

Reviews

New Frontiers

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Frontiers of Civil Liberties. By Norman Dorsen. New York: Pantheon Books, 1968. Pp. ccvi, 420. \$8.95.

By any account, Norman Dorsen has compiled a creditable record as law teacher and lawyer. Under his direction, the Arthur Garfield Hays Civil Liberties Program at New York University Law School has pointed the way to substantial curricular reforms in legal education, broken down the barrier between thought and action in the study of law, and greatly enriched the literature of both legal scholarship and civil liberties litigation. This book is a sort of diary of Professor Dorsen's work as law teacher and civil liberties lawyer from 1961 to 1968. The materials in it include papers, memoranda, and abridged texts of briefs (mostly in the Supreme Court) written by Professor Dorsen, as well as transcripts of conferences on civil liberties subjects moderated by him with contributions by men with as diverse views as Professor Alexander Bickel of Yale, Professor Paul Bator of Harvard, Professor Caleb Foote of Berkeley, and NAACP Counsel Robert Carter.

The subject matter of these materials is broad—free speech, academic freedom, religious liberty, criminal justice, the Supreme Court and constitutional adjudication, and racial and economic discrimination—and their quality is uniformly high. The book reflects well the issues of civil liberty which were before the Warren Court in the years it covers.

Were I to criticize at all, it would be only to suggest that the selection of materials ought not to have been limited to the work of one lawyer or group of lawyers. In considering the sit-in cases, for example, the Solicitor General's amicus brief in *Bell, Bouie*, and *Barr*

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Book Reviews

in the 1963 Term¹ is doubtless the most penetrating historical study of Jim Crow filed with the Court and deserves to be given a wider audience. But it is really unfair to criticize this book by scoring its concept. *Frontiers of Civil Liberties* so effectively represents the best in civil liberties litigation of the past decade that it provides an excellent basis from which to evaluate the work of the constitutional litigator in this period and to ask what role, if any, he has to play in the years just ahead. We lawyers owe ourselves this critical evaluation, for the social events to which civil liberties law and lawyers address themselves have moved from the relative obscurity of a lunch counter in Greensboro² or a loyalty oath in Florida³ to dominate public attention and political discourse. Whatever this process may have done for others, it has led me to take a more modest view than was fashionable several years ago of the constitutional lawyer's fitness to stand at the center of the stage in the drama of important social change.

Lawyers, a sociologist once said, are the last of the generalists; he meant that they were the last and only professionals to enjoy a comprehensive view of the society in which we live. He was wrong. Lawyers could be generalists, if they wanted to; their craft and the position it occupies in the lives of their fellow beings make it possible, and perhaps even appropriate, that they should be. But lawyers are by training and inclination "confined from molar to molecular motion."⁴ Taking a perspective broader than the case at hand—and, indeed, only one side of the case at hand—is an art that most of them never learn. To take one example, lawyers have for centuries been making up history to fit this or that occasion, while judges, to establish premises for decision and justifications for new rules dressed up in the guise of old, have put an imprimatur upon the crassest non-

1. Supplemental Brief for the United States as Amicus Curiae, *Griffin v. Maryland*, 378 U.S. 130 (1964), *Barr v. City of Columbia*, 378 U.S. 146 (1964), *Bowie v. City of Columbia*, 378 U.S. 347 (1964), *Bell v. Maryland*, 378 U.S. 226 (1964), *Robinson v. Florida*, 378 U.S. 153 (1964). The brief canvasses the history of Jim Crow and concludes that the actions of the storekeepers and restaurateurs which led to the arrests of the petitioners-demonstrators were part of a "community-wide fabric of segregation . . . filled with threads of law and governmental policy woven by the State through a warp of custom laid down by historic prejudice." *Id.* at 143. The brief is an eloquent statement of the "promise of Negro freedom" developed by Arthur Kinoy in *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967). See also Douglas, J., concurring in *Bell*, 378 U.S. at 242.

2. See NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 226-28 (Bantam ed. 1968) [hereinafter cited as KERNER COMM'N REPORT].

3. *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961).

4. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Holmes made the remark in reference to common law judges, who he said were cabined by the structure of the common law itself. That lawyers should be so confined is a product not of the exigencies of their art, but of a self-induced smallness of vision.

sense and called it history, or tradition. Lord Coke and the common lawyers distorted our perspectives of English history all the way back to Magna Carta and left us with myths from which, because many of them are now enshrined in our jurisprudence and therefore safely in the keeping of the courts, we will not be free short of revolutionary change. The reformers of the nineteenth century committed the same offense with respect to English political history, and the process continues to this day.

There is refreshingly little of this distortion of history in Professor Dorsen's book, although the references to Magna Carta in the introductory chapter⁵ and in the discussion of trial by jury⁶ betray an acceptance of the prevailing mythology concerning the historical importance of the Charter.⁷ Lawyers are free in brief-writing to put upon history any perspective that the court is likely to swallow, and to rely on what some politically-motivated old lord once said in King's Bench, the Exchequer, or the House of Lords as the authority for an assertion of fact about an historical period remote from our own and the old lord's. But when a scholar delineates the premises which establish why a written constitution is preferable to an unwritten one, or how we came to have trial by jury,⁸ he owes us more. I speak emphatically not because Professor Dorsen's work gives me much cause to do so, but because the extent of the malaise I am discussing is demonstrated by a scholar of his attainments falling victim to it in the course of a generally excellent work.

Lawyer's sociology is also a cause of some concern if the constitutional lawyer is accepted as central to the making and applying of the rules which are fundamental to our law-life.⁹ Caleb Foote observes in the course of a discussion reprinted in this book:¹⁰

The great stoic philosopher Epictetus in one of his writings imagined himself facing a wrestler. The strong man boasted to him "See my dumbbells," to which the philosopher impatiently retorted, "Your dumbbells are your own affair. I desire to see their effect." We should like to be able to supply this kind of standard to our subject, to be able to see beyond the decisions of

5. N. DORSEN, *FRONTIERS OF CIVIL LIBERTIES* 8 [hereinafter cited as *FRONTIERS*].

6. *Id.* 234.

7. See Radin, *The Myth of Magna Carta*, 60 *HARV. L. REV.* 1060 (1947).

8. *FRONTIERS* 3-21.

9. There are some exceptions. Edgar and Jean Cahn, advocates, researchers, teachers, and scholars, come readily to mind when one thinks of lawyers' sociology and fact-gathering of high quality.

10. *FRONTIERS* 31.

the Supreme Court and to gain a comprehensive picture of the effect of the Court's custodianship of our civil liberties.

When we measure the effectiveness of a public health campaign such as that against polio or venereal disease, we can say that the incidence of the disease ten years ago when the campaign began was such and such; that now it is so and so; that the difference represents a measurable decline; and thus by the use of controls we may be able to attribute that decline to certain specific factors. Such an empirical validation is as important for civil liberties as for science. We all know from sad experience that any form of government can hold out the promise of a bill of rights, and that what is critical is to look behind the promise to see if its principles are available in practice to most clients of the police and of the criminal law.

