U.S.C. § 1983 (1976).

106. 411 U.S. 1, 24 (1973).

107. U.S. CONST. amend. XIV, § 1, cl. 2.

108. Comment, *supra* note 14, at 123.

Alternatively, the due process clause may hold greater promise. In the so-called "right to treatment" cases, involving persons involuntarily committed to state institutions in civil proceedings, the courts have held that, since the denial of liberty is for the express purpose of habilitation, the failure to provide treatment constitutes a violation of due process.¹¹⁰ Arguing by analogy, the advocates of a cause of action for educational malpractice contend that the enforced confinement of public school students amounts to a deprivation of liberty without due process of law, unless appropriate, non-negligent instruction is provided.¹¹¹ This position is strengthened by the fact that the concept of due process has been held to govern certain aspects of the student-school relationship.¹¹²

The courts have not proven receptive to the involuntary confinement theory, however. For example, in *In re Gregory B.*, an action for habitual truancy, the student-respondents defended by arguing that their non-attendance was justified because the school involved wasn't teaching them anything.¹¹³ To support their allegation, they sought to compel the disclosure of various school documents. In denying the discovery motion on the ground that the information sought was immaterial and unnecessary, the court briefly discussed the respondents' due process theory.¹¹⁴ It postulated a set of hypothetical situations in which the inadequacy of the educational program might be tantamount to confinement in violation of due process. But, it continued, "we are

109. See, e.g., Note, *supra* note 15, at 402 n.115. The situation would be different, were some students permitted to participate in remedial programs, while others were denied such opportunity.

110. E.g., *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966). See generally Ennis, *The Rights of Mental Patients*, in *THE RIGHTS OF AMERICANS* 484 (N. Dorsen ed. 1970).

111. See Note, *supra* note 68, at 807-09; Comment, *supra* note 14, at 121-22; Note, *supra* note 11, at 356-57.

112. *Goss v. Lopez*, 419 U.S. 565 (1975) (student's entitlement to public education is a property interest such that suspension from public school requires proceeding consistent with due process); *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503 (1969) (suspension of public school students for wearing black armbands to protest Vietnam War violative of free speech and due process guarantees). But cf. *Ingraham v. Wright*, 430 U.S. 651 (1977) (due process does not require schools to provide notice and hearing prior to application of physical discipline); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (since the state can substantively limit the extent of an entitlement, it can also adopt procedural limitations). See generally Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 SO. CAL. L. REV. 1305 (1979).

113. 88 Misc. 2d 313, 387 N.Y.S.2d 380 (Fam. Ct. 1976).

114. Since the court expressly stated that it "need not reach this argument," *id.* at 316, 387 N.Y.S.2d at 383, however, its discussion can only be considered as dicta.

not here dealing with theoretical constructions. Nor do such hypothetical examples . . . apply to the instant matter."¹¹⁵ Rather, the court indicated, it must judge the matter within the context of the actual operation of the New York City schools, and in that context it found the analogy to the "right to treatment" cases to be "improbable."¹¹⁶

Any attempt to sustain an educational malpractice claim on a due process theory drawn from the "right to treatment" cases encounters several analytic difficulties. First, in order to establish a right to be unconfined, the educational malpractice plaintiff would have to show that compulsory school attendance constitutes confinement.¹¹⁷ But the nature of the confinement, in any, is different from that involved in the "right to treatment" cases. Unlike mental patients, students are confined to the institution for only a fraction of the school day, an even smaller fraction of the week, and a far smaller fraction of the calendar year.¹¹⁸ Moreover, in the "right to treatment" cases, the evidence established that the plaintiffs were receiving no treatment whatsoever.¹¹⁹ Even in the most inadequate school districts, however, students receive some education. To effectively analogize compulsory school attendance to the "right to treatment" cases, the educational malpractice

115. *Id.* at 317, 387 N.Y.S.2d at 383.

116. *Id.* at 316, 387 N.Y.S.2d at 383.

117. See Comment, *supra* note 68, at 703-04. The argument, moreover, would apply only to students below the age of compulsory attendance. Students above that age, generally secondary school students, could not argue that their "confinement" was involuntary. They have the option not to attend. See also note 125 *infra*.

118. Granting the ironic humor of an analogy between the public schools and mental institutions, it may be that a more appropriate analogy would be one between the schools and the prisons. In neither case, however, are the schools the kind of total institutions that are prisons and mental hospitals. This may account in part for the schools' relative lack of success in modifying the behavior of their inmates. See generally E. GOFFMAN, *ASYLUMS* 1-125 (1961) (on the characteristics of total institutions).

A total institution may be defined as a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.

Id. at xiii.

Interestingly enough, however, Goffman's emphasis, unlike that in the "right to treatment" cases, is not upon the involuntary nature of the inmate role. By Goffman's definition, thus, boarding schools might be seen as total institutions. But day schools, public or private, could surely not be, given the availability to students of concurrent alternative realities.

119. See note 110 *supra*.

plaintiff would have to show that the school was offering nothing but a custodial service.

Even could such a demonstration be made, that would not necessarily establish the analogy. The purpose of confinement of public school students differs from that of mental patients. "Because *the only* constitutional justification for civilly committing a mental retardate . . . is habilitation, it follows ineluctably that once committed such a person is possessed of an inviolable constitutional right to habilitation."¹²⁰ But the justifications for compulsory school attendance are neither as unidimensional nor necessarily as altruistic.¹²¹ The state has the authority to expose the child to education not only for the good of the child but also for the good of the state.¹²² It may also be that simple custody is a justification for the compulsory attendance laws. It is of note that most of these statutes on their face do not require education, only attendance.¹²³

Yet another problem with analogizing the treatment cases to education lies in the formulation of standards to judge the quality of the education provided. This has presented the courts with no difficulty in the "right to treatment" cases because, in the field of mental health, "custodial care" and "treatment" are terms of art with distinct and well-understood meanings. No such clarity exists in the education field as to the definition of a minimal educational standard.¹²⁴ Furthermore, in mental health, fulfilling the patient's right to treatment is accomplished by following particular procedures. It is not measured by the patient's progress in relation to an externally defined goal or achievement level. This in itself may render the whole body of "right to treatment" precedent inapposite to educational malpractice litigation.

Even more fundamentally, the due process theory, as with misrepresentation arguments, is not directed toward the kind of reform which is the essential concern of those who advocate educational malpractice as a cause of action. The reasoning of the "right to treatment" cases may call into question the constitutionality of compulsory education laws.¹²⁵ But these cases are not

120. *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (emphasis added).

121. In the confusion and debate over the institution's purpose, the schools may, indeed, be more closely analogous to prisons than to mental hospitals; see note 118 *supra*. See generally S. GRUPP, *THEORIES OF PUNISHMENT* (1971).

122. See note 68 *supra* and notes 151 & 158 *infra* and accompanying text.

123. *E.g.*, MASS. GEN. LAWS ANN. ch. 76 (Supp. 1975); ME. REV. STAT. tit. 20, § 911 (1964).

124. For further discussion of the difficulties involved in defining educational standards, see notes 171-79 *infra* and accompanying text.

125. Were a suit for educational malpractice premised on an involuntary con-

precedent for those who would hold the schools accountable for children's failure to learn or force the schools to provide an "adequate" or "better" education. It may well be that compulsory education should be abandoned. But that is an entirely different argument than the one which those who would recognize an educational malpractice cause of action are seeking to make.

Negligence

Because constitutional theory, like contract and misrepresentation, has proven inadequate to support the desired cause of action, educational reformers have tended to place their emphasis where they began, with common law negligence. But here, too, creating liability for educational malpractice would require an unjustified extension or distortion of present doctrine. As *Peter W.*, *Donohue*, and *Hoffman* eloquently testify, the principal difficulty has lain in finding any legally cognizable duty of care owed by educators to their students. But, even were such a duty to be discovered, educational malpractice advocates would yet experience numerous and substantial difficulties in (1) defining the appropriate standard of care to differentiate educational malpractice from appropriate practice, (2) establishing causation, and (3) proving the existence of any compensable injury.

Duty. There can be no recovery for negligence unless there is a legal basis for imposing a duty of due care upon the defendant.¹²⁶ A plaintiff seeking recognition of an educational malpractice claim, therefore, would first have to convince a court that the educator had a duty to provide competent instruction. The difficulties which the educational malpractice plaintiff faces in this regard are well illustrated by *Peter W.* The plaintiff in *Peter W.* argued that his enrollment in the schools established a duty of care in the school district under one or more of the following theories: (1) that, by assuming the function of instruction, the school district had assumed a concomitant duty to exercise reasonable care in discharging that function; (2) that the nature of the relation-

finement—due process theory to succeed, depending upon the exact reasoning of the court, a state seeking to limit the liability of itself, its school districts, and its teachers might (1) decrease the number of hours in the school day, (2) lower the compulsory attendance age, or (3) repeal the compulsory attendance laws.

126. *Palsgraf v. Long Island R.R.Co.*, 248 N.Y. 339, 162 N.E. 99 (1928) (Cardozo, C.J.).

ship between teachers and students created a duty to exercise reasonable care; and (3) that a duty to exercise reasonable care in carrying out the function of academic instruction was statutorily recognized in California. The precedent relied upon by the plaintiff in each of these arguments was dismissed almost summarily as inapplicable.¹²⁷

Two possible origins of a duty to use reasonable care in instruction have been advanced: common law principles and statutory enactments.¹²⁸ The first theory suffers from the fact that there exists no direct precedent for a common law duty. Nevertheless, arguments by analogy abound.

The first of these, the theory of an undertaking, draws support from the common law of rescue.¹²⁹ Both Prosser and the *Restatement (Second) of Torts* assert that when one undertakes to render a service to another upon which that other relies, the actor assumes a duty to act non-negligently and will be liable for any harm that results from negligent performance.¹³⁰ Just as there is no duty requiring a school system to educate, there is no duty at common law to rescue another in peril. An attempted rescue, however, may create liability. "Where performance clearly has been begun, there is no doubt that there is a duty of care."¹³¹ The rescuer need not succeed, but he must act reasonably under the circumstances. Similarly, it is argued, the school system and its teachers incur a duty to educate.¹³² The uneducated child is like a potential victim in need of rescue. When the schools undertake the attempt to educate this child, though they need not succeed, they do assume a duty to make the attempt non-negligently. If educational alternatives are available and the school negligently fails to utilize them, it has not acted reasonably under the circumstances and should be liable in tort. This argument is further buttressed by the fact that the general principle of voluntary assumption of duty has been applied specifically to government

127. 60 Cal. App. 3d 814, 820, 131 Cal. Rptr. 854, 861, *distinguishing* *Lau v. Nicholas*, 414 U.S. 563 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971); *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 87 Cal. Rptr. 376, 470 P.2d 360 (1970).

128. For a discussion of the "duty" concept by those favoring a cause of action for educational malpractice, see Comment, *supra* note 8, at 564-72; Note, *supra* note 58, at 33-41; Note, *supra* note 15, at 393-96; Comment, *supra* note 14, at 118-30; Elson, *supra* note 9, at 693-97; Comment, *supra* note 19, at 767-81.

129. See Note, *supra* note 15, at 398 n.92. See generally J. RATCLIF, *THE GOOD SAMARITAN AND THE LAW* (1966).

130. W. PROSSER, *supra* note 11, at 343-48; *RESTATEMENT (SECOND) OF TORTS* § 323 & comment *e* at 139 (1965).

131. W. PROSSER, *supra* note 11, at 346.

132. See Note, *supra* note 15, at 398 n.92.

undertakings in several cases.¹³³

The undertaking theory, however, normally requires the plaintiff's reliance on the defendant's affirmative actions,¹³⁴ and the difficulties of establishing reliance in educational malpractice actions have already been noted.¹³⁵ Moreover, unlike the undertakings in the cases applying the voluntary assumption of duty theory to government actions, a school district's provision of education is not discretionary or voluntary, but mandatory. Perhaps the state, as creator of the educational system, might be liable under this theory. But the cases will not support liability for school districts or for individual teachers. Finally, the educational malpractice plaintiff seeking to establish duty on an undertaking theory must confront the fact that the courts have been reluctant to apply the undertaking theory where the undertaking in question was the provision of some broad social service.¹³⁶

A second line of argument to establish a common law duty to educate proceeds from the school's duty of care for the physical safety of its students while at school.¹³⁷ So far, this is the only clearly recognized tort duty which a school system has towards its students. There is, however, a strong countervailing reason for not extending the educator's duty by this analogy. When a school district or its teachers are charged with a duty to act non-negligently in supervising the physical safety of the students, they are held to the traditional reasonable person standard.¹³⁸ The educational malpractice plaintiff, however, is seeking to hold educators to a higher standard of care, a professional or "reasonable teacher" standard.¹³⁹ Even the advocates of an educational mal-

133. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (discretionary operation of lighthouse); *Morgan v. County of Yuba*, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964) (gratuitous promise by sheriff to warn plaintiff of release of dangerous prisoner); *Conelly v. State*, 3 Cal. App. 3d 744, 84 Cal. Rptr. 257 (1970) (negligent preparation and release of weather and flood information).

