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# ACCELERATED EDUCATION AS A REMEDY FOR HIGH-POVERTY SCHOOLS

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William H. Clune\*

*High-poverty schools, and the students who attend them, have historically faced substantial challenges in providing, and receiving, adequate education. Despite some relief from the courts, school finance remedies that require the redistribution of monetary aid to low-wealth districts have encountered strong political opposition. In this Article, Professor Clune makes a renewed claim for accelerated education as the primary focus of adequacy litigation in school reform cases. He describes the nation's educational condition, in which there exists a disturbing correlation between poverty and low educational outcomes. He then drafts a vision of a comprehensive, school reform remedy, one that emphasizes institutional success over accountability, and discusses how this remedy compensates for the inadequacies of reforms suggested by other commentators. Finally, Professor Clune concludes that adequacy theory uniquely responds to the needs of high-poverty schools and provides the guidance necessary to achieving better education.*

## INTRODUCTION: THE PRIORITY OF POOR CHILDREN IN ADEQUACY LITIGATION

Logically, the poor should be a principal beneficiary of adequacy litigation. Adequacy refers to resources which are sufficient (or adequate) to achieve minimum outcomes and should be distinguished from equity, which requires equal resources regardless of results. Any theory focused on minimum outcomes could hardly overlook the strong correlation between poverty and substandard educational outcomes.<sup>1</sup> As pointed out by Dean Underwood, a sense of vertical equity—the special needs of

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1. Robert Berne, *Educational Input and Outcome Inequities in New York State*, in *OUTCOME EQUITY IN EDUCATION* 1, 20–21 (Robert Berne & Lawrence O. Picus eds., 1994); Gary Natriello, *Four Perspectives on the Disparities Between the Educational Resources Available to Students in the Hartford Public Schools and Other Connecticut Communities* 5–7, figs. 1–7 (Apr. 1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

various students in meeting minimum standards—pervades adequacy cases.<sup>2</sup> Courts have spoken eloquently about the dire consequences of allowing a large segment of American society to slip into permanent educational decline.<sup>3</sup> Extra resources certainly seem relevant. Books have been written about the abysmal condition of many schools in low income areas.<sup>4</sup> Any teacher could likely speak to the unavailability of the additional time required to meet the unique educational needs of economically poor children and their families. Indeed, courts have begun to fashion compensatory remedies. For example, the Supreme Court of New Jersey has ordered extra funding,<sup>5</sup> the Alabama judiciary has included social services,<sup>6</sup> and the State of Kentucky has begun searching for programs that effectively provide accelerated education.<sup>7</sup>

Even with such new remedies, these are perilous times for poor children. School finance remedies which redistribute aid to high-poverty districts typically encounter fierce political resistance and controversy.<sup>8</sup> Contemporary conservative political thought makes two powerful, though logically redundant, criticisms of compensatory aid—that poor minority children cannot reach minimum standards<sup>9</sup> and that public schools do not

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2. Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REF. 493, 495–96, 516–17 (1995).

3. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209–13 (Ky. 1989) (declaring that “every child” in Kentucky, whether rich or poor, must be provided with a constitutionally adequate educational opportunity); *Abbott v. Burke*, 575 A.2d 359, 397–99, 411–12 (N.J. 1990) (describing the inadequate facilities and low achievement statistics of certain poor, urban school districts in New Jersey, in sharp contrast to the resources and educational results of that state’s richer, suburban districts).

4. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (1991) (discussing conditions that make academic achievement difficult or impossible in America’s poor and segregated schools).

5. *Abbott*, 575 A.2d at 408–10.

6. Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REF. 559, 598 (1995). For a brief introduction to and discussion of accelerated education, see generally HENRY M. LEVIN, CENTER FOR POL’Y RESEARCH IN EDUC., *ACCELERATED SCHOOLS FOR AT-RISK STUDENTS* (1988), which discusses accelerated education as a means of raising the academic performance of “educationally disadvantaged or at-risk students.”

7. C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REF. 599, 646–48 (1995).

8. Margaret E. Goertz, *School Finance Reform in New Jersey: The Saga Continues*, 18 J. EDUC. FIN. 346, 349–50, 363 (1993).

9. For a discussion of such politically conservative criticisms, see RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). *The Bell Curve* is not clear on how much poor children can learn. Chapter 17 cites some examples of successful remedial education but claims that further research is needed and that implementation on a wide scale would

always use extra resources in an efficient manner.<sup>10</sup> School choice is much touted as a remedy for poor families,<sup>11</sup> but decentralization has a "dark side" as it easily could be used in the service of anti-tax forces to slash educational spending for the poor without improving schools or raising achievement.<sup>12</sup> Meanwhile, partly to secure political consensus, adequacy cases themselves may focus on equal funding and statewide reform as remedies, thereby overlooking the more intense and politically awkward claims of society's most disadvantaged.

This Article is intended to remind us of the case for including accelerated education<sup>13</sup> as the primary focus of adequacy litiga-

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be too expensive. *See id.* at 415. Chapter 18 notes improved achievement throughout the 20th century but also includes this enigmatic call for "realism":

[c]ritics of American education must come to terms with the reality that in a universal education system, many students will not reach the level of education that most people view as basic. Consider again the example of functional illiteracy mentioned earlier: that over 20 percent of 17 year olds are . . . marginal readers or worse. This is usually considered a failure of American education, and perhaps it is. But most of these nonreaders come from the bottom of the cognitive ability distribution. How well *should* they be able to read after a proper education, given the economic, technological, and political constraints on any system of mass education?

*Id.* at 436.

10. *See, e.g.,* Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991) (suggesting that there exists "significant inefficiency in the operation of schools").

11. *See, e.g.,* George A. Mitchell, *The Milwaukee Parental Choice Program*, WIS. POL'Y RES. INST. REP., Nov. 1992, at 1, 4 ("[o]ne proposal [to improve education] is to give low and moderate income parents more choice in selecting the schools for their children"); *see also* John E. Chubb, *Political Institutions and School Organization*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION 227, 234 (William H. Clune & John F. Witte eds., 1990) ("Far from being antithetical to school communities, market institutions may provide the only methods of school control that permit communities to flourish.").

12. *See* Donald R. Moore, *Voice and Choice in Chicago*, in 2 CHOICE AND CONTROL IN AMERICAN EDUCATION 153, 155-56 (William H. Clune & John F. Witte eds., 1990); Martin Carnoy, *Is School Privatization the Answer?: Data From the Experience of Other Countries Suggest Not*, EDUC. WK., July 12, 1995, at 52, 52; JOEL HANDLER, DOWN FROM BUREAUCRACY: AMBIGUITIES IN PRIVATIZATION AND EMPOWERMENT (forthcoming Apr. 1996) (manuscript at 257, 329-30, on file with the *University of Michigan Journal of Law Reform*). Decentralized school systems ironically may become highly bureaucratized as a way to survive in a regulated market. *See* Henry M. Levin, *The Theory of Choice Applied to Education*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION 247, 276-80 (William H. Clune & John F. Witte eds., 1990); Chubb, *supra* note 11, at 232-34.

13. By "accelerated education," I mean programs designed to bring disadvantaged students up to grade while they are still in grade school. For a discussion of the need for such programs, *see generally* Henry M. Levin, *Financing the Education of At-Risk Students*, 11 EDUC. EVALUATION & POL'Y ANALYSIS 47 (1989) [hereinafter Levin, *Financing Education*], which analyzes the educational needs of at-risk students and determines the financial requirements for funding accelerated education. *See also* Henry

tion and to recommend remedial strategies which are realistic yet responsive to the complexities and challenges of the task. Modern adequacy cases occupy an intermediate position between the old equity theory and the "true adequacy" approach.<sup>14</sup> The rest of this Article is an effort to point toward the direction of true educational adequacy for economically poor children.

