

Rutgers

Journal of Law & Public Policy

VOLUME 4

FALL 2006

ISSUE 1

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The *Rutgers Journal of Law and Public Policy* (ISSN 1934-3736) is published three times per year by students of the Rutgers School of Law – Camden, located at 17 North Fifth Street, Camden, NJ 08102. The views expressed in the *Rutgers Journal of Law & Public Policy* are those of the authors and not necessarily of the *Rutgers Journal of Law & Public Policy* or the Rutgers School of Law – Camden.

Form: Citations conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005). Please cite the *Rutgers Journal of Law & Public Policy* as 4 RUTGERS J.L. & PUB. POL'Y __ (2006).

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Rutgers
Journal of Law & Public Policy

VOLUME 4

FALL 2006

ISSUE 1

**Current Issues In Public
Policy**





THE MYTHS OF SCHOOL CHOICE: REFLECTIONS ON THE TWO-INCOME TRAP

Susan L. DeJarnatt¹

INTRODUCTION

What do the debate about the rising number of bankruptcy filings and the debate about public school reforms have to do with each other? Quite a lot according to Elizabeth Warren² and Amelia Tyagi, mother and daughter co-authors of *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE*

¹ Associate Professor of Law, the James E. Beasley School of Law of Temple University. I deeply appreciate the helpful comments of Theresa Glennon, David Hoffman, Kathy Stanchi, and Peter Schneider and the gracious feedback I received from Elizabeth Warren on earlier drafts. I also appreciate the financial support I received from the James E. Beasley School of Law of Temple University, and the research assistance of Richard Balsley.

² Elizabeth Warren is one of, if not the, preeminent scholars of empirical research about bankruptcy and debt. Jean Braucher's review of *THE TWO-INCOME TRAP* catalogues Warren's work, concluding that it "compellingly makes the case that the 'democratization of credit,' meaning a huge expansion in volume of available credit, particularly into sub-prime sectors at high rates of interest, is the single best explanation for the higher numbers of personal bankruptcy filings in recent decades." Jean Braucher, *Middle-Class Knowledge*, 21 EMORY BANKR. DEV. J. 193, 195 (2004). Warren's work includes TERESA A. SULLIVAN, ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989); TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000); Teresa A. Sullivan et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L.J. 121 (1994); Teresa A. Sullivan et al., *Folklore and Facts: A Preliminary Report from the Consumer Bankruptcy Project*, 60 AM. BANKR. L.J. 293 (1986); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801 (1994).

GOING BROKE.³ They conclude that middle-class families are driving themselves into debt and risking bankruptcy because of their desperation to buy houses in safe neighborhoods with good schools.⁴ They further conclude that switching the structure of public education to a voucher system will reduce this financial pressure by separating access to good schools from its current dependency on place of residence.⁵

Warren has been actively involved in policy discussions about bankruptcy and has used her academic research to try to persuade members of Congress, the media, and even presidential candidates to push for bankruptcy reform that addresses the realities shown by that research.⁶ In *THE TWO-INCOME TRAP*, Warren and Tyagi reach out even further to the general reading public, to engage them in the discussion of why Americans are carrying so much consumer debt. The book has been widely reviewed and critiqued by bankruptcy scholars who agree with Warren that high rates of bankruptcy are a symptom of loose credit standards and financial pressure.⁷ The book has

³ ELIZABETH WARREN & AMELIA TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE* (Basic Books 2003) [hereinafter WARREN & TYAGI]. Warren and Tyagi also collaborated to write *ALL YOUR WORTH; THE ULTIMATE LIFETIME MONEY PLAN* (Free Press 2005); a clear, down-to-earth guide to money management for the ordinary person.

⁴ WARREN & TYAGI, *supra* note 3, at 8. Warren and Tyagi define middle class fairly loosely, based on “enduring criteria . . . such as going to college, owning a home, or having held a good job.” *Id.* at 7. The family they use as a prototype for today’s middle-class family of four has an annual income of approximately \$68,000. *Id.* at 50.

⁵ *Id.* at 34.

⁶ WARREN & TYAGI, *supra* note 3, at 123. Warren served as the reporter for the National Bankruptcy Review Commission and has written numerous opinion pieces and spoken in many forums about bankruptcy and various reform proposals. Warren’s curriculum vitae includes her numerous publications and other professional activities, *available at* <http://www.law.harvard.edu/faculty/ewarren/cv.php> (last visited July 30, 2006).

⁷ *See, e.g.*, Braucher, *supra* note 2; James Sullivan, *Book Review: The Two-Income Trap: Why Middle Class Mothers and Fathers Are Going Broke*, 27 HARV. WOMEN’S L.J. 273 (2004) (praising the book’s value for women’s groups and encouraging them to consider the disproportionate harm that bankruptcy and debt inflict on women).

also been critiqued by those who disagree and believe that American consumers are profligate spenders who no longer feel sufficient stigma from failing to pay their debts.⁸ The focus of this article, however, is not on the book's analysis of the motives of bankruptcy filers but on its conclusions about how to respond to the causes of increasing debt burdens. The book concludes that a major contributing factor in the increased debt load of the middle class is the perceived decline of public schools, which has driven middle-class families into a bidding war for housing in "good" school districts, and that bidding war has left many of those families extremely vulnerable to any financial setback like illness or job loss.⁹ Warren and Tyagi propose to end the bidding war by using a voucher system to cut the tie between school assignment and residence.¹⁰

⁸ See, e.g., Kevin Dwyer, Book Note, *The Two-Income Trap*, 6 J. L. & FAM. STUD. 365, 373-375 (2004) (critiquing Warren and Tyagi for failing to sufficiently examine the role of bad behavior by consumers in increasing rates of bankruptcy filings but praising the book for offering a "uniquely realistic perspective on the often ethereal debate on bankruptcy reform."). Todd J. Zywicki offers a contrary diagnosis, that the increase in consumer bankruptcy filings reflects not increased economic distress but "an increasing propensity for American households to file bankruptcy in response to economic problems." Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1540 (2005).

⁹ Mechele Dickerson critiques Warren and Tyagi for an unexamined use of the term "good" to describe schools:

The book never explains how parents determine what is a "good," "safe," neighborhood or school. Housing and school segregation patterns suggest, however, that some middle-class parents consciously or unconsciously use "good and safe" as a proxy for predominately or exclusively "nonminority." This Review suggests that middle-income parents can no longer afford these racial housing preferences. The Review summarizes the problems middle-class families face, then argues that what is viewed as "good" and "safe" may be based more on racially biased perceptions than on reality. The Review concludes by arguing that the best way to help middle-class families avoid the income trap is to make school assignments without regard to the student's street address and to allow parents who live in integrated neighborhoods to participate in an auction to buy a slot in their first-choice school.

A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. 1273, 1273-4 (2005).

¹⁰ WARREN & TYAGI, *supra* note 3, at 34.

I fall into the camp of those who think high bankruptcy rates are a symptom, not a disease.¹¹ The opposing camp has finally, after many years, achieved its goal of making consumer bankruptcy a much more difficult option for most people.¹² It will be interesting to see if, as bankruptcy rates come down, borrowing declines too. Under the 2005 reform of bankruptcy law it has become much more expensive to file, harder to find a lawyer, and significantly more difficult to get a full discharge of consumer debt.¹³ So why am I bothering to respond to a book that is focused on a battle that is, at least temporarily, over? Because the fundamental perspective of *THE TWO-INCOME TRAP* is about why consumer debt has risen, not whether consumer bankruptcy is the best solution for those with that debt. Under Warren and Tyagi's analysis, the pressures driving American families into debt are not going away; they will remain unaffected by the changes in the bankruptcy law. In a word,

¹¹ Susan L. DeJarnatt, *Once Is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection*, 74 IND. L.J. 455 (1999).

¹² The 2005 reform, entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as 11 U.S.C. §101 et. seq.), became effective on October 17, 2005, though a few provisions were effective upon its enactment in April 2005. Melissa Jacoby points out that this bill as enrolled has fifteen titles and over two hundred sections, many of which make multiple changes to Title 11, Title 28, and other parts of the United States Code. Melissa Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169 (2005). The centerpiece of the Act is the imposition of a means-test for eligibility for Chapter 7 consumer bankruptcy. 11 U.S.C. §707 (2006). This test requires would-be debtors to demonstrate financial eligibility to avoid the presumption that the bankruptcy filing should be dismissed as an abuse of the bankruptcy process. The Act also places numerous other burdens and limitations on the debtors, their lawyers, and their potential discharges. See Henry Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191 (2005).

¹³ See, e.g., Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457 (2005); Sommer, *supra* note 12.

children cause debt—and children are not going away any time soon.¹⁴

Children are the source of the financial pressure on American families because parents feel compelled, in Warren and Tyagi's words, to devote more of their resources that they should to winning the competition for housing¹⁵ in the limited number of communities perceived to have "good" schools.¹⁶ This pressure is preceded by the costs of preschool which enables both parents to work outside the home and is viewed by middle-class parents as an essential first step in the education process. The K-12 pressure is also succeeded by the growing expense of college, which, similarly, is now widely viewed as essential to maintaining middle-class status.

Warren and Tyagi offer several prescriptions to ease this burden—government funding of quality preschool,¹⁷ a cap on college tuition,¹⁸ and a voucher system for public education.¹⁹ My focus is on the last of these. Warren and Tyagi argue that vouchers will dampen the housing competition by cutting the tie between residence and school assignment, and will result in improved education for all families, by implication resolving the public education crisis as well. It is ironic that THE TWO-INCOME TRAP, which does such an effective job of debunking the myths that consumer debtors are immoral over-spenders, itself accepts similar myths about the "crisis" in public education at seemingly

¹⁴ WARREN & TYAGI, *supra* note 3, at 13. "Having a child is now the single best predictor that a woman will end up in financial collapse." *Id.* at 6 (emphasis in the original).

¹⁵ Buying a house is typically the middle-class family's single biggest expense. *Id.* at 20.

¹⁶ Warren and Tyagi also identify health care, job insecurity, and divorce as other key, often overlapping, contributory factors to the financial pressures on American families. WARREN & TYAGI, *supra* note 3, at 82, 84, 85-86, and 88.

¹⁷ WARREN & TYAGI, *supra* note 3, at 39.

¹⁸ *Id.* at 44.

¹⁹ *Id.* at 35-36. Warren and Tyagi also recommend limits on interest, elimination of taxes on savings, and making disability and health insurance universally available. *Id.* at 144, 69, and 92.

face value.²⁰ These myths include the assertion that public education is currently failing and that vouchers will solve this crisis in a fair, easy, parent-driven manner.²¹ Before we can determine if public school vouchers would be an effective solution to the debt problem, I hope to take a closer look at the debt crisis identified by Warren and Tyagi and whether the education myths need some debunking as well.

First, I will briefly review Warren and Tyagi's analysis about the interplay between debt burdens and bankruptcy filings. The bulk of this article will contrast the myths about debtors which Warren and Tyagi debunk, with the myths about public education which they accept fairly uncritically. I will look at the basis for the perception that public education is in crisis and will examine the myths that school choice in the form of vouchers is parent-driven, fair, easy, and democratic, and thus will solve the problems of inequity and of middle-class debt burden that Warren and Tyagi identify.

I conclude that Warren and Tyagi correctly diagnose the problem—that the tie between residency and school assignment puts enormous and expensive pressure on families' decisions about where to live and that inequities in school quality hurt all families, including those who buy their way into "good" schools. "Failing schools impose an enormous cost on those children who are forced to attend them, but they also inflict an enormous cost on those who don't."²² Yet the voucher solution will not

²⁰ "Everyone has heard the all-too-familiar news stories about kids who can't read, gang violence in the schools, classrooms without textbooks, and drug dealers at school doors." *Id.* at 23. In fairness to the authors, public education is not the primary focus of the book and the authors do not purport to offer vouchers as a panacea. *Cf.* JOHN E. CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 217 (The Brookings Institution, 1990). Chubb and Moe do promote vouchers as exactly that—a panacea that will fix the shortcomings of a public education system run by democratically elected governments. *Id.*

²¹ *See id.*; MACKINAC CENTER FOR PUBLIC POLICY, PARENTS AS THE ENGINE OF CHOICE, available at <http://www.mackinac.org/article.aspx?ID=1062> (last visited July 30, 2006); Center for Education Reform, *Nine Lies About School Choice: Proving the Critics Wrong*, CENTER FOR EDUCATION REFORM REPORT, September 1, 2005, available at <http://www.edreform.com/index.cfm?fuseAction=document&documentID=825§ionID=74&NEWSYEAR=2006> (last visited July 31, 2006).

²² WARREN & TYAGI, *supra* note 3, at 23.

effectively ease that pressure. Instead it will further disadvantage the poor and their communities while, at best, merely changing the pressure point for the middle class from housing to tuition. It will also undercut the democratic and communal responsibility for education that animates our current system, putting at risk the enormous benefits we all reap from having a universal system of public education.²³ Breaking

²³ David Labaree identifies three conflicting goals for the public education system—democratic equality, social efficiency, and social mobility. David Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 AMER. EDUC. RESEARCH J. 39, 41 (1997). Labaree notes that the tension between these conflicting goals fuels conflicts over the role of schools and the goals of reform movements. *See id.* The democratic equality goal represents the view of the citizen and focuses on the need for schools to prepare children for equal participation in the political process. *Id.* at 42. The social efficiency goal represents the perspective of the taxpayers and employers and focuses on preparation of children to become productive workers. *Id.* The social mobility goal represents the viewpoint of the educational consumer and sees education as “a private good designed to prepare individuals for successful social competition for the more desirable market roles.” *Id.* at 42. Labaree notes that the third goal has come to dominate, and “[a]s a result, public education has increasingly come to be perceived as a private good that is harnessed to the pursuit of personal advantage” *Id.* at 43. Warren and Tyagi focus nearly exclusively on this third goal, social mobility. Although they acknowledge the role public education has played as an engine of democracy, their focus on vouchers all but ignores that goal of democratic education and does not adequately recognize the costs of treating education as a private, not a public good. Though the common school system has not completely succeeded in making equality of opportunity a reality, equality of opportunity remains one of its fundamental purposes. I write from the perspective that this goal remains critical and reforms to public education should be evaluated on their effect on it. I also adhere to the belief that the other fundamental purpose of public education is to prepare children to be full participants in democracy, to be able to voice their concerns and to understand and engage in representative democratic government, Labaree’s first identified goal. *Id.* at 42. *See also*, Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. (forthcoming 2006) [hereinafter Liu, *Education, Equality, and National Citizenship*] (arguing for a congressional duty to guarantee educational adequacy arising from the national citizenship language of the 14th Amendment). Liu defines educational adequacy for citizenship as requiring “a threshold level of knowledge and competence for public duties such as voting, serving on a jury, and participating in community affairs, and for the meaningful exercise of civil liberties like freedom of speech.” *Id.* at 13. This idea has animated efforts to support public education dating back to its early years. Liu quotes Senator Henry Blair of New Hampshire’s arguments advocating federal support for public education in 1884: “[b]y the public life of an American citizen I refer to his life as a sovereign; to his constant participation in the active government of his country: to the continual study and decision of

the residence / assignment tie in other ways will provide a more fair and democratic step towards easing the debt burden and giving all of our children more equal access to quality education.