134. W. PROSSER, *supra* note 11, at 347.

135. See notes 94-98 *supra* and accompanying text.

136. *Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928) (Cardozo, C.J.) (suit for negligent failure to provide adequate water to extinguish a fire before it destroyed plaintiff's warehouse not maintainable as an action for a common law tort). *Moch* is not followed in at least one jurisdiction; see *Doyle v. South Pittsburgh Water Co.*, 414 Pa. 199, 199 A.2d 875 (1964). See also note 79 *supra*.

137. See, e.g., Comment, *supra* note 8, at 566-67. For further discussion of the cases involving physical injury to students and their reception in educational malpractice actions, see note 20 *supra*.

138. See note 20 *supra*; see generally W. PROSSER, *supra* note 11, at 149-66.

139. The appropriate standard of care, therefore, is one factor to consider in de-

practice cause of action, therefore, concede that the "basic distinction between standards of care applicable to physical supervision and academic instruction significantly weakens any attempt to analogize the two" and leaves this line of argument "without a solid logical basis."¹⁴⁰

The third theory for the creation of a common law duty of non-negligent academic instruction rests on an analogy to the professional malpractice actions.¹⁴¹ This, assert the commentators, is "[t]he strongest legal argument for recognition of an educator's duty to provide competent academic instruction"¹⁴² Even so, it is not all that strong, for it rests upon the unarticulated premise that public school educators are, in fact, professionals. To be sure, that is how public school teachers characterize themselves.¹⁴³ But self-characterization by an occupational group should not be legally dispositive. Could physicians escape professional liability if the American Medical Association were to unilaterally reclassify medicine as a trade?

Upon analysis it appears that there is reason to doubt the professionalism of public school educators, at least in any legally meaningful sense. Sociological studies of the "professions" normally exclude education because it fails to meet various criteria of professionalism.¹⁴⁴ By occupation, the professional holds himself or herself out as possessing certain skills and special knowledge secured by arduous post-graduate education; as a consequence, persons who utilize those services have a right to expect the professional to use that skill and knowledge with some minimum degree of competence.¹⁴⁵ The public school teacher, by contrast, possesses no well-defined technical knowledge comparable to that of a legal or medical professional. To the extent that educators hold themselves out as possessing any special skills or knowledge, it is knowledge in a particular substantive area (e.g.,

termining whether a duty exists; judicial consideration of these two elements, thus, does not actually proceed in two separate and distinct phases. Regarding the standard of care, see notes 167-89 *infra* and accompanying text.

140. Comment, *supra* note 8, at 567.

141. See W. PROSSER, *supra* note 11, at 161-65. Technically, it is accurate to speak of "malpractice" only where the object of the negligence action is to hold the professional defendant liable *as a professional*. It follows that the professional standard of care is applicable only once a professional duty has been established.

142. Comment, *supra* note 8, at 567.

143. See, e.g., Saretsky, *The Strangely Significant Case of Peter Doe*, 54 *PHI DELTA KAPPAN* 589, 592 (1973).

144. See, e.g., D. LORTIE, *SCHOOL TEACHER: A SOCIOLOGICAL STUDY* (1975); W. MOORE, *THE PROFESSIONS: ROLES AND RULES* 5-6 (1970); Goode, *The Theoretical Limits of Professionalization*, in *THE SEMI-PROFESSIONS AND THEIR ORGANIZATIONS* 266, 277-78 (A. Etzioni ed. 1969); Wilensky, *The Professionalization of Everyone?*, 70 *AM. J. SOC.* 137 (1964).

145. See T. ROADY & W. ANDERSEN, *supra* note 11.

biology, history) and not with respect to the process of education per se.¹⁴⁶ The professional relies primarily upon status and reputation to determine earning capacity. The public school teacher receives an annual wage according to a salary schedule determined by an external authority. Indeed, society does not accord high social status to teachers precisely because it perceives that the knowledge possessed by educators is readily comprehensible by laypersons, unlike medical or legal knowledge.¹⁴⁷ In short, public school teachers are at best aspiring semi-professionals.¹⁴⁸ Therefore, the application of the professional negligence cases to this occupational group, in order to create a duty of care to educate, would be inappropriate.

Unfortunately for the advocates of an educational malpractice cause of action, arguments that statutory or constitutional provi-

146. This tendency is, of course, more pronounced as one moves up the educational hierarchy. Perhaps a political science professor might be held liable for political science malpractice, assuming that an appropriate standard of care could be developed. But to hold the same professor liable for educational malpractice is a different matter. On the other hand, the advocates of a cause of action for educational malpractice are not seeking to hold the second grade teacher liable for arithmetic malpractice.

147. See *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 860-61 (general public believes that laypeople can teach or at least offer valuable advice to educators on appropriate teaching methods). Even though there is widespread agreement about the utility of education, it is this public perception of the level of knowledge necessary to teach effectively that negatively affects the status of educators. W. MOORE, *supra* note 144, at 235. See also note 172 *infra* and accompanying text.

148. Marcus, *School Teachers and Militant Conservatism*, in *THE PROFESSIONS AND THEIR PROSPECTS* 191 (R. Friedson ed. 1971); W. MOORE, *supra* note 144, at 73.

Candor compels the admission that the courts have not entirely subscribed to this line of reasoning. See, e.g., *McGrath v. Burkhard*, 131 Cal. App. 2d 367, 376, 280 P.2d 864, 870 (1955) (imposition of extracurricular duties permissible because of professional nature of teacher's position); *District 300 Educ. Ass'n v. Board of Educ.*, 31 Ill. App. 3d 550, 554, 334 N.E.2d 165, 168 (1975) (teacher's professional status not demeaned by assignment of extracurricular duties); *McCullough v. Cashmere School Dist.*, 15 Wash. App. 730, 734, 551 P.2d 1046, 1050 (1976) (contract offer must reflect educator's education, experience, and professional preparation). In according teachers professional status, the *McGrath* court was also influenced by the fact that they received an annual wage, rather than an hourly rate like a laborer. It should be noted, however, that many of these factors will support a contrary conclusion. Doctors, lawyers, and psychiatrists, for example, customarily bill by the hour; and, while it may be argued whether the performance of extracurricular duties, e.g., monitoring the students' lunch hour, is demeaning, it is difficult to conceive of true professionals performing them. A physician monitoring hospital patients' meals? Cf. *Hoose v. Drumm*, 281 N.Y. 54, 57-58, 22 N.E.2d 233, 234 (1939) (teacher required to meet the standard of care to be expected of an ordinary, prudent parent under the circumstances).

sions dealing with education create a duty of care in academic instruction have fared even less favorably at the hands of the courts than have efforts to create a common law duty. Thus, in *Donohue*, the New York Court of Appeals acknowledged the possibility of a common law duty but abruptly rejected the idea that there existed any statutory duty to educate.¹⁴⁹ Similarly, in *Peter W.*, the plaintiff invoked various provisions of both the Education and Government Codes,¹⁵⁰ but the California court held that these statutes were merely "directed to the attainment of optimum educational results, . . . not as safeguards against 'injury'"¹⁵¹

The principal difficulty with creating a statutory duty of due care in academic instruction lies in the breadth and generality of the legislative mandates involved.¹⁵² Generally, a statutory duty exists only where the underlying purpose of the statute is the protection of individuals from injury of a particular type.¹⁵³ The statute usually prohibits or commands particular actions in specific situations and will be applicable only if the plaintiff is a member of the class of persons intended to be protected by the statute and if the injury suffered is of a type covered by the statute.¹⁵⁴ State statutory and constitutional provisions relating to

149. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1353, 418 N.Y.S.2d 375, 377 (1979). The trial and appellate courts in *Donohue* had dismissed the plaintiff's statutory claim with equal dispatch. 95 Misc. 2d 1, 2, 408 N.Y.S.2d 584, 585 (1977); 64 App. Div. 2d 29, 37-38, 407 N.Y.S.2d 874, 880 (1978).

150. CAL. EDUC. CODE § 10759 (West) (repealed 1975) (requiring school district to keep parents informed as to the educational progress of the child); CAL. EDUC. CODE § 12154 (reorganized as § 12101) (West 1977) (mandating compulsory full-time education); CAL. EDUC. CODE § 8573 (reorganized as § 51255) (West 1978) (forbidding school district from granting a diploma unless certain standards of proficiency are met); CAL. EDUC. CODE § 8505 (reorganized as § 51204) (West 1978) (requiring that school districts design courses to meet the needs of its pupils). CAL. GOV'T CODE § 815.6 (West 1980) provides:

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

See generally E. KUNZI, THE CALIFORNIA EDUCATION CODE (1978).

151. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 862.

152. See, e.g., N.H. REV. STAT. ANN. § 189:10 (1977); N.C. GEN. STAT. § 115-1.1(4) (1977); MASS. ANN. LAWS ch. 76, § 1 (Supp. 1975). Were a statutory duty of due care in academic instruction to be recognized, the content of that duty would, of course, vary from one state to another, depending upon the wording and history of the state's education laws. See Note, *supra* note 11, at 344; Comment, *supra* note 14, at 127-30.

153. W. PROSSER, *supra* note 11, 190-97.

154. *Id.* But see *Runkel v. City of New York*, 282 App. Div. 173, 123 N.Y.S.2d 485 (1953) (allowing individual recovery for breach of a statute intended to benefit the public at large); *Foley v. New York*, 294 N.Y. 275, 62 N.E.2d 69 (1945) (interpreting public nuisance statute as intended to confer individual protection).

education are, thus, not of a type normally thought to create a tort duty. They merely require the creation and maintenance of public school systems. They are not intended to protect individual children against the injury of non-education but instead are designed to promote the general welfare through the development of a literate and productive population.¹⁵⁵

This conclusion is further strengthened by the historical background of the education laws.¹⁵⁶ The free public school movement was a product of the industrial revolution, a social and economic phenomenon that, among other things, created a demand for an educational system that would train people to adequately perform complex tasks. This need was eventually filled by state and local government through the provision of a compulsory, tax-supported, public school system. From its earliest beginnings, therefore, the purpose of the free public school movement was to confer the benefit of education upon the general populace.

In fact, far from creating a right to education for the benefit of the individual student, the compulsory attendance laws—rightly understood—actually appear to argue against the existence of such a right. The justification for the compulsory education laws lies in the recognition of the parent's duty to educate the child, not for the benefit of the child, but for the benefit of the state,¹⁵⁷ and at least one state supreme court has squarely so held.¹⁵⁸ Since a right would seem to belong to the party with the power to enforce it, it must follow that the right to education belongs to the state as representative of the general public.¹⁵⁹

Alternatively, a duty of educating a student to a certain required minimum level of proficiency might be found in statutes or

155. *Contra* Comment, *supra* note 19, at 780 (education statutes are designed to benefit a particular class, school-age children, rather than the general public).

156. See J. HOGAN, *THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST* 1 (1974); Koenig, *The Law and Education in Historical Perspective*, in *THE COURTS AND EDUCATION* 1, 10 (C. Hooker ed. 1978).

157. "One of the most important natural duties of the parent is the obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth." *State v. Bailey*, 157 Ind. 324, 329, 61 N.E. 730, 732 (1901).

158. *Fogg v. Board of Educ.*, 76 N.H. 296, 299, 82 A. 173, 174-75 (1912) ("the promotion of the general intelligence of . . . the body politic" held to be the primary purpose for maintaining the public school system). See also notes 68 & 117-23 *supra* and accompanying text.

159. *But cf.* *Mills v. Board of Educ.*, 348 F. Supp. 866, 874 (D.D.C. 1972) ("requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children").

regulations mandating specific actions in defined situations involving students with identifiable learning problems.¹⁶⁰ Such statutes or regulations do focus upon individual student needs and do address specific educational problems. But to hold educators liable for procedural violations does not necessitate liability for negligent academic instruction; nor are such statutes necessarily intended to permit private causes of action. To date, therefore, the courts have not been receptive to the use of such statutes or regulations to create a new tort duty.¹⁶¹

Ultimately, as the court recognized in *Peter W.*,¹⁶² whether or not the law will find that a particular duty of care is owed by one to another is a matter of policy.¹⁶³ There is no universal, certain test for establishing duty. The courts can find it where they choose to do so, and can as easily refuse to find it.¹⁶⁴ The plaintiff's interest in legal protection must be balanced against competing policy claims.¹⁶⁵

Judicial recognition of the existence of a duty of care is dependent upon principles of sound public policy and involves the consideration of numerous relevant factors which include, *inter alia*: . . . the degree to which the courts should be involved in the regulation of [the relationship between the parties] and the social utility of the activity out of which the alleged injury arises; . . . the degree of certainty that the alleged injuries were

160. See Comment, *supra* note 8, at 569-71, 596.

161. See *Doe v. Board of Educ.*, No. 48277 (Cir. Ct. Montgomery County Md. July 6, 1979), reported in Comment, *supra* note 8, at nn.1, 3, & 60-63 and accompanying text. See also *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979), *rev'g*, 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978).

In *Lau v. Nichols*, 414 U.S. 563 (1974), the United States Supreme Court did implicitly recognize a state commitment to provide a meaningful education, holding that non-English-speaking students who were denied compensatory language instruction had been foreclosed from a meaningful education in violation of the Civil Rights Act of 1964. See also *Serna v. Portales Municipal Schools*, 351 F. Supp. 1279 (D. N.M. 1972). But the recognition of a duty to provide education was implicit only; and, as even the proponents of educational malpractice concede, *Lau* is "distinguishable from the educational malpractice suit." Comment, *supra* note 14, at 126. It involved a class action brought by a minority group suing under clear statutory language and not the creation of a new cause of action on judicial authority alone.