Professor Foote's comments suggest two observations about attributes which the materials of *Frontiers of Civil Liberties* share with much of the constitutional litigator's work in the years just past. First, there is a distressing amount of conclusion-drawing from premises which lack empirical support. Second, the briefs and discussions which led to the Supreme Court decisions of six, five, or even two years ago do not give me the sense of a frontier's challenge: rather, I realize how quickly the social events of the ensuing years have dated the newly made rules, so that they can no longer guarantee the liberties they promised to make safe. I am led to wonder whether the lawyer's belief in "the law" as a universal solution to social controversy—a belief glowingly and ringingly asserted in urging the making of new constitutional rules and the revitalization of old ones fallen into desuetude—was in error. I consider these problem in turn.

First, as to argument from apparent empirical premises, consider the amicus brief from the right to counsel case, *Gideon v. Wainwright*, included in *Frontiers* as chapter 13.¹¹ The brief argues that providing counsel will not increase costs to the state and might even lower them. To support this assertion, it states that providing counsel in every criminal case will reduce postconviction applications premised upon "real or fancied trial injustices resulting from the lack of trial counsel," thereby saving litigation costs, and that prompt provision of counsel will help to eliminate delays in the administration of justice, presumably by releasing defendants on bail more quickly, thereby

11. 372 U.S. 335 (1963). The brief in *Gideon* was written by Professor Dorsen and J. Lee Rankin and is included in *FRONTIERS* in abridged form at 193.

saving detention costs.¹² Does the statement that costs will not increase rest upon a calculation, even a rough calculation, of the number of criminal cases tried each year and of the number of lawyers available to try them? Has thought been given to the average cost per hour of providing each criminal defendant with a lawyer, based on an estimate of the number of hours it takes to prepare and try the average criminal case?¹³ I doubt it, and the brief does not reflect it. I am not criticizing the brief. It's a good brief, and I have written just as broadly and just as baselessly in more than one case. But apparently no lawyer in raising the cost issue in *Gideon*, and no lawyer in dismissing it, bothered to find out just what he was talking about. Both sides dealt in broad-gauge argumentative assertions. (The same vice is often found in the discussions of church and state: someday, someone will tell me in terms other than ringingly Jeffersonian—or Madisonian—just what is the point of the establishment clause in contemporary America; then, by figuring out what evils lurk, sensible rules can be fashioned to deal with them.) Much of the book's discussion of racial discrimination in public schools, including de facto segregation, is similarly uninformed by analysis of the tensions which underlie disputes about schools in urban areas.¹⁴ The conference on de facto segregation reprinted in the book was held just after Harlem exploded in the summer of 1964, yet it dealt with the problem before it as one of applying *Brown v. Board of Education*¹⁵ to the problems of New York City's schools, including even (for some participants) the psychological and sociological underpinning of *Brown*. As stated in the introduction to the book, the conference made "the tactical and policy choices which informed the briefs." What "information"? In retrospect how viable were the choices?

These defects are minor, however. I am principally concerned with the view of the civil liberties frontiers and, impliedly, of the lawyer's role on those frontiers that one might gain from the book. I turn, therefore, to the second point raised above; do the briefs which secured yesterday's significant decisions instruct us about today's problems? On reflection, I think not, even when the briefs in question are, like those preserved here, among the best of their kind. This contention does not rest upon a distinction between "advocacy" and

12. FRONTIERS 207-09.

13. See generally AMERICAN BAR FOUNDATION, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (Silverstein ed. 1965) (3 vols.).

14. FRONTIERS 333.

15. 347 U.S. 483 (1954).

“scholarship,” for there need not be such a distinction, provided one informs his reader when he is arguing and when he is explaining.¹⁶ Rather, I think the truly challenging questions, the “frontier” questions about law and liberty, arise from events that occur at some remove from the forum in which constitutional cases are argued and are answered only by careful study of these events.

Consider the *Gideon* brief: it demolishes *Betts v. Brady*,¹⁷ the “special circumstances” counsel case which *Gideon* overruled. The brief and the paragraph of introductory material ably and perceptively inform the reader how a civil liberties lawyer goes about distinguishing, and if he cannot distinguish, discrediting, a precedent which stands squarely in the path of a new constitutional rule.¹⁸ At the conclusion of the abridged brief, there is a short paragraph summarizing the Court’s holding in *Gideon* and noting that the right to counsel has since been extended to arraignments, police stations, and line-ups.¹⁹ But the history of these developments, so quickly passed over, is central to the meaning of *Gideon*; we cannot understand *Gideon* unless we know the cases extending its rule into the police station. Moreover, we cannot comprehend the frontiers of the right to counsel issue unless we understand what lawyers discovered about criminal justice when they went to the station houses and criminal courts to represent indigents and unless we consider the practical effect of *Gideon* and its progeny upon the fairness with which criminal justice is administered. Now that a lawyer must be provided for everyone, should we not inquire whether the malaise of our criminal courts is more serious than the absence of counsel and of related procedural rights? Perhaps the malaise extends to our use of the criminal courts to sweep up society’s refuse—to incarcerate those spewn out by a system increasingly unable to deal with its social problems except by making their more violent (or, as in the case of public drunkenness, aesthetically displeasing) manifestations the subject of punishment.

Or consider school segregation, housing discrimination, and sit-ins. The documents this book contains concerning these issues are a 1963 manual for NAACP Legal Defense and Educational Fund field

16. I am, in principle, in accord with the suggestion of Justice Douglas that law review authors representing special interest groups identify themselves as such when writing in legal journals. See Douglas, *Law Reviews and Full Disclosure*, 40 *WASH. L. REV.* 227 (1965).

17. 316 U.S. 455 (1942).

18. *FRONTIERS* 193-210.

19. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Wade*, 388 U.S. 218 (1967).

workers entitled "Demonstrations: How to Protest Within the Law",²⁰ the transcript of a conference on de facto segregation whose participants were civil liberties lawyers and law professors,²¹ an American Civil Liberties Union amicus brief in a voting discrimination case,²² a 1967 paper on discrimination in private schools,²³ and a 1961 paper on antitrust law aspects of housing discrimination.²⁴ Material of this character cannot trace the frontiers of the questions it considers. In part this is because later legal developments qualify, modify and require re-evaluation of arguments in an area such as racial discrimination where demands and the manner in which they are presented are quickly changing. Thus, in the material on sit-ins, there is no mention of *Brown v. Louisiana*²⁵ and *Adderly v. Florida*²⁶; concerning de facto segregation, no mention is made of the implications of the *Hobson* case,²⁷ the recent statutory²⁸ and judicial²⁹ changes in voting law are not analyzed; and the Supreme Court's revival of a fair housing law dating back to Reconstruction is not discussed.³⁰

One ought, however, to raise questions even broader than those posed by subsequent litigation and legislation. The Court's decisions are rendered in specific historical contexts. To take an example, the holding in *Hamm v. City of Rock Hill*³¹ that the prosecution had "abated" is express recognition that historical events, here the passing of a statute, had overtaken the issues in the case before the Court could confront them. In many other ways, as well, the pressure of events outside the Court has defined and redefined the frontier problems for courts and lawyers.