Part I discusses the factual predicate under an adequacy theory for a special remedy aimed at high-poverty schools. Such schools have the great preponderance of students who fail to meet minimum state standards of student achievement and other key educational outcomes. Part II expands the factual picture and suggests the scope of an adequate remedy by means of a brief discussion of the multiple obstacles faced by high-poverty schools in delivering quality education. Part III sets out the basic architecture of a comprehensive remedy, a remedy with three parts. Part III.A recommends an "inquiry process"—a set of research studies on locally idiosyncratic conditions, such as the need for new physical facilities and further development of school-linked social services. Part III.B covers the heart of the remedy—additional resources and accountability mechanisms—and recommends a compensatory aid grant for each poor student built on a statewide foundation of fiscal equity, strongly favoring accountability for results rather than detailed regulation of school inputs. Part III.C considers what governance structures are most compatible with the recommended approach to accountability. Both local control and statewide reform are judged insufficient and, while family choice might be a useful element, the most congruent form of governance seems to be some kind of "bilateral contracting" between agencies of school improvement and each school. Finally, despite the emphasis on accountability, this Article concludes that "success is better than accountability." Success, first established in ambitious educational experiments, can yield information about how to be successful on a wider scale and satisfy strong political objections about increased educational spending on poor children.

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M. Levin, *Accelerated Schools for Disadvantaged Students*, EDUC. LEADERSHIP, Mar. 1987, at 19 [hereinafter Levin, *Accelerated Schools*] (discussing methods of improving the educational plight of disadvantaged students).

14. For a definition and analysis of equity theory, adequacy theory, and true adequacy, see generally William H. Clune, *The Shift From Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994), which describes the evolution of litigation strategies used to reform inadequate school finance structures.

## I. WHETHER AND FOR WHOM TO ORDER COMPENSATORY AID

The basis and proof for courts ordering some kind of compensatory aid are actually fairly clear. In every state, high-poverty schools contain large numbers of students who achieve scores below state-defined minimums on any measure of schooling outcomes,<sup>15</sup> especially achievement tests and educational attainment.<sup>16</sup> Outcomes for such children show massive deficits. For example, the passing rates of children in high-poverty schools in Connecticut, New Jersey, and New York are far below the statewide averages.<sup>17</sup> In New York, the incidence of low educational indicators in these schools is truly remarkable—economically disadvantaged children and those children from racial and ethnic minorities are all concentrated in high-poverty/high-minority schools in New York City and other large cities.<sup>18</sup> Therefore, if adequacy refers to minimum outcomes, children in high-poverty schools represent the most serious breach of the adequacy standard.

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15. See, e.g., WISCONSIN LEGISLATIVE AUDIT BUREAU, AN EVALUATION OF THE CHAPTER 220 PROGRAM 38 (1994) (noting that more than twice as many suburban students scored above the national fiftieth percentile on the tenth-grade reading test when compared to the number of urban students scoring at the same level, in a study of the public schools in Milwaukee and surrounding suburbs).

16. "Educational attainment" means the highest grade level a student reaches before dropping out.

17. See *Abbott v. Burke*, 575 A.2d 359, 400 (N.J. 1990) (ruling on school adequacy in New Jersey); Berne, *supra* note 1, at 2-3, 17-20 (analyzing public education in New York); Natriello, *supra* note 1, at figs. 3-7 (studying schoolchildren in Connecticut).

18. One commentator has noted:

The statewide distribution of children from poor families is also striking. . . . Using the New York State Department of Education's definition of high poverty—schools with over 41% of pupils in poverty—45% of pupils in New York City are in high poverty schools, as are 74% of pupils in the other large city school districts, compared to 24% statewide.

High poverty-high minority schools are an urban phenomenon in New York State, where there are 495 such schools. A high poverty school has over 41% of its pupils in poverty, and in a high minority school over 80% of its pupils are from racial-ethnic minority groups. There are 427,417 students in these high poverty-high minority schools and 392,069 are in the 418 high poverty-high minority schools in New York City.

Berne, *supra* note 1, at 2-3. The same study shows 55-60% passing rate on the New York State Regents Comprehensive Examination in English for pupils in low-poverty schools in suburban and rural districts, compared with a 0-7% passing rate in high-poverty schools, regardless of location. See *id.* at 20.

On the finance side, the schools attended by such economically disadvantaged children usually spend near or below the state average in dollars per pupil.<sup>19</sup> Thus, a natural experiment has occurred in which two sets of schools—high-poverty schools and other schools throughout the state—receive about the same amount of money. One set—the high-poverty schools—achieves outcomes below the adequacy standard, while the other set generally passes minimum standards. Apparently, equal dollars does not produce equal outcomes.

## II. THE MULTIPLE PROBLEMS OF HIGH-POVERTY SCHOOLS AND THE CORRESPONDING NEED FOR MULTIFACETED REMEDIES

At least with regard to acceptable minimum levels of achievement, such as basic literacy, numeracy, and problem solving, the idea that there exists an absolute barrier to achievement seems wrong. We have many examples of successful remedial programs on a small scale.<sup>20</sup> Rather, the efficiency objection seems closer to the mark.<sup>21</sup> It seems our educational system has not been successful at replicating these smaller effective programs on a larger scale.

But the concept of inefficiency, with its connotation of an uncaring, public school bureaucracy, is so oversimplified as to be blatantly misleading. We do not understand nearly enough

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19. See, e.g., *id.* at 2–3, 7–8 (providing data relating to high-poverty schools and per pupil expenditures in New York).

20. See, e.g., Elizabeth Fennema et al., *Learning Mathematics With Understanding: Cognitively Guided Instruction*, in 1 ADVANCES IN RES. ON TEACHING 195, 203–16 (1989) (proposing a new model for curriculum development); Nancy A. Madden et al., *Success for All: Longitudinal Effects of a Restructuring Program for Inner-City Elementary Schools*, 30 AM. EDUC. RES. J. 123, 127–45 (1993) [hereinafter Madden, *Longitudinal Effects*] (describing and evaluating the Success for All reading program); Nancy A. Madden et al., *Success for All*, 72 PHI DELTA KAPPAN 593, 594–97 (1991) [hereinafter Madden, *Success for All*] (describing and evaluating the Success for All reading program).

21. Cf. William S. Barnett, *Obstacles and Opportunities: Some Simple Economics of School Finance Reform*, 8 EDUC. POL'Y 436 (1994) (discussing potential opportunities, problems, and issues raised by growth in education expenditures); Eric A. Hanushek, *A Jaundiced View of "Adequacy" in School Finance Reform*, 8 EDUC. POL'Y 460, 464 (1994) (concluding that "[t]here is no consistent relationship between the resources applied to schools and student performance") (emphasis omitted).

about why education is so difficult in high-poverty schools.<sup>22</sup> Since the problems themselves are not specifically understood, it is inevitable that there are few standards by which to measure an effective remedy. To put it in terms of the Article by Morgan, Cohen, and Hershkoff in this Symposium,<sup>23</sup> we have standards for what a typical good school looks like, but such standards are only a partial model for what is needed in high-poverty schools.<sup>24</sup> School standards for the typical school do not embrace the full range of educational services needed in high-poverty schools—services such as accelerated instruction and better attendance policies—and otherwise do not address how to achieve standards of good practice in a difficult environment, one lacking sufficient family involvement in the educational process, safe schools, and a stable, qualified teaching staff.

