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SCHOOL CHOICE: THE THRESHOLD QUESTION

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School choice is an issue that has several dimensions. There is an educational dimension, which involves a consideration of whether choice may or may not improve the present condition in American Education. There is also the legal dimension that involves First Amendment questions in addition to state constitutional ones. Contrary to what some would argue, I believe that school choice in the form of vouchers given to children is constitutional. I also believe vouchers will be upheld by the U.S. Supreme Court when it reviews the sixth circuit decision being appealed.

Choice is consistent with values ingrained in the American political culture like freedom, equality, and pluralism, adding strength to the arguments of those who support it. Many opponents claim that school choice is divisive and that it will lead to the disintegration of civil society. I would argue to the contrary: I believe that school choice will contribute to the health of civil society especially in poor communities where civic life is weak.

I am not going to talk about law or civil society today. Rather, I am going to address the transformation of the school choice concept from an economic empirical model based on market efficiency to an equity model based on the notion of justice. I will discuss why the equity model is more compelling and I will outline what we need to do in order to make it work.

The central idea—the most important message I want to communicate—is that choice is a moral question. It is not an economic issue. It is not about efficiency. Many of you know

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that the idea of the market model in education originates with Milton Friedman, a Nobel Laureate, who in 1955, wrote a provocative essay in which he proposed a universal system of school vouchers that would allow all parents to select the schools their children attend.[1] The objective of Friedman's model was to break up a public school monopoly that he considered inefficient. The central promise of his model was that competition would eliminate low performing schools and provide the rest with an incentive to improve. Competition is central to both the economic model and the market idea. Friedman's vision was a system of schools that would be publicly financed but privately run. He believed that private schools were superior to public schools, that they would out-perform public schools and eventually replace them. His appeal was mostly to conservatives and those on the right side of the political spectrum.

I refer to the second generation of school choice advocacy, the equity model. This model began to evolve in the 1980s. It did not start with the idea that we should eliminate public education. To the contrary, it really emerged from the public sector. Public school reformers were the first to talk about choice. The first choice programs were magnet school and controlled choice programs that were designed to provide an incentive for racial integration.[2] After that, a variety of experiments focused more decidedly on student achievement emerged within the public sector. Today, about nineteen states in the nation have inter-district open-enrollment programs.[3] There are also intra-district choice programs in about fifteen states.[4]

The phenomenon that really added momentum to the choice movement in America was that of charter schools. Minnesota passed the first charter school law in 1991. Charter schools are public schools that function outside the jurisdiction of a traditional school district. Approximately 1,200 charter schools now exist in thirty-six states and in the District of Columbia.

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[1] *See* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST (Robert A. Solo ed., 1955).

[2] *See* Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV 613, 613–15 (1995).

[3] *See* Nina Shokraii Rees, *School Choice 2000 Annual Report at* http://heritage.org/schools/intro.html (last visited Mar. 22, 2001).

[4] *See id.* at 187.

These schools provide an avenue for public school advocates to support the choice idea without having to go over to the voucher camp.

Vouchers became a reality in the 1990s. The first program was created in Milwaukee in 1990 followed by another in Cleveland in 1995. In 1999, a statewide voucher plan was adopted in Florida. These programs are very different from the kind of programs that Milton Friedman was talking about in 1955. They are not universal voucher programs. They are programs that are targeted at children who are either economically disadvantaged or under-served by the public schools they attend. In Milwaukee and Cleveland, the voucher programs are needs-based.[5] A child qualifies for a voucher if his or her family income level falls below a certain level. In Florida, the plan is targeted at students who attend chronically failing public schools.[6] There is an obvious correlation between poverty and academic failure because a disproportionate number of poor children are in failing schools.

The second-generation proponents did not completely abandon the market model. Most will tell you they believe competition will improve public education. But something else very important has happened in the second generation that we need to understand. The constituency for choice has expanded. It is not just composed of free market advocates and libertarians. It is not part of a mischievous plan to eliminate the public schools. There is very strong support found in minority communities. The most consistent constituency for school choice and vouchers today is composed of African-American and Hispanic parents.[7] It is not hard to understand why that would be the case. It is because many minority children are attending schools that are not functioning well, and their parents seek alternatives.

