Introduction: Lawyers and Education Reform

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INTRODUCTION
LAWYERS AND EDUCATION REFORM

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This is no ordinary issue of the Harvard Journal on Legislation. The Articles and Notes address a topic of unusual importance, school finance reform, with a provocative breadth of perspectives and insights. The role of lawyers and the legal process in resolving the crisis in public education is the subject of this Introduction. My thesis is that we will fail in meeting the education challenge unless we pursue a very substantial “legalization” of our strategies.

If relations with the Soviet Union remain comparatively congenial, the Cold War will be history, and we will perhaps address the now-paramount threat to our national welfare: the decayed state of public elementary and secondary education. There is no greater challenge to America’s democratic character and awesome global power—a combination of national qualities unique in world history, but which we sadly take for granted.

Do we face an education crisis? Many people think not, a fact dismaying in itself because an aroused public will be necessary to address the problem. The education crisis, however, lacks the dramatic gravitas of the Cold War. The foreign enemy inspired screenplays and nightmares, fevered patriotism, and enormous peacetime spending on defense. The nation’s welfare, and even survival, depended on a collective resolve. Political careers were made and wrecked on that one question, and no issue did as much to define the present character of the two political parties.

By contrast, education reformers have attempted all manner of rhetorical appeal, stressing the innocence of children, the prosperity of future generations, and even the apocalypse of class warfare. Yet no appeal has opened coffers or excited passions the way the Red Scare did in its many forms. The case for comprehensive education reform, it seems, will require more

* Professor of Law, Harvard Law School. I would like to thank Christopher P. Lu for his invaluable assistance in preparing this Introduction. The ideas presented here grow out of work supported by a generous grant from the Andrew W. Mellon Foundation.
careful construction and advocacy than education reformers have provided thus far.

The model for such reform may be less the explosive, sometimes demagogic anti-tax revolt of the 1980's,1 and more the protracted civil rights struggle of the second reconstruction. That struggle stretched from *Sweatt v. Painter*2 in 1950, through *Brown v. Board of Education*,3 the 1964 and 1965 federal legislation,4 and into the Carter Administration of the late 1970's.5 If this analogy is even partially correct, deep and successful reform in the political and policy spheres will require the mobilization of legal institutions, legal processes, and lawyers. It is difficult, therefore, to imagine a more deserving subject for an issue of the *Journal on Legislation*.

I. THE ROLES OF LAW AND LAWYERS: BEYOND LITIGATION

The initial judgment of most observers would be that law and lawyers have little to do with the general crisis in public education, or with its solution. On further reflection, a few specific areas might emerge as exceptions: desegregation, certainly; the administrative complexities occasioned by procedural due process and its emanations; and regulation of the collective bargaining process. Then there are some programs that have spawned particular procedures and litigation, most notably federal and state programs establishing quasi-entitlements for children with special needs.

However, litigation has much wider application than this brief list. The spate of recent state constitutional cases has made school finance reform a very lively arena for lawyers and legal processes.6 It was a blow to reformers when the United States Supreme Court signaled, in *San Antonio Independent School...*
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District v. Rodriguez,7 that the federal constitution does not provide the tool that advocates need to challenge even radically unequal distribution of education funding. However, the recent success of litigation in New Jersey,8 Texas,9 Montana,10 and Kentucky11 creates new hope that state constitutions will provide the test of fundamental fairness which the Supreme Court could not find in the federal constitution.12 The success of the school finance cases also serves to remind us that other education grievances can and must be explored under state law, using litigation theories ranging from tort to constitution to statute to regulation.13 Indeed, even familiar problems in federal litigation, such as metropolitan remedies for segregation, now may find fresh solutions under state law.

But bringing education cases in state courts is not without its potential drawbacks. That state judges are sometimes popularly elected has an indeterminate effect on judicial activism. A judge may profit politically by championing school reform, or may assume considerable risks by taking on powerful school and legislative officials. This political dynamic alone is reason enough to dwell on the relationship between lawyering in the courtroom and the surrounding swirl of overtly political advocacy. A school finance case cannot be viewed merely as a battle over constitutional interpretation and equitable remedies. Instead—if the reader will forgive the post-Iraq martial metaphors—the constitutional battle is only one front in a complex war, and doctrinal argument only one of several weapons to be used by lawyers and others.

