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# RETHINKING COLLECTIVE RESPONSIBILITY FOR EDUCATION\*

STEPHEN D. SUGARMAN† AND DAVID L. KIRP††

## INTRODUCTION: A STRATEGIC RETREAT FROM THE PRESENT

Most discussions of educational policy are shaped by perceptions of the present. Although this limitation is often useful, because it keeps discourse within the bounds of the real or politically plausible, it also imposes significant constraints. In thinking broadly about how this society might go about identifying and securing its interests in education, the difficulties of an exclusively present-oriented focus become manifest. There arises a tendency to confuse what exists—a system that provides publicly-run schools as a “free” good available to all children and requires all children to attend some school for a specified number of years—with what must be, to treat what is actually only one among several alternative approaches as if it were the exclusive alternative. A wholly present-oriented frame of reference may consequently prompt “solutions” that tend only to tinker with a perhaps fundamentally misdirected approach.

One way of escaping this bind—of considering in a quite different light basic choices with respect to educational policy—is to cast the problem in terms of the dilemmas that would confront a new society<sup>1</sup> formed in order to advance individual and certain jointly-held interests of its founders.<sup>2</sup> The first three parts of this article focus on this creation, which for want of inventive-

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1. The terms “society” and “government” are used diffidently, if frequently. Both should be taken as metaphors: “society” describes a collectivity of individuals who in some sense act in concert; “government” signifies the instrument through which a society acts. Varieties of collective action are explored throughout this article.

2. This view of the purpose of collective action dates at least from Aristotle. It has been carefully scrutinized in M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

ness is called Atlantis II, attempting both to assess the nature of its education-centered interests and to relate these to techniques of implementation. The final two parts explicitly link this discussion to the contemporary American experience.

Every society, even invented ones, has specific attributes. In order to keep the model quite general, we have imposed relatively few constraints on Atlantis II. We assume (i) that the society has some rule for joint or collective decision-making, which enables it both to frame its initial compact and to resolve issues that subsequently arise; (ii) that the society is self-renewing; (iii) that families bear primary responsibility for conceiving and rearing children; (iv) that those outside the family have some interest in children generally and in their education specifically; and (v) that this interest may be framed in terms of the initial compact and in subsequently-made rules.<sup>3</sup> Because these assumptions bear on education-specific decisions that Atlantis II may make, each requires some further explication.

#### A. Decision-Rule

What might be meant by the phrase "society's interest" is decidedly ambiguous. Conceivably, one might have in mind an organic interest of the whole community, different from and greater than the sum of its constituent parts. We prefer, however, to treat "society's interest" as exemplifying the sum of its individual members' interests, to assume that it is equatable with the preferences, somehow combined or filtered, of those who would be members of Atlantis II.

There are, of course, many ways of assessing such preferences and, correspondingly, many decision-rules that might be utilized as the basis for collective societal action. At the outset, when the founders of Atlantis II frame its constitution or compact, a rule of unanimity may be wisest: that rule would permit each individual founder to negotiate on an equal footing with respect to the terms of the constitution and freely to opt out of Atlantis II if he or she were unwilling to abide by the society's constitution.

The proper constitutional task is the framing of broad principles, including the demarcation of the realms of private and collective activity. Decisions concerning *particular* courses of action cannot be specified at the outset, for any attempt to bind the society in this fashion risks societal stagnation, as initially unrecognized problems inevitably surface. For this reason, the Atlantis II compact will include provisions concerning decision-rules for the resolution of subsequently-realized problems. Here, some rule less rigid than unanimity will be needed; were this not the case, the costs of securing consen-

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3. Other limiting assumptions are noted throughout the text where these are relevant to particular issues.

sus would make further collective action almost impossible.<sup>4</sup> We assume that in determining what this decision-rule will be (or, more likely, what different decision-rules will apply to different types of issues), no individual can precisely predict his position in the society or know whether a given rule will render him more often a "winner" or "loser" in the ongoing process. Hence, the rule (or rules) adopted will generally be thought just or fair.<sup>5</sup>

For the most part, we will treat the ongoing decision process of Atlantis II as governed by majority rule. We recognize that such a rule—for that matter, *any* rule—may, in fact, be used by the dominant members of the society for exploitative purposes (indeed, we note instances of just such exploitation in analyzing possible decisions). The choice of majority rule as the decision standard is not critical to the analysis, but *some* choice must be made, and this choice may be justified on the pragmatic grounds that it commands general adherence as the proper way of resolving many societal issues. We do not assume that individual votes are necessarily motivated either by self-interest or by a concern for the interests of others, but treat this as a matter to be discussed in the context of particular issues. Finally, they assume that the franchise would be limited to adult members of the society and that children would not be entitled to vote until they reach some specified age or demonstrate some particular ability thought necessary for political participation.

### B. A Self-Renewing Society

We assume that the founders of Atlantis II would wish to perpetuate their society primarily through self-renewal and will do so by entitling their children to membership in the enterprise. This assumption is not, of course, inevitable: Atlantis II might, for example, choose to be self-liquidating, effectuating its choice through reliance on sexual abstinence, contraception, and abortion, or by transferring unwanted offspring to other societies; alternatively, quite like many "subsocieties" or clubs, it could seek to perpetuate itself by attracting new members;<sup>6</sup> or, again, children might be required to petition for societal membership, with the expectation that few would be admitted. The preference for self-renewal is assertedly premised on the view that children benefit the society at large. They provide a certain general pleasure, even as children: to them, received wisdoms are passed along, and from them adults acquire a sense of collective immortality, of something to work for.

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4. See J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 97-116 (1962).

5. See generally J. RAWLS, *A THEORY OF JUSTICE* (1971).

6. The American Shakers, who believed in celibacy, did not have children. They relied for their continuity upon converts and upon adoption (largely, it seems, of orphans, neglected children, and the like). But this society is dying out; it has been reported that there are only twelve remaining Shakers, although there were perhaps 6,000 a century ago. See Nebbe, *The Last Shakers*, *The Christian Science Monitor*, Feb. 25, 1975, at 5, col. 1.

And they constitute the society's future—their labor and their intellectual contributions are the society's anticipated source of self-rejuvenation.

### C. The Primacy of the Family

In some societies, children are thought of as belonging to the community as a whole, rather than to subgroups or families; assuming that to be the case, children's treatment presumably would be reflected entirely in collective judgments. We posit, however, that primary authority over the children of Atlantis II resides with their families, those who bear or rear them. We assume that families will be motivated to have children by the immediate pleasures and long-run benefits they hope to receive from their offspring, including their ability to perpetuate themselves through lineage.<sup>7</sup> In this setting, self-renewal may be viewed as reflecting a mutual agreement to further individualistic desires. The founders of Atlantis II would permit people to bear children and allow the children of others to join the society in good part because each individual founder wants, for personal reasons, both to have children who belong to him and to have his children become part of the society.

### D. The Interests of Others

Even in a society that treats the family as centrally important, those who are not a part of a given family will have interests in the welfare of the children of that family. "Outsiders" will, for example, be concerned about how their lives will be affected by these children, what these children will do with the society once they assume their adult roles, and the comparative advantages that others' children may enjoy (or disadvantages that they may suffer). These concerns for the children of others may suggest the propriety of either conditioning the right to bear children or of assuming *some* collective responsibility toward children, the specifics of which may be treated as a part of the self-renewal compact.

### E. The Interest in Education

Whether these concerns related particularly to education would depend in some part on how the founders of Atlantis II view the effects of education. We assume provisionally that the experience of learning is seen to bring immediate pleasure, or consumption benefits, and that it is thought to yield long-term, or investment, benefits as well.<sup>8</sup> The educated individual in Atlan-

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7. It should be noted that this need to perpetuate oneself need not be a matter of biology, that one can impress a part of himself on a child through child rearing without child bearing (witness adoptions).

8. In America, the assumed correspondence between education and lifetime income has come in for serious criticism of late. See generally C. JENCKS, *INEQUALITY* (1972).

tis II can participate in the society's civic, economic, social, and cultural life in personally satisfying ways; the exercise of that capacity also affects other members of the society—albeit in a varied and unequal manner.<sup>9</sup>

Educational attainment is thus generally seen as important not only in itself, but also as a proxy for other societal purposes that are realized in the future; it relates to such ultimate ends as societal cohesion and individual self-sufficiency. Assuming that the founders of Atlantis II are motivated by this nexus between educational attainment and these ends to include provisions concerning education in their compact, they will have to define in detail collective objectives that focus specifically on education. For example, the founders might consider the nature of the educational experiences or skills they desire children to possess, and whether they wish children to possess diverse skills, and if so, which children are to acquire specific skills. The delineation of these educational skills (literacy, for example) or experiences (say, years of schooling) and the manner of their distribution (by merit or family choice, or consistent with a principle of equal opportunity, for instance) are what we term a society's education-specific objectives. These are likely to be idiosyncratic, varying substantially with the preferences of a particular society. We will have little to say about the particular choices Atlantis II might make. Instead, we stress more general and universal concerns, treated in the familiar welfare economics terms of equity and efficiency.

Any given set of ends may be secured by a variety of devices or means. Logically, one might expect a society to decide first what it wants to do, and then how to go about doing it. With respect to education, however, the means-end relationship is seldom that straightforward.<sup>10</sup> A society's ends may be couched ambiguously, making it difficult to assess how most effectively to accomplish them; this is frequently the case in complex contemporary societies, where such ambiguity may well be intended to mask tensions among competing ends. Further, the capacity of a particular means to affect behavior in the desired way may not be well understood, thus rendering the choice among means a matter of informed guesswork. Finally, while ends themselves might conceivably be inferrable from means, a given means may be adopted for quite diverse ends-reasons. It is on these linkages that this article focuses. We employ the metaphor of Atlantis II to sharpen the focus.

We approach the means-end relationship from diverse perspectives. First, we imagine what might transpire if Atlantis II adopted an essentially decentralized strategy for providing education, one that relied primarily on family voluntarism and the market; part I considers the consequences of such a

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9. These impacts on others are often called neighborhood effects, spillovers, or positive externalities. *See, e.g.*, text at notes 37-48.

10. There is little in the literature of either organizational theory or political decision-making to suggest that the posited rationality reflects actual practice.

choice. Part II specifically examines those broad ends—defined in terms of equity and efficiency—that might not be satisfied by such an approach. Part III focuses on the kinds of means that might be adopted as a response to dissatisfaction with voluntarism. Part IV considers contemporary American policy in light of this analysis. The concluding part V analyzes several contemporary reformist proposals in these terms.<sup>11</sup>

## I

### VOLUNTARY EDUCATION: THE FAMILY AND THE MARKET AS EFFECTUATORS OF SOCIETY'S INTERESTS

#### A. Voluntarism

The founders of Atlantis II might initially consider what would transpire under the following arrangement: parents would have the unquestioned right to have children and to treat them as they wished until the children had reached a designated age of maturity; parents would be responsible for their children, in the sense that they would be obliged to assure that their offspring did not interfere with the rights of others; and parents could make no formal claims on their offspring and would have no further responsibility with respect to their conduct, while children themselves gained the rights and obligations of adulthood, once they had reached maturity.<sup>12</sup> Under this approach, families would determine whether to educate their young, how to do so (either by themselves or by purchasing instruction elsewhere), and how much education to provide. The society would not formally intervene in the family's decision-making. The obvious appeal of this voluntaristic approach—and the reason we start with it—is that it tries to achieve the maximum of individual liberty (and decentralized decision-making), at least for adults in the society. Individual liberty, we assume, is a preference that Atlantis II founders would have.

The parent-hegemony or market model requires no collective expenditure and imposes no collective educational requirements. Yet, it is not necessarily panglossian to suggest that this approach might lead a large number of children to secure whatever Atlantis II collectively regarded as satisfying its edu-

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11. E.G. West has undertaken similar inquiries. *See generally* E. WEST, *EDUCATION AND THE STATE* (2d ed. 1970) [hereinafter cited as *EDUCATION AND THE STATE*]; E. West, *The Economics of Compulsory Education*, 1974 (unpublished manuscript on file with the authors) [hereinafter cited as *The Economics of Compulsory Education*].

12. The specific assumptions are, of course, arbitrary. In this country, for example, parents have no common-law vicarious liability for the torts of their children, although this has been changed by statute in some states; parents, however, are liable for negligent failure to control their children. *See* W. PROSSER, *LAW OF TORTS* § 123, at 869-73 (4th ed. 1971). Also, pursuant to relative responsibility statutes of various states, parents may have continuing obligations to their children even when the children are emancipated. *See* H. CLARK, *LAW OF DOMESTIC RELATIONS* § 6.7, at 212-18 (1968).

cational objectives. If parental behavior were influenced by a strong shared moral code that valued education, if parents might expect real benefits to accrue to them from educating their young, if children themselves were able to bargain within their families for education, and if others who desired children to be educated could privately arrange for it, substantial education might in fact be attained voluntarily. And even if those assumptions produced what was viewed collectively as an imperfect outcome, the results of this approach could serve as a foundation upon which formal societal intervention might be superimposed.

The assumed moral code might assume any of several forms. Natural parental affection could substantially assure that families would provide education, as long as they shared the general societal perception concerning the importance of education. Put differently, many Atlantis II parents might well act in what they perceived as the "best interests" of their children, and in so doing secure an education for them.<sup>13</sup> Social pressure might also encourage such an outcome. Were education regarded generally as a civic obligation of parents to their offspring, parents would be exposed to informal community demands to educate, even in the absence of a collectively-imposed requirement. In addition, parents might feel the force of a more general moral consensus that they were responsible for their own conduct, and hence obliged to their children because they were resultant of parental decision and action. Psychology and ideology, joined in this fashion, could strongly prod parents into providing education on essentially moral grounds.

If parents perceived that the education of their offspring benefited them as parents, this also would prompt parents to furnish that education. Quite different kinds of benefits might be imagined. Substantial status rewards may accrue to parents when their children are educated: being father to the chief or mother to the doctor has long carried considerable cachet. Also, children may be more interesting family members once educated, and that too is a benefit. If education renders the child economically autonomous, the educated child may no longer burden the family's resources—indeed he may help his parents with assistance in their old age and with contributions to a family-run enterprise, thus generally promoting increased prosperity for a multigenerational family. The educational process itself may be enjoyable for the family, for there is pleasure that comes from teaching children and watching them learn. Finally, if education helps to control children's behavior by making them more conscious of society's demands, it may limit parental responsi-

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13. Despite the harsh treatment recently accorded to the "best interest" concept as a basis for judicial action—see, e.g., J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); Mnookin, *Foster Care—In Whose Best Interest?*, 43 *HARV. ED. REV.* 599 (1973)—the claim that parents generally know best (or better than others) what their children need does not seem far-fetched.



bility for the misdeeds of their charges.<sup>14</sup>

Each of these reasons why parents might voluntarily provide education assumes children to be passive beings, creatures of their parents' will. In few societies, however, is this, in fact, the case: children too have desires and expectations and may be able to persuade their parents to act on them. If children themselves see education as of personal value, they may be able to bargain for it within the family, threatening, for example, to withhold their services (or their love) unless those desires are satisfied.

To the extent that such forces do not operate in Atlantis II, parents will be less inclined to supply education voluntarily. And even if parents wished to educate their young, some may be incapable of doing so. The capacity of a family to act upon its preferences with respect to education will depend in part upon the distribution of purchasing power in the society; and we assume that income and wealth in Atlantis II would be unequally distributed. Education is bound to be costly, consuming time, if not resources. To the extent that wealth varies, some families will be able to furnish education more easily and amply than others. It is possible, of course, for apparently-poor families to borrow money to educate their children, repaying those loans over a long period of time; their current poverty may simply reflect the fact that the "costs" of children are concentrated in a few years. If wealth distribution in Atlantis II is extremely unequal, however, very poor families will consume all of their current resources on things regarded as essential for immediate survival, and they may sacrifice education out of necessity, not out of choice. But this outcome might be avoided if families were permitted to borrow funds for the education of their children, encumbering the future earnings of the *child* as the basis for repayment. Alternatively, children from poor families, upon becoming employable, could acquire jobs and use their savings to pay for their *own* later education.<sup>15</sup>

Regardless of the aggregate strength of these forces, all families would not, of course, be expected to respond to them in the same way. Perhaps if social or economic class factors came to assume a powerful place in this society—a predictable but not inevitable possibility, given the preference for liberty—the class of the family, independent of its income, would be an important variable, although it is not clear whether higher class would be associated with a greater or lesser responsiveness. Upper-class parents, one might expect, would provide their children with whatever was necessary (including education) to preserve that status. It might further be expected that

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14. This specific behavior in response to a more general responsibility is an example of what Professor Calabresi calls the "general deterrence" effect of the law. See G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

15. It is a pedagogical commonplace that individuals are more malleable, and hence more amenable to education, as children than they are at later stages of life. But see Freire, *Cultural Action and Conscientization*, 40 HARV. ED. REV. 452 (1970).

lower-class parents would have lesser aspirations for their children, would harbor jealousy if their children were more successful than they were, would be excessively conservative in protecting their children against the risk of sinking to an even lower class, would have less knowledge of the benefits of education, and so on. The very opposite might be true—for example, the lower classes might measure success by the social mobility of their children and put inordinate faith in education as critical to that success, thus devoting proportionately more of their resources to education than their wealthier counterparts.

Apart from the action of families, the society might also rely on the voluntary efforts of private charities to assist children who otherwise would go undereducated or uneducated. Altruism on the part of well-off members of the society—the donors' perception that they would rather spend some of their resources on the education of "deserving" children than on anything else—would be one motivation for such private efforts.<sup>16</sup> Others might contribute to the education of those whom they thought undereducated in order directly to benefit themselves by, for example, decreasing the propensity of the uneducated to commit crimes or assuring the donors of a future stream of trained, productive workers.<sup>17</sup> Similarly, employers might provide subsidized on-the-job training to young apprentices, although it would be in the employers' interest to restrict such education in ways that assured subsequent benefit.

In sum, *it is at least conceivable that despite collective nonintervention, a sizable proportion of the children of Atlantis II would somehow acquire an education.*<sup>18</sup> *Much of it could be anticipated to come from families' own resources; for the rest, charity, private loan arrangements, apprenticeship schemes, and education purchased by the children themselves would each be utilized.* Just how many children would receive less education than was collectively desired is in part a matter of guesswork; but the American and English experience with such an arrangement, briefly noted in the next section, bears directly on the issue.

#### B. The American and English Experience With Voluntarism

There is historical precedent of sorts for the voluntarist approach. Until the mid-nineteenth century, parents in the United States and to an even greater extent in England determined whether or not to educate their

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16. The utilities of persons in this case would be interdependent—the donor's happiness depending upon the improved condition of the donee. See Hochman & Rodgers, *Pareto Optimal Redistribution*, 59 AM. ECON. REV. 542 (1969).

17. Some might make voluntary charitable contributions in hopes of avoiding a subsequent collectively-imposed obligation to make a substantially larger contribution.

18. It might be necessary for Atlantis II to determine collectively who has the education-specific right over a child in instances of dispute among family members and to create a scheme—such as an adoptive mechanism—for designating substitute parents if a child is abandoned or his parents incapacitated from caring for or controlling him.

children and voluntarily assumed primary responsibility for that education. Their efforts were supplemented by private charitable contributions, and some education took place in the work setting. Relatively little revenue was collectively raised or dispersed for publicly-provided educational services.<sup>19</sup> In England, education was primarily privately-financed until 1870.<sup>20</sup> Within the United States, the pattern of public support for education varied substantially among regions: public schools were commonplace in New England but were almost nonexistent in the South.<sup>21</sup> Even as recently as 1860, American governments raised through taxes less than half of the total costs of schooling; parent and charitable support accounted for the rest.<sup>22</sup> Despite this relatively limited governmental role, a substantial number of American children appear to have attended some school and acquired at least basic skills, and a substantial majority of the white population was functionally literate.<sup>23</sup> Moreover, opportunities external to education made significant social mobility possible.<sup>24</sup> A similar pattern appears to have prevailed in England.<sup>25</sup> Children of this era were not as badly educated as has popularly been assumed.

Yet, during the second half of the nineteenth century, taxes supplanted parental and charitable initiative as the primary support for education. Public expenditures jumped from 19.9 million dollars to 229.6 million dollars, with government assuming 79 per cent of educational costs.<sup>26</sup> And in the same interval, thirty-three states adopted laws requiring children to attend some school.<sup>27</sup>

From the contemporary perspective, it seems unthinkable that America

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19. See generally F. ENSIGN, *COMPULSORY SCHOOL ATTENDANCE AND CHILD LABOR* (1921); *EDUCATION AND THE STATE*.

20. The Act of 1870, known as the Forster Act, marked the first important collective step toward the provision and financing of education in England. See *EDUCATION AND THE STATE* xvii.

21. See generally L. CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876-1957* (1961).

22. See Fishlow, *Levels of Nineteenth-Century American Investment in Education*, 26 *J. ECON. HISTORY* 418, 419 (1966).

23. By 1840, approximately 40 per cent of children from five to nineteen years of age attended school at least some of the time. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, *EDUCATION OF THE AMERICAN POPULATION* 3 (1967). According to census surveys in 1840, 1850, 1860, and 1870, illiteracy was reported at the rate of about 20 per cent, although the earlier figures were less accurate and probably understated the amount of illiteracy. Blacks were not included in these statistics; the black illiteracy rate in 1870 stood at around 80 per cent, although it declined sharply thereafter. See *id.* at 112-15.

24. Cf. S. THERNSTROM, *POVERTY AND PROGRESS* (1964). Some critics have questioned the significance of "Horatio Alger" paths to a better life, much as some critics currently doubt the role of education in fostering social mobility.

25. See West, *Resource Allocation and Growth in Early Nineteenth-Century British Education*, 23 *ECON. HISTORY REV.* 68 (1970); West, *Educational Slowdown and Public Intervention in 19th Century England: A Study in the Economics of Bureaucracy*, in CARLETON UNIVERSITY ECONOMIC PAPERS (Paper No. 74-09, 1974).

26. See Fishlow, *supra* note 22, at 420.

27. See Landes & Solmon, *Compulsory Schooling Legislation: An Economic Analysis of Law and Social Change in the Nineteenth Century*, 32 *J. ECON. HISTORY* 54, 56-57 (1972).

might reinstitute voluntarism: the preconditions for its success appear to be lacking. One would be hard-pressed to specify a moral consensus concerning education in this country or to gauge its force. Many American families differ markedly from the sort of unit that would have to exist if voluntarism were to succeed: some appear so preoccupied with other pursuits that assuming a primary educational role would be viewed as a burden; others are currently too poor to be able to devote substantial time or resources to the task, and the charitable impulse to help such families seems blunted.<sup>28</sup> Contemporary parents cannot anticipate, as they once could,<sup>29</sup> that their children's education represents an investment in the family's economic future. The multigenerational family has nearly disappeared, and with its demise, the understanding that a child bears obligations to his elders and mentors has perceptibly diminished; and public old-age security programs, which relieve the need for the elderly to rely on their children for financial support, have correlatively undercut parental incentives to educate their young in order to assure that support. In short, the interdependency of generations within a specific family has been substantially reduced. Even the nuclear family, while perhaps not as endangered a species as some social scientists would have us believe, has shown signs of erosion: a large number of American children grow up today in one-parent homes, and many do not live with their natural parents.<sup>30</sup>

One might conclude from this recitation that the voluntary model would be fit only for a simpler, less "modern" community than ours—and there may be some validity to that conclusion. It is a sociological truism that as societies grow more complex (as America certainly has during the last century), formal agencies of government come to supplant families in providing needed training;<sup>31</sup> and the consistent historic pattern suggests that the lure of voluntarism may be naïvely romantic, even for a new society. Yet this is not necessarily the case. In America, at least, the reality of limited voluntary education

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28. Today, charitable giving is importantly motivated by tax benefits. See D. Good & A. Wildevsky, *A Tax by Any Other Name: Budget versus Tax Alternatives for Financing Governmental Support of Charitable Contributions* (University of California, Berkeley, Graduate School of Public Policy, Working Paper No. 15, 1974).

