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The Realpolitik of Racial Segregation in Northern Public Schools: Some Pragmatic Approaches

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Neighborhood legal service programs, financed by the federal government to give legal assistance to indigents, particularly in the North, may find themselves asked to represent indigents who have legal problems in the civil rights area. Although civil rights litigation has not been the fare of most legal aid societies because illegal racial discrimination in the North has typically been handled by state agencies or private organizations, there is no technical reason why an indigent ought not to have access to a legal aid lawyer to handle a legal problem which just happens to involve racial discrimination. This article provides some practical approaches to the solution of one of the most pressing social and legal problems faced by Negro indigents — poor schooling because of Northern-style isolation.

I. De Facto Segregation

A. The Factual Background

The pervasive experience for Negroes in education is separation from the majority community. Prior to the 1954 decision in Brown v. Board of Education, which sought to end government-enforced racial segregation in the schools, every Negro child and teacher in 17 Southern and border states was separated from every other white child and teacher in separate schools by mandate of state law. The picture could not have been much different in the rest of the country, for a 1966 report by the Department of Health, Education and Welfare found that 80% of all white pupils in the country in grades 1 through 12 attended schools that were from 90% to 100% white. In 75 cities surveyed, 9 out of every 10 Negro elementary students attended schools in which the majority of students were Negroes; 43 of these cities were in the northeast, midwest, and west.

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Nor are Negro students merely isolated within the public school systems of the country, but they are typically subjected to grossly inferior facilities, curriculum, and teachers. Nationwide, the number of pupils per room is lower for white elementary school children (29) than for Negro students (30 to 33). This is even more aggravated in particular areas: in the metropolitan midwest, the average number of pupils per room for Negro students is 54 as compared with 33 per room for whites. Minority groups tend to have less access to physical facilities which are related to academic achievement (such as accelerated curriculum, more frequent intelligence testing, etc.). Negro students are less likely to attend secondary schools that are regionally accredited than are white students. Indices of teacher quality (such as number of advanced degrees, years of teaching experience) demonstrate that a greater percentage of the teachers in "Negro schools" fall below the median than teachers in "white schools". The result of the isolation and the inferior facilities is not surprising: Negroes show progressive deterioration in achievement scores as they proceed through the public school system. The fact that many Negroes are in the low-income group might qualify this finding since lower academic achievement bears some relationship to lower socio-economic status. There are, however, other studies which show that Negro students of the same socioeconomic level of white students score lower on achievement tests when they are in racially-isolated schools.

B. Brown v. Board of Education — A Support for De Facto School Litigation?

All discussion of de facto litigation has proceeded from an analysis of the Brown case where the Court held racially segregated public schools unconstitutional. The problem consistently presented to litigants in a de facto school segregation suit is that the opposition quickly points out that Brown arose in jurisdictions where the segregation of the races was total and mandated by state or local law — the pure de jure segregation. Many commentators, by analyzing the fact that some social science data was introduced, state that Brown was not decided solely on the principle of law that legislatively mandated school

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4 HEW, Supra note 2, at summ. 3.
5 HEW, supra note 2, at summ. 9-20.
6 HEW, supra note 2, at app. C.
segregation is unconstitutional, but went further and said that it was the "harm" done to Negro children resulting from segregation which was unconstitutional and, therefore, Brown stands for the principle that equal educational opportunity is what is required by the Constitution. The problem with this argument is that the social science data introduced in the Brown case was slight and could not be characterized as definitive. The Court did not have before it a full and exhaustive study of the harm done to Negro children so that it could hold, as a material of law, that this harm would obtain in the same degree throughout any de jure system. While the most recent and comprehensive appellate decision on racial segregation in schools, United States, et al. v. The Jefferson County Board of Education, states in dicta that Brown points toward a duty to integrate de facto segregated schools. The same court also distinguished de facto from de jure segregation in a way which could increase the burden of proof for litigants in the North:

The similarity of pseudo de facto segregation in the South to actual de facto segregation in the North is more apparent than real.

[and] although psychological harm and lack of educational opportunities to Negroes may exist whether caused by de facto or de jure segregation a state policy of apartheid aggravates the harm.

The key question is whether formal legislation explicitly requiring racial segregation in public schools is a necessary quantum of "state action" to have segregation in schools held unconstitutional as a matter of law. This would limit Brown to the Southern and border states which had legislated segregation and would require plaintiffs outside of that context to prove that the school board had actively gerrymandered school zone lines with the sole purpose of achieving racial segregation.

