2010

# Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from Antoine v. Winner School District

Catherine Y. Kim
*University of North Carolina School of Law*, cykim@email.unc.edu



Publication: *New York Law School Law Review*

VOLUME 54 | 2009/10

CATHERINE Y. KIM

# Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from *Antoine v. Winner School District*

ABOUT THE AUTHOR: Staff Attorney, American Civil Liberties Union, National Legal Department, Racial Justice Program; B.A., Cornell University; J.D., Columbia Law School. The views expressed in this essay are those of the author; they do not reflect the views of the American Civil Liberties Union, the parties, or other participants in the remediation process described.

## I. INTRODUCTION

As described throughout this issue, the "school-to-prison pipeline" refers to policies and practices that systemically push at-risk youth out of mainstream public schools and into the juvenile or criminal justice systems.[1]

Students in K–12 public schools are subject to exclusionary school discipline practices of suspension or expulsion with increasing frequency;[2] in some states, the number of school suspensions exceeds 10% of the number of students enrolled.[3] Being suspended or expelled from school increases the likelihood of failing a grade, dropping out, engaging in criminal activity, or later incarceration.[4]

Schoolchildren may also find themselves on a more direct route from the classroom to the juvenile or criminal justice system by being arrested and charged for minor school misbehavior. School-based arrests, like suspensions and expulsions, are on the rise.[5] The growth in rates of suspensions, expulsions, and police referrals coincides with the proliferation of zero-tolerance discipline policies mandating these penalties automatically for certain predetermined infractions, regardless of the circumstances.[6]

---

1. Leading advocacy organizations have identified this issue as one of the most critical civil rights issues confronting our nation today. Organizations that have prioritized this issue through research, publications, or litigation include the Advancement Project; Advocates for Children; American Civil Liberties Union; Bazelon Center; Charles Hamilton Houston Institute at Harvard Law School; Children's Defense Fund; Children's Law Center; Civil Rights Project at UCLA; Education Law Center; Juvenile Law Center; NAACP Legal Defense and Education Fund, Inc.; National Disabilities Rights Network; National Economic and Social Rights Initiative; National Juvenile Defender Center; Southern Poverty Law Center; Texas Appleseed; and the Youth Law Center, among many others.

2. Rates of suspension nationwide nearly doubled from 1.7 million in 1974 to 3.1 million in 2000. Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track 15 (2005).

3. Thomas D. Snyder et al., National Ctr. for Educ. Statistics, Digest of Education Statistics 2007 230–31 (2008).

4. *See, e.g.*, Am. Acad. of Pediatrics, Comm. on Sch. Health, *Out-of-School Suspension and Expulsion*, 112 Pediatrics 1206, 1207 (2003).

5. *See* American Civil Liberties Union, Race & Ethnicity in America: Turning a Blind Eye to Injustice 149 (2007) (reporting statement by juvenile court judge that he handles more school discipline in his courtroom today than in his former position as a high school principal); Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track 15–16 (2005) (documenting growth in the number of school-based arrests in select jurisdictions); Children's Defense Fund, America's Cradle to Prison Pipeline 125 (2007) (noting tripling in the number of school-based arrests in one jurisdiction); Nat'l Council of Juvenile & Family Court Judges, Juvenile Delinquency Guidelines: Improving Court Practice in Delinquency Cases 151 (2005) (explaining critical importance of commitment to "keeping school misbehavior and truancy out of the formal juvenile delinquency court"); *see also* American Civil Liberties Union, Criminalizing the Classroom: The Over-Policing of New York City Schools (2007) (describing arrest of students for walking in the hallways between classes or for having cell phones).

6. According to the National Center for Education Statistics, as of the 1996–1997 school year, 91% of public schools had instituted certain zero-tolerance discipline policies. Nat'l Ctr. for Educ. Statistics & Bureau of Justice Statistics, Indicators of School Crime and Safety 2002 135 (2002), *available at* http://nces.ed.gov/pubs2003/2003009.pdf.

Perhaps one of the most pernicious aspects of the pipeline is its impact on traditionally disenfranchised communities, particularly communities of color. While rates of suspension have increased for all students, the spike has been most dramatic for children of color.[7] These children also are more likely to be arrested at school than their white counterparts, even when they are accused of the same offenses.[8]

Unfortunately, systemic legal challenges to the school-to-prison pipeline face substantial doctrinal obstacles. Courts are reluctant to interfere with school discipline policies.[9] And doctrinal developments, at least at the federal level, prohibit discrimination claims brought by private parties absent proof of discriminatory intent.[10]

But even where suits overcome doctrinal obstacles to prevailing, the most difficult issues, as in other public law litigation seeking to reform government institutions, often relate not to the question of liability, but rather to the question of remedy.[11] As described by Professor Abram Chayes, the distinguishing characteristic of these types of cases, or their "centerpiece," is the remedial consent decree.[12]

This article describes the process utilized in *Antoine v. Winner School District* as a case study for public law remediation in school-to-prison pipeline litigation, particularly those that have a significant racial impact. *Antoine* was brought on behalf of a class of American Indian students attending a majority-white school district in

7. *See* Johanna Wald & Daniel Losen, *Out of Sight, The Journey Through the School to Prison Pipeline*, *in* Invisible Children in the Society and its Schools 23, 26 (Sue Brooks ed., 3d ed. 2007) (finding that black children have experienced the largest increase in suspension, from 6% in 1972–1973 to 13.26% in 2000–2001, and that the discipline gap between black children and white children had grown from 2.9% in 1972–1973, to 8.17% today); American Civil Liberties Union of Michigan, Reclaiming Michigan's Throwaway Kids: Students Trapped in the School-to-Prison Pipeline (2009) (documenting the disproportionate suspension of African American students in school districts throughout Michigan); Russell J. Skiba et al., The Color of School Discipline: Sources of Racial and Gender Disproportionality in School Punishment, Indiana Ed. Policy Research Report #SRS1 (2000) (documenting racial disparities in school discipline).