I. COMPARATIVE MYTHS — IMMORAL DEBTORS, OVERCONSUMPTION, AND FAILING SCHOOLS

A. THE CAUSE OF DEBT — PROFLIGACY OR CHILDREN?

The heart of THE TWO-INCOME TRAP is a thorough debunking of the arguments that the explosion of bankruptcy filings is the result of over-consumption and moral weakness. The authors use detailed personal histories and a wealth of data to demonstrate that middle-class American families are spending about what they did several decades ago on most budget items except for health care and housing. Warren and Tyagi examine the data on expenditures for a single earner family from the early 1970s and contrast that with data for similar expenditures as a percentage of income for the two income family more common today.²⁴ They conclude that the current average middle-class family has a higher income compared to the single earner household of thirty years ago but devotes more of that income to fixed expenses.²⁵ This expense inflexibility combined

political issues which devolve upon him whatever may be his occupation”
Id. at 36 (quoting CONG. REC. 2000 (1884) (Sen. Blair)).

²⁴ Jean Braucher points out that the average family may not accurately represent the average bankruptcy filing family who may still be on the high end of spenders. *See* Braucher, *supra* note 2. The Bureau of Labor Statistics Consumer Expenditure Survey data relied on by Warren and Tyagi do not allow separation of the consumption patterns of debtors and non-debtors. *Id.* at 211-215. However Braucher acknowledges that Warren and Tyagi’s use of the data is sufficient to make the critical point, that middle class spending is not wildly out of control or directed to frivolous luxuries. *Id.* at 211.

²⁵ Warren and Tyagi calculate that the modern middle-class family devotes 75% of its income to fixed expenses (house and car payments, insurance, taxes, and child care) compared to 54% for the single earner family of thirty years ago. WARREN & TYAGI, *supra* note 3, at 50-54. They examine common categories of expenses to demonstrate that, for most of these categories, the expenses as a share of income have remained stable or that increases in one category have been offset by decreases in another. For example, the modern family spends 21% less on clothing, 22% less on food, 44% less on major appliances but 23% more on home entertainment. *Id.* at 17-19.

with the employment of both parents actually gives the modern family less room to cope with the financial disasters of illness, divorce, or unemployment of one or both parents. Thirty years ago, when the single earner, typically the husband, lost his job or became ill, the family had the safety net of the wife's ability to enter the labor force.²⁶ Today, the wife is already there and her income is already committed.²⁷ The individual stories are moving and give the reader a real feel for the emotional devastation that accompanies the financial collapse of these families who "played by the rules," that is who strove to provide their children with a good education and a safe place to grow up.²⁸

The other story that Warren and Tyagi take on is the myth of the "immoral debtor," that high rates of bankruptcy filings represent a lack of shame and willingness to game the bankruptcy system, rather than a reflection of real economic crisis.²⁹ They trace the history, from colonial-era complaints about the immorality of those who would not pay their debts, up to the rhetoric employed by the proponents of the recent reforms who similarly decried the lack of stigma associated with the filing for bankruptcy. Warren's research into the financial condition of debtors belies this rhetoric. She notes that the debt load of filers increased from 80% of annual income in 1981 to 150% in 2001.³⁰ The other aspect of this myth is the supposed increase in the willingness to cheat, to defraud the bankruptcy system. This claim was used to justify many of the new paperwork requirements imposed on bankruptcy filers under the reform Act.³¹ But, as Warren and Tyagi point out, if the increase in bankruptcy filings is due to massive fraud, then ten

²⁶ *Id.* at 58-60, 62.

²⁷ *Id.* at 62. As a consequence, today's middle-class families also face a double risk of job loss. *Id.* at 82.

²⁸ *Id.* at 2-7, 55-56, 90-91, 97-98, 107-108, 179-180.

²⁹ *Id.* at 71-95.

³⁰ *Id.* at 77.

³¹ See Sommer, *supra* note 12.

million families “independently decided that they would commit a felony that could land them in jail.”³²

B. THE RELATIONSHIP BETWEEN EDUCATION AND DEBT

The huge change for middle-class families in the last several decades is the increase in the amount of income devoted to housing. In contrast to the stability of the other typical household expenses, mortgage expenses have increased by 69%.³³ The authors conclude that families have used the increased income from the second earner to purchase their way into security for their children in the form of neighborhoods that are perceived as safe with “good” schools.³⁴ Warren and Tyagi acknowledge that these perceptions might be inaccurate or overstated,³⁵ but they do not really challenge them or challenge

³² WARREN & TYAGI, *supra* note 3, at 80. Warren and Tyagi deem this notion “pretty absurd.” *Id.* But see Zywicki, *supra* note 8. Zywicki argues that the increased numbers are indeed due to lack of shame, if not to actual abuse, as American families react differently to financial crisis today than they did in earlier times.

³³ WARREN & TYAGI, *supra* note 3, at 32.

³⁴ *Id.* at 24.

³⁵ *Id.* at 28. Or, as Dickerson explains, racially suspect. Dickerson, *supra* note 9. Warren and Tyagi note:

In the early 1970s, not only did most Americans believe that the public schools were functioning reasonably well, a sizable majority of adults thought that public education had actually improved since they were kids. Today, only a small minority of Americans share this optimistic view. Instead, the majority now believes that schools have gotten significantly worse.

WARREN & TYAGI, *supra* note 3, at 25 (citing George H. Gallup, *The Eleventh Annual Gallup Poll of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN 37 (1997); and *More Than Half of Americans Say Public Education Is Worse Today Than When They Were Students*, PUBLIC AGENDA ONLINE (April 2000), available at <http://www.publicagenda.org/>). Richard Rothstein notes that these polls are highly unreliable and “consistently show that, while the public believes schools do a terrible job, respondents generally think the particular schools their own children attend are pretty good.” RICHARD ROTHSTEIN, *THE WAY WE WERE?* 28 (Century Foundation 1998). The same Gallup poll respondents give public schools in general poor marks but three times as many give their own schools high marks. *Id.* at 29. Warren and

the responses of families who decide that competing for more expensive housing is necessary to improve the life chances of the children who live in it. They accept with little question the story that public education is in crisis and that, at least on some level, the housing competition is a rational response to that crisis. THE TWO-INCOME TRAP seems to accept that fundamental structural changes in the public education system are necessary for improvement.

In order to free families from the trap, it is necessary to go to the heart of the problem: public education. Bad schools impose indirect—but huge—costs on millions of middle-class families. In their desperate rush to save their children from failing schools, families are literally spending themselves into bankruptcy. The only way to take the pressure off these families is to change the schools.³⁶

Warren and Tyagi recognize that parents are strongly motivated by their perceptions of which schools are “good.”³⁷ This perception drives middle-class parents to pay triple for houses with the right location.³⁸ Breaking the tie between neighborhood and school through a “well-designed voucher program,” they posit, will dampen this competition and allow families to buy more affordable housing.³⁹ Allowing the student

Tyagi focus on the beliefs though. In discussing the accompanying parental concern for safety, they note the reality that, despite higher urban crime rates,

the average family faces only miniscule odds of being killed in a random act of violence in downtown Baltimore or any other city [b]ut it is beside the point, because it ignores a basic fact of parental psychology—worry. Parents are constantly mindful of the vulnerability of their children, and no amount of statistical reasoning can persuade them to stop worrying.

WARREN & TYAGI, *supra* note 3, at 26.

³⁶ WARREN & TYAGI, *supra* note 3, at 33.

³⁷ *Id.* at 24.

³⁸ *Id.*

³⁹ *Id.* at 34.

to take her funding to the school of her choice—within the public system—should mean she is no longer dependent on whether she lives in a \$50,000 house or a \$250,000 one.⁴⁰ But this solution rests on several assumptions that need examination.

First, Warren and Tyagi seem to assume that either the vouchers will not be dependent on the students' current district assignments, or districts will have equal funding.⁴¹ Southeastern Pennsylvania, for example, contains numerous independent school districts.⁴² These districts vary widely in their ability to fund their schools.⁴³ A voucher program will only replicate the competition for location if there is no revolution in equal funding across district lines. Otherwise, Philadelphia students get a voucher for \$9,299, but those in Lower Merion get one for \$17,261.⁴⁴ How are such vouchers going to equalize

⁴⁰ *Id.* at 35.

⁴¹ *Id.*; vouchers should be usable at “all the public schools in a locale” (emphasis in original).

⁴² I use the Philadelphia area as my primary example because that is where I work and live and where my children have been public school students. My daughter attended our neighborhood school, C.W. Henry Elementary School, from kindergarten through eighth grade and then attended Central High School from which she graduated in 2002. My son is currently in the fifth grade at Julia R. Masterman, a magnet middle school, but he too attended Henry from kindergarten through fourth grade.

⁴³ Pennsylvania ranks next to last among states in the share of education funding contributed by the state government, and is fifth from the bottom in size of disparities between districts. See EDUCATION LAW CENTER, SHORTCHANGING OUR CHILDREN: OPPORTUNITY GAPS IN PENNSYLVANIA PUBLIC SCHOOLS 25, 67, 70 (July 2005), at <http://www.elc-pa.org/pubs/downloads/english/schoolreports/Opportunity%20gap%20report%207%2026%2005.pdf> (last visited July 31, 2006). For example, the Education Law Center (ELC) report calculated 2002-2003 program expenditures per student (total expenditures per student minus costs for transportation, facilities, and debt service) at \$14,772 for the Lower Merion School District and \$8,455 for the Philadelphia School District. *Id.* at 66-67. Lower Merion serves a wealthy suburb of Philadelphia. The total expenditures per student were \$17,261 for Lower Merion and \$9,299 for Philadelphia. *Id.*

⁴⁴ *Id.* at 17. The ELC report analyzes public school expenditures in Pennsylvania for 2002-2003, finding that the total per-pupil spending ranged

opportunity for those kids or reduce the pressure for parents to find their way from Philadelphia to Lower Merion? Warren and Tyagi support equal funding, but do not offer suggestions on how it might be accomplished.

Second, the proposed voucher solution assumes that the crisis in public education is real—that parents are responding realistically to “failing” schools. There is no citation to any evaluation of public education as an institution, just to polls showing parental belief that the system is deficient.⁴⁵ The voucher solution also assumes that parents exercise all of the choice, and will be able to navigate the education market easily and effectively on behalf of their children so that such choice will inevitably solve the public education “crisis.”⁴⁶ Professor Lee Anne Fennell points out that public schools are not simple consumer items whose producers will respond to the market demands of their consumers, i.e., making more strawberry than chocolate pop tarts if that is what sells.⁴⁷ But the purchasers of pop tarts do not create the product—they just buy and eat it. And the producers want to sell as many pop tarts as possible. Schools are a different matter. The consumers of education themselves create the quality of the good, that is, the quality of

from a low of \$6,651 to a high of \$17,746 in Pennsylvania districts. If long-term expenditures for construction costs and debt service are excluded, the range goes from \$6,177 to \$15,745, a difference of more than 250%.

⁴⁵ See *supra* notes 34-35 and accompanying text.

⁴⁶ WARREN & TYAGI, *supra* note 3, at 35:

Under a public school voucher program, parents, not bureaucrats, would have the power to pick schools for their children—and to choose which schools would get their children’s vouchers To collect those [vouchers], schools would have to provide the education parents want. And parents would have a meaningful set of choices, *without* the need to buy a new home or pay private school tuition. Ultimately, an all-voucher system would diminish the distinction between public and private schools, as parents were able to exert more direct control over their children’s schools.

⁴⁷ Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 11-12 (2001) (using game theory to examine the role of user behavior in the creation of local public goods, specifically education and neighborhood security).

the school. School quality depends, in large part, on the participation of what Fennell calls “quality enhancing users,” families who encourage their children to work hard and to do well in school, and who support the school’s efforts.⁴⁸ This means the schools are driven to choose high-quality users as much as the users are also driven to choose high-quality schools.⁴⁹

Finally, the voucher solution does not address the risks that it poses to the role of public education in democracy, even though Warren and Tyagi acknowledge that “[t]he concept of public schools is deeply American. It is perhaps the most tangible symbol of opportunity for social and economic mobility for all children, embodying the notion that merit rather than money determines a child’s future.”⁵⁰ But this acknowledgment is immediately discarded by acceptance, without challenge, that parents don’t believe in the current system, must buy their way into “good” schools, and that “a well-designed voucher program” will solve this problem.⁵¹ “Fully-funded vouchers would relieve parents from the terrible choice of leaving their kids in lousy

⁴⁸ *Id.* at 13-17.

⁴⁹ *Id.* at 75-76. Fennell posits that regrouping the user pools—the groups of students and families associated with particular schools and districts—can result in improved schools for all.

[A] user-participation model suggests that we should find ways to both encourage and to facilitate the optimal mixing of users and also to assist more people in becoming quality-enhancing users. Markets are not designed to do either of these things. Instead, market-oriented voucher programs can stratify users and may thereby generate undesirable results. Limited “choice” programs which prohibit schools from screening by ability or income might offer benefits for some students but would still entail risks for the students left behind. It is also important to recognize that any gains associated with these constrained programs would be the result of government-selected policy choices and user participation, not the operation of competition.

Fennell, *supra* note 47 at 79-80.