Since racial discrimination was by no means solely a Southern phenomenon and, in fact, has been practiced in literally every state in the country, in one form or another, the segregation

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9 372 F. 2d 836, 875 (5th Cir. 1967).
10 Id. at 876.
in Northern schools is probably not, in most instances, fortuitous. Probably with adequate time and resources, one could prove that a school board (or a school board in conjunction with housing authorities or other state agencies) had at some time actively patterned their decisions about school organization so as to isolate Negroes into Negro schools. While this may be true, attorneys who instituted litigation in the North knew that the average Negro community did not have the resources to undertake a detailed investigation to show such a pattern. They also knew that attempts to prove unequal facilities and the resultant unequal achievement would have to be repeated for each future case. Therefore, they wisely emphasized the principle that Northern school boards have a constitutional obligation to relieve segregation in the school system, without proof that school districts were gerrymandered or that racial isolation worked a detriment to educational opportunities.

Unfortunately (but perhaps predictably) the early de facto school litigation, at the Court of Appeals level, has been unsuccessful. In Bell v. the School City of Gary, Indiana,11 plaintiffs asserted that the school board had a constitutional obligation to relieve racial imbalance. The district court held against them. Plaintiffs lost on appeal and the Supreme Court of the United States denied certiorari.12 The same results followed in Downs v. Board of Education,13 Gilliam v. School Board (Hopewell)14 and Deal v. Cincinnati Board of Education.15 All held that the plaintiffs had the burden of excluding all alternative explanations for the existence of racial segregation in the public schools and were required to show that such segregation was solely the intentional act of the school board.

There have been three successful federal court suits against school systems not previously having de jure segregation.16 They may not be particularly helpful since one court simply rejects

12 324 F. 2d 209 (7th Cir. 1963), cert. denied, 377 U. S. 924 (1965).
13 336 F. 2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965).
14 345 F. 2d 988 (4th Cir. 1964), vacated and remanded on other grounds, 382 U.S. 103 (1965).
the holding in Bell,17 and two make direct findings that racial imbalance denies equal educational opportunities, without extended discussion as to how the court ruled out explanations, other than discrimination, as the cause of poor achievement in Negro schools.18

E. Fiss Theory: Duty of the school board to respond affirmatively to changing conditions.

Owen Fiss, in a long and definitive article,19 argues that the de jure — de facto distinction may obscure many of the lines of state responsibility which occur in the de facto situation. He is cognizant of the extreme proof difficulties involved in showing a denial of equal opportunity through concentrating on a comparison of the achievement levels between Negro and white students.20

Fiss argues along these lines: one must look to surrounding state agencies to see if the confluence of their activities and the school board’s activity has caused the results of racial imbalance in schools. Here one would examine the site selection policies of public housing authorities or any prior ordinances requiring racial segregation in residence. Since these are state agencies the school board cannot escape responsibility because it maintains that it did not segregate by itself — the “state” is the sum of activities of its disparate agencies regardless of whether there was a planned intention for their separate activities to result in school segregation. The school board cannot be passive in the face of activities of other state agencies, or, indeed, in the face of privately achieved racial segregation in neighborhoods.

19 Fiss, supra note 7.
20 Id. at 595-96:

"... in each case the court will be called upon to decide whether the racial imbalance that exists in the schools of a particular community results in systematically and substantially inferior educational opportunity for Negroes. No matter how conscientious the court that decides this question, an irreducible amount of uncertainty will remain. It is doubtful that any experiment or survey can be devised that will satisfy the vigorous standards of a scientific method and still eradicate this uncertainty ..., if such an experiment were to be devised, it would have to include an almost infinite set of variables. ..."
but has an affirmative duty to construct its school assignment policies in response to these activities.

Fiss says that although there is a degree of "uncertainty" in the proof of unequal educational opportunities the courts have, in other contexts, made normative judgments about large scale social facts. He suggests that the court use that technique in the school segregation area.

F. "Reasonable Alternative" Theory

Other commentators have suggested that the analysis in *Bell* and like cases are wrongly conceived. As one stated:

The courts in these cases (*Bell* and *Downs*) seem to have applied the principle that as long as there was a rational relationship between what the school board did and a legal end to be achieved the courts' inquiry was concluded. The courts rejected the suggestion that the end intended was racial segregation and held that the boards' action perpetuated segregation was reasonable under the circumstances.

But, as we shall see, the rational relationship doctrine has no application to cases involving racial discrimination in public education. Even if it did, it would be highly questionable whether permitting segregation of Negroes is racially related to the education of those children who must attend them.21

The argument essentially is that once the plaintiffs prove substantial racial concentration in a school system, the burden then shifts to the school board to show that they have no "reasonable alternative" for relieving the segregation. This reasoning assumes that since there is such massive denial of equal educational opportunity in isolated Negro schools, that it is not a sufficient defense to assert that some minor educational ends are being served, such as avoiding the expense of bussing or drawing zone lines along "natural" boundaries.