Surprisingly, there has been little serious effort to sketch the educational process and resulting costs of an effective high-poverty school. A substantial knowledge gap exists, but we know enough that courts could guide the design of a basic remedy with the capacity for adjustment in light of further research and the knowledge generated by evaluation of the reform effort itself. There thus exists a need for a new generation of adequacy cases that assess the problems of high-poverty schools against reasonable standards and attempt to build effective remedies. The following discussion describes some of the problems associated with high-poverty schools in order to lay the groundwork for the discussion in Part III of how judicial remedies could offer viable solutions to these problems.

- *High mobility of teachers.* At least some high-poverty schools have extraordinarily high rates of teacher mobility. One source reports that the average tenure of a teacher in disfavored high-poverty schools in New York City is approximately six weeks.<sup>25</sup> As a result, there exists an absence of stability in educational planning and the presence of many inexperienced, substitute, and uncertified teachers, or

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22. See William S. Barnett, *Economics of School Reform: What Can We Learn From Three Promising Models* 2–4, 36, 37–38 (Mar. 21, 1995) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*) (existing research tells us what effective schools do but little about their processes, costs, and generalizability).

23. Morgan et al., *supra* note 7.

24. See *id.* at 563, 590–91.

25. Linda Darling-Hammond, Address at Incentives Forum (Dec. 20, 1994).



teachers who are instructing topics that are not in their field of specialty.<sup>26</sup>

- *High mobility of students.* Students in high-poverty schools also have a high rate of mobility. Furthermore, many students may only attend school intermittently during the short time that they are enrolled in a school. As a result, there is an inconsistent and unpredictable pattern of episodic attendance which defies efforts of schools and teachers to provide a rational, continuous program of instruction.

- *Non-accelerated instructional programs.* The consequences of falling behind grade-level in achievement are devastating, resulting in a greatly increased probability of dropping out of high school.<sup>27</sup> Yet few high-poverty schools are effectively organized to bring children rapidly back to grade-level. Indeed, many educational practices, such as pull-out instruction<sup>28</sup> and retention in grade, are counter-productive.<sup>29</sup>

- *Unsafe and disorderly schools.* Learning requires effective time spent on tasks, which is unavailable in dangerous, disorderly schools.<sup>30</sup> Urban schools face severe disruption from their external and internal environments and, thus, must expend extra effort and resources to stabilize the school environment for students and teachers alike.

- *Insufficient and inadequate physical facilities and instructional materials.* Many urban schools are overcrowded and lack the instructional facilities necessary to meet state in-

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26. See Berne, *supra* note 1, at 2-3, 17-20.

27. See Levin, *Financing Education*, *supra* note 13, at 47.

28. A pull-out program removes the student from the regular classroom for supplementary instruction. Pull-outs have been favored by schools as a means of meeting fiscal auditing requirements but have been criticized on educational grounds because of lack of coordination with regular instruction. See Kenneth K. Wong, *The Changing Politics of Federal Educational Policy and Resource Allocation*, in *RETHINKING POLICY FOR AT-RISK STUDENTS* 25, 39-41 (Kenneth K. Wong & Margaret C. Wang eds., 1994).

29. See generally *FLUNKING GRADES: RESEARCH AND POLICIES ON RETENTION* (Lorrie A. Shepard & Mary L. Smith eds., 1989) (presenting research on the effects of grade retention and broadly concluding that it is not an effective policy).

30. See Stewart C. Purkey & Marshall S. Smith, *Effective Schools: A Review*, 83 *ELEMENTARY SCH. J.* 427, 445 (1983) (stating that "[c]ommon sense alone suggests that students cannot learn in an environment that is noisy, distracting, and unsafe").

structional mandates. For example, classroom space and laboratory equipment are often lacking.<sup>31</sup>

- *Inefficient staffing patterns.* Some evidence exists to suggest that urban schools are too large to be effective and that they are inefficiently staffed with too many people not involved in teaching. For example, in some cases, 60% of the staff may be engaged in teaching rather than 80%.<sup>32</sup> Another problematic pattern is the inefficient management of class size.<sup>33</sup>

- *Bloated and interfering central bureaucracies and school boards.* Some research and discussion on urban schools finds that the school district system can be an obstacle to effective instruction.<sup>34</sup> Reduced school district budgets (other than for key support services like transportation) and school site management are plausible responses to this problem.

- *Unqualified and burnt-out teachers—dumping grounds.* Anecdotal evidence suggests that some urban schools become, in effect, dumping grounds for teachers who have become ineffective or problematic in other schools.<sup>35</sup> At least three mechanisms may be responsible for the “dumping ground” phenomenon: (1) principals of experimental schools are given unusual authority over personnel selection; (2) the combination of teachers’ contractual rights to decline open positions

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31. See William A. Firestone et al., *Where Did the \$800 Million Go? The First Year of New Jersey's Quality Education Act*, 16 EDUC. EVALUATION & POL'Y ANALYSIS 359, 367 (1994) (reporting that inadequate space was “the most striking problem reported by the urban low-wealth districts” surveyed).

32. Valerie E. Lee & Julia B. Smith, *Effects of High School Restructuring and Size on Gains in Achievement and Engagement for Early Secondary School Students*, 68 SOC. EDUC. (forthcoming 1995) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*) (assessing the impact of attending restructured secondary schools on students in their early years of high school).

33. One study found that, although schools in Boston average arithmetically one teacher for every 17 students, actual classrooms seldom achieved this number. Karen H. Miles, *Finding Time for Improving Schools: A Case Study of Boston Public Schools 1* (Apr. 1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*). Most classes had about 22 students per teacher because there were very small classes in special education and other subjects. *Id.* at 3–4. These inefficient, small classes could be eliminated, such as by consolidating grades, thereby reducing the student-teacher ratio for regular academic subjects.

34. See G. Alfred Hess, Jr., *Adequacy Rather Than Equity: A New Solution or a Stalking Horse?*, 8 EDUC. POL'Y 544, 561–65 (1994) (discussing the interaction of schools, school districts, and state and federal governments in setting policy).

35. *E.g.*, Darling-Hammond, *supra* note 25.

in and transfer out of troubled schools and the privilege of good schools with a surplus of applicants to reject the applications of troubled teachers, resulting in a systematic concentration of troubled teachers in troubled schools; and (3) the procedural difficulties in dismissing teachers for less than blatant misconduct.

- *Lack of parental involvement.* Parental support and coaching are well understood to be important components of acceptable educational achievement and are lacking for many poor, urban school children.<sup>36</sup>

- *Lack of social and medical services.* Because hungry school children with toothaches and in need of eyeglasses make less effective students,<sup>37</sup> adequate social services can make a real difference in educational achievement.<sup>38</sup>

- *Lack of incentives to emphasize student performance.* Schools and teachers generally lack incentives to use their time and resources in ways that maximize student achievement. Rather than undertake the difficult and uncertain task of accelerated instruction, many schools go through standard teaching routines and use their budgets in traditional categories.<sup>39</sup>

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36. See MARGARET C. WANG ET AL., NATIONAL CTR. ON EDUC. IN THE INNER CITIES, SCHOOL LINKED SERVICES: A RESEARCH SYNTHESIS 23-25 (analyzing parental involvement programs); Madden, *Success for All*, *supra* note 20, at 596 (describing the importance of parental involvement in the Success for All program); David Sullivan, The Robert M. LaFollette Institute of Public Affairs, An Understanding of What Is Possible: A Guide to Collaboration and the Coordination of Services in Schools 11 (Aug. 1993) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

37. For a description of the conditions in some of the nation's poorest schools, see generally KOZOL, *supra* note 4, which describes the state of public education in some urban and impoverished school districts in the United States). See also JONATHAN KOZOL, DEATH AT AN EARLY AGE (1967) (describing the author's experience as a teacher in Boston in the mid-sixties).