When this mini-revolution took place in Wisconsin and later in Ohio and Florida, some very unusual political coalitions came into existence. They included business leaders, free market advocates, libertarians, inner-city parents, and local community

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[5] *See* Simmons-Harris v. Zelman, 234 F.3d 945, 948 (6th Cir. 2000); *see also* Jackson v. Benson, 578 N.W. 2d 602, 608 (Wis. 1998).

[6] *See* Kelly Cohen, *Will Opportunity Scholarships Make the Grade? An Examination of School Vouchers*, 24 NOVA L. REV. 469, 470 (1999).

[7] *See* TERRY M. MOE, SCHOOLS, VOUCHERS AND THE AMERICAN PUBLIC, (2001).

groups. The common thread among these constituencies was the demand for alternatives to schools that failed children. It was not a rebellion against public education, *per se*, rather it was a rejection of public schools that do not work. Many leaders in the black community now support choice. Martin Luther King III, whose father was a driving force behind the civil rights movement, is now an advocate of school choice.[8] Former Atlanta Mayor Andrew Young, former Colorado NAACP President Willie Breazell, and Reverend Floyd Flake of Queens also voice support for school choice.[9]

Why is the equity model so compelling? The first reason is that it places the choice issue in a moral domain. Most families in this country already enjoy choice. Middle class parents exercise choice in one of two ways: they either have the income to send their children to a private school or they have the economic mobility to move into communities where public schools are good. It may be a suburban district or a district in the city where schools perform at a decent level, like District 2 in Manhattan or District 28 in Queens.

When we understand that choice is something that the middle and upper classes already enjoy, it puts the issue in a context that makes it difficult to dismiss. The question is not whether we should have choice. The question is whether choice should be limited only to those people who have the private economic means to exercise it. When there are failing schools in places like New York, Milwaukee, and Ohio, the question becomes: why should parents be forced to keep their children in those failing schools when alternatives exist? There is simply no excuse for keeping children in failing schools.

The second reason why equity is compelling is that it is good public policy. Researchers constantly debate the quality and condition of education in this country. Those who look at it objectively will agree, however, that the most serious problem in American education is the enormous gap in achievement defined by race.[10] Impoverished minority children get left behind. The average black twelfth grader reads at the same level of

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[8] *See* Rees, *supra* note 3.

[9] *See id.*

[10] Christopher Jencks & Meredeth Phillips, *The Black–White Test Score Gap: An Introduction*, *in* THE BLACK WHITE TEST SCORE GAP (Jencks & Phillips eds., 1998).

proficiency as the average white eighth grader.[11] The dropout rate for Hispanics is twice that of blacks and three times that of whites.[12]

We have been discussing educational equality in this country for almost half a century since the *Brown v. Board of Education*[13] decision in 1954. It has yet to be achieved. The reason why the equity model works is because it deals with the issue where the problem exists—with the poor children who are the lowest performers. Another reason the equity model is more attractive than the market model is because it is more tangible and real than the market concept. Economists romanticize "the power of the market" in the same way public school advocates romanticize public education. Parents in communities where schools are not working do not have any more confidence in the market than they do in their public schools. Parents lack confidence because they believe the market does not respond to them if they do not have money.

To see this illustrated, take a walk through East New York in Brooklyn or another low income neighborhood in the city. Look at the number of businesses that have closed down because people cannot afford to patronize them. Go into a supermarket in the South Bronx and examine the quality of the meat. That is what the market produces. The market works when people have money.

There are obvious advantages to a market system, but my point is that there is no reason to glorify the market when people are all too aware of its shortcomings. The market will work when we give people the means to prod it. Some conservatives do not like to hear this, but school choice—at least choice that is targeted at low income families—is a form of redistributive social policy. It appropriates public money to private consumers for the purpose of purchasing a private service. It is a form of economic redistribution that is justified in terms of a greater public interest: equality of opportunity in education.