II. PRAGMATIC APPROACH TO DE FACTO SCHOOL LITIGATION

The Fiss and "reasonable alternative" theories must be stressed in all *de facto* school litigation. A part of the failure of school litigation in the North is probably related to the court's lack of acquaintance with the concepts in litigation involving racial discrimination, particularly since most of them have been

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21 Wright, supra note 7, at 294.
spun out of the general language of the fourteenth amendment. An educational job will have to be done with judges before success can be obtained at the appellate level. The theories have the attraction of being couched in terms which would be respectable in the writing of an opinion. However, they do have problems attached to them. Fiss' theory of the joint-action of state agencies would probably present a litigator with almost the same degree of proof problems that he would have in trying to show a school board has actively gerrymandered school zones. While it may be simple to present prior legislation of the state or local government which required racial segregation in housing or other areas, charting the action of a public housing authority in its total site selection activities would be a substantial job. While the "reasonable alternative" theory is a more adequate analysis of the question which a Northern court should ask in de facto segregation, it is in essence a reformulation of a theory advanced by Fiss and, therefore, will not essentially alter the resistance of courts in a de facto case.

Theories, or concept construction which have been the sole thrust of comments on de facto segregation, are not addressed to the real and underlying resistance of the courts in this area. It is instructive that very few courts at the District Court level and none at the appellate court level have responded to the common sense judgments which every "reasonable man" might make about how schools become segregated or about the resultant deficiency of educational opportunities in all-Negro schools. It cannot be that these courts are totally ignorant of the abundance of social science data which point heavily towards the consistently poor quality of education in Negro schools; it can only mean that they have used judicial techniques for avoiding the obvious. This article will explore the unstated reasons for opposition and advance some suggestions for long-range and short-range activities by legal aid lawyers which may aid in coping with resistance to dis-establishing inferior Negro schools.

A. Maximum Proof on Inequality and Gerrymandering

If expert resources were no problem, one could skirt the theoretical problems in Bell by showing direct denial of educational opportunities to Negro students due solely to school board action. In Hobson v. Hansen,22 the plaintiffs took on this full

22 269 F. Supp. 401 (D. D.C. 1967). The school board as a body voted not to appeal. The superintendent (now resigned), one dissenting school
burden and showed manipulation of zone lines to achieve predominantly-white schools, and, in the Negro schools, overcrowding, unequal facilities and curriculum. In *Bell*, plaintiffs proved that Negro students had lower achievement levels, but the trial court stated that they had not proven that this was due solely to the unequal facilities provided by the defendants. Plaintiffs in *Hobson* undertook this task and linked poor achievement with lack of equivalent educational resources (e.g., there was expert testimony that Negro students could not achieve as well as white students because they had no kindergarten classes, which all the predominantly-white schools had). They also showed that some of the poor conditions in Negro schools were correctable (e.g., there were vacancies in white schools which could have relieved the overcrowding in Negro schools). The substantiality of the proof is attested to by a trial court opinion of 118 pages, most of which is a summary of the evidence. Plaintiffs used six experts and the trial took approximately twenty days. Unfortunately *Hobson* can probably be reproduced in the same form of thoroughness in only a few school systems.

B. Prior Mandatory Segregation

*Taylor v. Board of Education* is one of the few *de facto* school segregation cases in which plaintiffs were successful, and it may provide an approach calling for fewer resources than *Hobson*. While the court found that there had been active gerrymandering until 1934 and a transfer plan until 1949 which permitted white students to leave predominantly Negro zones, in essence, it held that once there had been active gerrymandering the school board had an obligation to make affirmative efforts to relieve racial imbalance in schools even though the imbalance which had occurred since 1949 was largely due to changed residential patterns. This offers one line for reducing the proof effort; namely if plaintiffs can prove some "past gerrymandering," coupled with an acquiescence in growing racial imbalance thereafter, *Taylor* is some precedent for fastening a duty

board member, and white parents who sought to intervene are attempting to appeal. The motion to dismiss their appeal has not been decided.

on the school board to restructure. Taylor, however, is a district court opinion which was never reviewed on the merits by the Court of Appeals or the Supreme Court of the United States, and is substantially at variance with Bell.24

C. Securing Data

In order to evaluate the litigation potential in a de facto school situation, an attorney must first secure some minimal data about the school system and the placement of Negro students and teachers. HEW is now surveying all school districts in the North with over 3,000 students as to the assignment and employment of minority groups.25 This is the opening in a projected effort to more adequately assure compliance with nondiscriminatory pledges in the North. The Freedom of Information Act26 a recent Amendment to the Administrative Procedure Act, requires every federal agency to make its records available to the public with certain exemptions, such as purely intra-agency data about personnel and secret information relating to the national security. Should the federal agency refuse to make its records available upon demand, litigation is authorized to require the agency to do so.