8. *See* American Civil Liberties Union, Hard Lessons: School Resource Officer Programs and School-Based Arrests in Three Connecticut Towns 35–37 (2008) (finding that in one town, African American and Hispanic students accounted for 24% of the student body, but 63% of school-based arrests and that students of color who commit certain common infractions are more likely to be arrested at school than white students who commit the very same infractions); *see also* Judith A. Browne, Advancement Project, Derailed! The Schoolhouse to Jailhouse Track 18–19 (2003) (documenting racial disparities in school-based arrests in select jurisdictions in Florida).

9. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.").

10. Alexander v. Sandoval, 532 U.S. 275, 285 (2001) (requiring proof of discriminatory intent to sustain private rights of action brought pursuant to Title VI, which prohibits race discrimination by recipients of federal funding including school districts); Washington v. Davis, 426 U.S. 229 (1976) (requiring proof of discriminatory intent to sustain private rights of action brought pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution).

11. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976). These types of cases are sometimes also referred to as "structural reform litigation." Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979).

12. Chayes, *supra* note 11, at 1298.

rural South Dakota; the complaint alleged that the defendant school district disciplined students in a racially discriminatory manner, maintained an educational environment hostile to American Indian youth, and violated students' rights through its use of school-based arrests.[13] The parties reached settlement over the course of a two-day mediation session before a magistrate judge, which the presiding district court judge approved and entered into as a consent decree.[14] By identifying lessons learned from this process, this article hopes to contribute to the scholarly literature exploring remediation processes in public law litigation while at the same time providing guidance to advocates who struggle daily with the thorny questions of how best to produce the desired outcomes in public interest cases.

The next section of this article describes scholarly perspectives on public law remediation, focusing on critiques relating to judicial legitimacy and efficacy in reforming complex government institutions to vindicate social and civil rights. It then describes proposals set forth in the scholarship for processes of remediation that might mitigate these concerns, focusing in particular on securing adequate representation and the participation of the parties.

Part III then describes the case *Antoine v. Winner School District*, offering the process utilized in this litigation as a case study for public law remediation in school-to-prison pipeline cases. Specifically, it focuses on the direct participation of class members, rather than exclusive reliance on class counsel, to shape the ultimate goals of the lawsuit, and explores lessons that might be gleaned from this experience.

## II. SCHOLARLY PERSPECTIVES ON PUBLIC LAW REMEDIATION

### *A. Concerns About Public Law Remediation*

Since the model of public law litigation was first described by Professor Chayes over thirty years ago, scholars have been challenging the placement of the judge in the role of policymaker.[15] Two major concerns stem from this unfamiliar role: judicial legitimacy and efficacy.[16]

13. Complaint at 1–4, Antoine v. Winner Sch. Dist., No. 06-3007, (D.S.D. Mar. 24, 2006).

14. Consent Decree at 1–2, Antoine v. Winner Sch. Dist., No. 06-3007, (D.S.D. Dec. 10, 2007).

15. Chayes, *supra* note 11, at 1313–16; *see also* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. Cal. L. Rev. 735, 748–49 (1992) (describing concerns over sweeping remedial power of federal courts including those rooted in separation of powers, federalism, and democratic principles); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C.L. Rev. 1623, 1626 (2003); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994, 1997 (1999); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 Geo. L.J. 1357, 1406 (1991).

16. *See, e.g.*, Parker, *supra* note 15, at 1626–27 (describing scholarly criticism of public law litigation); Friedman, *supra* note 15, at 748–49 (1992); Sturm, *supra* note 15, at 1379 (describing scholarly criticism about the proper role of the judge in public law remediation, including concerns about the lack of legitimacy, violation of principles of federalism and separation of powers, judicial competency, and abuse of power).

*1. Legitimacy*

First, public law remediation poses questions about judicial legitimacy, subsuming two related but subsidiary concerns—judicial competence and democratic accountability.[17]

Given the policymaking nature of comprehensive consent decrees in public law litigation, critics question whether judges possess the competence and expertise to weigh and consider competing policy concerns.[18] These views frequently appear in the case law itself, where courts express a reluctance to impose comprehensive decrees that might substitute their individual judgment for that of, for example, penalogical experts in the context of prisoners' rights cases or pedagogical experts in the context of education cases.[19]

Relatedly, scholars question the legitimacy of consent decrees in institutional reform litigation in light of the "countermajoritarian difficulty" inherent in court-made rules.[20] Under this view, the imposition of consent decrees to reverse, revise, or restructure institutions determined by popularly elected bodies violates our democratic ideals, constituting the judiciary's "trampling upon the rights of state and local governments in the running of their affairs."[21]

*2. Efficacy*

Second, commentators question whether the judiciary, without the power of the sword or the purse, can successfully reform complex government institutions to remedy the harms identified in litigation and ensure compliance with the terms of its consent decrees.[22] This critique focuses on the inherent disconnect between the relatively easy job of announcing legal principles, something judges are particularly

17. *See* Chayes, *supra* note 11, at 1313–16 (discussing concerns about legitimacy in public law litigation model).

18. *See* Sturm, *supra* note 15, at 1407–08.

19. *See, e.g.*, Turner v. Safley, 428 U.S. 78, 86–90 (1987) (deferring to expertise of prison administrators); *Wood*, 420 U.S. at 326 (deferring to expertise of school administrators).

20. Alexander Bickel first described the concept of the "countermajoritarian difficulty," in which courts invalidating the conduct of popularly elected governments "exercise[] control, not in behalf of the prevailing majority, but against it." Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 17 (Yale Univ. Press 1986) (1962). Under this view, a perceived "blur [in] the distinction between legal decisionmaking and ordinary political decisionmaking" compromises the legitimacy of the courts. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 Geo. L.J. 723, 779 (2009).

21. Parker, *supra* note 15, at 1642–43; *see also* Chayes, *supra* note 11, at 1313–16; Sturm, *supra* note 15, at 1404–05.