38. See generally Edward F. Zigler & Matia Finn-Stevenson, *Schools' Role in the Provision of Support Services for Children and Families: A Critical Aspect of Program Equity*, 8 EDUC. POL'Y 591 (1994) (discussing the importance of support services in achieving educational equality); WANG ET AL., *supra* note 36, at 1-31 (suggesting services should be school based); Sullivan, *supra* note 36, at 1-35 (suggesting school/community partnerships in providing services).

39. See Richard F. Elmore, *Thoughts on Program Equity: Productivity and Incentives for Performance in Education*, 8 EDUC. POL'Y 453, 455-57 (1994).

### III. THE BASIC ARCHITECTURE OF A COMPREHENSIVE REMEDY

Keeping in mind the problems facing high-poverty schools, there are certain important elements of a comprehensive court-ordered adequacy remedy for high-poverty schools. Several points, however, should be emphasized at the outset. First, while courts might well be required to initiate such a remedy on behalf of underrepresented poor children, the remedy itself would have to be designed legislatively at both state and local levels. In that sense, the judicial remedy is really comprehensive, legislative reform with judicial stimulus.<sup>40</sup> Second, the remedy should include inquiry procedures and research necessary to design parts of the remedy or modify them as time progresses. Third, while the recommendations are hopefully well-considered, they are also tentative and suggestive, offered as much to guide analysis as to suggest final action. In addition to the need for ongoing analysis, remedies must conform to local needs and to the existing policy environment.

#### *A. A Set of Independent Studies and Structural Design Efforts*

The core issues of an effective remedy are instructional resources and accountability, including governance. This Part briefly recommends inquiry processes for several issues that require specifically tailored fact-finding or institutional development and thus resist generic policies.

- *Physical facilities and instructional materials.* In states that are undergoing court-ordered school finance reform, funds intended for instructional improvement have been diverted to repair dilapidated facilities or to build new classroom space needed for state-mandated classes.<sup>41</sup> The only rational way to address this problem is to conduct an audit of capital needs, to build adequate facilities, and to provide for a fair

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40. Such was the case in Kentucky. See Trimble & Forsaith, *supra* note 6, at 605-13.

41. See, e.g., Firestone et al., *supra* note 31, at 367 (finding that low-wealth New Jersey school districts used funds earmarked for curriculum improvement to rebuild school facilities).

apportionment of the costs between state and local sources. There also should be an audit of instructional materials, because anecdotal evidence suggests that many poor, urban schools do not provide students with books and other materials to use outside of school.<sup>42</sup>

• *Study of student mobility and new attendance policies.* The problem of student mobility requires action at the school, district, and state levels. Schools and districts need to adopt intelligent and firm attendance policies. Districts may need to change attendance rules and provide transportation to maximize the likelihood of continuous instruction. Again, both the state and the local district should share these expenses. The district is in the best location to build a "tracking" system that is capable of identifying intra-district attendance patterns and assessing the effectiveness of various policies.<sup>43</sup>

• *Teacher mobility.* To address the problem of teacher mobility, states should begin experimenting with salary bonuses and other policies for increasing the number of qualified applicants per position and reducing turnover during the first five years of teaching. States may also need to consider reform of the personnel system by, for example, delegating hiring to the school level, removing unproductive personnel restrictions, and helping schools develop more effective personnel policies.<sup>44</sup>

• *Continued development of school-linked social services.* The development of social services for poor children is a long-range project with its own logic and timetable. For example, funding comes from multiple sources and varies significantly by state, district, and school.<sup>45</sup> Thus, a rational approach to

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42. See KOZOL, *supra* note 4, at 24, 28–29, 34, 49, 52–53, 63, 86–87, 131, 138–39, 157–58.

43. While districts may be overly bureaucratic and intrusive with respect to the core of the educational process, they, or some regional authority, may by necessary to deal with problems that are beyond the control of individual schools.

44. See generally RICHARD J. MURNANE ET AL., WHO WILL TEACH? POLICIES THAT MATTER (1991) (summarizing hiring practices, attrition rates, and the characteristics of prospective teachers and teachers who leave and later return to teaching, concluding with recommendations for licensing requirements and teaching incentives).

45. Michael W. Kirst, *Equity for Children: Linking Education and Children's Services*, 8 EDUC. POL'Y 583, 587–88 (1994).

this very important policy would ensure that the planning proceeds as expeditiously as possible.<sup>46</sup>

- *Changes in school size.* A final area needing special study is how best to create schools of a manageable size not larger than 500 students. There exist various ways to accomplish this goal—through schools within schools, or in conjunction with a building program. Timetables and logistics will also vary, adding to the importance of a planning process.

### *B. Additional Instructional Resources and Accountability Mechanisms*

This Part considers the core of the remedy for high-poverty schools: additional funds for accelerated instruction and mechanisms for encouraging efficient use of resources, that is, guarantees that the extra resources are, in fact, used for accelerated instruction.

1. *Calculating the Amount of Compensatory Aid*—The accepted method for calculating compensatory aid involves establishing the cost of the educational services necessary to reach defined educational outcomes.<sup>47</sup> The challenges of making the calculation in an adequacy context are great, though perhaps similar to other contexts, such as special and bilingual education. First, the minimum standard can be defined in different ways—for example, as all children reaching the minimum or as the average child reaching the state average or grade level. There are quite frequently a few children, overlapping with students in special education programs, who would require an exorbitant amount of resources to reach minimum achievement. Second, there are many potential categories of spending or types of services which have a plausible connection to higher achievement: safety, physical plant (e.g., heated classrooms), extra staff (e.g., tutors), extended instruction (e.g., preschool, summer school), staff for program management, professional development (e.g., training of teachers in

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46. See Madden, *Success for All*, *supra* note 20, at 599; Zigler & Finn-Stevenson, *supra* note 38, at 600–04; Sullivan, *supra* note 36, at 1–4 (suggesting collaboration as the means to encourage these plans).

47. See Richard A. Rossmiller, *Equity or Adequacy of School Funding*, 8 EDUC. POL'Y 616, 618 (1994).

accelerative teaching methods), higher salaries to hire and maintain qualified teachers, school-linked social services,<sup>48</sup> and bonuses to schools for outstanding performance.<sup>49</sup> Finally, schools differ in the efficiency with which they transform inputs into outcomes, so that different schools may require different amounts of money, and most schools could reach higher outcomes on existing resources. Finally, most high-poverty schools already receive some compensatory aid. Chapter 1 funds are distributed by the federal government to states and thence to local educational agencies according to the number of poor and low-achieving students in the school districts under those agencies.<sup>50</sup> Available monies are widely distributed because of a very low threshold of eligibility.<sup>51</sup> The basic grant is about \$1000 per pupil. A smaller amount of additional funds is distributed to localities with a concentration of eligible students, but even this threshold is below the national average, resulting in wide geographic coverage and low per-pupil amounts. Local education authorities have discretion about how to allocate funds across schools but presumably would include or favor high-poverty schools. Most funds go to elementary schools because of the perceived importance of preventing early educational deficits.<sup>52</sup> In 1987–1988, for example, seventy-one percent of the students served by Chapter 1 attended elementary school.<sup>53</sup> But, according to one study of a sample of schools, per-pupil expenditures funded by Chapter 1 were lowest in high-poverty schools located in low-revenue districts, “precisely the schools one would expect to have the greatest need.”<sup>54</sup>

It was recommended in Part III.A of this Article that studies be undertaken to establish the approach to spending in certain

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48. See Clune, *supra* note 14, at 387–88.