162. See note 28 *supra* and accompanying text.

163. As Prosser states:

The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct It is a shorthand statement of a conclusion, rather than an aid to analysis in itself [I]t should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

W. PROSSER, *supra* note 11, at 325-26 (footnotes omitted).

164. See, e.g., Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1939).

165. Discussion of whether those competing policy considerations augur against recognition of a cause of action for educational malpractice is reserved; see notes 228-319 *infra* and accompanying text.

proximately caused by the defendant . . . ; *economic* considerations, which include the ability of the defendant to respond in damages; and *administrative* considerations, which concern the ability of the courts to cope with a flood of new litigation, the probability of feigned claims and the difficulties inherent in proving the plaintiff's case.¹⁶⁶

Standard of care. Also relevant is the degree to which reasonable people can agree as to the proper course to be followed to prevent injury. Yet this, too, presents a problem in framing a cause of action for educational malpractice on a negligence theory, the inability to define an appropriate standard of care.

Were a legal duty of care to be recognized in educational malpractice cases, the courts would then have to establish a standard by which to determine whether that duty had been breached. Depending upon the origin of the duty,¹⁶⁷ the choice would be between imposing a reasonable person or a professional standard of care.¹⁶⁸

In educational malpractice actions, however, a reasonable person standard of care would be unsatisfactory. True, this is the standard to which teachers have been held in the negligent supervision cases.¹⁶⁹ But supervising the physical activities of children is a responsibility frequently experienced by members of the general public and easily understood by jurors. Allegations of incompetent pedagogy, by contrast, would probably involve expert testimony proffered by both sides. In such cases, use of a reasonable person standard of care would involve the danger of arbitrary jury verdicts. Such considerations have influenced even those favorably disposed to an educational malpractice cause of action to argue that "adaptation of a reasonable person standard to the area of academic instruction is questionable."¹⁷⁰

A professional standard of care would be more protective of the

166. *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 35, 407 N.Y.S.2d 874, 877 (1978) (court's emphasis), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

167. Regarding the interrelationship between the concept of duty and the standard of care, *see* note 139 *supra* and accompanying text. Recognition of a statutory duty would imply its own unique standard of care defined by the requirements of the statute on which the duty was predicated. *Cf. Lau v. Nichols*, 414 U.S. 563, 566 (1974) (state imposed standard of proficiency in English for high school graduation requires compensatory language instruction for non-English-speaking pupils).

168. Discussions of the appropriate standard of care by those in favor of an educational malpractice cause of action may be found in Comment, *supra* note 8, at 572-79; Comment, *supra* note 14, at 126-27.

169. *See* note 10 *supra*.

170. Comment, *supra* note 8, at 573.

educator.¹⁷¹ But, in view of the abstract quality of education and the existence of numerous and conflicting theories of learning, formulation of a judicially manageable standard of professional care is unlikely if not impossible.¹⁷² In medical malpractice cases, the standard of care required is that of the level of skill and knowledge common to members of the profession in good standing, and practical in the community.¹⁷³ In education, creation of a workable standard of ordinary care and skill is confounded by the lack of established goals in the field and the widespread disagreement among educators as to the appropriate response to any particular, practical pedagogic problem.¹⁷⁴ Indeed, educators cannot even agree as to the primary goal of education. Some argue that it is to teach basic skills;¹⁷⁵ others maintain that it is to socialize students;¹⁷⁶ and still others contend that it is to develop creative mental capacity.¹⁷⁷ Not surprisingly, there is no consensus about how best to teach or how to measure what has been taught.¹⁷⁸ In a medical malpractice action, an expert can testify as to the correct and accepted standard that the physician should have followed. No expert could testify to a similar standard in education. In this regard, the exasperated, albeit correct, remarks of the court in *Otero v. Mesa County Valley School District, No. 51*, are of note:

Certainly, if the expert testimony proved anything, it proved that educational theory is not an exact science, and an expert can be found who will testify to almost anything. Listening to these experts causes one to conclude that if psychiatrists' disagreements are to be compared to differences between educators, psychiatrists are almost of a single mind.¹⁷⁹

Besides, even if some conventional educational methods could be discovered, or at least methods adopted by a substantial portion of the education community, mere deviation from these conventional methods should not be construed as negligence. Such a

171. See generally T. ROADY & W. ANDERSEN, *supra* note 11.

172. But cf. Elson, *supra* note 9, at 679-93 (discussing justiciability of standards for deciding issues of educational negligence). Given the symbiotic relation between the duty concept and the standard of care, see note 139 *supra*, this is itself an argument against the creation of a duty to educate on the basis of the educator's alleged professional status.

173. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959); W. PROSSER, *supra* note 11, at 162.

174. See Shanker, *Dangers in the "Educational Malpractice" Concept*, AMERICAN TEACHER 4 (June 1975). The implications of this lack of consensus for judicial intervention or non-intervention in the establishment of education policy are explored at notes 247-58 *infra* and accompanying text.

175. See *id.*

176. See *id.*

177. See *id.*

178. See R. STICKLAND, J. PHILLIPS & W. PHILLIPS, *supra* note 4.

179. 408 F. Supp. 162, 164 (D. Colo. 1975), *vacated on procedural grounds*, 568 F.2d 1312 (10th Cir. 1978).

stultified position would discourage experimentation and restrict the development of better teaching methods. In fact, under certain circumstances, requiring a teacher to follow a particular methodology may present constitutional problems.¹⁸⁰

Student performance on standardized achievement tests has been suggested as a measure of teacher competence. But achievement test scores are notoriously inadequate measures.¹⁸¹ Even were they not, mere poor performance on achievement tests would be insufficient to establish educational malpractice, absent proof of some other negligent conduct on the part of the teacher, for the causes of non-learning are numerous.¹⁸²

Moreover, any attempt to establish an acceptable standard of care by which to measure educational malpractice allegations must confront the problem of identifying the appropriate community whose standard will be used. "In a suit to recover for a student's failure to learn because of teacher negligence, the standard of acceptable instruction should be comparative, that is, the level of skill and learning of the minimally acceptable teacher in the same or similar communities."¹⁸³ But what is to be the community? If the standard against which the performance of ghetto schools and their teachers are evaluated is to be that of other ghetto schools and teachers, a majority of ghetto schools and teachers will, by definition, meet the communal standard of care. But the utility of educational malpractice actions as a vehicle for improving the quality of these schools will be seriously undermined. Use of a more inclusive community standard, however, could impose unrealistic, even unattainable, performance expectations upon these educators. The result would be an unfair imposition of liability that would further discourage the qualified from teaching in these schools. Again, the educational malpractice action as a means to improve educational quality would be self-defeating.

"The science of pedagogy itself is fraught with different and

180. *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972).

181. *Scheelaase v. Woodbury Central Community School Dist.*, 488 F.2d 237, 244 (8th Cir. 1973) (Bright, J., concurring), *cert. denied*, 417 U.S. 969 (1974). See also Goodman, *Testing in Reading: A General Critique*, in ACCOUNTABILITY AND READING INSTRUCTION 22 (1973) (detailing inadequacies of reading tests).

182. For a discussion of the problem of determining causation in educational malpractice actions, see notes 199-227 *infra* and accompanying text.

183. Comment, *supra* note 19, at 771.

conflicting theories of how and what a child should be taught," observed the *Peter W.* court.¹⁸⁴ Influenced by this consideration, the courts that have been presented with educational malpractice claims have tended to move with great caution. Both the California court in *Peter W.* and the New York Supreme Court, Appellate Division, in *Donohue* held that, in a suit for educational negligence, a workable standard of care was simply inconceivable.¹⁸⁵ The New York Court of Appeals, however, while affirming the Appellate Division's holding in *Donohue*, stated, "Nor would creation of a standard with which to judge an educator's performance of that duty necessarily pose an insurmountable obstacle."¹⁸⁶

The judiciary's experience in the education finance cases suggests that the New York court's optimism is unwarranted.¹⁸⁷ In the public school financing area, the courts have experienced grave difficulties in arriving at an ascertainable standard by which to identify what an adequate education is, much less how it can be achieved.¹⁸⁸ The history of the courts' handling of the school finance issue teaches not that the courts cannot

decide issues concerning the quality of educational services. Rather, its lesson is that courts should be wary of determining what an adequate or minimum quality education requires, since there is no empirical evidence, no agreement among practitioners or experts, no social or moral consensus, and no commonsense rationale that a court can use, without serious reservation or qualification, to define what constitutes adequate or minimum quality educational services.¹⁸⁹

It is a lesson with negative implications for the recognition of a cause of action for educational malpractice.

Injury. In addition to establishing a duty of care and a breach of that duty, a plaintiff in negligence must show that he or she has suffered a legally compensable injury.¹⁹⁰ Commentators favoring a cause of action for educational malpractice have tended to leap

184. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 860-61 (1976).

185. *Id.* at 825, 131 Cal. Rptr. at 861; *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 33-34, 407 N.Y.S.2d 874, 878-79 (1978).

186. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1353, 418 N.Y.S.2d 375, 377 (1979).

187. *See, e.g.*, *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); 63 N.J. 196, 306 A.2d 65 (1973); 67 N.J. 35, 335 A.2d 6 (1975); 67 N.J. 333, 339 A.2d 193 (1975); 69 N.J. 449, 355 A.2d 129 (1976); 70 N.J. 155, 358 A.2d 457 (1976); 70 N.J. 464, 360 A.2d 400 (1976).

188. Coons, *Recent Trends in Science Fiction: Serrano Among the People of Number*, in *EDUCATION, SOCIAL SCIENCE AND THE JUDICIAL PROCESS* 60 (R. Rist & R. Anson eds. 1977); Note, *Robinson v. Cahill: A Case Study in Judicial Self-Legitimation*, 8 RUT.-CAM. L. J. 508 (1977).

189. Elson, *supra* note 9, at 689.

190. RESTATEMENT (SECOND) OF TORTS §§ 848, 902 (1965).

this analytic barrier by simple assumption.¹⁹¹ But defining his or her injury in a legally cognizable fashion presents the educational malpractice plaintiff with a problem at least as intractable as that of establishing duty or fixing the standard of care.

The virtual unanimity of the courts in denying that any harm incurred by educational negligence conforms to the accepted understanding of tortious injury stands in stark contrast to the commentators' confidence. In *Peter W.*, for example, the court found "no reasonable 'degree of certainty that . . . plaintiff suffered injury' within the meaning of the law of negligence."¹⁹² This language was quoted with approval by the Supreme Court, Appellate Division, in *Donohue* which went on to add that the law was "not intended to protect against the 'injury' of ignorance, for every individual is born lacking knowledge, education and experience."¹⁹³ According to this reasoning, the failure to teach has left the educational malpractice plaintiff no worse off when he left school than when he entered. As the court wrote in rejecting Gregory B.'s claim that he had been unconstitutionally confined because the education offered him had been inadequate:

How is such "inadequacy" to be measured? Against the inadequacy of nothing, that is to say, not going to school? . . . [A] Court may *reasonably* assume that a student, even in a school which falls below the median . . . is educationally better served than without an education at all.¹⁹⁴

The principal difficulties attending the recognition of educational deficiency as a tort injury are two-fold. First, the educational malpractice plaintiff has lost an expectancy interest or failed to receive a benefit. But the law of tort does not generally compensate for lost expectancies or benefits.¹⁹⁵ In *Moch v. Rens-*

191. *E.g.*, Note, *supra* note 58, at 48 ("That plaintiffs suffer harm . . . is indisputable . . ."); Comment, *supra* note 14, at 118 ("This Comment builds upon the premise that an inability to read or write at an adequate level constitutes an injury.") For a more careful analysis of injury by a commentator favoring a cause of action for educational malpractice, see Comment, *supra* note 8, at 579-82.

192. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861 (1976).

193. *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 31-32, 35-36, 407 N.Y.S.2d 874, 878, 880 (1978). See also *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 388-89, 410 N.Y.S.2d 99, 118 (1978) (Damiani, J., dissenting).

194. *In re Gregory B.*, 88 Misc. 2d 313, 317-18, 387 N.Y.S.2d 380, 384 (Fam. Ct. 1976) (emphasis in the original). Cf. also *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (denying recovery for "wrongful life").

195. But see *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (allowing recovery for benefits plaintiff probably would have received, had it not been for attorney malpractice).

selaer Water Co., for example, Judge Cardozo held that a municipal contractor's failure to furnish a supply of water adequate to fight a fire amounted to the denial of a benefit and not the commission of a legal wrong.¹⁹⁶ In other words, it was not an injury at all. The situation of a student who fails to learn because of teacher negligence would be closely analogous.