22. *See* Robert E. Buckholz, Jr. et al., *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 837–42 (1978) (describing problem of, and strategies to overcome, non-compliance with consent decrees); David M. Engstrom, *Civil Rights Paradox? Lawyers and Educational Equity*, 10 J.L. & Pol'y 387, 404 (2002); Law, *supra* note 20, at 726 (discussing limitation of judicial ability to coerce compliance from other branches of government); Gerald N. Rosenberg, *Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 Law & Ineq. 31 (2006) (arguing that consent decrees are incapable of altering political will to achieve compliance);

well-situated to do, and the far more difficult task of implementing those principles in the real world. Implementation poses a particular problem given the limited power of the judiciary to coerce compliance with its rulings. As one critic states, "[w]hen social reformers succumb to the 'lure of litigation' they forget that deep-seated social conflicts cannot be resolved through litigation."[23]

The problem becomes even more pronounced when one considers the temporary nature of consent decrees. Even where a consent decree succeeds in obtaining compliance and achieves the aspirational goals sought during its pendency, experience shows that the eventual termination of judicial supervision often results in a reversal of the progress previously obtained. The findings of "unitary status" and the resultant termination of court orders in school desegregation cases throughout the 1990s provide perhaps the starkest example of this phenomenon.[24]

Courts and parties developing consent decrees in institutional reform cases ignore these considerations at their peril. As experienced impact litigators can testify, insufficient attention to issues of judicial competence, political accountability, efficacy, and compliance may derail years of successful litigation in the remedy and enforcement phase. But this is not to say that these weaknesses are inevitable. Rather, courts and parties may incorporate processes such as those described below into the development of the consent decree to minimize these concerns.

### *B. Proposed Strategies to Improve Legitimacy and Efficacy*

A rich body of legal scholarship has developed theories to analyze the processes by which remedies are developed in public law litigation and to identify those aspects that mitigate the concerns of judicial legitimacy and efficacy described above.[25]

The remedial consent decree may be developed subsequent to a finding of liability or prior to trial. Where liability already has been determined, there are several options available to the court for designing the appropriate remedy. It may: develop a

---

Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994, 2013 (1999).

23. Rosenberg, *supra* note 22, at 46.

24. School districts under consent decrees may seek "unitary status" and terminate judicial supervision by establishing that they have "eliminate[ed] '[t]o the greatest extent practicable' the vestiges of its prior policy of segregation." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 716 (2007) (quoting Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000)). For a discussion of the termination of desegregation consent decrees in the South, and the consequent reversals in racial integration in public schools, see Gary Orfield & Chungmei Lee, Civil Rights Project of UCLA, Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies (2007), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf; *see also* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. Rev. 1597, 1615–20 (2003) (discussing termination of desegregation orders in the 1990s and resulting resegregative effects).

25. *See, e.g.*, Buckholz et al., *supra* note 22, at 784; Friedman, *supra* note 15, at 735; John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 Cal. L. Rev. 1387 (2007); Schlanger, *supra* note 22, at 1994; Sturm, *supra* note 15, at 1357; David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. Rev. 1015 (2004).

decree based on the defendant's proposal, develop its own remedial plan, choose from among remedial plans submitted by the parties, adopt a plan developed by an expert special master, or adopt a remedial plan negotiated by the parties.[26] In contrast, where the parties settle prior to a finding of liability, the parties negotiate a remedial plan and submit it to the court for approval as a consent decree. As much of the scholarship in this area suggests, the process by which the remedial goals are developed have a great impact on the legitimacy and efficacy of the decree.[27]

Specifically, participation by the parties in designing the remedies may prove to be the most important factor in enhancing the legitimacy and efficacy of a structural reform effort.[28] As described by Professor Susan Sturm, participation enhances legitimacy because it affords "those affected by the decisions . . . a formally guaranteed opportunity to affect those decisions."[29] At the same time, it enhances efficacy by "increasing the likelihood that the remedy will succeed by promoting a higher level of acceptance of and commitment to the remedy."[30]

*1. Participation by the Defendant Parties*

There is a consensus within the legal academy that the effectiveness of structural reform efforts depends on the extent to which the defendants "buy-in" to the need for reform and agree upon the steps to be taken to achieve reform.[31] In the context of structural reform suits challenging patterns and practices of police abuse, Professor Debra Livingstone has pointed out that effective reform requires far more than the defendant police department's mere adherence to judicial edicts; instead, it requires "a change in the organizational values and systems to which both managers and line officers adhere."[32] Participation by the defendant parties in designing the remedy

26. Buckholz et al., *supra* note 22, at 796–812; *see also* Sturm, *supra* note 15, at 1366–76 (describing different processes employed by courts to develop public law remedies).

27. *See supra* note 25.

28. *See* Friedman, *supra* note 15, at 738 (positing that courts take into account the will of the majority through the process of remediation and enforcement in public law litigation, serving to mitigate the countermajoritarian difficulty); Jeffries & Rutherglen, *supra* note 25, at 1412; Parker, *supra* note 15, at 1638 (acknowledging importance of parties' agreement to improve likelihood of successful implementation of remedy); Sturm, *supra* note 15, at 1377 ("Participation in the formulation of a remedy serves an independent value because of the importance of cooperation and respect for the authority of public entities in achieving compliance."); *id.* at 1385 (describing Lon Fuller's view that "the legitimacy of the court's role in dispute resolution turns on whether a particular process or type of issue enhances or destroys party participation."); Zaring, *supra* note 25, at 1028.

29. Sturm, *supra* note 15, at 1392 (internal quotations omitted).

30. *Id.* at 1393.

31. *See id.* at 1425, 1438–39; *see also* Buckholz et al., *supra* note 22, at 795–96 (noting that reform efforts are more difficult with recalcitrant defendants); Robert E. Easton, *The Dual Role of the Structural Reform Injunction*, 99 Yale L.J. 1983 (1990) (examining role of the bureaucratic institutions that are the target of structural injunctions to the effectiveness of reform efforts); Schlanger, *supra* note 15, at 2012 (noting that high level of cooperation from defendants facilitates settlement in institutional reform settings).