The first lunch counter demonstration at Greensboro, on February 1, 1960,³² no longer looks to us as it did at the time. Today we view it through the smoke and flame of Harlem, Watts, Newark, Detroit, Washington, D.C., and scores more cities. Careful distinctions about speech and trespass, about residential patterns, and about public

20. FRONTIERS 161.

21. *Id.* 333.

22. *Id.* 317.

23. *Id.* 359.

24. *Id.* 377.

25. 383 U.S. 131 (1966).

26. 385 U.S. 39 (1966), discussed in Kipperman, *Civil Rights at Armageddon—The Supreme Court Steps Back: Adderley v. Florida*, 3 LAW IN TRANSITION Q. 219 (1966).

27. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

28. Voting Rights Act of 1965, 42 U.S.C. § 1973 (Supp. II, 1965).

29. *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). *And see* Judge Wisdom's devastating opinion in *United States v. Louisiana*, 225 F. Supp. 353 (E.D.La. 1963), *aff'd*, 380 U.S. 145 (1965).

30. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

31. 379 U.S. 306 (1964).

32. *See* KERNER COMM'N REPORT 226-28.

accommodations, seem somehow less than adequate to these events. The litigator who, after reviewing his work, can tell us only that we must bring new lawsuits in the mold of yesterday's³³ should be asked whether he really believes his solution can adequately deal not merely with demands for justice grown more insistent of late, but with a society which, as the Kerner Commission found, is permeated with "white racism."³⁴ In short, the liberties declared by the Supreme Court cannot be understood from an examination of the briefs and conferences that led to them. To some extent this is because the conclusions these materials advance do not rest upon empirical data. But apart from this we can understand the frontiers of civil liberties only by following a rule from the moment of its birth in the Supreme Court to its impact upon those for whom it was intended, thus determining how far it goes toward solving the problems to which it was addressed. We might then ask whether the problem was properly defined in the first place, or whether a different rule ought not to have been sought. We might even ask whether the problem can be solved by orthodox litigation strategies conducted within the framework of contemporary constitutional doctrine. This point is, I suggest, all the more urgent because today blacks in the cities and youths on the campuses are asking whether the legal system can accommodate just demands, whether it can even redeem the promises it makes.

Take, as an example, the 1968 disturbances at Columbia University and the Cox Commission Report.³⁵ The authors of the Report concede that Columbia was permeated with cynicism, impersonality, and arbitrariness; they admit that the institution's defects were so great that one could understand, though not condone, the acts of the students who rebelled. While the *Report* does not concede all of the students' allegations against the university, (and one would not expect it to), it does carefully document Columbia's self-proclaimed Manifest Destiny to expand into Harlem, the community be damned. It is difficult to imagine how lawsuits could be fashioned to bring the trustees and administration to account for their accumulated misdeeds. Yet the values for which the students fought at Columbia are concerned with the most fundamental issue before us today: the power of the people to control the decisions which determine the

33. FRONTIERS xxi: "[I]t may be years and even decades before persistent efforts crumble the illegal resistance and secure rights that previously were won only on paper."

34. KERNER COMM'N REPORT *passim*.

35. FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY 1968, CRISIS AT COLUMBIA (1968).

content and rhythm of their lives and to call to account the wielders of power in and out of government. If a lawyer had participated in the events at Columbia, he would perhaps have helped the students to frame their demands in the rhetoric of existing legal principles to the extent that this could have been done. To the extent it could not, he might have used his talents to define the kind of assertions about social organization which were implicit in the students' demands for change; in this role he would have been developing a counter-jurisprudence, or a jurisprudence of insurgency, elaborating justifications for conduct which is outside the law as it exists and is interpreted today. In addition, the lawyer-participant in the Columbia events would have attempted to organize an effective legal defense for the movement for change. He would not necessarily have defended the participants in court, however, for one consequence of large-scale and significant conflicts of the Columbia variety may well be that the participants will acquire a deeper understanding of the principles at stake than they will trust a lawyer to have, so that they (or some of them) will want to defend themselves at trial.

Another possible legal response in the Columbia situation is "affirmative action"—making a number of the protesters plaintiffs and placing their demands before the courts for decision. One difficulty with this tactic is that the constitutional and legal principles which can be invoked in such a suit cannot meet the students' central demands. Also, the manner of the students' protest and the breadth of their demands are often so repellant to the average judge that their lawsuit is likely to be dismissed out of hand.³⁶ Finally, should the suit survive a motion to dismiss, there is an unfortunate tendency for a lawsuit of this kind to acquire a life of its own, possibly becoming unresponsive to and independent of the goals of the movement it seeks to serve. It tends to become the center of the movement and even its purpose. In some contexts, it is wise for a lawsuit to play a central role; lawsuits for desegregating schools and public facilities were the principal organizational and political method for ending racial discrimination in the South throughout the decade after *Brown v. Board of Education*. In the context of a situation like that at Columbia, however, when a lawsuit fills this central role and then is tossed out of court by an angry district judge, the defeat is debilitating and seems more important than it probably is.

36. One can say this with some confidence in the case of Columbia, since the lawsuit was dismissed out of hand. *Crossner v. Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

I have dwelt upon Columbia because the issues which the students raised and the institution against which they rebelled were more limited in scope and thus more easily comprehended than those that are involved when the residents of our city ghettos unite to seek significant social change. But here, too, the lawyer must analyze the demands being made and attempt to redefine them in terms of the fundamental constitutional and democratic values which he can assert on behalf of clients. He can further assist those pressing demands by assessing the impact of particular tactics upon the government and its agencies and by charting the extent to which governmental institutions can accede to these demands. His roles as advisor concerning the law as it is and advocate for the law as it should be do not exhaust his capacity for useful service. The lawyer who claims a place on the frontiers must listen to the voices of the people on the streets and cast their demands as claims for justice in a jurisprudence of insurgency.