29. See Stern, Smith, & Doolittle, *How Children Used to Work*, 39 *LAW & CONTEMP. PROB.* no. 3, at 93 (1975).

30. According to the 1970 Census, of 69,522,812 children under the age of eighteen, 11.5 per cent, or 7,979,085 children, lived with their mother alone and 1.9 per cent, or 1,399,184 children, with their father alone; 3.5 per cent or 2,460,594 children, lived with neither parent, including 2.3 per cent who lived with other relatives, 0.6 per cent with nonrelatives, and 0.6 per cent in group quarters. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: SUBJECT REPORTS—PERSONS BY FAMILY CHARACTERISTICS pt. 4B, at 1, Table 1 (1973). See also R. SORENSEN, *ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA* (1973). Mr. Sorensen's study suggests that 89 per cent of adolescents aged 13-19 expect to get married, *id.* at 344, 378 Table 2, and virtually all expect to have children (regardless of their marital status), *id.* at 353, 355, 359 Table 180.

31. See, e.g., Inkeles, *Society, Social Structure, and Child Socialization*, in *SOCIALIZATION AND SOCIETY* 73 (J. Clausen ed. 1968).

is *partly* attributable to the operation of the government's education programs. Public schools are largely financed through local taxes on property and state sales and income taxes. These taxes consume an important share of a family's disposable income, depriving even middle class families of the capacity to make effective choices with respect to education.<sup>32</sup> To the extent that such taxes are regressive, falling more heavily on the poor than the rich,<sup>33</sup> they are particularly coercive for this segment of society. Abandoning both education taxes and government-run schools, substituting in their place the private unsubsidized purchase of education, might yield quite unexpected patterns of voluntary behavior.

### C. The Necessity of Choice

Changes in the relationship between family and government with respect to education that have taken place during the last century are not paralleled in other spheres of child rearing. In both the United States and England, the family continues to make many critical child-centered decisions, including the decision initially to conceive<sup>34</sup> (or, having conceived, to give birth to)<sup>35</sup> and to rear<sup>36</sup> children. This variation in governmental role reveals—or, better, reminds—that we might have continued to treat education essentially in voluntary terms, relying primarily on family initiative. The development of the present system represents a choice among policies, not an inevitability; presumably, it derives from a collectively-made decision that reliance on the family and the market insufficiently satisfies this society's objectives. The next part considers how Atlantis II might view the question.

## II

### EDUCATIONAL OBJECTIVES: POTENTIAL SHORTCOMINGS OF THE VOLUNTARY MODEL

Atlantis II may find reliance on voluntary efforts and family decision-making an imperfect means of satisfying its educational objectives. In this part, we explore those educational objectives.

Since we treat Atlantis II as a collection of individuals, rather than as an entity with interests of its own, to speak of the "objectives of Atlantis II" is misleading. Even if everyone in Atlantis II were to agree that the voluntary model had defects, it is unlikely that collective action to remedy these shortcomings would be designed to help everyone equally. More plausibly, the vol-

32. See EDUCATION AND THE STATE 62-66.

33. There is considerable debate on the incidence of the property tax. See, e.g., J. PECHMAN & B. OKNER, WHO BEARS THE TAX BURDEN? 25-43 (1974).

34. See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942).

35. See, e.g., Roe v. Wade, 410 U.S. 113 (1973).

36. See text at notes 208-221 *infra*.

untary model would be thought deficient because it ill served the interests of only some of the society's members. That recognition makes it possible to analyze the potential defects of the voluntary model in terms of those who might be dissatisfied with it and who thus might benefit from collective action. This we have attempted to do by subdividing the objectives of Atlantis II into those pertaining to parents, children, and others.

We discuss the nature of those objectives and imperfections in traditional welfare economics terms—to wit, the model's outcome *may* be perceived as inefficient and/or inequitable with respect to parents, children, and/or others. This part examines objectives in the abstract; it also considers why collective action may be needed to secure those objectives. In part III, actual collective means for achieving ends are considered in detail.

### A. Efficiency and Equity

#### 1. *Efficiency*

Efficiency is best understood as a concept of ideal market behavior, indifferent to the initial distribution of resources or entitlements<sup>37</sup> but very much concerned with the ways in which those resources are subsequently allocated or transformed into goods for consumption and exchange.<sup>38</sup> At optimal efficiency, no alternative transformations or voluntary exchanges could be undertaken that would make someone better off without making another worse off.<sup>39</sup> Any particular transfer is tested for efficiency in the same terms: does it make someone better off without worsening the position of another? The pursuit of efficiency with respect to education would thus promote exchanges, both between education and other things (such as food or golf) and among education-specific resources, until any imaginable additional changes would necessarily leave someone worse off.

"Better off" and "worse off" have no objective referents. They are defined in subjective terms of the bargain struck: does at least one party prefer what he has after the exchange to what he had previously, while no party prefers not to exchange? If so, the exchange is efficient. It is assumed, at least in the first instance, that individual preference-based actions will lead ultimately to efficient solutions: individuals are considered capable of bargaining with others, and because efficiency gains are matters of personal preferences, such bargains are thought generally to be better than externally-imposed

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37. See, e.g., R. MUSGRAVE & P. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 51-82 (1972) [hereinafter cited as MUSGRAVE & MUSGRAVE].

38. Indeed, efficiency calculations ignore the ethical aspects of such questions. See, e.g., E. MISHAN, *COST-BENEFIT ANALYSIS* (1971).

39. This is known as the condition or state of "Pareto optimality," after the Italian economist Vilfredo Pareto. See Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-94 (1972); and MUSGRAVE & MUSGRAVE 60.

transfers.<sup>40</sup> In this sense, efficiency treats society's "interest" as merely the facilitating of informed self-interest. So defined, efficiency is likely to be an objective of any individualistic society.<sup>41</sup> Such deference to individual preferences—to consumer sovereignty—embodied in the concept of efficiency is the linchpin of modern welfare economics.<sup>42</sup>

Sometimes, however, reliance on private exchanges—or, if you will, on the market—may yield inefficient solutions. Those who are not parties to a transaction may, nonetheless, feel its undesired effects; or because an unwieldy number of individuals would have to engage in negotiations, it may not be feasible to consummate an efficient transaction privately.<sup>43</sup> In such instances achieving efficiency may require collective action.

In other instances, individual preferences with respect to particular goods may be superseded in order, paradoxically, to protect the individual's long-term preferences. Goods treated in this fashion are termed "merit goods."<sup>44</sup> The merit goods concept assumes that another person, perhaps acting as an agent of the collectivity, knows better than does the individual directly affected what his long-term interest is and can calibrate both the short-term costs and long-run advantages of a temporary constraint on his choice. Such constraints frequently involve rules of behavior and are often directed toward the young—for example, the rule that contracts entered into by minors are voidable by them. When a society that claims to care about the welfare of its members has little confidence in or respect for individual preferences, it may choose to supply many of what it calls merit goods. Whether such merit goods and the continuing paternalism they represent can comfortably be fit within the framework of welfare economics is open to question.<sup>45</sup>

## 2. Equity

In contrast with efficiency, pursuit of equity or distributional objectives (strictly defined) make one party better off only at the expense of another.<sup>46</sup>

40. See Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

41. See generally G. TULLOCK, *PRIVATE WANTS, PUBLIC MEANS* (1970).

42. See generally A. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970).

43. See Calabresi & Melamed, *supra* note 39, at 1094-95; MUSGRAVE & MUSGRAVE 52-68. See generally G. TULLOCK, *supra* note 41.

44. See R. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 13-14 (1959) for an early treatment.

45. See MUSGRAVE & MUSGRAVE 80-81. To confuse matters further, transfers by society which are inalienable or in-kind goods that are difficult to transfer have sometimes been called "merit goods." *Id.* We attempt to reserve the label for paternalistic decisions.

46. The text overstates the distinction for purposes of clarity. Recall that in the earlier discussion of charity, text at note 16 *supra*, altruism was seen as motivated by a belief in the donor that he is better off when the recipient is made better off. If this altruism is institutionalized through collective action, the distinction between efficiency and equity becomes blurred. With respect to wealth, for example, an equity objective implies a redistribution or transfer of entitlements among claimants; the consequence is to make one person richer only by making another poorer. But what if it happens to be a transfer from a richer person who prefers the poorer one to have the wealth? In such a case, the richer person, though less wealthy, is richer in terms of psychic

The equity focus centers on the initial assignment of rights to goods and resources and their subsequent redistribution in an ongoing society.<sup>47</sup> Such objectives are usually derived from a concept of fairness or justice and invoke "patterned" criteria—that is, they typically specify "that a distribution is to vary along with some natural dimension" such as need, merit, usefulness to the society, personhood, or equality.<sup>48</sup>

The economic concept is relativistic. It does not purport to choose among these bases for redistribution, but simply notes their existence in explaining certain societal actions. What distinguishes the economic concept of equity from mere banditry is that the transfer has been consented to by the society's decisional apparatus; the right to benefit from such a distribution represents not a private license to confiscate, Robin-Hood-style, but a formally agreed-upon claim.

#### B. The Interests of Others, of Parents, and of Children: Efficiency and Equity Under a Voluntary Education Model

If Atlantis II tests the voluntaristic model in these welfare-economics terms, it may find its results inadequate, for any of several quite different efficiency or equity-based reasons.

Atlantis II may conclude that those outside any one family who consider themselves as benefiting from the increased education of children in that family cannot realize their preferences through market bargains, even though the conditions for an efficient exchange exist. Were this the case, less than the optimal amount of education would be provided jointly by the family and the market, and collective intervention designed to promote efficiency might be called for. How the burden of this intervention is assigned may be seen to have distributional effects.

The founders of Atlantis II may fear that as parents, they will fail, in fact, to secure for their own children the education that (before the fact) they agree they should provide. That fear might lead the founders to act collectively, helping themselves to achieve what they individually wanted. This

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welfare and, on balance, considers himself better off. Recognizing that it may be difficult to distinguish in practice, in the abstract, redistribution will be viewed here as making individual transferors worse off, and the institutionalization of altruism will be treated as an efficiency and not a distributional move.

47. The words "distribution" or "redistribution" are here used when referring to equity, and "allocation" is used when referring to efficiency. These *assume* a given system of property rights with respect to goods and resources; hence when talking of allocation, one typically is looking for an efficient allocation of those resources according to the Pareto principle. But when a property right does not yet exist (or when the acquisition of initial entitlements is being discussed), the collective decision about that right may be described as one of "allocating" that right; hence "allocation" in this sense is a matter of determining distributional consequences. *See generally* Calabresi & Melamed, *supra* note 39. Moreover, in certain cases this initial assignment of rights can be made for efficiency as well as equity reasons. *See* text at note 66 *infra*.

48. *See* Nozick, *Distributive Justice*, 3 *PHILOSOPHY & PUB. AFFAIRS* 45, 52 (1973).



differently-premised collective action would also be taken in pursuit of efficiency.

It may be felt that voluntary arrangements would leave certain children undereducated, as Atlantis II defined that concept. If this outcome is perceived as unfair to these children, some form of societal action—in the form of either collectively-distributed benefits or collectively-imposed requirements—would be considered. Collective action taken for this reason would be intended to promote equity-based objectives.

The founders of Atlantis II may also be concerned that the benefits that parents (or other “volunteers”) generate by educating children would rebound to the benefit of others and go unfairly uncompensated. If they conclude that collective action to secure payment is appropriate, such action would also be undertaken in pursuit of equity.

This section addresses each of these four concerns, identifying their abstract educational objectives.

### 1. *Securing the Educational Interests of Others*

#### a. Bribes

For a variety of self-interested reasons, people in Atlantis II may want other families' children to receive more education than their families will choose to provide. They may believe, for example, that such additional education will benefit them, the outsiders, by yielding more enlightened political participation, less violation of the laws, increased contributions to the society's economy, and the like. These “spillover” or “external” benefits of education represent what have been termed ultimate ends, which the intermediate end—educational attainment—is supposed in causal fashion to promote. If they could, these outsiders would be willing to pay for such benefits by paying families to increase the education of their children.<sup>49</sup>

Such desires could conceivably be accommodated in the market:<sup>50</sup> the resources that outsiders would willingly contribute in order to achieve their educational objectives might be collected and redistributed in a manner that induced families to obtain the desired amount of education for their progeny. The success of such a venture assumes, of course, that the would-be recipients willingly forego something—time, opportunity costs (which might be considerable for older children), or simply personal liberty—to obtain this privately-

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49. What others would hope to pay for would be only that increment above what was already freely provided—that is, from a selfish viewpoint, they would hope to obtain without charge the spillover benefits created by voluntary action. Of course, the desires of others may be with respect to certain children only, and different outsiders may prefer different things with respect to different children.

50. The “Coase theorem” demonstrates that these desires will be accommodated, *provided that there are no costs of such market transactions*. This condition, however, is empirically implausible. See Coase, *supra* note 40.

subsidized education. Were that the case, the exchange would be an efficient one.

If such transactions could effortlessly be consummated, outsiders could realize their wishes. In a small community, this type of behavior might well be anticipated. But if Atlantis II is a sizable society, there will exist barriers—in economic terms, transaction costs—that impede the functioning of such a market.<sup>51</sup> The external benefits that accompany the education of any given child will accrue to many people—albeit in an uneven and often indeterminate fashion—thus making the task of identifying all the potential beneficiaries and conducting the necessarily protracted negotiations a difficult one. More importantly, each prospective beneficiary has an incentive to disguise his true preferences by pretending that the further education of others is worth less to him than, in fact, it is. If this “free-rider” strategy succeeds, and others make compensatingly greater contributions, the miserly donor will get just what he wants without having to pay for it. Other contributors cannot preclude him from benefiting, and assuming his enjoyment does not reduce their enjoyment, it would be inefficient to exclude him, even if they could.<sup>52</sup> If, however, many would-be contributors adopted the same strategy—as can be anticipated—no efficient exchange of resources will be consummated: each rationally-calculating individual may be expected to wait upon the others for the necessary contributions, and these will not be forthcoming.<sup>53</sup>

In some societies, particularly small or tightly-knit ones, pressures placed on the beneficiary (analogous to those posited in this discussion of the family) would diminish the appeal of behaving like a free rider; being excoriated as stingy may be thought too high a price to pay for short-run financial gain. Conceivably, a relatively small number of wealthy contributors could also accomplish the transaction, despite the presence of numerous free-riders. But in general, private action cannot be expected fully to reflect outsiders’ real preferences with respect to education. As a result, the self-interested calculations of numerous potential bargainers is likely to doom the possibility of a generally efficient market solution.<sup>54</sup>

In these circumstances, collective action may be necessary to secure an ef-

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51. See, e.g., Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUDIES 323 (1973).

52. See MUSGRAVE & MUSGRAVE 53-54.

53. The common example involves land that might be turned into a public park. If many neighbors would enjoy the park regardless of who bought it (assume, for example, that it would be too costly to try to exclude persons from the park or to charge admission), each neighbor would have an incentive to keep secret his true preference and hold off contributing to a park fund, hoping thereby to enjoy the benefits provided by others. But such “free-rider” behavior would be likely to prevent the park project from going forward. See Calabresi & Melamed, *supra* note 39 at n. 49; MUSGRAVE & MUSGRAVE 72-76.

54. Even if the transaction could be accomplished voluntarily, those who contribute more might resent the fact that they are, in effect, providing windfall benefits to the “free riders,” a transfer that they neither sought nor particularly desired. The payors may seek to obtain compensation collectively.

ficient solution. The government could coercively exact contributions from outsider-beneficiaries in order to permit the transaction to go forward. With funds in hand, the government would then be able to negotiate with families whose children are undereducated in order to achieve the desired result.<sup>55</sup>

Some contributors might accept this arrangement only if it wholly solved the perceived problem of underconsumption of education by commanding universal acceptance.<sup>56</sup> Were this the case, families with children would have an incentive to conceal their preferences, holding out until they had exacted the maximum inducement they imagined the government was willing to offer. As with the free-rider noncontributors, a substantial number of such holdouts would make the transaction impossible. The society might then find it necessary to insist upon a transaction presumed to be consistent with the families' true preferences, compelling families to accept payment and acquire the generally desired education.<sup>57</sup> This scenario appears improbable: from the contributors' point of view, substantial benefits may be anticipated even if all "undereducated" children did not accept the proffered education opportunity. It may, however, have served as one rationale for legally compelling school attendance in the United States:<sup>58</sup>

If everyone was taxed for school support, if this was justified by the necessity of schooling for the preservation of urban social order, if the beneficial impact of schooling required the regular and prolonged attendance of *all* children, and, finally, if persuasion and a variety of experiments had failed to bring all the children in to school—then, clearly, education had to be compulsory.

Thus far, it has been assumed that collective action undertaken in order to realize the educational interests of outsiders is efficient—that is, it assertedly benefits at least some, while not harming anyone. But this need not be—and, indeed, probably is not—the case. A coerced donor may, in fact, not regard himself as better off because someone else's children receive an education; indeed, he may perceive himself as having suffered an undeserved loss of wealth. Similarly, if families are coerced to accept the exchange, there may be some among the holdout class—those whose philosophy of education is pat-

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55. It may be assumed—consistent with earlier assumptions—that parents will be given the legal right to decide on behalf of the child, but may commit the child only so long as he is unemancipated. Of course, the child may bargain informally within the family.

56. In other words, these contributors are unwilling to pay anything if *any* target family refuses to accept what is offered.

57. Eminent domain is commonly defended on these grounds. A road, for example, cannot be constructed unless a continuous right-of-way is obtained; therefore, without eminent domain, any party along the path could block construction by demanding more for his land than he would really be willing to take for it were he not cast into this monopoly position. Since each owner along the right-of-way has this monopoly power, too many holdouts will undermine a voluntary transaction.

58. M. KATZ, CLASS, BUREAUCRACY, AND SCHOOLS: THE ILLUSION OF EDUCATIONAL CHANGE IN AMERICA 48 (1971).

terned after Rousseau's *Emile*, for instance<sup>59</sup>—who truly value other things more than the opportunity to receive a subsidized education.

This problem plagues any attempt at collective action: in all imaginable cases, at least one party to the coerced transaction may well view himself as worse off because of it. At the least, the claim of disadvantage will invariably be asserted; and who can confidently say whether it masks "true" preferences? Some economists treat collective policies as efficient so long as those who gain *could* compensate those who lose in the transaction, even if such compensation is not paid.<sup>60</sup> Others impose an additional equity-based criterion in evaluating such exchanges, requiring that the inefficient aspect of a transaction cause a "good redistribution of wealth."<sup>61</sup> These attempts at identifying criteria for "net benefits," or what might be described as "aggregate efficiency," have been strongly criticized.<sup>62</sup> Yet, some criterion less absolutist—hence, less irrelevant to government behavior—than classical efficiency is required in evaluating transactions that cause certain individual inefficiencies in order to avoid even greater ones. At the least, recognizing this dilemma suggests the importance of developing processes that carefully identify the groups to be coerced or bribed and assure that (despite the enormous difficulty of comparing the real preferences of different individuals) losses are minimized.<sup>63</sup>

These efforts constitute a search for a second-best solution when the market is thought to have failed. In light of the risk of such inefficiencies, a society ought to be convinced that the market has indeed failed before taking collective action supported by the majority to achieve greater efficiency. Put differently, a society ought to avoid making *accidental* redistributions when its objective is efficiency.<sup>64</sup>

#### b. Requirements

The "bribe" approach implicitly assumes that parents have no obligation to supply, or children to obtain, whatever education others desire.<sup>65</sup> An alternative approach would require families to secure this education on their own, entitling outsiders to a free good for which, in the absence of such a requirement, they would be willing to pay.

59. See generally J. ROUSSEAU, *EMILE* (Everyman's Library ed. 1911).

60. See Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939); Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 (1939).

61. See, e.g., I. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* 109 (2d ed. 1957).

62. See Mishan, *The Futility of Pareto-Efficiency Distribution*, 62 *AM. ECON. REV.* 971 (1972). See generally Haveman & Weisbrod, *Defining Benefits of Public Programs: Some Guidance for Policy Analysts*, 1 *POLICY ANAL.* 169 (1975).

63. See Buchanan, *The Institutional Structure of Externality*, 14 *PUB. CHOICE* 69 (1973), where the author examines alternate strategies for minimizing collective errors.

64. The evaluation of which course of action is least violative of personal preferences also bears upon the decision to have any collective action. See generally G. TULLOCK, *supra* note 41.

65. The assumption that parents are liable for the conduct of their unemancipated children is a requirement that might indirectly prompt some voluntary education.

A “requirements” scheme alters the nature of (property) rights that were assumed to exist under the payment or “bribe” approach. While both techniques are intended to promote similar changes in behavior, their distributional effects are different. Assuming at this point that children cannot be expected to obey a command to educate themselves, the requirement alternative implicitly conditions the right of parents to have children on their promise to provide and pay for a certain quantum of education.<sup>66</sup>

For several reasons, this requirement approach, rather than the bribe, might be adopted. First, while the educated child may be said to benefit others, the uneducated child may equally be said to impose costs—negative externalities or undesired spillovers—that the culprit family should bear. In effect, stressing the costs of noneducation in this way would render the family liable for the failure of its children to meet societal expectations. Second, the founders of Atlantis II may treat educational externalities issues as indicative of reciprocal desires: every family wants every other family to provide more education than would voluntarily be provided.<sup>67</sup> If that is the case, it may be simpler—and less costly—to require the generation of these benefits at the outset, rather than creating a system for shuttling payments back and forth.<sup>68</sup> Third, the choice between bribery and requirement may be premised on just distributional criteria, a possibility discussed later.<sup>69</sup>

If it is believed that parents will not reliably respond either to bribes or requirements, then more drastic collective intervention may be necessary in order to secure the educational interests of others. In particular, someone other than the parent might be assigned the responsibility of providing the desired education.

## 2. *Helping Parents Obtain the Education They Desire for Their Children*

### a. Paternalism

The founders of Atlantis II might agree that the provision of, say, a minimum education to each of their own children, was important to all of them as would-be parents. Yet, if the concurrence were to assume the form of a New Year’s (or United Nations General Assembly)<sup>70</sup> resolution, constraining

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66. Calabresi & Melamed, *supra* note 39, discuss the distributional impact of efficiency-motivated decisions to assign entitlements in different ways.

67. See The Economics of Compulsory Education 33.

68. This rationale does not work very well if applied to childless founders or to founder families with an atypical number of children.

69. See text at notes 127-33 *infra*.

70. See Principle 7 of the United Nations Declaration of the Rights of the Child, 1959 UNITED NATIONS YEARBOOK 192, 199:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his

no one, it might well be ignored in the face of later temptations to behave otherwise, to use resources for some noneducational end. Only if the duty to educate were rendered into a binding obligation could the founders be protected against themselves.

The fear of succumbing to temptation—indeed, its very perception as temptation, as distinguished from a legitimate alternative course of action—typically varies among individuals. Accordingly, it would make sense that such obligations be self-imposed, much as is the case with respect to privately-created trusts.<sup>71</sup> If, however, there were universal or near-universal agreement concerning the desirability of avoiding a particular temptation, it may be both appropriate and efficient to translate this concurrence into a law, for the law will be harder to change than will be an individual's mind. The adoption of constitutionally-protected guarantees is frequently explained in these terms.<sup>72</sup>

Thus, in this case, consensual agreement concerning the importance of education might lead the founders of Atlantis II to impose upon themselves a legal obligation to make certain educational provisions for their children. Such action may be characterized as self-paternalism: it enables people to protect themselves against their own baser instincts.<sup>73</sup> The collectively-made decision is designed to secure efficiency, making everyone better off (assuming that the education benefits, or at least does not harm, children and nonparents) and no one worse off.

In fact, however, only some founders may feel that unless there exists a collectively-imposed obligation, they themselves—or, more predictably, others—would surrender to temptation, and subsequently regret doing so. If there is disagreement on the point and if the decisional apparatus of Atlantis II permits, these individuals may impose on all parents the obligation to secure education for their children—an action predicated on the belief that everyone really is better off as a result, despite the present views of some. Such a decision renders the requirement to provide education one form of a merit good; more precisely, it represents true, as distinguished from self-

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individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavor to promote the enjoyment of this right.

