

# Michigan Law Review

---

Volume 79 | Issue 4

---

1981

## Public School Meltdown

Stephen Arons

*University of Massachusetts, Amherst*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Education Law Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Stephen Arons, *Public School Meltdown*, 79 MICH. L. REV. 792 (1981).

Available at: <https://repository.law.umich.edu/mlr/vol79/iss4/20>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## PUBLIC SCHOOL MELTDOWN

*Stephen Arons\**

EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL. By John Coons and Stephen Sugarman. Berkeley: University of California Press. 1978. Pp. xi, 249. \$10.95.

John Coons and Stephen Sugarman have written a stimulating, important, and fundamentally reasonable book, *Education by Choice: The Case for Family Control*. Alternately anecdotal and argumentative, reassuring and iconoclastic, it is a pragmatic formula for the reconstruction of consensus through the legitimizing of dissent. The authors' tone is hopeful; but the problem they address is grim.

The existence of such a book, which has as its avowed purpose to justify family control of children's schooling, is in itself striking evidence that American culture is in a state of confusion — that we do not know how to understand childhood, whether to trust institutions, or how to extrapolate from the present to the future. In such a situation, politicians and others who seek public support turn increasingly to law and policy to take the place of dysfunctional values. It is fortunate, therefore, that in articulating a case for family control of schooling, *Education by Choice* has managed an air of humility: "lawmakers must be helped to understand that conflict, confusion, and ignorance respecting the child's interest are not a disaster but the stuff of which a rich pluralism can be forged" (p. 222).

The argument of the book is straightforward, even if it is filigreed with legal nicety: the design of public education and the accident of personal economics prevent most Americans from exercising any meaningful choice concerning one of their most intimate and personal concerns, the education of their children. This situation short-circuits the most efficient and reliable means of ascertaining and protecting the best interests of the child — the family. Worse still, it undermines the potential for achieving legitimate social or political consensus among adults in areas where such a consensus is vital.

The virtually unstated premise of this argument is that schooling is such a manipulator of consciousness that unless families possess the power to control the transmission of culture through schooling,

---

\* Associate Professor and Director of Legal Studies, University of Massachusetts, Amherst. B.A. 1965, University of Pennsylvania; J.D. 1969, Harvard University. — Ed.

our society risks becoming statist, monolithic, and repressive. It is a theme which is both depressing in showing how far we have moved toward conformity, and encouraging in its implication that voluntary school association can be a significant tool for community reconstruction. The failure to make this theme explicit is the only significant weakness in this otherwise encyclopedic discussion of educational policy. The authors have been so concerned to bring all interested parties into the fold of their choice plan that they have elected to downplay their concern that American schooling is undercutting the principles of liberty and pluralistic political order.

Coons and Sugarman demonstrate fairly convincingly that "value-neutral schooling" never was and never will be. They quote G.K. Chesterton to good effect: "It is quaint that people talk of separating dogma from education. Dogma is actually the only thing that cannot be separated from education. It *is* education. A teacher who is not dogmatic is simply a teacher who is not teaching" (p. 81). It is to the authors' credit that they are not deterred from this realization by the fact that so much of today's taught dogma is wrapped in candy-coated psycho-babble or secular claims about "good citizenship" or Americanism. The issue, as Coons and Sugarman clearly see, is not what is best for the child in a particular setting or what is good education in general, but whether the family or some apparatus of the majoritarian state will hold the balance of decision-making power over the schooling of a child.

