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QUESTIONING THE POWER OF CONSUMERISM TO REFORM PUBLIC EDUCATION

MOLLY TOWNES O'BRIEN†

Legend has it that as the people were rioting in the streets in Paris just before the French Revolution, Marie Antoinette turned to her assistant and asked, "What is wrong? Why are the people fighting in the streets?" "They have no bread to eat, your majesty" came the response. "No bread?" gasped Marie. "Let them eat cake."¹

INTRODUCTION

The goals of current initiatives for private school tuition vouchers are lofty: academic excellence, economic efficiency, intellectual and spiritual liberty, and equity. A voucher system, it is argued, would introduce market competition into schooling and would result in increased efficiency and higher student achievement.² Moreover, vouchers would increase parental control over their children's education, giving families more educational flexibility and more intellectual and spiritual liberty.³ Further, a voucher system could improve educational equity by giving poor children educational options that are currently only available to wealthier families.⁴ Finally, even if

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¹ The story is said to have originated with Jean Jacques Rousseau in his *Confessions*, Book 6 (1782) and is generally understood to be fictional.

² See JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* (1990); Paul E. Peterson, *School Choice: A Report Card*, 6 VA. J. SOC. POL'Y & L. 47, 49-50, 53 (1998).

³ See JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 52-61 (1978); see also Rosemary Salomone, *Struggling With the Devil: A Case Study of Values in Conflict*, 32 GA. L. REV. 633 (1998) (describing that values of religious families conflict with public school agendas).

⁴ See JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION AND CIVIL SOCIETY* (1999).

vouchers cannot deliver all of the expected benefits, at least they will do no harm and, given the poor state of public schooling, should be tried.⁵ Faced with the seemingly intractable problems of urban public schools—poverty, racial segregation, low achievement—school voucher advocates propose to give parents tuition vouchers to allow them to purchase their children's escape from failing public schools. Let them attend private schools, they say.

If a reform in the method of financing public education could advance the important goals of excellence, efficiency, liberty, and equality, then certainly it would be worth trying. What could be the harm?

In the short space I have here, my task is to cast a skeptical eye on the prospects of school reform through tuition vouchers and to illuminate what I perceive to be some of the potential harms of moving to a voucher system for funding public education. Of course, the issues are complex and any specific voucher plan may be configured in a way that will change the values implications of the proposal. Nevertheless, I contend that the method of reform envisioned by voucher advocates, that is, market reform based on consumer choice in education, will facilitate academic credentialing and the individual pursuit of education for advantage while it undermines progress toward educational equity. It may also have serious unintended effects on individual intellectual and spiritual liberty. Consumer sovereignty is unlikely to alleviate the serious difficulties facing urban public education. Resting on false assumptions about the availability of choices and the dynamics of school attendance in urban systems, tuition voucher initiatives promise to distract attention from some of the problems facing public education and exacerbate others.

⁵ See Stephen D. Sugarman, *Part of the Solution Rather than Part of the Problem: A Role for American Private Elementary and Secondary Schools in the 1990s*, 31 WM. & MARY L. REV. 681, 693–700 (1990) (arguing that vouchers could provide immediate benefits and will not create new harms and should therefore be tried).

I. POTENTIAL HARM #1

Voucher programs will be expensive and are not likely to yield the expected gains in student achievement and school administrative efficiency.

Arguments favoring tuition vouchers are often premised on the expectation that private schools will improve student achievement. There is, however, surprisingly little evidence that private schooling results in higher educational achievement. Recent empirical studies comparing traditional public schools to choice schools reveal either no differences or minimal differences in student academic achievement.⁶ Extensive analysis of the Milwaukee voucher program has yielded results suggesting marginal, if any, improvement in academic performance among students who accepted private school vouchers.⁷ The more salient factors in determining student achievement are the socioeconomic status (SES) of the student body, school resources, and student selection.⁸ The available evidence predicts that a given student moving from the public to private sector would be expected to achieve higher test scores and be more likely to graduate from high school and from college, *if the student moved to a school with higher SES classmates*—even if there were no difference in the quality of instructions between the two schools.⁹

⁶ See Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs*, 17 J. POL'Y ANAL. MGMT. 375–79 (1998) (reviewing the results of major empirical studies of public/private school achievement); See also Dan D. Goldhaber, *School Choice: An Examination of the Empirical Evidence on Achievement, Parental Decision Making, and Equity*, 28 EDUC. RESEARCHER 16–25 (1999) (reviewing quantitative assessments of the impact of choice on educational outcomes); cf. JAMES S. COLEMAN & THOMAS HOFFER, *PUBLIC AND PRIVATE SCHOOLS* (1987) (arguing that private Catholic schools have positive effect on achievement); see also Levin, *supra* at 378–79 (comparing educational attainment of urban minority students at public and Catholic schools and suggesting that the Catholic school students had higher graduation rates, higher rates of college attendance, and higher college graduation rates than their public school counterparts).