Some of the sentiments expressed in this resolution are, at best, inconsistent.

71. Typically, the maintenance of freedom of action is preferred in the belief that it is at least as likely that different future decisions will represent changed long-run objectives as they will short-run giving-in-to-temptation.

72. See, e.g., Calabresi & Melamed, *supra* note 39, at 1111-15, where they discuss "inalienable" rights.

73. See EDUCATION AND THE STATE xxx-xxxv.

imposed, paternalism. Of course, true paternalism runs the risk of erroneously constraining choice, and if this occurs, it ceases to be justifiable as furthering efficiency.<sup>74</sup>

Paternalistic collective action might also be premised on the view that, quite apart from income effects, parental willingness to educate young children inevitably is influenced by the social class of the parents in a way adverse to the "true" interests of lower-class parents and their children. Assuming the founders are unaware of the class in which they or their descendants will find themselves, it might be argued that at the outset, educational obligations should be imposed on the poor in the name of self-paternalism. If the lower class that eventually emerges did not share this judgment, the requirement would become a form of true paternalism with respect to the poor and a basis for class confrontation, as the poor dispute the assumption of class-based inability to judge one's own best interests.

#### b. Market Failure

For reasons quite different from surrendering to temptation, some parents may fail to provide what they want for their children. Market conditions may disable them from financing the education of their offspring over a long period of time in the way that many people finance the purchase of their homes. Since parents cannot post conventional collateral (for children are not quite like real property), lenders may be unwilling to lend, fearing that too many parents may later default;<sup>75</sup> and these fears may simply cause the "human capital" market to atrophy, rather than to exist with, say, higher interest rates. Collective action in the form of a government loan or loan guarantee scheme could be employed to help parents do what they would like to do, thus responding to the perceived market failure. Alternatively, the elimination of "debtor protections"—usury laws, notice and hearing rights, and the like—which prevail in America might ease the market problem.

The founders of Atlantis II may fear a quite different sort of market failure: dearth of sufficient, accurate information on which to base purchases of education or, worse, misrepresentation of offerings. Of course, the very fact that education is not likely to be monopolistically provided<sup>76</sup> would itself be

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74. The abstract requirement that parents provide education for their children has emerged as a collective means for dealing with both spillovers or externalities—see text at notes 65-69 *supra*—and the paternalism being discussed here. Thus, the existence of such a requirement alone will not disclose whether it is designed for one, the other, or both purposes.

75. This fear of lenders may be particularly great if bankruptcy laws exist in which borrowers can find refuge; and even if this is not the case, it may be feared that certain parents will simply earn too little or stop working, assuming that slavery is outlawed and particularly if certain minimum income amounts are not subject to garnishment.

76. Education is unlikely to be a technical monopoly. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 93-94 (1962). Studies of the "optimally efficient size" of educational institutions suggest that there are few benefits of scale that would hinder competition on rational economic grounds.

one safeguard against this possibility. Still, just as the United States has for reasons of efficiency required sellers of securities to disclose information, similar intervention in the education market may be undertaken by Atlantis II.<sup>77</sup> If consumers think themselves incompetent to evaluate educational offerings, then product-testing, screening, or licensing, as is done in America with drugs and doctors, may be employed; at the extreme, consumers may choose to have the choice taken out of their hands.<sup>78</sup>

### 3. *Achieving Child Educational Equity*

#### a. The Basis of the Equity Argument

Young children are, of necessity, dependent on others. They are physically weak and lack developed mental skills, and cannot generate income to be exchanged for education or whatever goods they may need. Since, as has been assumed, children are not full participants in the society's formal decision-making process, they cannot bring about redistributions of goods or services through their own political efforts. What they receive under the voluntary model will essentially depend on the individual altruism and self-interested determinations of their elders. And what they receive under such an approach may be thought by the founders of Atlantis II to be insufficient. Put differently, it may be felt that because of their powerlessness, children have equity-based claims to a larger share of goods generally, or education specifically, than would voluntarily be provided. "Dependency itself creates a right to fair treatment."<sup>79</sup>

Equity-based actions are not merely disguised efficiency calculations—actions taken by the elders of Atlantis II in order, for instance, to safeguard themselves against subsequent retribution being visited upon them by neglected and resentful children. Equity also encompasses more than altruism.<sup>80</sup> Actions undertaken altruistically, even if on a collective basis, are presumed to be voluntary—the donor opts to transfer his property rights. By contrast, the

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See, e.g., M. KATZMAN, *THE POLITICAL ECONOMY OF URBAN SCHOOLS* (1971); M. Levy & W. Niskanen, *Cities and Schools: A Case for Community Government in California* (University of California, Berkeley, Graduate School of Public Policy, Working Paper No. 14, 1974). The survival of rural one-room schoolhouses and the emergence of urban minischools also indicate that scale is relatively unimportant.

77. *But see* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 198-201 (1973) which questions whether the securities laws do promote efficiency.

78. Is consumer protection really the basis for the American rules in the medical field; if so, does it work; and would Atlantis II reach the same conclusion about education—each of these is an unanswered question.

79. M. Eisenberg, *Modes of Dispute Settlement* 87, 1974 (unpublished manuscript on file with the authors). As with the issue of externalities, different children might make different claims to equity.

80. As indicated in the discussion of definitions, the distinction between equity and efficiency becomes difficult in this situation. See note 46 *supra*.



child-equity concept treats the child as entitled to a transfer of resources from someone else, whatever the donor's preferences. Put differently, child equity implies that the society has chosen to redistribute goods in ways that advantage children, even if others are consequently disadvantaged.

This concept of child equity stems from a collectively-held sense of justice, a belief that children deserve something and that it would be unfair not to assure its provision. This is a moral proposition. The understanding that children should be made better off, even at the expense of someone else, pervades most present-day societies, although the nature of these claims and the allocation of responsibility for satisfying them vary with particular societies.

The treatment of a severely handicapped child in America today affords an illustration of this principle. Although this child will never be an economic asset, his basic wants will, nonetheless, be supplied; and while it might be more expedient simply to kill him, such an act is universally regarded as a punishable offense. Some would argue that the handicapped child's claim to resources is predicated on the view that others gain from the transfer because the child's plight is then less visibly felt, and hence less disturbing to them; others might describe these transfers as a kind of collective social insurance, which families purchase in order to protect themselves against the risk of having privately to support a handicapped child.<sup>81</sup> Neither of these efficiency-based explanations is entirely convincing; if nothing else, it is hard to conceive of societal consensus with respect to them by reference only to his own preferences.<sup>82</sup> The suggestion that such support stems instead from a deeper moral conviction that the blameless, helpless child has a recognized claim to assistance from the society is more persuasive.<sup>83</sup>

The argument that equity is a pervasive concern, one that operates to the general benefit of children, requires some qualification. For one thing, equity-based claims may—as in the case of handicapped children—extend to some, but not all, children; some may be felt to have greater needs or deserts than others. Indeed, equity-based actions may involve redistributions *among* children, redistributions that make certain children better off at the expense of others. For another, it is easy to exaggerate the force of such concerns, particularly at a time when “children's rights” has become a fashionable

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81. The argument that the purpose of a collective social-insurance program is to mutualize the risk of rather random events (those beyond the control of the beneficiary) is often treacherous because the “insureds” often have clearly different risk exposure.

82. We refer here to self-interest preferences and not ethical preferences. See Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955).

83. A rather different perspective on child equity stems from the idea that children themselves would want to bribe their peers to become educated, but cannot because they do not have the money. The bribing is desired so as to improve the quality of life of the briber(s) once members of the presently young generation become adults and elders. Hence, each child's equity becomes having other children bribed for him.

subject.<sup>84</sup> Historically, the lot of children was often nasty, brutish, and short;<sup>85</sup> the apparent shift in attitude toward the young may simply be a product of relative societal affluence. If that is the case, societally-protected child equity appears a fragile thing.

b. Who Subsidizes the Equity?

To state that children might, for equity-based reasons, possess entitlements implies that someone bears corollary responsibility for assuring their provision. This obligation may be imposed by Atlantis II on parents, in which case the privilege of having children would be vested only in those parents willing and capable of meeting the specified obligations. Under such an arrangement, Atlantis II would have to devise an enforcement mechanism and fix appropriate penalties in order to protect children against noncompliant parents.<sup>86</sup>

Alternatively, the collectivity itself could assume responsibility for securing these entitlements. That decision would require an allocation of burdens among the citizens of Atlantis II and assurances that the government, in fact, respected this entitlement.<sup>87</sup> Were collective responsibility conceived as supplemental to voluntary efforts, the society would also have to take into account the reactions of parents who realized that government would act if they defaulted. These matters are addressed in part III.

c. Equity Decisions: Who Decides?

How the child's rights were determined would depend upon the workings of the decision-making apparatus. At the outset, the founders might all agree on the nature of the equity claim and the manner of its provision. Newcomers would enter Atlantis II subject to the terms of this agreement, just as they are subject to rules concerning other property rights.<sup>88</sup> If, however, the entitlement were not defined initially or if its specifics changed over time, the meaning of "just deserts" would presumably emerge from ongoing, collectively-

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84. A spate of publications attests to this recent interest. See, e.g., HARVARD EDUCATIONAL REVIEW, THE RIGHTS OF CHILDREN (1974); CHILDREN'S DEFENSE FUND, CHILDREN OUT OF SCHOOL IN AMERICA (1974). So too does the willingness of foundations to finance enterprises such as the Childhood and Government Project.

85. See THE HISTORY OF CHILDHOOD (L. de Mause ed. 1974); D. HUNT, PARENTS AND CHILDREN IN HISTORY: THE PSYCHOLOGY OF FAMILY LIFE IN EARLY MODERN FRANCE (1970). Compare P. ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (R. Baldick transl. 1962).

86. This is discussed in part III *infra*.

87. Children might have guardians appointed to look out for their interests, or parents might be presumed to act as guardians. This matter is taken up again in text at notes 193-99 *infra*.

88. Professor Nozick seems to believe that since *parents* have certain property rights, it is consistent with their freedom and the idea of liberty—and hence fair—to permit them to pass on what they have to their children. Hence, children fairly come into the world subject to these rights, including whatever property and genes they inherit from their own parents. Nozick, *supra* note 48, at 42-61. Others disagree. See, e.g., H. Varian, Distributive Justice, Welfare Economics, and the Theory of Fairness, 1974 (unpublished manuscript on file with the authors).

made decisions. As has been indicated, children will have no formal voice in this process. Adults, most of whom are (or have been, or can be expected to be) parents will be the deciders. Whether such an arrangement can preserve equity-based claims will depend on how parents behave as voters.

Reliance on voting procedure might satisfy both children and the collectivity if parents were regarded as representing their children's interests in the political process.<sup>89</sup> Where the family is an important social unit, this expectation appears plausible. Yet parents are not perfect representatives of their offspring: what they may want for their children, the children themselves may not want; and what parents may desire for themselves may conflict with their child-centered concerns, as they decide just how much to redistribute from themselves to their young. More significantly, parents are likely to be less interested in children generally than in the welfare of their own offspring. For that reason, any given parent's view of fairness or his willingness to vote on the basis of fairness may be colored by his own position in the society. Decisions concerning children's welfare made at the time Atlantis II is coming into being, when no one knows just how he will fare in the new society, might differ from decisions reached in an ongoing society, when the direct benefits (or costs) that a redistribution would produce are better understood. Once one knows his social position and may vote in a way that furthers that position, the tug of justice-based claims may become weaker. This is not, of course, an inevitable result: as we have suggested, it is also possible that affluence permits a society to indulge its beliefs in equity.<sup>90</sup> Yet, unless initial entitlements are alterable only by the concurrence of more than a majority, children's "just deserts" may come to mean simply what politically dominant Atlantisiters desire.

The recognition that people may vote to further their own interests and not according to some moral standard increases the difficulty of determining what is equitable. If one could discern a general moral principle upon which equity is rightly based and could assure that the deciders acted consistently with that principle, then questions concerning *how* decisions were reached might assume secondary importance.<sup>91</sup> The recognition that no agreement concerning such a principle is at hand—and, indeed, that the very quest may prove unrealizable<sup>92</sup>—underscores the necessity of devising a fair procedure.<sup>93</sup>

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89. See, e.g., Arrow, *Some Ordinalist-Utliarian Notes on Rawls's Theory of Justice*, 70 J. PHILOSOPHY 245, 258 (1973): "[T]he notion of voting according to one's own beliefs and then submitting to the will of the majority represents a recognition . . . that justice is a pooling of irreducibly different individuals . . ."

90. See also text at notes 242-48 *infra*.

91. There are, of course, no lack of proposed theories of justice. Compare J. RAWLS, A THEORY OF JUSTICE (1971), with R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

92. See, e.g., Arrow, *supra* note 89, at 262-63.

93. The United States has adopted different rules for different kinds of situations. Atlantis II

d. What is to be Redistributed?

Even if children's equity-based claims lead Atlantis II to transfer *something* to them, the society is likely to impose quite particular conditions on what is given. Adults are typically presumed competent to know and act on their own preferences; for that reason, redistributions in favor of adults are alienable—money, for example. But children's very lack of education would probably lead Atlantis II to conclude that they are incompetent to make such decisions, at least with respect to their long-run welfare—indeed, it is just this decision-making skill that education is thought to develop. Thus, redistribution directed toward children is likely to assume the form of merit-goods provision.

Whether Atlantis II chooses collectively to define educational experiences for individual children turns on a more precise understanding of the child's right. For example, the child might be viewed as entitled *not* to have the amount of education he received turn on the wealth of his family. Were that the rule, education subsidies (or money) would be distributed to poor families, who, in turn, would provide whatever they thought necessary for their children. Children would receive merit goods, but their content would be fixed by the family, not the collectivity. Such an approach would permit families to make their own "best interest" calculations; presumably, it would satisfy both the society's and the child's equity-rooted concerns. Alternatively, the child might be entitled to an education free from such parental judgment. This approach would require either collective determinations concerning the "right" merit good, creation of a guardianship system, or—as children's rights advocates sometimes suggest—the entitlement could be secured through direct transfers, in the form of cash or education vouchers, to the child. Enabling the child to pledge (or have pledged for him) a portion of his future income in order to finance his education might achieve this same desired objective.

If the equity-based claim is designed, in some sense, to render all children equal—to undo the very inequalities that generally accompany the voluntary and collective efficiency-motivated distribution of goods—far more radical measures will be required. While it is imaginable, for example, that educational maxima (ceilings on the amount of education a child may receive) might be imposed through regulation, this sort of control of private behavior is likely to be ineffective. Such a rule also violates the initial assumptions that children in Atlantis II "belong" to their families and that families are motivated by concern for their own children. At the extreme, this collective role—even if feasible—increases the risk that actions taken in the name of

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will have to puzzle out its own scheme. And that task may ultimately prove no less difficult than the quest for just results.

justice for children will turn out to be misguided. These questions will be treated again in part III, which considers government as monopoly provider of education.

#### 4. *Paying for Benefits Voluntarily Provided*

Atlantis II may also be concerned about the inequitable consequences of voluntarism as these affect the pocketbooks of parents. Specifically, it may feel that the benefits that parents secure for the society by educating their offspring go unfairly uncompensated.

This concern poses issues reciprocal to those treated in the discussion of external effects. To recapitulate: the spillover benefits of voluntarily-secured education are valuable to others. While these outsiders would willingly pay for such benefits, parents cannot readily capture such sums, and for this reason, the outsiders enjoy an unearned, and perhaps undeserved, windfall.<sup>94</sup> Collectively-imposed transfers from outsider-beneficiaries to parents might be treated as a means of achieving the market result, were the benefits susceptible of precise measurement and capture. Such a scheme would be adopted if it were generally felt equitable for the free riders to pay for what they get.<sup>95</sup>

Alternatively, Atlantis II might conclude that when parents voluntarily benefit their children, it would again be fairer for the society as a whole to pay for the portion of this benefit that did not flow solely to parents. If the society acted for either of these reasons, it would collectively assume responsibility for subsidizing some portion of the cost of education.

### C. Summary

This part has addressed the conceivable deficiencies of voluntarism, viewed in terms of likely inequities or inefficiencies. Of course, none of those concerns might prove persuasive. It might, for example, be the case that: (i) outsiders are not interested in paying for education beyond what parents provide and what was paid for in the market;<sup>96</sup> (ii) parents conclude

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94. Suppose a person shoots Independence Day fireworks into the air above his backyard and his neighbor enjoys the benefits without paying. As previously indicated, the neighbor would in fact be willing to pay something for fireworks but, of course, would prefer to pay only what is necessary. This means that even if there were bargaining, he would try to pay only for fireworks that he desires in addition to those that would be voluntarily set off.

95. Of course, if they paid for the *full cost* of the benefits, the parents and children might be seen as "free riders," and this might also seem inequitable. Some cost-sharing might be the resultant solution.

96. This might be the case if outsiders preferred to rely upon collective action aimed more directly at the ultimate ends that education is supposed to serve—for example, the criminal law, welfare, and government regulation and subsidy of political campaigns. It might also be the case that outsiders perceived no additional benefits to be gained by further education. Indeed, there might be a collective concern that *too much* education is being voluntarily obtained: although much of the education attained is not usable in the jobs that most persons eventually hold, families educate their children as a means of enabling them to compete for the elite jobs. And

that they can competently protect their own interests with respect to the education of their children; (iii) children are thought to have educational deserts no greater than what they, in fact, would receive under the voluntary model (assuming that includes societal intervention in cases of abandonment and severe parental incapacity);<sup>97</sup> and (iv) parents are viewed as justly expected to pay for the education they choose to give their children, regardless of who benefited. In this event, there would be no equity or efficiency-based reason for any further collective action beyond the bare minimum of the voluntary model. This article proceeds, however, on the assumption that the concerns that have been raised leave the founders of Atlantis II dissatisfied with the family-market model, or at least curious to understand in more detail the collective alternatives available to them and the problems they might expect to encounter in implementing them.

The discussion thus far reveals no tidy relationship between the concerns of equity and efficiency (and the educational ends implicit in them) and courses of action designed to meet them. It suggests rather that there exists a variety of responses (or means) to resolve a given concern or objective. The next part reverses the puzzle, focusing on choices among means.

### III

#### MEANS FOR ACHIEVING EDUCATIONAL ENDS

The preceding part noted briefly the variety of means by which Atlantis II might respond to its equity or efficiency-motivated concerns. As this part argues, the critical societal decisions involve not just a choice among means—requirements or inducements, for instance—but decisions about nuances, selection with respect to detail. Before entering that thicket, a brief survey of the ground thus far traversed seems appropriate.

Part II identified three groups on whose behalf collective action with respect to education might be undertaken: children, parents, and “outsiders” or others. While a particular effort may not be designed to benefit all members of a given group, these gross categories serve as a convenient basis for discus-

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while the market might be self-regulating in the long run, perhaps the market will not work because parents irrationally overinvest in the education of their children out of affection or guilt. In any event, collective stimulation of education might be thought to accentuate this problem; not only would the extra education be thought wasteful of resources by the outsiders, but the adult upper class might fear a revolution, peaceful or political, if there were too many persons over-educated for their work.

97. Families might be thought to have equitable claims to guaranteed income that was in no way tied to education. Also, child equity might not be thought to be best served through manipulation of the distribution of educational attainment. As long as job stratification and income inequality exist and the amount of education that one has influences the job obtained, education for personal vocational purposes tends to be a zero-sum game. Child educational equity in these terms then must mean a redistribution of the jobs, and this, in turn, pits child against child. Some might prefer to concentrate on changing the job or income structure first.

sion. The basic outlines of possible collective action can readily be fashioned for each group. *If Atlantis II sought to further the interests of outsiders, the collectivity can: (i) require parents (or children) to act in the desired way; (ii) take resources from outsiders and use these to bribe parents (or children) to act in the desired way; or (iii) assume responsibility for educating children in the desired way, charging outsiders for this. If the aim is to further the interests of parents, the collectivity can: (i) impose requirements on parents for paternalistic reasons; (ii) regulate, enter, or supplant the market in order to redress market imperfections faced by parents; or (iii) transfer resources from outsiders to parents in compensation for the desirable external effects of the education they voluntarily provided. Finally, if the objective is to further the interests of children, the collectivity can: (i) require that parents do for their offspring whatever is deemed just; (ii) pay parents to do for their offspring whatever is deemed just, charging society members generally; or (iii) assume responsibility for children itself and do for children whatever is deemed just, charging as thought appropriate.* Of course, a combination of techniques may be employed on behalf of each objective.

This summary identifies three basic types of societal intervention—the imposition of *requirements*, the provision of *payments or inducements*, and the *collective assumption of responsibility* for education—as the range of alternatives available to a society wishing to do more, on a collective basis, than is implicit in the family-market approach. Each technique may be employed in the service of any of the objectives that have been discussed. For this reason, the detailed discussion of means is organized in terms of these three governmental techniques. This approach does not respect the categories of equity and efficiency-based concerns of interested parties; in discussing each of these means, we note the multiple objectives that might be served by it and indicate how such differences in objective might influence the choice of Atlantis II.

The emphasis in this part is on *how*, and *how well*, a given means would actually work. The detailed choices to be made both within and among means will be considered in the analysis of anticipated advantages and disadvantages—of implementation, enforcement, inefficacy, and the like—associated with a given means. In explicating the consequences of a given approach, the basis for choice among means should become somewhat more coherent.

## A. Collectively Set Educational Requirements

### 1. *Determining Objectives From Means*

Requirements may be employed to serve a variety of educational objectives. For example, parents may be required to educate their children in order to further the children's equity-based claims, to minimize the imposition of negative externalities on outsiders, or to help parents themselves in doing what they want to do.

If an observer knows only that parents are required to educate their off-

spring, this fact will not reveal the objectives of collective action.<sup>98</sup> To argue that regardless of collective motivation, requiring education, in fact, furthers everyone's interests is too simplistic. Different "beneficiaries" may, on closer inspection, desire specific and rather different kinds of education; moreover, in any particular society, some will object to the element of compulsion. Thus, inferences of purpose derived from identifying potential interests may well prove erroneous. Similarly, efforts to infer purpose from effect, by determining who actually benefits from the education required, will likely prove unsuccessful: it is very difficult to make such calculations without knowing what each group regards as a benefit. In short, educational objectives cannot readily be inferred. Despite these difficulties, useful things can be said about this particular means—requiring education—without knowing the collective goals of Atlantis II.

## 2. *Detailed Choices*

Requirements may be directed toward different parties, demand different things, and employ different sanctions. Each of these variations bears brief explication.

### a. To Whom is the Requirement Directed?

Educational requirements are generally thought of as imposed on parents, implicitly conditioning their right to have children. While this section stresses such parental obligations, Atlantis II is not necessarily so limited. The society may, for instance, impose obligations on children themselves: to stay at home and study two hours each day, or to know how to read by age ten.<sup>99</sup> Analogous obligations may be imagined for outsiders: craft unions, for example, could be required to teach their trade to apprentices each year, or landlords might be expected to provide libraries in multifamily dwellings. That educational requirements generally run to families betokens the primacy of this unit in the society; it also suggests that children themselves may be presumed incapable of satisfying societal expectations.

### b. What is Required?

What Atlantis II chose to require may also vary: it may insist either that the child undergo certain educational experiences or that he attain certain outcomes. The first type of requirement would oblige parents to expose their children to something; the second would demand that their children, in fact, accomplish something. At first blush, experientially-defined requirements

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98. Parental requirements express a general preference for parental payment for education.

99. Children in American public schools are required to learn, at least in some schools, in order to pass from one grade to the next and thus stay with their friends.



make little sense, for the society's likely interest is in achievement of some sort, not the process of its acquisition. Yet, this is not necessarily the case. Atlantis II may be interested simply in assuring all children the opportunity to succeed, not success itself. Even if its objectives are cast in outcome terms, the costs of requiring what is desired may be perceived as too high; this point will be discussed again in the general treatment of costs.<sup>100</sup>

c. Sanctions

For any requirement scheme to accomplish its intended objective—that is, to coerce behavior—it must be coupled with sanctions for noncompliance; were this not the case, the “requirement” would be mere exhortation. Again, there are choices to be made: parents, for example, might be sent to jail, fined or taxed, or forced to surrender their children.