The market concept is an empirical model. It has forced the choice debate into an evidentiary trap. There is an academic

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[11] *See* Doug Cumming, *Georgia Reading Skills Not Up to Par*, ATLANTA J. & CONSTITUTION, Mar. 4, 1999, at 01A.

[12] *See* The Associated Press, *High Hispanic Dropout Rate Is Linked to Students' Language Problems*, ST. LOUIS POST-DISPATCH, Mar. 16, 2000, at A13.

[13] 347 U.S. 483 (1954), *rev'd*, 349 U.S. 294 (1955).

riddle within the research community urging that you should not try choice until it is proven to work. But, of course, we all know that if you don't try it, you can't prove whether it works or not. This riddle has created a great industry of evaluation research for social scientists. The point is that the threshold question is not an empirical question but a moral question.

There is, however, a great deal we have learned from social science research.[14] There are now 9,000 students in the voucher programs in Milwaukee.[15] There are 4,000 students in the program in Cleveland between kindergarten and fifth grade.[16] There is also the statewide program in Florida that hopefully will grow next year.[17] As I previously stated, there are 2,100 charter schools in thirty-six states and in the District of Columbia. There are also many private initiatives. The Children's Scholarship Fund has awarded nearly 40,000 scholarships to poor children.[18] Meanwhile, the Children First America initiative has sponsored private voucher programs in 70 cities nationwide.[19] All of these programs serve as important laboratories for experimentation. A great deal is learned from them. Evaluations have been conducted in New York, San Antonio, Indianapolis, the District of Columbia, Dayton, Milwaukee, and Edgewood, Texas.[20]

What did we learn from these experiments? First we have learned that there is an enormous demand for choice. That demand is evidenced by the waiting lists of families hoping to participate in the programs. Last year, when Ted Forstmann and John Walton announced their choice initiative for low income families, 1.25 million students applied.[21] The families of

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[14] *See, e.g.*, PAUL E. PETERSON & DAVIS CAMPBELL EDS., CHARTERS, VOUCHERS AND PUBLIC EDUCATION (2001); BRIAN P. GILL, ET AL., RHETORIC VS. REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS (2001).

[15] *See* Scott Greenberger, *Voucher Lessons Earned*, BOSTON GLOBE, Feb. 26, 2001, at A1.

[16] *See* DeWayne Wickman, *Halting Cleveland's School Voucher Plan Good News*, GANNET NEWS SERVICE, Aug. 27, 1999, at ARC.

[17] *See* Rees, *supra* note 3.

[18] *See id.*

[19] *See* Jennifer Garrett, *Progress on School Choice in the States*, THE HERITAGE FOUNDATION, May 16, 2001, at 1.

[20] *See generally* Rees, *supra* note 3 (noting that social science researchers have offered several promising findings regarding school choice).

[21] *See id.*

those that applied were willing to forego a free public education and absorb part of the responsibility to pay for tuition costs in order to have an opportunity to exercise choice.[22] If that is not demand, I do not know what is.

We have learned that the main beneficiaries of choice programs have been poor minority students. Part of this is a function of program design: The voucher programs are targeted. The charter schools, however, have not been targeted. They are open to all on a first-come, first-serve basis. Yet, in some places there are a disproportionate number of poor students enrolled because they are the ones who are looking for new opportunities.

There is a slightly higher percentage of the better educated parents among the poor families taking advantage of choice. This is an important point. It is what some people refer to as a "skimming" or "creaming" phenomenon. Some of this skimming effect is the result of program design. It is particularly evident in private programs that do not award full scholarships. It is difficult to reach the poorest of the poor if you do not give a full scholarship. I am not saying that as a criticism of the private scholarship programs. I understand they have a certain amount of money to work with and want to allow for the maximum number of scholarships. The more you give in a scholarship, the fewer scholarships you can give. I think, however, there is a lesson to be learned from them in terms of policy design.

