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FAIRNESS IN THE DISTRIBUTION OF EDUCATION†

John E. Coons*

PROFESSOR O'CONNELL has described eloquently the plight of the child in a poor school district in California or in one of the 48 other states with predominantly local school financing—Hawaii being the exception.¹ In these rather informal remarks I shall view the problem that this child faces as having three aspects. First is the problem of priorities in spending. Given a finite number of dollars to spend on any kind of activity, one must decide what his preferences are; in education we have much dispute over where we should put our dollars. Whether one wishes to emphasize preschool education, university education, education for the gifted, for the disadvantaged, or vocational training, he will find a lobby representing him in Springfield or Sacramento.

Second, even if all of one's preferences were satisfied in this respect, there would remain, in states like California and Illinois, the kind of discrimination that Professor O'Connell has described.² That is a problem that we can characterize as one of fair distribution among people in the same category. A child essentially the same in age, intelligence, and family background from district to district, in states like Illinois and California, will have enormously different kinds of resources devoted to his education—resources which largely depend upon the wealth of his school district. In California, for example, the spending range is somewhere between $450 per pupil at the bottom and $3,500 at the top.³ I am told that the students in

† This article is adapted from an informal speech delivered at the conference entitled “Equal Protection Against Unequal Schools?,” held at the University of Illinois College of Law, February 23, 1972, discussing the decision in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The author is grateful for the editing and documentation by the editors.

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2. See O'Connell, Equal Protection Against Unequal Schools?, p. 215 supra.
3. 2 The President's Comm'n on School Finance, Review of Existing State School Finance Programs 35 (Commission Staff Report 1972).
the rich district go to Europe every summer on funds provided by the local property tax; that tax is perhaps $50 on the average house with a rate which runs perhaps one fourth of one per cent. Meanwhile, the school district that is spending $450 per pupil is likely to have a tax that runs around six or seven per cent—20 or 30 times as heavy. These are extremes but, even eliminating these freaks at the end of the spectrum, this is a strange system; it is this system and these relationships to which Serrano v. Priest was addressed.

From my point of view, there is also a third kind of problem and it is roughly this: No matter how completely one satisfies preferences in spending, and no matter how fair one makes the distribution or equalizes the expenditure from school to school and district to district (if that is one's notion of fairness), one still has not necessarily done anything about giving most people choice or variety in their education. It is only rich people like you and me with all our advantages of family background who can decide to go to private schools. Freedom of choice is an interesting problem related to that of Serrano, and likely to be boiling up in the legislatures if Serrano survives.

The problem of priorities or expenditure preferences was actually the first of these three problems addressed to the judiciary by the poverty bar. In 1968, in the first cases which dealt with financing problems—in fact they were brought in Professor Carrington's neighborhood, Detroit—the school district decided to go after the state's money via the fourteenth amendment. The idea was that every child ought to have dollars spent on him according to his particular "needs." That idea is interesting and one which I might endorse as a legislative matter; it is one, however, which I have difficulty understanding. The judiciary had trouble with it too. That complaint was copied in a number of states, including Illinois in McInnis v. Shapiro. That case was promptly disposed of by a three-judge federal court and thereafter by the United States Supreme Court. The three-judge court stated that this constitutional standard was too unrefined and unclear. For a court to make a judgment about every individual child-plaintiff and his personal characteristics was "judicially unmanageable." That decision seemed right to me; indeed, it seemed inevitable.

Serrano had the advantage of watching McInnis walk the plank. Serrano was filed in a state court and by the time the case reached the California Supreme Court the theory had been refined to the form

Professor O'Connell has described.⁷

Now I think it is probably useful to tell you at the start what Serrano and the Texas⁸ and the Minnesota⁹ cases and the other cases¹⁰ did not do; there has been a great deal of misunderstanding about the magnitude and the relevance of these cases. First, they do not, under the fourteenth amendment, tell the state that it must make spending on schools uniform throughout the state. District spending level differences still are permitted so long as they are not related to wealth differences.