D. Limited Proof of Gross Irremediable Inequality

One cause of the major resistance of the courts must be the sheer size of the problem presented to them. Essentially, they are asked to have a thorough and complete description of an entire school system (alternative zoning, transportation provided, transfer policies, etc.). The courts are now aware of the substantial political and social forces arrayed against any major system-wide reorganization. A court maintains respect for itself by taking on only those tasks with which its limited coercive powers can cope. It is a strong institution when dealing with disputes between single individuals, but it becomes a

24 The trial court in Bell attempted to distinguish the Taylor case by stating that there the plaintiffs had proved that the school board had deliberately drawn the lines so as to create an all-Negro school. This does not adequately distinguish the Taylor case since in Bell the school board had maintained segregated schools under state law and had only ceased that policy in response to a change in state law in 1949. The school board, in Taylor had also ceased its practice of active segregation and in exactly the same year, but the court there still used the prior practice as a part of establishing a present duty to avoid racial imbalance.


progressively weaker institution as it moves out into the area of public law and attempts to structure widespread public activity. (In arguing before the court, one frequently is asked whether school desegregation is now a "legal problem" or has not become essentially an educational administration problem which would be handled by some federal agency.) One can clearly see, for example, that the Supreme Court of the United States is taking a "hands-off" attitude toward de facto litigation. As recently as December, 1967, it denied certiorari in another Northern school case.\(^\text{27}\) The Supreme Court must be aware of the almost total resistance of school boards in the South to the Brown decision over the last 13 years. It is probably not anxious to make another sweeping school decision which would cover all non-southern school systems and have the spectacle of open resistance and non-compliance which they have had to countenance under Brown. Even the Jefferson case implicitly recognizes the vulnerability of the court in this area — after a long and affirmative opinion which argues for complete reorganization of the dual school system, the actual implementing decree gives nothing more than individual Negro students the right to demand transfer to white schools.

The tactical response to the caution of the court is to scale down substantially the size of the problem presented. The Hobson case suggests one approach to achieve some desegregation on a more limited and manageable basis.

While attorneys may not be able to fully canvass an entire de facto school system as was done for Hobson, it is probably possible to get a quick index of courses and facilities missing from a few of the all-Negro schools but present in all the predominantly-white schools, e.g., science laboratories, honor programs, or certain academic courses. (Negro administrators or principals, if assured of confidentiality, are generally knowledgeable enough to point towards the grosser deficiencies.) Or one might limit the inquiry to a gross disparity with regards to double sessions, pupil-teacher ratios, or the lack of accreditation in Negro high schools. Here, one probably need not show the connection between poor achievement and the absence of these facilities or curriculum, for the equal protection claim is that a school board cannot always provide certain educational oppor-

tunities in predominantly white schools, and always deny them to predominantly Negro schools. At the least the burden should shift to the school board to justify the inequality. If the disparity is gross, the school board may not be able to correct the deficiencies in Negro schools.

In that event, Jefferson outlines one remedy:

If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this subparagraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice.\(^{28}\)

If the school board claims that there are insufficient funds to correct deficiencies in Negro schools,\(^{29}\) the immediate alternative may be to close them and assign the students to predominantly white schools which are not deficient.

(1) Right to Transfer

If the deficient Negro schools cannot be closed, any Negro student there should have the right to transfer into a predominantly white school pending the full correction of the deficiencies. In Bell, the court appeared to hold contra. Although plaintiffs proved that certain academic courses were not available in Negro schools, but were present in all predominantly-white schools, the court commented that the curriculum was made up in response to student demands and that if the demand for some courses in a given school was inadequate, the school board was justified in not providing those courses. (There was no comment as to whether the school board regularly canvassed students to find out, however, what courses they wanted to be added to the present curriculum). Bell did not take the next step, however, and place a responsibility on the school board to permit as many Negro students as possible to transfer to the predominantly-white schools which had the courses the Negro schools lacked. Jefferson specifically requires that a Negro student be permitted to transfer under these circumstances.

\(^{28}\) United States v. Jefferson County Bd. of Educ., 372 F. 2d 836, 900 (5th Cir. 1967).

\(^{29}\) Cf. Griffin v. Bd. of Educ., 377 U.S.218 (1964). It is no defense once a denial of equal protection is established that the school board does not have sufficient funds to correct the denial. In Griffin, the court merely added the tax authorities as parties-defendant and ordered them to raise sufficient funds to provide equal protection for Negro students.
(2) General Transfer Policies

While litigation might establish a "right to transfer" because of unequal curriculum or facilities, attorneys should also study transfer rules which can be employed to effect some limited integration. Typically, the transfer rules will permit some students to leave their present school. (For example, some school boards permit students to attend schools near their parents' place of employment. This exception might be used by Negro teachers who work in predominantly white schools or by Negro domestics in white residential areas). Attorneys could lecture parent-teacher associations on the school board's transfer policies, urging them to transfer their children where this would mean assignment to an integrated school. If the school board refuses to honor these transfer applications, litigation should follow. White students who would be assigned to all-Negro schools because of their residences are usually assigned to white schools. A suit could assert that the school board was operating a racially discriminatory transfer policy.