Another battle front, the interplay of doctrine and social science,14 is critical in these cases. Unfortunately, both sides at

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their peril ignore the value of sophisticated data analysis of education expenditures. The antecedent question of whether higher levels of spending will indeed improve education is primarily a matter of interest to skeptical economists. The mainstream, conventional wisdom is justifiably unshaken by such skepticism: if we are interested in better education results, higher per-pupil expenditures are neither necessary nor sufficient in all cases, but money is very likely to help. Moreover, schools that are comparatively starved for resources will be successful only through extraordinary and unlikely effort. However imperialistic lawyers can be in offering their services and habits of mind in the solution of all problems, economists are even more dangerous with implicit claims that their grossly simplified models should displace the instincts and experiences of professionals, such as educators, who have worked for decades to understand the ingredients of progress. Crucial research must focus not on the empirical analysis of aggregate input-output models, but on the more conventional, less tidy, applied problem of program evaluation and replication. That is how social science can best serve struggling educators and advocates, who ought not to be diverted to rebutting and perfecting flawed economic models.

Community support, yet another battle front, may be crucial to plaintiffs in several respects. A broad plaintiff class of children, parents, and local school officials may be vital for purposes of standing, including remedial standing. This procedural hurdle itself requires community support, and an implicit test of political legitimacy. As the experience in Texas demonstrates, once the court invalidates the school finance system and judicial appeals are exhausted, it will be extraordinarily difficult to devise a legally sufficient, politically acceptable, and fiscally responsible response. The work that the litigation team does in shaping the problem, and the public's political appreciation of it, will be critical. After all, as Tip O'Neill instructed, all politics is local. What lawyers do to teach and persuade the public and their elected representatives will be critical.

With respect to the litigation weapon, one might ask whether advocates have used it enough. In comparison with other sec-

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tors, the education process has been remarkably free of judicial intervention, even considering the history of desegregation, special needs programs, procedural due process challenges, bilingual education, and the like. Senior education administrators who doubt this need only consult with senior managers of industry, who face regulatory constraints from antitrust to environment to occupational safety and health to employment discrimination to ERISA to the SEC, FTC, and IRS. Typical school superintendents spend less time with lawyers than typical corporate CEOs, and spend less money on litigation. Few would be so bold as to suggest that more regulation and litigation would cure American’s economic anemia, but it is clear that litigation has been an essential tool for enforcing public policy on recalcitrant bureaucracies—both regulated corporations and the public bureaucracies that default in their regulatory duties. Nothing about the education enterprise suggests that these traditional legal devices cannot be applied with similar effectiveness to enforce such public goals as improved educational equity and performance.¹⁶

School finance litigation forces us to appreciate the role of lawyers and legal processes in the broader context of political transformation and policy revolution. For revolution is precisely what plaintiffs may well envision, seized of courtroom victory on so fundamental a matter. Because education is perhaps the greatest determinant of our individual and collective prosperity, when we undertake to renovate the foundation of the education system, the entire structure of opportunity is up for grabs. The directness of the relationship between litigation and the political process of policymaking is highlighted in massive institutional reform litigation, such as school finance, because the political branches are necessarily drawn, perhaps kicking and screaming, into the remedial phase. Thus, the boundary between law and policy or politics becomes indistinct, as does the boundary between lawyer and policymaker.

However, litigation is not the only context for rethinking the roles of lawyers and legal processes. Less obviously, we must recognize that layers of federal and state programs, policies, and directives are stated in often complex statutes and regula-

¹⁶ There is growing sentiment favoring alternative dispute resolution methods as replacements or supplements for litigation. These tools are also finding application in education.
tions, the crafting of which should be very much the occupation of lawyers. For lawyers to claim a major role in the shaping and administering of statutes and regulations affecting the banking industry would be an unremarkable claim. Why should it be less so in education? Perhaps it is only because lawyers have not had the same monetary incentives to invade the education terrain in force. Similarly, it seems almost natural when lawyers dominate the shaping and administration of responses to environmental problems. Why, then, do so many people have the instinct that our response to education problems should be left to educators? Perhaps, the field of environmental concerns has not had an organized, unitary profession that laid prior claim to that terrain in the way that educators have in their own domain.