Second, the decision has nothing to do with the special needs of either urban or rural schools. No particular theory of education is at stake in these decisions. Indeed, it is not at all clear that the decision will help the cities; it is fairly clear that it will hurt some cities in the short run. If the measure of privilege that now exists under the system is the property wealth of the school district, then cities like New York and San Francisco, rather than being the victims of the present system, are its beneficiaries. New York and San Francisco are fairly well above the average in assessed property value per pupil.¹¹ On the other hand, there are many cities that are well below the average: Newark,¹² Elizabeth,¹³ San Diego,¹⁴ Fresno,¹⁵ all the cities of Kansas,¹⁶ and some of the cities of Illinois.¹⁷ But then there are those cities for which the assessed valuation per pupil is about the state average: Oakland, Los Angeles,¹⁸ Chicago.¹⁹ Therefore, if one's primary objective is to help city dwellers, Serrano is distressingly neutral. It hurts and helps indiscriminately.

It is also not at all clear how many of the poor—the personally

⁷ See O'Connell, Equal Protection Against Unequal Schools?, p. 215 supra.
¹¹ See 2 The President's Comm'n on School Finance, Public School Finance: Present Disparities and Fiscal Alternatives 81, 95, 133, 152 (Urban Institute Study 1972).
¹³ See id. at —, 287 A.2d at 221.
¹⁴ See 2 The President's Comm'n on School Finance, supra note 11, at 84.
¹⁶ See 2 The President's Comm'n on School Finance, supra note 3, at 80.
¹⁷ See id. at 68.
¹⁸ See 2 The President's Comm'n on School Finance, supra note 11, at 84.
¹⁹ See 2 The President's Comm'n on School Finance, supra note 3, at 69.
poor—will be helped by such a decision. First of all, we do not know where the poor live. The statistics in this country have not historically been kept in a fashion which permits one easily to find the coincidence between personal and school district poverty. Now it is true that one can find areas of family poverty which are obviously related to school district poverty, but it is also just as true that one can sometimes find poor people living in rich districts. I live next door to a district called Emeryville, which has a quarter of a million dollars in assessed valuation per pupil but in which all the families are poor. This paradox exists because these few hundred families are neighbors to belching smoke stacks, large warehouses, and distributing centers—very valuable commercial and industrial property. On the other side of Berkeley is a place called Orinda, which is populated largely by upper middle class people with fairly large families. But that district has no industry and, ironically, is poor; it will be the beneficiary of Serrano. So there are strange relationships which must be tolerated, if we are to have reform of the kind that Serrano represents. This assumes it is reform, and I want you to consider that question seriously.

Moreover, it is not clear that Serrano will uniformly help minorities. We tried to find where minorities live in California, with respect to school districts and school district wealth, and I think we have some fair line on it. The average minority pupil lives in a school district which is above average in wealth. When one thinks about it, that is not too surprising, because such pupils tend to live in Los Angeles, San Francisco, and Oakland, whose size tends to dominate the statistics. Two of these three districts have slightly above average assessed valuation, and San Francisco is a good deal above average.\(^2\) Of course, assessed valuation may not be the criterion which one should employ to determine whether minorities are being treated fairly by the present system; it obscures the fact that many members of minority groups—particularly Mexican-Americans—tend to live in rural districts of extreme school poverty. But this relationship is also difficult to pin down, and the situation may differ from state to state.

Next, although this is no news to the law students and lawyers, we do not in Serrano have a constitutional handle on the differences among the states. The Constitution does not require the federal union to make the states equal in any economic sense however appealing the analogy may seem. So we have Mississippi on the one economic hand, and we have New York, and California, on the other. The southern states, in part because they are poor, tend to make much higher tax efforts for a much lower dollar yield for education than California and the other rich states.\(^2\)
Finally, let me add the obvious: *Serrano* has nothing to do with the validity of the property tax however much the popular press may disagree. The characteristics of that tax make for interesting debate, but they have little to do with *Serrano* itself.

For the moment that is enough about what *Serrano* does not do. Let us examine the central aspects of the case. The standard which is enunciated in *Serrano* is simply this: the level of spending for a public school pupil may not be a function of wealth. Obviously, under the present system, wealth is precisely the most powerful influence on spending. Of course, this influence is aggravated in California where the state equalization apparatus is very weak. In other states the relationship is not quite so strong.