One may query — will this at best produce piece-meal student-by-student integration? How can this remedy an entire system of poor Negro schools? Worse, won't the students who transfer be the brightest students of the more alert aggressive Negro parents? All of this cannot be refuted entirely. To some degree this pessimistic prognosis is true. The only answers are partial and speculative. School boards that do not mind short-changing Negro children can do so more easily where there are identifiable Negro schools. Therefore, individual Negro students may benefit by moving into predominantly white schools because the school board will more likely prevent a drop in educational standards in these schools (unless the white children in the schools are from poor families who are themselves prone not to protest inferior education.) Community concern is a more potent weapon than litigation. The attorney can only hope that the pressures for transfers will generate demands from the Negro community for greater change — partial inadequate solutions may create a demand for more complete solutions. Transfer of a few Negroes into white schools will feed more information into Negro communities about the gross disparity between the white school and their former Negro school. Here the lawyer can set the stage for generating community concern — "outside agitation" at its best.
E. TAXPAYER’S ACTIONS

(1) Closing Inferior Negro Schools

One attractive device for reassuring the court that its decisions will meet with greater public acceptability is to link the desegregation process to financial economies. While many oppose racial desegregation per se, their opposition might be greatly lessened if it can be shown that the school budget would substantially benefit from some reorganization.

Therefore, where one seeks to integrate Negro students through school closings, it would be wise to start with small, inadequate Negro schools in a system where there is some possibility that the entire student body can be absorbed into predominantly-white schools. Indeed, since many schools attended by poor whites are as deficient as some Negro schools, an attorney can increase the acceptability of a suit by including them in a school-closing effort. A taxpayers’ action could be instituted on the ground that the continued operation of these schools is a waste of public funds since there is an alternative which is much less costly. Such an action was instituted in Florida to close a Negro law school with an average total enrollment of 12 to 13 students.\(^{30}\) The courts in Alabama have also ordered the closing of small inadequate Negro schools.\(^{31}\) Even the increased expense of bussing students might be less than the cost of keeping these schools open.

(2) Plans for New Schools

Taxpayer’s actions can be utilized to achieve desegregation in other ways. New schools, with new equipment and facilities, act as a “magnet” for white students and may be a deterrent to the typical Northern pattern of the white, middle class parents placing their children in private or parochial schools. A limited amount of information may show that, instead of building two new schools, one in a predominantly Negro community and another in a predominantly white community, one larger school, built midway between two such communities,

\(^{30}\) Due, et al. v. Florida Agricultural and Mechanical University (FAMU), et al. Civil No. 947 (N.D. Fla., filed Feb. 1961). Plaintiffs acquiesced in a dismissal of the suit when assured that these plans were to close the school. The school is now closed.

would achieve substantial savings. Here, no theoretical question arises of whether school boards have a duty to locate schools to achieve integration, because the thrust of the suit would be preventing a waste of public funds. This suggestion is particularly relevant for junior and senior high schools for which residential proximity is normally less important.

(3) Consolidation of School Districts

The trend in the United States has been towards the consolidation of small school districts into a single one. Typically, this was not done to achieve school integration but rather to reduce duplication and to effect savings. For example, one school district may be building schools because its present ones are filled beyond capacity, while an adjoining district may have unused classroom space. In the rural areas of a state, where there are many small school districts, a taxpayer's suit to require a consolidation of these districts might succeed in integrating some Negro student populations into a larger, white-student population.

F. Public Housing: Bringing the Mountain to Mohammed

To the extent that the Negro population falls in the low-income group, many will be eligible for low-rent public housing projects. Since the "neighborhood school" policy is the primary means for assignment to public schools, an attorney might secure school integration indirectly by litigation to place new public housing in predominantly white residential areas.

The Department of Housing and Urban Development (HUD) has reversed its earlier "hands off" policy as regards racial segregation in federally supported public housing. This was done largely in response to Title VI of the 1964 Civil Rights Act which explicitly prohibits racial discrimination in any federally supported program. HUD has promulgated regulations which require local housing authorities to select sites

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32 See, Racial Isolation, supra note 3 at 143-46 for survey of communities which achieved greater integration in this manner.
33 In 1932 there were 127,530 school districts; in 1955 the number was 59,270 and in 1962 it was 37,025. Advisory Commission on Intergovernmental Relations, Performance of Urban Functions: Local and Areawide 63 (1963).
34 See J. Greenberg, Race Relations and American Law 286-93 (1959), for early history of federal agency on this issue.
for new housing projects outside of Negro ghettos. One who wishes to complain that a local housing authority is about to select a site which will maintain racial segregation can file a complaint with HUD. HUD can investigate and, if the charges are well founded, it can negotiate for new sites. Ultimately its sanctions are to cut off federal funds or ask the Attorney General of the United States to sue to enjoin the construction.