Educators and the public in general may recoil at the proposition that lawyers might be centrally involved in shaping the response to the education crisis. Obviously, lawyers should be brought to the table once the policy decision has been made by the "professionals" and the answer must be reduced to the formal language of statute or rule. And, certainly, compliance and enforcement problems may present matters of legal interpretation or call for judicial processes. But is the core business of designing education policy and institutions the appropriate work of lawyers?

Perhaps it is. Lawyers are not education professionals, but neither are they as irrelevant to resolving the education crisis as dentists. In other major sectors and complex endeavors, from banking to housing to health care, we have found legal skills and institutions indispensable in pursuing public purposes and promoting private welfare. Indeed, lawyering is clearly valuable during the process of reaching compromises on policy goals, solving problems of program organization, and creating mechanisms of accountability and enforcement. A lawyer’s instincts and experience on such matters constitute an agenda which complements, and occasionally conflicts with, the agendas of educators at the policymaking table.

Lawyers cannot responsibly compete with educators on core matters of professional judgment, such as class size or mainstreaming of special needs students. As in other fields, however, the experts should find the substantive contributions of lawyers helpful. The blending of lawyering and policymaking occurs not just because legal procedures, including litigation and legislation, throw the two together, but because the intellectual method
of law itself has a certain parasitic quality: the lawyer must immerse herself in the client's substantive concerns in order to apply her skills. This is obviously true in difficult litigation, but it is even more true in complex counseling situations. In legislative and regulatory processes, the interpenetration is virtually complete.

Unhappily, too many lay advocates only know to use lawyers for litigation and drafting contracts, and too many lawyers know education practice only as administrative or judicial litigation. Even as we focus on litigation in this issue of the Journal, we do well to reject narrow constructions of the role of law in addressing the urgent problem of education.

II. Governance of Education

Closely tied to the problem of school finance is the question of education governance. To whom do the people delegate responsibility for our schools, and with what consequences for legal and political accountability when we are dissatisfied with the results? School finance inequalities illuminate both the vertical and horizontal dimensions of this question.

The vertical problem is seen in the complex intergovernmental structure of education. The stated tradition is local control, but state law and actors are often dominant because local governmental units, including school districts, are creatures of state law. The state retains (and not infrequently exercises) control over the revenue-raising powers of local authorities, as well as the policy framework for education programs. At the federal level, financial contribution to elementary and secondary education is falling towards a mere six percent of all money spent on education, and that federal contribution is mostly targeted at needy communities and student populations. Although fed-

17 Appropriations for Fiscal Year 1991: Hearings Before the Subcomm. on Dep'ts of Labor, Health and Human Services, and Education, and Related Agencies, of the Senate Comm. on Appropriations, 101st Cong., 2d Sess. 174 (1990) (statement of Secretary of Education Lauro F. Cavazos). Furthermore, the education initiative announced by President Bush on April 18, 1991, makes clear that his administration does not favor any significant increase in federal spending or standard-setting in public education.

eral funding comes attached with many regulatory strings, it is too precious for state and local officials to reject. The bottom line is that the finances of any local school district depend on a set of interlocking and complex legislative, regulatory, and budgetary decisions by officials at three levels of government.

The horizontal problem is that at each of these levels of government, authority is divided among variegated executive and legislative institutions. In Boston, for example, the mayor, city council, and elected school committee are in the throes of a pitched political battle for control of the disastrously failing school system; the state legislature and governor will make the ultimate decision, probably by their inaction. The quality of schools is second only to public safety on the agenda of Washington, D.C., but the mayor and city council have little control over the elected board of education. Similar controversies exist in communities across the country.

Both the vertical and horizontal dimensions of the governance problem implicate law. Formally and informally, the power to control school finance, education budgets, and education policy are defined, delegated, and checked by law and politics. On the one hand, public officials look to voters, electoral mandates, and ballot measures for their job security and legitimacy. On the other hand, law operates to create and shape power through constitutional provisions, statutes, regulations, and litigation. One cannot underestimate the importance of law in creating, sustaining, and eventually resolving the education crisis. The successful joining of law and politics implies, however, some obligation on the part of lawyers and legal institutions to better understand the issues of the education sector and to devote greater resources to a solution. It also implies that educators, administrators, and political authorities grappling with education reform will increasingly find lawyers under foot, in the wings, and at the table.