But what does it mean if one removes from the system the possibility of wealth influence? One could still imagine a very wide range of responses by the state legislature and, indeed, it is not a necessary result that funding and fiscal decisions be centralized in Springfield or Sacramento. Of course, it is possible that there will be strong pressures brought to centralize all decisions. Some states may decide to simply gather all money through central sources. These sources may include an income tax, a statewide property tax, sales tax, gasoline tax, or whatever. Of course, it matters what kinds of taxes one uses as to whether one is helping or hurting different income classes. The state would gather all the money through this apparatus and dispense it according to whatever kind of preferences the legislature would enunciate. It could be "one kid-one buck"; that is, it may be like voting re-apportionment, a flat distribution of money according to the number of pupils in each district.

On the other hand it is much more likely that, even in a centralized model, the legislature would be sensitive to the differences among people and among curricula and among high cost and low cost areas. The legislature would develop a range of responses to these needs and opportunities and express them in different dollar amounts. Thus, the average child might be worth an $800 state subsidy to the district, a blind child $2,000 or $3,000; differences according to age, grade and curriculum would also be quite appropriate. At the district—the receiving end—the legislature could either mandate spending according to the type of pupil or leave it up to the district as to how the money was to be spent. Now, of course, there are some real advantages to tying each dollar to the child himself. That is, only that way can one be sure that the extra dollars help that particular child. At the same time, a price is paid, because it means one has to track people, and separate them out from one another. If most of the disadvantaged pupils on whom one has spent the extra money turn out to be black, or Chicano, it may be that one's spending preferences will be
implemented only at the price of racial segregation. But for the moment my point is only that there are all kinds of centralized apparatuses.

Surprisingly, to many, there are also a number of decentralized apparatuses which are still available. Because *Serrano* does not require equal spending from district to district, it is still possible for the state to use the existing districts for fiscal decisionmaking or even to fragment the system further into smaller autonomous districts so long as each district has the same capacity to spend. That result is all that is required; if each district were equally wealthy, by definition there would no longer be any influence on spending from wealth. Now how that could happen requires explaining. In a very simplistic way we might imagine all the districts in Illinois being examined by the legislature using a computer operated out of the education school; the statistical experts would explain how to distribute industry within new district boundaries, thus reapportioning tax wealth so as to provide every district with the same tax base. Naturally it is difficult to draw boundary lines like that, particularly in rural areas with geographically large school districts. But it is possible to imagine a first step toward tax base equalization being effected in that way. For example, the splitting of North Stickney among the neighboring school districts by redrawing the boundary lines would cause a considerable measure of local tax base equalization.

A more plausible method of tax base equalization is through state subsidies to the districts depending upon the level of their tax effort. In this kind of a system the legislature might first give each district $500 per pupil as the minimum permissible expenditure but also permit them to add on to that $500 according to the following kind of rule: for every mill—for every one tenth of one percent—that the district adds to its local property tax rate by referendum or by school board decision, it would be permitted to spend $25 more. It would not matter what amount the district raised: if it raised only $10 with that mill because it happens to be a relatively poor district, the state would add $15 to make it possible for the district to spend $25. If, however, the district were wealthy and raised $30 for each additional mill, it would be subject to the recapture of $5, with that $5 to be redistributed to the poorer districts as part of their subsidy. In other words, the level of spending above the $500 minimum would be a function only of the district's self-chosen tax rate and not of district wealth. This system is what my colleagues Clune, Sugarman, and I call "power equalizing."22 The underlying theory is that it is not unfair to make the level of spending depend upon the committ-

ment of the people who are paying the tax bills. Perhaps it is a reflection of the Protestant ethic: it is all right to get more if you are trying harder. In any event, we think it is constitutional, and it is certainly permitted by *Serrano* and the other decisions.

Now, given those kinds of centralized and decentralized general options, you can also see that you could have a very complex system expressing many different values, including the local option value and compensatory education. Imagine the following three-part system: *first*, flat grants from the state of perhaps $500 per pupil expressing the state’s idea of the minimum tolerable spending; *second*, local add-on, power equalized; *third*, categorical aids for special kinds of legislative preferences and cost differences. That, it seems to me, is the most likely resolution of the problem in California. I am no prophet, but there are strong pressures for continued decentralization of decisionmaking on the issue of spending. Pressures come from districts like Beverly Hills, which are used to spending fairly high. Another source of pressure is Berkeley, where I live; it is not a rich district, but it spends a great deal and is used to taxing itself heavily. Such a mixed system is, I think, a fair resolution of the California problem. Other states more used to centralized solutions may opt for a total state takeover. The New York State Commission, for example, has advocated such “full state assumption.”