I am suggesting, really, a new style of life and work for lawyers, rooted elsewhere than in the law's traditional mythology. We must take the Bill of Rights out of never-never land. Once upon a time there was the American Revolution, and then came the Constitution and some rights by amendment to it. Then there was a Civil War, resulting in many statutes and some explicit promises of freedom, duly enshrined in constitutional amendments. The historical experience out of which the Bill of Rights and the Civil War amendments were fashioned was concrete and real to the authors of those amendments; not so to us. Instead, we rely upon dim and distant historical perspectives, and increasingly consider the rights themselves as abstract concepts and play intellectual games with them. Define, redefine, decide, distinguish, overrule, and dispute are the operative terms in this process. Is it any wonder that at two places in his *History of Western Philosophy* Bertrand Russell puts theology and law together as kindred intellectual disciplines?³⁷

While the process of abstraction has gone on, the society for which the abstractions were designed has fundamentally changed. Unfortunately, lawyers and judges know and take account of the changes in far too many cases only by virtue of their own limited sets of experiences. This state of affairs can not continue. Lawyers must understand the life-styles of those who make these insistent claims for justice. First, the lawyer must make legal and tactical decisions in

37. B. RUSSELL, *A. HISTORY OF WESTERN PHILOSOPHY* 199 (1945).

the light of events around him. More important, he must assist in the fashioning of a new jurisprudence which gives meaning, content, force, direction and coherence to the demands of the young, the poor, and the black discriminated against. As lawyers of this new generation leave the law schools to represent those who are pressing for social change and who have been virtually unrepresented until now, the experiences they share with their clients will give them insight into the principles of social order which alone will accommodate their clients' interests. Some of these principles can be advanced by lawsuits cast in the traditional mold. Some require strategies designed to influence decision makers other than courts—legislators, administrators, city officials. Others can be made into defenses in criminal cases when demands for change confront unyielding authority. Still others can be fashioned into jury speeches. There will yet remain some principles which cannot be accommodated within the system, and which await more fundamental change in our social condition and a return to the equilibrium of opinions and institutions of which Shelley spoke so eloquently.³⁸

We will learn to what extent the law can serve people's interests and where it will betray them. I do not know where this process will end, nor what discomfort we shall endure before it has run itself out. I venture only that the frontiers are not in the courtroom any longer, if indeed they ever were.

38. "The great writers of our own age are, we have reason to suppose, the companions and forerunners of some unimagined change in our social condition or the opinions which cement it. The cloud of mind is discharging its collective lightning and the equilibrium between institutions and opinions is now restoring, or about to be restored." Shelley, Preface to *Prometheus Unbound*, as quoted in G.D. THOMSON, *AESCHYLUS AND ATHENS* 344 (1st ed. 1941).

It's Academic

Ralph S. Brown, Jr.†

The Academic Revolution. By Christopher Jencks and David Riesman. Garden City: Doubleday, 1968, Pp. xvii, 580. \$10.00.

This is an important and exasperating book—important because in it two highly competent critics severely but sympathetically examine American higher education; exasperating because it is immoderately long and is a confusing mixture of hard data and avowed impressionism. It is full of remarkable insights, as we have come to expect from David Riesman, and also full of near-gossip, which we also expect, and accept sometimes with relish and sometimes with annoyance. These attributions of Riesman characteristics are not intended to slight Jencks, who, we are told, did most of the writing. Since the collaboration has been an extended one, Jencks, I take it, has come to think and write rather like Riesman. He could have far worse models.

The “Academic Revolution” that the authors are describing is something much less sensational than one’s linking of the title with current headlines would suggest. It is not about the uprisings of students, although the authors deal with this phenomenon in a calm and sensible way. Their academic revolution is simply the “rise to power of the academic profession.”¹ For those who are inclined to take it for granted that the professors have power in the academy, the term “revolution” may seem a little strident. No matter. The authors do have a transformation to report—a transformation of the eighteenth and nineteenth century college, which was sectional, sectarian, and dominated by presidents and trustees, with the former drawn largely from the clergy and the latter being first under clerical and later under business domination. None of these worthies, nor the nineteenth century faculty, were professionals in the way that Jencks and Riesman use the term. They remind us that they are adhering to

a rather special sense. Unlike many people, we do not regard an occupation as a profession simply because it requires advanced training or expert knowledge. We use the term only to describe an occupation that is relatively colleague-oriented rather than client-oriented. Professionalization in our lexicon therefore im-

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1. C. JENCKS & D. RIESMAN, *THE ACADEMIC REVOLUTION* xiii (1968).

plies a shift in values, in which the practitioner becomes less concerned with the opinion of laymen . . . and becomes more concerned with the opinion of his fellow practitioners More specifically, . . . professionalization means that the practitioners seek the exclusive right to name and judge one another's mistakes. . . . [A] profession is akin to a guild or even a club.²

This definition comes in a chapter which discusses other professions and the incorporation of their training into the academic system. But the definition is equally applicable to professors of the arts and sciences (with the interesting difference that most other professions nowadays protect themselves by a system of formal licensing, while academic people still do not, except to the extent that the Ph.D. is in effect a license to teach and to do research in higher education, although not yet an exclusive one).

The author's thesis, then, is that the academic profession has succeeded in shaping higher education in its own image. The modern university is primarily an institution for training more professionals, with the graduate school at the center, and the less academic professional schools clustering closely around that nucleus. Four-year colleges that lack graduate schools accept the "university colleges" as their dominant models. Thus, at institutions like Oberlin, Swarthmore, and Reed the vast majority of students are trained for and go on to graduate and professional schools. The modern version of liberal arts education for its own sake—general education—has its strongholds and defenders, but a commitment to general education is more likely the rationalization of an institution that can't make it as a "university college."

This enormous machine, that stamps out universities as alike as automobile bodies, has not yet, to be sure, succeeded in displacing all other models from the market. The authors devote more than half the book to description and analysis of some of the other models that co-exist, sometimes vigorously, sometimes vestigially. They consider the locally-oriented colleges (as all colleges once were) which, in the form of the two-year community college, are burgeoning madly. A new one every week is the dramatic way to put it; fifty or sixty new ones every fall is the fact—startling no matter how you say it. Besides taking care of those who seek vocational training or a part-time education, the community colleges include among their constituencies those parents in social groups not yet willing to let their children go away from

2. *Id.* 201-02 (footnotes omitted).

home, the poor, for whom subsistence away from home would make a critical difference, and, not least, politicians who have caught on to the rewards of creating a public college in every community. Then there are the women's colleges (declining), the Protestant colleges (declining), the Catholic colleges (not declining, but struggling in the coils of modernization), and, most mournfully, the Negro colleges.

The chapter on the Negro colleges was published earlier, and although it appeared in a journal that I would suppose to be no more widely read than this one, the *Harvard Educational Review*, it created a storm not unlike that which was brewed by Moynihan's "Report on The Negro Family."³ This chapter (mildly tempered in response to the winds of criticism) is typical of other descriptive parts of the book. That is, it is a mixture of empirically established conclusions and bluntly subjective judgments, of wounding put-downs, and compassionate empathy. No matter how it is phrased, it touches a sensitive nerve when, after noting less than a dozen institutions that are "near the middle of the national academic procession," Jencks and Riesman assert of the rest—"some 50 relatively large public colleges and about 60 small private ones"—that, "[b]y almost any standard these 110 colleges are academic disaster areas."⁴ The authors elaborate fully and painfully on the coerced pattern of external servility and internal autocracy of the Negro colleges, on their desperate poverty and even more desperate illusions. But they do not simply write them off. They devote many earnest pages to suggesting a mission for them. Consistent with their major thesis that American higher education is being pressed into a common mold, and that this is not always a good thing, they urge the Negro colleges to give up being "third-rate imitations of Harvard"⁵ and to strike out in new directions. But they have little expectation that this will happen when the standard academic model is so fashionable. "America's Negro colleges are the products of white supremacy and segregation," they conclude, and "[t]he malignant consequences of this vicious tradition"⁶ increase the difficulties of breaking out of it.