32. Debra Livingstone, *Police Reform and the Department of Justice*, 2 Buff. Crim. L. Rev. 815, 848 (1999).

mitigates concerns about legitimacy by increasing the likelihood that the required conduct is feasible and will actually occur.[33]

*2. Participation by the Plaintiff Parties*

To a lesser extent, scholars have identified the plaintiffs' participation in designing the remedial plan as critical to enhancing the legitimacy and effectiveness of any structural reform effort.[34] As Professor Buckholz and his colleagues described over thirty years ago, the exchange of information between the parties during the design of the remedy is likely to improve the resulting plan's viability.[35] In addition, plaintiffs' participation improves the likelihood that the remedial plan will actually resolve the harms identified.[36]

Generally, though, participation by the plaintiffs is accomplished via plaintiffs' counsel, usually a "professional group rights litigator" from an "organization that is interested in securing the civil rights of the group suffering the deprivation."[37] In public law cases, it is plaintiffs' counsel, rather than the class members themselves, who drives the litigation:

> [Class counsel] defines the class he will represent and shapes the litigation and negotiation strategy. He decides which remedies will be most beneficial and the degree to which he should press for them before compromising. Finally, he decides whether a remedial plan meets the needs of the class and whether it should be accepted.[38]

There are several reasons why class counsel, rather than the class members themselves, controls the remediation process from the plaintiffs' side. By definition, class members are numerous and diffuse; also, class members may be "uneducated, uninformed, or uninterested."[39] Class counsel also possesses "legal expertise, superior awareness of the material facts, and an ongoing involvement in the case."[40]

Yet, with a few notable exceptions, scholars to date have paid relatively little attention to the ways in which the division of responsibility between plaintiffs

33. *See* Buckholz et al., *supra* note 22, at 810; Schlanger, *supra* note 15, at 2012; Sturm, *supra* note 15, at 1438–39.

34. *See* Buckholz et al., *supra* note 22, at 810; Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 Colum. L. Rev. 1384, 1390–99 (2000); Schlanger, *supra* note 15, at 2014–15; Sturm, *supra* note 15, at 1410; Zaring, *supra* note 25, at 1030–31.

35. Buckholz et al., *supra* note 22, at 810.

36. *See id.*

37. *Id.* at 874–75; *see also* Jeffries & Rutherglen, *supra* note 25, at 1413; Schlanger, *supra* note 15, at 2014–23; Zaring, *supra* note 25, at 1062–63.

38. Buckholz et al., *supra* note 22, at 884.

39. *Id.*

40. *Id.* at 884–85; *see also* Sturm, *supra* note 15, at 1396 ("[P]laintiffs frequently are poor, politically powerless, and unorganized, and thus may be less able to influence the remedial decision.").

themselves and plaintiffs' counsel impacts the perceived legitimacy and effectiveness of a consent decree. In the context of school desegregation litigation, Professor Derrick Bell has pointed out conflicts between the goals of public interest law organizations that bring these suits and the goals of their client-community, criticizing class counsel for "making decisions, setting priorities, and undertaking responsibilities that should be determined by their clients and shaped by the community."[41] Professor Buckholz and his colleagues similarly identify the risk that class counsel "may, either intentionally or inadvertently, subordinate to his own interests those of the class members."[42] Such subordination may occur,

> [b]ecause of . . . failure on the part of the litigator to discuss the lawsuit with his class clients, possibly because of an "I know what's best" attitude that is reinforced by his expertise and the clients' inability to pay for his services. In addition, the professional group rights litigator may be so sure of his idealistic motivations that he fails to see that the sort of remedy he considers most beneficial may not in fact be the one most desired by the class members.[43]

In addition to the potential for these sorts of conflicts between class counsel and class members, pragmatic concerns also play a role. Professional group rights litigators, particularly those from large national organizations, usually do not come from the same community in which a case is litigated; this is especially true for racial justice cases, given the dearth of public interest organizations with the resources necessary to bring these types of suits. Viewed as outsiders in the community, lawyers who develop remedial plans may enjoy even less legitimacy and credibility within the local community than the judge. And, given the geographic distances that these lawyers must frequently cover, they are often unavailable and uninvolved in the day-to-day work of implementation and monitoring the way that the parties may be.[44]

In the context of structural reform challenges to police abuses, Professor Myriam Gilles argues in her influential article, *Reinventing Structural Reform Litigation*, that the exclusive reliance on the Justice Department to litigate these cases compromises the effectiveness and legitimacy of reform efforts.[45] This exclusive reliance, the result of Supreme Court case law effectively prohibiting private plaintiffs from seeking systemic injunctive relief in these cases and the current statutory regime delegating enforcement authority to the Justice Department, has been ineffective in eradicating the widespread problem of police abuse, she argues, because it fails to "harness[] the power of private citizens to reform unconstitutional practices . . . ."[46] "What is truly

41. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 512 (1976).

42. Buckholz et al., *supra* note 22, at 877.

43. *Id.* at 886.

44. *See* Susan Poser, *The Ethics of Implementation: Institutional Remedies and the Lawyer's Role*, 10 Geo. J. Legal Ethics 115 (1996).

45. Gilles, *supra* note 34.

46. *Id.* at 1387.

lost in such a centralized regime are the eyes, experiences, motivation, and resources of millions of Americans who bear witness to institutionalized wrongdoing and are willing to endure the expense of rooting it out."[47] Government prosecutors in the Justice Department suffer from political and resource constraints that limit their ability to initiate these cases; providing a role for members from the impacted communities to assist in litigating these cases would ameliorate this problem.[48] As Gilles puts it, "the massive governmental expenditures required to detect and investigate misconduct are no match for the millions of 'eyes on the ground' that bear witness to constitutional violations."[49]

Moreover, participation by community members who are most greatly impacted by the challenged practices enhances the legitimacy of the remedial plan imposed:

> In any effort to improve the interaction between the police and the policed, it is vital that both sets of voices are heard. If, as one scholar has noted, "reform can enhance accountability through the message[] it sends to the police . . . that greater accountability is desired by the community," then the community must have some role in determining the content of that reformative message.[50]

Otherwise, "[a] regime that forces community leaders—particularly in minority communities—to come hat in hand to federal officials seeking protection of their civil rights is at cross purposes with a zeitgeist that encourages community empowerment."[51] It "fosters an unhealthy reliance in affected communities on the benevolent paternalism of the federal government."[52]

Unfortunately, many of the very same critiques leveled against relying exclusively on federal prosecutors may be leveled against relying too heavily on public interest law organizations to design and implement remedial plans to protect the rights of minority community members. Like the Justice Department, public interest law organizations suffer from political and, to a greater extent, resource constraints. As with the Justice Department, the investigative and enforcement efforts of public interest law organizations, particularly those located far from the impacted communities, cannot approach the "millions of eyes on the ground" to detect and report abuses. And, delegating the design and enforcement of a consent decree exclusively to class counsel, rather than ensuring a participatory role for the impacted community members, compromises the "zeitgeist that encourages community empowerment." For these reasons, although public interest law organizations undoubtedly continue to play a critical role in representing communities that would

47. *Id.*

48. *Id.* at 1409–11.