Now I would like to shift over to the law side and talk about the theory of the *Serrano* case—I will come back to the federal role and to some notions about vouchers in a few minutes. The *Serrano* opinion was decided on the basis of wealth discrimination with respect to a “fundamental interest,” namely education. Before describing this, however, it might be well to see where the traditional rationality test of equal protection would have taken the court. Later I will also add a third kind of test that may be important in the appeal in the Texas case.

The notion of rationality is essentially this: there must be a rational relationship between the legislative purpose and the means chosen to achieve that purpose. One can see that much will depend on how one defines the legislative purpose when he is dealing with the school finance apparatus. If the purpose of this structure is to provide equality of educational opportunity, then I would submit that it is irrational in any normal usage of the term to so arrange school financing that it is impossible to have any kind of equality among the districts in any sense of the term. The difficulty with the rational-

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ity test is not that it does not apply, but that it applies too well and to all kinds of public services. That is, we finance so many of our municipal and other public services in this way that if the rationality test were applied to education it would really mean logically that it would have to be applied to the whole range of public services. The courts are not about to do that and I don't blame them. This problem is what we call "the equal sewer problem," and we must find a way to deliver the court from that chamber of judicial horrors. For a court to produce the result with respect to education is difficult enough. This is where the fundamental interest test supplies the court with an escape; education's "fundamentality" distinguishes it from sewers. Now I do not know whether you agree with that judgment or not, or whether intrinsically that is a convincing proposition. But it is one that has so far succeeded.

Of course, education's fundamentality is not all that there is to the legal argument and I think the rest of the rationale may be worth discussing. Like many legal arguments, the result is not compelled simply by logic. The argument, that is, is not purely syllogistic, but rather is a collection of ideas, none of which by themselves are necessarily convincing and all of which are independent of each other. Nevertheless, taken together they pose a rather compelling picture. Now here is what is in the package. First, the poor school districts and the children who inhabit them are historically powerless politically. Indeed, if you want to be technically correct, children are intrinsically powerless because they do not hold the franchise. Now you may say that their parents represent them in their votes, but that is problematic; I am not sure they do. This argument touches the court where it lives, because one is saying to the court that if it does not break up this form of discrimination it will not be done. In the language historically used by some of the justices, we are dealing with a "disenfranchised minority," one in some respects very similar to the minority represented by convicted criminals. It is very difficult as you know, to organize a lobby for convicted criminals and, therefore, the court has felt constrained to rescue them when they have been maltreated.

Second, there is here a "suspect classification," that is, a classification by wealth. But note the difference here: it is not wealth in the sense of personal wealth as it was in the criminal law cases, or in the

25. Hawkins v. Town of Shaw, 437 F.2d 1286, 1287 n.1 (5th Cir. 1971), suggests no judicial heroism in this regard; it is closely tied to race. But note the curious reference in Serrano. 5 Cal. 3d at 614 n.31, 487 P.2d at 1262-63 n.31, 96 Cal. Rptr. at 622-23 n.31.
poll tax case;\textsuperscript{28} it is collective wealth, the wealth of the school district which is the problem. That may hurt the argument, or it may help. Maybe it helps because the wealth that we are dealing with in this argument is a wealth difference for which the state itself is responsible. The state has created the problem by creating school districts unequal. Therefore, the state may be visited with a heavier burden of responsibility for undoing the harm of such a system, than if it were merely personal wealth discrimination in which one could blame the inequalities on natural selection of rich and poor by the free enterprise system.

Third, as already suggested, the court will give special attention to fundamental interests, and particularly so, when there is a suspect classification such as wealth. But even if we assume the constitutional fundamentality of education, courts will face the constitutionally relevant response that there is a compelling state interest at stake. Now I think there is a compelling state interest which lurks here—the state's interest in local control of schools. The state could have a proper and powerful interest in local control. The difficulty with the argument, from the point of view of the state, is that there are many systems which would satisfy local control without maintaining wealth discrimination. As the court has occasionally put it, there is a "less onerous alternative"—less onerous on the victims of the discrimination than the present system. The state does not have to hurt people by virtue of their residence in a poor school district in order to have local control; indeed, I have already implied this earlier by describing a decentralized fiscal model in which all the districts have equal capacity to spend.