Certain of these sanctions are designed to be severe enough completely to deter noncompliant tendencies. Where prison serves as the penalty, for example, the unarticulated societal hope is that the threat alone will serve as an effective prod to action and that no penalties need to be meted out. Other sanctions may be adopted for quite different reasons. Where, for example, parents who fail to meet educational requirements with respect to their children are forced to surrender them to the collectivity (or some other adult), the very imposition of the penalty shifts responsibility for fulfilling the societal objective to another person. This latter penalty is both a deterrent (assuming that responsibility for one's child is desired) and a remedial technique.

The adoption of yet a different kind of penalty—for instance, a tax based upon the monetary costs of failure—may reveal societal indifference concerning whether the requirement is met; more precisely, it gives a financial incentive to comply where the perceived benefits of doing so outweighs the costs of noncompliance (here, the tax burden). The imposition of a tax on polluters functions in this way: it enables them to determine whether the most sensible course of action is to pollute willy-nilly, paying the tax; to invest in pollution-control equipment; or to abandon their operations. With respect to education, Atlantis II might impose a similar tax on parents who failed to educate: if it perceived the beneficiaries of education to be outsiders, the tax moneys thus generated could be used for their good; if the child were presumed to be the

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100. See text at notes 101-06 *infra*. One additional kind of requirement should be noted: parents might themselves be expected to achieve a certain level of educational attainment (or perhaps a certain amount of educational experience). Like the text example of having landlords provide libraries, this requirement would be designed to be one step removed from the true societal objective, counting on a behavioral response to achieve its purpose: educated parents will educate their children without further compulsion, just as children will learn without further compulsion when libraries are nearby. This point is made in educational attainment form, but it could also be posed in terms of experience—*e.g.*, parents will provide education if they have experienced education themselves.

beneficiary, the parents might be obliged to pay these taxes—or damages—directly to their own child.<sup>101</sup>

### 3. *Costs*

#### a. Ineffectiveness

As has been suggested, Atlantis II could choose to frame its requirements in outcome terms. But its objectives—minimal competence, for example—might not be effectively accomplished through this device. Defining such objectives more precisely is difficult business—that is one reason why discussions of objectives tend to be vague and unsatisfactory. And the vagueness of typical objectives makes their enforcement impossible. How, for instance, is one to know whether a child's achievement is consistent with his "educational potential"?

Even if consensus concerning specific desiderata were to be reached, Atlantis II might well not be able to accomplish them through a requirements scheme. The relationship between resources and educational outcomes—what economists call the "educational production function"—remains stubbornly elusive, at least where the objectives of education include the transfer of complex skills.<sup>102</sup> Given that reality, simply requiring families to accomplish some such specified objectives is unlikely to make the task any more feasible.

There are several plausible explanations for this difficulty, none of which makes the imposition of output requirements more attractive. For one thing, children's abilities differ substantially. Because of this, some families will be able easily to satisfy uniform societal goals, while others will find even the simplest demands impossible to meet. If the penalty is sufficiently severe, parents could conceivably be deterred from having children when there is predictive evidence that the child might not be able to meet the standards; given the substantial risk of inaccurate prediction, such behavior could be quite costly to the society as a whole. Otherwise, uniform standards are likely to accomplish little; commanding the unaccomplishable does not render it any easier to achieve. Even if requirements were to some extent individualized (as, for example, by a rule requiring that each family educate its children to what the collectivity identified as the maximum level of their ability), there would remain children who were deemed capable of greater educational success than they actually achieved; and in these instances, Atlantis II would not know whether parental failing or bad prediction caused the mismatch between prediction and outcome.

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101. In a crude way, imposing relative responsibility on adults for the minimum welfare of their children even beyond the age of emancipation is a penalty/tax of this sort.

102. See generally ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972).

It may well be the case that the solution to the educational production-function puzzle does not lie with education itself. Current wisdom concerning the causal connection between resources and outcomes suggests that the most significant resources are not narrowly educational, but have to do with such factors as family wealth and status, things that a family cannot readily alter on its own. If this conclusion is correct, it indicates that unless outcome requirements are meant to deter poor and low-status families from having children, income redistribution should be a precondition for their imposition.<sup>103</sup>

Alternatively Atlantis II could couch its requirements in terms of educational resources or inputs. This is what the United States has done in demanding that children experience education for a minimum period of time, fixing the qualifications of teachers, insisting that particular materials be presented, and the like.<sup>104</sup>

Such an approach might be adopted, even by an outcome-oriented society, if minimum exposure is a necessary—albeit insufficient—condition for achieving societally-desired outcomes. The plausibility of this proposition is not negated by the fact that the nature of the input-outcome relationship is unclear. Certain skills can be learned only through exposure; the child is unlikely to invent them on his own.<sup>105</sup> Even if the desired learning does not take place, Atlantis II may feel that such requirements embody the only feasible and tolerable precondition to learning, and hence serve as a useful symbol. Particular input requirements—those concerning the qualifications of would-be educators, for instance—may also be designed to protect families against fraud. The cogency of this approach will depend upon the capacity of Atlantis II to distinguish the competent from the charlatan—or at least to do so more successfully than can the family. Finally, mere exposure to an educational regime might be felt to teach valuable lessons, such as the need to submit oneself to routine; this objective is not typically advanced in discussions of desired outcomes, although it may well be consistent with the interests of those outside the family who rely on education to train compliant as well as productive workers.<sup>106</sup>

In short, a society concerned about outputs may be unable directly to require them and unsure that framing requirements in more manageable experiential terms will accomplish its objectives. Even if Atlantis II is interested only in securing an *opportunity* for successful outcomes, it still needs to know

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103. If redistribution of income were the ultimate end that education sought to achieve, then perhaps that end should be approached by means more direct than the creation of educational obligations. See C. JENCKS, *supra* note 8, at 253-65.

104. See generally K. ALEXANDER & K. JORDAN, *LEGAL ASPECTS OF EDUCATIONAL CHOICE: COMPULSORY ATTENDANCE AND STUDENT ASSIGNMENT* (1973).

105. See Mosteller & Moynihan, *A Pathbreaking Report*, in *ON EQUALITY OF EDUCATIONAL OPPORTUNITY*, *supra* note 102, at 3, 21.

106. See, e.g., Bowles & Gintis, *I.Q. in the U.S. Class Structure*, 3 *SOCIAL POLICY* nos. 3-4, at 65 (1973).

rather more about the educational input-outcome linkage than is presently understood in order confidently to determine which experiences should be universally mandated.

b. Fairness

Education-specific requirements may, on a number of grounds, be thought unfair because they clash with other values of the society. As has been suggested, they may affect parental decisions to have children; they may also demand of parents responses that—for a variety of reasons, none of them blame-worthy—they are unable to make. These points will be addressed in turn.

It may be argued that parents' obligation to educate their offspring legitimately flows from their decision to have a child, an act that—with the widespread use of contraceptives and the availability of abortions—has become increasingly voluntary. Were that position generally accepted, any forbearance that such a rule induced would appear fair. But the question may be politically more delicate than this proposition supposes. Atlantis II may share the American view that even if having children is not an unfettered right, the imposition of pressures that induce total forbearance from its exercise is as unthinkable as would be outright prohibition of childbearing.<sup>107</sup>

The fact that children's behavior is not predictable prior to birth and not wholly constrained by parental wishes thereafter poses additional problems, particularly if requirements are cast in outcome terms. As has been noted, some children may simply not have the capacity to satisfy whatever requirements Atlantis II imposes. Children generally have wills of their own and may not accede to their parents' demands. If parents could inject their children with learning serum (at a time when the resistance of their offspring to the medicine was presumably low), their task would be relatively simple. But the acquisition of knowledge is not—at least, not yet—that sort of process.<sup>108</sup> To require parents to do what may, in fact, be impossible appears intolerable.

Requiring specified inputs or experience seems fairer, if only because it asks parents to undertake something more obviously within their grasp. But even on these grounds, this approach is not wholly free from problems. The more specific the input requirements, the greater will be the predictable demand for some justification: without adequate defense, these requirements will be viewed as time and resource-wasting, their imposition as arbitrary and unduly constrictive of liberty. In some cases, requirements may actually interfere with the achievement of the society's desired educational interests—as

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107. *Cf.* *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

108. Even if it were true that the child could be educated if parents had access to the uniquely proper teacher or psychiatrist, in reality at least, some parents will be unable to obtain such services.

where a particular required experience restricts the child's capacity to learn. Further, parents (even if aided by the government)<sup>109</sup> may be unable successfully to force their children through the desired experience. To fine or imprison parents because of their children's conduct may be thought unjust unless parents have the option of disassociating themselves from responsibility for their offspring.

If the penalty is cast in terms of parental forfeiture of the child, this last difficulty is resolved. But to the child, the loss of his natural parents may well be more harmful than his loss of education;<sup>110</sup> and if the requirement scheme is thought to further the equity-based interests of the child, the removal decision would necessarily be preceded by such a weighing of effects.<sup>111</sup> Similarly, if the founders of Atlantis II view educational requirements as self-imposed for their own good but feel strongly proprietary toward their children such a penalty would be intolerable.<sup>112</sup>

If some families are too poor to secure the education contemplated by the requirements of Atlantis II, it may seem unjust to penalize them for their failure. Poverty is not, of course, a generally exculpatory fact: the poor thief is not exonerated because he stole in order to feed his family. And historically, being poor has been no defense against failure to perform certain basic societal obligations. As late as the nineteenth century, English and American Poor Laws empowered "Overseers of the Poor" to require that indigent families indenture their children to others as workers if poverty prevented them from satisfying minimal family needs.<sup>113</sup> Yet, in America, as collective awareness of the consequences of being poor has grown, certain penalties

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109. Compulsory-attendance laws may be seen as devices for helping parents control their children, even though the penalties are borne by the parents. Children may be more compliant when parents assert that they are required to send the child to school than if, as under the truancy portion of the compulsion laws, it is the child to whom the requirement applies. In other words, children may feel it unfair to subject their parents to penalty for their own misconduct. See also text at note 231 *infra*.

110. In *Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973), plaintiff children argue that the state requirement that mothers of illegitimate children disclose the name of the father in order to protect the interests of the child in having support and knowing the name of his father may be outweighed in many cases by the harm done to the child either if the mother refuses and is sent to jail or if the mother discloses the father's identity and destroys a relationship with another man assuming the role of father.

111. If a child taken from his parents were, on balance, thought hurt, it would then be necessary to decide whether it was fair ever to employ this penalty, and if so, would the overall gains from deterrence outweigh the harms in cases of noncompliance.

112. Even if the requirement were imposed to secure external benefits, the costs of enforcement could be substantial, and were removals called for, the collectivity would be forced to bear substantial maintenance—as well as educational—costs. In that event, the prospect of capturing external benefits through a requirements scheme would become less inviting. This is no longer a question of fairness, but one of effectiveness. If, however, there were a ready adoption market in which adoptors would take the child free, the efficiency concern would be largely satisfied.

113. See ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. I), 16 STAN. L. REV. 257, 279-80, 295 (1964).

have been judged unnecessarily harsh, in that they treat indigency as if it were a particularly blameworthy status, a predicate for the imposition of further hardships. The recognition that such treatment violates American distributive or justice goals bottoms recent Supreme Court decisions striking down laws that made indigency itself a crime<sup>114</sup> and that imprisoned the poor while permitting wealthier individuals who had committed the same offense to escape with a fine.<sup>115</sup> Requirements that oblige poor people, because of their poverty, to choose between not having children and being imprisoned for their failure properly to educate them would be inconceivable in contemporary America;<sup>116</sup> and *Atlantis II* might hold the same view.

In sum, requiring parents to educate their children is unlikely wholly to meet any of the objectives of *Atlantis II*. A great many families would not—perhaps could not—do more to satisfy the society's desires than would be the case were there no requirements. For that reason, *Atlantis II* would be obliged either to enforce a penalty scheme that many would consider unfair, to allow its laws to go unenforced, or to enforce them on a selective, discretionary basis. Each of these options calls into question the perceived legitimacy of a solely requirements-centered approach and suggests the utility of examining alternative techniques.

#### B. Payments or Inducements to Educate

Rather than requiring families to obtain more education than they would procure voluntarily, *Atlantis II* might induce them to alter their behavior with respect to education by offering them some good in return for the desired change. The inducements approach offers families a carrot; the requirements approach wields a stick. The intention of both is similar, but their distributional consequences differ: inducements probably leave the family better off and those who bear the burden of paying for the inducement worse off; while under a requirements approach, families bear the added costs.<sup>117</sup>

The treatment of the varieties of inducements is organized somewhat differently than the preceding section. Two forms of inducement are separately considered: (i) monetary incentives to purchase education, and (ii) payments for educational attainment. In discussing each, we consider the detailed

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114. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

115. *Tate v. Short*, 401 U.S. 395 (1971).

116. *Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973), challenges Connecticut's statute that fines or imprisons mothers of illegitimate children who fail to disclose the father's name. Counsel for the mothers claim the law is applied only to welfare mothers, who, because of their poverty, are put to the odious choice of imprisonment or abandonment of sexual privacy.

117. "Inducement" is, in some sense, a misleading word, since requirements also induce; and whether something is a carrot or a stick is sometimes a question of perspective. See text at note 140 *infra*. But in general, as the word "inducement" is used here, it may be thought of as a bribe that the briber has designed with the expectation that it will be taken, but that the bribee has no legal obligation to accept.

choices that must be made, the objectives served by an inducement scheme, and the costs that they may impose.

1. *Payments or Inducements to Purchase Education*

a. Objectives

Inducements to purchase education render education a more appealing good by making it easier to obtain. A dynamic process is envisioned: as the cost of education is reduced (or the financing of education made more attractive), families will purchase more of it relative to other goods—at least if the normal tenets of market behavior apply to family demand for education.<sup>118</sup> These payments or inducements may be thought of generally as subsidies. The additional consumption that is generated may itself satisfy the society; or it may be that such consumption alters—or is assumed to alter—patterns of educational attainment in the desired direction. In this sense, a policy of inducing purchases of education is analogous to an input requirement.

Such a scheme could be adopted to further quite different interests. Subsidies may be seen as a means of promoting outsiders' interests in the education; it is equally the case that the child's equity-based claim to education may be promoted by paying parents to satisfy that claim; or parents may perceive the "subsidy" as, in fact, a restriction of their own funds, a paternalistically motivated effort. As with requirements, the bare existence of a subsidy or inducement arrangement does not clearly suggest a rationale for it.

b. Choices: Who is to Benefit From the Inducement?

The introduction of a subsidy is intended to change people's behavior without legal compulsion, to affect their choices among goods by lowering the price of a particular good—here, education. But just whose behavior does Atlantis II wish to influence? How does it go about deciding who is to be induced? Conceivably, the government could bargain with individual families, entering into individual contracts. The negotiating costs of such a strategy argue against it—at least, where the target population is sizable. Alternatively, bargaining costs could be eliminated by making the subsidy universally available through a unilateral offer that families could accept at their option.<sup>119</sup> This strategy would be sensible if Atlantis II perceives that the demand of *all* families for education is equally inadequate.<sup>120</sup>

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118. That is, demand for education is elastic—sensitive to price changes.

119. The dimensions of the subsidy would have to be determined. The subsidy could be available only for the purchase of a specified amount, or for the purchase of any amount, or, most likely, for the purchase of any amount up to a specified amount.

120. In the United States, universal subsidies are characteristic of users of public transportation and the arts: those who use buses and subways and those who queue early enough to purchase opera and theatre tickets obtain these services at a discount. Yet, because the "oppor-

But families' demands for education will, in fact, differ. Left to their own devices, some families will predictably devote more resources to education than will others; this will be the case even with respect to families whose other attributes, such as size and income, are identical. Unless Atlantis II is interested in increasing educational consumption, regardless of who the consumer is, the society may wish to take these variations into account. Certain families will, in fact, surely provide without subsidy the collectively-desired quantum of education for their children. Should they, nonetheless, be subsidized? Others will voluntarily provide almost enough. Should they be subsidized to the same extent as those who fall well below the desired amount? Others, whose present demand for education is deemed inadequate, will not accept the universal inducement even if education is offered as a "free good." Can the incentive be made irresistible?

c. Targeted Subsidies

Assume that Atlantis II wishes the subsidy to supplement—not replace—voluntary efforts, to make contributions only if these motivate families who otherwise would purchase too little education to obtain the societally desired amount. Such selectivity requires less transfer of resources within the community, and one might presume that it would be less costly for the government to administer. More importantly, a policy of supplementation reflects the judgment that parents rightly bear the costs of the education that they would voluntarily provide.

Yet, Atlantis II may be unable to achieve this goal of supplemental subsidies because of the difficulty of actually identifying those who should be subsidized. If the government does not know in advance which families' true demands for education are inadequate and elects simply to offer the subsidy to all who claimed to need it, families will be encouraged to pretend that their demand for education falls below the societally-desirable level. This strategy permits them to garner a share of the collective largesse, whatever their preferences might actually be. Such behavior would convert what is meant to be a supplemental scheme into a universal one, as families substituted collectively-raised resources for their own. Even if the government utilized individual negotiations, the disguised preference problem would persist as long as the limits of governmental negotiating capacity were publicly known.

The government could attempt to avoid this dilemma by predicting in advance who would purchase insufficient education: if that calculation were feasible, the government could limit its subsidy to such persons and define the amount of subsidy needed to induce the desired purchase of education. The difficulty here, of course, lies with the calculation itself. It might, for example,

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tunity cost" of queuing is less for poor people than for the well-off, it may be argued that such subsidies have income-related distributional effects.



be assumed that income and taste are highly correlated and that it is poor families that purchase too little education—either because they cannot afford to do otherwise or because their tastes for education are too low.<sup>121</sup> This assumption would lead Atlantis II to subsidize only the economically badly off. To the extent that the presumed correlation misdescribes individual cases, wealthy families with little taste for education would continue to supply too little, while poor families with large natural appetite for education would be needlessly subsidized.

If more accurate predictors than family indigency were available, the offer could be cast in increasingly particularistic terms. With each step in this process, the government would have to determine whether the administrative cost of achieving greater accuracy was worth the efficiency thereby gained and whether nonindividualized groupings were offensive to some other societal value (if, for example, the subsidy amount varied with race).

Alternatively, Atlantis II could offer subsidies only *after* observing the consequences of voluntarism. It could, for instance, subsidize the purchase of additional education for those children whose educational performance at a certain point in time was inadequate. In theory, this approach circumvents the task of predicting demand. But in practice, families might provide less education prior to the performance measurement than they would without the presence of the subsidy in the expectation that the society would subsequently assume financial responsibility for the “catch up” task.<sup>122</sup> Such parental behavior—which this scheme would reward—would convert the undertaking into a universal subsidy. This strategy holds additional risks for the society: it may well be harder—and more costly—to undo real educational failure than to confront learning difficulties early in a child’s career.<sup>123</sup>

These realities leave Atlantis II with hard choices to make; *whatever the society does, it risks acting ineffectively*, particularly with respect to target inefficiency. The society may simply make an enlightened guess concerning the demand for education likely to be expressed by families of differing characteristics, realizing that to the extent that its guess missed the mark, the program will fail to achieve the desired goal. Alternatively, Atlantis II might abandon its concern for supplementation and make the subsidy avowedly uni-

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121. See, e.g., Cohen, *School Finance and Social Policy: Serrano and its Progeny*, in *SCHOOL FINANCE IN TRANSITION* (J. Pincus ed. 1974); Davis, *Quality and Inequality: Some Economic Issues Related to the Choice of Educational Policy*, in *THE QUALITY OF INEQUALITY: URBAN AND SUBURBAN PUBLIC SCHOOLS* 89 (C. Daly ed. 1968).

122. The fact that in America, parents know that their children will learn to read in school may lead them to dispense with the preschool teaching of reading; however, with respect to other aspects of education (toilet training, for instance) the costs of such waiting are clearly too high.

123. Atlantis II could pay after the fact for inadequate spending as well as for inadequate results. Also it could decide the issue of inadequacy at various points—e.g., at age sixteen, at the end of each year, and so on. Likely, the longer it waited, the more it would force families to reveal their true preferences, but the harder it would be to undo real failures.

versal, reducing the price of education even to those who would purchase enough voluntarily. This approach would oblige the society to pay collectively for what would otherwise be free goods created by education-minded families.<sup>124</sup> If (contrary to the assumption of this discussion) such a result were desired on equity grounds, that outcome would have particular appeal. But were this not desired, Atlantis II may be able to limit such inadvertent redistribution in constructing its revenue-raising scheme; this possibility will be revisited shortly.

Quite the reverse dilemma is posed by families who failed to take advantage of subsidies, even if education is so fully subsidized as to be commonly regarded as "free." While it might seem irrational for someone to refuse what amounts to a gift, education—even if provided at no cost—is not free to the recipient in the way that a gift of gold would be. Those who accept an educational subsidy have to give up doing whatever else they might otherwise do in order to enjoy the subsidy, such as the time and effort required to take advantage of its benefits and the money that might otherwise be earned. For that reason, unless the subsidy is transferrable, some will not accept it at all, while others will not make full use of it. Thus, reducing the price directly paid for education to zero may not induce people to utilize the societally desired amount of education. In order more fully to effectuate its objectives through inducements, Atlantis II may be forced to adopt still other subsidies—for example, specially paying families whose children were of employable age in order to compensate for foregone income.<sup>125</sup>

The discussion of targeted subsidies has thus far implicitly assumed that there is a target amount of education—or at least a minimum amount—that society desires families to purchase.<sup>126</sup> But if the collective objective were only to make available to families—or certain of them—the *opportunity* to purchase additional education, Atlantis II might subsidize education without having a desired level of educational purchase in mind. In that event, its objective is unrelated to tastes and hence unconcerned with eventual purchases. The un-

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124. Even if the subsidy were only for purchases up to a certain amount, these families would still receive the benefit of lower prices up to that amount.

125. In this country, such an approach might involve paying families to keep teenagers in high school. Atlantis II might also wish to vary the educational attainment of children in order to match the diverse educational demands of the job market. To meet this objective, it would seek to employ means that related educational investment with predicted future roles of individual children. Yet, it might be difficult to do this in a way that appeared to be fair—that is, neither wholly preservative of nor wholly hostile to past advantage. Further, given what is presently known about predicting children's educational and subsequent vocational performances, it would be difficult to make such investment calculations confidently. Given these difficulties, some "overeducation" would likely be necessary.

126. This is straightforwardly clear if the subsidy is available only on the purchase of  $X$  amount of education. But even if it were desired that  $X$  amount be purchased, society might well be willing to subsidize anything up to  $X$  amount. Again, the objective could not confidently be extracted from the means.

derlying value might be the right of the child to have the amount of education he receives determined by his family, but freed from the limitations caused by, say, his family's poverty or the unusually high costs necessary to educate him.

d. Who Bears the Costs?

In a more general sense, it is illusory to speak of subsidies as "free." Unless Atlantis II can plunder its neighbors or unless wealth is independently held by the government, some members of the society have to contribute in order to make a subsidy possible. Since subsidization involves resource transfers, the revenue-raising as well as the distributional aspects of the subsidy must be known in order to comprehend its full effects; it is, after all, the complete package that the society adopts in pursuit of its efficiency or equity objectives. For example, a subsidy of families with young children paid for by those who enjoy the benefits of the externalities thereby secured is a way of accomplishing an efficiency-based end. If it is proposed that a general tax be used to support the subsidy, then it follows that almost everyone—including the beneficiaries—will pay something to support it. Failure to recognize this may produce an illusory subsidy that, for instance, while avowedly directed toward the poor, relies on regressive taxes for its support, and thus actually costs the intended class of beneficiaries more than it advantages them.<sup>127</sup>

Upon whom, then, is the burden of the subsidy to be imposed? If Atlantis II is at all like America, it cannot seriously consider exclusively taxing or charging the permanently childless in order to subsidize those with children. As most taxpayers eventually have children, the burden of any sizable subsidy placed upon the childless would likely be confiscatory, incentives for families to have children would be substantial, and the difficulties of identifying the class to be taxed would be insurmountable. Nor would it be thought proper to single out this minority.<sup>128</sup> Therefore, as a practical matter, Atlantis II will make distinctions among persons who, at least at some point, will have children. Since the payors, or supporters of the subsidy, will have less income to spend on the education of their own children, it would be important to be precise about just what attributes of payor families are held to warrant this imposition.