Second, calculation of damages for non-learning would be almost impossible. In the very apposite case of *Sioux Tribe v. United States*, the United States Court of Claims recognized that Indian children who had been denied educational benefits which the government should have provided under the terms of a treaty, had suffered a substantial loss.¹⁹⁷ But the court denied recovery because the monetary value of the loss could not be calculated with sufficient certainty. If the educational malpractice plaintiff's claim is that he has suffered psychological harm in terms of lowered self-esteem, the value of literacy to an individual is so highly personal as to be speculative.¹⁹⁸ On the other hand, if the claim is one for loss of prospective wages, the plaintiff is again asserting a mere expectation, the loss of a possible economic advantage. Education to a particular level does not and cannot assure a certain level of income. The inability of the educational malpractice plaintiff to assert an injury cognizable at law, thus, remains fatal to recognition of the cause of action.

Causation. Even were it possible for the educational malpractice plaintiff to conform his or her claim to negligence law's model of duty, standard of care, and injury, the largest hurdle of all would still await—establishing a causal link between the negligent education and his or her own failure to learn.¹⁹⁹ The courts'

196. 247 N.Y. 160, 159 N.E. 896 (1928).

197. 84 Ct. Cl. 16 (1936), *cert. denied*, 302 U.S. 740 (1937).

198. *But see* *Dillon v. Legg*, 68 Cal. 2d 738, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (allowing recovery for psychological damages in the absence of accompanying physical injury). *Dillon*, however, has not been overwhelmingly endorsed by other jurisdictions and has been explicitly rejected by some. *See* Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HAST. L. REV. 1248 (1974). It remains true, therefore, that courts still treat allegations of mental distress with great caution, if not outright suspicion.

Note, however, that great stress was laid on plaintiff's psychological damage in *Hoffman* Given the nature of the defendant's negligence . . . and the particularly sympathetic nature of the plaintiff's situation, the allowance of psychological damages by the lower court in *Hoffman* is understandable. In similar fact situations, claims of such injury are appropriate, *but Hoffman does not represent the typical case.*

Comment, *supra* note 8, at 580 n.115 (emphasis added).

199. This is best evidenced by the testimony of those favoring an educational malpractice cause of action, *see* Comment, *supra* note 8, at 596 ("plaintiff's most difficult task"); Note, *supra* note 11, at 341 ("very difficult to show the requisite

discussion of injury suggests that one could argue that a failure to teach does not cause a state of illiteracy because a child is born ignorant of how to read or write. Negligent education, therefore, cannot be said to produce a state that would not otherwise exist. Taking a less cynical view, the causes of non-learning are so numerous and ill-understood that, as a matter of law, causation probably cannot be proven.²⁰⁰

Causation is perhaps one of the most difficult of all jurisprudential concepts.²⁰¹ In tort, the negligence plaintiff must prove, first, that the defendant's conduct was in fact the cause of his injury²⁰² and, second, that not only was it the factual cause but also that it was the *proximate* cause of the injury.²⁰³ In dealing with cause in fact the test commonly applied by the courts is the so-called "but for" rule. The first *Restatement of Torts* states the rule thus: "Where a person can prove that but for the tortious interference

causal relationship"). See also Note, *supra* note 15, at 383, 396-99; Comment, *supra* note 14, at 130-32.

200. See M. SORGEN, P. DUFFY, W. KAPLIN & E. MARGOLIN, STATE, SCHOOL AND FAMILY § 11-3 (1973):

It is exceedingly difficult to evaluate current forms of public classification or to accurately determine their effect on scholastic achievement, because one cannot isolate the extent to which the manner in which the school treats children is determinative of their performances.

Contra Comment, *supra* note 14, at 131 ("mere fact that certain elements of a cause of action are difficult to prove should not be the crucial factor in categorically denying a cause of action"). See also note 1 *supra* (lack of public consensus regarding the causes of non-learning).

201. Cause, as a basis of liability by virtue of its quality of wrongness, has been frequently expressed in terms of unlawfulness, intent, blame, fault, deceit, negligence—summed up as culpability. Cause has been frequently characterized as direct, proximate, imputed, presumed, inducing, efficient, active, culpable, and by many other descriptive terms. Moreover, liability based on the cause concept is frequently qualified or limited by cause characterized as remote, passive, sole, intervening, independent, superseding, supervening, and similar terms. The causation *doctrinal superstructure* for determining liability is extensive, refined, complicated in detail, and metaphysical both in thought and terminology. It was the creation of the nineteenth century during the transition period from medieval to modern tort law, and designed as a means of *limiting* liability, primarily by the judge as opposed to a jury. As a basis for the adjudication of litigated tort cases it has had a weird history and has resulted in great confusion of legal theory, endless, and arid legal disquisition, and many injustices to litigants.

Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 42-43 (1962) (emphasis in the original). Anyone who has ever studied the doctrine of causation can sympathize with this indictment. Nevertheless, as a matter of legal, if not philosophical, analysis it remains with us, in the law of torts as well as the law of crimes.

202. W. PROSSER, *supra* note 11, at 236-44.

203. *Id.* at 250-70.

of another, he would have received . . . a specific [outcome] from a transaction, he is entitled to full damages for the loss which has thus been caused to him"²⁰⁴ It follows that, where the loss would have been sustained without defendant's negligent conduct, that conduct cannot legally be said to be a cause of the injury.²⁰⁵

The multiplicity of factors affecting the learning process, coupled with the lack of any clear understanding of the impact on learning of any one of those factors, makes it virtually impossible to prove that the educator's negligence was a cause in fact of a student's illiteracy.²⁰⁶ Social, economic, emotional, and cultural factors all play an essential and immeasurable role in learning. In addition to innate intellectual ability, a child's failure to learn may be affected by home environment, peer pressure, attitude, motivation, personality, student-teacher interaction,²⁰⁷ class size, and faculty experience. It will be readily perceived that many of these factors are beyond the control of schools and teachers. Some may be uncontrollable by anyone. In such a situation, where it may be readily inferred that a student's illiteracy resulted from other causes, it would be manifestly unjust to hold educators liable for non-learning.²⁰⁸

Recognizing this, the *Peter W.* court held that the difficulties in establishing causation were another reason for refusing to entertain a suit for educational malpractice.

[T]he 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

204. RESTATEMENT OF TORTS § 912, comment *f* at 584 (1939).

205. *But see* Note, *supra* note 58, at 45 n.127; Comment, *supra* note 14, at 131 & n.102, advocating that, because of the interaction of so many causal factors, the "substantial factor" test is more appropriate for an educational malpractice action than the "but for" test. Under the "substantial factor" test, where multiple factors converge to cause the plaintiff's injury, the defendant remains liable, if his or her conduct was a material element and a substantial factor in bringing about the injury. But even under the "substantial factor" test, each factor operating alone must have been sufficient to have caused the result. The classic case is where a fire, set by the defendant, joins another, and the plaintiff's property is burned, but either one of the fires could have burned the property by itself. *See, e.g., Minneapolis, St. P. & S.S.M. Ry., 146 Minn. 430, 179 N.W. 45 (1920).*

206. *See* Hechinger, *No One Knows What Makes A Good School*, N.Y. Times, Nov. 13, 1977, § 12, at 1, col. 1. Indirectly, this is also attested to by the very hypotheticals advanced by educational malpractice advocates to suggest where cause in fact might be found. The examples used are as ethereal as the proposed cause of action itself; *e.g.,* Comment, *supra* note 8, at 583 n.124 ("able student . . . totally denied access to the written word").

207. *See* Sprinthall & Sprinthall, *Learning and the Classroom*, in EDUCATIONAL PSYCHOLOGY 159-60 (1969) (students affect the way adult teaches, because teacher will tend to focus on responsive pupils).

208. *See* L. STRAIN, *supra* note 4, at 8; Elson, *supra* note 9, at 689.

may be present but not perceived, recognized but not identified.²⁰⁹

This, too, was quoted with approval by the New York appellate court in *Donohue*, adding the curt but common sense observation, "The failure to learn does not bespeak a failure to teach."²¹⁰

The courts' wisdom is illustrated by the problems of proof that a plaintiff would encounter, were a cause of action for educational malpractice to be allowed to proceed to trial.²¹¹ Because causation in the education field would be beyond the normal understanding of the average lay juror, the plaintiff would have to rely upon expert testimony. But such testimony would either be unavailable or so vehemently contested as to be valueless, due to the widespread disagreement among educators concerning how children learn and, thus, how they should be taught. Because students learn at different rates and in different ways, it is difficult to employ scientific methodology to establish the most appropriate teaching behavior in any given situation. The result is an almost total absence of scientific evidence and theoretical consensus as to how best to teach.²¹² Expert testimony, therefore, would only heighten the jury's confusion and pave the way for arbitrary verdicts.²¹³

In view of the deficiencies in expert testimony, at least one advocate of a cause of action for educational malpractice has pro-

209. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 861 (1976) (footnote omitted).

210. *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 33-34, 36, 407 N.Y.S.2d 874, 878, 881 (1978). See also *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 446, 391 N.E.2d 1352, 1355, 418 N.Y.S.2d 375, 379 (1979) (Wachtler, J., concurring); *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 389, 410 N.Y.S.2d 99, 118 (1978) (Damiani, J., dissenting).

211. Because the thesis of this article is that a cause of action for educational malpractice should not be recognized, a detailed discussion of the problems of proof is technically beyond its scope. Problems of proof would, in fact, arise only if the cause of action were entertained, and a suit were allowed to proceed to the trier of fact. The problems are briefly mentioned here only to illustrate the difficulties in establishing causation in fact that argue against permitting such causes of action. See also note 43 *supra*. For more in-depth treatment of the problems of proof in educational malpractice actions, see Comment, *supra* note 19, at 790-801; Comment, *supra* note 8, at 582-85.

212. See B. BLOOM, *HUMAN CHARACTERISTICS AND SCHOOL LEARNING* (1976); M. SORGEN, P. DUFFY, W. KAPLIN & E. MARGOLIN, *supra* note 200, at § 11.2 ("our knowledge . . . is remarkably primitive").

213. *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979), presents a situation in which expert testimony was useful and should perhaps have been successful. But there the allegation was that the plaintiff had been misassigned in the first place, not that he had failed to receive adequate instruction within the class to which he was assigned.

posed a comparative method of proof "that relies on inferences drawn from circumstantial evidence . . ."²¹⁴ Under this method of proof, plaintiff would establish causation in fact

by proving that a class of which he is a member performed significantly worse [on standardized achievement tests] than did classes identical in all essential respects except that they were not taught by the defendant teacher.²¹⁵

Leaving aside objections to standardized tests as measures of anything other than the ability to take a test,²¹⁶ this proposed method of proof, proceeding as it does from an apparently endemic legal naiveté regarding social science methodology and standards of proof,²¹⁷ suffers from several flaws. First of all, it would be impossible to identify appropriate comparison classes "identical in all essential respects," because no one knows what the "essential respects" are.²¹⁸ Second, because of the vast number of possibly relevant factors, it would be difficult, if not impossible, to hold all factors, other than teacher performance, constant over time. Third, even if the relevant factors could be identified and held constant, the method of proof proposed would be valid only if employed over a multi-year period. Poor performance by a teacher's classes in any given year would not necessarily indicate teacher incompetence but might be more reasonably attributed to some situation unique to that year. The method of proof, thus, would be inapplicable to beginning or relatively inexperienced teachers, as well as to elderly teachers who, though previously competent, had become incompetent due, perhaps, to senility. Fourth, this comparative method of proof would be limited to class actions and would not be readily available to individual plaintiffs like Donohue and Peter W. Indeed, this method would not even be relevant to proving the generalized allegations of those plaintiffs. Peter W. and Donohue did not argue that a specific teacher or teachers or an identifiable program were at fault. Their contentions were much simpler. They just argued that they had graduated unprepared and that someone—other than themselves—ought to pay for that.

Because it "seems impossible to prove that the substandard result was not the consequence of the student's own lack of intelli-

214. Comment, *supra* note 19, at 790.

215. *Id.* at 790-91. Presumably the method is intended to be applied to comparisons between school districts and between schools within a single district, as well as to teachers.

216. See note 181 *supra* and accompanying text. See also C. JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972) (teacher quality does not have much effect on achievement test scores).

217. See Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955); A. DAVIS, *THE UNITED STATES SUPREME COURT AND THE USES OF SOCIAL SCIENCE DATA* (1974).

218. See notes 206-09 *supra* and accompanying text.

gence, aptitude, diligence, attitude, ambition, or general educability,"²¹⁹ the educational malpractice advocate would have to rely upon the doctrine of *res ipsa loquitur*.²²⁰ But the lack of any demonstrable correlation between teacher quality, test scores, cognitive skills, and economic success should defeat such reliance.²²¹

Therefore, in a situation where variables that are uncontrollable by the defendant play such a predominant role in causing the alleged injury, not only should liability not attach but also, in the interest of judicial economy, the cause of action should not be entertained in the first place.