There is another relevant aspect of our processes of governance. It concerns the fare of policy reform proposals in the

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19 One might add judicial institutions to the mix, not only because the courts may be enlisted to enforce law, but also because many school officials operate under consent decrees and injunctions which, for better or worse, create important constraints on the allocation of resources. See, e.g., D.C. COMMITTEE ON PUBLIC EDUCATION, OUR CHILDREN, OUR FUTURE: REVITALIZING THE DISTRICT OF COLUMBIA'S PUBLIC SCHOOLS (June 1989) (report of blue ribbon citizen group on state of public education in the District of Columbia, discussing the complex variety of court orders faced by school officials).
machinery of governance. Surprisingly, the persistence of the crisis in education is not due to a shortage of good ideas. Keeping in mind that the perfect is the enemy of the good, and acknowledging that we do not know how to achieve, or perhaps even define, perfection, there is remarkable consensus about which reforms would improve significantly the performance of a given school. For example, the Business Roundtable has offered the following “essential components” as a general guideline for legislators, officials, and advocates seeking to create a new, successful education system:

1. The new system is committed to four operating assumptions: all students can learn at significantly higher levels; we know how to teach all students successfully; curriculum must reflect high expectations for all students, but instructional time and strategies must vary to assure success; every child must have an advocate.
2. The new system is performance or outcome-based.
3. Assessment strategies must be as strong and rich as the outcomes.
4. School success is rewarded and school failure penalized.
5. School-based staff have a major role in making instructional decisions.
6. Major emphasis is placed on staff development.
7. A high-quality pre-kindergarten program is established, at least for all disadvantaged students.
8. Health and other social services are sufficient to reduce significant barriers to learning.
9. Technology is used to raise student and teacher productivity and to expand access to learning.

These recommendations are non-controversial, with the possible exception of the business-like emphasis (often more myth than reality in private business) on accountability and incentive systems. A group of prominent black intellectuals issued a similar manifesto two years ago. And President Bush and the fifty governors espoused the same themes of excellence and accountability at the 1989 education summit.

If there is such broad consensus on what to do for the system as a whole, and even for specific schools and particular children, we are left with a difficult question: why doesn't this expert consensus on desirable steps lead to actual reform on a wide scale? Put differently, with potential solutions so well understood, what is it about our processes of governance that leaves so crucial a problem to fester for so long at such enormous human, social, and economic cost? The same question can be asked about many other pressing problems, including Third World debt, the savings and loan crisis, and homelessness. Such a broad inquiry is beyond the scope of this Introduction, but ultimately that is precisely the inquiry triggered by an examination of school finance litigation.

Whatever may be the "complete" answer to larger questions of governance, the problem of school finance illustrates that lawyering must play a key role in breaking the virtual death-grip of inertia in our political and educational institutions. For all the limitations of rights-based advocacy, as illuminated by post-modern legal scholars and social theorists, the successful cases in Kentucky, Texas, and elsewhere have opened up a new world of possibilities with arguments about legal rights. In important respects, institutions in those states were comatose, drifting towards disaster; now they are careening towards who-knows-what. If this is not progress, at least it makes progress more possible.

III. LAWYERING IN THE LEGISLATIVE RESPONSE

After the liability phase, there remains the problem of a remedy, and specifically the difficulty of crafting a legislative response. Here it may be useful to distinguish litigation addressed solely to the financing structure from litigation such as that in Kentucky in which the entire structure of the educational system has been challenged. While the narrower case—a characterization which hardly does justice to the momentous character of the suit—will demand traditional lawyerly skills in redesigning a complex statutory formula, the broader structural challenge creates chaos, and out of chaos, opportunity.

As already noted,23 the broad policy consensus about effective schools includes a number of measures not directly related to

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23 See text accompanying supra notes 20–22.
fiscal resources. It is increasingly apparent that, whether there has been litigation or not, legislatures must assume a senior leadership role in defining and imposing the basic framework of education reform goals, structures, and incentives. After all, broad delegations to professionals and units of local government have been the most salient feature of our drift into crisis. To reverse this pattern and reshape the array of powers and policies will require the same lawyerly skill we might imagine in a massive overhaul of any complex regime, though admittedly the education terrain is less familiar to the legal profession.