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127. See West, *Dr. Blaug and State Education: A Reply*, in INSTITUTE OF ECONOMIC AFFAIRS, *EDUCATION: A FRAMEWORK FOR CHOICE* 49, 61-62 (2d ed. 1970), who argues that at least in England, the poor are regressively taxed for educational programs alleged to be in their interest. Whether they actually pay more in taxes than they obtain in benefits is another matter.

128. It could plausibly be argued that nonparents are obtaining major benefits from other people's children without contributing their own children to the society and hence should pay. Of course, the collectivity could pursue two objectives at once—*e.g.*, stimulate population expansion on the revenue-raising side and pursue educational policies on the benefits side. The possibility of combined objectives is something that may always occur—*e.g.*, educational policies on the benefits side and income redistribution policies on the revenue-raising side.

For example, the subsidy technique could be designed to take income from parents who, over their lifetimes, are rich and convert it into educational inducements for those who are poor. Such a strategy is consistent with the conclusion that "inadequate" educational spending stems from lifetime poverty and that it is either fair to the children of the poor or desired by nonpoor families that poor children receive more education. A progressive income tax based on income over a span of years, accompanied by an income-based educational price subsidy, is one way of accomplishing this end.<sup>129</sup>

Alternatively, Atlantis II could employ the subsidy in order to take income from families who, at a given point in time, are childless and convert it into educational inducements to those currently with young children. This strategy treats lack of income during child-raising years as the cause of inadequate educational spending; it is designed to induce greater spending on education by a group that may be described as temporarily or transitionally poor and may be adopted, for example, because such behavior seems equitable to children or because it is desired by outsiders (in this case, those currently without young children). Basing tax obligations on the number of adult household members and distributing resources in the form of an education voucher (or universally available education price subsidy) would be one way to accomplish this end. A governmental long-term educational loan scheme might do just as well.<sup>130</sup>

In this country, publicly-supported loans are one means by which government assists the purchase of higher education. Whether the loan is extended directly to the child—as is typically the case with college loans—or to the parents—as would likely be true for lower education loans—it would provide

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129. See, e.g., Polinsky, *Imperfect Capital Markets, Intertemporal Redistribution, and Progressive Taxation*, in REDISTRIBUTION THROUGH PUBLIC CHOICE 229 (H. Hockman & G. Peterson eds. 1974); Thurow, *The Optimum Lifetime Distribution of Consumption Expenditures*, 59 AM. ECON. REV. 324 (1969). See generally Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

A negative income tax could be used to give the same amount of education purchasing power to poor families as would the education price subsidy. But limiting the subsidy to education might have a different resulting impact; that is, the price subsidy will have "bite" if it influences purchases above the amount of education a family would have purchased anyway, given an extra amount of income equal to the value of the price subsidy. The American food-stamp program poses analogous issues. But there the program may well have much the same effects as would a cash grant equal to the value of the food-stamp subsidy. Perhaps most food-stamp recipients either already spend at least as much on food as the value of the stamps or, more relevant to our problem, would spend that much if given the cash value of the coupons instead. Hence, requiring people to purchase food with the food-stamp subsidy really restricts behavior very little. The education price subsidies being discussed may not operate in that manner, however—the poor may wind up buying more education than they would have if given cash instead. In part, this is because they might use the money for food.

130. The impact of a loan scheme, however, is different for the permanently childless.

funds for individuals who are transitionally poor, unable to post collateral or guarantee payment out of current earnings, and thus unattractive to private lenders.<sup>131</sup> By making funds available for education that the child or his family is not otherwise able to obtain, a loan scheme can produce results similar to the adult tax-voucher plan noted above. The choice between these alternatives would depend on the objective of Atlantis II. A loan scheme is designed to correct for a market imperfection, enabling some parents to obtain what *they* now want; parents retain the option of not participating in the scheme. By contrast, the adult tax-voucher plan is more coercive, consistent with furthering the interests of children, or outsiders, or paternalism.<sup>132</sup>

Finally, Atlantis II might use the tax and price-subsidy technique to earmark for education those resources that families otherwise have available for unrestricted use. It could, for instance, reduce the price of education to all families through, say, income-neutral price subsidies, raising the needed funds with a proportional tax. The net current effect of such an approach does not constitute a subsidy in the commonly-used sense of the term: by responding to the incentive, families would, in general, get back for educational use the funds that they contributed; the subsidy would simply alter the nature of the family's entitlement with respect to its own resources. The approach employs what initially appears to be a subsidy in order to effectuate paternalism or to secure the child's equitable claim to educational provision from his parents. While much the same result—redirecting private choices—could be accomplished by requiring that families spend more of their resources on education, the earmarking scheme has the added consequence of a built-in penalty for noncompliance: the difference between taxes paid and subsidy foregone.

If the subsidy is motivated by concern for the equitable treatment of children and the burden of securing such treatment to be borne by the collectivity, what does this imply with respect to revenue-raising? A tax premised on ability to pay or perhaps a proportional tax would be consistent with this objective—indeed, any tax indifferent to the number of children in the family could be justified. Yet, because of the burden imposed on poor families, a regressive tax would not seem appropriately employed unless Atlantis II was

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131. As explained in part II, the availability of bankruptcy and the ban on slavery are factors that may make lenders nervous about relying for the repayment of long-term loans on the production of income from human capital. Again, reference is here primarily made to those families willing to finance the education of their children over, say, twenty-five years, as they now finance their homes, but who cannot obtain long-term loans for this purpose.

132. Under a loan scheme in which repayment were made contingent upon both income and family size, the problems attributable to long-term as well as short-term poverty would be addressed. The "problem" with using a children's allowance alone instead of educational loans or educational vouchers is the same as that discussed in note 129 *supra*; if less constrained, the parents might spend the allowance on food for the child.

concerned only with the equity-based educational claims of poor children and was quite indifferent to their noneducational needs.

If certain outsiders who were not identifiable by income attributes were to benefit especially from the education of others—for example, the factory owner who, because of the subsidy, will eventually have more employable youths—and if the collective action is undertaken for this efficiency-based reason, the burden of the subsidy would properly be placed on such individuals through carefully directed taxes or charges. The transfer would, of course, still flow from some families to others, but it would be based upon this particular attribute—factory-owning or not. It is unlikely, however, that the benefited class is so easily identified; shop owners, for instance, may also gain, and some factory owners might gain more than others. Assuming that external benefits do vary, actually identifying those beneficiaries and assigning a value to the benefits they received is a hazardous enterprise. The costs and likely errors of this process argue against the utilization of other than rather general taxes—say, business profits taxes—in furtherance of this objective.<sup>133</sup>

e. What is the “Education” Being Subsidized?

If Atlantis II does adopt an education-subsidy strategy, whatever its dimension, it presumably has in mind the sorts of activities that it wishes to subsidize. While education would have to mean something less inclusive than the life experiences of a child, it might well entail more than formal schooling. Children learn in diverse ways; indeed, any single approach to education is unlikely to be equally effective with all.<sup>134</sup> For that reason, a society concerned about education might subsidize expenditures for various media, for activities involving other children and adults, for apprenticeships, for solitary experiences such as reading or playing an instrument, and the like.<sup>135</sup> The necessity to identify subsidy-worthy activities, and perhaps to protect families against fraud, would require intervention in the form of governmental regulation beyond the subsidy itself.<sup>136</sup> The actual choices made might vary substantially, depending upon whether the subsidy is intended primarily to further the interests of children, parents, or outsiders; knowledge of those

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133. Even if such a general tax were employed, one would have to be quite careful to assure that the incidence of the taxing instrument chosen turned out as intended.

134. This point bottoms contemporary criticism of American public schools. *See, e.g.*, T. SIZER, *PLACES FOR LEARNING, PLACES FOR JOY* (1973).

135. This is the problem of input requirements in another context; the perspective, however, is that of one who is imagining alternate inputs that would be allowed to satisfy the requirement.

136. The Veterans' Educational Assistance program (“G.I. Bill”), 38 U.S.C. §§ 1651-1697 (1970), which subsidizes veterans' education, requires that educational institutions be approved before they may participate in the scheme. *Id.* at § 1686. Even the Food Stamp Act, 7 U.S.C. §§ 2011-2025 (1970), identifies those things that can be purchased with coupons. *Id.* at §§ 2013(a), 2012(b).

choices would reflect more precisely the nature of that society's educational preferences.

## 2. *Payments for Attainment*

In any society, the private actions of individuals create incentives for parents to provide education, stimulating parental behavior that might not flow merely from affection. For example, if a particular level of education is deemed necessary for a child to obtain employment of the sort that his parents view as desirable or if relatives condition their gifts on a child's acquiring education, this private system of inducements to educate is operating.

Atlantis II could collectively create such inducements through provisions of either monetary or nonmonetary benefits to those who achieved a given educational *status*, as distinguished from the before-the-fact inducements offered examined in the preceding section. It might, for instance, provide bonus payments to competent engineers or poets (on top of whatever else they might earn in the market), regardless of the costs to those individuals of acquiring those skills. The payments might be made pursuant to an open-ended unilateral offer: those who become competent are paid; those who do not are ignored. Alternatively, the society could pay pursuant to contractual arrangements—to those who promised in advance to attain—so that those who failed after promising otherwise would be in breach of contract. Under this plan, some might attain and yet be owed nothing because of their unwillingness to risk the breach of contract costs they would suffer in case of failure.

This approach pays for success: it is meant to encourage people to acquire given skills by promising future reward, rather than by making more attractive the purchase of the skill-acquisition experience. Since the real value of the payment depends on previously borne costs, it also motivates people to educate themselves as efficiently as possible. But reliance on payment for results ignores the possibility that some are simply too poor (or too risk-averse) to obtain the education—and hence the reward—whatever their desires and talents might be;<sup>137</sup> thus, this scheme may be thought to be both inequitable and ineffective. It may also reward people for activities that they would have undertaken voluntarily rather than induce changed behavior. And this may be seen as a variant of target inefficiency. In sum, the monetary-payments approach affords a clear illustration of what David Reisman terms the principle of “the more the more.”<sup>138</sup>

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137. “Self-education” without out-of-pocket costs might be possible, but the poor would be at a clear disadvantage.

138. Quoted in F. LEVY, A. MELTSNER, & A. WILDAVSKY, *URBAN OUTCOMES* 224 (1974). This objection might be met, however, through the manner in which the payments are financed. Payments for results greater than those that would have been voluntarily achieved, even if appealing in theory, seem incredibly difficult to implement because of measurement problems. Still, paying

Atlantis II might also create such inducements by giving nonmonetary benefits to those who achieved a given educational status. The hope of such ventures is similar: that families would thereby be encouraged to educate their young. The reality might simply be the rationing of a given good and hence be thought inequitable by some. For example, the society could, as John Stuart Mill once proposed, condition the franchise upon educational attainment.<sup>139</sup> Such a proposal would, in fact, encourage education, rather than merely restricting the vote, only if parents were interested in assuring that their offspring eventually became voters or if children were able to obtain their own education. Quite the same would hold true if government entered the market, either by acting as an employer of those with particular skills or credentials or by imposing licensing requirements on private market occupations; in each instance, the outcome could either be an increase in education or a limitation of the job market.

Neither after-the-fact approach seems particularly fruitful. The nexus between the postulated goal of increased education and the means chosen to accomplish it seems too remote to make its achievement likely. Moreover, certain of these inducements will have inadvertent and problematic effects. Restricting certain jobs to those with particular educational credentials, for example, may, indeed, affect the kind of education that people choose; but if the relationship between the credential and the job-relevant skill is tenuous, as is often the case,<sup>140</sup> the arrangement seems ineffective at best. Unless finely tuned, these "inducements" may actually serve as cruel barriers to those for whom adequate response to the inducement is infeasible. In that event, it is hard to discern a carrot from a stick.

### 3. *Payments for Voluntary Provision*

A payments scheme may be intended not as a subsidy designed to induce more education, but rather as compensation to parents for education voluntarily provided. This objective too may not be readily accomplished. An announced promise to pay for "what would be done anyway" will induce additional provision by parents; and unless the society can distinguish what was provided voluntarily from what was provided in response to the offer of payment, this stimulating impact may be unavoidable.

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third-graders (in cash or candy) for learning an amount that is based upon an estimate of their ability is not unheard of in American public schools today. At least it is clear that payments, or the provision of benefits, for attainment are analogous to output requirements. Thus, some of the problems with requiring outputs, already discussed *see* text at notes 101-03 *supra*, would persist if one opted instead to pay for them.

139. Mill emphasized that a proper education was a prerequisite to intelligent exercise of the franchise. *See* J. MILL, *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 376-78 (Everyman's Library ed. 1951).

140. *See, e.g.,* I. BERG, *EDUCATION AND JOBS: THE GREAT TRAINING ROBBERY* (1970).



#### 4. *Combining Inducements With Requirements*

Combinations of inducements and requirements are also imaginable. For example, Atlantis II might offer to subsidize the purchase of education and then require that its offer be accepted in order to satisfy experiential or input-based objectives. Similarly, the society might pay for results, requiring families to promise those results. Or the purchase of inputs might be subsidized, while requirements are framed in outcome terms. These alternatives are at least responsive to two shortcomings that any solely requirement-based scheme presents: requirements may be unfairly imposed upon poor families, and the allocation of costs under a requirements scheme may be inequitable. But they are unresponsive to other aspects of what we have termed the problem of impossibility. Conceivably the society itself might attempt to address those issues—to assure, for example, that the education provided yielded collectively desired results—by actually performing the function of education. At the least, such a scheme might lead the collectivity to hold the government, rather than children or parents, accountable for failure. The next section considers ways in which government itself might undertake the function of educating.

### C. Government as Educator

To this point, we have described the government of Atlantis II as playing only an indirect role with respect to education: policing collectively-imposed requirements, transferring payments to families, and supervising or defining the education to be purchased or achieved. The requirements and inducements approaches contemplate that the acquisition of education occurs in the private (albeit possibly government-regulated) market. Alternatively, Atlantis II could decide to create its own educational institutions. There are a variety of ways in which these government institutions can fit into an overall scheme. As but one example, the government could provide a subsidized in-kind good, public schools, instead of “vouchers” for use at private schools; this sort of plan differs from previously discussed subsidies as surplus food distribution differs from food stamps. It is this technique—in-kind provision—that is now addressed. The examination focuses initially on government as one among numerous providers of education and then on government as monopolist educator.

#### 1. *Government as Competitor*

In-kind provision by the government of competitive educational experiences might be undertaken for any of several reasons. The rationale for direct intervention would determine the form of provision.

If, for example, Atlantis II believed that the private market was not operating competitively—that an insufficient mix of educational services was

being offered, that inadequate information was made available, or that oligopolistic pricing tendencies were detectable—the creation of a public competitor, *without* giving that competitor an economic advantage greater than that enjoyed by the private alternative, could be seen as collective action to offset market imperfections.<sup>141</sup> Under such an arrangement, public and private institutions would be equally subsidized, if subsidized at all.

Governmental intervention of this variety might then serve any of the efficiency or equity-based objectives that have already been noted. Since the same results could conceivably be reached by regulating (or giving special subsidies to) private educational institutions, thus preserving the private character of the market, such in-kind provision by government would be preferred only when it became clear that these other efforts would not work.<sup>142</sup>

The rationale for collective entry would also shape the characteristics of the government offering. If it were perceived, for example, that the private market was unwilling to offer a particular, valued kind of experience, public institutions might be designed to provide just that experience, supplementing what was already available. Under this arrangement, government-run institutions might be treated like public libraries or parks—available to families on their own terms. Alternatively, the public option might be conceived as a complete educational alternative whose benefits were realizable only if children were fully involved in the institution; the growth of public education in the United States suggests that such a position might well be held by professional educators.<sup>143</sup> Were this the case, families could only utilize governmentally-provided experiences only on an all-or-nothing basis.

## 2. *The Government as Monopolistic Educator*

The most interventionist choice available to Atlantis II is the creation of its own educational institutions, coupled with the requirement that all children between the specified ages attend them. Under this approach, the government assumes exclusive primary responsibility for education: while it does not formally preclude families from voluntarily doing more, the education that it provides is meant to be both sufficient and, in fact, largely preemptive.<sup>144</sup>

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141. It is not clear why one would expect this market failure, however, since there would be easy entry into the market by new competitors.

142. Recall that Atlantis II has been described as a society that values family liberty. The discussion of "government as educator" is at points deliberately inconsistent with that assumption. The liberty preference still influences choice between otherwise identical proposals.

143. This point is consistent both with general bureaucratic theory and with economic analyses of bureaucratic behavior. See, e.g., W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

144. Unless Atlantis II removed children from their families, the society would be unable effectively to preclude families from voluntarily providing supplemental education: it would be difficult to enforce such a ban through a penalty scheme both because of the invasion of family privacy that would be required and because "education" may be characterized as a pervasive activity, particularly for children. A different, collectively-provided, and required kind of experi-

Before Atlantis II would create a public school *and* direct families to utilize it, it would have to conclude both that the public institution was “better” and that people would not voluntarily recognize this.

Rather than requiring the public offering, Atlantis II could pursue the same preemptive objective by offering this alternative at prices substantially lower than those that prevailed in the market. The price-advantage policy would skew the choice between private and public competitors by rendering the public alternative financially more attractive; it would also reduce the income available for private-school purchases by imposing the costs of operating the public institutions on families. If the effect of these factors were strong enough, only the wealthiest could readily exercise the “choice” formally preserved by the scheme.<sup>145</sup> Employing a price benefit to influence choice is less comprehensive in its coverage than a plan that requires public school attendance; it permits at least theoretical choice. Were the nonpublic-school option widely utilized, despite the strong disincentive to do so, this might demonstrate that the collective judgment was wrong. The “pricing-advantage” approach is the pattern that prevails in America; it is not clear, however, that it was adopted for these reasons.

a. Why Government Monopoly?

On several grounds, Atlantis’s founders might conclude that the public is not to be trusted to select public educational institutions, even though they are “better.”

One reason is essentially paternalistic in the sense that the term has been used thus far. Atlantis II might fear not only that parents will spend less than they truly “want” to spend, but also they will spend it in the wrong way. Collectively-designated agents might be considered to know best—or, at least, better than parents—what kind of education should be made available to the young, and thus withdrawal of educational choice might protect everyone from the mistakes that parents would otherwise make. Indeed, individual founders might be willing to relinquish their own liberty in order paternalistically to limit the choices of others.

Alternatively, it might be believed that a scheme of requirements and/or inducements, coupled with reliance on the private market, is simply too cum-

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ence directed at a particular aspect of education can be imagined—e.g., required once-a-week state-funded citizenship classes. In that case, the government would not seek to be preemptive. Of course, it is highly unlikely that the government in any event would attempt to be preemptive with respect to all of a person’s lifetime learning. Thus, the government might seek educationally to monopolize a number of years or a certain amount of learning—say, what today is called elementary and secondary education—but not, for example, postsecondary education.

145. Conceivably, this arrangement could reduce total societal expenditures on education if families substituted the cheaper public good for previously-preferred private alternatives. See Peltzman, *The Effect of Government Subsidies-in-kind on Private Expenditures: The Case of Higher Education*, 81 J. POL. ECON. 1 (1973).

bersome or ineffective to produce parental responses congruent with what is collectively desired. For example, public institutions might be thought to react more readily to shifting societal wishes than would the private market, even if parents and providers are stimulated by new inducements or requirements.<sup>146</sup> Or on cost-benefit grounds, it might be held to be too expensive to target inducements properly or to enforce requirements, as compared with exclusive public provision.<sup>147</sup> And perhaps ineffectively regulated, privately-supplied education would be considered subversive to the collectivity because, for example, it tolerated (or promulgated) points of view strongly inconsistent with those enshrined in prevailing existing property rights and decision-rules. In brief, if Atlantis II feared that its collective interests were simply not as readily accomplishable through a system of requirements and payments, it might abandon these less interventionist devices and substitute a preemptive scheme.

Quite differently, it might be assumed that parents and private providers would act inconsistently with certain collectively valued (if difficult to state) child-equity goals, such as equality of opportunity. Stated more strongly, the diversity of treatment received by children in an essentially privately managed world might be thought antiegalitarian and hence undesirable; parental control of education decision-making might be perceived as *too good* for some children, and for that reason, bad for other children.<sup>148</sup> Implicit in this position is the perception that fairness with respect to certain children requires sacrifices on the part of others, that restrictions must be placed on the attainment of some in order to achieve, say, the minimal competence of the rest. This conclusion violates our initial assumptions concerning family primacy: rules intentionally aimed at making certain children absolutely worse off than they would be under voluntarism are inconsistent with the assumption that the children of Atlantis II are regarded as "belonging" to their parents. If in a more egalitarian-minded Atlantis II than has been described, this assumption is relaxed, the founders might rely upon public monopoly provision of education. They would logically do so as part of an overriding institutional framework designed to permit all children to share (actually or through substitute compensation) those things that parents provide specially to their own children in a family-based society—natural endowments on birth, home environment and parental care while the child is young, and property inheritance when the parents die.

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146. *But see* EDUCATION AND THE STATE 87-108. Professor West argues that the primitive nature of social forecasting (at least in societies subject to market vagaries in other spheres) makes the claim unlikely of fulfillment.

147. For example, requirements might simply be too difficult to tailor to individual children or too hard to enforce; designating a state employee (*e.g.*, a teacher) as empowered to make these decisions might be thought more effective.

148. *See, e.g.*, Blaug, *Economic Aspects of Vouchers for Education*, in INSTITUTE OF ECONOMIC AFFAIRS, EDUCATION: A FRAMEWORK FOR CHOICE, 21, 43-46 (2d ed. 1970).

This last justification of government monopoly assumes that private parental interests impose collective costs. It treats collective interests in less fortunate children as more important than individual—or family—liberty interests. For that reason, it is of little surprise that the monopolist approach holds particular appeal in communistic societies, such as China and Cuba, or communal settlements, such as the Israeli kibbutz.<sup>149</sup>

b. Monopoly of What?

A government-monopoly approach is not restricted by any of our conventional understandings of the meaning of education. For example, the time that a youngster spends being educated in Atlantis II could be substantially shorter than the prevailing American pattern, which requires that children devote roughly a decade of their lives to schooling. This would be the case if the society were to be simpler, more *Communitas*-like,<sup>150</sup> if there was relatively little that had formally to be learned. Alternatively, education could occupy a longer, or a different, period of time. If, for example, Atlantis II accepts the currently prevalent American psychologists' view that the critical formative years occur before age six,<sup>151</sup> it might begin formal (that is, collectively-provided) education substantially earlier than most societies now do.<sup>152</sup> Proposals that kindergarten be made compulsory and that the school starting age in the United States be lowered one year suggest that there exists some sentiment for such a rule in this country and in Europe.<sup>153</sup> Either education might be narrowly defined, to encompass collective provision only of particular

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149. See, e.g., C. RIDLEY, P. GODWIN, & D. DOOLIN, *THE MAKING OF A MODEL CITIZEN IN COMMUNIST CHINA* (1971). Harold Berman's description of Soviet law as teacher and parent, designed to "unite and organize and educate," suggests why that society might rely exclusively on government to educate its young. H. BERMAN, *JUSTICE IN THE U.S.S.R.* 282-84 (1963). The idea of communally-run schools was also advanced in this country by Jacksonian-era radicals. See D. KIRP & M. YUDOF, *EDUCATIONAL POLICY AND THE LAW* 6-7 (1974).