Moreover, even were the causal relationship between failure to learn and failure to teach less speculative and remote, courts might still deny recovery for failure to prove proximate causation. While it may be that "the educational process would be meaningless if *some* kind of causal relationship between the behavior of teachers and learning by students did not exist,"²²² more than this is required by the law of negligence. The doctrine of proximate causation requires that the plaintiff's injury be the natural, probable, and foreseeable consequence of the defendant's conduct.²²³ To be held liable, the defendant must have been able to foresee that a breach of the duty of care owed to the defendant would cause not only *an* injury to the plaintiff (cause in fact) but also the *particular* type of injury actually suffered by the plaintiff. Of course, were some scientifically valid correlation to be demonstrated between learning and classroom methods, common sense would almost inevitably point to the conclusion that non-learning was a clearly foreseeable risk of poor classroom performance.²²⁴

219. Comment, *supra* note 19, at 790.

220. See *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863); RESTATEMENT (SECOND) OF TORTS § 328 D, comment *d* at 157-58. Whether the doctrine would even be available is, in fact, problematic. *Res ipsa loquitur* has been used to establish causation in medical malpractice actions, *see, e.g.*, *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944), but is not applied in attorney malpractice cases, *see Wade, The Attorney's Liability for Negligence*, in T. ROADY & W. ANDERSEN, *supra* note 11, at 228. For criticism of the doctrine and suggestions that the courts should abandon it, *see Prosser, Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949); Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950).

221. C. JENCKS, *supra* note 216.

222. Comment, *supra* note 8, at 582 (emphasis in the original).

223. W. PROSSER, *supra* note 11, at 250-70.

224. This may account for the brief, almost offhand treatment that probable cause has been accorded by the advocates of an educational malpractice cause of

But in *Donohue* the lower court held that

the plaintiff's complaint must be dismissed because of the practical impossibility of demonstrating that a breach of the alleged common law and statutory duties was the *proximate* cause of his failure to learn . . . [I]t is virtually impossible to calculate to what extent, if any, the defendant's acts or omissions proximately caused the plaintiff's inability to read at his appropriate grade level.²²⁵

The *Donohue* court may have been in error. But proximate cause is often a vehicle for the expression of judicial policy concerns that affect recognition of a negligence cause of action.²²⁶ The language of proximate cause may be used to limit legal responsibility for conduct that has been proven to be a cause in fact. Thus, even if educational misfeasance could be proven to be a cause in fact of functional illiteracy, the educational malpractice plaintiff, having established all the other elements of a negligence cause of action, could still be denied recovery on a conservative view of proximate cause. Whether that should or should not be the case, however, requires an examination of the policy considerations and consequences that underlie the educational malpractice debate.²²⁷

action. See, e.g., Comment, *supra* note 8, at 585 & 596; Note, *supra* note 11, at 354; Comment, *supra* note 19, at 768.

225. *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 35, 407 N.Y.S.2d 874, 881 (1978) (emphasis added).

226. Although courts do balance policy considerations under the rubric of proximate cause, some have suggested the causal relation is simply a question of fact and that policy should only be considered in the determination of duty; see, e.g., Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

227. Were a suit for educational malpractice to be allowed to proceed, rather than being summarily dismissed for failure to state a cause of action, the plaintiff would encounter still other problems. While detailed consideration of these issues is not relevant here, because this article takes the position that such causes of action should not be entertained, some of them may be briefly recognized.

Whatever theory the educational malpractice plaintiff proceeds under, all of the usual defenses will presumably be available to the defendant. For example, in a suit bottomed on a negligence theory, the defendant may plead contributory negligence in those jurisdictions that still recognize this defense. See Sugarman, *supra* note 4, at 247; Abel, *Can a Student Sue the Schools for Educational Malpractice?*, 44 HARV. EDUC. REV. 416, 428 (1974). The educational malpractice defendant may allege and prove that a plaintiff-student failed to attend class, exhibited a negative attitude toward learning, did not do assignments, or seldom paid attention in class, thereby causing his own injury. Such a defense, however, would be unavailable in those jurisdictions that make it impossible for a child below a certain age to be contributorily negligent. See W. PROSSER, *supra* note 11, at 156-57, 419 & n.31, 447 & n.82. Even in jurisdictions where such a defense is theoretically available, courts are reluctant to attribute contributory negligence to a child. See, e.g., *Bear v. Auguy*, 164 Neb. 756, 768, 83 N.W.2d 559, 567 (1957) (extreme situation required to bar child from recovery due to contributory negligence). On the other hand, to the extent that a student's age would limit the availability of affirmative defenses, educational malpractice would approach becoming a strict liability tort, and this consequence courts should not overlook in deciding whether or not to recognize it as a cause of action.

Against a plaintiff-parent, an educational malpractice defendant might argue

IV. POLICY CONSIDERATIONS

As has already been seen, the courts' legal analyses of educa-

that the parent failed to encourage the child to read, did not assist in developing literacy skills, or created a home environment not conducive to study. Alternatively, the defendant might turn the tables on the parent-plaintiff by alleging that, once the parent knew or should have known that the public school system was failing to fulfill its educational mission, the parent had a duty to exercise reasonable care to see that other provisions were made for the child's education.

These positions are further complicated by the fact that the negligence of the child may be imputed to the parent, although the reverse is not true: Parental negligence cannot bar the child from recovery. *See, e.g., Welter v. Curry*, 260 Ark. 287, 302, 539 S.W.2d 264, 273 (1976) (child's contributory negligence may be asserted against parent); *contra Handeland v. Brown*, 216 N.W.2d 574, 579 (Iowa 1976) (child's contributory negligence does not bar parental recovery).

For further discussion of defense problems in this area, including the availability of a student's suit against his or her parents for failure to ensure their education, the impact of intra-familial immunity, and the possibility of an educational malpractice defendant impleading parents as third-party defendants, *see Note, supra* note 58, at 52-55.

In those jurisdictions that have abandoned contributory negligence in favor of comparative fault, *e.g., Nga Li v. Yellow Cab Co. of California*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), any or all of the above considerations would work to limit the educational malpractice defendant's liability. *See generally V. SCHWARTZ, COMPARATIVE NEGLIGENCE* (1974). Indeed, they may very well limit defendants' liability to such an extent in so many cases that the question must arise whether recognizing the cause of action is worth the effort.

The defense of assumption of risk, however, would not be available, since attendance is not voluntary. Besides, it would be a strange argument for an educator to make. *But see* note 292 *infra*.

But the most effective defense would remain the denial of any causal relationship between the harm allegedly suffered and the negligent conduct asserted. *See* notes 199-226 *supra* and accompanying text.

The educational malpractice plaintiff would also have to consider the question of what is the appropriate remedy to be sought. In the public school context, at least three alternative forms of relief would be available: (1) monetary damages, compensating the plaintiff for the disability suffered and its effect on future earnings potential, (2) provision of or payment for remedial education, or (3) dismissal of incompetent teachers.

Removal of incompetent teachers would have the advantage of avoiding the potentially detrimental and far-reaching effects of substantial compensatory and punitive damage awards. But, while this alternative would eliminate future harm, it will do nothing to recompense the student-plaintiffs who have already been subjected to the incompetent teacher or teachers. Moreover, where teacher union contracts are involved, dismissal may not be so easily accomplished, particularly if the contract provision permitting removal "for cause" does not recognize negligence or incompetence as a valid "cause." *See also Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Ordering the defendant to make available to the defendant an appropriate remedial program would simply involve reassigning the defendant to the public school system that produced the injury in the first place, a result anomalous in the extreme. Remedial instruction, in fact, is the most illogical of the alternative remedies, for it would neither deter future harm nor make whole those students who

tional malpractice claims have been strongly influenced by considerations of public policy.²²⁸ Conversely, the logical constructs of legal reasoning have also shaped their policy analyses.²²⁹ In *Peter W.*, for example, the court indicated that the lack of "readily acceptable standards of care, or cause, or injury" was a policy factor that argued against recognizing educational malpractice as a cause of action.²³⁰ In *Donohue*, on the other hand, the New York Court of Appeals relied almost exclusively on public policy to hold that, although such standards could be framed, the courts should make no effort to frame them.²³¹ Even the lower court in *Hoffman*, though permitting a cause of action for negligence in ac-

had been subjected to the inadequate instruction. Moreover, for those who see educational malpractice suits as a means of reforming public education, the remedy of additional instruction offers no prospect for improving the regular school program. In short, the only thing that remedial instruction, as a remedy in an educational malpractice action, has to commend it is that, like dismissal of incompetent teachers, it would avoid the substantial monetary awards that would be contrary to sound public policy and deter insincere plaintiffs merely seeking a windfall.

On the other hand, "the award of money damages for diminished earnings could be a potentially crushing burden upon a school district, especially in a class action." Comment, *supra* note 19, at 759 (footnotes omitted). Recall that the plaintiff in *Donohue* sought five million dollars (\$5,000,000); Hoffman was willing to settle for a mere five hundred thousand dollars (\$500,000). But such awards, particularly where they attempted to restore lost future earning potential, would be almost wholly speculative. See note 197 *supra* and accompanying text. As has already been seen, the difficulty of calculating damages for non-learning weighs against its recognition as a tort injury. See notes 190-98 *supra* and accompanying text.

Of course, the remedies which would be available and appropriate would depend upon the theory under which the educational malpractice action was brought. For example, if the suit were premised on a contract theory, the damages recoverable should be limited to the benefit of the bargain. But what was the bargain? See notes 68-69 *supra* and accompanying text. And a plaintiff suing on contract would be under a duty to minimize his or her damages, but a litigant resting on misrepresentation could avoid this requirement. See W. PROSSER, *supra* note 11, at 422-24.

For further discussion of the remedies available to educational malpractice plaintiffs and the problems attendant on each, see Comment, *supra* note 8, at 581, 595, 596; Note, *supra* note 11, at 355; Note, *supra* note 58, at 56-58; Comment, *supra* note 19, at 757-60.

The nature and extent of the remedies available in educational malpractice suits, however, are considerations intimately related to the fundamental public policy issues which should determine whether such a cause of action should be recognized or not.

228. See notes 28-32, 37-49, 163-66 & 226-27 *supra* and accompanying text.

229. This judicial tendency to intermingle law and policy has been severely criticized by some commentators; see, e.g., Comment, *supra* note 8, at 586 ("... confusing real policy issues with abstract pleading arguments only weakens respect for judicial reasoning..."). But see W. PROSSER, *supra* note 11, at 325 ("... 'duty' is... only an expression of the sum total of... considerations of policy...").

230. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 860 (1976).

231. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443-44, 391 N.E.2d 1352, 1354-55, 418 N.Y.S.2d 375, 378 (1979).

ademic instruction, was moved to stress the limited nature of its holding. Its decision, the court said,

does not mean that the parents of the Johnnies who cannot read may flock to the courts and automatically obtain redress. Nor does it mean that the parents of all the Janies whose delicate egos were upset because they did not get the gold stars they deserved will obtain redress. If the door to "educational torts" . . . is to be opened . . . it will not be by this case²³²

The Court of Appeals, however, would not go even that far and flatly held that it was the public policy of the State of New York that no cause of action should exist for educational malpractice.²³³ Clearly, a judicial reluctance to intervene in the operation of the schools has been a pervasive theme in the educational malpractice litigation.

This reluctance has been motivated by extra-legal concerns that go far beyond the mere technicalities of pleading. The principal policy objections to recognition of a cause of action for educational malpractice appear to be of two types. The first consists of concerns internal to the judiciary. Among these is the impact such recognition would have on the courts; in particular, it is feared that the result would be to burden the courts with a flood of claims, many of which would be frivolous if not, in fact, feigned. At the same time, there is acute awareness that most judges possess little, if any, expertise in the complex educational issues that are and would be involved in malpractice suits.²³⁴ The second set of objections proceeds from a consideration of matters external to the judiciary. On the one hand, the courts have taken judicial notice of the existence of alternative procedures for correcting, reforming, or deterring incompetent instruction.²³⁵ On the other hand, grave doubt has been expressed as to the desirability of the consequences that would flow from recognizing an educational malpractice cause of action. The impact on education might be

232. *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 379-80, 410 N.Y.S.2d 99, 110 (1978). Thus, the court sought to ground its decision on a characterization of the defendant school board's negligence as misfeasance, expressly declining to recognize suits for nonfeasance. As for the utility of the distinction, *see* notes 13 & 56 *supra* and accompanying text.

233. *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 126, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 379 (1979).

234. The absence of any judicially manageable standards is no doubt also a factor of the courts' perceived incompetence; *see* notes 172-79 & 184-89 *supra* and accompanying text.

235. A related, though slightly different, policy argument is that judicial intervention would contravene principles of democratic government; regarding this argument, *see* note 264 *infra*.

financial, adding to the costs of the already beleaguered public schools, or behavioral, disrupting classroom relationships and encouraging "defensive" teaching. Or the impact might be both. In any event, the purported benefits of holding the educational malpractitioner liable would be more than offset by the negative consequences.

Advocates of a cause of action for educational malpractice, of course, denigrate the idea that recognition of such a cause will lead either to a flood of litigation or to disruption of the educational process.²³⁶ The rationale for refusing to exempt doctors from liability for malpractice is, these advocates contend, equally applicable to teachers. They are skeptical of the feasibility of procedures other than judicial for satisfying claims of improper or incompetent instruction. As for the problem of judicial understanding, the courts, they confidently opine, can "intelligently sift the wheat from the chaff."²³⁷

But, it can be argued, that is exactly what the courts have already done in refusing to recognize a cause of action for educational malpractice. Providing a judicial remedy for the infliction of educational injury would have wider consequences than simply allowing compensation to a few individual students for the harms they have allegedly suffered at the hands of the public schools. However, they may have confused their policy analyses with their legal arguments, the courts seem to have reached the right result in the educational malpractice cases.