49. *Id.* at 1413.

50. *Id.* at 1414 (alterations in original) (quoting David H. Bayley, *Accountability and Control of Police: Lessons for Britain*, in POLICING II 439, 444 (Robert Reiner ed., 1996)).

51. *Id.* at 1425.

52. *Id.*

otherwise not have the financial or organizational resources to initiate and implement structural reform efforts, they would do well to nonetheless maximize, to the extent practicable, the active participation of their clients in the impacted community.

Drawing on the "public consensual dispute resolution" model, Professor Susan Sturm endorses a process, facilitated by a neutral third-party mediator, which emphasizes adequate and equal participation by all stakeholders.[53] She proposes a pre-negotiation process of identifying and convening the relevant stakeholders, establishing ground rules and identifying the key issues to be addressed by the negotiations, and engaging in joint fact-finding.[54] During the negotiation process, the parties develop an outline of their concerns and brainstorm potential solutions, attempting to reach consensus on particular responses to each agenda item.[55] Once consensus is reached, the parties enter into a written agreement.[56] During the final implementation stage, the parties develop a structure for monitoring compliance with the agreement.[57] In her view, such a process "offers the potential to educate the parties, develop working relationships, integrate different perspectives, and generate creative solutions."[58]

Importantly, Professor Sturm's model emphasizes direct participation by the actual parties rather than exclusive reliance on class counsel; in the examples she sets forth in her article, the parties "participated directly in the process and had access to counsel, but they did not rely on their lawyers to negotiate for them."[59] She cautions against the risk of "lawyer dominated negotiations" that would compromise the goal of "meaningful participation" by the actual parties to the litigation.[60] Under her model:

> The lawyer's role is to facilitate her clients' effective participation in the process of remedial decisionmaking. This role may involve assisting individuals or groups in organizing and selecting representatives. In some instances, such as when the client has the capacity to articulate her own interests and to participate fully in the dialogue, the lawyer may simply monitor the progress of the discussions, provide ideas, and draft proposals implementing the agreements reached. In other cases, when the client is unable to participate fully in the deliberations, the lawyer may play a more substantial role in the deliberations.[61]

53. Sturm, *supra* note 15, at 1421.

54. *Id.* at 1422.

55. *Id.*

56. *Id.* at 1422–23.

57. *Id.* at 1421–23.

58. *Id.* at 1425.

59. *Id.* at 1424.

60. *Id.*

61. *Id.* at 1434.

In her view, "[t]he informal but structured process of exchanging information, brainstorming, and attempting to reach consensus offers the potential to educate the parties, develop working relationships, integrate differing perspectives, and generate creative solutions."[62] Such a process maximizes legitimacy, both in the eyes of the parties and in the eyes of the general public, while at the same time fostering the relationships and personal investments necessary to ensure good faith compliance for the life of the consent decree, and perhaps holds the potential to change overall attitudes to a degree that would ensure retention of the progress achieved, even upon termination of court monitoring.

## III. CASE STUDY: REMEDIATION PROCESS IN ANTOINE v. WINNER SCHOOL DISTRICT

### *A. Background to the Lawsuit*

In 2004, the Attorney General of the Rosebud Sioux Tribe, located in the south-central portion of South Dakota, contacted the American Civil Liberties Union's National Legal Department to investigate a series of complaints regarding racially motivated harassment, racially discriminatory discipline, and school-based arrests of American Indian students in Winner School District.[63]

---

62. *Id.* at 1425.

63. Much of the current scholarship on the school-to-prison pipeline focuses on its impact on African American and Latino communities, but virtually none has focused on its impact on American Indian communities. The discriminatory treatment of American Indians throughout this nation's history is well documented, if frequently forgotten. *See* Stephen L. Pevar, The Rights of Indians and Tribes: The Basic ACLU Guide to Indian and Tribal Rights (2d ed. 1992). Mr. Pevar also served as co-counsel in *Antoine v. Winner School District*. In the education context, perhaps the starkest example of earlier attitudes was embodied in the "assimilation" policy of removing American Indian children from their homes and placing them in boarding schools, popularized as "Kill the Indian, Save the Man." *See* U.S. Comm'n on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country 84 (2003), *available at* http://www.usccr.gov/pubs/na0703/na0731.pdf. Unfortunately, race discrimination and its effects, particularly on low student achievement, high dropout rates, and unequal access to resources, remain problems for American Indian youth today. *Id.* at 83–99 (documenting disparities in American Indian academic achievement and dropout rates, as well as differences in salaries for educators of American Indian students). The Commission concluded:

> Dropout rates among Native American students are high because, among other reasons, their civil rights and cultural identities are often at risk in the educational environment. Research shows that Native American students experience difficulty maintaining rapport with teachers and establishing relationships with other students; feelings of isolation; racist threats; and frequent suspension.
>
> These sentiments were echoed at a community forum held by the Commission's Montana Advisory Committee, where Native Americans attributed high dropout rates to irrelevant curricula, discriminatory practices, and insensitive teachers and administrators. These circumstances arise in environments that do not uphold the education rights of Native American students or recognize their cultural backgrounds, instead allowing miscommunication and confrontation leading to hostility, alienation, and dropping out.

*Id.* at 86–87.