⁷ See JOHN F. WITTE, *THE MARKET APPROACH TO EDUCATION* (2000) (analyzing the results of the Milwaukee voucher experiment and concluding that there is no consistent and reliable evidence that vouchers produced higher student achievement). But see Jay P. Greene et al., *School Choice in Milwaukee: A Randomized Experiment*, in PAUL E. PETERSON & BRYAN C. HASSEL EDS., *LEARNING FROM SCHOOL CHOICE* 342–51 (1998) (suggesting that students accepting vouchers and remaining in voucher schools demonstrated improved performance in reading and math).

⁸ See Goldhaber, *supra* note 6, at 20.

⁹ See *id.*

On the other hand, if the socioeconomic demographics of a given private school begin to look more like the public schools, achievement gains will no longer result from moving from one system to the other.¹⁰

Voucher advocates have often argued that, even if public and private schools provide comparable student achievement levels, private schools operate more efficiently than public schools. Private school tuition is often lower than the per pupil expenditure at comparably achieving public schools.¹¹ Comparing public school expenditures to private school tuition, however, is not a valid approach to assessing the relative costs of public and private schools.¹² Henry Levin, Professor of Higher Education and Economics at Stanford University, explains that private school tuition does not measure the full cost of private schools, which supplement tuition with fund-raising events, special student fees, financial contributions and in-kind contributions.¹³ Further, in calculating per pupil expenditures, public schools include the cost of providing special educational services for students with disabilities, vocational education, transportation and food services, none of which are usually included in the cost of private school tuition.¹⁴

Even if private schools do currently operate more efficiently than public schools, the gains in school efficiency that are expected to flow from the market competition among public and private schools are unlikely to be realized. This is so, in part, because parents are not likely to select a cheaper school over a more expensive one. Parents are likely to select a school for the prestige of the school's academic credential and its ability to provide their children upward social mobility and to guard them against downward social mobility.¹⁵ Education is frequently

¹⁰ See *id.*

¹¹ See Levin, *supra* note 6, at 383 (citing *inter alia* David Boaz & R. Morris Barrett, *What Would a School Voucher Buy? The Real Cost of Private Schools*, Cato Briefing Paper No. 25 (1996)).

¹² See *id.* at 383.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See David Hogan, "To Better Our Condition:" *Educational Credentialing and "the Silent Compulsion of Economic Relations" in the United States, 1830 to the Present*, 36 HIST. EDUC. Q. 243, 253-57 (1996). Other factors, such as minority enrollment, religious preference, convenience, and proximity to home or work, have been shown to play a major role in determining how parents exercise school choices. See Kevin B. Smith & Kenneth J. Meier, *School Choice: Panacea or Pandora's Box*,

valued for the status it confers rather than for its intrinsic value.¹⁶ The available sociological data suggests that parents choose a school, in part, to place their child “not in the right kind of program, but with the right kind of children.”¹⁷ Further, schools do not necessarily compete by becoming more efficient, but rather, by adding programs, increasing endowment, and improving reputation. A school’s reputation may be dependent on factors having more to do with the wealth of the school and the exclusivity of its admissions process than with the quality of the classroom teaching. Parents, who must often make choices based on limited information, are not “education consumers,” but rather consumers of school program brochures, test scores, building and grounds appearance, and elite reputations.¹⁸

If public money is made available to private schools that have been operating with only minimal public subsidy, the total cost of education at these institutions is likely to rise. In a society where property and educational credentials together define an “individual’s class,”¹⁹ some parents with disposable income will still pay tuition above the subsidized amount of a voucher to buy not only an academic, but also a social advantage for their children. As wealthier parents use their voucher to place their children in even more expensive private schools,²⁰

77 PHI DELTA KAPPAN 315–16 (1995).

¹⁶ See Smith & Meier, *supra* note 15, at 312 (arguing that academic achievement had no measurable impact on private school enrollment).

¹⁷ Carol Ascher, *Retravelling the Choice Road*, 64 HARV. EDUC. REV. 209, 216 (1994).

¹⁸ See Amy S. Wells, *African-American Students’ View of School Choice*, in WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 32–38 (Bruce Fuller & Richard F. Elmore eds., 1996) (describing what parents looked at to determine which school was a “better” school). *But see* WITTE, *supra* note 7, at 62–73 (describing the reasons that parents gave for selecting a particular school, including “educational quality,” “teaching approach,” “discipline,” and “general atmosphere of the school”).