⁵⁰ WARREN & TYAGI, *supra* note 3, at 33.

⁵¹ *Id.* at 33-34.

schools or bankrupting themselves to escape those schools.”⁵² The myths of school choice need debunking too.

II. THE MYTH OF FAILING SCHOOLS

Warren and Tyagi accept with little question the assertion that public schools are failing. This assertion has two main underpinnings—repetitive rhetoric and test scores. I wish that the scope of *THE TWO-INCOME TRAP* allowed the authors to explore the failure of public education myth with the same energy they devoted to the over-consumption and immoral debtor myths. But other scholars have done important work in this area.⁵³

The primary basis for arguing that public schools are failing is the story of high-stakes test scores.⁵⁴ Even this story is flawed — the most comprehensive national standardized test scores, the NAEP⁵⁵ scores, have been stable in recent decades with

⁵² *Id.* at 34.

⁵³ See, e.g., ROTHSTEIN, *supra* note 35; LUIS BENVENISTE, ET AL., *ALL ELSE EQUAL: ARE PUBLIC AND PRIVATE SCHOOLS DIFFERENT?* (RoutledgeFalmer 2003); MICHAEL APPLE, *EDUCATING THE “RIGHT” WAY: MARKETS, STANDARDS, GOD, AND INEQUALITY* (RoutledgeFalmer 2001).

⁵⁴ For example, then-Pennsylvania governor, Mark Schweiker, on the need for privatization of the Philadelphia School District: “[A]cademic performance is at tragic levels for the children of Philadelphia with 80% of the District’s children scoring below ‘proficient’ in reading and math.” Gov. Mark Schweiker, *A Proposal to Transform the Philadelphia School District into a High-Performance System of Schools for the 21st Century*, 6 (Oct. 31, 2001). Schweiker’s definition of failure ignored both the recent history of improvement in scores and that the test scores he cited were based on norm-reference standards that required half the test takers to be deemed in the bottom two quartiles—below “proficient.” Susan L. DeJarnatt, *The Philadelphia Story: The Rhetoric of School Reform*, 72 *UMKC L. REV.* 949, 969-976 (2004). Only in 2001 did Pennsylvania change its main test to a criteria-referenced base instead of a norm-reference based test. *Id.* at 975.

⁵⁵ The National Assessment of Educational Progress (NAEP) is often referred to as the nation’s report card. Representative samples of students across the country are evaluated in math, reading, science, and writing, and the resulting data allows comparisons of different years and different states. See *The Nation’s Report Card*, at <http://nces.ed.gov/nationsreportcard/> (last visited July 31, 2006). Richard Rothstein’s review of the NAEP shows that score “changes over the past twenty-five years are small but statistically significant.

small increases.⁵⁶ SAT scores have risen if one does a real comparison of the scores of similarly situated test takers.⁵⁷ But there is no doubt that some schools have higher test scores than others and that the socio-economic status of the students is closely correlated with the scores a school's students achieve.⁵⁸

District-based vouchers are most likely to replicate the failure that does exist today—a failure of equity, not a failure of public education. The disparities in funding between school districts are stark. Wealthy communities in Pennsylvania fund their schools at a rate that is 250% higher than the poorest funded districts.⁵⁹ These funding disparities are worsened by the reality that the best funded districts are not those with the most challenging students.⁶⁰ The failure rhetoric typically

On the whole, they show no deterioration in overall academic performance during this period.” ROTHSTEIN, *supra* note 35, at 70. Rothstein goes on to critique the process by which the standards for proficiency for the NAEP were set, a process fraught with ideology and politics, with standards set so high that only 30% of U.S. nine year olds satisfy the proficiency standard in reading. *Id.* at 70-74.

⁵⁶ *Id.* at 68-74, 81-86.

⁵⁷ *Id.* at 51-58. See also Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 396 (1997). Rothstein and O'Brien both demonstrate that the touted “decline” in SAT scores primarily reflects access—that a much larger and more heterogeneous pool of test-takers now exists in contrast to the largely white, male prep school student population that took the test in the 1940s. O'Brien argues that the “decline” really reflects a decline in white advantage, not a decline in the effectiveness of education. *Id.*

⁵⁸ Alfie Kohn, an intense critic of standardized testing, notes the suggestion that “we should save everyone a lot of time and money by eliminating standardized tests, since we could get the same results by asking a single question: ‘How much money does your mom make? . . . O.K., you’re on the bottom.’” ALFIE KOHN, *THE SCHOOLS OUR CHILDREN DESERVE: MOVING BEYOND TRADITIONAL CLASSROOMS AND “TOUGHER STANDARDS”* 77 (Houghton Mifflin 1999). I have previously attempted to contrast the rhetoric of failure with the reality of public education in Philadelphia. See DeJarnatt, *supra* note 54.

⁵⁹ EDUCATION LAW CENTER, *supra* note 43, at 17.

⁶⁰ *Id.* See also Liu, *Education, Equality, and National Citizenship*, *supra* note 23 (demonstrating a similar correlation between low funded states and higher populations of poor, minority, and limited English students).

ignores these disparities, or asserts that they do not matter and that educational quality is a function of the organization of the school, not the funds available.⁶¹ Unless vouchers are equal across district lines, both the equity issues, and the financial pressures on parents will remain.

The strongest proponents of privatization through vouchers, John Chubb and Terry Moe, argue that the system of public education itself is the problem—that democratically controlled schools, run by elected school boards, are inevitably bureaucratic and ineffective; replacing the entire system with a market-based system will operate as a panacea, fixing all of public education's ills.⁶² They propose a complete replacement of the existing system of common schools with vouchers. Warren and Tyagi do not go that far—but the first step in fixing a problem is correctly diagnosing it.

The weakness of the marketization proponents' argument is that it confuses school effectiveness with test scores. Test scores are, at best, a limited piece of information about how students are doing in a particular school in a particular year.⁶³ Contrary to Chubb and Moe's conclusion, more recent studies have found that school organization, like high stakes test scores, is more closely related to the socio-economic make up of the student body than to its status as private or public.⁶⁴ A recent study shows that, even on the test score standard, the public schools' test scores actually exceed those of private or charter schools when one controls for demographics including socioeconomic

⁶¹ See CHUBB & MOE, *supra* note 20, at 44-47 (arguing that the organization of public schools, that is their dependency on democratically elected school boards and governments, makes them unresponsive and deficient in contrast to private schools that are, they argue, more beholden to parents). *But see* BENVENISTE, *supra* note 53, at 73-74 (analyzing the organizational structure of private and public schools and finding that the structure correlated more closely with the economic status of the student body than with the school's public or private status).

⁶² CHUBB & MOE, *supra* note 20, at 217.

⁶³ For thorough and helpful analyses of the over-reliance on high-stakes testing, see Lisa Kelly, *Yearning for Lake Woebegone: The Quest for the Best Test at the Expense of the Best Education*, 7 S. CAL. INTERDISC. L.J. 41 (1998); and KOHN, *supra* note 58.

⁶⁴ BENVENISTE, *supra* note 53.

status, race, ethnicity, gender, disability, limited English proficiency, and school location.⁶⁵ This work casts doubt on the magic of the market to change the test scores of schools unless the market also works to magically integrate them socio-economically.⁶⁶ There is little evidence that parents or schools will seek such integration if they are left to cope with school choice solely on an individual basis.⁶⁷

The market approach also begs the question of whether it is the school system or society that is failing.⁶⁸ Most scholars

⁶⁵ Christopher Lubienski and Sarah Theule Lubienski, National Center for the Privatization in Education, *Charter, Private, Public Schools and Academic Achievement: New Evidence from NAEP Mathematics Data*, Jan. 2006, available at www.ncspe.org/publications_files/OP111.pdf (last visited Feb. 25, 2006).

⁶⁶ Indeed Richard Kahlenberg advocates the use of school choice not through vouchers but through school selection designed to integrate schools economically. RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 1* (Brookings Institution Press 2001).

[A]ll schoolchildren in America have a right to attend a solidly middle-class public ‘common school.’ They may not have a right to middle-class parents, or a right to live in a middle-class neighborhood, or a right to a middle-class income and life-style. But every child in the United States—whether rich or poor, white or black, Latino or Asian—should have access to the good education that is best guaranteed by the presence of a majority middle-class student body.

Id. Kahlenberg defines middle class by amount, not source, of income, using as a cut off the eligibility threshold for subsidized school lunches, \$32,000 annual income for a family of four. *Id.* at 2.

⁶⁷ Fennell examines the pressures on parents to avoid such integration, using game theory to address the problems parents face in deciding whether to exit or remain in a particular user pool, i.e. a public school. Fennell, *supra* note 47. The parent’s role as a user of a school depends not only on her choice of a school but also on her behavior after that choice is made. *Id.* at 16. Fennell argues that behavior, that is “user participation,” directly creates school quality and has a more significant impact than the exercise of voice in the political process or the exercise of exit. *Id.* at 23.

⁶⁸ Funding inequities are a societal problem. Schools should be evaluated on what they do with the students they have. James Ryan’s critique of No Child Left Behind’s testing requirements advocates use of value-added accountability measures instead of the annual high-stakes testing scheme required by the

agree that the current system includes inequities in funding and opportunities that are undemocratic and disadvantage groups of children, including racial and ethnic minorities, disabled children, and language minorities.⁶⁹ Those inequities certainly contribute to the pressure on middle-class families to avoid having their children suffer the results of those inequities. In addition, they affect the community as a whole. So the question becomes how to eliminate the inequities. Does choice through vouchers, as proposed by THE TWO-INCOME TRAP, offer promise, or will it exacerbate the problems its authors identify?

If the success of a school is measured in standardized test scores, as No Child Left Behind (NCLB) requires,⁷⁰ and test scores are largely determined by the socio-economic status of a school's students,⁷¹ then we can expect continued significant test score gaps unless schools are more fully integrated socio-

statute. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004). Value-added measures could still be high-stakes tests but they would be designed to measure what the year of schooling had added to a group of students' accomplishments—for example the fifth graders in September could be compared to the same group of fifth graders in the following May. The NCLB regime requires measurement of the 2005 fifth graders against the 2004 fifth graders. *Id.* at 940-941. A school gets no credit for what it accomplishes with any one group of students, just how it “improves” with each new group. Ryan examines how this regime encourages schools to push out the students who are likely to bring down their test scores, most likely widening the very gaps that NCLB purports to attack. *See Id.*

⁶⁹ There remains debate however on how much increased funding will, by itself, improve student achievement, especially when that achievement is measured by standardized tests. *See* Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, at n. 228 (2004) (noting inconsistency of evidence that per-pupil spending is significantly correlated with student achievement). *But see* Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. at 23-31 (forthcoming 2006) [hereinafter Liu, *Interstate Inequality*] (evaluation of NAEP scores and spending patterns “suggests a relationship between resources and outcomes” Liu goes on to advocate for more sophisticated analysis of the relationship).

⁷⁰ NCLB, 20 U.S.C. §6301(4) (2001).

⁷¹ KAHLBERG, *supra* note 66, at 16-17, 25-31 (noting studies showing that status of a school's population is critical and that poor students score better when they are enrolled in a predominantly middle-class school); KOHN, *supra* note 58, at 77.

economically. School district boundaries tend to segregate students economically, and the localized funding of education widens the gap between rich and poor schools and rich and poor students. Unless these inequities are addressed, providing middle-class families with vouchers will do little, if anything, to end the financial competition for improving life chances—it will simply push the competition somewhat away from housing and focus competition more directly on school tuition. If the vouchers do not cross district boundaries, then vouchers are highly unlikely to even ease the housing crunch, as parents will still compete to get into the “good” school districts. If the vouchers can be supplemented with additional tuition, we can expect the bidding war to switch to tuition instead. The key point Warren and Tyagi recognize is that middle-class parents are paying a high price for the real inequities in public education that afflict the poor.⁷² Fixing those inequities is a better solution to ease the price paid by the middle-class and to improve the life chances of all children.

Public education in the United States traditionally has been controlled and funded locally.⁷³ Individual communities fund their schools in accordance with their own tastes and standards—and, unfortunately for poor communities, their tax bases.⁷⁴ In most systems, students are assigned to schools based on their residences.⁷⁵ Today, the tie between residence and assignment within a school district is breaking down. Many alternatives exist—from systems of magnet schools, to lotteries for assignment to any school in the district, to the growth of charter schools which are typically open to any student within

⁷² WARREN & TYAGI, *supra* note 3, at 23.

⁷³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁷⁴ Pennsylvania, for example, ranks 49th out of the 50 states in the proportion of school funding that comes from the state, but even in the majority of states, less than 60% of the funding is from the state, rather than the locality. EDUCATION LAW CENTER, *supra* note 43, at 7.

⁷⁵ Of course, in the days of de jure segregation, in large sections of the United States, students were assigned based on their race, no matter how close they lived to a particular school.

the district supporting the charter school.⁷⁶ No Child Left Behind requires that parents of students enrolled in schools labeled “failing” be given the right to transfer to a more successful school within the district.⁷⁷ One aspect of this pattern has not broken down though—the sancrosanctity of districts. Except for the cyber charters, and a few rare exceptions,⁷⁸ students must stay within their district boundaries. This requirement preserves the “good” school districts from having to educate outsider children and renders hollow the promise of the transfer provisions of NCLB.⁷⁹

Parents fight primarily to get into good school districts, not just into particular schools. To be sure, within a district, some

⁷⁶ Amy Stuart Wells examines the wealth of choice options that have been growing over the past several decades. AMY STUART WELLS, TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY (Hill & Wang 1993). Pennsylvania’s cyber charter schools draw students from across the state. For a list of Pennsylvania’s charter schools see http://www.pde.state.pa.us/charter_schools/lib/charter_schools/Cyber_addresses_-_02-03-06.pdf (last visited Feb. 27, 2006).

⁷⁷ 20 U.S.C.A. §6316(b) (2006).

⁷⁸ Hawaii, for example, has a single state-wide district, established in 1840. Hawaii Department of Education, <http://doe.k12.hi.us/about/index.htm> (last visited June 15, 2006).