The general impression that emerges from these chapters on institutions that are not stamped from the "university college" model is that there is still a good deal of diversity in American higher education.

3. U.S. DEP'T OF LABOR, OFFICE OF POLICY PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

4. C. JENCKS & D. RIESMAN, *supra* note 1, at 433.

5. *Id.* 477.

6. *Id.* 479.

But it is a diversity that does not win high marks on a qualitative grading system. If small private Negro colleges are inferior, can anything more be said for the general run of small Catholic women's colleges, except that they meet a demand from certain sectors of Catholic parents who want their daughters kept virginal and devout? Still, satisfying a demand (the Negro colleges probably do not) is a measure of performance that should be seriously regarded. The varieties of higher education, largely untrammelled by monopolistic restrictions on either entry or survival, create a fairly open market. It is an imperfect market in significant respects, however, both in allocation of resources and availability of information. The economic and social consequences of these imperfections are the subjects of two meaty chapters that to a considerable extent are separate from the rest of the book.

One is on "Social Stratification and Mass Higher Education;"⁷ the other deals with "Class Interests and the 'Public-Private' Controversy."⁸ The chapter on "Social Stratification" argues painfully and at length that class structure and social mobility aren't changing much in American society, and that the extraordinary enlargement of opportunities for college education works chiefly to support the pretensions of the middle class and to provide a buffer against decline in status for the children of the upper-middle class (since they can make their way through the system even if they do not have great ability). Both groups have little trouble in meeting the costs of higher education and getting to college. While the vast increase in public institutions with low tuition makes it easier for the poor to go to college, there is still a subsistence problem. Scholarships tend to be spread wide and thin. Yet the first quintile of the children of the poor (in terms of apparent ability) now get to college somewhere. It is the second quintile, the authors assert, that could be college-educated but is not. A greater concentration of aid would improve this situation. Beyond the question of who gets to college, college education supports the status quo in a different fashion by the way it confers prestige. "Regardless of price . . . low income families send their children to poorer, less selective, less prestigious colleges . . ."⁹

If the system of higher education does not markedly enhance mobility, this, the authors point out, is not necessarily a bad thing. "A mobile, fluid society in which men move up and down is simulta-

7. *Id.* ch. 3.

8. *Id.* ch. 6.

9. *Id.* 139.

neously a competitive, insecure, and invidious society. The more we have of the one, the more we will have of the other."¹⁰ Even if colleges attract more students from the lower strata, there will still be no more room at the top. "The 'best' colleges are 'best' precisely because they are competitive and exclusive. If they got more applicants they would not expand appreciably to accommodate demand, for that would jeopardize their elite standing."¹¹

The chief difference that the authors find between public and private institutions is that some private institutions, though under increasing financial strain, continue to strive for limited enrollments and students. Against the swollen and indistinguishable public institutions ("the only small public institutions are those that cannot get more applicants"¹²), the authors urge the case for preserving the distinctiveness and standards that the leading private institutions seek to maintain. But the financial inequality between public and private, as we all know, is increasing. Pouring tax money into public institutions is a form of middle-class insurance. "Everyone pays into the kitty. Then families whose children stay in school win; families whose children drop out lose."¹³

The basic flaw of the college educational system is inequality: first, the inequality of resources available to students who, by widely accepted criteria, ought to be able to go to some college, or even go to a good college; second, inequality between types of institutions. One remedy which the authors suggest almost casually is that much more of the large subsidies to higher education should go directly to the student, to be taken back in tuition by the institutions that the students choose. This is a proposal that has growing support. It is reflected, as this review is written, by the recommendations of the Carnegie Commission on Higher Education. Such proposals are automatically opposed by spokesmen for the public institutions. The implications for control of higher education, if it is the students who decide where the money will be spent, are rather chillingly explored by Irving Kristol in a recent essay which doubtless was (and should have been) widely read, because it appeared in the *New York Times Magazine*.¹⁴ On the other hand, Jencks and Riesman, realistically assuming a mixture of institutional grants and students grants, again almost casually

10. *Id.* 148.

11. *Id.*

12. *Id.* 288.

13. *Id.* 277.

14. *N.Y. Times*, Nov. 24, 1968, § 6 (*Magazine*), at 49.

suggest that there is no "foreseeable danger that student tastes will play too large a role in determining institutional priorities."¹⁵

The readers of this *Journal* almost without exception have a concern with higher education—as alumni, as parents, as taxpayers. One who made his way through *The Academic Revolution* would emerge both bewildered and better informed. He might agree with a recent journalist's suggestion—it must have been Russell Baker's—that the thing to do is to give everyone a B.A. on graduation from high school. Then we could get rid of a lot of unwilling scholars—and perhaps wind up with an academic environment that was entirely and suffocatingly cast in the academic-professional mold. But if most readers of this *Journal* will not read *The Academic Revolution*, they will nevertheless be influenced by it. It is a book that, despite its faults, has so much substance and so many ideas (impossible to convey in a review) that we will be—we already are—absorbing them through other channels of popularization.

Equal Education?

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The Quality of Inequality: Urban and Suburban Public Schools. Edited by Charles U. Daly. Chicago: University of Chicago Press, 1968. Pp. 160. \$2.45. *Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity.* By Arthur E. Wise. Chicago: University of Chicago Press, 1968. Pp. xiv, 228. \$9.00.

The "opportunity" for education, the Supreme Court asserted in *Brown v. Board of Education*, "is a right which must be made available to all on equal terms."¹ The Court was not explicit, however, in defining the nature of the equality that the Constitution required. Clearly, classifications which deliberately distinguished on the basis of race were for that reason unconstitutional. But was racial discrimination the sole measure of equal educational opportunity? Must the state

15. C. JENCKS & D. RIESMAN, *supra* note 1, at 290.

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1. 347 U.S. 483, 493 (1954).

spend equal sums of money on each pupil? Must it provide equal resources? A different set of issues was raised by the Court's citation of studies which demonstrated the psychological damage attributable to segregation. Was the Court implying that segregation was unconstitutional not only because it was morally abhorrent but also because it adversely affected chances for educational success?² Was the Court hinting that equal educational opportunity could be attained only when every student had an equal chance at educational success regardless of race or class or family background?³ Might this not require unequal expenditures and facilities for different kinds of pupils? Resolution of these questions matters greatly, for determining what the state's obligations are will affect how much money is raised for education, and in what fashion that money is raised, as well as how the state allocates money, teachers, and students among its schools.

Many of these issues are or recently have been before the courts. The constitutionality of tracking—differentiated curricula for students of allegedly different ability—was put in doubt by Judge J. Skelly Wright's decision concerning the Washington, D.C., public schools.⁴ Parents in Wyandanch, New York, have sought to dissolve their predominantly black school district and parcel its students among the surrounding whiter and wealthier jurisdictions. In Norwalk, Connecticut, two civil rights organizations have sued a city school board, demanding that students be bussed into as well as out of the black community, to assure that neighborhood schools do not become a white-only phenomenon.⁵ Suits in several states have challenged the formulae for apportioning state aid to local school districts.⁶ These lawsuits, others like them, as

2. See the discussion in *Brown* of "a feeling of inferiority" generated by segregation, 347 U.S. 483, 494 (1954).

3. James Coleman expands upon this point in *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7, 16-22 (1968).

4. "Any system of ability grouping which . . . fails in fact to bring the majority of children into the mainstream of education denies the children excluded equal educational opportunity and thus encounters the constitutional bar." *Hobson v. Hansen*, 269 F. Supp. 401, 515 (D.D.C. 1967).