¹⁹ See WITTE, *supra* note 7, at 254.

²⁰ This phenomenon has long been present in American schooling:

The financial resources of the middle class, their greater demand for the consumption of benefits of education, and their resistance to the downward mobility their children would suffer if they did not attain a high education level complement a probable tendency for the financial rate of return to their education to exceed that of the lower class. The overall result is a definite expected class bias in private education demands—an expectation that is fully supported by the statistics of class differences among families in educational investment.

JOHN D. OWEN, *SCHOOL INEQUALITY AND THE WELFARE STATE* 69 (1974).

private voucher schools and public schools will either lose ground in a competitive marketplace, or require additional funding to remain competitive. The new infusion of capital into private schools puts public schools at a competitive disadvantage.²¹

Rather than resulting in economic savings and improved efficiency, implementation of a voucher system will subsidize the middle and upper class pursuit of educational advantage and contribute to the escalation of the public costs of schooling. Vouchers add to the administrative burden of public education and increase the total public cost of education. Professor Levin estimates that the added cost of a voucher system—which includes: accommodating the additional students who are now in private schools,²² keeping records of voucher payments, monitoring voucher schools, providing transportation to voucher schools, providing information for parents to make informed choices, and adjudicating disputes related to voucher school placement—would total almost \$73 billion, or an additional twenty-five percent of the public education budget.²³

II. POTENTIAL HARM #2

A. *Voucher programs will facilitate choices made on the basis of bias and elitism and will result in greater racial and economic segregation of schooling and society.*

Although many of the scholars who have endorsed private school tuition vouchers cite the potential benefits of market competition as a reason to move to a voucher system, the scholastic and economic benefits of moving to a voucher system are speculative at best. Market theory, however, has provided a respectable intellectual framework for arguments that might

²¹ See Goldhaber, *supra* note 6, at 23–24 (noting the lack of empirical data showing the institutional response of public schools to the competitive threat of losing students and funding); see also Eric Rofes, *How are School Districts Responding to Charter Laws and Charter Schools?* (April 1998) (describing the complex effects on public schools that result when disgruntled parents remove their children from the school).

²² When vouchers were made available to pay for private, parochial education in Cleveland, approximately 75% of the voucher recipients had been enrolled in the parochial schools before the advent of the voucher program. Proposition 38, defeated in California in November 2000, would have given \$4000 to the parents of each private school student, including children of affluent families already enrolled in private school.

²³ See Levin, *supra* note 6, at 385–87.

otherwise be viewed as undermining an important American tradition in the name of self-interest.²⁴ Although the contemporary private school voucher debate is frequently said to have been sparked by the writing of Nobel Laureate Milton Friedman,²⁵ the first state law providing for private school tuition vouchers in this country was not the brain-child of the free market economist Milton Friedman, but was instead the invention of a southern racist politician, Roy Harris. In 1950, Harris, a demagogue, behind-the-scenes power broker and editor of his own newspaper, responded to the looming threat of court-ordered school desegregation in Georgia, writing, "If the public school system is to mean the destruction of the pattern of segregation, then we ought to do away with the public school system and devise another to take its place."²⁶ Harris predicted that if the public schools were ordered to desegregate, whites and industry would leave the central cities and whites would stop taxing themselves to support public education, eventually placing their children in private schools.²⁷ In the succeeding months and years, private school tuition statutes designed to avoid school desegregation were enacted and, after being in operation for several years, were ruled unconstitutional in Louisiana, Mississippi, Alabama, and Virginia.²⁸ Georgia's

²⁴ See Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 363 (1997); see also JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 189 (1994) (stating that "the market overlay provides a sheen of intellectual rigor, the reflected stature of economic theory, and an opportunity to gain financial support from corporations, foundations, and grant-giving agencies that otherwise have shown indifference toward [choice] initiatives").

²⁵ Milton Friedman is the Nobel Laureate who is frequently credited with kindling modern interest in privatization of public schools. See *id.*; see also VITERITTI, *supra* note 4, at 54 (claiming that Friedman anticipated not only the voucher debate but also the rise of private entrepreneurs in education).

²⁶ O'Brien, *supra* note 24, at 384 (quoting Roy V. Harris, *Strictly Personal*, AUGUSTA COURIER, Oct. 9, 1950). Harris' declaration was four years before *Brown v. Board of Education*, 347 U.S. 483 (1954), and five years before Milton Friedman first wrote about vouchers.

²⁷ See O'Brien, *supra* note 24, at 384.