The final part of the \textit{Serrano} argument is that there is available a constitutional rule which is clear and relatively simple, and which would remedy the primary evil. That rule is simply that the level of spending by school districts may not be a function of wealth. It does not require an esoteric investigation by the court to determine that the present system is wealth dominated; that conclusion springs from the structure of the statute itself. Concededly, under a power equalized system, more sophisticated issues would arise about wealth influence, but those issues are a far cry from the problem presented to the court in \textit{McInnis}. Whatever doubts remain about \textit{Serrano}, judicial manageability is not among them.

Whether the \textit{Serrano} argument would succeed in the Supreme Court of the United States is difficult to say. Actually, there is not a very good chance it will ever get there; the Texas case\textsuperscript{29} is on the main track at the moment. The state has taken a direct appeal to the United States Supreme Court from the three-judge Texas federal district court,

and that decision will probably be out about Christmas, unless unforeseen circumstances intervene. The argument that will be presented by plaintiffs' counsel in the Texas case is regrettably unpredictable. Hopefully the Court will be given a clear picture of the very limited character of the required judicial intrusion.

However skillfully the case is presented, it could prove important to develop additional arguments for the Texas case. Let me outline one which is adumbrated in some ways in the language of Serrano and in some ways in our work. Unfortunately, I did not see it so clearly when we wrote the book. Oversimplified, the point is this: education is not just a fundamental interest, it is a part of a recognized constitutional right imbedded in the first amendment as a part of free speech. I do not mean in the sense of Tinker—wearing arm bands, active speech—I mean in the sense of the right to know, the right to receive information, which is a recognized part of the speech doctrine now. There are a number of cases involving that right; an example is Lamont v. Postmaster General, securing the right to receive mail from communist countries. Here a unanimous Court spoke of the right to receive information as an intrinsic part of the first amendment free speech right. Of course, there is Stanley v. Georgia the obscenity case which speaks also in terms of the right to know, the right to receive information. Perhaps that is not a direct analogy to education again, but who can say. In Sweazy v. New Hampshire, the right to study, to learn, and to receive information in school was explicitly mentioned by Chief Justice Warren.

The role of education as an inseparable part of speech and political association has yet to be explored. The Court's most tender concern has always been reserved for those activities which are crucial to the maintenance of a democratic society. Thus voting, speech, and association are constitutionally preferred. In my view, education is not only equal in importance to these three, but also is the very condition of their enjoyment. To the extent that we discriminate in respect to education, we burden both speech and the entire political process. Education is the citizen's first political act. It deserves protection equivalent to those first amendment rights of which it is an organic part.

Turning briefly to the federal role in school financing, and I think there is one, those of you who are interested in the current federal package of aid to education ought to give some attention to

32. 381 U.S. 301 (1965).
Public Law 92-48,\textsuperscript{35} which provides $700 million in federal aid to so-called impacted areas. The principal rationale for impacted area aid has been that a federal enclave within a school district is an economic burden, because it withdraws from the tax base land which otherwise would be taxable under the property tax. In a crude way, the federal money replaces that lost property tax.

Now to the extent that Serrano forbids a state to have school districts with differential power to spend, that federal money has lost its underlying rationale. Plausibly, the money might still be spent at the state instead of the district level; it could thus go to the state for distribution according to impact from the federal programs having withdrawn property from the reach of a state property tax. But a wiser resolution would be simply to rid us of what is probably an irrational program in the first place, and use that money for something more directed to educational needs.