⁷⁹ Suburban parents and voters have strongly resisted efforts to force those districts to take responsibility for educating outsider children. See Saiger, *supra* note 69, at 1665 (analyzing the potential effect of state level threats to disestablish school districts and arguing that accountability will be strengthened by empowering states with greater discretion rather than requiring all districts to follow fixed and definite standards like those imposed by NCLB); James Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043 (2002). Goodwin Liu demonstrates that an even more glaring disparity exists at the state level. Liu, *Interstate Inequality*, *supra* note 69. He reviews spending patterns and the distribution of poor, minority, and limited English proficiency students and concludes that spending disparities between states dwarf the disparities within states. Liu, *Interstate Inequality*, *supra* note 69. Even after accounting for regional variations in living costs, the lowest funded districts in the 14 highest spending states provide more support per pupil than the median districts in the lowest 15. *Id.* at 20-21. “In other words, even if school finance reform in the fifteen low-spending states were to raise spending in the bottom half of districts up to the state median, those districts would still trail 90% of the districts in the fourteen high-spending states.” *Id.* at 21.

schools are labeled “good” and some “bad.”⁸⁰ But generally, parents move to the zip code, not to the neighborhood of a school within a district. Discrepancies in tax bases among districts lead to enormous disparities in resources available for schools.⁸¹ Any voucher program that offers “full funding” will have to address this disparity, or it will simply re-enshrine it in a new form. If the goal is fairness and equal access, the Philadelphia children should get at least the same amount as children from wealthier communities. Only then could there even theoretically be an equal playing field.⁸² Of course, there are those who say that spending differences really don’t matter much.⁸³ It is certainly possible that staff commitment,

⁸⁰ Warren and Tyagi note the example in Philadelphia of the Penn-Alexander School, a new public elementary school associated both with the University of Pennsylvania and a tripling of housing prices within its catchment area. WARREN & TYAGI, *supra* note 3, at 24. But Philadelphia’s public school system is still popularly labeled “failing” to an extent where one could think that was part of its official name. See DeJarnatt, *supra* note 54, at 969-985. The Philadelphia School District already has a significant transfer system in addition to the transfer options in force through NCLB. But these transfer rights are all intra-district. A voucher system that limits Philadelphia residents to Philadelphia schools is not going to magically create more Penn-Alexander schools nor is it going to equalize the funding of Philadelphia with that of the surrounding counties.

⁸¹ See EDUCATION LAW CENTER, *supra* note 43.

⁸² Liu and the Education Law Center report both analyze the increased costs of educating a more challenging student population. Warren and Tyagi suggest that children with physical or learning disabilities be given larger vouchers to make them more attractive to schools. WARREN & TYAGI, *supra* note 3, at 35. The history of funding equity litigation and the pressures NCLB inflicts on schools to avoid these very children make this solution a problematic prospect at best. See Ryan, *supra* note 68.

⁸³ Harvard economist Caroline Hoxby, for example, has concluded that local property taxes are a good and stable way of financing public schools and that class size, closely related to cost, has no effect on student achievement. George A. Clowes, *How to Improve School Productivity*, Interview with Caroline Hoxby, THE HEARTLAND INSTITUTE, September 1, 2001, available at <http://www.heartland.org/Article.cfm?artId=10212&CFID=7815643&CFTOKEN=43072831> (last visited October 1, 2006); Caroline M. Hoxby, *Local Property Tax-Based Funding of Public Schools*, THE HEARTLAND INSTITUTE, May 19, 1997, available at www.heartland.org/pdf/hoxby.pdf (last visited July 31, 2006). But see Liu, *Interstate Inequality*, *supra* note 69, at 23-31 (showing high correlation between NAEP scores and spending levels in that the “vast majority of high-

unusually dedicated parents, or other factors, can help and even overcome a small spending disparity—some schools and some kids succeed in spite of these obstacles. But if it doesn't matter, then why do wealthy communities devote so much more of their resources to their schools?⁸⁴ Why do elite private schools charge tuition that is often twice as much as the median per-pupil spending in public school districts in Pennsylvania?⁸⁵ Smaller classes and highly qualified teachers cost more money.⁸⁶

performing states are high-spending"). Liu calls for more sophisticated analysis that would incorporate disparities in the use of funds, intrastate inequity, standard, and regulatory environment. *Id.* Aaron Saiger cautions that scholars disagree on the effects of spending disparities and that more money, alone, without other accountability reforms, has not resulted in clear school improvements. Saiger, *supra* note 69, at 1713.

⁸⁴ As Justice Thurgood Marshall noted in his dissent in *Rodriguez*, 411 U.S. at 85 (Marshall, J. dissenting), "if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court."

⁸⁵ See EDUCATION LAW CENTER, *supra* note 43, at 20 (listing the median program expenditure at \$8,740). Elite private schools in the Philadelphia area typically charge tuition in the \$12,000-20,000 range. A 2005-2006 survey lists tuition of \$12,100-19,200 for Abington Friends School, \$15,850-18,850 for Akiba Hebrew Academy, \$11,140-21,100 for the Baldwin School, \$14,980-21,100 for Episcopal Academy, and \$13,000-19,850 for Springside Academy, to name a few. Metrokids, *Education Survey 2005-2006*, at <http://www.metrokids.com/education/paschoolsurvey.pdf> (last visited July 31, 2006).

⁸⁶ See KOHN, *supra* note 58, at 155-156, 282 n. 86. Nancy McGinley, who worked as a principal at middle schools in both Philadelphia and suburban Abington, explains exactly what the funding disparity meant for students at her two schools. EDUCATION LAW CENTER, *supra* note 43, at 12-16. The Philadelphia school, with an 85% poverty rate for its 1,140 students, had one assistant principal, a nurse four days a week, two counselors, three secretaries, five non-teaching assistants, and two security officers. *Id.* at 13. Abington, with a 9% poverty rate and 1,700 students, had three assistant principals, each with a secretary, six counselors, two nurses with a clerk, two full-time librarians, and twenty-six non-teaching assistants to supervise students in the halls, lunchroom, and on buses. *Id.* Every Abington student had current textbooks and calculator. *Id.* at 14. Abington spent four times as much as the Philadelphia school on textbooks and supplies. *Id.* Classes in Philadelphia had no less than 30 students, but Abington had smaller class sizes. *Id.* Teachers were paid more and the faculty was more stable in Abington. *Id.* at 15. The department chairs

And nearly everyone agrees that those two elements are critical factors in providing quality education.⁸⁷

III. THE MYTHS OF CHOICE

The question then becomes: will choice in the form of vouchers reduce the inequities, especially if the vouchers are only usable in the child's school district of residence? Or, will middle-class parents instead use the vouchers to continue their flight from the "bad" schools and outbid each other on tuition to avoid schools they fear will have too many "undesirable" children—i.e. schools that look too much like the urban schools they feared so much that they overextended themselves financially in the first place? In this section, I suggest that vouchers might cut the tie between residence and housing within a school district, but they will do nothing to equalize districts unless the vouchers cross district lines. If they do cross district lines, the pressures on schools to select the most desirable children will continue to exert control.⁸⁸ The market alone is not going to integrate the schools economically unless a bureaucracy forces it to—or unless the vouchers are limited to the public system and are capped to prevent parents from paying additional tuition beyond the voucher. Even then, the schools will have to be precluded from choosing the students. Once we step back into the bureaucratic control of school choice, parental choice is no longer exerting as much market force—but

had reduced teaching loads that enabled them to mentor and support teachers. *Id.* at 14. In Philadelphia, McGinley and the one assistant principal were responsible for such supervision. *Id.* McGinley notes, "I did not become a better principal when I moved to the suburbs, but I was given the tools necessary to produce better results for children." *Id.* at 16.

⁸⁷ See, e.g., KOHN, *supra* note 58, at 282-283 n. 86; KAHLENBERG, *supra* note 66, at 71-72. *But see* Hoxby, *supra* note 83.

⁸⁸ See Ryan, *supra* note 68 (describing the incentives schools have under NCLB to push out students who are likely to lower the school's test scores); APPLE, *supra* note 53, at 70-71 (noting that the shift to choice combined with publication of test scores in England caused a shift from "student needs to student performance and from what the school does for the student to what the student does for the school.").

the community commitment to the public system is weakened by the consumer approach.⁸⁹

I will examine the rhetoric and mythology of choice that is used to support the voucher idea to see how likely vouchers are to promote equity and reduce the financial pressures on the middle class. Choice itself imposes burdens on parents who do not always cope with such weighty decisions in the manner predicted by economists and education policy advocates, who envision fully rational actors who have the resources and knowledge to make the best decisions possible for each of their children.⁹⁰ Finally, I look at the concern that choice through individual vouchers will ultimately shift the burden, responsibility, and blame to parents. This shift will further stratify and disadvantage poor kids and further limit their options to our collective detriment, and will decrease the public's collective voice into the education of all of our children.⁹¹

People say they want choice but do they really want choice or just better schools? There is a continuing rhetorical theme of escape from failing schools. If the problem is failing schools, then improvement of those schools is preferable to dismantling

⁸⁹ APPLE, *supra* note 53, at 18-19 (noting the importance of connection to community institutions and describing the democracy of the market as a "thinner" version of possessive individualism.).

⁹⁰ Barry Schwartz analyzes the burdens of consumer choice, concluding that more choice does not mean better decisions and more satisfaction. He concludes that as choices multiply, "choice no longer liberates, but debilitates. It might even be said to tyrannize." BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS 2* (Harper 2005). Schwartz relies extensively on the work of Daniel Kahneman and Amos Tversky which has also been widely used in the scholarship of behavioral law and economics. See, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

⁹¹ This likely shift to individual responsibility will mirror the immoral debtor myth that Warren and Tyagi dissect. They point out that it is comforting to the rest of us to think that the financial distress of middle-class families is the product of those families' bad choices—of overspending and ignoring their responsibilities. If their distress is by choice, then we are not vulnerable to the same pressures because we will make wise choices. WARREN & TYAGI, *supra* note 3, at 88-89. Putting parents in sole charge of choosing schools for their children also makes those parents responsible for the results of that choice and concomitantly decreases society's collective responsibility for education.

them, especially if choice will still leave them in existence. If what people really want is individual advantage for their child, then choice is likely to exacerbate, not ameliorate, the class and race divisions that already plague our schools.⁹² The theory of the market is that competition will improve all schools, and Warren and Tyagi appear to buy into this theory.⁹³ My focus

⁹² See O'Brien, *supra* note 57, at 396-397 (noting that the racial test score gap has narrowed while the rhetoric of school failure has increased, “[p]erhaps the rising chorus of dissatisfaction with regard to academic standards reflects in part, white majority concern over losing that advantage. The fact that many more blacks are attending high school than before and that their achievement is improving may contribute to the perception that public school education is not as good as it used to be.”) An article in the New York Times chronicled the “dilemma” faced by mayoral candidate Gifford Miller about whether to send his four year old son to his neighborhood public school. Jennifer Steinhauer, *Public School, or Private? When Family Choice Is a Political Issue*, THE NEW YORK TIMES, August 18, 2005, available at <http://select.nytimes.com/search/restricted/article?res=F30B1FFB385A0C7B8DDDA1089> (last visited Feb. 28, 2006). The school, P.S. 158, was described as “one of the best schools in one of the top districts of the city . . . with 91% of the school’s fourth-grade students perform[ing] at or above grade level on the statewide English test.” *Id.* Noreen Connell, the executive director of the Educational Priorities Panel, is quoted as saying,

But he was the only one up there who has to really answer that question. And when you know as much as you do about the schools as he does, you would question why you would want to put your young child in those schools, and especially in the early grades. If I were a parent, and especially an affluent parent, private schools—especially on the East Side—all offer more. He should sacrifice his kids?

Id. It is unclear from this article why going to “one of the best public schools in one of the top districts” is a sacrifice of anything other than personal advantage based on wealth.

⁹³ The theory that school choice will result in across-the-board improvement of schools is expressed by Chubb and Moe, *supra* note 20. Warren and Tyagi state, “if decent public schools were made available to all children, regardless of the child’s zip code, then the bidding wars for suburban housing would let up . . .” WARREN & TYAGI, *supra* note 3, at 121. Thus,

[a]n all-voucher system would be a shock to the educational system, but the shakeout might be just what the system needs. In the short run, a large number of parents would likely chase a limited number of spots in a few excellent schools. But over time, the whole concept of ‘the Beverly Hills schools’ or ‘Newton schools’ would die out, replaced in the hierarchy by schools that offer a

here is examining how disempowered parents and their children are likely to fare under such a scheme. How they fare matters to Warren and Tyagi's analysis as it posits that middle-class parents buy expensive houses because of the inadequacies of so many school systems.⁹⁴ If vouchers do not improve those systems, then the competition to escape them will continue.

A. CHOICE IS PARENT DRIVEN

The rhetoric of choice—and I am speaking much more broadly here than just the limited discussion in THE TWO-INCOME TRAP—consistently lauds parental choice, and speaks of school choice in terms of increasing access for disadvantaged children.⁹⁵ This rhetoric itself assumes that parents always

variety of programs that parents want for their children, regardless of the geographic boundaries. By selecting where to send their children (and where to spend their vouchers), parents would take control over schools' tax dollars, making them the de facto owners of those schools.

Id. at 36.

⁹⁴ *Id.* They are paying for their escape from the systems they perceive as inadequate. But escape is not cost-free and not entirely possible, even in wealthy parts of larger communities. As Fennell points out, “[i]n an important sense, ‘exit’ is not really possible; as long as one remains in the relevant community, one will be affected by the quality of education and security in that community as a whole.” Fennell, *supra* note 47, at 5.

⁹⁵ For example:

Male Voice: Like everything else, we exercise choice when we're going to buy a car or when we're going to buy a box of cereal. And what can be more important than the education of your children? Why should we not have the right or privilege of choice?

Mayor Guiliani: If we give poorer parents the same opportunity to make choices about their children's education that the richest and most affluent parents in New York City have, let's see if that doesn't work to really energize that school district and help to create another alternative and more competition for the school system Any school district in this city. And see if it works. It ties parents to the education of their children. It gets them to start making choices about their children.

know best and can make the best selection for their children if only the school bureaucrats would get out of their way.⁹⁶ It also presumes that the schools will have to compete for “customers” and that the unchosen schools will go out of business.⁹⁷

Rhetoric about choice assumes it is unequivocally good; the discussion is usually couched in the unfairness of the choices available to people of wealth compared to the constraints imposed on people without such resources.⁹⁸ A common

Event Transcript, New York City Conference on School Choice (Dec. 13, 2000), at http://www.manhattan-institute.org/html/nyc_school_choice.htm (last visited July 31, 2006).

