LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

Since *Brown v. Board of Education*[1] was decided in 1954, social science research findings have continued to play a role in school desegregation litigation. The legal issue in *Brown* seemed simple: whether segregated schooling solely on the basis of race, pursuant to state laws requiring—or at least permitting—such segregation, denies minority children the equal protection of the laws[2] even though the segregated public schools are equal in terms of physical facilities, resources, and other tangible factors.[3] But efforts to implement the decision and to extend it to school segregation in the North have revealed not a single issue, but many diverse and complex underlying issues.[4] As the legal issues have become more complex, sociologists, psychologists, economists, demographers, educators, and other social scientists have been making more frequent court appearances as expert witnesses, often introducing ambiguous and contradictory research findings, making it difficult to apply such evidence to the resolution of these issues.

At some point in the early 1960s, school desegregation began to be defended or justified by scholars and others on a very narrow basis—that deseg-

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

2. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

3. 347 U.S. at 492-93.

4. Some illustrative examples of the kinds of issues which the courts confront today are the following: whether the actions of school officials that *result* in segregation in jurisdictions where, unlike the South, there were no state laws requiring segregated schooling, are in violation of the fourteenth amendment; whether the actions of other governmental agencies that result in segregation—such as the adoption of exclusionary zoning policies and the location and construction of public housing projects in certain areas and not in others—is a violation; whether segregation resulting solely from residential patterns imposes an affirmative duty upon school officials to redress the racial imbalance; whether busing to overcome racial imbalance is a valid constitutional tool and, if so, what are the limits to the use of that remedy; whether the usual equitable remedial powers of the district court are limited by the extent of the violation, even if such limits mean a pro forma decree which will have no effect on the segregated schooling of the inner cities; whether school officials, once the system has been desegregated, are responsible for the racial imbalance that occurs through natural shifts in residential patterns; whether minorities who, given a truly free choice between a segregated, community controlled school and integrated schools, may constitutionally choose the former; whether the use of otherwise educationally valid tools—such as ability grouping, tracking, special classes for the handicapped—are constitutionally permissible if the effect is segregated classrooms even though the school building is integrated.

regation would improve the achievement test scores of black students. The argument is as follows: minority segregated schools are inherently inferior (little was said about the harm to whites of attending segregated schools)[5] and as a result, minority children were being held back both educationally and economically.

If blacks were given an "equal educational opportunity"—*i.e.*, by assigning black students to a desegregated school—the achievement gap between white and black students would be eliminated as would, ultimately, the gap in educational and economic attainment between white and black adults. This "myth"—that equal educational opportunity would resolve all the social and economic ills of the nation,[6] as well as bring about racial justice—collided sharply with the social science research of the late 1960's and early 1970's, and disillusionment set in.

The *Coleman Report*,[7] published in 1966, indicated that the major factor affecting pupil performance was the home environment, and that differences in school resources explained very little of the differences in pupil performance. In the early 1970's, the writings of such academics as Arthur Jensen and Richard Herrnstein on the effect of race or class, environment, and IQ on educational outcomes[8] were widely disseminated. They concluded from their analysis of the data that the gap in IQ between blacks and whites explained most of the gap in achievement scores, and that environment played only a small role. Finally, Christopher Jencks' book on the effects of family and schooling,[9] which argued that schooling has little effect on a student's life chances, further undermined confidence that racial justice could be secured through desegregation of the schools. The simplistic faith that merely reassigning bodies to different schools would bring about equality was shattered, with a profoundly unsettling effect not only on education, but on the law.

There are a number of questions about the relationships between social science and the judicial response to school segregation for which there are now no ready answers. What are the legal issues confronting courts today, and which of these issues rely in part on, or can be illumined by, social science research? On which issues is there agreement among social scientists—and on which, disagreement—as to the research findings and the conclusions to be

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5. *See Hearings on Equality of Educational Opportunity Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess., pt. 1a, at 73 (1970); Hart v. Community School Bd., 383 F. Supp. 699, 740 (E.D.N.Y. 1974).

6. The preamble of the Elementary and Secondary Education Act of 1965, Act of Apr. 11, 1965, Pub. L. No. 89-10, 79 Stat. 27, and the Presidential message accompanying the bill when it was introduced, 1 U.S. CODE CONG. & ADM. NEWS 1448-50 (1965), clearly reflect this belief.

7. J. COLEMAN, EQUAL EDUCATIONAL OPPORTUNITY (1966).

8. *See* Jensen, *How Much Can We Boost IQ and Scholastic Achievement*, 39 HARV. ED. REV. 1 (Winter 1969); R. HERRNSTEIN, I.Q. IN THE MERITOCRACY (1973).