5. N.Y. Times, Nov. 16, 1967; *id.*, July 26, 1968 (Wyandanch); *Norwalk Hour*, Sept. 17-27, 1968 (Norwalk).

6. See *Board of Educ. v. Michigan*, No. 103342 (Wayne County Cir. Ct. 1968). In *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub. nom. McInnis v. Ogilvie*, 37 U.S.L.W. 3350 (Mar. 24, 1969), the District Court rejected plaintiff's contention that Illinois's formula for apportioning state aid was unconstitutional. The court upheld the "rationality" of the aid apportionment formula, denying plaintiff's contention that "need"—the criterion proposed by the plaintiffs—was the only constitutionally permissible basis upon which to apportion aid. The court rejected plaintiff's claims on the independent ground that they were "unjusticiable," because the court could not identify standards by which to test constitutionality. These difficulties arose in large part because of the way the suit was framed. Nonetheless, a California suit seeking on different grounds to overturn that state's aid apportionment formula was dismissed on the authority of *McInnis*. *Serrano v. Priest*, — Cal. App. 2d —, — Cal. Rptr. — (1969).

well as legislative proposals, whether seeking centralization or decentralization, bussing, cross-bussing, or neighborhood schools, allocation of resources based on numbers of students, or allocation of resources based on kinds of students, all seek equally effective educational opportunity for the students concerned. Yet at times these activities conflict, pushing states in different directions, and suggest the need for greater clarity in defining equal educational opportunity.

*The Quality of Inequality*⁷ represents an attempt to cope with these issues. Since the contributors include social scientists, politicians, and lawyers, the book offers promise that it will deal with the issues both in depth and breadth. More important, the book's central essay—"The Constitution and Equal Educational Opportunity," written by Arthur Wise—focuses on a novel and potentially revolutionary view of the state's constitutional obligation to provide equal educational opportunity to all students in the state.⁸ It finds that disparities among schools in the allocation of resources for local education violates the equal protection clause, and urges judicial action to overhaul existing systems for collecting and disbursing public education funds.

Wise's thesis, more fully stated in his book, *Rich Schools, Poor Schools*,⁹ is seductively simple. (1) Great disparities in educational opportunity, which he defines in terms of expenditures for education, exist among communities within a given state.¹⁰ (2) The cause of these disparities is the state's reliance on local property taxes as the chief revenue source for education, enabling a well-to-do town to support a well-equipped school with relatively little effort, while handicapping its poor neighbor's effort to raise sufficient funds to support the same kind of school. (3) According to the criteria developed by Wise, these disparities have no rational justification. The more well-off schools make no greater showing of need than the less fortunate; it costs no more to educate the students of a richer district than a poorer one. Indeed, quite the contrary is typically the case: schools in city ghettos, where the cost of running a school is greatest, have less money available than schools in the surrounding suburban towns. (4) Therefore, existing modes of

7. *THE QUALITY OF INEQUALITY: URBAN AND SUBURBAN PUBLIC SCHOOLS* (C. Daly ed. 1968) [hereinafter cited as *THE QUALITY OF INEQUALITY*], is an edited collection of papers and comments at a University of Chicago Center for Policy Study conference.

8. *THE QUALITY OF INEQUALITY* 27.

9. A. WISE, *RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* (1968) [hereinafter cited as *RICH SCHOOLS, POOR SCHOOLS*].

10. "[S]eventeen states have ratios between high and low expenditure classroom units exceeding 4 to 1; seven of these have ratios of at least 6 to 1. Twenty-five states have ratios between the 98th and 2d percentiles exceeding 2 to 1, four of these have ratios exceeding 3 to 1." *THE QUALITY OF INEQUALITY* 28.

state support for public education are constitutionally vulnerable. Wise cites a variety of equal protection decisions—notably those concerned with the poll tax, indigent criminals, and reapportionment—as judicial support for his argument.

Wise's thesis, while exciting in its potential, nonetheless raises some serious questions. One concerns his approach: is his reliance on the judiciary, rather than on the legislature, to remedy the educational inequities misplaced? Another deals with theory: what criteria of equality of educational opportunity can and should be applied? Others bear on the propriety and the feasibility of the action that Wise suggests be taken. Will an equalization of educational opportunity that apparently requires shifting resources from rich to poor communities have an adverse levelling effect, preserving (or creating) mediocrity rather than stimulating excellence, as a few well-to-do school systems assertedly do?

Philip Kurland's essay, "Equal Educational Opportunity, or the Limits of Constitutional Jurisprudence Undefined," takes up the first of these questions.¹¹ Kurland doubts the Court's ability to foster support for this new foray into social engineering, and he questions whether it has adequate means to enforce decisions requiring financial disbursements. Yet as Kurland himself notes, the Court has had considerable success in implementing its indigent criminal and reapportionment holdings. Legislators generally have not resisted reapportioning state or congressional districts or providing extensive legal armament to indigent defendants when obliged to do so by the Court. Where they have threatened resistance, the Court has had ample means available to coerce compliance, including staying elections and enjoining state tax collections and disbursements.

Kurland also questions the desirability of an "equal resources" resolution of the "equal educational opportunity" issue, describing it as "The Problem of the Wrong Problem."¹²

The real problem is either that there are too many of our school systems that are undernourished or that the desegregation problem is not subject to solution so long as local governmental units exercise autonomy over their school systems. In either case, I don't expect the solution to be found in a simple rule of equality of educational opportunity on a statewide basis.¹³

Wise, however, assumes that "equal resources" is at least one permissible measure of equality. Thus he proposes "to determine whether

11. *Id.* 47.

12. *Id.* 55.

13. *Id.* 47.

the absence of equal educational opportunity within a state, *as evidenced by unequal per-pupil expenditure*, may constitute a denial by the state of the equal protection of the laws."¹⁴ When discussing "permissible deviations" from the standard, Wise unnecessarily presumes the "deviation" to be from an "equal resource" standard of equality.¹⁵ He then proceeds to construct legal arguments to support his constitutional position.