236. For discussions of the policy issues underlying judicial reticence in the educational malpractice cases by advocates of such a cause of action, *see* Comment, *supra* note 8, at 585-93; Elson, *supra* note 9, at 645-93; Note, *supra* note 58, at 33-41; Comment, *supra* note 19, at 760-66.

237. *See* *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976) (holding physician liable in negligence), *modified on other grounds*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977):

What statute or theory of law grants preferential treatment or immunity to the medical profession? The court is the guardian of the rights of all the citizenry, not only a chosen few To use the worn-out, rejected cliché of "public policy" is to single out and grant preferential treatment to the medical profession over all other professions and enterprises where malpractice could result in payment of ensuing resultant damages. This was never truly contemplated by either the general public, the Legislature or the Court. This court further believes that contrary to the fear . . . as to "fraudulent claims" or a "sensible stopping point", that the Judiciary can intelligently sift the wheat from the chaff and that it has the ability to succinctly deal with any attempted fraudulent scheme or claim and make short shrift thereof.

Id. at 231-32, 387 N.Y.S.2d at 211. As could be expected, this passage from *Park* is an oft-quoted favorite of those who wish to see an educational malpractice cause of action recognized; *see, e.g.*, Elson, *supra* note 9, at n.42.

Internal Concerns

The courts' concern for the judicial effect of creating this new cause of action has perhaps been most succinctly stated by the Court of Appeals in *Donohue*.

To entertain a cause of action for "educational malpractice" would require the courts not merely to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of those policies.²³⁸

In other words, a lack of judicial expertise in the subject matter coupled with the undue burden to be placed upon the courts cautions against recognizing the cause of action. And, indeed, the potential for frivolous claims would appear to be almost limitless. In *In re Gregory B.*, for example, one of the students' allegations was that "their teachers are mean to them."²³⁹ The court was not impressed.

Excessive litigation. But the claim that a flood of litigation will result is one that can be (and has been)²⁴⁰ raised against the recognition of any new cause of action. Were such a consideration to be decisive, the law would be incapable of growth and adaptation. "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."²⁴¹ Without more, the "excessive litigation" argument simply proves too much, and the advocates of a cause of action for educational malpractice are on firm ground in rejecting it as a general principle.

When one moves from a generalized to a particularized analysis, however, objections to the potential impact upon the courts of this new cause of action become weightier.²⁴² The commentators

238. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979).

239. 88 Misc. 2d 313, 318, 387 N.Y.S.2d 380, 385 (1976).

240. See, e.g., note 11 *supra* (products liability).

241. W. PROSSER, *supra* note 11, at 51. It must be noted, however, that Prosser confines his endorsement of new causes of action to "wrongs that *deserve*" a remedy (emphasis added). Thus, advocates of a cause of action for educational malpractice must bear the burden of demonstrating that a genuine need for relief is present, a burden that, so far, they have not successfully borne.

242. An alternative objection related to the potential volume of litigation is that, if recognizing educational malpractice as a cause of action would result in a substantial amount of litigation, the cost to the defendant school boards and teachers would be such as to detrimentally effect the overall quality of education. Any ben-

have sought to dismiss the courts' fears of excessive litigation by analogizing educational malpractice claims to other types of professional malpractice actions.

Comparing educational malpractice to other "new" types of malpractice actions, . . . there is no reason to differentiate between educational malpractice and other forms of malpractice litigation which currently congest the courts.²⁴³

Such an argument, however, (1) rests upon a crucial admission and (2) overlooks a critical, empirical fact.

The empirical fact overlooked is the simple number of potential plaintiffs, were an educational malpractice cause of action to be recognized. Ironically enough, the compulsory education laws—the very bedrock of many of the *legal* theories for recognizing the cause of action—, coupled with the existence of a publicly financed school system, insure that many more will be subjected to education than will ever consult a doctor, a lawyer, or an architect.²⁴⁴

The crucial admission is that other forms of malpractice litigation are already congesting the courts.²⁴⁵ Why add to that congestion? In fact, as a logical matter, this argument can just as easily cut the other way—abandon the other malpractice causes of action for the reasons that the courts have declined to recognize educational malpractice as a viable cause of action. Like its counterpart, the "excessive litigation" argument, this argument, too, proves too much.

The courts' fears of excessive litigation, therefore, are not as groundless as the commentators suggest. Those fears, moreover, are occasioned by the nature and depth, as well as the breadth, of judicial involvement that is contemplated by educational malpractice litigation.²⁴⁶ Generally, educational malpractice advocates have sought to conduct a broad and total attack upon the public school program. The object has been reform, and the choices presented to the courts have been intricate. So far, the courts have declined to make such choices for the laudibly candid reason that they wouldn't know what they are doing.

efft to individual plaintiffs would, then, be overshadowed by the negative systemic impact. For a discussion of the potential costs of recognizing educational malpractice as a cause of action, *see* notes 268-92 *infra* and accompanying text. Because this concern is not related to the internal operation of the judiciary, however, it is not considered at this point.

243. Note, *supra* note 11, at 342 & 351 (footnote omitted).

244. *See generally* T. ROADY & W. ANDERSEN, *supra* note 11.

245. *See* H. JAMES, *CRISIS IN THE COURTS* (rev. ed. 1971).

246. *See* note 238 *supra* and accompanying text; *see also In re Gregory B.*, 88 Misc.2d 313, 317, 387 N.Y.S.2d 380, 384 (1976).

Judicial expertise. In addition to a fear of excessive and possibly fraudulent claims that could unduly burden the courts, the educational malpractice decisions have reflected a concern for judicial inability to formulate standards for teaching and learning. Where educators themselves have failed, there appears little reason to believe that courts would be successful. "Education," the Supreme Court has noted, ". . . presents a myraid of 'intractable economic, social, and even philosophical problems.'"²⁴⁷ Judicial decisionmakers, however, are untrained in the substantive issues of pedagogical policy and, even if they were, lack adequate information gathering and deliberative processes to make an informed evaluation of them.²⁴⁸ Recognizing this, the lower court in *Donohue* was moved to observe,

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 [educational malpractice as a cause of action] is clear from the fact that in presenting their case, plaintiffs would, of necessity, call upon [the courts] 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. It simply is not within the judicial function to evaluate conflicting theories of how best to educate.²⁴⁹

As previously discussed, there is no agreement and, in fact, considerable, rancorous dispute among educators as to appropriate instructional strategies.²⁵⁰ Some favor holding slow learners back; others support "tracking" theory, which groups students of similar learning abilities; still others rely upon a variety of remedial programs to assist those pupils who fall behind.²⁵¹ It seems unlikely that the courts can resolve that which educators cannot.

Indeed, even some of the educational malpractice critics have conceded that "[t]here is . . . no doubt that the formulation and

247. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973), quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (upholding state welfare regulation). The Court's point was that the judiciary is an even more inappropriate forum of overseeing the daily operation of the school system than it is for operating the welfare system.

248. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1129 (1969); Kuriloff, Truc & Kirp, *Legal Reform and Educational Change: The Pennsylvania Case*, 41 EXCEPTIONAL CHILDREN 35, 41 (1974); D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 33-56 (1977).

249. *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 34, 407 N.Y.S.2d 874, 879 (1978).

250. See notes 172-89 *supra* and accompanying text.

251. See Shanker, *supra* note 174, at 4.

implementation of educational policy, which is inevitable in the determination of issues of educational [malpractice], can be accomplished more effectively by school officials than by judges.”²⁵² One need not subscribe to the romantic idea that the teacher always knows best²⁵³ to believe that career teachers and school administrators are more qualified to formulate educational policy than are courts. The teacher may not know best, but he or she probably knows better. As the Supreme Court put the matter in *Hortonville Junior School District No. 1 v. Hortonville Education Association*,

Policymaking is a process of prudential judgment, and we are not prepared to say that a judge can generally make a better policy judgment or . . . as good a judgment as the School Board, which is intimately familiar with all the needs of the school district, or that a school board must, at the risk of suspending school operations, wend its way through judicial processes not mandated by the legislature.²⁵⁴

The determination of the requisite level of instructional quality within a school system and how to attain it is a fundamental policy-making function that educators are better equipped to handle than are courts. The judicial process, therefore, should eschew discretionary decisions of educator competence.²⁵⁵ In fact, the New York Court of Appeals has gone even farther and has held that, within the State of New York, educational policy *must* be left to the appropriate school authorities.²⁵⁶ If they fail to exercise their powers in an appropriate manner, the remedy should be legislative or administrative, not judicial. “Such matters as the competence of teachers . . . are peculiarly appropriate to state and local administration.”²⁵⁷

As new teaching methods are devised and as urban growth demands changed patterns of instruction, the only realistic way the state can adjust is through legislative study, discussion and continuing revision of the controlling statutes. Even if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and

252. Elson, *supra* note 9, at 677.

253. *But cf.* Goss v. Lopez, 419 U.S. 565, 593-94 (1975) (Powell, J., dissenting) (eulogizing teachers generally in the context of a discussion of the Justice's own “warmly remembered” school days). The statements of Mr. Justice Powell, himself a former school board member, concerning the nature and function of education constitute one of the more curious bodies of judicial opinion in modern American jurisprudence.

254. 426 U.S. 482, 496 n.5 (1976).

255. See Scheelaase v. Woodbury Central Community School Dist., 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

256. James v. Board of Educ., 42 N.Y.2d 357, 366 N.E.2d 1291, 397 N.Y.S.2d 934 (1977). See also Vetere v. Allen, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77 (1965) (educational policies are solely the province of state educational authority).

257. Scheelaase v. Woodbury Central Community School Dist., 488 F.2d 237, 243-44 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

consultation necessary for intelligent educational planning.²⁵⁸

External Concerns

The availability of alternative processes for correcting the wrongs of which educational malpractice plaintiffs have complained has been yet another policy consideration that has influenced the courts to decline to recognize the proposed cause of action. While these alternatives are external to the litigation, the courts could hardly ignore their existence. Nor can the courts fail to be troubled by the potential consequences of judicial intervention in this peculiarly sensitive area of educational policy.

Alternative procedures. The absence of judicial competence in the educational field, coupled with the lack of either reliable data or acceptable theory on which to base a judicial determination, is a compelling argument against establishing a cause of action for educational malpractice. But it would not be sufficient, were there no non-judicial mechanisms for dealing with incompetent academic instruction. When, however, it is recognized that such alternatives are already in place and that they provide a more efficient remedy to the problem, the policy argument against judicial intervention becomes persuasive. Among the extra-legal processes available to correct educational malpractice are political action, certification procedures that impose minimum qualifications on educators, professional review systems, supervisory control over teaching behaviors, and school boards' powers to terminate incompetent teachers.²⁵⁹ Parents may also have an opportunity to utilize intrasystem grievance procedures to challenge the instruction their children are receiving.²⁶⁰ Thus far, no educational malpractice plaintiff has alleged, let alone proven, that these various alternatives are inadequate to prevent or deter negligent or incompetent teaching.

In fact, the plaintiffs in *Hoffman* and *Donohue* had not even at-

258. *McInnis v. Shapiro*, 293 F. Supp. 327, 336 (N.D. Ill. 1968), *aff'd per curiam sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969).

259. See Comment, *supra* note 8, at 591-92; Comment, *supra* note 19, at 764.

260. Internal grievance procedures, however, would be inadequate, unless the parents are aware of their child's learning difficulty while he or she is still an enrolled student and have notice of the availability of the grievance mechanism. There is, moreover, no certainty that the grievance procedure will produce a resolution acceptable to the parents. The shortcomings of such administrative mechanisms, however, is no argument for ignoring them.

tempted to avail themselves of the administrative remedies available to them.²⁶¹ This led the Court of Appeals to state in *Donohue* that it could not overlook the right of public school students and their parents to enlist the aid of the State Commissioner of Education to insure that such students were receiving a proper education.²⁶² Under the New York education law, any person aggrieved by any official act or decision of any school officer, school authority, or meeting concerning any matter within the purview of the law, or by any other act or decision pertaining to the public schools, was entitled to seek review of such act or decision by the Commissioner.²⁶³ This the plaintiff and his parents had wholly failed to do.

Moreover, it is not simply the availability of these procedures but also the legislative intent in creating them that argues against judicial interference. In most states, the purpose of making educational policy solely the province of the duly constituted educational authority is to remove all matters pertaining to the public school system, insofar as feasible, from controversy in the courts.²⁶⁴

Conceding the need for reform and improvement in American public education, conceding the need for some form of external control to assure better teacher and administrative performance, it does not follow that that external control must be judicial. The judicial process is slow, costly, inefficient, and "prone to misconceive the public good."²⁶⁵ New causes of action generally develop in response to societal demand, but new causes of action are not the only possible responses to legitimate social concerns. The na-

261. See *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 36-37, 407 N.Y.S.2d 874, 881 (1978); *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 379-81, 410 N.Y.S.2d 99, 108-09 (1978).

262. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1355, 418 N.Y.S.2d 375, 378 (1979).

263. N.Y. EDUC. LAW § 310, subd. 7 (McKinney 1970 & Supp. 1978).

264. See, e.g., *James v. Board of Educ.*, 42 N.Y.2d 357, 366 N.E.2d 1291, 397 N.Y.S.2d 934 (1977); *Vetere v. Allen*, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77 (1965).