“We’ve seen the power of choice in Washington, D.C. where the first-ever federally funded opportunity scholarship program has given low-income families the same choices other Americans have. Almost 1,700 disadvantaged students have received grants of up to \$7,500 to attend the private or parochial school of their choice.” Press Release, U.S. Department of Education, Margaret Spellings Delivers Remarks on School Choice (April 5, 2006), at <http://www.ed.gov/news/pressreleases/2006/04/04052006.html> (last visited Apr. 28, 2006).

⁹⁶ See The Center for Education Reform, *Just the FAQs—School Choice*, at <http://www.edreform.com/index.cfm?fuseAction=document&documentID=57§ionID=67&NEWSYEAR=2006> (last visited July 31, 2006) (“School choice means better educational opportunity, because it uses the dynamics of consumer opportunity and provider competition to drive service quality. This principle is found anywhere you look from cars to colleges and universities, but it’s largely absent in our public school system and the poor results are evident, especially in the centers of American culture—our cities. School choice programs foster parental involvement and high expectations by giving parents the option to educate their children as they see fit. It re-asserts the rights of the parent and the best interests of the child over the convenience of the system, infuses accountability and quality into the system, and provides educational opportunity where none existed before.”). Warren and Tyagi echo this rhetoric: “Parents, not administrators, would decide on programs, student-teacher ratios, and whether to spend money on art or sports.” WARREN & TYAGI, *supra* note 3, at 36.

⁹⁷ See, e.g., Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the “Adapt or Die” Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 132-35 (1995).

⁹⁸ Jennifer Garrett, *School Choice: A Lesson in Hypocrisy*, THE HERITAGE FOUNDATION, June 26, 2002, at <http://www.heritage.org/Press/Commentary/ed062602b.cfm> (“Surveys repeatedly show that the strongest supporters of school choice are low-income minority parents. A 2000 poll by the Washington-based Center for Education

observation is that choice will give the poor the options currently enjoyed by the wealthy and thus it is inherently fair and desirable.⁹⁹ THE TWO-INCOME TRAP tacitly adopts this view in arguing that vouchers will enable more equal access to schools by families of different economic status.¹⁰⁰

But schools will choose too, and the pressures on them to choose the children who will make the school look good will be enormous. Public schools have been the target of accountability through high-stakes testing for several decades. NCLB imposes a near-constant testing regime on public schools, designed to make transparent any gaps between the test results for children of different genders, races and ethnicities, for English-language learners, for disabled children and for poor children. James

Reform found that 70% of African-American parents earning below \$15,000 a year support school choice. . . . They care about their children. It's time for Congress to give them the educational opportunities they crave for their children—and to stop denying them the same choice they exercise themselves.”) (last visited October 1, 2006).

⁹⁹ As the editor of The Blum Center’s Educational Freedom report writes:

The poor, now without choices, will be the first and primary beneficiaries [of school choice]. In the clear-eyed words of the October 21, *Economist*: “School vouchers, nice for rich whites, are even more desperately needed by children stuck in failing and gun-ridden inner-city schools.”

Tax those able to carry the burden, as normal. Let parents and the virtues of love and justice work. That is what school choice is about. School choice without financial penalty done properly and appropriately is a general policy, and it will give the poor a measure of the educational freedom the “better off” already have. It is simply not accurate to describe the concept of school choice as advantageous to the wealthy. There is no logic which says school choice should stop at any particular income level or any municipal boundary line.

The Blum Center, *The Editor’s View on: Those Wicked Windfalls for the Wealthy*, 29 EDUCATIONAL FREEDOM REPORT, November 17, 1995 (last updated Nov. 1, 1998), at <http://www.marquette.edu/blum/efr29.html> (last visited June 12, 2006).

¹⁰⁰ WARREN & TYAGI, *supra* note 3, at 35 (“Ultimately, an all-voucher system would diminish the distinction between public and private schools, as parents were able to exert more direct control over their children’s schools.”).

Ryan has persuasively explained why the tests will pressure schools to shunt those children aside if they possibly can.¹⁰¹ The more diverse a school community is, the more its subgroups are subject to the testing mandated by NCLB—and to the possibility that one of those subgroups will fail.¹⁰² NCLB requires that, by 2014, every testable subgroup within a school achieve 100% proficiency on a rigorous state-mandated test.¹⁰³ Schools are now labeled failing if their students, in total and by subgroup, are not making adequate yearly progress. Again, progress is defined by the high-stakes tests.¹⁰⁴ The fewer subgroups subject to testing, the fewer opportunities the school has to fail. Schools will thus face strong incentives to avoid taking voucher students who the school perceives may increase the school's risk of failure.

The image the rhetoric of choice evokes is of the elite private schools that everyone seems to see as the bastion of educational excellence and safety. But those schools achieve that status by highly selective admissions and by high tuition.¹⁰⁵ They are not subject to the NCLB testing regime, though it is likely that their high socio-economic status students would do well. After all, one thing on which most education scholars agree is that socio-economic status correlates closely with standardized test results.¹⁰⁶ If schools continue to live or die by their test results, they will be hard pressed to resist chasing the higher status kids themselves. So that child from the \$50,000 house may just find

¹⁰¹ Ryan, *supra* note 68. See also Linda Darling-Hammond, *From "Separate but Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities*, in *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 18-24* (Deborah Meier and George Wood, eds., Beacon Press 2004).

¹⁰² Ryan, *supra* note 68, at 961-966.

¹⁰³ NCLB requires that schools test students annually on reading and math in grades three through eight and that all subgroups achieve proficiency on the test by 2014. 20 U.S.C.A. § 6311(b)(2)(F) (2006).

¹⁰⁴ 20 U.S.C.A. § 6311(b)(2)(C).

¹⁰⁵ See *infra* notes 85 and 163 and accompanying text for descriptions of the application process and the tuition costs typical of such schools.

¹⁰⁶ ROTHSTEIN, *supra* note 35, at 37-41.

that her voucher isn't worth quite as much as the equal funds offered by the child from the \$500,000 house.¹⁰⁷

THE TWO-INCOME TRAP recommends that students who present challenges be given higher voucher amounts. If the political will existed to do this, maybe it would ameliorate some of this problem, but the history of school funding equity litigation does not show much, if any, support for this type of remediation.¹⁰⁸ Pennsylvania has ranked for years as one of the states with the highest funding disparities between rich and poor districts.¹⁰⁹ Litigation did not resolve this problem.¹¹⁰ New York remains enmeshed in litigation to improve equity for students in New York City.¹¹¹ Neither the Pennsylvania nor the New York legislature has been seriously interested in equalizing funding. These stories lend credence to the notion that suburban parents do not see the education of the students they left behind

¹⁰⁷ "Tax dollars would follow the children, not the parents' home addresses, and children who live in a \$50,000 house would have the same educational opportunities as those who live in a \$250,000 house." WARREN & TYAGI, *supra* note 3, at 35.

¹⁰⁸ See generally Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (tracing the shift in school finance litigation from equity to adequacy and noting that even these claims are highly contentious because of disparities arising from school funding's traditional dependence on local property taxes).

¹⁰⁹ See Education Week's annual "Quality Counts" reports, available at www.edweek.org/rc/articles/2004/10/15/qc-archive.html (last visited June 12, 2006). Pennsylvania ranked 49th on the state share of public education funding in the 2004 report. EDUCATION LAW CENTER, *supra* note 43, at 7 (citing Education Week, "Quality Counts" (2004)).

¹¹⁰ See *Marrero ex rel/Tabalas v. Commonwealth of Pa.*, 739 A.2d 110, 111, 113-114 (Pa. 1999) (holding nonjusticiable plaintiff school district's claim for a judicial declaration that inadequate state funding violated the Pennsylvania Constitution's requirement that the state provide a "thorough and efficient system of public education.").

¹¹¹ See *Campaign for Fiscal Equity v. New York*, 801 N.E. 2d 326, 350 (N.Y. 2003) (holding that under-funding of school districts, including the New York City district, violated the New York Constitution's requirement that the state provide an adequate education). The lawsuit was filed in 1993 and the Court of Appeal's order has not yet been complied with. A chronology of the litigation is available on the Campaign for Fiscal Equity's website, at <http://www.cfequity.org/CFEchronology.htm>.

as their problem.¹¹² Warren and Tyagi go a long way to show them why it is their problem—but giving those students vouchers will only give the suburban parents a more individualized incentive to seek privilege for their children by excluding the children who are perceived as dangerous or difficult to educate. Even if the will exists to offer schools more to educate the more challenging children, private schools certainly don't rush to enroll them now. The pressures from NCLB on public schools will strongly discourage them from seeking out children who will make it more difficult for the school to achieve the “annual yearly progress” towards 100% proficiency required under NCLB.¹¹³

The parents who do not fare well in a choice system are also likely to have a much harder time holding the schools accountable for what will appear to be the parents' choice. Ryan demonstrates why the sanction provisions of NCLB will pressure schools to avoid the poor and minorities—that same pressure is going to disadvantage those families in searching for schools. The assumption of voucher proponents is that parents can exercise accountability by leaving a school for a more desirable one. But this assumes the parents, not the schools, are doing the choosing, and that other more desirable schools are in existence and available.

Vouchers will move accountability from school districts and communities to the hands of individual school administrators. This may reduce the bureaucracy, but it also increases the informality of the system, and may reduce parents' rights and ability to challenge school decisions in any manner other than through exit. David Super has examined the move to what he terms informal rationing in the context of welfare reform.¹¹⁴ The

¹¹² See generally Dickerson, *supra* note 9; Ryan & Heise, *supra* note 79.

¹¹³ See generally Ryan, *supra* note 68. The history of other types of public benefits does not show any willingness to provide greater resources to the poor to make up for their disadvantages in the market. See David Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633 (2004) (analyzing privatization efforts and increased “choice” in housing, food stamps, section 8 vouchers, and welfare, and finding these changes resulted in less not more for the poor) [hereinafter Super, *The Political Economy of Entitlement*].

¹¹⁴ David Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L. J. 815 (2004) [hereinafter Super, *Invisible Hand*]. See also Martha Minow, *Public and*

welfare system has moved away from formal rules that invite a litigation response, to framing eligibility in terms of “choices” by claimants.

But the choices and the eligibility decisions are both constrained by informal rationing through bureaucratic manipulation. For example, claimants may be required to get documentation of employment or housing from their employer or landlord. This effectively puts control over eligibility for benefits in the hands of a third party like a landlord or boss from whom the claimant must get the documents. What if the landlord refuses? What if the claimant is planning to move because of repair problems with the apartment? Can she demand the documents or enforce that demand through the courts? The claimant’s rights are far fuzzier and entail greater administrative costs than when she dealt with formal eligibility rules.¹¹⁵ Contrast the accountability mechanisms of a public housing authority which is governed by explicit regulations setting out tenant and landlord rights and obligations, with the public housing equivalent of vouchers—the Section 8 program. Tenants get financial help, but they are on their own in finding an apartment, negotiating with the landlord, and coping with disputes.

Charter schools already have the potential to exercise informal rationing. They can control access simply by not answering phone calls or by being unresponsive to requests for information, and by making parents demonstrate intense commitment by requiring perseverance just to get through the application process.¹¹⁶ Proponents of school choice are often full

Private Partnerships: Accounting for the New Religion, 116 HARV. L. REV. 1229, 1235 (2003) (noting that privatization of formerly public institutions like schools, social services, and prisons reduces public control and review and reduces public access to decision making as people become consumers, rather than participants in the decision-making process). Limiting public participation in education to the role parents will have as consumers leaves little role for the rest of the community in choosing the education the community as a whole would seek to provide its children.

¹¹⁵ Super, *Invisible Hand*, *supra* note 114, at 852.

¹¹⁶ I tried my own little experiment by calling five charter schools in the area to get information about their admissions processes. Most were very forthcoming and offered to sign me up for an open house or to put me on a waiting list. The exception was the Laboratory Charter School which advertises

of complaints about school bureaucracy but rarely acknowledge that a good chunk of that bureaucracy is related to access of disempowered groups—especially special needs kids. Charters have often been accused of failing to serve this population;¹¹⁷ private schools have no obligation to serve them.

School choice advocates often argue that the market will respond; that new schools will arise to meet the needs of all¹¹⁸ so that the reluctance of the existing elite private schools to take on unprivileged children will not be a problem. The vouchers themselves will attract entrepreneurs who will design and open schools attractive to parents and students. However, education

the most rigorous program and has had exceptional success in its test results. The school's webpage is available at www.labcharter.org. The webpage does not contain admissions information. I had to call the school four times before I was able to speak with a person. The voice mailbox was full the first two times I called and no one answered the message I left the third time. When I did speak with a person, I was told there were no available spaces in the fourth or fifth grades and there was no waiting list. The person declined to give me the dates for any upcoming open houses and told me I had to call back in April to find out the dates. A parent of a Laboratory Charter student confirmed that it took great persistence to find out about open houses even though attendance at one is a requirement of the admissions process. This family used community connections, including letters of reference, to get on the list of families entered into the admissions lottery. Their child was evaluated through testing before admission. All of this process operates as a form of rationing so that the school can limit itself to families with a deep commitment to the school. This is a far cry from the lottery system that charter schools are supposed to use. The key is that the lottery functions after the parent has run the application gauntlet. That gives the school significant control over the student population that is unavailable to an ordinary public elementary school but could easily develop into a common practice in a market system.

¹¹⁷ See, e.g., GARY MIRON ET AL., THE EVALUATION CENTER, WESTERN MICHIGAN UNIVERSITY, *Executive Summary STRENGTHENING PENNSYLVANIA'S CHARTER SCHOOL REFORM: FINDINGS FROM THE STATEWIDE EVALUATION AND DISCUSSION OF RELEVANT POLICY ISSUES*, 7-8 (Oct. 2002), available at http://www.wmich.edu/evalctr/charter/pa_5year/executive_summary_pa_cs_eval.pdf (finding that charter schools in Pennsylvania in 2001-2002 had proportionately fewer students with individualized education plans, indicating disabilities. Excluding gifted students, who charter schools are not required by Pennsylvania law to serve, only 8.5% of charter students had Individual Education Plans (IEPS) in contrast to the 13% state average and three times as many IEP students in the host districts had severe or moderate disabilities compared to the charter school students).