150. See P. GOODMAN & P. GOODMAN, *COMMUNITAS* (1947).

151. See generally D. AUSUBEL & E. SULLIVAN, *THEORY AND PROBLEMS OF CHILD DEVELOPMENT* (2d ed. 1970).

152. In modern industrial nations, children generally begin compulsory education around age six. See 5 UNESCO, *WORLD SURVEY OF EDUCATION: EDUCATIONAL POLICY, LEGISLATION AND ADMINISTRATION* 29 (1971). For example, in Great Britain, children start at age five, *id.* at 1188; at age seven in West Germany, *id.* at 497, the USSR, *id.* at 1168, and Sweden, *id.* at 1083; at age six or seven in Switzerland, *id.* at 1094. In France, children began at age six, but a recent provision allows them to begin at age five, *id.* at 450. These nations all also provide for preschool education.

153. Wilson Riles, California's Superintendent of Public Instruction, proposed that the twelfth grade be dropped in favor of beginning compulsory schooling one year earlier. Address by Wilson Riles, the University of California, Berkeley, School of Education, Commencement, June 8, 1971. Riles also suggested that money saved by dropping the twelfth grade could be more effectively applied to prekindergarten classes, referring to research indicating the importance of early learning. The Dutch minister of education recently urged lowering the compulsory school starting age from five to four, and requiring that children remain in school until age eighteen (instead of age sixteen). Personal communication from Professor D. Kallen, University of Amsterdam, Sept. 16, 1975.

skills, or education and child rearing could become almost synonymous, with the government assuming many of the duties that parents perform in our society.<sup>154</sup> These examples are intended merely to suggest—not to exhaust—possibilities of government monopoly. What is essential to the technique is that it places central determinations concerning the definition of education and decisions as to who will provide it in the hands of the government—directed, of course, by the society's collective decision-making process.

### c. Preemptive Government Education in America

At present, no American government could constitutionally assume the role of exclusive educator. The Supreme Court's decision in *Pierce v. Society of Sisters*,<sup>155</sup> which overturned an Oregon statute compelling parents to enroll their children in government-run schools, rejected such an approach, concluding that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>156</sup> The *Pierce* Court disputed neither the legitimacy of the government's interests in education nor the corollary proposition that in order to effectuate those interests, government might reasonably regulate education. What the Court found constitutionally offensive was the decision—made by majority rule—to vest government with monopolistic control over the process of schooling, thus barring all family choice.

References to the constitutional guarantee of a private realm of family life that the state cannot enter recur in Supreme Court opinions that attempt to delineate a right to privacy.<sup>157</sup> These opinions suggest that in the United States, the government can aspire only to share and not to monopolize dominion over the child. But the judicial decisions and the web of legislation that directs aspects of children's upbringing leave unclear just how close America could come to adopting a government-monopoly approach. They do not precisely define the point on a continuum of increasing governmental control over the educational process where other interests—in family privacy or individual liberty—would be constitutionally preferred to the state's claim. Those issues are considered in part IV, which examines the prevailing American system.

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154. The Israeli kibbutz perhaps affords one example of the second approach. Cf. B. BETTELHEIM, *THE CHILDREN OF THE DREAM* (1969); M. SPIRO, *CHILDREN OF THE KIBBUTZ* (1965). For a distinction between education and learning and the observation that relatively few cultures carry out training of the young outside school, see M. HERSKOVITS, *MAN AND HIS WORKS* 311 (1949).

155. 268 U.S. 510 (1925).

156. *Id.* at 534-35.

157. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See also Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 34-38 (1973).

#### D. Summary

Once a society has determined its educational objectives, only a portion of the problem has been solved. Accomplishing them draws it into another thicket; it becomes necessary, first, to select the best or best combination of implementation techniques, and then to ascertain whether the collective objectives remain worth pursuing in view of the prices that must be paid. Educational subsidies may be very costly but not buy what is desired; educational requirements may be neither credible nor accomplishable; government monopoly over education sacrifices parental liberty interests. Moreover, any collective intervention risks yielding unintended consequences, which may have effects inconsistent with, or even directly contrary to, what is overtly desired: the discussions of "target inefficiency" and "requiring the impossible," for example, are meant to convey this. Finally, fairness and effectiveness lie, not in the grand design, but in the technical details. For rationalists and policy makers, these are important, if sobering, conclusions.

This mode of analysis also has a more positive purpose. It yields a way of understanding the world which can be applied not only to project the consequences of hypothetical educational interventions in invented societies, but also to evaluate the consequences of the choice of means utilized to satisfy the objectives of even a complex society such as the United States. It is to that task that we now turn.

### IV

#### THE AMERICAN SOLUTION

This part identifies the collective techniques employed in the United States<sup>158</sup> to further its educational interests. What is said is unconventional, yet elementary: the familiar is presented and criticized in light of an analysis of societal objectives and means; American treatment of education is also contrasted with collective involvement in other aspects of child rearing.<sup>159</sup> The discussion of the American present is more avowedly opinionated than the earlier analysis of the choices open to an imagined society.

#### A. American Means

The ways in which this country seeks to accomplish its educational objectives include a complex mixture of requirements and inducements. Exposure to education is a legal obligation; parents are permitted to provide voluntary instruction in satisfaction of that requirement; and a mix of incentives—education-specific and extrinsic—influence family choice.

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158. More precisely, the description tracks the general pattern of *state* laws concerning education, for it is the state—not the nation—that undertakes primary responsibility for education.

159. Cf. C. BENSON, *THE ECONOMICS OF PUBLIC EDUCATION* (2d ed 1968), the leading work in the field.

### 1. *Requirements*

Forty-nine states require attendance at either a public school or at a state-approved private-schooling experience;<sup>160</sup> some permit the private education to be conducted at home, either by parents or by a private tutor.<sup>161</sup> Parents who do not submit to these requirements are typically subject to modest fines and (rarely-imposed) jail terms.<sup>162</sup> In certain states, failure to educate is a basis for a neglect action, which may lead to the removal of the child from the home.<sup>163</sup> Children who violate the law by not attending school may be punished as truants in a variety of ways, including assignment to state-run "rehabilitative" boarding institutions.<sup>164</sup> Most families do educate their children, although the causal nexus between these legal requirements and parental behavior is unknown.

The law seldom reaches those families who, despite these legal requirements, do not send their children (an estimated three per cent of the school age population)<sup>165</sup> to some school. Various plausible explanations for this selective enforcement of nominally universal requirements can be constructed. In certain urban school districts, the requirement has been rendered a dead

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160. Mississippi does not require attendance. Its compulsion law was repealed in 1956 as part of the battle over desegregation. See Arons, *Compulsory Education: America in Mississippi*, SATURDAY REVIEW/WORLD, Nov. 6, 1973, at 54-57.

161. New Jersey's law is an example of this:

Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

N.J. STAT. ANN. § 18A:38-25 (1968).

162. See K. ALEXANDER & K. JORDAN, *supra* note 104, at 18, 71-72. Indiana, however, provides for a \$500 fine and six months imprisonment. IND. ANN. STAT. § 28-5341 (Burns Supp. 1974). Also, each day of noncompliance seems susceptible of treatment as a separate violation under many statutes.

163. *Id.* For example, New York has such a provision. N.Y. JUDICIARY-COURT ACTS § 102(f)(i)(A) (McKinney Supp. 1974). For an analysis of the interplay of New York provisions, see *In the Matter of Thomas H.*, 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Family Ct. 1974).

164. See, e.g., *In re Mario*, 65 Misc. 2d 708, 317 N.Y.S.2d 659 (Family Ct. 1971). Typically, provisions relevant to compulsory attendance are included in both the education and the juvenile codes of a given state. E.g., in California, CAL. EDUC. CODE § 12454 (West 1975) provides for the primary penalties against noncomplying parents, while the treatment of truant children involves a complicated interplay between CAL. EDUC. CODE §§ 12401-16 (West 1975) and CAL. WELF. & INST'NS CODE §§ 601-02 (West Supp. 1975). Parental conduct is reachable under CAL. PENAL CODE § 272 (West Supp. 1975).

165. See CHILDREN'S DEFENSE FUND, *supra* note 84, at 33-53, where 1970 United States Census data and Children's Defense Fund survey results are reported. The Census reports 2.9 per cent of children aged seven to fifteen as "not enrolled." The Children's Defense Funds claims to have found a larger percentage of children to be out of school. Apart from the problems of identification of the children in question, differences in result may reflect differences of the important issue of who is to be counted. In any event, the data of neither the Census nor the Children's Defense Fund was tallied on the basis of who is out of school in violation of the compulsory attendance laws.



letter by the sheer magnitude of noncompliance.<sup>166</sup> Elsewhere, some families are coaxed by school officials into returning their children to school; these administrative efforts go unreported, and the offending families remain unpenalized. Students have been eased or forced out of school by officials who found them difficult to educate, or disruptive of others; the requirement is deliberately not applied to them.<sup>167</sup> In other, less commonly noted instances, families elude attendance officers through frequent moves and similar devices—migrant-worker families are perhaps the best illustration of such behavior. Some officials may perceive the compulsory education law as designed to assist parents in controlling their children's behavior and may enforce it only when requested by parents to do so; others, one suspects, recognize parents' inability to control their children but see the available legal remedies as unfair or inefficacious.

Nearly nine out of every ten youngsters who attend school are enrolled in a publicly-run school. Such attendance, on terms fixed by the public system, completely satisfies family obligations with respect to education. Even if children merely pass—or, as is often the practice, are passed—through the public schools, emerging wholly as innocent of learning as when they arrived a decade earlier, no formal penalty attaches to either the children or their parents.

Parents who opt to satisfy the educational obligation by sending their children to nonpublic (typically, religious) schools are bound by input or experiential requirements: children must attend school for the same portion of their lives in both private and public schools;<sup>168</sup> and the private schools themselves typically must satisfy certain requirements concerning their instructional program.<sup>169</sup> The private-school requirements are variously enforced through a system of prior approval (by state or local education officials) or by requiring that the school submit an affidavit attesting to compliance with state regulation. Since disputes between private schools and their regulators rarely surface, it is difficult to gauge the extent to which noncompliant schools exist.<sup>170</sup>

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166. See generally PRESIDENT'S SCIENCE ADVISORY COMMITTEE, *YOUTH: TRANSITION TO ADULTHOOD* (1974).

167. See Yudof, *Suspension and Expulsion of Black Students From the Public Schools: Academic Capital Punishment and the Constitution*, 39 LAW & CONTEMP. PROB. no. 2, at 374 (1975).

168. But in California, for example, private schools need *not* be open for the minimum-length school day or for the minimum number of school days required of public schools. See CAL. DEP'T OF EDUCATION, *SUMMARY OF CERTAIN OF THE LAWS OF CALIFORNIA RELATING TO THE ESTABLISHMENT AND MAINTENANCE OF PRIVATE SCHOOLS, PARTICULARLY THOSE OF KINDERGARTEN, ELEMENTARY AND SECONDARY GRADES* (1972).

169. South Dakota, for example, quite extensively regulates private education. See S.D. COMPILED LAWS ANN. § 13-4-1 - 13-4-4 (Supp. 1974).

170. See *Application of Auster*, 198 Misc. 1055, 100 N.Y.S.2d 60 (Sup. Ct. 1950), where a Jewish Yeshiva, which taught only religious subjects, was scrutinized in the course of a custody fight. See also the discussion of the fight between the Santa Fe Community School and New

Very little is known about that tiny portion of families who satisfy schooling requirements by educating their children at home. Some states prohibit such instruction<sup>171</sup>—except, of course, as a supplement to an approved instructional regime—while others permit only parents who hold teaching credentials to undertake it.<sup>172</sup> Even where states permit parents to demonstrate that the home instructional program is “equivalent” to the state’s offering,<sup>173</sup> equivalency is defined primarily in terms of inputs; indeed, in some instances, equivalency has been equated with social learning experiences, plainly rendering illusory the possibility of at-home teaching.<sup>174</sup> Only a scattering of litigation—much of it involving disputes between the state and a particular sect—attests to sporadic tension between family desires and official preferences with respect to such education.<sup>175</sup>

## 2. *Inducements: “Free” Public Schools*

The widespread reliance on public schools does not imply that such schools somehow proved themselves better in a competition with private schools for family favor. Public schools enjoy an enormous advantage over their private counterparts: they are tuition-free,<sup>176</sup> while private schools (except for some parochial schools) are quite expensive;<sup>177</sup> moreover, families pay for public schools through taxes, whether or not they use them. Since this pattern exists nation-wide, one cannot readily estimate what the “true” preferences of families for different kinds of education might be.

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Mexico authorities in *New Schools Exchange Newsletter*, April 15, 1973, at 36-38; D. KIRP & M. YUDOF, *supra* note 149.

171. See K. ALEXANDER & K. JORDAN, *supra* note 104, at 26-30. See also *State v. Counort*, 69 Wash. 361, 124 P. 910 (1912), and *State ex rel. Shoreline School Dist. No. 412 v. Superior Court*, 55 Wash. 2d 177, 340 P.2d 999 (1960), which demonstrate that state’s resistance to home instruction. Still, Washington might allow certain home-instruction programs to qualify as “private schools.” This appears to be the Illinois approach. See *People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950).

172. California is an example of this. See CAL. EDUC. CODE § 12155 (West 1975).

173. New Jersey’s statute is typical. See note 161 *supra*.

174. D. KIRP & M. YUDOF, *supra* note 149, at 52-62, trace the New Jersey history illustrated by *Stephens v. Bongart*, 15 N.J. Misc. 80, 189 A. 131 (Juv. & Dom. Rel. Ct. 1937), and *State v. Massa*, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967). In the former, home instruction was condemned, in part because the children were not educated with others outside the family; in the latter, this notion was rejected as inconsistent with the New Jersey statute.

175. The Amish have frequently engaged in legal battles with public school officials over the education of their children. See Erickson, *Showdown in an Amish Schoolhouse: A Description and Analysis of the Iowa Controversy*, in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 15 (D. Erickson ed. 1969).

176. Some public schools do, however, charge fees for textbooks, bus fare, graduation, and so on. See, e.g., *Johnson v. New York State Educ. Dep’t*, 449 F.2d 871 (2d Cir. 1971), *vacated and remanded for determination of mootness*, 409 U.S. 75 (1972), in which textbook fees were challenged as unconstitutionally discriminatory against the poor.

177. See 1 NEW YORK STATE COMM’N ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION, THE FLEISCHMANN REPORT 395, Table 5.5 (1973).

The subsidy scheme for supporting public schools is decentralized. Over half of all educational resources are generated by local school districts from taxes on real property, and most of the remainder is financed by state taxes. Both the amount of resources spent on public schooling and the nature of the tax burden vary among districts. Since no tuition is charged, the amount of a family's subsidy depends on the number of its children who attend public schools.

Through the licensing of occupations and the hiring of civil servants—both of which often require substantial educational attainment or experience—the government has created additional extrinsic incentives to secure an education.

### B. Observations and Evaluation

Little may confidently be said concerning the educational objectives that have given rise to this scheme. For one thing, each of the fifty states—not the national government—determines what kind of educational offering to make, and one might suspect variations in aspiration among states. Further, many important policy decisions are delegated to the thousands of local school districts. More importantly, the rhetoric of aspiration is predictably unspecific, thus permitting the observer to infer both noble hopes and mean ambitions. Rather than centering on these stated educational objectives, this section examines the modes of collective intervention America has adopted, pointing out some of their shortcomings.

#### 1. *Favoring Public Schools*

The policy of subsidizing only state-run schools ostensibly assumes that schooling yields benefits that the society as a whole ought to pay for, and that public schools can provide more—or, perhaps, different or more equal—benefits than private schools. This second assumption (implicitly based on equity and efficiency considerations) has been the subject of extensive and acrimonious debate, which cannot fully be recapitulated here.<sup>178</sup> Certain points are, however, worth brief mention.

##### a. Equal Opportunity

The most common American argument for a publicly-run and specially-subsidized system is that it affords equality of educational opportunity and thus serves a child-equity objective. The equal-opportunity language recurs in numerous judicial decisions and preambles to legislation. The concept is susceptible of diverse meanings, but however it is defined, the claim that the

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178. See, e.g., C. SILBERMAN, *CRISIS IN THE CLASSROOM* (1970).

public system, in fact, secures the desired goal in a way that private institutions could not appear unconvincing.

Consider the alternative meanings of equal opportunity that have been advanced. It might imply that schooling should render trivial the impact of social class on educational attainment,<sup>179</sup> a task at which public schools have had notably little success. Alternatively, the principle might be thought to guarantee that the educational resources received by children are distributed on the basis of equality or need; in fact, the present system relies heavily on the happenstance of a school district's property wealth in allocating resources, a criterion that has little reference to any child-based claim.<sup>180</sup> Yet another possibility is that equality of opportunity might be taken as a reduction of social cleavage through educating in the "common school" children of diverse racial and class backgrounds. But the prevailing and vehemently defended practice of assigning children to the school located in their neighborhood,<sup>181</sup> coupled with the race and class demarcations that characterize many neighborhoods, suggests that this approach is ill-suited to accomplishing the objective. Indeed, much of the heterogeneity in primary schools is attributable not to popular preference but rather to a kind of true paternalism imposed by judicial decision.<sup>182</sup> Although comprehensive secondary schools appear superficially classless, particularly when contrasted with the European practice of culling the most able students and assigning them to special grammar schools, the placement of American students into different programs—college preparatory, vocational, and general—recreates many of the community's racial and economic distinctions.<sup>183</sup>

This failure to realize equality, however defined, may suggest a deeper, unperceived dilemma; to the extent that a child "belongs" to his parents, and hence cannot wholly be controlled by the state, real equality of opportunity may be impossible to accomplish. The present system, unwilling to sever those

179. See J. GUTHRIE, G. KLEINDORFER, H. LEVIN, & R. STOUT, *SCHOOLS AND INEQUALITY* (1971). See also Coleman, *The Concept of Equality of Educational Opportunity*, in HARVARD EDUCATIONAL REVIEW, EQUAL EDUCATIONAL OPPORTUNITY 9, 13 (1969), in which it is suggested that equal educational opportunity may be defined as "equality of results given different individual inputs. . . . Such a definition taken in the extreme would imply that educational equality is reached only when the results of schooling (achievement and attitudes) are the same for racial and religious minorities as for the dominant group."

180. See *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). See generally J. COONS, W. CLUNE, & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

181. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484 (1972); *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972).

182. Often, this court-ordered desegregation only integrates blacks with poor whites, as in Boston, an outcome difficult to defend in principled terms. See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 117-51 (1970).

183. See B. JACKSON, *STREAMING: AN EDUCATION SYSTEM IN MINIATURE* (1964). Even at the time of *Pierce* there was ethnic separation by neighborhoods in American cities. See Tyack, *The Perils of Pluralism: the Background of the Pierce Case*, 74 AM. HISTORICAL REV. 74, 94 (1968).

ties, offers half-measures that constrict liberty somewhat without rendering children demonstrably more equal.

b. Socialization

Publicly run schools are also supposed to socialize students to the norms of the society by giving worldly meaning and importance to the instructional program—imparting such values as loyalty to the political system, the importance of economic productivity, and the necessity for rule-conformity.<sup>184</sup> This activity is also said to justify subsidizing only public schools. Socialization is an objective that—at least by assertion—serves the interests of both children and “outsiders.”

It is, of course, important that children understand at some point in their lives the consensually held values of the society and acquire the tools with which intelligently to reassess those values. Whether the task can or should be coupled with an instructional mission poses a different and harder question. The ways in which schools treat the socialization task give rise to doubts that the linkage is a sensible one. The schools' formal stress is on memorization of (and presumably student identification with) national symbols, as in saluting and pledging allegiance to the flag, and on the avoidance of controversial issues that otherwise might emerge in the curriculum or as expressions of a teacher's point of view.<sup>185</sup> Perhaps the best that one can say about these efforts is that they have had little success;<sup>186</sup> the attitudes of public-school children vary little from those of their parochial-school counterparts.<sup>187</sup>

Recently, rather more attention has been paid to the “hidden curriculum” of schools, which assertedly stresses routine and diligence, even at the expense of individualism and competitive success, and hence prepares people to accept similar demands for routine in their working lives.<sup>188</sup> Such outcomes are, of course, hard to measure; it is harder still to attach responsibility for them to a single institution, even one that consumes as much of a child's life as the school. Whether demonstrable or mythical, they seem a rather odd defense for the necessity of subsidizing only publicly-run schools.

c. Certification

Public schools are also supposed to prepare students for subsequent vocations, thus serving both the equity-based interests of children (their right to claim something) and the efficiency-motivated interests of outsiders (employers and, indirectly, others whose general-welfare responsibilities are thus

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184. For a general discussion of the concept, see *SOCIALIZATION AND SOCIETY* (J. Clausen ed. 1968).

185. See generally D. KIRP & M. YUDOF, *supra* note 149 ch. 2.

186. See generally R. MERELMAN, *POLITICAL SOCIALIZATION AND EDUCATIONAL CLIMATES* (1971).

187. See generally A. GREELEY & P. ROSSI, *THE EDUCATION OF CATHOLIC AMERICANS* (1966).

188. See generally Bowles & Gintis, *supra* note 106.

lessened). In fact, American public schools have not done a particularly good job of training individuals for specific work,<sup>189</sup> and there is little reason to expect that they are more fit to this task than private institutions. A recent study of postsecondary vocational schools confirms this expectation and finds both kinds of schools to be rather disappointing trainers.<sup>190</sup>

This is not to suggest that public schooling does not bear importantly on future career opportunities. The schools do evaluate students differentially, and the credentials awarded to the successful serve as threshold requirements for further educational opportunities and prized jobs. If the certifying process were perceived as meritocratic, it might be said to serve equity objectives, for in that case, children's rewards would depend on their abilities, not their lineage or wealth.<sup>191</sup> Yet, there is little reason to suspect that the best are consistently rewarded in this fashion or that the abilities measured by schools have much to do with work competence. Employers do, of course, rely somewhat on the schools' evaluations in selecting among applicants; they might be less inclined to do so if private schools—whose standards were neither so consistent nor so well-known—were more widely attended. Whether the selection criteria adopted in such a world would be more efficient or fairer than what is presently used is simply unknown.

#### d. Public Education as Paternalism

Conceivably, collective distrust of parental capacity to choose an education for their children has led this society to favor public schools in its inducement policy; viewed in this light, the American policy implies that only those who resist the lure of a free good and use private schools despite the financial disadvantage of doing so are capable of competent decision-making. Yet, imagine a regulated subsidy scheme that permitted subsidies to be used only at approved schools and hence restricted the choices available to those that the collectivity perceived as sensible. Why would such a scheme, which affords greater liberty to families, be perceived as unlikely to have the same desired effects? Perhaps boards of public education and public-school administrators are thought substantially more capable than parents (even when parents are guided by government regulation) of matching a child to the appropriate teacher and program. The difficulty with this view is that it seems frankly incredible: there is little evidence that American public schools are properly thought of as merit goods, that parents are—or ought to be—so distrusting of themselves as consumers of education.

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189. See generally 16 *INEQUALITY IN ED.* (Mar. 1974).