Second, the federal government ought to be experimenting with a program analogous to the one in the voting area which, under the fourteenth amendment, makes it national policy that states not discriminate with respect to voting on the basis of race. A rather subtle statutory paraphernalia\textsuperscript{36} has been set up under the fifth clause of the fourteenth amendment which gives Congress, as well as the Supreme Court, the responsibility of enforcing fourteenth amendment rights. Congress might adopt as national policy the rule announced in Serrano and the other cases. That is not unimaginable. Even the President has said some nice things about that policy. One of the inspiring pictures of this year had several of the Justices in the front row at President Nixon's State of the Union address as he spoke favorably of school tax reform.\textsuperscript{37}

Third, in the long run, the federal power may be addressed—and, if the President is serious, will be addressed—to the distinctions among and between the states in terms of their wealth;\textsuperscript{38} that would seem to me a great contribution. But finally, if one is interested in variety and freedom of choice in education,\textsuperscript{39} one can even imagine a national model in which the money was raised centrally but the decisions about how it would be spent were made very locally. One can imagine in some hazy distant future a federal preemption of the financing of education. The real question is how much control must one accept with that kind of central apparatus.

\textsuperscript{37} See N.Y. Times, Jan. 21, 1972, at 19, col. 2.
\textsuperscript{38} See The President's Comm'n on School Finance, Schools, People & Money xii (Final Report 1972).
\textsuperscript{39} Cf. Carrington, On Egalitarian Overzeal: A Polemic Against the Local School Property Tax Cases, p. 232 supra.
In my Utopian moments I like to think of a centralized money-raising apparatus which would locate the real power to spend in families. This apparatus would convert families into school districts in much the same way that I described before; that is, families would be power equalized in their capacity to spend for schooling for their children. Thus, parents would have a choice of whether to spend $500 or $1,000 or $1,500 on private or public education, whichever they preferred. Their choice of a school would trigger an appropriate tax against their income, so that a welfare mother might, for example, have access to a $500 school for her children at a $5 a year tax; being rich, you and I would spend much more for that same school. She could have access to the $1,500 school for perhaps $20—we, for an appropriately higher price. I do not care where you set the dollar figure; that would have to be adjusted so as, in theory at least, to equalize the economic burden on all classes for access to any given institution.

This kind (or any kind) of a voucher system, of course, would require an elaborate apparatus to prevent its becoming a means of segregation, both economic and racial. First, any voucher system must forbid the rich from adding on. If you or I were given $1,000 apiece for our children, we would probably add on a few hundred more and send them to the best schools, whereas the poor would all wind up in the $1,000 academies. Therefore, there must be control of the level of the expenditure. The provision of transportation is also crucial, as are controls over assignment policies. If a popular school with 100 places has 200 applications, and if that school is allowed to choose the 100 students that it will take, it is going to choose those students which are the easiest to educate. Thus, students who are the most difficult cases will wind up in the least popular schools. Our solution to that is a totally random selection operated by the government; the family applies to an agency which then uses a random table of numbers to decide who is admitted if a school is over-subscribed; the school would have no control over admission. There are obviously certain disadvantages in that which we have tried to deal with elsewhere.40

Let me make one more point about the problem of free choice. No matter how open and varied you make the educational system, poor children still do not have any choice. It is their parents who make the decisions. This is one reason that critics like Ivan Illich41 would say, "Let's get rid of the schools altogether, why spend all of this

money; and why should we not give people freedom from what is in effect a kind of social jail?” School as jail—I understand that, I think; and I understand Paul Goodman’s point42 and to some extent it is convincing. My problem is, that for little children, decisions will be made one way or another. There is no way to give them real freedom. They will be dominated by their parents or by someone else until they have the capacity to fight back. The real question is to whom are we going to give that power of domination; to whom will we entrust the disposition of children’s lives. Is it the state, or the parent, or must they share and how?

I recognize the legitimate interest of the state in requiring minimum adequate education and perhaps even more than that; nevertheless, I am more willing to trust parents with respect to a variety of experiences that children ought to get. I know that this raises many questions about ethnicity and diversity, about John Birch schools, and Black Muslim and Black Panther schools for some people. Those questions can be a problem for people who still look to our current public schools to provide the social melting pot. I feel strongly that the melting pot has not melted us socially, but that it has, sadly enough, melted us intellectually. The experiences that most children are getting through television and generally through the world both inside and outside school invite a kind of homogenization which is fundamentally unhealthy. If I am right about this, the expression of differences of opinion—religious, intellectual, and political—through a well-designed voucher experiment could be as worthwhile a consequence of the necessary legislative reexamination of funding as anything I can imagine.

42. See P. GOODMAN, COMPULSORY MIS-EDUCATION (1964).