¹¹⁸ See CHUBB & MOE, *supra* note 20 at 190.

for profit has not been easy. Edison Schools has been seen for some time as the poster child for running public schools for profit.¹¹⁹ Its effort to take over the Philadelphia School District nearly did it in, causing its stock to nosedive. The company stopped public trading, and was taken private the year after it was assigned to run only twenty-three schools instead of the entire district.¹²⁰ Although Edison originally claimed it could save Philadelphia money if it took over the district and make a profit at the same time, it ultimately demanded and received an extra \$881 per pupil for running the twenty-three schools it was assigned.¹²¹ It has continued to receive these extra funds but has yet to show improvements that exceed those the District-run schools have achieved in the same time period.¹²² It is unclear how Edison or the other private providers would meet the market demand of people holding vouchers for the smaller amount of per pupil expenditures.

The market response, evoked by the rhetoric of choice advocates, of high-end private schools springing up to serve the voucher students is unrealistic. The typical elite private school tuition in the Philadelphia area is \$12,000 to \$20,000, double the amount spent per pupil in the Philadelphia School District.¹²³ The elite schools are unlikely to take voucher

¹¹⁹ Edison Schools website, www.edisonschools.com/contact/contact_faqs.html#1 (last visited June 3, 2006).

¹²⁰ The deal to take Edison private was finalized on Nov. 14, 2003, following the awards of the schools in the spring of 2002. See <http://www.edisonschools.com/news/news.cfm?ID=167> (last visited July 31, 2006); DeJarnatt, *supra* note 54, at 958-959.

¹²¹ DeJarnatt, *supra* note 54, at 955, 961-963. The extra funds were reduced to \$750 per pupil after the first year of Edison's contract. ELIZABETH USEEM, RESEARCH FOR ACTION, LEARNING FROM PHILADELPHIA'S SCHOOL REFORM: WHAT DO THE RESEARCH FINDINGS SHOW SO FAR? 4 (2005), available at <http://www.researchforaction.org/publication/details/213> (last visited September 30, 2006).

¹²² USEEM, *supra* 121, at 14-17, 20-22 (analyzing the first four years of Philadelphia's school reform effort which has employed a hybrid approach of district-run reforms in some schools and private managers, including Edison, for others).

¹²³ See *supra* note 85.

students for half their normal tuition. If the vouchers are increased, the costs of education will rise substantially. Instead of throwing away our democratic commitment to all of our children, let's spend that extra money to improve the schools we already have that are already accessible to all. If the problem that middle-class parents really have is with the funding levels and concomitant opportunities, then doubling the funds available to urban districts ought to address their concerns.

We have an example of the role of markets in trade school education which does not bode well for the marketizing of public schools.¹²⁴ This story also intersects with the bankruptcy story as many of the student loan dischargeability cases involve trade school loans.¹²⁵ In the 1980s, deregulation of student loan and grant programs opened up a market in trade school education. Adult students, who were acting for themselves in what they presumably thought was their own best interests, took out loans to attend a variety of educational programs. They trained to be medical assistants, security guards, long distance truck drivers, beauticians, and computer technicians, to name a few. A market grew up to meet this demand but it was a mixed bag at best—including some legitimate training programs but also numerous fly by night schools that offered useless training leading to useless credentials. The students were left worse off by being saddled with student loans they could not pay.¹²⁶ Bankruptcy surfaced as a way for those students to escape the debt burden imposed by the loans, for what was too often useless education.¹²⁷

¹²⁴ See Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753 (2001); Cathy Lesser Mansfield, *The Federal Trade Commission Holder Rule and Its Applicability to Student Loans: Reallocating the Risk of Proprietary School Failure*, 26 WAKE FOREST L. REV. 635 (1991).

¹²⁵ See, e.g., *In re Hoyle*, 199 B.R. 518 (Bankr. E.D. Pa. 1998); *In re Williams*, No. 99-10899DWS, 99-0378, 1999 WL 1134772 (Bankr. E.D. Pa. 1999).

¹²⁶ See Linehan, *supra* note 124; Mansfield, *supra* note 124; *Rodriguez v. McKinney*, 156 F.R.D. 112 (E.D. Pa. 1994).

¹²⁷ See Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 451 (2005) (conducting an empirical analysis of ten

The growth in availability of student loans did increase the number of beauty colleges and trade schools. But many were not good ones, and the adult students they enticed fell victim to fraud and loss of educational opportunities. The consumers were relatively ineffective at weeding out the bad schools, which tended to close only when the loan default rates finally got the attention of the state and federal loan guarantee agencies that were left holding the defaulted loans. Increased capacity at quality schools was not, by any means, a given.¹²⁸

B. CHOICE IS FAIR AND EQUITABLE

Many voucher defenders argue that at least vouchers will give poor and minority kids a chance to escape from their current bad schools.¹²⁹ The schools will have to respond to customer demand and will be forced to improve.¹³⁰ This story itself relies on two assumptions—1) that the schools are indeed willfully bad now so that improvement is just a matter of gumption and desire; and 2) that poor and middle-class parents will find it equally easy to negotiate school choice and make the schools responsive to their needs.

The promotion of vouchers as a panacea or even just a good step towards improving education rests in large part on the idea that all parents are equally equipped to make good choices for their children—that they will exert market discipline on the

years of decisions resolving claims for undue hardship discharge of student loans, finding 26% of the debtors obtained the loans for high school equivalent education, or technical or vocational training).

¹²⁸ See Minow, *supra* note 114, at 1252-1253 (noting the decline in the initial enthusiasm that for-profit companies had for operating charter schools. Their expectations that economies of scale and other business techniques would make running schools profitable were not easy to meet.).

¹²⁹ See Casey Lartigue, Jr., *Educational Freedom for D.C. Schools*, in EDUCATIONAL FREEDOM IN URBAN AMERICA: BROWN V. BOARD AFTER HALF A CENTURY 69 (Casey Lartrigue, Jr. & David Salisbury, eds., Cato Institute 2004).

¹³⁰ See, e.g., Frederick M. Hess, *Markets and Urban Schooling: What Choice-Driven Competition Is Doing and How to Make It Do More*, in EDUCATIONAL FREEDOM IN URBAN AMERICA: BROWN V. BOARD AFTER HALF A CENTURY, *supra* note 129, at 247.

schools by voting with their feet.¹³¹ This assumption is flawed. Middle-class parents, particularly upper-middle class parents, have much greater cultural capital¹³² which gives them greater ability to navigate the system, complementing the pressure on schools to seek them out in order to improve their test scores.

The work of sociologist Annette Lareau provides an interesting counterpoint to the story of the middle class laid out in *THE TWO-INCOME TRAP*. Lareau has studied how middle-class and working-class parents relate to the schools their children attend,¹³³ and how they differ in their approaches to child rearing.¹³⁴ Lareau has illuminated these differences, and how they affect the interrelationship of socio-economic status and schooling. She examines how class status changes the relationship parents have with their children's school. Middle-class parents are demanding of schools and of their children. They schedule enrichment activities around the clock in the constant effort to increase their children's opportunities for intellectual, athletic, and artistic growth, to a point that can seem quite exhausting.¹³⁵ Lareau and others criticize this effort

¹³¹ CHUBB & MOE *supra* note 20.

¹³² Annette Lareau uses Pierre Bourdieu's work defining cultural capital as arising from the socialization of children which provides "a sense of what is comfortable or what is natural"—the *habitus*. ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 275 (University of California Press 2003) [hereinafter LAREAU, *UNEQUAL CHILDHOODS*]. The resources developed from this process, the capital, are used by individuals as "they confront various institutional arrangements (*fields*) in the social world." *Id.* at 275. Michael Apple also notes that "more affluent parents are more likely to have the informal knowledge and skill—what Bourdieu would call the *habitus*—to be able to decode and use marketized forms to their own benefit." APPLE, *supra* note 53, at 73.

¹³³ ANNETTE LAREAU, *HOME ADVANTAGE: SOCIAL CLASS AND PARENTAL INTERVENTION IN ELEMENTARY EDUCATION* (Rowman & Littlefield (2000) [hereinafter LAREAU, *HOME ADVANTAGE*]). Lareau does not provide a precise definition of the distinctions between classes but her research categorizes the families by occupation—professionals, semi-professionals, skilled and semi-skilled workers, unskilled workers and welfare recipients, and unknown. *Id.* at 16, 25.

¹³⁴ LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 132.

¹³⁵ *Id.* at 3, 238-245. Lareau catalogues one middle-class child's weekly activities which include baseball practice and a baseball game, several soccer

as leaving little time for family, for imagination, and for self-sufficiency.¹³⁶ According to Lareau's study, in contrast, working-class children have stronger family bonds, and many more opportunities to work out peer relationships without adult interference.¹³⁷ But working-class parents tend to treat their children's relationship to school as they treat their own relationship to work.¹³⁸ The working-class parent perceives her obligation to the school to be limited to getting the child to school on time, fed, clean, and ready to learn.¹³⁹ The working-class parent views the school staff as responsible for what goes on in the building, as experts to whom they defer.¹⁴⁰ These different approaches extend to the families' relationships to schools—characterized by intense intervention on the part of the middle-class parents,¹⁴¹ but akin to the home/work divide for the working-class and poor families. The schools respond to

practices and games for two different levels of teams, piano lessons, swim team practices, cub scouts, and saxophone lessons (the saxophone lessons are the only activity occurring at school). *Id.* at 42-43.

¹³⁶ *Id.* at 245, 253-254 (noting criticisms of over scheduling as destructive of family life).

¹³⁷ *Id.* at 3-4 (noting that working class and poor children have much more free time and more time with relatives and that they have more chances to invent their own games and work out their own interactions with peers).

¹³⁸ LAREAU, HOME ADVANTAGE, *supra* note 133, at 114-115 (finding that the jobs of working class parents tended to have set hours, defined tasks, and clear separation between work and non-work time, especially home time).

¹³⁹ *Id.* at 50, 112.

¹⁴⁰ Lareau points out that working class and poor parents "approached teachers from different positions in the status hierarchy. [These parents] held jobs with lower occupational status than teachers" in contrast to the middle-class parents who were likely to hold equal or higher status jobs and tended to be much more likely to challenge the teachers' expertise. *Id.* at 110-111.

¹⁴¹ *Id.* at 112-114, 117. Interestingly, Lareau found that middle-class parental intervention was most intense for children who were low, not high, achievers. *Id.* at 129.

these differing approaches by attending much more intensely to the middle-class parents' demands.¹⁴²

Lareau's work relies on the theory of cultural capital developed by Pierre Bourdieu.¹⁴³ In Bourdieu's view, one must examine the vocabulary, networks, constraints, and structure of people's lives and how things such as job flexibility and access to cars affect one's ability to negotiate with and within institutions.¹⁴⁴ This does not mean working-class parents do not

¹⁴² *Id.* at 10, 123-124. Another recent study, of public and private schools in California, found that the socio-economic status of the students, not the public/private distinction, defined and determined the school's organization and environment. BENVENISTE ET AL., *supra* note 53. The authors conclude that schools serving high income neighborhoods differ from those serving low income ones, whether the school was private or public. "Both private and public schools serving low-income families find it difficult to get parents to participate. Both private and public schools serving high-income families have to control overzealous parents." *Id.* at 190. The curricular focus of the schools also differed depending on the community served—the authors found:

that less-educated parents living in low-income communities who send their children to private schools don't demand that the schools teach their children a high-powered, problem-solving curriculum. These parents worry more about greater safety and a more disciplined environment for their children. Higher-educated parents living in high-income communities also demand from private education about the same academic curriculum as is taught in suburban public schools, but, in addition, greater exclusivity, smaller class sizes, or specialized programs not offered by public schools.

Id. at 190-191. These findings challenge the conclusion of Chubb and Moe that a school's private or public character determines its organization. *See generally* CHUBB & MOE, *supra* note 20. Useem's study too notes that despite substantial efforts on the part of school administrators to encourage parent involvement, few parents in the predominantly low-income Philadelphia School District have used the transfer options made available by NCLB, and many schools lack a functioning parent-teacher organization. USEEM, *supra* note 121, at 12-14.

¹⁴³ LAREAU, HOME ADVANTAGE, *supra* note 133, at 4-5; LAREAU, UNEQUAL CHILDHOODS, *supra* note 132, at 275-278. *See also* APPLE, *supra* note 53, at 72-73, 81-82 (analyzing how class differences in cultural capital advantage affluent parents in the contest for schools).

¹⁴⁴ LAREAU, UNEQUAL CHILDHOODS, *supra* note 132, at 275-278. *See also* LAREAU, HOME ADVANTAGE, *supra* note 133, at 145 (noting the need for parents to activate the resources available to them).

care about education. Lareau found that they often care deeply, but do not feel they can have much of a role in affecting the education of their children.¹⁴⁵ Middle-class parents, in contrast, tend to be intimately and sometimes overly involved, questioning and challenging the education experienced by their children.¹⁴⁶ Any use of vouchers as a solution to educational disparity must take these differences into account, or that form of choice is more likely to exacerbate, rather than to ameliorate, the disparities that now exist.¹⁴⁷

A recent study by Courtney Bell, examining how parents choose schools, provides further support for the argument that socio-economic status will have a significant impact on how parents negotiate school choice.¹⁴⁸ Bell concludes that parents rely primarily on their social networks, no matter the parent's class background. But those social networks in turn greatly alter the schools parents hear about, and view as available to them.¹⁴⁹ Bell examined the school choice process of parents who have already chosen to choose—and found that the differing social networks determined the schools they chose from.¹⁵⁰ Poor and working-class parents chose failing schools at a higher rate than the middle-class parents, even though the choice processes of

¹⁴⁵ *Id.* at 99-100.

¹⁴⁶ *Id.* at 149, 159 (noting this level of intensity can impose stress on the children and can lead to conflicts with teachers).