190. See W. WILMS, *PUBLIC AND PROPRIETARY VOCATIONAL TRAINING: A STUDY OF EFFECTIVENESS* (1974).

191. Cf. M. YOUNG, *THE RISE OF THE MERITOCRACY 1870-2033* (1958).

e. Explaining the Present

In sum, none of these justifications—equal opportunity, socialization, certification, or public education as paternalism—persuasively reveals why this country relies on public schools. The explanation for the present system may well not reside in currently identifiable benefits of that choice, but rather in a century-old tradition whose first causes include the imperialism of early public-education officials, fears of immigrant deviance and resistance to Americanization, and the increasing demands of industry for workers trained at public expense.<sup>192</sup>

2. *Allowing Public School Attendance to Satisfy Fully a Family's Educational Requirements*

Permitting families to satisfy all educational obligations by sending their children to school enables them to meet a legal requirement without at the same time achieving the objective—minimal competence, performance consistent with potential, or the like—that presumably gave rise to that requirement. That does not seem a terribly sensible rule for the state to adopt. Conceivably, experience-oriented requirements are adopted either because no other alternative is thought feasible (and hence an input obligation embodies a second-best solution) or because it is thought unfair to punish parents for the failure of children who have participated in the government-run enterprise. Once the parent delivers the child to the schoolhouse door, either the child or the school system itself does seem a more plausible culprit when learning does not occur. But blaming the child is a fruitless—and probably wrong-headed—undertaking; and the public schools have become, to a considerable measure, unaccountable to anyone for their failures.<sup>193</sup>

American public schools, like other large bureaucratic organizations, have their own agenda that only approximates any societal ideal; those interests relate also, and quite naturally, to institutional convenience.<sup>194</sup> For this reason, the society might benefit from a mechanism that gave parents continuing incentives or levers to require that schools do more. At present, except where a public school practice is legally challengeable, parents have no effective way of influencing school decisions. They cannot behave in normal market fashion by threatening to redirect the use of their resources. While parents can indirectly make their preferences felt by their choice of residence, frequent moves

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192. See generally e.g., M. KATZ, *supra* note 58; L. CREMIN, *supra* note 21; C. GREER, *THE GREAT SCHOOL LEGEND* (1972).

193. See Sugarman, *Accountability Through the Courts*, 82 *SCHOOL REV.* 283 (1974). Under a voucher system, which gives families choice over schools, the familiar "blame the institution" argument will be difficult to fashion. If one does not do well, the reason will be said to inhere in individual incapacities (or inability to make wise choices) rather than with "the system."

194. See Bidwell, *The School as a Formal Organization*, in *HANDBOOK OF ORGANIZATIONS* (1972).

are costly, factors other than school quality influence residence-selection, poverty may drastically curtail choice of residence, and the diverse needs of more than one child may not be satisfied in any one location.<sup>195</sup>

Parents may organize and seek through the political system to change the rules. But the concerns of particular parents are typically too idiosyncratic to be subject to political manipulation. Even where the proposed changes are general in scope, the professional organization is often able effectively to insulate itself from external intervention; it has no incentive to be responsive.<sup>196</sup> There have, of course, been occasions when parental pressure produced school reforms, but these are rather the exception than the norm.<sup>197</sup> In short, the schools that presently operate are not necessarily those we wanted, in part because the decision-rule that actually operates differs markedly from that formally contemplated by the relevant statutes.

If parental pressure for educational reform is regarded by the society, if not by the professionals, as a means of furthering collectively-shared objectives, one way of encouraging it without burdening parents with additional obligations might be to endow children, through their families, with legally enforceable educational entitlements. Such a right might be viewed as part of the constitutional compact—as is the case with respect to many state constitutions<sup>198</sup>—or it could specifically be secured by legislation. Given the very real differences among children and the previously discussed difficulties with insisting that any specified set of ends be achieved, the nature of the entitlement would vary with the grievance. Just such an approach is being advanced by those who view themselves as badly served by the present public-school system: the handicapped, non-English speaking, nonlearners. Each group has relied in part on the state-imposed attendance requirement as a basis for claiming some reciprocal obligation on the part of the public school system; each has sought to secure some needs-based entitlement.<sup>199</sup> Whether courts have the institutional competence to respond to demands for more reasonable (or good faith) treatment of children when the system fails is, however, unclear.

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195. See Sugarman, *Family Choice: The Next Step in the Quest for Equal Educational Opportunity?*, 38 LAW & CONTEMP. PROB. 513, 514-17 (1974).

196. See, e.g., Kerr, *The School Board as an Agency of Legitimation*, in GOVERNING EDUCATION 137 (A. Rosenthal ed. 1969); Eliot, *Toward an Understanding of School Politics*, in *id.* at 3; James, Kelly, & Garms, *The School Budget Process in Large Cities*, in THE POLITICS OF EDUCATION AT THE LOCAL, STATE, AND FEDERAL LEVELS 74 (M. Kirst ed. 1970).

197. See Murphy, *The Education Bureaucracies Implement Novel Policy: The Politics of Title I of ESEA, 1965-1972*, in POLICY AND POLITICS IN AMERICA 1607 (A. Sindler ed. 1973).

198. See, e.g., N.J. CONST. art. 8, § 4, ¶ 1: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

199. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974); *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Doe v. San Francisco Unified School Dist.*, Civil No. 653-312 (Super. Ct. Cal., defendant's demurrer sustained Sept. 6, 1974).



### 3. *Conditions on Public School Attendance*

Families who send their children to public schools must conform to the requirements fixed by state legislators and school administrators. In particular, they are not free to select among schools or educational offerings, but have to accept the state-offered program and designated school. Whatever options families have are those that the school itself chooses to make available. This limitation on family choice is most candidly defended in terms of administrative convenience, a rather special kind of efficiency argument: if teachers are assured that most of their students will be present on a given day, they can better organize class presentations; and school systems can better allocate faculty and other resources if they know how many students will be attending a given school. This rationale, of course, assumes that the public school system is highly structured, as it is in fact; but such structuring is not itself an agreed-upon objective.<sup>200</sup>

Any defense couched in terms of traditional educational objectives—for example, the paternalistic claim that the experts know what detailed educational regime best satisfies collective interests—seems unconvincing. The nexus between program and objective is rarely specified; instead, requirements are adopted on an ad hoc basis, without much attention to justification. Certain requirements—for example, instruction in reading and mathematics—are directly linked to collective interests in children's political and economic futures. With respect to others, such as music and physical education, the connection appears attenuated. More importantly, these requirements are not waived even if a child has satisfied them independently—as through learning to read on his own—or can meet them through some other nonschool activity such as church choir. For the child who finds particular aspects of the mandated curriculum repetitious, such demands appear unreasonable. They may restrict the child's capacity to maximize his educational opportunities and even render education itself boring. In short, school-imposed restrictions may promote inequity with respect to the child and inefficiencies with respect to everyone *except* school personnel.

The uniform imposition of public school requirements presents other difficulties. Some families may have moral objections to particular curricular offerings.<sup>201</sup> Where the sensibilities of many are likely to be offended, as with sex-education courses, most states have made the instructional program

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200. But structure may promote student discipline, which many parents do want. *See, e.g., THE GALLUP POLLS OF ATTITUDES TOWARD EDUCATION 1969-1973*, at 2 (S. Elam ed. 1973): "In all but one of the last five years, the nation's adults sampled in these surveys have named discipline as the number one problem of the schools in their own communities."

201. *Mitchell v. McCall*, 273 Ala. 604, 143 So. 2d 629 (1962). Parents objected to the requirement that their daughter appear in a gym suit, regarding it as indecent; the proffered remedy—obliging her to take physical education, while not insisting on the dress requirement—was unsatisfactory.

optional.<sup>202</sup> They have done so as a matter of grace and political good sense, not because choice within the public program was conceived as a right. If the family's objection is political—if, for example, parents seek to have their child excused from a class that they consider "radical" or "sexist"—the response is likely to be unsympathetic, and judicial tests of the school's authority unrewarding. In these situations, courts are likely to remind parents that they may take advantage of private educational alternatives, conveniently ignoring the illusoriness of that choice.<sup>203</sup>

Outside the public school, government imposes few similarly inflexible requirements. Children are not, for instance, forced to use public libraries and museums, and a youngster who has been vaccinated by a private doctor need not submit to revaccination by a government-employed doctor. It is doubtful that the panopoly of required school experiences is necessary either to assure child equity or to produce benefits for others; the claim that these are "expert" judgments rings hollow. It seems more plausible, if less satisfactory, to conclude that as there have been vogues in politics and pedagogy over time, public school requirements, like Topsy, have "just grown." One alternative to the present practice, more closely linked with conceivable collective objectives, is to permit tailored exemptions where the irrelevance of a requirement could be shown; another might be to operate public elementary and secondary schools as public colleges are run, with choice of campus, advanced placement, course options, waivers of requirements, and the like.

#### 4. *Input Regulations: Private Schools and Home Instruction*

Even in those states that most closely regulate private instruction, it would misdescribe reality to assert that state requirements forced such schools into the public school mold. Substantial diversity is legally permissible, often realized, and presumably thought by the government to be valuable. Objections to the legitimacy of regulation itself are rare: some regulation is clearly countenanced by *Pierce*; and without it, any educational requirement would be meaningless. It is the specifics—curriculum, teacher certification, and similar requirements—that sometimes cause trouble.

Many of the concerns relating to course requirements imposed in private schools are identical to those considered in the public-school context. Parents (with the concurrence of the private school) and the state will weigh differently the need to teach mathematics every year or the need to provide physi-

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202. See, e.g., *Cornwell v. State Bd. of Educ.*, 42 F.2d 471 (4th Cir. 1970); *Hopkins v. Hamden Bd. of Educ.*, 29 Conn. Supp. 397, 289 A.2d 914 (C.P. New Haven County 1971). But see *Valent v. State Bd. of Educ.*, 114 N.J. Super. 63, 274 A.2d 832 (Ch. 1971).

203. See the debate on this question between Justices Clark and Stewart, dissenting, in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). See also *Commonwealth v. Bey*, 166 Pa. Super. 136, 70 A.2d 693 (Super. Ct. 1950); *Todd v. Rochester Community Schools*, 41 Mich. App. 320, 200 N.W.2d 90 (1972).

cal education instruction at all; some families will prefer a program that concentrates on particular aspects of knowledge, while the state insists on a more general offering. In each instance, the state is advancing a generalized “best interest” standard to justify its requirement, while the family is countering with a position that appears to make sense for its children. In any particular case, the family’s assessment (and private school agreement) of what is appropriate may well be correct: it is, after all, in a better position to know its child than is the state. Yet, if the state only requires that private schools have certain courses in their curriculum, rather than requiring that such schools actually teach certain things to individual children, it will then have either to treat all private school students as it treats those taught at home (that is, individually) or to trust the interaction of private school educators and parents to satisfy its interests.<sup>204</sup> There is one undoubted advantage in relying on the discrete and varied judgments of parents and private school educators: a state-made error will affect all who are supposed to benefit from the rule, while the costs of an error made by a family or private school will be borne only by its children and those affected by them. In fact, some states do require only that private schools offer certain courses and not that each child actually take all of them.

A second notable source of conflict is a state requirement that those teaching in private schools have state credentials. Families may prefer to have their children educated by graduate students or artisans (or, for that matter, university professors) and will assert that these individuals are both highly qualified—even if not in the state’s terms—and effective teachers. The reason for the credential requirement is probably paternalistic: the state wishes to prevent families from being abused by charlatans—but the justification is unconvincing. Teaching appears to be an art for which particular training may be unhelpful and even detrimental. Parents (who, having had an education, presumably know something about the process) can judge the quality of instruction that their children are receiving. Such parental competence may be particularly likely in families sufficiently concerned about education to reject the free alternative, choosing instead one for which they have to pay. If the state viewed the credential as an aid to choice, it could offer it optionally and require teachers to disclose whether or not they possess it rather than demanding it of all.<sup>205</sup> The failure to do this is, again, probably attributable to governmental concern for administrative convenience and the consequent unwillingness to evaluate individual teachers or student progress. But experi-

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204. The state may feel that it lacks both the administrative resources and the skills to monitor or evaluate a large number of individual students. *But see* text at note 208 *infra*.

205. This is what states do when, through professional boards, they “certify” public accountants, while permitting uncertified accountants to do business—at least much of the same business—of CPAs.

ence with public school teachers who *are* credentialed should have eroded whatever confidence one might have had that a license guarantees competence or protects against incompetence, and hence serves both administrative and broader societal interests.

The conflict between the state and those few families who wish to educate their children at home is even sharper. Parents wishing to assume this obligation are quite obviously committed to a view of what is educationally best; the government distrusts the ability of untrained individuals to provide the range and depth of exposure that it views as desirable. Where home instruction is allowed, it is also evaluated with respect to input standards—the content of the curriculum, parental possession of a teaching credential or other proof of competence, duration of the “school” day, and school routine such as homework and other assignments. Objections to such measures resemble those advanced on behalf of users of private schools.

The fact that exposure, not desired outcomes, satisfies the state is less readily explained with respect to at-home or private school education than in the public school context. Since the government is neither providing the educational experience nor requiring parents to support it through tax payments, there is less reason for ignoring results than where the child is educated in public schools. A requirement framed in outcome terms is not impossible to conceive: the government could, for example, insist on demonstration of a given set of skills at regular intervals during a child’s educational career.

It may be that such a demand would be regarded as unfair, at least insofar as it penalized the child whose limited abilities disabled him from reaching the required minimum; or it might simply appear impolitic to impose on those who attend private schools or are taught at home a requirement that many public school youngsters would be unable to meet. But the actual consequences of an exclusively input-directed inquiry are disturbing. They have led to threatened punishment where a child’s performance was, in fact, satisfactory<sup>206</sup> and to the disapproval of educational experiences that promise to yield state-desired outcomes.<sup>207</sup> In effect, these requirements may actually discourage success. Insofar as they stress only exposure, the rules may also operate to reward costly failure.

One alternative would allow those who employed private educational means to meet either exposure *or* output requirements at their option. If, for example, a child performed at a state-determined minimum for six-year-olds, parents would be free to educate him as they wished until age seven. At that time, the child would be tested again. If he passed, the process would continue; if not, his education would then have to conform to state exposure

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206. See *In the Matter of Shinn*, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961).

207. *In the Matter of Thomas H.*, 78 Misc. 2d 412, 357 N.Y.S.2d 412, 384 (Family Ct. 1974); cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

requirements, at least until he could pass the age-appropriate test. This approach attempts to balance real and conflicting interests of parents (in liberty) and of the collectivity (in successful outcome). Given that undoubted virtue, claims that such an arrangement would impose an intolerable administrative burden on public officials should be examined carefully before they are accepted as determinative.<sup>208</sup>

##### 5. *Child Rearing and Education: A Brief Digression*

What is worth remarking about the way education is treated in this society may be better appreciated by contrasting it with the American approach to the general issue of child rearing.

###### a. The Presumption of Parental Competence

This society acts on the assumption that parents are competent to raise their own children and that their interest in doing so is an important one. As the Supreme Court noted in *Stanley v. Illinois*: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>209</sup> While this freedom may be abridged if the parent is found "unfit," the court's opinion in *Stanley* clearly indicates that the state is constitutionally restricted in adopting a standard of unfitness. For example, government intervention into the lives of families that generally assigned children to the fulltime care of those whom the state perceived as serving the "best interests" of children or the society would seem constitutionally impermissible.<sup>210</sup>

While most state neglect statutes<sup>211</sup> do not explicitly reaffirm this concern

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208. This approach has obvious shortcomings, some of which are noted in earlier discussion. See text at notes 41-45 *supra*. Various modifications—for example, defining minimum outcomes in terms of some measure of aptitude or the average public school attainment—are conceivable, and these too have their own difficulties. It is not, however, clear that the arduousness of the task warrants wholly abandoning the idea.

209. 405 U.S. 645, 651 (1972), quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

210. *But see In re B.G.*, 11 Cal. 3d 679 (1974), in which custody of the child was awarded to a long-term substitute parent in preference to a fit natural parent on the basis of the "best interests" test; and *Wyman v. James*, 400 U.S. 309 (1971), in which New York State's regulation conditioning Aid to Dependent Children on home visits by social workers was upheld in view of the public's interest in the best interests of the child. In both cases, however, an act of the parent (leaving the child with another natural parent who subsequently died in *B.G.*; applying for public welfare to support the child in *Wyman*) precipitated the governmental intervention into the family life.

211. Criminal neglect statutes are rarely invoked—a result that is consistent with statutory emphasis on the child's needs rather than parental acts, CAL. WELF. & INST'NS CODE § 600 (West 1972); and on rehabilitating homes rather than removing children. CAL. WELF. & INST'NS CODE § 11205 (West Supp. 1975). Hence, we focus on these more frequently invoked civil-family-juvenile definitions of need.

for the primacy of the family, judicial interpretations bespeak a limited governmental role. The California legislation, for example, notes that a child who "is destitute, or . . . is not provided with a home or suitable place of abode" or is not afforded "the necessities of life," or "is in need of proper and effective parental care . . . and has no parent . . . willing to exercise or capable of exercising . . . or . . . actually exercising such care" or whose "home is an unfit place for him by reason of neglect . . ." is deemed neglected and may be taken from his parents.<sup>212</sup> If so, the responsibility for caring for the child is assumed by the government.

This language is remarkably ambiguous: to define a home as "unfit" because of "neglect," as the statute does, substitutes one unknown for another. It is unclear, for example, whether these requirements stress resource availability or child outcomes. With respect to the basic care of children, the statute may be seen to focus on inputs—the "necessities of life."<sup>213</sup> Even though there are no specific benchmarks in the legislation (no "1000 calories a day" requirements, for instance), it would be consistent with this statutory language for a juvenile or family court to concern itself with inputs, relying on generally accepted standards of what feeding and medical care should involve in determining parental fitness. This, however, does not represent common practice. Instead, the salient variable typically is parental success (or child outcomes); the inquiry is focused on whether the child is reasonably healthy and well-fed. There are good reasons for this approach. Parents are presumed to care about the health of their offspring. They can usually discern when their children are not healthy or adequately fed. Since they provide for their own health and food needs, parents can reasonably be expected to do the same for their children—in most instances, simply giving to children whatever the parents eat would satisfy minimal nutritional requirements. Where parents fail to meet these (legal and moral) obligations, detection and intervention by the government is generally feasible. To impose, on an ongoing basis, more detailed standards—enforcing, for instance, a particular culinary regime—seems unnecessarily intrusive, violative of family privacy.<sup>214</sup>

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212. CAL. WELF. & INST'NS CODE § 600 (West 1972).

213. *Id.* § 19, which states the purpose of all Welfare and Institutions Code Programs for children, sheds no light on the nature of the inquiry called for. It provides that the purpose of child-welfare programs is "to provide protective services [to children] to the fullest extent deemed necessary by the juvenile court, probation department or other public agencies . . . to insure that the rights or physical, mental or moral welfare of children are not violated or threatened by their present circumstances or environment." *Id.*

214. On occasion, however, the vagueness of the statutory standard has led courts to find parents unfit because of their idiosyncratic behavior or beliefs. *See, e.g.,* Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966) (child placed with grandparents because father was an atheist and led a "bohemian" lifestyle), a decision that has been severely criticized. *See, e.g.,* Mnookin, *supra* note 13; J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 13.

b. Parental Failure Attributable to Poverty

The resources needed to meet the responsibilities of child rearing are usually privately provided. The fact that such care creates desirable benefits for those outside the family has not been held to justify its collectivization or government subsidy. But when a family defaults on these obligations because of poverty, its children are neither removed from their home nor required to participate in a public program outside the home. Instead, such families receive a variety of subsidies intended to increase their competence. Primarily, welfare payments and food programs are used to enable parents to make available to their children the "necessities of life"; indeed, welfare is paid in anticipation of default. A familiar example illustrates the general point: When the presence of widespread, severe malnutrition among children was called to governmental attention during the 1960's, officials did not respond by increasing enforcement of neglect laws in order to force parents to do a better job of child rearing. The problem was perceived as attributable to family poverty, not to parental fault or negligence. For that reason, the revelations produced pressure to expand the food-stamp program and to make available additional publicly-provided meals for school children.<sup>215</sup> The societal remedy for child neglect attributable to poverty has, in other words, been conceived in family-subsidy, rather than penalty, terms.

c. Operation of the Neglect Laws

No one knows whether neglect laws cause parents to demonstrate greater concern for their children than they would voluntarily or what proportion of legally neglected children are identified by officials charged with enforcing these laws. It is, however, clear that very few parents in America have their child-raising practices scrutinized by the judicial system; and far fewer children are removed from their homes than are helped by other means, including the unknown deterrent effect of the neglect laws, the provision of money and goods to poor families, and the utilization of social workers who are supposed to help in stabilizing the family unit.<sup>216</sup>

Some children are, of course, actually removed from their homes pursuant to the neglect laws, and in such cases, parental responsibility turned over to someone else. While these laws impose universal requirements, their force is felt primarily by poor families; poverty is a near-necessary condition for the invocation of neglect statutes. This outcome seems at odds with the societal preference for family subsidy as a means of correcting poverty-induced ne-

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215. See generally *Hearings On Nutrition and Human Needs Before the Senate Select Comm. on Nutrition and Human Needs*, 90th Cong., 2d Sess., pt. 1 (1968). See especially the testimony of Dr. Aaron Altschul, Special Assistant to the Secretary of Agriculture, *id.* at 101-33.

216. Such social workers may be assigned either through the welfare bureaucracy or as a disposition of a family court case.

glect. Moreover, even though poverty itself may contribute to what is viewed as blameworthy behavior, one suspects that there are equally culpable parents in all social strata. The explanation of this apparent paradox resides in the way neglect laws are actually enforced.

Enforcement is selective. It is triggered by complaints from neighbors, police, and government-employed social workers.<sup>217</sup> Because poor children are more often the subject of police attention<sup>218</sup> and social workers a more likely fixture in households that receive welfare, the neglect statutes are invoked more frequently against poor families. And because of the dependency of the poor on the society for wealth redistribution, these families are obliged to submit to this second-guessing of their capabilities as parents.

#### d. The Contrast With Education

Were the collectivity's role with respect to education conceived in similar terms, the result would be a strikingly different set of rules from those that currently prevail. Parents would still be required to educate their children, but the requirement would be defined in outcome, not input, terms: parents would be presumed competent to accomplish the job of educating their children, and the means used would not routinely be examined. Education would be provided by the private market and would be primarily financed out of the family's own pocketbooks. Those families unable, because of poverty, to finance the education of their children would receive collective assistance enabling them to do so. Sanctions would be imposed only as a last resort, where inducement and voluntarism had previously failed. In practice, these sanctions might be disproportionately employed against the poor.

This, in fact, is closely akin to the proposal advanced by John Stuart Mill a century ago.<sup>219</sup> Mill called for government to "require and compel the education, up to a certain standard, of every human being who is born its citizen,"<sup>220</sup> while staying out of the business of running schools. "If the government would make up its mind to require for every child a good education, it might save itself the trouble of providing one. It might . . . content itself with helping to pay the school fees of the poorer classes of children . . ."<sup>221</sup> Mill's approach was probably politically unfeasible in the United States, even when he advanced it. In the intervening hundred years, government's func-

217. See, e.g., Kay & Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717 (1966); Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966).

218. The poor are more likely to get caught, although they may well not commit more delinquent acts than their middle class counterparts. See A. PORTERFIELD, *YOUTH IN TROUBLE* 46 (1946); Murphy, Shirle, & Witmer, *The Incidence of Hidden Delinquency*, 16 AM. J. OF ORTHOPSYCHIATRY 686 (1946). See also Nye, Short, & Olson, *Socioeconomic Status and Delinquent Behavior*, in *JUVENILE DELINQUENCY* 17 (R. Giallombardo ed. 1966).

219. Mill, *On Liberty*, in *THE UTILITARIANS* 473, 586-87 (Dolphin Books ed. 1961).

220. *Id.* at 586.

221. *Id.*



tion as provider and regulator of the intimate details of education has substantially increased. Yet we remain unable either to define a "good education" or to assure that it be provided; in light of the disappointing results of greater governmental intervention, we could do worse than to reconsider the Mill approach.

### C. The American Approach to Education: A Summary

The complex American system of educational inducements and requirements is not calibrated to produce results that fully satisfy anyone—except, perhaps, those who work in public schools. The broad requirement that children be exposed to educational experience has only limited influence on family behavior. Those families who undertake the obligation would likely do so without being compelled, both out of familial concern and as a response to inducements; and of those relatively few families who do not provide an education, only a handful are reached by law. The subsidy policy—which strongly favors public over privately-run education—is in need of better defense, in either distributional or efficiency terms. The focus on inputs or exposure that characterizes regulation of both public and private school attendance appears to be predicated on concerns for governmental convenience. Although the exposure demands are harmless in most cases and beneficial in some, they also encourage behavior inconsistent with any readily ascertainable set of educational objectives. This society might do rather better if it asked government to do rather less in this particular domain.