²⁸ See *Coffey v. State Educ. Fin. Comm'n.*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969); *Brown v. South Carolina State Bd. of Educ.*, 296 F. Supp. 199 (D.S.C.), *aff'd per curiam*, 393 U.S. 222 (1968); *Poindexter v. Louisiana Fin. Assistance Comm'n.*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967).

voucher statute, enacted in 1953,²⁹ has not been funded since 1961, but is still on the books in Georgia and was recently the focus of an unsuccessful lawsuit seeking to require full funding.³⁰

Meanwhile, the racism that fueled white residential, commercial and industrial flight from our central cities continues to play a major role in the persisting inequity in our American public schooling.³¹ White racism, both intentional and unconscious, and the African American struggle against racism have been key factors in both the historical development of American education and contemporary dissatisfaction with it.³² Vouchers will facilitate the long-term trend toward self-segregation based on race.³³

B. Even if vouchers are given only to poor children in the worst schools, private school tuition vouchers will exacerbate rather than cure the existing inequity in public schooling.

We know that individual parental demand for education of his or her own child is already an important force in the distribution of educational resources in this society and is "certainly the key factor in explaining schooling inequities."³⁴ Some of the most interesting voucher proposals are those that seek to use vouchers as a redistributive force, giving poor families increased choices and improving educational equity across race and class lines. This "second generation of policy proposals," which claim the work of Ted Sizer, Christopher Jencks, John Coons and Stephen Sugarman as their intellectual

²⁹ See 1953 Ga. Laws 24 (proposing state constitutional amendment to provide grants for private educational purposes).

³⁰ See *Lowe v. Georgia*, 482 S.E.2d 344 (1997) (stating that mandamus not available to compel state to fund Tuition Grant Act).

³¹ See Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (Gary Orfield & Susan E. Eaton eds., 1996).

³² See THOMAS V. O'BRIEN, *THE POLITICS OF RACE AND SCHOOLING* (1999) [hereinafter *THE POLITICS OF RACE AND SCHOOLING*]; see also O'Brien, *supra* note 26 at 374, 376, 405 (describing white resistance to providing education for minorities, the role of education in maintaining a status of "advantage," and the role that race plays in the unwillingness of fiscal conservatives to support public services in general and public education in particular).

³³ See *THE POLITICS OF RACE AND SCHOOLING*, *supra* note 32; see also O'Brien, *supra* note 24, at 403 (discussing reasons why parents who do not consider themselves to be racist may nonetheless choose to send their children to majority-white schools).

³⁴ See OWEN, *supra* note 20, at 59-66.

progenitors,³⁵ seek to improve equality of educational opportunity by giving poor families options that more closely resemble the choices available to the middle class.³⁶ Voucher programs passed in the 1990s in Wisconsin, Ohio, and Florida with the endorsement of diverse constituencies of whites, blacks, conservatives, and liberals claim to be designed to provide relief for students at “failing schools.”³⁷

The theory behind redistributive voucher proposals is that they will put poor families in the market position of their wealthier middle-class counterparts. Given the ability to pay tuition at private schools, poor families, whose children are currently “trapped” in inadequate urban schools, will create a demand for high quality urban schools.³⁸ This demand will stimulate supply, inducing innovative entrepreneurs to open new schools, and create competition that will stimulate reform in the public sector.³⁹ Although it is too early to make judgments about the real-world operation of these “second generation” voucher programs, it is nevertheless worthwhile to consider the experience of one such program.

Florida recently adopted a statewide redistributive voucher program.⁴⁰ Under the newly enacted Florida voucher program, schools all over the state were tested with the Florida Comprehensive Assessment Test (F-CAT).⁴¹ The schools that had the lowest scores were deemed to be “failing schools” and were given an F.⁴² The Florida law provides that vouchers be given to each child attending a school that received a grade of F for two consecutive years. The \$3,000.00 voucher could be applied to private school tuition. Alternatively, the child could attend a different public school in another district.⁴³

The A.A. Dixon and Spencer Bibbs Advanced Learning Academy schools were the first two schools to be identified as

³⁵ VITERITTI, *supra* note 4, at 209–10.

³⁶ *Id.* at 211.

³⁷ *Id.* at 209.

³⁸ *Id.* at 214–17.

³⁹ *Id.*

⁴⁰ See MICHAEL MINTROM, *POLICY ENTREPRENEURS AND SOCIAL CHOICE* 34 (2000).

⁴¹ See Kelly Cohen, *Will Opportunity Scholarships Make the Grade: An Examination of School Vouchers*, 24 NOVA L. REV. 469, 474 n.36 (1999).

⁴² See *id.* at 474.