49. See generally Craig E. Richards et al., *Cooperative Performance Incentives in Education*, in REFORMING EDUCATION: THE EMERGING SYSTEMIC APPROACH 28 (Stephen L. Jacobson & Robert Berne eds., 1993) (discussing the use of cooperative performance incentives in education).

50. Chapter 1 funds are provided by the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2711 (1988 & Supp. V 1993).

51. Chapter 1 only requires that there be at least ten children eligible for funding in a district. See 20 U.S.C. § 2711(b), (c).

52. See Wayne C. Riddle, *Federal Aid for the Education of Disadvantaged Children: Funding, Participation and Legislative Trends*, in HELPING AT-RISK STUDENTS: WHAT ARE THE EDUCATIONAL AND FINANCIAL COSTS 12, 19–20 (Patricia Anthony & Stephen L. Jacobson eds., 1992).

53. *Id.* at 18.

54. JAY CHAMBERS ET AL., AMERICAN INST. FOR RESEARCH, TRANSLATING DOLLARS INTO SERVICES: CHAPTER 1 RESOURCES IN THE CONTEXT OF STATE AND LOCAL RESOURCES FOR EDUCATION at xv (1993).

categories, such as capital needs and teacher salaries. Some allowance also must be made for inquiry and proof in each lawsuit as to state standards and local needs. Despite these challenges, a tentative approach and even a typical dollar amount is emerging. First, raising the average achievement in high-poverty schools to the state average or to grade level seems a reasonable goal that satisfies the criterion of distributional equity in that no groups would be systematically disadvantaged.<sup>55</sup> Certainly this result would be a significant achievement for practically all high-poverty schools. Second, as for the amount which should be spent, given the complexity of the variables affecting outcomes, there is no substitute for a pragmatic approach that would determine a best estimate of the funds needed, to some extent influenced by the constrained financial conditions of most states. Well-financed accelerated schools spend about \$2000 per pupil on accelerated instruction, including extra staff, program management, outreach, preschool and professional development.<sup>56</sup> In theory, the amount of new aid required would be reduced by existing compensatory aid, including federal, or Chapter 1, and state aid. Finally, any costs associated with a new system of accountability and governance should not be deducted from compensatory aid to schools intended for instruction but rather should be added to the budgets of state and local government.

Such recommendations seem acceptable as a place to begin. Once a state starts a program of accelerated education for high-poverty schools, data can be collected on the conditions of success. For this reason, it may be advisable to fund groups of schools at various levels above and below the best estimate to provide a natural experiment.

2. *How to Structure the Rest of the Formula*—Compensatory aid is only one aspect of funding public education, and its effectiveness depends on the structure of the entire system of school finance. First, there is the old problem of the variable

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55. Henry M. Levin, *The Economics of Justice in Education*, in SPHERES OF JUSTICE IN AMERICAN SCHOOLS, 1990 YEARBOOK OF THE AMERICAN EDUCATION FINANCE ASSOCIATION 129-45 (D. Verstegen & J. Ward eds., 1991). Determining how long to maintain compensatory spending if achievement does not rise to the standard established is one of the problems considered in the desegregation case of *Missouri v. Jenkins*, 115 S. Ct. 2038, 2045-46 (1995).

56. Clune, *supra* note 14, at 388; William H. Clune, *Adequate and Efficient—The Role of Research*, in HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION (Helen Ladd ed., forthcoming 1996) (manuscript at 4, on file with the *University of Michigan Journal of Law Reform*).



base, addressed in federal law through comparability and supplementation requirements of Chapter 1.<sup>57</sup> If base spending varies widely among districts, compensatory aid will result in widely different amounts of total revenue available. Some variation can be allowed to recognize variable costs, efficiencies, and allowable differences in local educational goals, but the basic point remains—that compensatory aid must be added to an equal base in order to buy the same extra services for all schools. Second, new funds for public education are severely constrained in most states.<sup>58</sup> The overall formula must be designed intelligently so as not to “break the bank,” with enough left over after meeting other needs to fund the compensatory portion. Third, the politics of school finance makes it imperative to build and maintain a strong political coalition behind school reform that can continue to seek to satisfy other principles of justice and standards of minimum adequacy.<sup>59</sup>

This approach to the structure of school finance formulas, which is emerging in research and state policy making, meets various needs, offers something for a broad coalition of interests, and stays within reasonable revenue limits.<sup>60</sup> First, a moderately high foundation program serves as a base—minimum spending at a fixed local tax rate with the difference made up in state aid. The minimum spending level is indexed to a high spending rural district, perhaps the ninetieth percentile of rural

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57. See 20 U.S.C. § 2728(b), (c) (1988); see also MARK G. YUDOF ET AL., EDUCATION POLICY AND THE LAW 703 (3d ed. 1992) (explaining that Congress enacted fiscal requirements to ensure that school districts would spend Chapter 1 funding as intended).

58. See STEVEN D. GOLD, THE OUTLOOK FOR SCHOOL REVENUE IN THE NEXT FIVE YEARS at v, 5, 7 (Consortium for Policy Research in Educ. Research Report Series No. 34, 1995).

59. The Grossman Article in this Symposium provides an excellent description of the relationship between politics and litigation in Oklahoma. See Mark S. Grossman, *Oklahoma School Finance Litigation: Shifting from Equity to Adequacy*, 28 U. MICH. J.L. REF. 521, 548–51, 553–56 (1995).

60. See generally William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721 (1992) (presenting a three-part plan for improving the effectiveness of public education); Allan Odden et al., *The Intricacies of Reforming School Finance: Providing Property Tax Relief Through the School Finance System* (May 1995) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*). Note that the Supreme Court of New Jersey limited its remedy to the urban districts “with special educational needs,” and thus did not require a new system of aid for the entire state. *Abbott v. Burke*, 575 A.2d 359, 408–09 (N.J. 1990). The amount of aid ordered by the court for the special needs districts, however, approximated what would be available in a statewide system like the one recommended here, in effect creating a high foundation plus compensatory aid. See *id.*

spending.<sup>61</sup> This level of spending has the advantage of not forcing rural districts to spend more than they wish, thus saving money and avoiding political resistance. The "rural ninetieth" probably also corresponds to what independent study would establish as a minimally adequate, low-cost program for the state. If the required local tax rate is set properly, taxpayers in many poor districts will receive substantial local property tax relief, because many poor districts already exceed what is likely to be the required minimum.<sup>62</sup> The benefit comes from the state aid awarded for the minimum local rate. Thus, one important group—taxpayers in poor districts—is given some relief, while spending rises in a few low-wealth, low-taxing districts.<sup>63</sup>

A second tier of guaranteed tax base (GTB),<sup>64</sup> or power equalization, is added primarily to cover the generally higher average costs of suburban and urban districts, but the GTB is also available to the rural districts.<sup>65</sup> A GTB allows these districts to estimate their own costs by choosing a tax rate above the minimum in the foundation program, with the GTB compensating for the wealth of districts. But costs of a GTB can be large because of the stimulative effect of high matching grants in the lower wealth districts. To counter these costs, the program is constrained by setting the guaranteed tax base at a high but not unreasonable level, for example, the ninetieth percentile of wealth, and by setting a maximum spending level supportable by state aid, again set at about the ninetieth percentile of statewide spending. This part of the formula gives something to poorer urban and suburban districts in the coalition, avoids excessive costs, and provides a high base for compensatory aid. The assumption is that cities containing high-poverty schools will correctly estimate their general costs by setting a reasonably high local tax rate.