Attorneys may also file a direct suit asserting that the site selection is unconstitutional because it increases racial concentration (although it is probably wise to exhaust the federal administrative remedies first). The suit might also be brought under Title VI of the Civil Rights Act on a claim that the Negro plaintiffs are the third-party beneficiaries of the non-discriminatory agreements made between the housing authority and the federal agency. Tenants or applicants for public housing have been found to have standing to challenge the site-selection policies of a local housing authority.

G.ABILITY GROUPING: THE NEW SEGREGATION

(1) Track System

A “track” system classifies and programs the instruction of students along the lines of their supposed abilities. This kind of ability grouping, though not defective in concept, often in execution works to the detriment of the poor or minority-group pupil.

The tests which determine the groupings are usually culturally biased — favoring the middle-class white child to the disadvantage of the already economically-deprived or racially-discriminated against student. Pupils from this underclass are in a disproportionate number, thus locked into the lower tracks at an early stage, with little likelihood of movement between tracks. This phenomenon is often found in previously de facto segregated schools that have recently integrated. The resulting pattern is one of the internal desegregation of what are now at least nominally “integrated” schools.

39 See “Public School Segregation and Integration in the North,” 4 J. Intergroup Rel. 71-73 (1963) [Hereinafter cited as “Public School Segregation”].
One federal court has indicated that when the track system builds in this structural bias it is amenable to legal attack. *Hobson*\(^{40}\) held that where disadvantaged children, primarily Negro, are relegated to lower tracks based on intelligence tests largely standardized on white middle-class children, and there given reduced education, such disadvantaged children are denied equal protection of the laws. Recent studies have produced highly persuasive evidence of the inappropriateness of standard tests.\(^{41}\) Social scientists claim that more accurate methods are needed for testing the aptitude of the disadvantaged child.\(^{42}\)

In evaluating any track system in contemplation of litigation, an attorney should look to such indices as the number and proportion of underclass children in the different tracks; the nature of the tests that put them there; the possibility of movement between tracks — especially the frequency of retesting and the quality of remedial instruction given to students in lower tracks.

Attorneys in *Hobson* presented the court with detailed data on the operation of the track system in the Washington, D.C. schools. One might try, as attorneys there did, to tap the Social Research Department of a local university. However, the track system involved in the *Hobson* case was found remiss on many grounds, and there may be some more expedient ways to show the defects. Since much of the evidence was cumulative, the quantum of proof necessary to challenge a discriminatory track system successfully need not be nearly so great. It would be sufficient, for example, to show that predominantly Negro schools did not have the honors or highest track (as was the case in Washington, D.C.), and that over the years no provision had been made for taking the qualified students out of the predominantly Negro schools and placing them in schools with an honors track. This more simplified approach to this proof problem is more realistic, given the exigencies of a legal aid practice.

Social science data in this type of litigation may be of substantial value. Recent research indicates that ability grouping may be detrimental to students in the average and low

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\(^{41}\) See, e.g., The Lorton Study, discussed in Hobson v. Hansen, Id. at 485.

ability categories. The students suffer from the lack of intellectual stimulation provided by brighter children while, on the other hand, the brighter children do not appear to be harmed when left with average and lower group children — at least through elementary school.

Studies show that ability grouping can have a deleterious effect upon the social and emotional development of children. Children are aware of a "class" system and those in the less gifted section evince feelings of worthlessness and rejection as a result.

One study has pointed out, that

[S]o-called "homogeneous groups" — whether based on I.Q. or some other measure, or even on several criteria — not only reveal a substantial range of individual differences in function or functions used for the classification, but they also reveal still wider ranges of difference in other functions. The pupils may be fairly homogeneous in reading achievement, for example, but very heterogeneous in arithmetic achievement.

This "Heterogeneity of 'Homogeneous Groups'" has been well documented.

This is not to say that all ability grouping is harmful, or even that all harmful ability grouping is vulnerable to legal attack — only that a lawyer working on de facto segregation should be aware of this problem. A system of ability grouping with proper supplemental learning assistance and frequent retesting with properly designed tests, could be of advantage to all children involved. "The new problem (racial integration in the classroom) is simply the old problem — how to create a harmonious working group in which each individual is encouraged to develop to the fullest extent of his capacities."

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46 Eash, supra note 44.
47 "Public School Segregation," supra note 39 at 72.
(2) Special Schools and the "difficult" child

There is a definite need for special educational facilities for the retarded and the emotionally disturbed child. However, the designation has sometimes been used as a convenient means of shunting off difficult discipline problems. School authorities who lack a full appreciation of some of the cultural differences involved may be causing many underclass children to end up in the "special" schools.

Attacking improper classification through legal avenues presents many problems. Generally, the placement of children in special schools is viewed by the courts as purely an internal administrative matter not subject to judicial intervention. However, where the removal of the child from a regular school is of a questionable nature, certain legal arguments are available to challenge the placement.