⁴³ See *id.*

failing.⁴⁴ These schools have ninety-six percent black enrollment and free lunch participation.⁴⁵ The schools are two of the poorest and least racially diverse in Escambia County.⁴⁶ Dixon enrolls children from four public housing projects. Bibbs is located in a neighborhood of "dilapidated rental houses interspersed with some better kept but humble homes."⁴⁷

In general, schools in Florida's wealthy neighborhoods earned A's and B's on the F-CAT test while schools in poor neighborhoods earned D's and F's. Although all of the children in the two schools judged to be failing were offered a voucher, only 138 of 876 children left Bibbs and Dixon schools.⁴⁸ Fifty-eight children enrolled in private sectarian schools⁴⁹ and as of May 5th of this year, fifty-two remain in private schools.⁵⁰ Ninety-two children applied in all, but there were only sixty seats available in the participating private sectarian schools.⁵¹ Seventy-eight children went to schools in other districts.⁵² But, the vast majority of parents decided to let their children stay in the schools that had been judged failures.⁵³

Why would they do that? Did they not care about their children's education? Did they think their children might not receive a better education somewhere else? Why would a parent *choose* to allow a child to remain in a failing school?

I do not have access to the actual reasons for the parents' decisions, but I will venture to speculate a bit. The concept of school "choice" implies the power to select among viable alternatives. For most of the families, a \$3000 voucher did not provide a viable alternative. There may be several reasons. First, there were not enough seats available in the existing

⁴⁴ See *A+ Plan Already Getting Good Results*, TAMPA TRIBUNE, May 5, 2000, at 16.

⁴⁵ See Heidi Hall, *Humiliated But Defiant, Two "F" Schools Fight On*, SUN-SENTINEL, Mar. 5, 2000, at 1A.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See Steven Hegarty, *Study Doesn't Back Voucher Exodus Fear*, ST. PETERSBURG TIMES, Sept. 11, 1999, at 1B.

⁴⁹ See *id.*

⁵⁰ See Steven Hegarty, *Scores Up In Two of the Three "R"s*, ST. PETERSBURG TIMES, May 9, 2001, at 1A.

⁵¹ See Hall, *supra* note 45, at 1A.

⁵² See *id.*

⁵³ See Steven Hegarty, *Day One For Vouchers*, ST. PETERSBURG TIMES, July 19, 1999, at 1B.

nearby private schools to accommodate all of the children enrolled at Dixon and Bibb schools.⁵⁴ Rather than encountering competition for their voucher money, most parents learned that there was a notable lack of interest in it.⁵⁵ Successful private schools are fully enrolled and not likely to compete for the attendance of large numbers of society's poorest children. Neither is it likely that the vouchers will stimulate the establishment of new schools for these children. The amount of a tuition voucher—even if funded at the full per-pupil expenditure level—would not be sufficient to support the additional capital outlay necessary to build new schools. Even if funding for new private schools were available, savvy entrepreneurs are more likely to establish schools in wealthier areas and to compete for the attendance of wealthier students.⁵⁶

Second, many parents may have been reluctant to send their child to a school in another district. Use of a voucher that requires a child to travel to another neighborhood places an additional burden on the child, both in terms of travel time and in terms of proximity to family, friends and culturally familiar situations.⁵⁷ The parents of the children at Dixon and Bibb schools may not have agreed that the schools were failing. In fact, looking at the progress of the children in those schools from year-to-year, the children who attended the Dixon and Bibb schools were gaining more than a year's reading achievement for every year they were in school.⁵⁸ The F-CAT standardized test results are an imperfect measure of school success or failure. The test results do not identify the reasons for each child's poor score; they do not identify the problems within the administration of the school, nor do they identify which teachers

⁵⁴ Hall, *supra* note 45, at 1A.

⁵⁵ The Florida experience is consistent with the voucher experiment in Milwaukee, where few new private schools entered the market. See WITTE, *supra* note 7, at 55–56.

⁵⁶ Consider the experience of our society with our most widespread voucher program: food stamps. The fact that food stamps are given to poor families has not created excellent grocery shopping in poor neighborhoods. I thank Professor John Zimmerman for this analogy.

⁵⁷ See Amy S. Wells, *African-American Students' View of School Choice*, in WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 25–49 (Bruce Fuller & Richard F. Elmore eds., 1996) (describing the burdens on individual students from urban minority neighborhoods who attended suburban, majority white schools).