This battle for control of children in school has been going on ever since the late nineteenth and early twentieth centuries, when the rise of compulsory, universal, publicly supported schooling began to reverse the presumption of parental competence in child rearing and to transform education into a professional prerogative. In an early chapter entitled "The Intellectual History of Choice in Education" (pp. 18-32), Coons and Sugarman acknowledge the durability of these struggles for control and show that the courts have been able or willing to provide only the most general guidance for the resolution of what are essentially school-based disputes over public orthodoxy. Their history is too brief, however. It is not pointed enough in its analysis of the politicization of schooling,<sup>1</sup> and it is often overly aphoristic in dismissing certain libertarian perspectives. The idea that parents' rights have something to do with the balance of power over schooling is treated in one early page and summarily dismissed: "we view parents primarily as potential instruments of the child's wel-

---

1. See D. NASAW, *SCHOOLED TO ORDER* (1979); and Coons & Sugarman's own note 10, at p. 230.

fare; the chief issue is whether family choice would be a blessing for children, not whether it is a right of the parents" (p. 23). The radical individualism of people from John Stuart Mill to John Holt receives a similarly abbreviated treatment that concludes with the following summary judgment: "Little children will not be liberated; they will be dominated. The only question is by whom and for what ends" (p. 24).

These sentences are not only facile; they do not correctly state the authors' position on the issues. Later in the book, a more lengthy and sensitive discussion of the rights of children as against the dominion of parents makes it clear that Coons and Sugarman are committed to increasing the autonomy of the young and to incorporating such autonomy in legal rules and public policy (pp. 63-64, 71-87). Moreover, their discussion of "The Issue of Ideological Pluralism" (chapter 6) shows them to be articulate advocates of parents' rights in schooling even if they find the label "parents' rights enthusiasts" (p. 22) uncomfortable: "Can there be doubt that one effect of public education as presently structured is to chill the expression of minority views?" (p. 101).

Current battles for control of public schooling make the book's case for family choice even more important to the preservation of ideological pluralism, political democracy, and the institution of the family than Coons and Sugarman seem to perceive. A more direct discussion than the authors provide of modern American schooling as anti-democratic might show that their proposals are not only workable but necessary.

Two kinds of contests over schooling — the censorship of texts and teachers, and the attack on home education — are proliferating at an alarming rate. They serve as evidence that schooling continues to provide a generally accessible means of suppressing dissent in America. The current climate of confusion and disagreement is finding expression in innumerable pitched battles over public orthodoxy played out as issues of who shall control the education of children. In Island Trees, New York, for example, a four-year contest over the power of a school board to ban Malamud's *The Fixer* as anti-Semitic and Langston Hughes's edition, *Best Short Stories of Negro Writers* as anti-Negro has only recently been remanded for trial by the Second Circuit Court of Appeals.<sup>2</sup> It contains all the emotional and polarizing strife of a seventeenth-century battle between English Pu-

---

2. *Pico v. Board of Educ.*, 474 F. Supp. 387 (E.D.N.Y. 1979), *revd.*, 638 F.2d 404 (2d Cir. 1980).

ritans and the Anglican Church. As mindless as the censor's claims about these and other banned books may seem, the battle exhibits a parental desire to replace the perceived confusion of values with an imposed order. The willingness of the Island Trees School Board to use school policy as an instrument of orthodoxy is also exhibited by more ideologically articulate groups all over the country who are fighting everything from sexism and racism in textbooks to flabby moral relativism and Darwinism in the curriculum. The sad truth about the hundreds of instances of school censorship arising yearly is that these are intractable contests over issues of conscience whose heat is melting down the structure of school governance and whose existence is encouraged and even made necessary by the majoritarian structure of American schooling. The system of education by choice which Coons and Sugarman advance holds the strong possibility of eliminating at one stroke much of this polarizing and unreconcilable strife over schooling.

The recent flare-up of contests over parental assertions of the right to educate children at home, though less visible to the public, exhibits the same emotional intensity and institutional repression found in the censorship cases. Parents who have rejected the dominant ethic of schooling and, because of their lack of funds or radical individualism, decided to teach their children at home, have been faced with the most extreme reactions from public school administrators. From unreasoned refusals to authorize home teaching to attempts to take legal custody of children or to fine or imprison parents, those charged with operating the public schools have often shown that while ignoring thousands of drop-outs, they can see home teaching as a threat to public schooling. Individualism and choice are anathema to a monopolistic organization of schooling. Schools are a primary means of transmitting culture in industrial societies, and the control of this process is firmly lodged with the political majority and its agents. Yet neither the public nor the authors of *Education by Choice* have squarely addressed the contradiction between majoritarian control of schooling and the right of any individual or family to formulate and hold basic values apart from those of the majority. Though they do not fully explore its consequences for political legitimacy, here is how Coons and Sugarman describe the orthodoxy they perceive in public schools as presently structured:

Explicitly the schools emphasize technology, uncontroversial information, and skills, an approach officially deemed to be "neutral." On its surface the intended message appears to have little philosophical content; by and large, the schools shun explicit treatment of controversial moral and political issues. Implicitly, however, they endorse

majoritarian social and political norms. Historically and currently they have striven with enthusiasm to produce "true Americans" by conditioning the children to the mind-set accepted in the larger — or at least local — society. This "hidden curriculum" relies principally on the social ambience of the teaching personnel, who are generally middle class and trained in similar institutions. [Pp. 42-43.]

On the whole a basic goal in most American public schools has been the creation of one version of conditioned man.

. . . .

The proper product is a fundamentalist rectitude embodied in personal models of the American Gothic — industrious, flinty, intelligent, and narrow. . . .

The pervasiveness of ideology in the schools has not been much diminished by First Amendment strictures. The Constitution has frustrated only the cruder forms of pious edification, and the vacuum has been filled by subtler persuasions wisely preferred by more sophisticated purveyors of gospel. The work of the apostles can be seen in the books, pictures, teachers, silences and ambience of our public schools. The civil religion includes the virtues of hard work, accumulation, . . . marriage, small families, . . . thin girls, aggressive boys, reverence for applied sciences, health through professional medicine, denial of death, and (above all) "belonging" . . . . [Pp. 78-79.]

Small wonder that public school officials react with irrational hostility to home educators who do not want to belong. Great wonder that Coons and Sugarman do not follow their own civil religion analogy to its logical conclusion: Education is as much undermined by a lack of separation of school and state as political life would be by a lack of separation of church and state.

Perhaps we have a right to expect that two persons who are such powerful thinkers, eloquent writers, and influential scholars will not pull their best punch in the public struggle over how our school system should be structured. Certainly they did not hold back in their analysis of economic discrimination in school funding, *Private Wealth and Public Education* (written with William Clune III). But Coons and Sugarman have chosen another avenue of argument, perhaps because they hope to upset fewer true believers in the genius of majoritarian schooling, or perhaps, to convince a significant number of people that education by choice is a safe and technically feasible expression of traditional American values.

At bottom their chosen argument has two parts which are repeated and summarized in numerous ways and places within the book: that parents are best able to perceive and pursue the educational needs of their own children; and that the two legitimate collective goals for education — achieving a consensus in support of the political structure and promoting racial integration — are probably

better served by a system of choice than by our present government monopoly in schooling. The authors point out with their customary force that this monopoly constrains only those without the substantial wealth required to choose nongovernment schools, and that such economic discrimination in the allocation of school choice contradicts important principles of equality and fairness. Early in the book the economic issue is brought to the fore:

The combination of compulsory school attendance, the public school administrative structure, and the taxing apparatus displace the normal parental-choice standard and substitute a presumption that only rich parents are the best judges of their child's educational interest . . . in matters respecting basic loyalties, intellect, and fundamental values — in short, where the child's humanity is implicated — the state must dominate the prime hours of the average child's day. Whether a distinction of this sort among economic classes is good public policy is the basic issue. [P. 27.]

Coons and Sugarman are at their iconoclastic best in discussing these economic issues, in stripping tax structure of its technical camouflage and pointing out the value judgments which many support out of simple ignorance of their existence. It is more than a little painful to confront this economic discrimination when, as the authors make clear, a majority of American families are its degraded and repressed victims, and when it is the freedom of a pluralistic democracy which is most threatened by the absence of equal school choice. No doubt just such a tweaking of public conscience is intended later in the book when the "basic issue" of American public education is being addressed:

It has been argued that the problem with public education today is that the rich can exit; if they were forced to remain, they would exercise their voices and such complaints would bring about needed change. Our interpretation of the problem is the converse. The problem is that only the rich can exit, and that it is the extension of the right of exit to the nonrich that will induce educational improvements. [P. 164.]