¹⁴⁷ Kahlenberg argues for a structure that would harness the power of the middle-class to improve schools in general by redrawing district lines and allowing public school choice, not vouchers, within the redrawn districts to try to insure that all schools have a middle-class majority. KAHLBERG, *supra* note 66. The socio-economic status of the school may even have a more powerful effect on all the students, including low-income students, than the student's own status because the school environment itself has a profound influence. *Id.* at 40-42.

¹⁴⁸ Courtney A. Bell, National Center for the Study of Privatization in Education, Teachers College, Columbia University, *All Choices Created Equal? How Good Parents Select "Failing" Schools*, Working Paper (2005).

¹⁴⁹ *Id.* at 20-21.

¹⁵⁰ *Id.* at 20.

the two groups were not significantly different.¹⁵¹ Both sets of parents first decided to make a choice — that is, they opted not to accept the neighborhood school. They then began their search — either a closed search focusing on a small set of schools or an open search. Finally, they selected a school for their child.¹⁵² But the process resulted in different school choices — the middle-class parents chose non-failing, selective, and tuition-based schools at much higher rates than the poor and working-class parents.¹⁵³ The difference Bell identifies is the set of schools the parents chose from—their “choice sets.”¹⁵⁴ The parents almost uniformly relied on their social networks to learn about schools to include in their searches. And, the social networks produced different information for the different groups.¹⁵⁵ As Bell puts it, “[t]hese schools were ‘in the air,’ part of middle-class parents’ social and historical experiences. These were the schools they went to as children, the schools they saw their friends go to, the schools they drove past on the way to a party.”¹⁵⁶

This study too underscores the challenges of using a voucher program as a panacea for school improvement, or for middle-class debt woes. Given how differently middle-class and working-class / poor parents are equipped to negotiate school

¹⁵¹ *Id.* at 20. Bell uses the NCLB definition of failing, while noting its questionable validity, especially given that private schools are not required to participate in the tests. *Id.*, at 7, n. 1.

¹⁵² *Id.* at 16-18.

¹⁵³ *Id.* at 17-18.

¹⁵⁴ *Id.* at 18.

¹⁵⁵ *Id.* at 20.

¹⁵⁶ *Id.* at 24. Barry Schwartz’s examination of consumer choice echoes this. He notes that psychologists have found that people give excessive weight to the anecdotal recommendation of friends because of the “availability heuristic” —the assumption that “the more available some piece of information is to memory, the more frequently we must have encountered it in the past.” SCHWARTZ, *supra* note 90, at 57-61. Diverse sources of information can reduce the risk of error arising from the frequency the information is communicated but if one’s sources of information are not diverse, the availability heuristic increases the risk of error. *Id.* at 61.

choice, the middle-class parents will be distinctly advantaged. This advantage, in turn, is likely to leave intact the disparities between schools serving different communities, which will lead the middle-class parents to continue to seek out the “good” schools.¹⁵⁷ The focus on achievement that animates middle-class parents will advantage them in the competition for schools under any choice program as well. However, it will not relieve those parents of the burden, financial or psychological, of the competition. Voucher programs are also highly likely to further disadvantage the working-class parents whose acceptance of school expertise and whose burden of work will make them less equipped to navigate the education market, even with “full funding” vouchers. If choice does not equalize the competition, then it is unlikely to convert all schools into schools that cater to the middle class.

Choice plans must also be realistic about the constraints on parents’ lives. Imagine the typical Philadelphia School District parent. Her job is most likely inflexible, not allowing her to take time off to explore school options without losing pay, and probably not without risking the job itself. Eighty percent of Philadelphia School District children¹⁵⁸ qualify for free or reduced price lunches which are currently available to families of four earning less than \$37,000 annually for reduced price and \$26,000 for free lunches.¹⁵⁹ Such a family is not likely to have a dependable car, and is likely to rely on public transportation, to use laundromats, to shop for groceries at neighborhood convenience stores that are expensive, or to have to travel a distance to get to a supermarket. Life is harder.

¹⁵⁷ Ironically, it also shows that middle-class parents need not be so frantic to control the destiny of their children through micromanagement of their lives. The privilege of class is already enormous and operates within schools as well as among them. A middle-class child with an activist parent stands to “win” within a so-called weak school, being well positioned to take advantage of whatever the school has to offer, along with reaping the educational benefits of learning in a diverse community.

¹⁵⁸ Philadelphia School District, *About Us*, at <http://www.phila.k12.pa.us/aboutus/> (last visited June 15, 2006).

¹⁵⁹ Food Research Action Center, *Income Guidelines and Reimbursement Rates for the Federal Child Nutrition Programs*, at www.frac.org/pdf/rates.PDF (last visited September 22, 2006).

I conducted an informal survey of friends with kids in private schools just to see how much time it took them to negotiate their educational choices. The parents of these private school children reported certain striking commonalities in their experiences that echo what Bell's study found.¹⁶⁰ I asked each couple: how many schools they visited, how they decided to visit those schools, whether they knew about the schools through friends whose children attended, how much time they spent on the visits, whether both parents visited, what means of transportation they used to get to the visits, what arrangements they made for the care of their other children during the visits, whether they paid application fees, whether the child had to be tested or separately interviewed, and whether they repeated the entire process with any of their other children.¹⁶¹

Of the six couples I spoke to, all used cars to drive to the appointments they had with schools. All took time off from work to interview with several schools, and to get their children to separate interviews/visits with the schools. With some couples, the mother did the bulk of the visiting, but with most, both the mother and the father, or, in the case of the one lesbian couple I spoke with, both mothers took time off from work for the visits. The number of schools the families visited ranged from three to six. Testing of the child was usually involved. The parents networked to determine which schools to visit—they typically relied on information from friends, though some looked at websites or ads in the newspaper.¹⁶² None of the people I spoke with used a private education consultant. Each visit took an average of two hours. The children's visits typically took a half of a school day. Most of the couples with more than one child did not repeat the process but just signed the second child up at the school they had chosen for the first child. One couple repeated the entire adventure with the second child. All paid application fees.

The admissions information on the websites of Philadelphia-area private schools confirms the experiences of these families.

¹⁶⁰ See Bell, *supra* note 148.

¹⁶¹ Interview notes on file with author.

¹⁶² See Bell, *supra* note 148, at 20, 24 (finding parents relied primarily on social networks to determine which schools to consider for their children).

Two visits are typically required—one for the parents and one for the child.¹⁶³ Some kind of assessment of the child is required—whether it is one of school readiness for a prospective kindergartner or a more academic test for an older applicant. All charge fees for the application. School visits usually take place during the work and school week, though one school offers Saturday day visits for the kindergarten applicants.

This process takes time. It takes parental flexibility in the form of jobs that allow time off, or having one parent not employed outside the home. It takes resources in the form of the financial ability to lose time at work, to pay application fees, and to know other people knowledgeable about the private school scene. It takes transportation resources in the form of a car or additional time for public transportation. A typical Philadelphia School District parent will not have an easy time accomplishing this kind of search on her own. She will not fare well in competition with those parents whose cultural capital is so much greater. Unless the schools themselves seek out working-class and poor kids,¹⁶⁴ the competition between parents for schools and the accompanying debt burden on the middle class is likely to continue.

C. CHOICE IS EASY

At minimum, though, the middle class should benefit from vouchers, right? They have the ability and the cultural capital to negotiate the system and obtain good outcomes for their

¹⁶³ See, e.g., Germantown Friends School Admission Process, at <http://www.germantownfriends.org/FolderID/249/SessionID/%7B2F4578F0-A3B0-4870-A4ED-AB6D7C69237E%7D/PageVars/Library/InfoManage/Guide.htm> (last visited July 31, 2006); Miquon School Admissions Process, <http://www.miquon.org/admissions.html> (last visited Feb. 28, 2006); William Penn Charter School Admissions, at <http://www.penncharter.com/content/admissions/datesanddeadlines.asp> (last visited Feb. 28, 2006) (Despite its name, William Penn Charter School is not a charter school in the current parlance—its charter was granted by William Penn in 1689); Springside School Admissions, at <http://www.springside.org/home/content.asp?id=1017&zZsec=Admissions> (last visited Feb. 28, 2006).

¹⁶⁴ An unlikely prospect as discussed in part III A *infra*.

children. At least vouchers will defray the costs they now bear in the form of housing expenses. But choice is not without cost itself, even for the middle-class parent. Barry Schwartz has examined the burdens that can be imposed from an abundance of choice in the consumer context.¹⁶⁵ Schwartz looks at consumer choices from a psychologist's perspective, reviewing a number of experiments that show that, as choices increase, it becomes harder and more burdensome to make a choice.¹⁶⁶ These experiments show that most people are risk-averse—they prefer a small sure gain over a large uncertain one—but are also loss-averse, as they prefer a large uncertain loss over a small sure one.¹⁶⁷ They also become attached to items. For example, once an item is given to a person, even one as trivial as a cheap pen, she becomes attached and often unwilling to give it up for an object of equal monetary value.¹⁶⁸ Thus, choice is not simply a rational choice between equal options. How people frame the options will have a huge impact on how they relate to the choosing. Each choice involves opportunity costs—what has to be foregone to make the choice?¹⁶⁹ Would one do better to take the other or one of the other options? These costs increase as

¹⁶⁵ SCHWARTZ, *supra* note 90.

¹⁶⁶ *Id.* at 20. Schwartz describes an experiment where grocery store shoppers were offered the opportunity to taste gourmet jams with the extra enticement of a dollar-off coupon if they bought a jar. *Id.* at 19. When there were six jams to choose from, 30% of the shoppers bought a jar but when the array contained 24 jars, only 3% of the shoppers purchased a jar. *Id.* at 20. The experimenters speculated that the larger array discouraged shoppers because of the extra effort a decision required. *Id.* Schwartz points out that we go through much of our daily lives by habit without seriously considering alternatives—and we need to. *Id.* at 43. “The burden of having every activity be a matter of deliberate and conscious choice would be too much for any of us to bear.” *Id.* at 43.

¹⁶⁷ *Id.* at 63-70.

¹⁶⁸ “Once something is given to you, it's yours. Once it becomes part of your endowment, even after a very few minutes, giving it up will entail a loss. And, as prospect theory tells us, because losses are more bad than gains are good, the mug or pen with which you have been ‘endowed’ is worth more to you than it is to a potential trading partner.” *Id.* at 71.

¹⁶⁹ *Id.* at 120-137.

choice increases, and as more alternative options have to be given up.

The burdens of choice, along with the parental worry that Warren and Tyagi recognized, tend to make parents risk-averse even when they exercise choice of schools. The Benveniste study found that:

many if not most private schools do not focus on academics in distinguishing themselves from public schools. Indeed, academic programs in the vast majority of private schools tend to be no more or less innovative than those in public schools, despite the greater flexibility that private schools may have in providing different curricula or teaching methods [In] competing for students [private schools] are not likely to offer anything but tried-and-true approaches to teaching and learning and focus instead on nonacademic features that distinguish them from public education.¹⁷⁰

More choice increases the pressure to, in Schwartz's terms, maximize—to work to guarantee that you have made the best possible choice, instead of simply settling for an option that satisfies your original need.¹⁷¹ The wider the options, the more a choice reflects the chooser's quality of taste, "so the availability of many attractive options means that there is no longer any excuse for failure."¹⁷² Regret is a powerful negative force resulting from feeling one could have made a better choice, a better decision. "Unlike other negative emotions—anger, sadness, disappointment, even grief—what is so difficult about regret is the feeling that the regrettable state of affairs could have been avoided and that it could have been avoided by *you*, if only you had chosen differently."¹⁷³ The availability of choice increases the pressure on parents to make the perfect choice and increases their cost of regret if they fail.

¹⁷⁰ BENVENISTE, *supra* note 53, at 179.

¹⁷¹ SCHWARTZ, *supra* note 90, at 136-137, 85-96.

¹⁷² *Id.* at 136-137.

¹⁷³ *Id.* at 137.

Worse yet, the parent becomes solely responsible for the results of the education. If the parent chooses well, there should be no need for regret. If the educational outcome is less than ideal, it must have been poor choosing on the part of the parent rather than a failure of the education community. Treating schools as consumer items instead of social communities will undercut the commitment parents and students and communities make to their schools. Indeed, Chubb and Moe envision parents as consumers, freely leaving schools in favor of other options whenever the education market offers an apparently brighter horizon.¹⁷⁴ But, Schwartz emphasizes, social connections take time and commitment.

Social relations are different [than consumer ones]. We don't dismiss lovers, friends, or communities the way we dismiss restaurants, cereals, or vacations spots. Treating people in this way is unseemly at best and reprehensible at worst. Instead we usually give *voice* to our displeasure, hoping to influence our lover, friend, or community. And even when these efforts fail, we feel bound to keep trying. Exit, abandonment, is the response of last resort.¹⁷⁵

This should be our relationship to a social connection, like a school, but the marketization of schools through vouchers increases the risk that parents will feel pressured to "express displeasure by exit."¹⁷⁶ The pressure to maximize, to avoid regret, and the undercutting of commitment to the community will further pressure middle-class parents to seek the "best" for their children even when the "best" for their child comes at the expense of the widest good for others. It will fuel, not dampen, the competition.

¹⁷⁴ CHUBB & MOE, *supra* note 20.

¹⁷⁵ SCHWARTZ, *supra* note 90, at 112.

¹⁷⁶ *Id.* at 111-112 (citing ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970))

D. CHOICE IS DEMOCRATIC

My deepest concern about a voucher system is that it will individualize responsibility for education and absolve the community from the responsibility to educate all children. The next logical step is to blame the individual parent for any inadequacies in the education she has “chosen” for her child. Warren and Tyagi acknowledge the role public education has played in promoting the United States as a meritocracy but they do not explore how vouchers might threaten that role. Even though the vision of public education as an equalizer has never been fully realized, it has animated debates about how to improve the schools.¹⁷⁷ Marketizing public schools will fundamentally change the state’s obligation from providing equal educational opportunity through education as a public good, to treating it solely as a private consumer good¹⁷⁸ dependent on parents. If a child has parents who are ill-equipped for or uninterested in the competition, the state will no longer have any responsibility to that child.