⁵⁸ See Hall, *supra* note 45, at 1A.

are delivering high quality instruction and which are not.⁵⁹ Finally, there may have been some parents of children at Dixon and Bibbs schools who—for any number of reasons—were not capable of making a choice to send the child to another school.⁶⁰ In the final analysis, for the seven hundred and thirty-eight out of eight hundred and seventy children who remained in the “failing” public school, the voucher failed to provide real choice.⁶¹

Ultimately, providing *choices* in education is an unrealistic goal. It underestimates the size of the task and overestimates the political will of the majority to provide an excellent education for all children. Providing a free universal public education is a tremendous job. There are now over 49 million children enrolled in public schools, with diverse backgrounds, differing language abilities, and differing physical and mental abilities. The real challenge is to provide at least one excellent educational opportunity for each child, not choices, not options, but at least one high quality opportunity. As Professor Martha Minnow said recently, “The goal is not to get every kid into a private school, but to make all schools the kinds of places that give every kid the best possible fighting chance.”⁶²

Although free universal education was the vision of some of the nation’s founders and the dream of the common school

⁵⁹ This is just the beginning of a long list of important educational matters that are not measured by standardized tests. See NICHOLAS LEMANN, *THE BIG TEST* (1999) (describing a social history and analysis of standardized testing in the U.S.); see also ALFIE KOHN, *THE SCHOOLS OUR CHILDREN DESERVE* (1999) (describing high quality education in terms other than those measured by standardized tests).

⁶⁰ Many impoverished areas have high levels of homelessness, illiteracy, alcohol and drug abuse. Parents in these situations often lack the resources to gather and interpret information about their children’s educational options.

⁶¹ It should be noted that the voucher program did result in some reform in the Dixon and Bibbs schools. The schools changed their curricula, deleting science and social studies, and substituting additional F-CAT test preparation. See *A+ Plan Already Getting Good Results*, *supra* note 44; see also *The Voucher Distraction*, ST. PETERSBURG TIMES, Mar. 16, 2000, at 16A. The schools also increased number of days of school, so that students at Dixon and Bibbs had 210 mandatory days of school rather than the 180 that other students in Florida received. See Bill Kaczor, *Pressure Still On Former Failing Schools, Can't Afford to Get Another F*, FLORIDA TIMES-UNION, Aug. 13, 2000, at B6. The public attention drawn by the application of the “failing” label humiliated many students and teachers, but did bring in additional funds to buy new computers. See Hall, *supra* note 45. These changes, though they did result in the school’s receiving a passing score on the F-CAT tests this year, can hardly be said to be meaningful educational improvements.

⁶² Martha Minnow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 296 (1999).

crusaders as long ago as the 1830's,⁶³ the universal nature of public education has only recently been achieved. During World War II the effort to draft a force to fight against Japan and Nazi Germany awakened the nation to the fact that many of our young men were unfit for military service because they were illiterate or suffering from diseases relating to poverty.⁶⁴ Until then, many southern whites did not attend school at all, or attended perhaps for only a few months a year; schools were not necessarily available to black children at all.⁶⁵ They certainly were not available to most children with special needs.⁶⁶ It was not until 1954, in *Brown vs. Board of Education*, that the duty to provide an equal educational opportunity for black children was recognized by law.⁶⁷ Not until 1975 did the law recognize the need to provide educational opportunity for all handicapped children.⁶⁸ In 1988, the Bilingual Education Act was passed, providing educational opportunities for non-English speaking children.⁶⁹

This country has only recently begun to take seriously the task of providing a high quality public education for every student.⁷⁰ The gains of the reform movements of the 1950s through the 1980s created a more inclusive school system, but also contributed to dissatisfaction with public schooling.⁷¹ After decades of continuous school reform, the ideal of providing an

⁶³ See O'Brien, *supra* note 24, at 368–69.

⁶⁴ See Alex Molnar, *School Choice: WEAC Research Paper*, at <http://www.Weac.org/resource/nov96/vouchers.htm> (visited Mar. 19, 2001).

⁶⁵ See O'Brien, *supra* note 24, at 377.

⁶⁶ See KERN ALEXANDER AND M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 396–98 (4th ed. 1998) (describing the historical neglect of education for disabled children).

⁶⁷ 347 U.S. 483 (1954) (overruling the separate but equal rule set forth in *Plessy v. Ferguson*).

⁶⁸ See Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (1975). This act was later renamed the Individuals with Disabilities Education Act, 20 U.S.C. § 1400(a) (1994).

⁶⁹ See Bilingual Education Act of 1968, Pub. L. No. 90–247, 81 Stat. 816 (codified as amended at 20 U.S.C. 3221–3266 (1994)). This act was amended by the Bilingual Education Act of 1988, Pub. L. No. 100–297, 102 Stat. 274 (1988).

⁷⁰ Voucher proponents who genuinely believe that vouchers will “leave no child behind” are part of the trend and reflect this commitment.