For Wise, "legal reasoning . . . reasoning by example . . . reasoning from case to case"¹⁶ has become a license for holding-hunting and fact substitution. Thus he offers the legal syllogism: "Discrimination in education on account of race is unconstitutional. Discrimination in criminal proceedings on account of poverty is unconstitutional. Therefore, discrimination in education on account of poverty is unconstitutional."¹⁷ These premises, he states, reflect the "law of the land." Yet in fact they so oversimplify that "law" as to render any possible conclusion from them almost meaningless. Is discrimination in education on account of race always unconstitutional, or only when such discrimination (or, better, classification) represents declared state policy? Does the safeguard against discrimination in criminal proceedings always guarantee the poor man an attorney when charged with an offense, or only when charged with a serious offense? Does that safeguard assure him expert witnesses as proficient as those that more affluent defendants can afford? Does it guarantee him a lawyer as well versed in criminal practice as one he might hire on the open market? The negative answers that the courts have thus far given to all of these questions reveal a standard of equality more fragile, a view of discrimination more ambiguous, than Wise's formulations suggest.¹⁸

Wise's apparent inability to perceive the subtleties of the issues he is dealing with is evidenced not only by his simplified treatment of the

14. RICH SCHOOLS, POOR SCHOOLS 4 (emphasis added).

15. *E.g., id.* 135. Despite Wise's arguments, a court that found that present patterns of educational financing violated the equal protection clause would not necessarily adopt Wise's "equal resource" measure of equality and ignore other aspects of inequality in educational opportunity, such as differences in teaching ability of the teachers. As the Supreme Court has said elsewhere, "the constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula." *Kotch v. River Port Pilot Comm'rs*, 330 U.S. 532, 556 (1947).

16. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1948), quoted in *THE QUALITY OF INEQUALITY* 31.

17. *Id.* 32.

18. *See, e.g., Bell v. Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964) (de facto segregation); *Toledo v. Frazier*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967); *Winters v. Beck*, 239 Ark. 1151, 397 S.W.2d 364 (1965) (no constitutional right to counsel in all cases); *United States ex rel. Mathis v. Rundle*, 394 F.2d 748 (3d Cir. 1968) (competency of court-appointed counsel).

legal arguments, but also by the way he uses the language and holdings of the reapportionment cases. At one point, he lifts language from *Reynolds v. Sims*—"Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment"¹⁹—and sets it down in a hypothetical equal educational opportunity setting: "Since the achieving of fair and effective education for all citizens is the basic aim of the state's establishment of public schooling"²⁰ Yet the criteria for equality suitable to legislative apportionment differ significantly from those appropriate for public education. Apportionment concerns voting—a basic political right; no costly public good is provided. Furthermore, apportionment admits of a more readily definable and enforceable standard of equality than public education, if the constitutional standard for equality of educational opportunity is not equal expenditures per pupil for every child in the state.²¹ These differences might lead a court not to depend on analogies taken from reapportionment cases in deciding equal educational opportunity suits. Thus, the quality (literally, the essence or defining characteristics) of equality merits attention.

Furthermore, Wise's insufficient attention to the complexities of defining a measure of equality leaves him vulnerable to the argument (which Kurland makes) that "equalization" could be constitutionally required with respect to any public service.²² But courts have permitted communities to choose between different services and have permitted states to give communities unequal financial support for a particular public service; it is doubtful that all of these cases will be overturned. Wise attempts to distinguish other services from education on the ground that "state constitutions have placed the responsibility for education on the state. The same cannot be said for the other services."²³ This response is both inaccurate, for some state constitutions do vest responsibility for other public services in the state, and beside the point, for it assumes that the equal protection clause can be applied to enforce state constitutional mandates, an assumption that the Supreme Court has never shared.²⁴ Kurland's argument can

19. RICH SCHOOLS, POOR SCHOOLS 182.

20. *Id.*

21. Even in the apportionment cases, courts have developed the doctrine of "substantial equality" to uphold schemes in which there was some difference in population between districts. *See, e.g.,* Schaefer v. Thomson, 240 F. Supp. 247 (D. Wyo. 1964). The Supreme Court has made similar statements. *See, e.g.,* Roman v. Sinock, 377 U.S. 695, 710 (1964).

22. THE QUALITY OF INEQUALITY 54.

23. *Id.* 120. Wise offers a useful review of the statutory and case law which fixes the responsibility for public education on the state, RICH SCHOOLS, POOR SCHOOLS 93-118.

24. Kurland, in THE QUALITY OF INEQUALITY 54.

be met only by understanding what the common elements are that relate the seemingly disparate rights—to equal educational opportunity, to counsel for an indigent criminal defendant, to an equal vote—and that do not apply to all government activities. Wise never undertakes this task. He notes that the indigent criminal cases, such as *Griffin v. Illinois*, raise “parallel questions,”²⁵ and that the arguments made in the reapportionment cases are somehow “relevant”²⁶ to an equal educational opportunity lawsuit. Yet the nature and extent of that parallelism, the distinguishing characteristics that yield relevance, the limiting characteristics of what have been termed *fundamental* rights, all must be determined if courts are to be persuaded of the soundness of analogies drawn from such seemingly disparate cases. If the definition of equal educational opportunity is carefully developed from these cases, the courts might favorably consider the constitutional argument based on that definition. Otherwise, the courts might regard the constitutional argument as merely an egalitarian impulse, which they would be obliged to pursue with respect to *all* public services.²⁷ Without a carefully constructed definition, courts are likely to declare that equality of educational opportunity is a “thicket” too murky to penetrate.²⁸

Wise’s simplistic attempt to establish standards for allocating educational resources within a state according to a constitutional standard demonstrates the complexity inherent in defining equality of opportunity. He lists nine standards, offers no critical analysis of them, and indicates that these are supposed to be judicial guidelines: the standards range from a “negative definition—[e]quality of educational opportunity exists when a child’s educational opportunity does not depend upon either his parents’ economic circumstances or his location within the state”²⁹—to what Wise calls a “full opportunity definition . . . educational resources shall be allocated to every student until he

25. RICH SCHOOLS, POOR SCHOOLS 48.

26. *Id.* 66.

27. Several attempts at clarification have been made. See, e.g., Kirp, *The Poor, the Schools, and Equal Protection*, 38 HARV. EDUC. REV. 635, 639-42 (1968); Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First*, 60 NW. U.L. REV. 1 (1965); McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963); Harvey, *The Challenge of the Rule of Law*, 59 MICH. L. REV. 603, 608-09 (1961).

28. While Wise discounts the possibility that an equal educational opportunity suit will be dismissed as non-justiciable (RICH SCHOOLS, POOR SCHOOLS 90), the court in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1969), does in fact hold plaintiff’s claim non-justiciable, and the Supreme Court affirmed summarily. See note 6 *supra*.

29. THE QUALITY OF INEQUALITY 42 (emphasis omitted); RICH SCHOOLS, POOR SCHOOLS 146.

reaches the limits imposed by his own capabilities."³⁰ Although these standards represent possible views of equal opportunity, they are so imprecise as to provide no guidance to a court anxious to fashion a rule that is feasible to administer and likely to have beneficial educational consequences.³¹

Wise does deal with a corpus of case and statutory law that can be used to develop a more compelling constitutional objection to the way public education is presently financed. But would a reallocation of the state's education resources in accordance with such a constitutional standard lead to a measurably better education for children who are presently underschooled? Or would reshuffling resources only continue to provide what Eldridge Cleaver has termed a "Higher Uneducation"? The seminar participants, whose essays were published in *The Quality of Inequality*, ignore this issue. Wise does refer to the *Coleman Report*,³² a massive study of American schools, but he notes that its findings have not been universally accepted, and declares that he will not attempt to resolve this controversy in his paper.³³ This side step conveniently ignores the *Coleman Report's* central finding:

It appears that variations in the facilities and curriculums of the schools account for relatively little variation in pupil achievement insofar as this is measured by standard tests. . . .