Our communal commitment to education now puts the school system in the category of the fire or police departments—an institution that benefits us all and should be paid for by all.¹⁷⁹

¹⁷⁷ Even President George Bush pays lip service to it in his emphasis on the racial achievement gap. *See, e.g.*, President Discusses Education at Elementary School in Tennessee, at <http://www.whitehouse.gov/news/releases/2003/09/20030908-2.html> (last visited October 8, 2006).

¹⁷⁸ Labaree discusses the regard for education as a public good, as a means to realize the goals of democratic equality and social efficiency, as contrasted with viewing education as a private good through a social mobility perspective. Labaree, *supra* note 23, at 42. A voucher system will focus solely on the private good goal at the expense of the democratic equality and social efficiency goals Labaree identifies.

¹⁷⁹ Even though schools have not made equality a reality, they remain one of the few institutions that aspire to achieving it.

Public schools are one of the few institutions in the United States where people from different backgrounds come together to negotiate common values and to determine the course of our shared future. It is public spaces, such as those schools, that give meaning to citizenship—because it is in those spaces that we are all equal.

Moving to vouchers will have the effect of de-emphasizing the community benefit and making education solely an individual benefit and responsibility.¹⁸⁰ This diminution of our collective responsibility will undercut the vision of public education as a communal endeavor, an experience all of our children have together with the state providing a free, quality education to every child. Amy Gutmann terms democratic public education as:

[C]onscious social reproduction in its most inclusive form . . . a democratic state recognizes the value of professional authority in enabling children to appreciate and to evaluate ways of life other than those favored by their families . . . [and] recognizes the value of political education in predisposing children to accept those ways of life that are consistent with sharing the rights and responsibilities of citizenship in a democratic society. A democratic state is therefore committed to allocating educational authority in such a way as to provide its members with an education adequate to participating in democratic politics, to choosing among (a limited range) of good lives, and to sharing in the several subcommunities, such as families, that impart identity to the lives of its citizens.¹⁸¹

Denise Morgan, *The Devil Is in the Details: Or Why I Haven't Yet Learned to Stop Worrying and Love Vouchers*, 59 NYU ANN. SURV. AM. L. 477, 479 (2003). See also Molly Townes O'Brien, *Brown on the Ground: A Journey of Faith in Schooling*, 35 U. TOL. L. REV. 813, 830 (2004) (noting that, despite the bleak history of segregation, the NAACP lawyers in *Brown v. Board of Education*, 347 U.S. 483 (1954), recognized that "public schooling . . . appeared to offer the best hope for social transformation and for economic and social advancement. Schools were, after all, home base for the rhetoric of equal opportunity.").

¹⁸⁰ This move will also put state funding of education at risk. It is much easier politically to cut funding for programs that are seen as largess for the poor than for community institutions. See Super, *The Political Economy of Entitlement*, *supra* note 113. Individual vouchers will move education funding towards, if not into, the entitlement category and put it at the risks Super identifies.

¹⁸¹ AMY GUTMANN, *DEMOCRATIC EDUCATION* 42 (Princeton University Press 1999).

Switching to a voucher system shifts this balance towards what Gutmann calls the state of families. It puts both the burden and the right to determine education solely into the hands of individual parents and greatly reduces the political voice of the community into what schools should teach and how they should teach.¹⁸²

These risks of reduced state funding and diminution of community input into education do not concern the more extreme advocates of a market-based system. Indeed they are seen as positives.¹⁸³ They concern me though. We need to recognize the importance of public education in creating a real democracy and respect the social capital built by children having a shared educational experience.

The move to privatization and individualism is also likely to increase the divides that have been growing; increasing separation along not only racial but religious lines.¹⁸⁴ The home schooling movement is animated, certainly in part, by a desire

¹⁸² *Id.* See also Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "the Power of Parents to Control the Education of their Own,"* 11 CORNELL J.L. & PUB. POL'Y 481 (2002) (examining the risks of ceding total control of education to parents).

¹⁸³ See, e.g., The Alliance for the Separation of School and State, at <http://www.schoolandstate.org/home.htm>, (calling for an end to "government involvement in education," including involvement through vouchers) (last visited September 30, 2006).

¹⁸⁴ Robert K. Vischer analyzes the likely effects on racial segregation and integration of fully funded vouchers where the vouchers can be used at religiously-affiliated schools. Robert K. Vischer, *Racial Segregation in American Churches and Its Implication for School Vouchers*, 53 FLA. L. REV. 193 (2001). He concludes that increased segregation is a likely, if unintended effect, given the unwillingness of white parents to choose schools in which their children will be a minority or schools in minority neighborhoods, the relative lack of information resources available to poorer families, and the common desire for a geographically convenient school, combined with segregated housing patterns and segregation of religious institutions. *Id.* Because religious institutions are highly segregated—Vischer cites a study showing only about 10% of congregations are integrated—the use of vouchers at schools affiliated with these segregated institutions is likely to result in schools that reflect the racial make up of the congregations. *Id.* at 204. "A functioning market will supply schools based on families' cultural, religious, and even racial preferences, providing new avenues for school segregation to occur." *Id.* at 203.

for separation from the common experience. Although there is a wide range of political and social views among home schoolers, they share a commitment to individualized education at the cost of the socialization and socializing that characterize schools. This too cuts into the democratic purpose of education as an experience that can offer students world views other than those of their families.¹⁸⁵

CONCLUSION

I have offered only a critique of a solution and not an alternative. Perhaps I am looking at this problem through the wrong lens. The relative advantages of middle-class parents will enable them to navigate the system of vouchers much more efficiently than the less well off. So maybe THE TWO-INCOME TRAP is right—giving these parents vouchers will allow them to reduce their housing costs and still find those elusive “good” schools. They will be able to win the competition and reduce their housing costs to boot. But, as Warren and Tyagi note, currently middle-class parents pay a stiff price for the existence of the “bad” schools they are escaping from. They pay the cost in the form of higher housing prices in good school districts. Unless the magic elixir of choice through vouchers is going to improve all schools, there will still be a competition. The resulting competition will focus on tuition or space in the good schools. If a voucher program relies on current district spending, parents will still face the same pressure to locate within the higher spending districts. It is more important to break down the district assignment system than to allow parents to move around within district. These goals can be reached without vouchers, but instead by restructuring the assignment

¹⁸⁵ Indeed, home schooling proponents debate whether government money should ever be accepted for fear it will come with strings. *Compare* The Home School Legal Defense Association, which opposes vouchers because they “will regulate parental freedoms,” *at* <http://www.hsllda.org/docs/nche/Issues/V/Vouchers.asp> (last visited July 31, 2006) *with* The Pennsylvania Cyber Charter School, which supports individualized schooling at home through a government regulated charter school program, *at* <http://www.pacyber.org/> (last visited July 31, 2006).

process through a choice-driven lottery.¹⁸⁶ Whether school choice is examined through the lens of behavior,¹⁸⁷ sociology,¹⁸⁸ or game theory,¹⁸⁹ vouchers end up placing unexpected and undesired burdens on the advantaged choosers as well as those left behind. Furthermore, it fails to solve the real problem—the need for school improvement for the entire community.

Given the risks vouchers pose to democracy and the difficult questions they raise, what alternative solutions are there to the problem Warren and Tyagi identify—the inherent unfairness and cost of tying school assignment to residence? There are other proposals to cut that tie. Mechele Dickerson has proposed a choice system that advantages people who choose racially balanced schools and neighborhoods.¹⁹⁰ Amy Stuart Wells suggests the advantages of an all-choice public school system in which every family must choose among available public school options.¹⁹¹ Aaron Saiger suggests vesting greater discretion in

¹⁸⁶ Mechele Dickerson proposes encouraging racially integrated neighborhoods and schools by using a public school choice program that operates over entire metropolitan areas, supplemented by an auction that allows parents to buy a slot in their first choice schools. Dickerson, *supra* note 9, at 1289-1291. The auction would encourage integration by limiting participation to residents of racially integrated neighborhoods. *Id.* at 1291. Dickerson cautions, however, that “[i]f parents’ primary preference is to avoid living near minorities, then even a program that ensured that their children would attend safe, quality public schools will not prevent them from fleeing a racially transitioning neighborhood.” *Id.* at 1289.

¹⁸⁷ See SCHWARTZ, *supra* note 90.

¹⁸⁸ See Lareau, *supra* notes 132, 133.

¹⁸⁹ See Fennell, *supra* note 47.

¹⁹⁰ Dickerson, *supra* note 9.

¹⁹¹ AMY STUART WELLS, *supra* note 76. Wells would add additional requirements including that all students must be guaranteed a school choice and be forced to pick a magnet or alternative program; the program must operate within one public school district or union of two or more districts to prevent dollars from being siphoned off to support private and religious schools or wealthy suburban districts, the program must have a parent information center to help every family gain access, the program must offer free and reliable public transportation, the program must replicate the most popular programs at more than one school to avoid monopolies, and teachers and principals must have flexibility and autonomy to shape schools and programs. *Id.* at 92-95. The maintenance of district boundaries raises issues about whether Wells’s

state level officials to control local districts so they can demand accountability by their ability to threaten to disestablish a district that is not functioning adequately.¹⁹²

Additionally, Richard Kahlenberg proposes redrawing districts so that they encompass economically diverse communities, with the goal of creating a middle-class majority at each school.¹⁹³ There are obvious practical and political hurdles to this solution—the geography of metropolitan areas comes immediately to mind. But, combined with state or national funding equity, it could go a long way to assuaging fear of inadequate education as a motivator for middle-class housing competition.

These proposals are more likely than vouchers to solve the problem Warren and Tyagi identify. Redistribution of middle-class kids will likely improve the user pool that creates the schools,¹⁹⁴ thus offering more good schools for all, including middle-class families. The proposals would cut the direct tie between residence and assignment, eliminating one of the key pressure points on family finances. They are at least as politically possible as vouchers because they won't evoke the same opposition from teachers' unions and will not force reassignment of middle-class children to schools dominated by the poor.¹⁹⁵ The proposals would help save the system of public

suggestions would sufficiently break the tie between residence and school assignment.

¹⁹² Aaron Saiger, *supra* note 69.

¹⁹³ KAHLENBERG, *supra* note 66 at 103-145. It is hard to argue with Kahlenberg's premise—the schools he describes fit into any plausible definition of the "good" school. It sidesteps the issue of racism which may be a terrible weakness but may also be a political advantage. It is certainly easier to construct legal support for such a plan that does not run into the wall of *Milliken v. Bradley*, 433 U.S. 267 (1977). This form of integration will not solve racism and that struggle must continue to address the obstacles minority children will face even in these economically integrated schools. But understanding that this step is not enough does not make it a bad first step.

¹⁹⁴ Fennell, *supra* note 47.

¹⁹⁵ *But see* Ryan & Heise, *supra* note 79, at 2088-2091 (noting suburban opposition to allowing urban children into suburban schools under the Milwaukee school choice program).

education by retaining the community responsibility for education that vouchers would undercut.

Perhaps what we also need is a public relations campaign on behalf of the public schools we already have, a campaign that speaks to the morality of providing equality and fairness to all children.¹⁹⁶ This may sound absurdly naïve but we do have an asset that is underappreciated. It is in our individual and collective interests to preserve and nurture that asset. Polls consistently show that people think much more highly of the public school their children attend than they do of public education generally.¹⁹⁷ Clearly public education has suffered from bad press that is not an accurate reflection of people's typical experience with actual schools. David Super has examined the use of moral arguments to advance the social conservative agenda in recent years.¹⁹⁸ He posits that social conservatives have been able to reframe debates about welfare and other social programs by focusing on blame. He specifically places emphasis on the burdens the "blameworthy" should bear and the assessment of blame, instead of the burdens the innocent must carry.¹⁹⁹ Thus, in the arena of education, it should be possible to frame the debate in terms of how to provide an effective education to all children, not just to a select few. Universally available and accessible public schools remain an exceedingly attractive way to meet that need and a system that still enjoys wide popular support. Deepening the public's understanding of the social value of accessible education could help provide societal support for more equitable funding and support of the existing school system.

Warren and Tyagi's analysis of debt reflects a moral element. The focus of the book is on middle-class families who have

¹⁹⁶ Fennell, *supra* note 47, at 50-51 (noting the important role played by social norms and encouraging the effort to shift norms by "focusing users on the consequences of abandoning the city's urban schools and neighborhoods, and on the benefits that will redound to their children if these schools and neighborhoods are instead reclaimed and improved.").

¹⁹⁷ ROTHSTEIN, *supra* note 35, at 28-29.

¹⁹⁸ David Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032 (2004).

¹⁹⁹ *Id.*

“played by the rules;” that is those who have saved and worked hard and have strived to provide the elements of the traditional middle-class life for their children—which amounts to safe housing and good schools. The emphasis of THE TWO-INCOME TRAP is on how these laudable efforts have been undercut by the high costs of reaching those goals, not on any challenge to the goals themselves. A major part of the book is devoted to debunking the myth of the immoral debtor—showing that the families that are struggling with debt are moral and not the spendthrift frivolous acquirers we can consign to their self-induced fates.

The moral element of support for public education will be even more important if vouchers become the norm. If government support for education is limited to providing the money, then education will be even more vulnerable to cost cutting efforts. Financial support for education can then be recast as a welfare-type program, needed by others and costing the majority too much. Unless education remains the right of every child, our collective responsibility to meet that need will subside. Providing funds for education may come to be seen as no more necessary than providing funds to ameliorate hunger—a good idea but not a moral imperative. How long will it take before there are cries to subject vouchers to means-testing and to question the validity of this form of “redistribution” of wealth? To the extent voucher support can be portrayed as an entitlement for the less-well off, vouchers will be vulnerable to the same calls for cutbacks as food stamps, welfare, and other social programs.²⁰⁰

Building a wider appreciation for the role public education plays in building and maintaining democracy could ameliorate the drive to abandon the public schools in favor of seeking individual advantage. This would require the abandoners to put their children where their ostensible ideals lie—to “sacrifice” their advantage for the collective good.²⁰¹ We certainly aren’t there now, but recognizing the benefits that public schools confer on their students and their communities could help

²⁰⁰ Super, *The Political Economy of Entitlement*, *supra* note 113.

²⁰¹ It should not be considered a sacrifice of one’s child to send her to an academically effective, safe public school. *See supra* note 92.

middle-class parents see that using the schools is a positive good—for their individual children and for the future of all our children.