⁷¹ See O'Brien, *supra* note 24, at 401 (arguing that the loss of exclusivity of the public school credential contributes to parental dissatisfaction with public schools); see also LAWRENCE A. CREMIN, *POPULAR EDUCATION AND ITS DISCONTENTS* 10–11 (1989); DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* 140–42 (Harvard University Press 1995).

excellent educational opportunity for each child remains an unmet goal. This is indeed frustrating for students, parents, school reformers and scholars of education, who now call for radical reform, claiming that earlier reform efforts have failed.⁷² Declarations of failure, however, are premature. Building the schools and training the teachers for an ever-growing and increasingly diverse population of school children in an increasingly complex technological society is an expensive, difficult, and never-ending job. It is a task that is made even more complicated by the number and diverse nature of demands on schools and the disintegrating nature of our communities.⁷³ It is a task that requires society to harness the sustained effort of the entire population in pursuit of a common goal, a goal worth pursuing because the education of the next generation "is important to the entire society; to our economic, cultural and political well-being, as well as to the life prospects for the individual students involved."⁷⁴

Tuition vouchers, operating on individual self-interest, are the wrong tool for effectuating school reform that is dedicated to providing excellence, access, and equity. Individual consumer interests are not necessarily aligned with these goals.⁷⁵ Collective choices focused on our common future are more likely to advance progress toward educational equity.

Providing an exit ticket from inadequate schools for a small number of children cannot be viewed as successful school reform. It may, however, create the illusion of school reform. Private school choice threatens to undermine efforts at reforming ineffective schools by providing a conveniently guilt-assuaging illusion for suburban tax payers: the poor children in the worst schools were given a "choice" of a better school and have thus experienced equality of educational opportunity.⁷⁶

⁷² See Minow, *supra* note 62, at 270.

⁷³ See *id.* at 271.

⁷⁴ *Id.* at 270; see also TYACK & CUBAN, *supra* note 71, at 140-42.

⁷⁵ See KEVIN B. SMITH & KENNETH J. MEIER, THE CASE AGAINST SCHOOL CHOICE 131 (1995) ("The market seeks efficiency. Equity is not efficient.").

⁷⁶ See Jim Ryan, *School Choice and the Suburbs*, 14 J.L. & POL. 459, 465 (1998) ("[S]chool choice fits in comfortably within a trend of suburban absolutism and apartheid, wherein suburbanites have successfully managed to reduce their responsibility for and involvement in urban problems, particularly with regard to schools.").

III. POTENTIAL HARM #3

The concept of private choice implies private responsibility, undermining the societal understanding of education as a shared responsibility.

Although Milton Friedman did not originate the concept of the private school tuition voucher, his interest in vouchers anticipated a trend toward divesting government of many of its traditional functions.⁷⁷ Free market economists such as Milton Friedman do not take for granted that government should be involved in education at all.⁷⁸ Friedman did, however, suggest that it would be appropriate for government to require a minimum level of education and require parents to pay for it.⁷⁹ This would have a beneficial effect, he wrote, because “it would tend to equalize the social and private costs of having children and so promote a better distribution of families by size.”⁸⁰ He went on to postulate that this proposal is “hardly feasible” given differences in family resources and family size, which he says are the reason for and the result of the policy of government subsidy of education.⁸¹ Public education has traditionally come under attack from taxpayers who would prefer not to pay for an expensive governmental program that may not benefit their own interests. The 1990s saw a resurgence of resistance to governmental programs perceived as redistributive. According to Professor Minow:

Across the globe, we are witnessing a tidal change in the role of governments in providing for basic human needs. Western democracies are backing away from the social welfare state created through democratic politics. In the name of producing stable currencies and of securing promising positions in the global economic markets, Canada and countries across Europe are cutting back on social welfare guarantees. Here in the United States, devolution of governmental responsibility to the states constitutes part of a larger withdrawal of the federal commitment to providing economic relief for the poor, as

⁷⁷ See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST*, 123–24 (Robert A. Solo ed., 1955).

⁷⁸ See *id.* at 124–25.

⁷⁹ See *id.* at 125.

⁸⁰ *Id.* (footnote omitted).

⁸¹ *Id.* at 126.

originally established by the New Deal. Even formerly socialist countries like Russia are cutting back on basic social guarantees ranging from childcare to police protection.

Taking the place of social welfare guarantees are policies intended to harness the competitive efficiencies of the free market and to promote individual consumer choice.⁸²

Individual consumer choice is not likely to serve the long-term goal of maintaining public support for full governmental funding of a high quality educational experience for every child. If a redistributive program is enacted, only poor children will receive an educational voucher check in the mail. The American people will come to understand education as a subsidy, like welfare and food stamps, for poor families. When the white middle class sees the poor receiving a check in the mail, they will either demand that poor families take more responsibility for educating their own children, or will demand an equal voucher for their children. Meanwhile, wealthier families will always have more options for their children than poorer families.