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61. See Allan R. Odden & William H. Clune, *School Finance Formulas: Aging Structures in Need of Renovation* 5, 18–19 (June 26, 1995) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

62. See ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* 200 (1992).

63. See *id.*

64. Under power equalization, an equal tax rate always yields the same spending throughout the state. The hypothetical tax base that would produce such spending at the defined rates is called the guaranteed tax base or GTB. When the local tax rate produces less than the guarantee, the difference is made up from state aid.

65. See ODDEN & PICUS, *supra* note 62, at 182–92.

Finally, the adequacy standard does not require limiting spending in the wealthiest districts through spending caps or recapture of local revenues for other districts. Lower spending in wealthy districts does not help the students in other districts; rather, it may harm them by removing a standard for excellence and intensifying political resistance.<sup>66</sup>

3. *Combining Dollars, Inputs, Programs, and Incentives: Solving the Dilemmas of Loose Coupling*—We now reach the problem of how to guarantee adequate outcomes from the additional spending. The first question is whether the remedy should require specific inputs, such as pupil to teacher ratios, certified teachers, and research-based educational programs; or whether high-poverty schools should have discretion in how to spend the categorical aid. This question is particularly important because input standards have been used in proof of the violation, as in the Alabama case,<sup>67</sup> and it is only natural to ask whether the remedy should consist of simply filling the gap between the standards and the actual practice.

Our best knowledge on this question suggests that while inputs can be used to monitor quality, diagnose potential problems, and set a vision of effective education, they should not be used as regulatory standards.<sup>68</sup> The reason is our uncertainty about the relationship between educational practices and outcomes or, in the language of production functions, the indeterminate mix of raw inputs that will produce good outcomes for specific teachers and students.<sup>69</sup> Specified inputs and levels of inputs are a best guess about effective average practice but may not be the best answer in a particular context. Thus, schools should be given considerable flexibility in how they spend resources and should be held accountable only for results. If the results are not good, then deviations from standard

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66. See Clune, *supra* note 60, at 739–40 (arguing against recapture of local tax revenues and spending caps for wealthy districts).

67. Morgan et al., *supra* note 7, at 564–81, 587–92.

68. See Andrew C. Porter, *National Equity and School Autonomy*, 8 EDUC. POL'Y 489, 490 (1994); Andrew C. Porter, *The Uses and Misuses of Opportunity-to-Learn Standards*, EDUC. RESEARCHER, Jan.–Feb. 1995, at 27 [hereinafter Porter, *Standards*]; see also Lorraine M. McDonnell, *Opportunity To Learn As a Research Concept and a Policy Instrument*, 17 EDUC. EVALUATION & POL'Y ANALYSIS 305, 317–18 (1995) (concluding that "opportunity-to-learn" standards as a policy will remain primarily hortatory because of their political history and technical limitations).

69. See David H. Monk, *Policy Challenges Surrounding the Shift Toward Outcome-Oriented School Finance Equity Standards*, 8 EDUC. POL'Y 471, 473, 481 (1994).

practice may be used to explain why and to suggest possible avenues for improvement.

In this framework, the role of input standards in the violation stage is to establish a plausible link between low spending and low outcomes by demonstrating the absence among poor schools of typically effective practice. The ultimate remedy, however, should not tie the schools to typical practice and, indeed, should encourage more freedom than is allowed under certification standards.<sup>70</sup> Of course, equitable remedies have traditionally been flexible and discretionary,<sup>71</sup> and some tension between a standard-oriented violation phase and a flexible remedial phase is to be expected in public law litigation.

The one set of inputs which must be imposed from the outside is embedded in the basic theory of accountability for outcomes. When a state establishes the knowledge and skills for which schools are accountable through testing or other indicators, it also imposes, implicitly or explicitly, a curriculum of subject areas and specific skills within the subject matters.<sup>72</sup> Public authorization of the objectives of education is so fundamental to the state role that the Kentucky Supreme Court ordered the legislature to develop a statewide curriculum and student assessment as part of the constitutional requirement of a true "system" of public schools.<sup>73</sup> The danger of becoming too prescriptive about educational outcomes has prompted advocates of systemic reform to urge curriculum "frameworks" rather than detailed regulation of curriculum.<sup>74</sup> Yet the risk of detailed

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70. The Morgan et al. Article in this Symposium describes the detailed focus on inputs and input standards which characterized the violation stage of the Alabama litigation, but also refers to an ongoing remedial phase which considers a wide range of flexible remedies. Morgan et al., *supra* note 7, at 594-98. See also Robert E. Slavin, *Statewide Finance Reform: Ensuring Educational Adequacy for High-Poverty Schools*, 8 EDUC. POL'Y 425, 430-33 (1994) (listing seven kinds of programs with strong research bases for states to consider).

71. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292-1302 (1976).

72. Cf. Porter, *Standards*, *supra* note 68, at 22 (discussing the ways in which schools might be held accountable for meeting certain standards).

73. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215-16 (Ky. 1989). Note that a state or school district could authorize standards by approving those of intermediate agencies such as school improvement networks. See William H. Clune, *The Best Path to Systemic Educational Policy: Standard/Centralized or Differentiated/Decentralized?*, 15 EDUC. EVALUATION & POL'Y ANALYSIS 233, 245 (1993). Networks also might serve as the agent for accountability in bilateral contracts discussed *infra* Part III.C.

74. See, e.g., Marshall S. Smith & Jennifer O'Day, *Systemic School Reform*, in THE POLITICS OF CURRICULUM AND TESTING: THE 1990 YEARBOOK OF THE POLITICS OF EDUCATION ASSOCIATION 233, 249 (Susan H. Fuhrman & Betty Malen eds., 1991).

control is always present, sometimes in paradoxical ways. Portfolio assessment of student performance, for example, may be liberating for the student relative to standardized tests, but may go far toward regulating educational practice. For example, if students are to be assessed through written work they do for regular classes, then teachers may conform their practices to produce such papers.<sup>75</sup>

### C. What Kind of Governance? Solving the Problems of Knowledge, Productivity, and Political Support

The next question is what system of governance is best suited to measuring outcomes while otherwise leaving maximum discretion at the school level? Four broad options<sup>76</sup> are available: (1) local control or laissez-faire, (2) state reform, (3) bilateral contracts with schools, and (4) family choice or educational vouchers. This Part discusses the advantages and disadvantages of each, concluding that some form of technically assisted bilateral contract, such as chartering, is the most realistic option for achieving substantial improvements in outcomes among high-poverty schools.

Local control, or laissez-faire, is the historic system of educational governance in the United States.<sup>77</sup> It is also the reason why the United States is so unusual in the world context.<sup>78</sup> Educational reforms are gradually eroding this aspect of the system.<sup>79</sup> The advantage of local control, is allowance for maximum flexibility at the school level for defining and implement-

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75. See Porter, *Standards*, *supra* note 68, at 23. The Trimble and Forsaith Article in this Symposium contains several good discussions of the pressure exerted on practice by the Kentucky student assessment. See Trimble & Forsaith, *supra* note 6, at 616, 618-22, 626-30.

76. These options can be combined in various ways.

77. See David K. Cohen, *Governance and Instruction: The Promise of Decentralization and Choice*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE THEORY OF CHOICE AND CONTROL IN EDUCATION 337, 337-38 (William H. Clune & John F. Witte eds., 1990); cf. John F. Witte, *Choice and Control: An Analytical Overview*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE THEORY OF CHOICE AND CONTROL IN EDUCATION 11, 30-31 (William H. Clune & John F. Witte eds., 1990) (arguing that proponents of decentralization are incorrect to characterize American education as a uniform, hierarchically and centrally controlled system).