Most state constitutions provide for public schools, which "normal" children of certain ages have a right and a duty to attend. It can easily be shown that placing a normal child in a school where the other children are genuinely retarded or emotionally disturbed is injurious to him. Whenever government acts to injure an individual, or to deprive him of his educational rights, it must comply with the guarantees of due process. This line of argument, along with an expert witness or two, may permit a challenge to the procedures for faulty assignments. The difficulty with constitutional claims in this area is that a court is likely to interpret the Brown case as requiring an intent or motivation to harm children and as noted earlier, this in almost all cases will be difficult or nearly impossible to show.

Even where the designation has been proper, there may

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50 For a treatment of the general reluctance of courts to intervene in what they regard as internal school policy where the problem is discussed in the context of school suspensions and expulsions, see 58 A.L.R. 2d 903 (1958).
52 This theory has recently been advanced in the case of a supposedly emotionally disturbed child who had been barred from attendance at regular public school. Kirkland v. Bd. of Educ., Civil No. 67C698 (E.D.N.Y. filed Oct. 1967). The student is being represented by the Nassau County Law Services Committee, Inc., located at 150 Old Country Road, Mineola, New York 11501.
still be a litigable issue on the question of whether the special schools are doing the job they were established to do — i.e., teach the children. Special public schools for "socially maladjusted" children often become little more than custodial institutions — thus effectively depriving the students of the education which is their right. The Hobson case, supra, is a good example of the depth to which a court can go in evaluating the educational process within a school system when there are questions of constitutional dimension at stake. The district court in Madera v. Board of Education of the City of New York though for another purpose, inquired into the nature of schools for emotionally disturbed or "socially maladjusted" children.

H. CHOICE OF APPROPRIATE REMEDIES: SOLVING THE COURT'S DILEMMA

Litigation to close inadequate schools, to consolidate the construction of new ones or to rearrange a track system may run into one of the substantial but unexpressed fears of the courts, namely, that they will be saddled with the task of reorganizing the school system, when they have no particular expertise in this area. Many opinions give evidence of this unstated hesitation in the deference shown to any reason the school board offers as to the basis for its decisions, or in the comments that the courts cannot "substitute their judgment" for that of the school board. One way to reduce the spectre of the unmanageability or reorganization is to demand in a complaint that experts in school administration, attached to, or funded by, the Department of Health, Education and Welfare (HEW), be called in to advise the courts and assist the school boards in designing a feasible desegregation plan. This has been expressly authorized in the Jefferson case, and one district court has already ordered a school board to avail itself of the desegregation resources of HEW. The HEW funds for assistance in desegrega-


54 Madera, supra note 51 at 367. See also, Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S. 2d 852 (Dom. Rel. Ct. 1958), the court upheld Negro parents' defense to a proceeding for neglect following withdrawal of their children from a racially imbalanced school, saying that parents had a constitutionally guaranteed right to choose no education for their children rather than expose them to discriminatory-inferior education.

tion, are not limited to southern school systems.

Assistance is also available from some private companies. To the extent that reorganization of school systems requires the manipulation and accommodation of many variables, companies dealing in computer systems analysis are entering the field.

III. THE LAWYER AS NEGOTIATOR FOR THE COMMUNITY

The legal aid attorney should not limit his role to litigator but should act more broadly as a representative of groups of poor persons whose problems may be resolved by legislation, negotiation, or securing additional private and governmental resources. This was the original conception of the role of a lawyer by those who encouraged new legal service programs. An expanded definition of the attorney's role in school desegregation is necessary because litigation may have but a limited possibility of success where courts decide that its task of making neat findings of fact is incompatible within the evaluation of complicated and extended social data. While one can say that courts make these judgments in other areas of the law, the fact is that they are unlikely to make decisions which have the permanence of constitutional findings in sensitive areas like racial integration where school boards may actively resist court orders and the Congress has provided no direction and few resources. The lawyer confronted with this fact may approach the state legislature since it, unlike the courts, can experiment and adopt solutions which utilize massive social data. Each legal service program could attach a lawyer as "house counsel" to the local parent-teacher's association in schools servicing low-income communities. The attorneys so designated could form a state-wide group which could jointly draft and endorse model legislation, to be submitted to the state legislature which would place a legal duty on school boards to work, as much as is feasible, toward reducing racial imbalance. Such state legislation has achieved some desegregation of schools.