The most consistent finding across the board for charter schools, vouchers, and private scholarships concerns parental satisfaction. We find that parental satisfaction is high and parents are specific about what they like. Parents like the high academic standards. They like the opportunity for involvement. They like the safe environment that these schools provide. They also like the religious values taught in the parochial schools. We find that poor parents can be very intelligent shoppers.[23] They know what they want and where to get it when they are given an opportunity to make a choice.

The results on academic achievement are mixed, especially with Charter Schools. A major federal evaluation is under way for which we still await the results. The evaluations of the voucher programs in Milwaukee and in Cleveland and in the

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[22] *See id.*

[23] MARK SCHNEIDER, ET AL., CHOOSING SCHOOLS: CONSUMER CHOICE AND THE QUALITY OF AMERICAN SCHOOLS (2000).

private scholarship programs like San Antonio's Horizon program are more encouraging. The worst that can be said about them is that students in choice schools do as well as students in public schools. There is also evidence of academic gains accrued by program participants.

I think there are some lessons we can take from these experiments in terms of program design. If we are going to have choice, we must do it right. There are a couple of points I would like to leave you with in terms of what a choice program should look like. The way we currently implement choice in America undermines both efficiency and equity. Most choice programs are political compromises. Policy is crafted in a "halfway" fashion and the result undermines success.

Limits are set on the number of placements permitted. Only one percent of the students were allowed to participate when Milwaukee passed its voucher law in 1990.[24] Now it is up to fifteen percent.[25] Last year in Cleveland there were 4,000 participants with a waiting list of 17,000. Most charter school laws in this country limit the number of schools that can be created. The limit in New York is 100.[26] That sounds like a lot of schools, but when you realize most charter schools have less than 150 students enrolled in them and there are 6,000 public schools in the state, you understand that charter schools are not going to furnish a lot of competition. The flaw creates competition among parents who are looking for an alternative. It does not create competition among schools.

There are also funding problems with most of the choice programs. There are no start-up funds for charter schools. The average charter school gets eighty cents on a dollar when compared to a regular public school. The funding disparity works against competition. It is a disincentive for people to start schools, and educators with new schools are at a competitive disadvantage. It also hurts children that need help because they are given less. This is the nature of political compromise.

The rule of thumb is that the further you move away from the traditional school controlled by a school district, the less

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[24] *See* Jackson v. Benson, 578 N.W.2d 602, 607 (Wis. 1998).

[25] *See* Michael Taylor, *Neutral or Non-Neutral, Is That the Question?*, 16 T.M. COOLEY L. REV. 289, 306 (1999).

[26] *See* Rick Carlin, *Charter Schools More Than Just Latest Fad*, THE TIMES UNION, Mar. 11, 2001, at A8.

money is given to a child. In Cleveland, where there are regular public schools, charter schools, and voucher schools, the average public school gets $7,746 per student—one of the highest averages in the state—even though it does not translate into performance.[27] If that same student decides to go to the Charter School, he or she is allocated $4,518.[28] If the student is bold enough to go to a school participating in the voucher program, he or she is allocated $2,250.[29] What kind of competition do you think that encourages?

If choice programs are going to be implemented, it must be done in a way that is equitable, and in a way that will encourage competition. There can be no arbitrary limits on the number of participants, nor the number of schools. The same support must be provided regardless of what choice is made by the student. In order to overcome the 'skimming problem,' you must target vouchers to poor children. Any school that accepts a voucher should have to accept it as the full tuition. We cannot expect poor parents to come up with money to make up the difference.

All choice programs should have to meet a certain academic standard. If the program does not meet the standard it should not qualify for public money. The same standard should apply to both voucher and charter schools, as well as regular public schools.

Would competition really serve to improve education? Would competition really improve the worst public schools? I believe that it would do both. Many people who oppose choice do not believe competition would help improve the worst public schools. They are the real cynics with regard to public education. Whether I am right or they are, however, the most compelling argument for choice remains one of fairness. In the end it is a moral question.

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[27] *See* Aff. of Joseph P. Viteritti, Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (Nos. 1:99 CV 1740, 1:99 CV 1818).

[28] *See id.*

[29] *See id.*