78. David K. Cohen & James P. Spillane, *Policy and Practice: The Relations Between Governance and Instruction*, 18 REV. RESEARCH EDUC. 3, 6-7 (1992).

79. See *id.* at 7-8.

ing appropriate objectives. Research suggests, for example, the importance in accountability systems of measuring a wide range of student performance and giving teachers broad flexibility in meeting the widely varying learning needs of individual students.<sup>80</sup> But complete local control has fallen into disfavor because it has not produced high minimum outcomes,<sup>81</sup> and it seems to lack the external pressure to change that is needed to offset bureaucratic inertia. At least three main biases or flaws of educational organization have been accepted as requiring some system of external accountability—a lack of outcome focus, multiple and conflicting goals, and a lack of incentive for efficient use of resources.<sup>82</sup>

State reform is the most common emerging alternative to local control.<sup>83</sup> The great advantage of state reform is the hope for some degree of coherence in educational policy, giving schools authoritative guidance about what is expected of them and providing powerful statewide incentives for performance, such as high-stakes student examinations. A vigorous debate is emerging in the United States about advantages and disadvantages of central control, as well as dispute over exactly what this concept means.<sup>84</sup>

However, central control clearly must be supplemented and adapted for success in high-poverty schools because of a lack of performance standards and structured technical assistance. Even avant-garde state reforms such as Kentucky's emphasize content standards<sup>85</sup> and general standards of performance over

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80. See Linda Darling-Hammond, *Creating Standards of Practice and Delivery for Learner-Centered Schools*, 4 STAN. L. & POL'Y REV. 37, 47–48 (1992–1993).

81. See generally Hanushek, *supra* note 10, at 423–56 (discussing various misconceptions and problems surrounding school finance reform efforts).

82. For a related discussion, see William H. Clune, *The Cost and Management of Program Adequacy: An Emerging Issue in Educational Policy and Finance*, 8 EDUC. POL'Y 365, 368–69 (1994) (summarizing the work of several scholars on the adequacy of educational policy and finance).

83. For example, sophisticated recommendations from the Legislative Research Commission served as the architecture for the ambitious system of reforms in Kentucky. See Memorandum from David W. Hornbeck to Chairmen David K. Karem and Jody Richards and Members of the Curriculum Committee of Kentucky (Feb. 15, 1990) (on file with the *University of Michigan Journal of Law Reform*).

84. See generally Clune, *supra* note 73, at 233 (evaluating the problems and implications of systemic educational policy and concluding that such a policy is “fatally flawed”); Charles L. Thompson et al., *The State Policy System Affecting Science and Mathematics Education in Michigan* (Sept. 1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*) (comparing two approaches to systemic reform as they would relate to teaching mathematics in Michigan).

85. Content standards are those that define the knowledge and skills every student is to learn.

performance standards<sup>86</sup> for particular groups of students. The common approach to performance standards in statewide reform is "value added," an approach that expects schools to show improved scores annually.<sup>87</sup> To be sure, yearly gains would be welcome in high-poverty schools, and they are the focus of recent reforms in federal Chapter 1 aid for disadvantaged students and high-poverty schools.<sup>88</sup> But modest gains fail to express the idea of high minimum outcomes which is central to the theory of adequacy, and value-added reform may be a prescription for never escaping embedded patterns of educational failure. State reform also fails to offer high-poverty schools the kind of focused technical assistance and professional development that would be congruent with many higher performance goals, such as programs for rapid acceleration of outcomes.

A system of family choice, or vouchers, has much to recommend and probably should be part of the reform of high-poverty schools in some way. One advantage is a fundamental aspect of accountability through which parents can show their displeasure by simply abandoning bad schools, rather than appealing to a cumbersome and indifferent bureaucracy. When schools fail to show adequate progress in Kentucky, for example, family choice is one of the remedies which is automatically invoked.<sup>89</sup> Choice systems also may encourage the formation of motivated educational communities over time and encourage healthy competition in the whole system.<sup>90</sup> One cannot, however, begin with choice as a universal remedy as it poses several grave dangers. Choice schools have no obvious incentive to adopt accelerated education.<sup>91</sup> Choice systems also pose a problem on

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86. Performance standards establish levels of knowledge and skill to be attained by different groups of students at different times.

87. See Trimble & Forsaith, *supra* note 6, at 640-41, 645.

88. See COMMISSION ON CHAPTER 1, MAKING SCHOOLS WORK FOR CHILDREN IN POVERTY 29-31 (1992).

89. Trimble & Forsaith, *supra* note 6, at 649-50.

90. See JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES 221-33 (1987) (discussing the "human capital" and "social capital" provided to students by supportive and educated families and communities).

91. See William H. Clune, *Educational Governance and Student Achievement*, in 2 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE PRACTICE OF CHOICE, DECENTRALIZATION AND SCHOOL RESTRUCTURING 391, 409-10 (William H. Clune & John F. Witte eds., 1990); William H. Clune, *Educational Policy in a Situation of Uncertainty; Or, How to Put Eggs in Different Baskets*, in THE POLITICS OF CURRICULUM AND TESTING: THE 1990 YEARBOOK OF THE POLITICS OF EDUCATION ASSOCIATION 125, 133 (Susan H. Fuhrman

the supply side. An adequate supply of private schools takes a long time to develop, especially if parochial schools are excluded. Furthermore, poorly designed choice systems could severely harm poor children, unless courts were as willing to strike down inadequate voucher schools as inadequate state-run schools.<sup>92</sup> In sum, voucher schools should not be starved of resources, should be subject to the same standards of minimum student achievement, and should not be exempt from performance sanctions—both rewards and punishments.

Thus, at least in the short term, the most promising way to institutionalize high expectations, technical assistance, and local flexibility for high-poverty schools is to institute some variation of bilateral contracting.<sup>93</sup> An agency of government must reach an agreement with each school about the high outcomes which the school would target and the means necessary to reach these outcomes. The government unit can be the state, the district, or an independent professional agency, and there may be standard agreements. Research on accelerated education shows quite clearly that the key component and critical first phase of restructuring is obtaining the consent of the local staff about the ends and means of accelerated education.<sup>94</sup> This agreement may then serve as the blueprint for monitoring outcomes, technical assistance, and accountability through the use of group bonuses and graduated sanctions.

Many aspects of this kind of bilateral contracting remain to be developed and refined. For example, the agency involved with accountability should also offer technical assistance.<sup>95</sup> Also,

& Betty Malen eds., 1991). For an analysis of a particular choice system, see JOHN F. WITTE ET AL., *FOURTH-YEAR REPORT MILWAUKEE PARENTAL CHOICE PROGRAM* (1994).

92. See Carnoy, *supra* note 12, at 52.

93. See Clune, *supra* note 14, at 380 (noting the contractual nature of the "true adequacy" approach); Linda Darling-Hammond, *Standards of Practice for Learner-Centered Schools*, in *OUTCOME EQUITY IN EDUCATION* 191, 197-98 (Robert Berne & Lawrence O. Picus eds., 1994) (listing ways to make schools more accountable and noting that school districts also must pledge themselves to certain standards); Henry M. Levin, *The Necessary and Sufficient Conditions for Achieving Educational Equity*, in *OUTCOME EQUITY IN EDUCATION* 167, 181 (Robert Berne & Lawrence O. Picus eds., 1994) (suggesting that quality education of at-risk students requires a unity of purpose among those who respectively plan, implement, and evaluate educational programs).