The quality of teachers shows a stronger relationship to pupil achievement. . . .

[A] pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school. . . . [C]hildren from a given family background, when

30. THE QUALITY OF INEQUALITY 42 (emphasis omitted). Compare this definition with that given in the book: "every person is to be given full opportunity to develop his abilities to their limit [*sic*]." RICH SCHOOLS, POOR SCHOOLS 148.

31. The other standards that Wise develops are: (1) foundation definition—the state guarantees to spend a certain minimal amount on each student; (2) minimum attainment definition—"educational resources [are] allocated to every student until he reaches a specified level of attainment; (3) leveling definition—"resources [are] allocated in inverse proportion to students' ability [*sic*];" (4) competition definition—resources are allocated in direct proportion to each student's ability; (5) equal dollars per pupil definition; (6) maximum variance ratio definition—"educational resources [are] allocated so that the maximum discrepancy in per pupil expenditures does not exceed a specified ratio"; and (7) reasonable classification definition—the amount of support that "is regarded as a 'suitable' level of support for a student of specified characteristics is suitable for that student wherever he lives within the state." THE QUALITY OF INEQUALITY 43-44. Compare Wise's more extended discussion of these definitions in RICH SCHOOLS, POOR SCHOOLS ch. 8, at 143-59.

32. J. COLEMAN *et al.*, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

33. THE QUALITY OF INEQUALITY 42. Moreover, in his book Wise asserts: "even in the absence of a demonstrated relationship between inputs and outputs, the burden remains of defending the current variation in educational spending," RICH SCHOOLS, POOR SCHOOLS 141. But, once a rational principle for the state's exercise of its spending power is asserted, the burden to prove its irrationality shifts to those who contest state formulae, and here Coleman's data may be very relevant.

put in schools of different social composition, will achieve at quite different levels. . . .

. . . [T]he principal way in which the school environments of Negroes and whites differ is in the composition of their student bodies [and not in the quality of facilities available], and it turns out that the composition of the student bodies has a strong relationship to the achievement of Negro and other minority pupils.³⁴

In a seminar examining a proposal to change radically existing public policy towards education, some attempt should have been made to cope with the implications of the *Coleman Report* data, at least to the extent that it casts doubt on the efficacy of Wise's proposal.

Most of the contributors to *The Quality of Inequality* appear to accept Wise's thesis as the new conventional wisdom. Thus, analyses which view educational financing schemes as but one way of making schools more useful to the children who attend them are either not made or only briefly mentioned. Economist Otto Davis's thoughtful examination of the economic consequences of various changes in patterns of educational financing and control goes undiscussed in the rush to judicial judgment.³⁵ The impact of Wise's proposal on community control of schools is not examined, even though Arthur Mann's introductory essay provides a brief but incisive history of the thrust to "establish a community based on ethnic consciousness and pride, and [to] justify such a community as a good thing in itself . . ." ³⁶ Edgar Friedenberg, whose writings on education are based on schoolchildren's perceptions of their school-world (rather than upon the views of adult policy-planners),³⁷ admonishes the seminar participants that "you are middle class partisans with an ideology of your own and . . . what will be best for the changes of other people that will be best for *you* would not necessarily be best for them."³⁸ Wise rejects Friedenberg's comment and the concerns that it suggests; he views his own role more narrowly. "I began with a rather limited objective. That was to propose an attack on the current method of public school financing. We seem to be bringing the whole of the educational enterprise into the picture.

34. J. COLEMAN, *supra* note 32, at 22.

35. Davis, *Quality and Inequality: Some Economic Issues Related to the Choice of Educational Policy*, in *THE QUALITY OF INEQUALITY* 89. Davis is particularly useful in describing the structural changes that his studies of public service preferences indicate would be necessary in order to equalize resources. "At the very minimum it will be necessary to abandon local fiscal control," and to change radically the present modes of raising educational revenues. *THE QUALITY OF INEQUALITY* 98.

36. Mann, *A Historical Overview: the Lumpenproletariat, Education, and Compensatory Action*, in *THE QUALITY OF INEQUALITY* 9, 24.

37. E. FRIEDENBERG, *THE VANISHING ADOLESCENT* (1963); *COMING OF AGE IN AMERICA* (1965).

38. *THE QUALITY OF INEQUALITY* 131 (emphasis in original).

I am not sure that this is necessary.”³⁹ This limitation of the issues to be considered is regrettable. It lets Wise insist that “questions of desirability” and “values” are outside his competence.⁴⁰ Yet he clearly sets forth his values at the outset: “I was impelled in this endeavor by the *belief* that there is no justification . . . for permitting the circumstance of parental wealth and geography to determine the quality of a child’s education in the public schools of a state.”⁴¹ More importantly, the limitation prevents him from considering the political impact of his scheme. Wise is prescribing a “professional” solution to an educational problem. But in many communities there exists real doubt concerning the feasibility of any educational policy-making undertaken by professionals *for* communities, policy-making which carries with it assumptions about what is important about schooling (that children be equipped to fit into the society’s middle class) and how to measure the success or failure of schooling (through standardized verbal and arithmetical achievement tests).

There are sound reasons for bringing the kind of judicial action that Wise proposes. The threat of such a suit might prod a legislature into developing a different, and hopefully better, resource reallocation scheme.⁴² Were the suit to succeed, it is likely (given predictable political pressure) that the result would not be merely a reallocation of existing resources but an absolute increase in state educational expenditures. Furthermore, the consequences of spending more money for schools attended predominantly by poor and black children—another likely result of such a suit—would undoubtedly benefit them and their community. The *Coleman Report’s* measure of the effect of increased expenditures on education is based on a relatively narrow range of expenditures; it does not consider what would happen if the state spent two, three, or four times more for public education than it traditionally has. And increases in expenditures of these magnitudes will probably be necessary to enable the states to overcome schoolchildren’s differences in background and to move toward providing equally effective educational opportunity for all their children.

Determining what constitutes equal educational opportunity is certainly important; a successful suit for equal expenditures per child

39. *Id.* 134.

40. RICH SCHOOLS, POOR SCHOOLS 209.

41. *Id.* xi.

42. Robert McKay suggests that the *Brown* decision served a similar function in awakening Congress and the American public to “the larger problems of racial discrimination in the public schools.” McKay, *Defining the Limits*, in *THE QUALITY OF INEQUALITY* 77, 81.

would not only oblige the state to undertake a major reallocation of its education resources but, more importantly, would require major changes in administering and teaching in the schools. Unfortunately, neither *The Quality of Inequality* nor *Rich Schools, Poor Schools* provides the breadth of vision and deft analysis that the issues require.