An alternative form of the argument that existing administrative and legislative practices are adequate is the argument that judicial determination of educational malpractice claims would contravene democratic principles of government. This argument is discussed by Elson, *supra* note 9, at 659-67, who attempts to rebut it. But see Hazard, *Courts in the Saddle: School Boards Out*, 56 PHI DELTA KAPPAN 259 (1974); Glazer, *Towards An Imperial Judiciary?*, 41 PUB. INTEREST 104 (1975); A. BICKEL, *THE MORALITY OF CONSENT* (1977); D. HOROWITZ, *supra* note 248. The argument is too detailed and philosophic to be discussed in this article. It should be noted, however, that despite Professor Elson's discussion of it, the democratic theory argument has been neither raised by the plaintiffs nor addressed by the courts in any of the actual educational malpractice litigation.

265. *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 556 (1949) (Frankfurter, J., concurring).

tionwide movement in state legislatures, state departments of education, and local school boards to adopt minimum competency standards and tests is evidence both of the growing public concern for students graduating without minimal skills and of the capacity of non-judicial agencies to respond to that concern.²⁶⁶ While the means of educational reform selected, minimum competency testing, may be subject to serious reservations,²⁶⁷ the point is that legislative or administrative institution of evaluative and remedial programs obviates the need for judicial intervention, without leaving students remediless. So long as the legislatures are legislating, the problem of educational malpractice should be left to legislation. The social importance of education will be better served by political than by judicial solutions.

Educational impact. This becomes particularly manifest when one examines, as have the courts,²⁶⁸ the possible consequences that the recognition of a cause of action for educational malpractice would have for the public schools. Permitting suits for non-learning would have two primary effects. First, there would be the additional costs that the already financially hard-pressed public school systems would be required to bear. The result would likely be a further reduction in, rather than an improvement of, educational services. Second, even were there no such reduction, awarding damages for malpractice could have a number of disruptive impacts upon educational processes. In either case, the consequences would be undesirable.

Substantial damage awards would have a disastrous effect upon finite and shrinking public school budgets.²⁶⁹ Originally, those who advocated creating a cause of action for educational malpractice argued that "[a] school district is obviously a better loss bearer than an individual student because it can pass on whatever remedy is awarded to the general public in the form of

266. See N.Y. Times, Nov. 20, 1977, § 1, at 31, col. 5 (report on national enthusiasm for competency testing).

267. See notes 294-305 *infra* and accompanying text; McClung, *Competency Testing: Potential for Discrimination*, 11 CLEARINGHOUSE 439 (1977).

268. E.g., *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861 (1976); *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979).

269. Regarding the size of the damage awards that educational malpractice plaintiffs have already sought, see note 227 *supra*. The highly speculative nature of such claims has, of course, been one of the reasons for the courts' dismissing the suits for failure to state a cause of action. See notes 197, 198 & 227 *supra*.

increased taxes.”²⁷⁰ Today, only a few years after that was written, the confident assertion about the general public’s willingness to sustain additional taxation has a faintly nostalgic ring. In the face of public resistance to tax increases, heightened competition for the remaining tax dollars available, and public hostility toward the schools,²⁷¹ public education would almost certainly have to diminish still further the quality of its services. Nor would liability insurance provide a panacea, for the premiums themselves would have to come from the public revenues.²⁷²

In addition to any damage awards, recognition of a cause of action for educational malpractice would present the schools with other costs as well. Depending upon the remedy that a court might select, a school district might be required to make extensive (and expensive) curricular changes or to introduce remedial programs. Exactly how the situation would be resolved if the school district could prove that it was not provided with adequate funds to comply with such an order is difficult to predict.²⁷³

Short of that, preparing and defending malpractice suits would itself be a drain on the school system’s resources. Particularly would this be true, if the courts’ fears of a flood of litigation were to prove to be justified. In fact, even the advocates of an educational malpractice cause of action, themselves fearful of a major fiscal outflow, have recommended only a limited damage formula²⁷⁴ or have sought to allay fears by arguing that recognition of the cause of action won’t really result in very many suits anyway.²⁷⁵ “[I]t is probable that many potential plaintiffs will be

270. Comment, *supra* note 19, at 762. Note also that this sanguine asseveration rests upon the unarticulated, but not unarguable, assumption that the student has, in fact, suffered a loss. *But see* notes 190-98 *supra* and accompanying text.

271. *See* note 1 *supra*. Ironically, the very social psychological atmosphere out of which the charges of educational malpractice have arisen is one of the data courts should consider in making the policy determination of whether to allow for such causes of action; *see* note 28 *supra* and accompanying text.

272. If, because of immunity from liability, *see* note 12 *supra*, a school district could not be held liable under the doctrine of *respondeat superior* for a teacher’s incompetence or for its own negligence in hiring the incompetent teacher, damages would necessarily have to be awarded against the teacher. In view of the nigardly awards that most public school teachers could sustain, this is obviously not what most educational malpractice advocates would desire. Moreover, holding teachers individually liable or requiring them to retain malpractice insurance would have the undesirable effect of discouraging many from entering or remaining in the occupation. Attempts to pass on to the public teachers’ insurance costs through higher salaries would again require higher taxes and meet with the same opposition.

273. A court effort to require adequate funding would amount to a judicial exercise of the appropriation power and would definitely raise questions of democratic theory and the legitimacy of such an action; *see* note 264 *supra*.

274. *E.g.*, Comment, *supra* note 8, at 594-95; Note, *supra* note 58, at 13, 36, 56.

275. *E.g.*, Comment, *supra* note 8, at 587-88; Elson, *supra* note 9, at 652.

from socially and economically deprived backgrounds, and thus unlikely to bring suit because of their limited resources and relative alienation from the judicial system."²⁷⁶ Apart from commenting upon the cynicism of such a position (and it is cynical in the extreme), it must be noted that restricting the cause of action in such a way that "many suits could be dismissed at the earliest possible stage solely on the pleadings"²⁷⁷ will still require the schools to devote time, money, and effort to the preparation of their pleadings.²⁷⁸ This, in turn, will require shifting money and personnel that would otherwise be available for instruction to the detriment of the educational program. It was exactly these kinds of fiscal considerations that led the Supreme Court to decline to become involved in questions of educational finance,²⁷⁹ and the lower courts should find them dispositive in the case of educational malpractice.

That would not be the case, were recognition of a cause of action for educational malpractice to improve the quality of the public schools.²⁸⁰ On balance, however, it appears unlikely that holding educators liable for non-learning will result in improved education. Particularized suits against individual teachers are "probably not an effective approach to a general upgrading of education."²⁸¹ On the other hand, broad-scale attacks upon school districts or even whole school systems may produce instructional behaviors or approaches to student evaluation that will be counter-productive.

Conceptually, it is possible that malpractice litigation could have a positive educational effect. The fear of lawsuits by dissatisfied students or their parents might deter negligent school administration, prevent the hiring of incompetent teachers, reform

276. Comment, *supra* note 8, at 588.

277. *Id.* at 587.

278. The assertion that "contributory negligence represents a viable response to the floodgate argument" is subject to the same objections and is even weaker. For one thing, the defense is not available in many jurisdictions. For another, the existence of the defense is not likely to deter the hopeful plaintiff or the ingenious plaintiff's counsel; and, even when the defense is available and successful, it will require the expenditure of the schools' limited resources in defending the litigation.

279. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

280. For a survey of some of the educational benefits that would allegedly flow from recognizing educational malpractice as a cause of action, see Elson, *supra* note 9, at 657-59.

281. Comment, *supra* note 19, at 756.

classroom practices, and generally upgrade the quality of public education. The likely reality, however, is otherwise.²⁸² Imposing liability on school districts, educational administrators, and teachers will only encourage "defensive education."

As has been observed, the advocates of an educational malpractice cause of action are fond of drawing an analogy between education and medicine.²⁸³ But permitting patients to sue doctors, hospitals, and hospital administrators has not resulted in improved health care.²⁸⁴ Apart from benefiting the sellers of liability insurance, recognizing a cause of action for medical malpractice has led to the practice of "defensive medicine," such as the administration of numerous, unnecessary tests.²⁸⁵ Teaching and administering the schools in the face of malpractice liability would result in the same misallocation of resources.

It would also have the probable effect of discouraging many qualified individuals from entering education as a career. Even if the availability of malpractice insurance could reduce the fear of financial liability, the prospect of being subjected to embarrassing courtroom proceedings would remain. And, were the courts actually to find educational malpractice in a few cases, the public would probably draw the inference that incompetence was widespread in education, making the field even more unattractive. The ironic result would be to diminish still further education's claim to the status of profession.²⁸⁶ Given the potential remuneration, people still become doctors, despite malpractice liability and its negative connotations. But it is difficult to believe that competent persons would choose to become educators if faced with such prospects.

Malpractice liability's capacity for discouraging prospective educators would be heightened by the ambiguous nature of the charge. The reformers and critics have yet to specify what conduct they see as constituting educational malpractice; or, conversely, their definitions are overly inclusive.²⁸⁷ If a student is promoted without having attained the requisite skill level, that is educational malpractice. But, if a student fails to progress, that, too, may be educational malpractice. One advocate of educational malpractice as a cause of action has complained that, in spite of

282. See Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

283. See notes 11 & 237 *supra*.

284. Project, *The Medical Malpractice Threat: A Study of Defensive Medicine*, 1971 DUKE L.J. 939.

285. *Id.*

286. See notes 141-48 *supra* and accompanying text.

287. See note 13 *supra*.

the billions spent on education, "twenty-three percent of all students fail to graduate from high school."²⁸⁸ But, if educational malpractice were recognized as a cause of action, presumably even more will fail to graduate; the elimination of social promotions, coupled with the student's legal right to leave school after a certain age, suggests that many will not secure diplomas. Were such muddled analysis to become legal doctrine, educators would be presented with an insoluble dilemma, damned if they did and damned if they didn't. Thus, the critics' own confusion as to what is meant by educational malpractice and its consequently discouraging effect upon those who might consider education as a career is itself a strong policy argument against recognizing the cause of action.

Additionally discouraging is the admission by some advocates that educational malpractice suits not only could but also would be used for purposes of harassment.²⁸⁹ The object is not even that the suits will be won. Litigation is simply to be used as a coercive device.

Tactically, therefore, even if ultimately lost on the merits, the lawsuit for educational injuries serves the democratically supportive purpose of causing [education] officials . . . to pay attention to grievances arising out of the disputed practices.²⁹⁰

Not only is it arguable that such do not serve "democratically supportive purposes" (particularly where the grievances are illegitimate, as presumably they would be if the suits are "lost on the merits"), but also the impact on classroom decorum and student discipline cannot be overlooked. In some schools, the students already come to class armed. Must they also come armed with a lawsuit? One of the causes of educational malpractice is often seen to be "crisis-laden" school systems.²⁹¹ It is difficult to see how recognition of this new cause of action will diminish the crises.

Besides, disruption of the educational process can occur in ways other than relaxation of school discipline or deterioration in student-teacher relations. Yet one more negative impact that would be probable to arise from allowing suits for educational malpractice would be to inhibit experimentation in teaching tech-

288. Note, *supra* note 58, at 34.

289. *E.g.*, Elson, *supra* note 9, at 664-67.

290. *Id.* at 666.

291. *E.g.*, *id.* at 665.

niques.²⁹² Even a particularized holding that an individual teacher's use of a specific experimental approach constituted malpractice, in view of the needs and abilities of that teacher's students, would have a general deterrent effect upon all other teachers within that court's jurisdiction. These other teachers will no doubt feel inhibited to some degree in using any new or experimental technique, even if their students' academic capacities and needs are different than those of the losing teacher-defendant. After all, their students' ability to sue will be the same.

In terms of teaching practices, there is also an ironic, alternative risk presented by educational malpractice suits. The educational malpractice plaintiff would, in effect, be asking a court to decide what instructional practices are legally acceptable. A decision in favor of the defendant would constitute a judicial statement implicitly—or, perhaps, even explicitly—legitimizing the challenged practice. It is not inconceivable that an idiosyncratic judge might endorse a peculiar teaching practice which would then be followed by educators in that jurisdiction (and, perhaps, by educators in other jurisdictions as well) in order to protect themselves and limit their own liability.

The optimism of the reformers that judicial intervention will improve the quality of education appears, therefore, to be misplaced. At best, recognizing liability for educational malpractice would create more uniformity in the quality of public education. But it will be a uniformity achieved by reducing expectations of student performance, enforcing minimal standards, and stultifying the experimentation that may lead to educational progress.