If a convention to reorganize the State Constitution were in the offing, attorneys might submit some general provisions assuring equal educational opportunities regardless of race (or

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economic status, which might be a more tactical approach). A concerned state educational agency might do as others have done and avoid the federal constitutional problems by finding that there was a duty under the state constitution to relieve racial imbalance.\textsuperscript{58} Or one might subsequently seek interpretation of the state constitution in litigation, where a court would not have the greater burden of interpreting the Federal Constitution.\textsuperscript{59}

Attorneys could also function as the negotiators for parent-teacher groups, by drafting applications to private foundations to provide funds on an experimental basis to assist with local educational problems. Typically, the average Negro community (and perhaps some school boards) will not have knowledge of these resources, and an intervening attorney could lend substance to an application to a foundation. For example, a foundation might finance a program to bus Negro children into white schools where there were vacancies. An attorney might simultaneously seek a university study of a comparison of the achievement levels of students who were bussed to their equivalents who remained in Negro schools. The school board could not make the usual objection to the bussing of the Negro students, if it was to be conducted without taxing the regular school budget, and there were spaces to absorb the transferees. Further, if Negro students were shown to be performing better in their new setting, negotiation with the school board might encourage them to continue the bussing. There are funds under Title I of the \textit{ESEA} for this kind of program.\textsuperscript{60}

\section*{IV. Decentralization of School Board Authority and Compensatory Education}

While an attorney may want to direct his efforts toward integration, if he is in a school system where the prospects for desegregation are minimal, because of residential segregation, he may be met with a demand by the Negro community that he draft and propose legislation giving them greater local control over the operation of their schools.\textsuperscript{61}

\textsuperscript{60} See Racial Isolation, supra note 3, at 238.
\textsuperscript{61} See e.g. "Separate Schools for Harlem Urged by 2 Civil Rights Chiefs," \textit{N. Y. Times} (Nov. 22, 1967).
This demand is, in part, an outgrowth of the "Black Power" demand that Negroes control their local institutions. There is also the desire to achieve more effective education, where school boards have failed to attend to the specialized needs of ghetto schools. Proponents of decentralization of school board authority claim that, in a large city school system, many programs are impeded by complicated bureaucratic structures, and school boards tend to get out of touch with the community. They argue that shifting greater control to smaller units will yield more immediate response to the local school needs, and those responses would be fashioned by persons closer to the problems.

The major study in this area was done in New York City, and is commonly referred to as the "Bundy Report." It was made in response to the rapidly declining quality of education in the New York schools. Working upon a premise that a greater sense of community control will result in increased achievement, the report proposes legislation to achieve a major shift in authority from the present central board of education to 30 community-school districts. Each school district would have a board of directors, elected by persons living within that school district. This board would have control over the selection of the district supervisor, principals, and the teaching staff (with teachers, however, continuing to be protected by the tenure provisions in state law). The board would also be able to reshape curriculum, plan construction, reassign students, and contract for special programs. The central board of education would retain the power to tax, as well as the responsibility for distributing a fair share of the total budget to the 30 community school districts. This central board would also engage in research, have authority to require the local community school board district to meet minimal state education standards, and assist in training persons for the task of sitting on the local community school board.

There are positive elements in decentralization, for example, teachers who evidence hostile and demeaning attitudes toward

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63 Persons could serve on the board regardless of whether they had children in school. The Mayor's Committee thought that persons without school children, but with the interest, time, and capacity for contribution, should be among those who could be selected to serve on the board.
the "unwashed" poor may be made more accountable if one of their parents is a school board member. But the report wisely stresses that decentralization is no panacea, and that its success will be strongly related to an increase in financial resources, particularly if many innovations are undertaken. However, even with adequate financial backing, there is still the more basic question of just how much fundamental and lasting change can be brought about through decentralization when the personnel that the local boards will use for the day to day running of the schools will be made up of the same teachers and administrators currently directing the system. Although control is shifted closer to the "consumers" of the school product, there may be certain built-in limitations on how much difference they can make.

The primary vehicle for the decentralization of a school board to improve the quality of education for disadvantaged children would be compensatory education. Studies show, however, that initial gains in achievement are not sustained over a period of years, and that racial and socio-economic isolation are the primary impediments to the learning process. Attorneys must be aware that emphasis on "quality" education within ghetto schools tends to divert integration efforts and to institutionalize and ossify the de facto segregation that characterizes these schools. There are those who dispute these findings and claim that achievement might have been greatly different had the schools themselves been different, and found that the schools themselves might have been different had there been greater community control.

CONCLUSION

School desegregation is a political problem — but as with most "political" problems, the courts, despite their disclaimers to the contrary, can give rational direction to its resolution. An attorney must assay the strengths and weaknesses of the litiga-

64 Compensatory education includes programs of remedial reading, cultural enrichment, and preschool instruction which are designed to counter the lack of intellectual stimulation in the lower socio-economic environment. Title 1 of ESEA provides a major source of funds for these programs, most of which tend to be in predominantly Negro schools.

tion system and structure the problems in the most palatable form. Poor people not only get inferior "private" goods (like slum housing and shoddy foodstuffs); but they get inferior "public" goods, like schools, although personal wealth, theoretically, should not determine the right to equal benefits in the public sector. The legal aid attorney can increase the power of his clients to "purchase" quality schools through litigation with limited, circumscribed goals.