Having made their arguments from the qualifications of parents to judge a child's best interest and the need of the society to rest its constitutional order upon a minimum consensus as to political structure, Coons and Sugarman have the honesty and good sense to confront directly the issue of racism in schools. It does not take a particularly long political memory or a particularly well-read legal scholar to note that freedom of choice has been the battle cry of sophisticated racists almost from the moment that *Brown* was handed down. Indeed voucher plans of all stripe have been produced in the interest of maintaining segregated schooling and continuing the stig-

matization of black children. The effort in *Education by Choice*, however, is not to gloss over the possible racial effects of a system of choice, but to make liberty and equality compatible and to gain as much of the benefits of both for all parents as is possible. Only substantial argument and risk-taking will even begin to tell us whether, as the authors put it, "the traditional conflict between liberty and equality may here be tempered" (p. 2).

Coons and Sugarman devote considerable space to this issue, examining the success of court and administratively ordered desegregation (p. 112), the uses and limits of existing legal protections against racial discrimination in private schools (p. 119), and the authority of the judiciary to order desegregation "under conditions of choice" (p. 115). They evaluate the problems presented by the rare teaching of explicit racism in schools and by the widespread racism implicit in teaching and in officially condoned peer pressure (p. 105). The authors conclude that a set of regulations and incentives and a partial reliance on the good faith of most families give "reason to believe that family choice could further . . . racial integration" (p. 129).<sup>3</sup> The conclusion is one I would like to believe; but it suffers from contradictory flaws. On the one hand, we are asked to rely upon public good faith that few will choose racism despite contradictory experience ever since the first black men and women were ripped from their culture and brought to America. On the other hand, we are provided with an elaborate set of incentives and legal protections designed to assure a minimum of good faith, but which constitute such broad over-regulation that nonracist choices may be significantly hampered as well.

But perhaps this complaint is merely a restatement of a terrible dilemma, and the thoughtful effort of *Education by Choice* really does represent the best that can be done to advance both liberty and equality. At the very least, we are led to think about the real possibility that more freedom of choice, sensibly designed, would reduce racism in schools, and that the supporters of the present structure of compulsory schooling have not cornered the ideological or practical markets on the issue of reducing school segregation.

In roughly the middle of the book, the focus shifts from the making of arguments and the sometimes endless mentioning of further considerations to "Designing The Instruments of Choice." Although it has been only 130 pages to this point, the reader welcomes what

---

3. For a more skeptical view, see Arons & Lawrence, *Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1981).

promises to be a hard-nosed practical approach. The first half of the book suffers slightly from an over-ambitious survey of issues. The focus and impact of the argument is sometimes lost in the proliferation of erudition. Coons and Sugarman have tried to be all things to all people, thereby committing a sin similar to that of the public schools which they so aptly criticize: "Here is a role for school, not to 'broaden' the experience of the already worldly child, but progressively to narrow and focus that experience until at last the school has brought his education to a point" (p. 102).

In broadening the discussion of family choice, Coons and Sugarman have tried to reassure all those who have a stake in the multibillion-dollar schooling industry that family choice is non-threatening and eminently sensible. The design of the system — which follows designs by a range of other scholars from Milton Friedman to Christopher Jencks, from Thomas Paine to the National Tax Payers Union — is consistent with this appeal to all those in a position to influence its acceptability politically. Here is one of their summaries of the instruments of choice:

[W]e invite the reader to assume the following: that each year there is to be provided to each school-age child in the experimental area(s) a scholarship certificate entitling the child to education in the public or private school of his family's choice; that the child himself, as he gains maturity, will be given increased formal power over the choice made; that families will not face significant schooling costs above the value of the scholarship (for example, no added tuition); that participating schools will be approved by government, but requirements for approval will be limited to concerns about safety, fraud, and minimum educational inputs; that an effective information and counseling service will be provided to assist the family in making an informed choice; that, subject to space availability, children will be admitted to schools of their choice, with admission by a state-conducted lottery when there is excess demand for a particular school; that adequate transport will be provided free; and that the present population of teachers will be given substantial job protection in the transition years. [Pp. 31-32.]