This brings me to an argument favoring tuition vouchers that I have heard many times from middle class parents whose children are already in private schools: I should receive a tuition voucher because I pay taxes to support the public schools that my children do not attend. I have received no benefit from my educational tax dollars and am essentially paying twice. Parents who make this argument fundamentally misunderstand the role of tax money in public education. All tax-paying members of society, whether they have children or not, contribute to the funds that pay for public schooling. The benefits and the costs of public education accrue to society generally, not merely to the children who attend and their families. Parents who decide to send their children to private schools are not "paying twice" for their children's education. They pay once, through their tax contributions, for the benefit of living in a society that educates all of its children.

The struggle for free universal education is one that has been hard-fought each step of the way against elitists and tax-resisters. The adoption of free universal education as a core value of our democratic society is not one that we can take for

⁸² Martha Minow, *Choice or Commonality: Welfare and Schooling after the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 499-500 (1999) (footnotes omitted).

granted. Excellence and equity in public education are collective values whose utility is not immediately apparent to individuals, and, may, indeed conflict with many individuals' self interest. What is needed in school reform is not an appeal to individual self interest, but rather a formulation of "a common ground of purpose sufficiently generous, compelling, and plausible that it can unify citizens in support of public schooling."⁸³

IV. POTENTIAL HARM #4

Private school tuition vouchers may threaten the autonomy of private institutions.

Theoretically, educational "choice" empowers parents to determine what is best for their individual children, and to find an educational placement that suits the parents' cultural and religious values. For voucher advocates, this is not only a matter of individual liberty, but also an issue of parental control of the manner in which the child is being indoctrinated while the parents are not present.⁸⁴ By funding private schools, the argument goes, vouchers would "remove the coercive financial pressure on parents to choose public over private schools."⁸⁵

Parents already have the right to place their children in private, secular or religious schools.⁸⁶ These schools are entitled to screen students in admissions, design their curricula, and effect their own educational values. Parents who choose private schools seek an educational culture of like-minded individuals for their children that is different from that of public schools. Demands for accountability of private institutions receiving public dollars may change the autonomous character of private schools.

Further, voucher programs will almost certainly require private schools to change admissions policies to prohibit exclusivity. This is not to say that many private schools do not provide for the kind of inclusive education currently available in the public schools, but if private, religious entities are *required* to be inclusive, something essential about the nature of a

⁸³ See TYACK & CUBAN, *supra* note 71 at 140.

⁸⁴ Stephen Gilles, *Why Parents Should Choose*, LEARNING FROM SCHOOL CHOICE 395-407 (Paul E. Peterson & Bryan C. Hassel, eds. 1999).

⁸⁵ *Id.* at 405.

⁸⁶ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

private, religious school will be lost.⁸⁷ Exclusivity is part of the essential character of private institutions, especially religious institutions, which are created by the exclusivity of a community of believers, as defined by religious faith and practice.⁸⁸ Changing the admissions policies of institutions that seek to define themselves by a community of belief will fundamentally alter the nature of those institutions.

CONCLUSION

Professor Lawrence Cremin wrote that popular education is "as radical an ideal as Americans have embraced."⁸⁹ The achievement of the ideal is difficult and the institutions established to achieve it are flawed, but it is important to note the achievements of the movement toward popular education and to strive for the ideal. Exposing our failure to meet our ideals of equality and access is a step toward giving substance to the ideal.

Private school tuition vouchers will not solve the problems of the public schools. Instead, they may create a distraction from the real question of how to provide universal free education of high quality. The real choice presented by school voucher initiatives is what kind of school system we choose to fund: one that is exclusive, oriented to consumer sovereignty and that permits greater racial socioeconomic and religious segregation; or one that is inclusive, tolerant of diverse views, oriented toward equity and toward social, racial and religious integration. Preference for the public good over private interest requires that we choose the latter.

⁸⁷ For a discussion of other implications of vouchers for private schools, see Angela Slate Rawls, *Eliminating Options through Choice*, 50 EMORY L.J. 363 (2001).

⁸⁸ See Abdullahai An-Naim, Human Rights, *Religion and Secularism: Does It Have To Be a Choice?*, Keynote speech at the Congress of the International Association for the History of Religion, Durban, South Africa, August 6–10, 2000.

This is not to say that it is not possible to understand some religious traditions in more inclusive terms But common human experience indicates that adherence to any religion is exclusive of those who are not accepted as members of the community of believers. Some form or degree of at least moral, and often material, exclusion seems to be necessary for vindicating the validity of the faith of one religious community as distinguished from that of other religious communities.

Id.

⁸⁹ CREMIN, *supra* note 71, at 39.