Winner School District serves the city of Winner and its environs in Tripp County, South Dakota. Although the majority of the city and county population is white, they border the Rosebud Sioux Reservation and include a significant number of American Indian members of the Rosebud Sioux Tribe. The school district serves approximately 800 students[64] through three elementary schools, one middle school, and one high school.[65] Approximately 74% of the district's student body is white, 24% is American Indian, and the remainder is identified as African American, Hispanic, Asian, or Other.[66] Forty-five percent of the district's students are eligible for free or reduced lunch, and 11% have special needs.[67]

Years prior, in December of 1997, the Office for Civil Rights of the United States Department of Education ("OCR") targeted the Winner School District for compliance review.[68] In April of 1998, OCR staff conducted a one-week on-site review to meet with school officials, community organizations, parents, and students.[69] After almost two years of negotiations and correspondence with the district, OCR entered into a Resolution Agreement in February 2000, under which the district agreed to, inter alia, revise disciplinary policies, define objective criteria for disciplinary offenses, periodically review disciplinary referrals for racial disparities

64. S.D. Dep't of Educ., Education in South Dakota 2007–2008: District and Statewide Profiles, *available at* http://doe.sd.gov/ofm/statdigest/08digest/documents/Winner08.pdf.

65. S.D. Dep't of Educ., 2008 Fall Census Enrollment—by School, by Ethnicity, by Grade, *available at* http://doe.sd.gov/ofm/fallenroll/documents/WEBPublicbySchoolbyEthnicitybyGrade.xls.

66. *Id.*

67. S.D. Dep't of Educ., *supra* note 64.

68. Specifically, the OCR records state:

> Parents in the community report that white students call American Indian students names like "dirty Indian" and tell them to "go back to the reservation where they belong." According to parents, groups of American Indian students in the school hallway are disbanded by teachers while white students are allowed to assemble without comment by teachers. An American Indian teacher in the District also substantiated the parents' claims that their children are called racially derogatory names by white students and reported that a white and an American Indian student had recently fought about such an incident. American Indian parents and the one teacher also reported numerous examples of different disciplinary treatment of white and American Indian students. One parent further reported that many American Indian students in the community leave the Winner School District because of the harassment and unfair disciplinary treatment. Although these students continue their education at Todd County School District which is located directly on the reservation, this arrangement requires that the students live in a dormitory which, according to one parent, poses a hardship for the families and the students who would otherwise be able to live at home.

Letter from Angela M. Bennett, Regional Director for the Office for Civil Rights, to Michael Elsberry, Superintendent, Winner School District (Dec. 3, 1997) (on file with author).

69. Letter from Linda H. Petry, Att'y, U.S. Dep't of Educ. Office for Civil Rights, to Parents (Apr. 17, 1998) (on file with author); Letter from Jody A. Van Wey, Case Resolution Dir., U.S. Dep't of Educ. Office for Civil Rights, to Dr. Gary Spawn, Superintendent, Winner School District (Sept. 3, 1998) (on file with author).

and ensure that students are disciplined in a non-discriminatory manner, and develop policies to identify and remedy a racially hostile environment.[70]

There is no indication that OCR met with any American Indian community members again after April 1998; OCR made no additional site-visits to Tripp County upon entry to the Resolution Agreement. Instead, relying exclusively on the district's self-reporting, OCR concluded in 2004 that the district had reached compliance and terminated OCR oversight.[71] That same year, at the request of the Tribal Attorney General, the ACLU, headquartered in New York City, initiated its investigation into Winner School District. This investigation involved an extensive review of documentation obtained through a public records request submitted to OCR.

The document review suggested that, on average from the 2001–2002 through 2004–2005 school years, one in three American Indian students in the middle and high schools was suspended each year, a suspension rate ten times greater than the suspension rate for Caucasian students.[72] It also found that an average of one in seven American Indian middle and high school students was arrested at school each year, a rate ten times greater than for Caucasian students.[73]

The investigation also involved a series of on-site interviews with American Indian families currently or previously enrolled in the district. Through five on-site visits over the course of two years, the ACLU met with over sixty local American Indian community members.[74] During these interviews, parents and students reported instances in which American Indian students were suspended and/or arrested for minor misconduct and punished more harshly than similarly situated white students.[75]

Community members also indicated that school officials maintained a zero-tolerance policy of calling the police any time an American Indian student was accused of certain disciplinary infractions, including alleged gang-activity, making a threat, fighting, or falsely pulling the fire alarm.[76] Pursuant to this policy, the principal would require the child to complete a form, entitled "Affidavit in Support

70. Resolution Agreement Between Office for Civil Rights, U.S. Dep't of Educ. and Winner Sch. Dist. at 1–3, 7, No. 07985009 (Feb. 1, 2000) (on file with author).

71. Letter from Angela M. Bennett, Regional Director for the Office for Civil Rights, to Mary Fisher, Superintendent, Winner School District (June 16, 2004) (stating that Winner School District had documented implementation of the terms of the Resolution Agreement and closing the compliance review (on file with author)). That same year, a federal district court observed "that there is a long and extensive history of discrimination against Indians" in the region surrounding Winner, and that "[t]he effects of this history are ongoing." Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1034 (D.S.D. 2004) (involving voting rights claims and documenting testimony of several witnesses at trial, including reports of discrimination in Winner schools).

72. Complaint, *supra* note 13, at 3, 17.

73. *Id.*

74. *See* Letter from Robin L. Dalhberg, Esq. et al., American Civil Liberties Union, to Angela M. Bennett, Regional Director, Office of Civil Rights (June 23, 2005) (on file with author).

75. Complaint, *supra* note 13, at 23–39.

76. *Id.* at 18–20.

of Prosecution," describing what had happened.[77] Upon completion of the form, the principal would notarize it and forward it to law enforcement for use in adjudicating the child a juvenile delinquent.[78] According to parents, American Indian students were told that the form was mandatory and were prohibited from leaving the room or speaking with their parents until they had completed the form.[79]

Finally, interviewees described the impact that these various policies and procedures had on their families. Many students would transfer to other districts, the closest one being in Todd County on the Rosebud Sioux Reservation, over an hour away.[80] Because of a lack of transportation, these students would often be sent to stay with relatives or to live in the Todd County dormitories.[81] Other students would drop out of school altogether, or even worse, be sent to a juvenile correctional facility.[82]