9. C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972).

drawn from those findings? What further research is needed before valid conclusions can be drawn? And broader, more normative questions can also be asked: what role *should* social science play in school desegregation litigation and is the adversary process the appropriate way of dealing with controversial social science issues? Since few judges or lawyers are familiar with the language and methodology of social science, a real possibility exists that substantial misinterpretation and overstatement will accompany the increasing use of social science evidence in the courts. Overgeneralizations—both in the courtroom and in the current debate over desegregation among academics and among the public at large—have been made on the basis of data from small, local studies, perhaps unique as to the circumstances in that particular community; many of these studies were also based on data collected only during the first transitional year of desegregation. It is particularly important that attorneys understand the nature of social science evidence *and its limitations*, as upon them falls the duty of making it understandable to the courts. To quote Judge J. Skelly Wright in a case involving economists as expert witnesses on behalf of both of the parties in the litigation:[10]

> [L]awyers . . . [have] a basic responsibility . . . to put the hard core statistical demonstrations into language which serious and concerned laymen could, with effort, understand.

Given the significance of the subject, it seemed especially appropriate, during the twentieth anniversary of the *Brown* decision, to bring together a number of the nation's leading social scientists and lawyers who are currently engaged in school desegregation litigation or in research on various aspects of school desegregation to explore questions such as these. Consequently, in August 1974, a Conference was convened in South Carolina, its objective being

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10. The full quotation from Judge Wright's opinion in *Hobson v. Hansen,* reads as follows:
> [T]he unfortunate if inevitable tendency has been to lose sight of the disadvantaged young students on whose behalf this suit was first brought in an overgrown garden of numbers and charts and jargon like "standard deviation of the variable," statistical "significance," and "Pearson product moment correlations." The reports by the experts—one noted economist plus assistants for each side—are less helpful than they might have been for the simple reason that they do not begin from a common data base, disagree over crucial statistical assumptions, and reach different conclusions. Having hired their respective experts, the lawyers in this case had a basic responsibility, which they have not completely met, to put the hard core statistical demonstrations into language which serious and concerned laymen could, with effort, understand. Moreover, the studies by both experts are tainted by a vice well known in the statistical trade—data shopping and scanning to reach a preconceived result; and the court has had to reject parts of both reports as unreliable because biased. Lest like a latter day version of Jarndyce v. Jarndyce this litigation itself should consume the capital of the children in whose behalf it was brought, the court has been forced back to its own common sense approach to a problem which, though admittedly complex, has certainly been made more obscure than was necessary. The conclusion I reach is based upon burden of proof, and upon straightforward moral and constitutional arithmetic.

Hobson v. Hansen, 327 F. Supp. 844, 859 (D.D.C. 1971).

the clarification of how social science research has been used—and possibly misused—in school desegregation litigation.

The Conference attempted to identify (1) what existing social science research tells us about the conditions, if any, that maximize the probability that various objectives of school desegregation can be obtained; (2) what are the current social, psychological, and educational consequences of school desegregation; and (3) which directions might future litigation and research on school desegregation take. The debate over the effects of desegregation and the use of busing as a tool to implement the command of *Brown* has tended to obscure the fact that there is substantial agreement on certain aspects regarding the educational effect of desegregation. The objective of the Conference was to highlight this agreement as well as to explore the areas of disagreement and uncertainty, and the nature—both substantive and methodological—of the research needed to respond to questions for which at present there are no adequate empirical answers.

While few of us are without our preferences with respect to the desirability of desegregation, the Conference was not intended to advocate or support any particular course of action or set of policies. Nor was the Conference to be another forum in which to debate *Brown* and footnote eleven, or even to debate whether segregation is harmful per se. Rather, given the Supreme Court's command that school districts desegregate *now*[11] and the increasing involvement of lower courts in drawing school desegregation plans, the focus was on determining the most effective way to make school desegregation work, what social science tells us in this regard, and when is it appropriate—or inappropriate—for courts to intervene in what may appear to be educational policy.

The Conference participants, listed on page 427, were selected after asking dozens of scholars and policy makers to identify the outstanding social scientists and lawyers dealing with issues related to school desegregation. Naturally, not everyone agreed on every name, but the degree of consensus that emerged was remarkable. Working sessions were devoted to the following topics: Effects of School Desegregation on Achievement and Life Chances, Effects of School Desegregation on Personality and Attitudes, Factors in Securing School Desegregation, Integration Within the School and the Classroom, Interdistrict Remedies After *Milliken v. Bradley*, and The Relevance of Social Science Research in Preparing School Desegregation Plans. Each session began with prepared presentations that had been solicited in advance, and was followed by intense and extensive discussion periods.