## V

### MEANS AND ENDS REDUX

#### A. Shortcomings and Compensations

Model-building is an enterprise of inherently bounded usefulness. The reader who has persevered to this point has doubtless reached this conclusion independently. But some of the limitations of this particular enterprise need to be spelled out, if only to steal a march on the critics.

The discussion asserts very few truths. The ringing declarative is nowhere to be heard. In its place, there are weasels familiar to lawyers and other evaders: conceivably, likely, probably. Neither of us has a particular fondness for such evasive tactics, but they are necessary here. Remarkably few limits have been placed on the model of Atlantis II. It is meant to fit societies that decide questions on a wide variety of bases and to apply to societies at quite different stages of economic development. Consequently, arguments concerning educational objectives are constantly made in conjectural terms; the complexity (of sentence structure, if not of thought) makes straightforward statement impossible. There also exists relatively little contemporary experience with, and

even less analysis of, alternative governmental techniques. If one is reduced to guess-work and speculation, it is because nothing better is at hand.

Our analysis is couched primarily in terms of welfare economics concepts. The virtue of this approach is its generalizability; but in relying upon it, we have doubtless failed to pay sufficient heed to the process by which concrete decisions in real societies are actually made. The cursory treatment of political and bureaucratic elites, for example, underestimates their role in educational decision-making.

Finally, while the analysis assumes that education (as broadly defined), income, and social status are somehow interrelated, it says little about the nature of that relationship. In this sense, this effort risks committing a sin familiar in discussions of educational policy: it treats education as if it were a self-contained enterprise. Doubtless, *some* relationship between the intermediate end of educational attainment and ultimate societal ends may be detected, but—particularly in light of recent scholarship<sup>222</sup>—the strength of those linkages requires more attention than has been devoted to the matter.

There do exist offsetting, if not saving, graces to the undertaking. It provides a rather complete map of collective educational objectives: these are defined both in terms of interested parties and with respect to the ethical bases upon which these objectives may be premised. The catalogue, while thorough, is by no means tidy. It suggests a complex interrelationship among the process of goal-derivation, the development of collective means to achieve societal ends, and the responses of individuals to those means. It also indicates that any given educational approach cannot be analyzed in terms of gross description or rhetorical promise, that—to put the point differently—the particulars of a given alternative prove crucial. Educational inducements, to note but one instance, can be designed to encourage quite different kinds of behavior through their distribution of costs and benefits. The very tentativeness of the exposition suggests that actual choices are often predicated on assumptions concerning causation, the empirical bases for which are, at best, imperfect. Viewed in this light, this analysis is another and somewhat focused call for evidence to confirm or rebut belief.

The categories of societal concerns and of means employed in the analysis need not be limited to education, as the range of illustrative examples is intended to indicate. Conceivably, the ways in which society undertakes child rearing generally could similarly be catalogued, a task that would aid in understanding the divergent approaches that this country has adopted with respect to the health, education, and nutrition of its young. It would, for instance, afford a way of conceptualizing—if not explaining—why a society

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222. See, e.g., C. JENCKS, *supra* note 8; THE "INEQUALITY" CONTROVERSY: SCHOOLING AND DISTRIBUTIVE JUSTICE (M. Bane & D. Levine eds. 1975).

might compel health screening for all children, while not also providing “free” universal health benefits.

This method of categorizing ends and means also permits one both to speak somewhat differently about the prevailing American system, as was done in part IV, and to contrast that system with contemporary proposals to reform American education, as will be done briefly here. This kind of analysis yields a basis for making and comparing choices. It may also provoke commentators into examining familiar problems in novel ways.

### B. Three Contemporary Reforms

We conclude with brief comments on three currently popular reform proposals: the abolition of compulsory-attendance requirements, the provision of education vouchers, and the guarantee of an “appropriate” education for handicapped children. These comments are meant to illustrate the way in which an analysis of means and ends may help to locate an individual proposal on the map of alternatives and also to identify implicit assumptions, probe detailed choices, and reveal unresolved issues in a given proposal.

#### 1. *Compulsion*

##### a. Some Specifics

Repeal of the compulsory-attendance laws has frequently been proposed in recent years.<sup>223</sup> The idea is usually advanced with little attention paid to related laws concerning child behavior, but before one can usefully say much about the abolition of compulsion, additional assumptions—concerning both the government’s role with respect to education and regulation of noneducation activities of the young—have to be made.

It is likely<sup>224</sup> that at the outset at least, the repeal of compulsion would not be accompanied by the abandonment of other governmental efforts that encourage (or permit) families to educate their children: tuition-free public schooling would continue, as would collective inducements to obtain educational credentials. Public schools might well relax certain of their regulations and operate rather as community colleges do presently: students would be permitted to enroll part-time, daily class attendance would not be required (although some attendance rules might be adopted), students would not have to be degree candidates, and many courses would be offered on an elective basis. Those who chose not to attend public schools would not be wholly free

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223. See, e.g., P. GOODMAN, *COMPULSORY MIS-EDUCATION* (1964); P. GOODMAN, *THE COMMUNITY OF SCHOLARS* (1962); J. HOLT, *FREEDOM AND BEYOND* (1972). Cf. E. FRIEDENBERG, *THE VANISHING ADOLESCENT* (2d ed. 1964). For a discussion of the salient legal issues, see Note, *Freedom and Public Education: The Need for New Standards*, 50 *NOTRE DAME LAWYER* 530 (1975).

224. These assumptions may be challenged as arbitrary; they are our best guess concerning what is most consistent with a change limited to compulsory-attendance repeal.

to spend their time as they wished. We may assume that the child-labor laws would remain in effect and would be enforced at least selectively.<sup>225</sup> Private-school regulation would be limited to meeting such traditional consumer-protection concerns as assuring information disclosure and satisfaction of health and safety standards. While educational failure might not be grounds for a neglect action, parents' inability to curb the misdeeds of their offspring would continue to justify juvenile court intervention; a child's activities when not in school could result in his removal from the family.

#### b. The Consequences of Repeal

Those who advocate the abolition of compulsion assert that the change will be consequential. They argue that children (or families), no longer subject to a "twelve year sentence,"<sup>226</sup> will be freer to choose what is best for them and that the society too will be better served by this general increase in liberty.

Certain consequences of repeal should indeed be beneficial. Children who would flourish in an experience that does not satisfy present legal requirements might be able to take advantage of their new-found freedom to combine, for example, some schooling with certain kinds of work and time free from *any* external demands. Since families would be able to opt in or out of the public schools, the schools themselves might see the need to appeal to a formerly captive clientele and hence become more responsive to the expressed desires of their constituents.<sup>227</sup> The education of those who voluntarily attended school might improve, since their teachers would no longer have to undertake to control others whose presence was attributable to legal coercion.

But insofar as advocates of noncompulsion belittle reasons—stemming from both voluntarism and the appeal of inducements—that lead contemporary families to educate their children wholly apart from their obligation to do so, they may doom their proposal to irrelevance. Furthermore, noncompulsion may itself generate new social costs. These two different concerns are treated in turn.

(1) *Why Are Children Sent to School?* Compulsion laws apparently do not serve as the primary motivation behind parental decisions to educate their offspring. The law is enforced sporadically,<sup>228</sup> and for that reason, the family

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225. Child-labor laws would likely persist even were compulsion abolished, for children might still be thought in need of protection from parental exploitation and intolerable working conditions, and adults might still insist on freedom from job competition. Indeed, as pupil attendance officers today often enforce both laws, the elimination of some of their responsibilities, coupled with bureaucratic pressures for their continued employment, might mean that the child-labor laws were more strictly enforced.

226. See generally *THE TWELVE YEAR SENTENCE* (W. Rickenbacker ed. 1974).

227. Whether such responsiveness embodies a benefit or a cost (*i.e.*, abandonment of standards) depends on one's view of the matter.

228. See text at notes 165-67.

determined not to school its children in state-prescribed fashion can likely do so with impunity. Available evidence is supportive of the proposition that even were the legal requirement to vanish, children would continue to be educated. In Mississippi, the one state that does not compel attendance, the percentage of children in school is not appreciably lower than elsewhere;<sup>229</sup> and in all states, the vast preponderance of children remains in school until high school graduation, even though not obliged to do so.<sup>230</sup> This pattern of behavior suggests that at present, attendance laws operate essentially like incest taboos, confirming what would, in any event, occur voluntarily.

The earlier discussion of voluntarism and inducements indicates why this might be the case. If schools, in fact, are thought to do a creditable job, families will be strongly inclined to take advantage of the "free" good. Whether good or bad, schools are—at the least—inexpensive babysitters; they assure parents a period of daily freedom from the demands of their children. The pleasure of being with friends in a place that they feel to be their territory ("our"—not "our parents' "—schools) may also encourage student attendance. And the lure of jobs that require educational credentials may keep many otherwise reluctant youngsters in school. For these reasons, families might well continue sending their children to school on a full-time basis because the perceived costs of not doing so appear too high; any potential long-term gains attributable to noncompulsion would be undone by the failure to exercise the new liberty. Freedom from compulsion may create frustration, rather than giving individuals greater control over their lives.

(2) *The Costs of Noncompulsion*. Some families would view the end of compulsion as a charter of liberation.<sup>231</sup> To the advocates of this approach, that result may be justification enough. But who would take advantage of this new-found opportunity? The advocates of noncompulsion have especially in mind the liberationist but law-abiding families who presently send their children to school despite their objections to the institution. Doubtless, such families do exist. Poor families, however, are those who would be especially tempted to withdraw their children from school, to send their children to

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229. See Arons, *supra* note 160. But nonenrollment may be slightly greater in Mississippi than elsewhere in the country; the Census data for children ages seven to seventeen, reported by the Children's Defense Fund, show 7.8 per cent of them not enrolled in Mississippi, as compared with 7.6 per cent in Kentucky (the state with the second highest percentage), more than 6 per cent in eight more southern states, and 4.2 per cent as the national average. See CHILDREN'S DEFENSE FUND, *supra* note 84, at 34-35.

230. Jencks cites census data showing that by the mid-1960's, 82 per cent of all students were graduated; the average age for entering the work force was nineteen. C. JENCKS, *supra* note 8, at 19.

231. In the Matter of Thomas H., 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Family Ct. 1974), for example, involved well-educated parents (the father having had teaching experience) who claimed to be educating their children on the family farm. Despite the fact that the children seemed to be happy, learning, and enjoying their work on the farm, this form of education was held to violate the New York compulsory education laws.

work (either legally, if work permits could be obtained; or around the house; or illegally, if necessary), to sacrifice future benefit for present income; and the child would be unable effectively to resist this pressure. Of course, in certain families, both parents and children will agree that work, if available, makes better sense than school; but the persistence of both child-labor laws and educational credential requirements makes it improbable that children presently obliged to go to school will find enjoyable or financially rewarding work. This predictable result suggests that one valuable effect of present attendance laws may be to aid the school-minded member of the family—the child or his parents—in intra-familial disputes concerning the necessity of continued schooling.

c. Prognosis

Compulsion itself remains the *bête noire* of the present system's harshest critics. Yet, it is difficult to imagine this society detaching the issue from broader and more basic concerns, proceeding to treat compulsion as if it existed in a vacuum. Only in a genuinely pluralist society—one that, for example, severed the connection between educational credentials and work opportunities; encouraged a vastly greater variety of experiences for the young; was willing to subsidize alternatives more diversified than the neighborhood public school; and tolerated more widely varied patterns of acceptable adult behavior—would the abolition of compulsion receive serious consideration—and there only as a rather modest element of a literally revolutionary set of institutional reforms.<sup>232</sup> If one needs evidence that the preconditions for such a society are not now at hand, the overwhelming popular support for compulsion reported in the Gallup polls<sup>233</sup> and the seeming political disinterest in the issue should suffice.

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232. See Green, *Schools and Communities: A Look Forward*, 39 HARV. ED. REV. 221 (1969). Allowing tailored exceptions—freeing certain children from all or a portion of the compulsion laws—is more conceivable. For example, children might be excused for one term to pursue some project of their own—including work; or they might be exempted from a class their family finds morally objectionable; or experiences gained out of school might satisfy school requirements. See text at notes 200-08 *infra*.

233. These polls show a consensus (across age, race, sex, educational background, occupation, religion, and income lines) that children be required to attend school at least until age sixteen. Sixty-one per cent wanted required schooling even beyond age sixteen; 28 per cent thought age sixteen would suffice. Professional educators provide a slight contrast, with only 35 per cent opting for over age sixteen, while 42 per cent settle for age sixteen. Ninety-one per cent of those surveyed thought that children not interested in school should be forced to attend grades one through six; for grades seven through twelve, this figure drops to 73 per cent. Professional educators are more lenient on grades seven through twelve (56 per cent favor compulsion) but are just as adamant as the general population on grades one through six (91 per cent for compulsion). The apparent inconsistency in these responses suggests that the structure of the question asked may have particular importance, a familiar problem with survey data. See S. Elam, *supra* note 200, at 139-41. *But cf.* NATIONAL COMMISSION ON THE REFORM OF SECONDARY EDUCATION, *THE REFORM OF SECONDARY EDUCATION* 137-39 (1973), which advocates reducing the age of compulsory school attendance to fourteen.

## 2. *Education Vouchers*

Voucher proponents propose to alter the traditional subsidy pattern of American education.<sup>234</sup> Collectively-raised resources would not be spent in a single governmentally-run system, as at present, but rather would be redistributed to families who would spend the vouchers in state-regulated schools of their choice; that is, inducements would continue to be employed, but the preference for public over private schools would cease (in some plans, public schools would disappear entirely). Most voucher schemes contemplate the use of vouchers only for “schooling” and not for other forms of education, such as home instruction or self-education, and envision governmental regulation of voucher-eligible schools.<sup>235</sup>

The voucherists assume that the availability of choice will make the inducement to educate so attractive that children (including those who have dropped out of present arrangements) will come forward willy-nilly, thus obviating the need for—or at least very much attention to—attendance requirements. This calculus dismisses what may be real opportunity costs of education for older children.

Debates over vouchers have stressed the ways in which this approach would alter the *status quo*;<sup>236</sup> and there are, to be sure, real differences. The argument for diversity that bottoms the voucher proposal reveals a diminished confidence in the claim that society’s designated experts know best how to educate children, a perception that the present paternalism badly serves many children. The stress that many of the voucher proposals place on providing additional assistance to poor children—either by offering vouchers only to them,<sup>237</sup> by making the value of the voucher vary inversely with income,<sup>238</sup> or by making the voucher’s worth turn on calculations of a family’s willingness-to-pay given its income<sup>239</sup>—indicates a greater concern for a certain kind of child equity among these voucherists than exists in the present system.

But voucherists do not disagree with what are asserted objectives of the present American system. Instead, they have argued that a voucher plan

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234. See generally EDUCATION VOUCHERS: FROM THEORY TO ALUM ROCK (J. Mecklenburger & R. Hostrop eds. 1971); Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CALIF. L. REV. 321 (1971); M. FRIEDMAN, *supra* note 76; Sizer & Whitten, *A Proposal for a Poor Children’s Bill of Rights*, 2 PSYCHOLOGY TODAY 58 (Aug. 1968); EDUCATION AND THE STATE.

235. Many voucher plans are surprisingly inattentive to what the requirements should be, typically stating only that the same rules would apply as apply to existing private schools for purposes of the compulsion laws. These proposals also pay little attention to the revenue-raising aspects of the plan.

236. See generally EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES (G. LaNoue ed. 1972).

237. See Sizer & Whitten, *supra* note 234.

238. See EDUCATION VOUCHERS, *supra* note 234.

239. See Coons & Sugarman, *supra* note 234.

would *better* secure equality of opportunity, heterogeneous learning experiences, stable political consensus, and the like, and that the addition of an element of choice makes these benefits possible. It is interesting that they have used the *status quo*, rather than a more overtly government monopolist model, as a basis for comparison; one could claim that these benefits, alleged to attach to choice, could be best attained if government were constitutionally able and willing to reach those factors—access to private schooling, differential home environments, and the like—that contribute to present inequality. Perhaps the voucherists do not take seriously the possibility that this country—which persists in preserving family hegemony—would impose on itself the further restrictions that such an approach would entail. Or perhaps they are unwilling to confront the more pointed choice between liberty and equality that such a comparison presents.

Those who propose vouchers argue that educational choice is not presently exercised because it is too costly. It is unreasonable, they quite correctly suggest, to expect all but the wealthiest families to pay for private schooling in addition to supporting the public system. Although such an argument assumes that wealth, rather than taste, leads families to make certain choices, no one has proposed to treat the education vouchers as family assistance, thus permitting families to determine for themselves whether or not to buy education with their additional resources. This may be attributable to the political infeasibility of such an approach (for voucherists, unlike anticompulsionists, have serious hope that their ideas might be adopted).<sup>240</sup> It may also reflect the fact that a single-parent family of four on welfare, which now annually receives some \$4,000 in cash and in-kind benefits in a state like California,<sup>241</sup> might rationally conclude that a portion of the \$6,000 that its vouchers would be worth (assuming that the voucher's value equalled the cost of education in, say, San Francisco) could better be spent on noneducational goods. Both the existing educational system and the voucher proposals appear willing to treat the present adult generation of poor people in niggardly fashion, while devoting a relatively large amount of resources to the education of the next generation; children receive more in in-kind goods than what their parents might

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240. Indeed, a modified voucher scheme—sponsored by the federal government—has been adopted in Alum Rock, California. Planning for a statewide experimental scheme in New Hampshire and for an experiment in East Hartford, Connecticut is underway. See Sugarman, *Family Choice: The Next Step in the Quest for Equal Educational Opportunity?*, 38 LAW & CONTEMP. PROB. 513, 555-64 (1974).

241. A family comprised of a mother and three children could receive up to \$282 per month under the California Aid to Dependent Children program. CAL. WELF. & INST'NS CODE § 11450 (West Supp. 1975). With \$282 a month in household adjusted income, the family would be able to obtain \$73 worth of food-stamp bonus coupons, as of July 1, 1974. The additional value of Medicaid would depend upon use and the family's health; since neither Medicaid nor housing subsidies are included in the total welfare benefit stated in the text, it may be too conservative. For a much larger estimate of the cash equivalent value of welfare assistance, see Glazer, *Reform Work, Not Welfare*, 40 PUB. INTEREST 3 (Summer 1975).



regard as their fair share. This trade-off between child and adult claims for equity may, in fact, be correctly made. It should be made explicitly, not merely be assumed to be appropriate or inevitable.

### 3. "Appropriate" Education for Handicapped Children

Traditionally, neither governmental requirements concerning education nor in-kind educational subsidies have applied to the severely handicapped, those thought to be "incapable of benefitting" from instruction.<sup>242</sup> As a result, whatever education these children have received has been supported by private (parental or charitable) expenditure; the government has provided custodial care in public institutions. This allocation of responsibilities is quite the reverse of the pattern for other children, where the society provides public schools but few other child rearing services.

Demands for quite different treatment of the severely handicapped have been advanced with considerable success in both the courts and state legislatures.<sup>243</sup> Educators have argued that the conclusion of ineducability was wrong—or at best premature—and that the government's failure to provide education for these children was thus unjustifiable.<sup>244</sup> That handicapped children should receive an *appropriate* education is typically defended in terms of child equity: the severely handicapped deserve to have collective resources expended upon them in order to help overcome their plight. More infrequently advanced is an efficiency justification: it is less costly for the state to subsidize education than to pay the costs of life-long care (an obligation that has historically been assumed); once educated, the severely handicapped would have less need of care and might even become marginally productive members of society.

In a sense, the advocates for handicapped children found themselves, a scant half-decade ago, in a position not dissimilar from that of our hypothetical Atlantis II founders, free to make initial decisions concerning what education should be provided and in what way. Few such decisions had been made, and a wide range of alternatives was conceivable. As these claims have been converted by courts into constitutional entitlements, the breadth of possibilities persisted; a great many different things could satisfy the legal requirement that the handicapped receive "appropriate" or "suitable" education.

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242. See, e.g., HERR, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995 (1972); MURDOCK, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAWYER 133 (1972).

243. See, e.g., *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972). See generally Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973).

244. See summary of evidence presented at trial in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

What has, in fact, been sought is a replication of the very mix of incentives and requirements that are employed for "normal" children. The subsidy desired is in-kind provision of public schooling, rather than a voucher that could be used to purchase privately-supplied services.<sup>245</sup> Despite the historic unwillingness of the public system to educate these children, the consequent lack of trained professionals in that system, and the relatively greater experience that private institutions have had in teaching the handicapped, public provision—collective or professional, rather than family, determination of what is appropriate—has been the goal. Indeed, state proposals to subsidize parentally-selected nonpublic options have been criticized by the "right to education" movement as embodying a governmental default on its obligation to educate.<sup>246</sup> This insistence on replication is consistent with the more general thrust to minimize differences between handicapped persons and others and thus to assimilate them in the society.<sup>247</sup> But the price for adherence to that commendable position may well be high.<sup>248</sup>

### C. Afterword

Throughout most of this discussion, we have attempted to be descriptive and analytical, to offer rather than urge choices. Our own biases—favoring both greater wealth redistribution and increased personal liberty—have nonetheless colored the presentation. Certainly, the present system of American education has been treated harshly in these pages. But this system has one clear advantage over any of the alternatives that have been advanced, either in the discussion of means or in the brief treatment of contemporary reform suggestions: it is in place and functioning tolerably well, despite a

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245. Note that under one proposal, a contract to provide "appropriate" educational services would be entered into by parents of a handicapped child and school officials, and if the school failed to satisfy its contractual obligations, parents would be entitled to a voucher equivalent to the moneys spent in the public school program. This proposal, designed primarily as a means of dealing with the problems posed by the education of mildly handicapped children, assumes that the voucher guarantee would induce the public schools to accomplish the agreed-upon task in order to retain control over public resources. See Gallagher, *The Special Education Contract for Mildly Handicapped Children*, 38 *EXCEPTIONAL CHILDREN* 527 (1972).

246. See Sage & Guarino, *Unintended Consequences: A Law Which Purports to Aid Handicapped Children*, 55 *PHI DELTA KAPPAN* 533 (1974).

247. See, e.g., Burt, *Judicial Action to Aid the Retarded*, in 2 *ISSUES IN THE CLASSIFICATION OF CHILDREN* 293 (N. Hobbs ed. 1975).

248. Reformers may feel that if the public system assumes the educational function, the children's right will be more financially secure, while voucher amounts will not increase with inflation. See *McMillan v. Board of Educ.*, 430 F.2d 1145 (2d Cir. 1970), where New York's \$2,000 voucher for handicapped children was challenged as inadequate. Insistence upon elimination of statutory provisions that "excuse" handicapped children from school attendance also constitutes part of the sought-after reform. Unless this last is simply of symbolic importance, it suggests a perception on the part of the reformers that some parents of the severely handicapped would not voluntarily utilize public education that helped their child because of the shame some parents feel, because these children cannot advance their own interests, and because parents might not realize that educational programs can truly help their children.

variety of perceived shortcomings.<sup>249</sup> And because the system is nearly universal, it remains difficult to gauge the impact of any radical surgery.<sup>250</sup>

It will not do, however, to reject any given alternative on the grounds that it will fail perfectly to accomplish this society's educational objectives; that characterization certainly applies to the *status quo* itself. In seriously attending to the possibility of change, the pertinent question is not whether a proposed approach satisfies some ideal, but instead what kinds of imperfections this society wishes to accept, what trade-offs it is willing to make in securing what are, in fact, divergent interests. Before that question can be well answered, our society, like Atlantis II, would profit greatly if the interests of parents, children, and outsiders were clearly revealed and balanced against each other, not simply assumed.

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249. See H. BROUDY, *THE REAL WORLD OF THE PUBLIC SCHOOLS* (1972), for a spirited defense of public schools.

250. Similarly, historical arguments that purport to demonstrate that compulsion followed, rather than preceded, increased public demand for education, see, e.g., Landes & Solmon, *supra* note 27, may always be countered by asserting that the undoubted differences between this era and some prior period limit the utility of the analogy.