Publicly available data confirmed the high out-of-district transfer rates and dropout rates of American Indian students in Winner. During the 2004–2005 school year, there were eighteen American Indian students enrolled in the ninth grade in Winner High School, but only two enrolled in the twelfth grade.[83] During the 2001–2002 school year, the most recent year for which data was available prior to the filing of the lawsuit, only two American Indian students graduated from Winner High School, and in 2000–2001, only four did.[84]

Consequently, in March of 2006, ten American Indian students and their parents filed a class action suit in federal district court against the Winner School District and several of its administrators pursuant to the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and the Fifth Amendment right against self-incrimination, alleging the racially discriminatory imposition of discipline, maintenance of a racially hostile educational environment, and unlawful practices leading to the adjudication of minority children as juvenile delinquents for minor school misconduct.[85] Plaintiffs sought declaratory and injunctive relief on behalf of themselves and all American Indian students who currently or would at some time in the future attend the Winner Middle School or Winner High School.[86]

---

77. *Id.*

78. *Id.*

79. *Id.*

80. *See* Letter from Angela M. Bennett, *supra* note 68. *See generally* Complaint, *supra* note 13, at 4, 6, 21 (describing how many students have been forced to transfer to other schools).

81. *See* Letter from Angela M. Bennett, *supra* note 68. *See generally* Complaint, *supra* note 13, at 4, 21.

82. *See* Letter from Angela M. Bennett, *supra* note 68.

83. Nat'l Ctr. for Educ. Statistics, Common Core of Data, Build A Table, http://www.nces.ed.gov/ccd/bat/ (select data for the 2004–2005 school year and follow "next" links to select specific information for Winner School District in South Dakota) (last visited Feb. 12, 2010). By contrast, there were seventy Caucasian students enrolled in the ninth grade, and fifty enrolled in the twelfth grade. *Id.*

84. Complaint, *supra* note 13, at 22.

85. *Id.* at 1, 39–41.

86. *Id.* at 41.

### *B. Negotiation of the Consent Decree*

Although the defendants contested the allegations raised in the complaint and consistently denied wrongdoing, the parties agreed to submit to mediation before a federal magistrate judge in an effort to resolve the dispute.[87] Ultimately, these efforts proved successful, and the parties developed a settlement agreement, which the federal district court judge approved and entered into as a consent decree in December of 2007 with ongoing judicial oversight.[88]

Many of the terms of the decree negotiated by the attorneys for the parties required the types of policy changes typical of public law remedies. The decree required the district to revise its policies regarding law-enforcement referrals for school-based offenses and its discipline policies to ensure objectivity and consistency, to periodically review discipline data and report on racial disparities, to hire a full-time staff person to serve as a liaison between school officials and American Indian community members, to provide mandatory in-service training to school staff and administrators on improving the educational climate for minority students and peer-on-peer mediation strategies, and to hire an independent monitor to analyze all relevant data and conduct periodic site visits to track progress and compliance.[89] These types of remedies have and continue to play critical roles in the effort to ensure equal educational opportunity for students of color across the nation.[90]

In addition to these requirements, however, the decree mandated a unique process whereby the specific remedial goals used to determine ultimate compliance and termination of judicial oversight would be developed. This was the decree's true innovation. Pursuant to the consent decree, an independent facilitator, mutually agreed upon by the parties, was hired to convene the relevant stakeholders in a "co-construction process" to determine, by consensus, the goals or benchmarks that the district would need to meet in the following areas. These included: (1) improving American Indian graduation rates, (2) eliminating racial disparities in suspensions and police referrals, (3) reducing the overall number of suspensions and referrals, (4) reducing American Indian transfer and dropout rates, (5) improving American Indian achievement, (6) reducing American Indian truancy and tardiness, (7) improving American Indian parental participation, and (8) improving American Indian participation in extracurricular activities.[91]

87. The mediation took place over the course of two full days, both lasting until well past midnight. Participants included counsel for both parties, representatives of the plaintiff class including but not limited to named plaintiffs, representatives from the Rosebud Sioux Tribal Council and the Rosebud Sioux Department of Education, every member of the Winner School District Board of Education, the district superintendent, and the building principals from the high school and middle school.

88. Consent Decree, *supra* note 14.

89. *Id.* at 2–12.

90. *See, e.g.*, Jeffries & Rutherglen, *supra* note 25, at 1411–12 (noting that common aspects of contemporary consent decrees include "identify[ing] goals the defendants are expected to achieve and specify standards and procedures for measurement of performance.").

91. Consent Decree, *supra* note 14, at 13. Three additional areas were identified in the Consent Decree for benchmark development: improvement of school climate for American Indian students; inclusion of

Participants of the co-construction process included three American Indian parents with children enrolled in the district, two representatives from the Rosebud Sioux Tribe, three district administrators, and two members of the district's Board of Education.[92] Counsel for both parties attended, but their input was not counted as "votes" to determine whether consensus was reached.[93]

During the sessions, the facilitators first set forth their findings of "baseline data" for each of the areas to be covered, including, for example, current graduation rates, participation in extracurricular activities, and suspension rates.[94] They then explained the purpose of the co-construction process, which was to agree upon goals in each of the identified areas that the district would need to reach in order to terminate the decree.[95]

For each area, the facilitators went around the room and asked each participant about general thoughts on what the goals should be.[96] The facilitators then initiated a group discussion about the possibilities suggested by individual participants and solicited thoughts on potential strategies to reach the goals or barriers that might hinder achievement.[97] Finally, once the group discussion suggested a consensus as to what the goal should be, facilitators went around the room once more to ask each individual participant whether they agreed that the identified goal should be set as a benchmark.[98]

Over the course of four days spread out over two months, the representatives of the stakeholder groups reached consensus in each of the identified areas.[99] They agreed that over the course of four years the district would need to reach an 80% graduation rate for American Indian students, a 50% reduction in the number of suspensions and police referrals for American Indian students, limits on the number of American Indian students who dropped out or transferred to different districts

---

American Indian culture, history, and language in the curriculum; and accountability for all district finances related to American Indian students. *Id.* For simplicity, I omit these areas from discussion.

92. *Id.* at 14; Status Report—Monitor's First Quarterly Report at Exhibit E, Antoine v. Winner Sch. Dist., No. 06-3007 (D.S.D. June 2, 2008).