This symposium issue is the product of that Conference. In order to put the symposium's articles in context, Frank T. Read has traced the judicial evolution of the law of school desegregation from *Brown* to *Milliken*. Professor Read's

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11. *See* Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1970); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd., 391 U.S. 430 (1968).

article is followed by an article by Betsy Levin and Philip Moise that attempts to set out the legal issues with which courts are concerned today in dealing with school desegregation cases and the extent to which social science has been brought to bear on the resolution of these issues.

In addition to articles from lawyers and social scientists, "comments" were solicited from several of the federal judges who frequently have before them seemingly intractable school desegregation cases. J. Braxton Craven, United States Circuit Judge on the Court of Appeals for the Fourth Circuit and author of that court's opinion in *Bradley v. School Board of City of Richmond*,[12] and James B. McMillan, United States District Judge for the District Court of the Western District of North Carolina and author of the opinion in *Swann v. Charlotte-Mecklenburg Board of Education*,[13] have joined John Minor Wisdom, United States Circuit Judge on the Court of Appeals for the Fifth Circuit, in presenting their views regarding the role that social science plays in the judicial decision-making process. Judge Wisdom's article was originally presented as the keynote address marking the opening of the Conference and it sets the tone for what is to follow.

The relationship of residential segregation—and the use of a neighborhood schools policy—to school segregation is analyzed by Reynolds Farley, followed by Owen M. Fiss's exploration of the most explosive issue in school desegregation today—the use of busing to counteract the results of residential segregation, and the degree to which its social costs ought to be weighed against the constitutional injury it purports to remedy.

Social scientists frequently assert that "facts" must be separated from "value judgments," implying that social science is objective, "scientific" truth. Henry M. Levin argues that this is not true, the problem being that the researcher himself, and certainly those outside the discipline—lawyers and judges particularly—fail to see the bias inherent in his selection of what to study, the way in which he develops his hypotheses, and in his analysis of the data and inclusion or exclusion of various factors. Others, such as Elizabeth G. Cohen, reiterate this view.

Several articles attempt to answer the questions raised at the Conference about the extent to which existing social science research can identify the social, psychological, and educational consequences of desegregation. Meyer Weinberg reviews the impact of desegregation on achievement, Elizabeth Cohen on racial attitudes, and Edgar G. Epps on aspirations, self-concepts, and other aspects of personality.

Gary Orfield's article distinguishes between desegregation that comes from merely reassigning students to different schools and effective integration. He suggests that the latter is a much longer process than the courts, the federal

12. 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973).

13. 311 F. Supp. 265 (W.D.N.C.), *rev'd in part*, 431 F.2d 138 (4th Cir. 1970), *district court opinion reinstated*, 402 U.S. 1 (1971).

government, and social scientists have seemed to assume, and that its success depends on the presence of certain factors within the schools, such as the attitudes and abilities of principals and the adaptation of the curriculum to meet the needs of the changing student body. He suggests that, used creatively, the process of desegregation can lead to significant educational reforms that will have a positive effect on *all* children.

In view of the increasing political barriers to complete integration, and the fact that many blacks—particularly those in the inner cities in the North—are still waiting for *Brown*'s promise of equal educational opportunity to be fulfilled, Derrick A. Bell explores some alternatives to integration that he suggests can also bring about equal educational opportunity.

It is important to note that it is not only the extent to which social science has become intertwined with the legal issues of school desegregation that needs to be reassessed, but also the extent to which the courts—especially the federal district courts—are involved in school desegregation and even educational policy issues. Mark G. Yudof provides this reassessment of the role of courts in the context of suspension and expulsion decisions. Other such areas in which courts have become involved are tracking and ability grouping policies,[14] whether or not to "mainstream" mentally handicapped children,[15] and the provision of bilingual educational programs as part of the relief in school desegregation cases affecting Hispano-Americans.[16]

In the concluding article, Willis D. Hawley and Ray C. Rist outline the conditions that seem to affect the probability that various goals of desegregation might be attained. In the process, they highlight some of the significant questions to which further social science research should be addressed.

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The editors hope that the earnest effort to communicate within and across disciplines has resulted in a symposium that will be of interest not only to scholars of diverse disciplines but will also be a useful resource for the practitioners—the judges, attorneys, educators, legislators and other policy makers—who are currently struggling with the difficult issues involved in school desegregation.

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14. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hansen, 408 F.2d 175 (D.C. Cir. 1969).

15. *See, e.g.*, Mills v. Board of Educ., 388 F. Supp. 866 (D.D.C. 1972).

16. *See, e.g.*, Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1973), *aff'd*, 499 F.2d 1147 (10th Cir. 1974).