This early summary only hints at the complexity and occasional hyper-regulation involved in the Coons and Sugarman demonstration of the technical feasibility of a racially equitable freedom-of-choice plan. Its elaboration and discussion over nearly 100 pages contains some essential requirements as well as some Swiftian exercises in working out hypotheticals. The entire enterprise is couched in the unfortunate language of experimentation, suggesting that while the aim is to smoke out the disagreements among reformers by proposing specific plans, the plans do not have to be taken all that seriously because they are to be tested in only a limited number of

areas.<sup>4</sup> This penchant for limited experiments rather than restructuring of the entire system may seem politically realistic, but it is probably doomed to failure through the same kind of machinations which aborted the Ocean Hill-Brownsville "experiment" in school decentralization in the late 1960s. In some ways, Coons and Sugarman have written a feasibility study reminiscent of the Office of Economic Opportunity-sponsored effort of the Center for Study of Public Policy in the early 1970s — a study which made proposals but never really received an experimental try-out.

In their attempt to add sophistication to previous voucher designs, the authors cover four basic issues: admission and selection of students (chapter 8), governance of schools eligible for vouchers (chapter 9), minimum requirements for eligible schools (chapter 10), and the nature of the voucher (chapter 11). Each of the chapters provides a thorough (sometimes too thorough) discussion of the alternative structures and issues which they raise. There is some very enlightening analysis of the rights and political influence of teachers, and a more than ordinarily thoughtful treatment of desirable and requireable forms of governance for schools eligible to receive voucher students. The strongest section, however, is the discussion of "The Nature of the Subsidy." It is here that Coons and Sugarman take a giant step beyond the thinking of their predecessors on the question of how to make a voucher system sensitive to the priorities of different families without allowing the wealthy to price others out of the market. This is the problem of equalizing family power on which the authors have been working for a decade.

Their plan begins with the principle that "[f]amily circumstance should not unfairly affect choice of school" (p. 190). After a review of four possible economic models, they conclude that their own "Quality Choice Model" (p. 198) is most likely to maximize family choices in a market unrestrained by economic circumstances. This model allows a school to choose from among four different tuition levels and thereby gives any family the choice of how much they wish to spend and have spent on their child's education. The entire plan is equalized according to a family's ability to pay, requiring that even the poorest pay some tuition from their own funds but supplementing this amount to the level of the tuition through state equalizing payments. The result is that any family can choose a level of funding, pay according to its ability, and receive equalizing support from the public treasury according to need. The eligible schools are

---

4. In fairness, it must be said that the authors are involved in an attempt to create a voucher system by citizen initiative for the nation's most populous state.

not permitted to charge or accept tuition supplements because that would have the effect of allowing the wealthy to monopolize the most expensive schools. Private schools outside the tuition voucher system would remain in existence for those who wish to buy their way out.

With these and other mechanisms, Coons and Sugarman have argued for a re-creation of family choice in schooling, and have sought to show that choice is practical as well as desirable. Their argument is at times less forceful than it might be because of their avoidance of hard-nosed criticism of the public school monopoly's effect on political freedom. Still, it is an admirable book in its intellectual craftsmanship and in its sensitivity to families, children, and the nature of education. Their closing paragraph echoes this sensitivity and reminds the reader of the human dimension of their technical work:

When the industrial revolution made children burdensome and when medicine made children avoidable, a new economy of the family was born. Although these influences seem to threaten the basic function of the institution, in fact they may be the sources of new life and a fresh career. Today those who choose parenthood display the only reliable token of craft and mastery known to the ancient vocation of child-rearing — the readiness to sacrifice. [P. 223.]