The legal, political, and fiscal acceptability of a legislative remedy are interrelated. Legal analysis will help shape the political environment, because some legislators will want to avoid action that subsequently might be found unconstitutional. Legal analysis will also shape fiscal acceptability, for example, by determining what revenue mechanisms are available, or how the tax base can be defined. Fiscal acceptability will certainly influence political calculations, but may also affect the legal analysis by shaping a judge’s sense of what she can feasibly require under a vague constitutional standard of “efficient,” “fair,” or “equitable.” This interaction of legal, political, and economic reasoning is typical of complex regulatory and policy problems.24

For example, legislators and their lawyer-advisers must apply hard-won lessons about regulatory failures in other contexts, such as the importance of considering incentive-based alternatives to command-and-control regulation, or the futility of establishing sanctions that, like nuclear weapons, are too devastating to use and therefore leave enforcers effectively unarmed.25 An example is total cut-offs of funding. This weapon is always wrapped in cumbersome procedures and is unlikely to be used, so the underlying program requirements are blunted if no other sanctions are available. Crafting an effective set of enforceable requirements and incentives will require a broad mix of skills, including those of lawyers, and a good sense of comparative approaches to administrative arrangements. The architecture of public programs is an art not ordinarily familiar to policy analysts, subject matter experts, or even administrators accustomed

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to operating within predefined institutional parameters. Lawyers are arguably the equal of any others at the architectural task, if not better than most.

Lawyers can also help in defining substantive goals for performance of students, teachers, schools, and districts. The balance of objectivity, flexibility, ambition, and feasibility is not unlike the difficulties faced by legislators revising the Clean Air Act or strengthening the capital requirements for savings and loans institutions. The extent to which details should or can be specified in statute rather than delegated to an agency, and the procedures to be used by agencies in setting policy, are familiar to administrative lawyers. Generalists can contribute some insights that education specialists will lack, and vice versa. And such partnerships with specialists are, again, familiar to lawyers skilled in legislative and policy matters.

Indeed, able lawyers are habitually attuned to process, “rights,” and the litigation eventuality. The nuances of process—who participates, with what formality, subject to how much delay, at what cost, with what provisions for administrative or judicial appeal, and appeal on what terms—can guarantee the failure of a program, though perhaps not its success. With respect to rights, education is interesting because of the enormous confusion of interests, which legal workmanship may remake as “rights.” As children, parents, teachers, administrators, tiers of officials, and taxpayers all assert their interests, legislators must decide which interests will be girded with legally cognizable rights, enabling the rights-holder to best an opponent in an administrative or judicial forum. For example, as a legislature defines its expectations for services, quality or performance, will that definition generate legally enforceable rights for aggrieved children, parents, or communities? And enforceable through what procedures?

Thus, in responding to school finance problems at the instance of a judicial decree or in political response to litigation that has not reached a conclusion, legislators have an opportunity to embrace a broader conception of reform, and an opportunity as well to take advantage of all the wisdom we have, both legal and social scientific, about the administrative state.

IV. Conclusion: The Legalization of School Reform

School finance litigation is a point of entry for potentially sweeping changes to a state’s education system, but that poten-
tial depends crucially upon the lawyering and the legislative response. There is more to lawyering than litigation, and more to legislating than writing down formulas and commands. Despite legions of detractors, law offers an important tool with which to address the crisis of education. This issue of the Journal offers rich insights with which to understand and shape that legal contribution.

The diffusion of power in education all but defeats accountability; it frustrates the reform impulse and saps the energy of civic participation. The gulf between public education professionals and most parents suppresses dialogue and promotes hierarchy. Ineffectual school personnel are shielded by civil service laws and labor contracts, while excellent personnel are underappreciated and over-regulated. Children and parents lack information about the true quality of their schools, or about alternatives. The political base of support for school spending and reform is diluted not only by general electoral apathy, but also by the disinterest of voters without children in public schools.

Under these circumstances, the astringent of legalism will serve well. Schools and school systems are public bureaucratic agencies wielding vitally important discretionary powers over our children, yet that discretion largely escapes the disciplines imposed through law on other public decisionmakers. Rights, whether statutory or constitutional, can be powerful antidotes to bureaucratic indifference. Well-defined procedures can pose effective challenges to hierarchy, and create access for the voiceless. Formally structured incentives can clarify performance measures and goals. Coherent patterns of governance can enhance accountability and dissipate civic apathy. Management, policy science, and democratic processes have not been equal to the task of reforming public education. Law must try.