In fact, it may be argued that this is already the direction that American educators have taken in response to the "accountability" movement.²⁹³ "Competency-based education" (CBE), the current catchword in educational reform, may be little more than a synonym for "defensive education."²⁹⁴

The emphasis in competency-based education is upon achieve-

292. Possibly this problem could "be overcome by giving parents the choice of putting their children in experimental classes; the doctrine of assumption of risk would then allow experimentation undeterred by the threat of damages or dismissal." Comment, *supra* note 19, at 764. But see note 227 *supra*. Presumably, were such a course of action open, school districts would then attempt to limit their liability by requiring parents to sign a blanket waiver as soon as their children enter school. The validity of such an instrument, however, is subject to serious doubt; see *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

293. Regarding "accountability," see notes 4-6 *supra* and accompanying text.

294. See generally Reilly, *Competency-Based Education: Pros and Cons*, 14 AM. EDUC. 21 (1978); Spady, *Concept and Implication of Competency Based Education*, 36 EDUC. LEADERSHIP 16 (1978); *id.*, *Competency-Based Education: A Bandwagon in Search of a Definition*, 6 EDUC. RESEARCHER 9 (1977).

ment, rather than upon spending an arbitrarily prescribed number of years within the school system. According to its tenets, educational policymakers are to transform generalized expectations of student achievement into written "behavioral objectives." These objectives reflect a general consensus as to the level of ability that students at a particular grade level should exhibit in subjects such as reading, writing, and arithmetic. Almost invariably, standardized tests are then used to assess whether and how many students have attained the prescribed minimum levels of proficiency. These tests results are, in turn, taken as a measure of how well the schools are performing their public mandate to educate the students.²⁹⁵ Some systems, in fact, have carried the emphasis upon test outcomes to its logical conclusion and allow children, once they have attained a minimum age, to receive a high school diploma and leave school as soon as they have passed the minimum competency tests.²⁹⁶ For those who cannot meet the basic skill requirements, remedial instruction is offered.²⁹⁷

The concept of competency-based education has proven so popular that in most states it is now legislatively mandated.²⁹⁸ Like most palliatives, however, it is deceptively seductive.²⁹⁹ Where school personnel are to be called to task for not meeting the specified goals, the intrinsic dynamic of the process encourages setting the goals as low as possible. Moreover, where the early-out concept is employed, these minimum competency levels have a way of becoming the behavioral maximums. In like manner, competency-based education denigrates the arts and humanities. The tests emphasize "life-role" skills, and the schools emphasize the tests. Indeed, test-taking skills become the primary instructional focus, even though improved test scores do not necessarily correlate with improved educational levels.

295. The process is described in L. BROWDER, *supra* note 4, at 9-16.

296. See, e.g., CAL. EDUC. CODE § 8574.5 (West 1977); Fiske, *Connecticut to Let Students, 16, Quit High School Early*, N.Y. Times, Jan. 8, 1978, § 1, at 1, col. 4.

297. E.g., CAL. EDUC. CODE § 8574.5 (West 1977).

298. For a detailed, state-by-state summary of legislative action up to the time of its publication, see Pipho, *Minimum Competency in 1978: A Look at State Standards*, 59 PHI DELTA KAPPAN 585 (1978); see also N.Y. Times Nov. 20, 1977, § 1, at 31, col. 5.

299. Fiske, *Educator Is Critical of Competency Tests*, N.Y. Times, Nov. 20, 1977, § 1, at 43, col. 1; Wise, *The Hyper-rationalization of American Education*, 35 EDUC. LEADERSHIP 354 (1978). The criticisms of competency testing suggested in the following paragraph are explored more fully in these two articles.

Most seriously, minimum competency testing involves dangerous potentials for discrimination and violation of students' due process rights.³⁰⁰ The cultural biases inherent in most standardized tests raise serious question about, if they do not invalidate, the use of such instruments to measure the educational achievement of minority group students or those from culturally disadvantaged backgrounds.³⁰¹ Test questions are often irrelevant to minority community experiences, while answers reflecting those experiences receive no test credit. Extreme anxiety about poor performance and lack of prior exposure to testing vocabulary are also factors that can produce inaccurate test scores for minority pupils.³⁰² Yet, without standardized tests, competency-based education would have to rely upon teachers' subjective appraisals, evaluations that all too frequently may reflect personal bias and prejudice.³⁰³

In terms of a cause of action for educational malpractice, however, the principal difficulty with minimum competency testing is that the courts might make test scores a measure of instructional competence. Particularly in those states where competency-based education is established by statute, a court might take test scores as establishing, for example, the necessary duty, standard of care, and measure of injury to sustain a malpractice action based on a negligence theory.³⁰⁴ Ironically, then, rather than avoiding judicial intervention, the establishing of minimum competency standards may invite increased litigation over academic

300. McClung, *supra* note 267; Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 J.L. & EDUC. 145 (1979); Clague, *Competency Testing and Potential Constitutional Challenges of "Everystudent,"* 28 CATHOLIC U. L. REV. 469 (1979); McClung, *Competency Testing Program: Legal and Educational Issues*, 47 FORD. L. REV. 651 (1979).

In addition, a problem with any test is, of course, the possibility that its results will be misused; see H. LYMAN, *TEST SCORES AND WHAT THEY MEAN* (2d ed. 1971).

301. *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979) (passage of functional literacy examination as a prerequisite to receipt of high school diploma held unconstitutional), noted in 10 CUM. L. REV. 863 (1980). See also Teicher, *Minimum Competency Test Requirements for High School Graduation: Are We Boxing in Minority Students for a Lifetime of Failure?*, 8 HUMAN RIGHTS 20 (1980).

302. Williams, *Black Pride, Academic Relevance, and Individual Achievement*, in CRUCIAL ISSUES IN TESTING 13 (1974); J. LOEHLIN, G. LINDZEY & J. SPÜHLER, *RACE DIFFERENCES IN INTELLIGENCE* (1975); W. MEHRENS & I. LEHMANN, *STANDARDIZED TESTS IN EDUCATION* 341 (2d ed. 1975).

303. *But cf.* Goodman, *supra* note 181, at 33 (assessments by experienced teachers who have daily contact with student more meaningful than testing devices).

304. See Note, *Implications of Minimum Competency Legislation: A Legal Duty of Care*, 10 PAC. L. J. 947 (1979). Problems of establishing causation would, however, remain. Nor would minimum competency statutes provide any guidance as to selection of an appropriate remedy or, if a monetary award were the remedial device chosen, how to calculate the damages.

instruction.³⁰⁵ For the reasons already surveyed, however, the judiciary should decline to accept the invitation.³⁰⁶ To make test scores a measure of liability would only accelerate the already undesirable trend toward defensive education, *i.e.* lower expectations, institute tests geared to those expectations, and then teach to the tests.

Educators should be allowed to define for themselves the significance of student achievement tests with respect to teacher competence.³⁰⁷ Presently, under the influence of the "accountability" movement, test results are perhaps being given inappropriate weight. But this does not argue that the judiciary should join the movement. Legislative and administrative solutions have flexibility to recommend them over judicial; and, once the ardor for competency-based education has cooled, legislators and school administrators can redress the balance. Unless the courts can produce better and not just the same solutions to the problems besetting American public education, they should stay their hand.

To argue in favor of judicial reluctance to assume the role of educational policymaker may strike some as quaint, in light of the activist role courts have played in recent years on education issues. Judicial review has been afforded to many significant aspects of educational policy: school desegregation,³⁰⁸ school finance,³⁰⁹ school personnel practices,³¹⁰ and school discipline.³¹¹

305. See N.Y. Times, Nov. 20, 1977, § 1, at 31, col. 6 (predicting such an increase). Could selection of a particular test constitute educational malpractice? Can students sue to challenge the content of the test? Its scoring? The interpretation of the scores?

306. *But cf.* Scheelhaase v. Woodbury Central Community School, 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) (implicitly endorsing school board's use of student achievement tests as a measure of a teacher's competence).

307. *Cf. id.* (teacher competence and the standards for its measurement are peculiarly appropriate to local administration).

308. See, *e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974).

309. See, *e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

310. See, *e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974); State Div. of Human Rights v. Westmoreland Central School Dist., 56 App. Div. 2d 205, 392 N.Y.S.2d 149 (1977).

311. See, *e.g.*, Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975); Wood v. Strickland, 420 U.S. 308 (1975); Ingraham v. Wright, 430 U.S. 651 (1977).

But judicial involvement in other areas of school operation need not justify involvement in questions of what should be taught in the public schools and how.³¹² This area may be qualitatively different from those other areas where courts have intervened.³¹³ Or, perhaps, judicial interference in those other areas has been mistaken.³¹⁴ At the very least, the time has come to draw the line.³¹⁵

Such, indeed, has been the lesson the Supreme Court itself has sought to teach during the past decade. In the *Horowitz* case,³¹⁶ holding that a hearing was not constitutionally required before a public medical school could dismiss a student for academic deficiencies, the Court wrote, "We decline to further enlarge the judicial presence in the academic community"³¹⁷ Like the decision to dismiss a student, determinations of academic quality and instructional competence require experienced evaluations of cumulative information not readily adapted to the procedural tools of the judicial process. Rather, like educational finance,³¹⁸

312. In fact, the very scope of the judicial effort in other educational matters, together with the reality that questions such as desegregation and school finance are far from settled and will require continued judicial oversight for the foreseeable future, may constitute an argument against the courts' entertaining suits for educational malpractice. As the late Professor Robert McCloskey, discussing another aspect of school-court interaction, put the matter some years ago,

On the basis of power and value considerations together, a strong case could be made for judicial avoidance of the whole issue. . . . [T]he evil in its present manifestations is fairly moderate. Even so, judicial correction of it might be warranted, if there were no other, graver wrongs simultaneously pressing for judicial attention and also taxing the power capacities of the [courts]. But when we take into account that there are those other wrongs, the price of dealing with this one may seem very dear indeed.

McCloskey, *Principles, Powers, and Values: The Establishment Clause and the Supreme Court*, 1964 RELIGION AND THE PUBLIC ORDER 3, 28.

313. Cf. Comment, *supra* note 8, at 589 ("historical record does appear to favor judicial noninterference"); Note, *supra* note 11, at 349 (courts have become involved in education issues only in the face of "a gross violation").

314. See, e.g., Wilkinson, *supra* note 2; Note, *supra* note 188; D. HOROWITZ, *supra* note 248; Hazard, *supra* note 264.

315. But cf. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 916-23 (1976) (catalogue of state court activism in education).

316. Board of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978). The significance of *Horowitz* will depend upon whether lower courts confine it to its facts or read it as a broad condemnation of judicial review of evaluative academic judgments.

317. *Id.* at 90. The most extreme statement of judicial restraint in cases involving the schools is to be found in Mr. Justice Powell's dissent in *Goss v. Lopez*, 419 U.S. 565, 593-94 (1975). See also *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 652 (1943) (Frankfurter, J., dissenting).

318. See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). But see *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), cert. denied, 432 U.S. 907 (1977); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

this is a subject best left to local citizen participation and control. In *Keyes v. School District No. 1*, the Court also commented on the issue of educational quality when it concluded that "communities deserve the freedom and incentive to turn their attention and energies to [the] . . . goal of quality education, free from protracted and debilitating battles over court-ordered student transportation"³¹⁹—and, one might add, over court-ordered adoption of particular educational strategies.

V. CONCLUSION

It would be fatuous to minimize the problems confronting American public education. Admittedly among these, especially in large urban school systems, is the problem of substandard instructional performance. But the common law is not the appropriate vehicle for correcting that problem. Whether based on contract, misrepresentation, constitutional right, or negligence, each of the legal theories thus far advanced to support a cause of action for educational malpractice has proven, upon closer analysis, to be inadequate. In each instance, one or more of the requisite elements is lacking, and the proposed cause of action is, thus, fatally defective.

It would be erroneous to ignore the evolutionary nature of the law. But that evolution need not always be in the direction of ever-increasing judicial involvement in educational policy. Courts have not always behaved toward education as they are now behaving,³²⁰ nor need they continue to so behave.

Arguments, both sophisticated and sophistic, may be fashioned by analogy to other, presently recognized causes of action. But good and sufficient policy reasons sustain the courts' continued refusal to recognize educational malpractice as a viable cause of action. In contrast to the reformers' act of faith that judicial intervention in the guise of educational malpractice suits will improve the quality of public education lies the reality that such actions would more likely result in redirecting energies and funds away from the educative function and into the defense of lawsuits.³²¹

319. 413 U.S. 189, 253 (1973).

320. See J. HOGAN, *supra* note 156, at 5-6 (identifying five separate and distinct stages in the evolution of educational jurisprudence).

321. An alternative theory, suggested but not advanced here, is that recognition of a cause of action for educational malpractice would simply amount to a judicial attempt to prop up an obviously failing public school system. If the courts really

The nation's teachers and school boards perform an important public function with limited resources. But, were educational malpractice to be recognized as a cause of action, these same teachers and boards could become the object of the animus of any member of the community. Whatever benefit this might provide to an individual plaintiff would be more than counterbalanced by the detrimental impact upon the quality of education as a whole. There appears to be no way to avoid such an outcome, short of excluding these suits completely. The "inability to perceive reasonable limits in the area of . . . recovery for educational malpractice, combined with the virtually limitless possibilities of harassment and burden upon the school system, if such suits are allowed,"³²² should result in the courts' continued foreclosure of such litigation.

wanted to make a contribution to educational quality, so the theory would run, they could do so by modifying existing equal protection and First Amendment doctrine to make education vouchers, issued by the state and redeemable by any school, a legally viable alternative. *But see* Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Runyon v. McCrary, 427 U.S. 160 (1976); Wollman v. Walter, 433 U.S. 229 (1977). *See generally* King, *Rebuilding the "Fallen House"—State Tuition Grants for Elementary and Secondary Education*, 84 HARV. L. REV. 1057 (1971).

322. Diamond, *supra* note 57, at 151-52.