93. Consent Decree, *supra* note 14, at 14; Status Report, *supra* note 92.

94. Status Report, *supra* note 92.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; *cf.* Sturm, *supra* note 15, at 1393.

> The goal of the remedial stage is not to determine where fault lies, but rather to develop a plan that fairly and effectively realizes the substantive norm. This process often requires taking account of and integrating different perspectives on the causes of the problem and the impact and feasibility of proposed solutions. The various actors often possess different information and perspectives that influence their views of the practicability and fairness of a remedy.

*Id.*

99. Status Report, *supra* note 92.

due to racial tensions at school, minimum improvements in American Indian performance on standardized tests, a 94% attendance rate for American Indian students as well as caps on the number of American Indian students who were tardy or truant each year, and minimum increases in the percentage of American Indian parents who attended school meetings and events and students who participated in extracurricular activities.[100] These goals were set forth in writing and approved by the co-construction team members and counsel for both parties.[101]

### *C. Lessons Learned*

Given the history of racial strife in the area and local disenfranchisement of the community, the plaintiffs' ultimate goals in *Antoine* were not only immediate improvements in educational opportunity and achievement for their children, but also having a permanent voice in the district's decision-making processes.[102] For this reason, the remediation process employed in *Antoine* emphasized direct participation by the parties, not just their attorneys, and incorporated many of the elements associated with the public consensual dispute resolution model described by Professor Sturm. Although it is still too soon to tell whether and the extent to which the decree will succeed in achieving the goals of the litigation, there are important lessons to be learned even at this early stage of implementation.

First, the co-construction team process itself, emphasizing equal participation of the relevant stakeholders, appears to have facilitated a process of reconciliation between the two groups, allowing both American Indian families and influential members of the white community to hear each other's perspectives. There were moments of tension wherein the white participants may have been perceived as exhibiting unfair assumptions about substance abuse, work ethic, or child-rearing habits among the American Indian community; likewise, there were moments when the American Indian parents may have been perceived as refusing to take responsibility for their actions or their children. Over the course of the sessions, however, participants had an opportunity to hear each other's past individual experiences and how each other felt, and, for a moment at least, place themselves in the shoes of members of the other group.

For example, when the group was developing goals for improving American Indian parent participation, representatives of the plaintiff class dispelled the perception that parents were unengaged in the education of their children by explaining that transportation issues and a perceived hostile environment in the school prevented many American Indian parents from attending; consequently, the group agreed to provide busing services for these conferences and to hold some of

100. *Id.* at Exhibit G.

101. *Id.*

102. Elections for seats on the Winner School District Board of Education are at-large; an American Indian has never held a seat on the board.

them off-campus in locations where American Indian community meetings are frequently held.[103]

Similarly, while discussing the racial disparities in discipline, both sides expressed their desire for objective and fair discipline policies that would ensure student safety, agreeing that school administrators could not and should not give a "free pass" to misbehaving American Indian students for the purpose of meeting benchmark goals. Hopefully, this process will have generated increased trust and good faith between the groups.

Second, it appears that the district's equal-voice participation in the development of the decree and ensuing benchmarks has corresponded with a willingness to cooperate and implement the decree.[104] As scholars have observed, there are benefits to giving the parties more control over the remedy obtained, including increased cooperation and, in this case, a realistic assessment of what is locally practicable.[105]

Third, by ensuring direct participation by the parties, the process mitigated concerns about political accountability. In many jurisdictions, including Winner, the judge is a distant figure who may not be perceived as relating to or understanding the local needs and constraints of the community, and attorneys in cases suffer even more severe criticisms of outsider intervention and illegitimacy. In *Antoine,* neither the judge nor the attorneys for the parties determined the actual benchmarks that would determine ultimate compliance.

In theory, at least, given the direct participation of the stakeholders, it would be more difficult for the white majority to claim that the remedies reached were dictated by out-of-town lawyers, a district federal court, or the minority American Indian residents, because district officials had an equal say in the development of those remedies. Nonetheless, there does appear to be resistance among members of the white community. A series of letters to the editor of the local weekly newspaper have blamed the litigation for the need to increase local taxes to finance the public schools,[106] and two votes in the past year have rejected increasing property taxes for this reason.[107] It may well be that the inclusion of white parents with students in the district in the co-construction process would have improved the perceived legitimacy of the ultimate remedy.

## IV. CONCLUSION

It remains too soon to tell whether the procedures utilized for remediation in the *Antoine* case will succeed in improving educational opportunity and achievement for American Indian students in Winner School District; the quantitative data on

103. Status Report, *supra* note 92.

104. *Cf.* Sturm, *supra* note 15, at 1393 (noting instrumental value of consensual participation in increasing likelihood of cooperation, thus increasing likelihood of compliance and success).

105. *See supra* Part I.B.

106. Steve Novotny, Letter to the Editor, *Opt-out Vote*, Winner Advocate, Jan. 21, 2009; John J. Simpson, Letter to the Editor, *Things you should know about school agenda*, Winner Advocate, Feb. 18, 2009.

107. *See* Steve Novotny, Letter to the Editor, *Notes on attorney bill*, Winner Advocate, Apr. 22, 2009.

progress toward the agreed-upon benchmarks has not yet been analyzed and it is unclear whether compliance will be reached within the mandated four years. Nonetheless, even at this early stage, it appears to have addressed some of the major concerns relating to public law litigation generally. Importantly, by ensuring participation by district officials as well as plaintiff class members, it permitted an opportunity for members of these historically antagonistic groups to sit in the same room and hear each others' stories. It has also provided a sense of empowerment to the historically disenfranchised group of American Indian families, and has produced ongoing efforts between the parties to work collaboratively toward shared goals.

The experience to date in *Antoine* suggests that affording a more central role to collective and consensual decisionmaking with direct participation of the parties, not just their attorneys, to develop remedies in public law litigation may improve the ability of pipeline-related litigation, especially those with a significant racial impact, to obtain long-lasting institutional reform. In *Antoine*, the co-construction model has served to advance the development of shared values between historically antagonistic groups and has enabled a historically underrepresented group to have a voice in local policymaking, while at the same time accommodating the expertise and political accountability of the government agency.