94. For example, the "Success for All" schools, developed by Robert Slavin, require that 80% of the school's staff agree to participate in the program. ROBERT E. SLAVIN ET AL., *SUCCESS FOR ALL: A RELENTLESS APPROACH TO PREVENTION AND EARLY INTERVENTION IN ELEMENTARY SCHOOLS* 42 (1992). Levin's "accelerated schools" also require the involvement of the school's staff in designing curriculum and strategies. Levin, *Accelerated Schools*, *supra* note 13, at 21; Barnett, *supra* note 22, at 5-6, 7.

95. The Kentucky system does so at the state level. See Trimble & Forsaith, *supra* note 6, at 632-37.



while withdrawal of compensatory aid could be used justifiably as an ultimate sanction, the agency should have authority for some system of graduated sanctions and intensified technical assistance if schools in difficulty are to be improved rather than simply punished.<sup>96</sup>

Despite its appeal, bilateral contracting has plenty of disadvantages. The contracts themselves could become empty exercises of paperwork or emphasize process and planning rather than substance. Such was the fate of a similar system in a previous phase of the New Jersey litigation.<sup>97</sup> The governance system also could be bureaucratically unwieldy and beyond the technical capacity of our political system. The strains placed by reforms on state education agencies are a sobering example of this danger.<sup>98</sup> Nevertheless, the fundamental structural advantages are great. Even a simple system could succeed in giving high-poverty schools three things we have never given them before: clear expectations about level of performance, technical assistance about how to make improvements, and meaningful rewards for success.

Bilateral contracting also is not as strange and novel as it sounds. All over the country, school districts are resorting to varieties of contracting for improved performance: charter schools, regulated vouchers, privatization, and so forth.<sup>99</sup> Under

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96. The Kentucky reforms offer a promising first approximation of such graduated responses at the state level. *See id.* at 649–50.

97. *See* *Abbott v. Burke*, 575 A.2d 359, 392 (N.J. 1990) (finding that the system designed “to measure and achieve a thorough and efficient” educational system had failed to meet its goal); *see generally* William A. Firestone & Brianna Nagle, *Differential Regulation: Clever Customization or Unequal Interference* (July 1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*) (describing the regulatory oversight system for “special needs districts” in New Jersey and how that system created “additional paperwork burdens”).

98. *See, e.g.*, Richard F. Elmore & Susan H. Fuhrman, *Governing Curriculum: Changing Patterns in Policy, Politics, and Practice*, in *THE GOVERNANCE OF CURRICULUM: 1994 YEARBOOK OF THE ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT* 1, 8 (Richard F. Elmore & Susan H. Fuhrman eds., 1994) (describing the knowledge, resource, and political barriers that policymakers and administrators face in implementing reform); Susan F. Lusi, *Systemic School Reform: The Challenges Faced by State Departments of Education*, in *THE GOVERNANCE OF CURRICULUM: 1994 YEARBOOK OF THE ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT* 109, 127 (Richard F. Elmore & Susan H. Fuhrman eds., 1994) (“Systemic school reform requires much deeper reforms than bureaucracies typically allow.”).

99. *See generally* CHOICE AND CONTROL IN AMERICAN EDUCATION (William H. Clune & John F. Witte eds., 1990) (analyzing both the theory and the practice of school choice and decentralization); Priscilla Wohlstetter, *Education by Charter*, in *SCHOOL-BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE* 139 (Susan A. Mohrman et al. eds., 1994) (comparing charter-school legislation in several states and in England).

considerable pressure from various sources, political authorities appear to be discovering the comparative advantages of this form of governance.<sup>100</sup> The coming period should be an interesting one in American educational history and a time for learning how to model new governance arrangements on successful experiments.

#### IV. CONCLUSION: SUCCESS IS EVEN BETTER THAN ACCOUNTABILITY

If we are gradually entering a period of educational policy characterized by compensatory aid for high-poverty schools and new kinds of educational governance, there are at least two great risks in the whole experiment: political skepticism and "getting to scale." Political skepticism about increased educational spending is rampant throughout society and even more so when the recipients are poor children who are racial or ethnic minorities. For instance, the long history of the New Jersey litigation is, among other things, a case study in a court battling negative political trends in suburbs and rural areas that oppose redistribution of wealth to poor cities.<sup>101</sup> A related problem is that of "getting to scale"—where good ideas about teaching practice and school organization seldom move to most schools when they are demonstrated to be effective in a few.<sup>102</sup> Most efforts to improve urban schools, like most efforts to implement any social policy, encounter various degrees of acceptance and resistance from different communities.<sup>103</sup> For

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100. See TED KOLDERIE, PUBLIC SERVICES REDESIGN PROJECT, CTR. FOR POLICY STUDIES, *THE CHARTER IDEA: PROGRESS IN '94; A BATTLE COMING IN '93* at 2 (n.d.); Kathleen Sylvester, *Setting Schools Free: The Charter School Movement in Public Education*, NETWORK NEWS & VIEWS, Oct. 1994, at 95, 95. See generally MARC D. MILLOT, PROGRAM FOR RE-INVENTING PUBLIC EDUCATION, INST. FOR PUB. POLICY AND MANAGEMENT & RAND, *WHAT ARE CHARTER SCHOOLS?: AN INTRODUCTION TO THE CONCEPT AND THE STATUTES* (n.d.) (describing the charter school concept).

101. See Firestone et al., *supra* note 31, at 360 (discussing the public's resistance to school finance reform); Goertz, *supra* note 8, at 363 (discussing Republican resistance to increased funding for urban schools).

102. Richard F. Elmore, *Getting to Scale With Successful Educational Practices 2-3* (Nov. 22, 1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

103. See, e.g., Henry M. Levin, *Little Things Mean a Lot*, 8 EDUC. POL'Y 396 (1994) (both endorsing and criticizing my adequacy model for school finance reform); Hess, *supra* note 34, at 544-67 (raising concerns about my adequacy theory from the point of view of a practitioner).

example, a small group of "connoisseur" schools may adopt reforms enthusiastically and skillfully; a middle group of schools may be slower but eventually may show substantial improvement; a final group, perhaps thirty percent, may be highly resistant to change, perhaps for reasons which remain elusive even under close inspection.<sup>104</sup> The two problems can converge in a social planner's nightmare when a large, poorly designed and financed program encounters strong resistance to implementation and social impatience with cost and lack of results.

I believe that the cure to these daunting problems is to build a program which emphasizes success over accountability. Success can be maximized by going slowly to scale rather than implementing the whole system all at once. Improvement efforts should focus first on the early grades, for example, grades one to three, because the youngest children have not yet fallen disastrously behind in their progress. Schools should be admitted to contracting status gradually to provide examples of success before any significant increases in taxes and to provide lessons from early successes and failures.

While the challenges are great, so is the promise. The two earlier experiments in vertical equity, special education and bilingual education, have serious problems, but are also accepted as at least partial success stories. How can deaf children and children who do not speak English make adequate progress without special attention to their communicative problems? At the most fundamental level, the concept of adequacy in school finance is extremely simple: it recognizes the special needs of a new group of students, those in high-poverty schools. Adequacy theory sets appropriate, high expectations of performance, and it delivers the resources and governance necessary to reach those goals.

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104. For a description of the results of one Chicago program, see Hess, *supra* note 34, at 557-58 (finding that one-third of the schools studied engaged in significant reform, one-third in unfocused changes, and one-third in few changes). See also Levin, *supra* note 103, at 400 (estimating that, in one program, half of the schools "take off immediately," one-third take more time, and 15% face serious obstacles).