

SOCIAL SCIENCE AND THE DISTRICT COURT: THE OBSERVATIONS OF A JOURNEYMAN TRIAL JUDGE

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Like most trial judges, I find my research usually confined to what is needed to decide a particular question; broad-spectrum analysis of a whole field of controversy—even if there were time to pursue it—is not my forte. This brief paper will therefore reflect only the observations of one journeyman trial judge who for more than six years has lived and worked closely with some touchy school segregation problems.

What is the role of the social sciences in judicial decisions as to school segregation? It is the same as its role in other matters of general public interest; it is part of the facts and a source of enlightenment and should be considered by the court.

Social science, briefly defined, is the study of human society, the interaction of individuals in and with groups, and the welfare of people in society. Like the legal profession, social science has its own ordained high priests, often with M.A. or Ph.D. degrees. They are the experts. “Why,” it has been asked, “shouldn’t we leave issues with social implications to experts in that field?” It is a fair question. Judges are neither born nor chosen as experts in social problems. Most of us would welcome a change of venue to some never-never land of expert and happy—and popular—decisions.

The trouble is, social science experts disagree, just as stockbrokers, doctors, engineers, and lawyers do. The goals of education, for example, are today in considerable dispute; former Chicago University President Robert M. Hutchins recently remarked: “Since any free society is likely to be engaged in controversy about the kind of society it ought to be, confusion about the kind of education it ought to have seems inevitable.”¹

Somewhere, in a viable society, there must be a place of decision, where public and individual issues can be settled, and where a path can be charted through conflicting testimony and conflicting expert opinion. Americans tend to go to court for these decisions. As a result, many of us, who once thought Bacon was unique and brave when he proclaimed that he had “taken all

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1. Hutchins, *The Great Anti-School Campaign*, in *THE GREAT IDEAS TODAY* 154, 158 (1972).

knowledge to be my province,"² now sadly realize that he was just stating the everyday but unattainable duty of every trial judge!

In this land the power of government is wisely, though often vaguely, divided by our Constitution among executive, legislative, and judicial branches. Of those three branches, on a federal level, obviously the legislative branch, which appropriates over 300 billion dollars a year, and the executive, which spends that much and more, are the most powerful—and the most influenced by rankly political considerations. Though bound by the same constitutional restraints and obligations as judges, they often ignore those restraints until brought before a court where a judge has the unpleasant duty of calling those restraints to their attention.

At their worst, courts are simply a third branch of power; they are the places where day after day judges accept the dare to uphold the Constitution, and where issues of lesser moment which cannot be decided elsewhere are resolved. At their best, they are places where litigants get justice—where controversies are decided on the basis of neutral principles of public morality and law.

Courts, however, have no roving commission to seek out and right wrongs; the jurisdiction of federal courts is limited; and they, fortunately, are only authorized to decide a question after it has been presented as a "case or controversy" under a pertinent statutory or constitutional provision.

Courts have no money, no troops, no CIA, and no police force except the limited number of United States marshals. Federal courts in 1974 cost the taxpayers approximately one fourteenth of one per cent of the federal budget (before credit is taken for fines, costs, penalties and other collections by the courts).³ The other branches of government cost us almost four times as much every day as the courts do in an entire *year*! Courts tend to stay busy and to be overloaded. Federal procedure permits dispatch but invites delay. The numbers of judges and the numbers of supporting personnel are inadequate to provide fast or consistent justice. It could be said that the federal courts today are like the household gods or icons of the ancient nomads; they look good on the tent rail and they speak high moral platitudes, but we keep them in their place and restrict their power so that their less palatable orders can be "more honour'd in the breach than in the observance."⁴

How, then, is it that courts are still listened to in large affairs? It is my own conviction after twelve years of judging spread over more than a quarter of a century that courts are heard and obeyed because they provide a forum where all sides can be heard; because they try to find the truth from a study of facts

2. Bacon, *Letter to Lord Burghle, 1592*, in J. SPEDDING, *THE LETTERS AND THE LIFE OF FRANCIS BACON* 108, 109 (1890).

3. *THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974*, at 175-78 (1973).

4. W. SHAKESPEARE, *HAMLET*, I, iv, 14.

rather than debate about theory; and because they try to do right based upon fundamental principles of fairness, justice, and morality.

This, of course, states an ideal. Not all judges and writers agree with that ideal. Moreover, a trial judge and, to a much lesser extent a circuit court of appeals judge, is often bound by a controlling statute or precedent. Such statutes or precedents must themselves in time stand the test of justice and morality and usually have so stood that test. However, in many—perhaps most—judicial problems there is room to decide more than one way; and debate has raged throughout history over the true foundations of such decisions. Some of the better known theories of judicial decision are pragmatism,⁵ likelihood of success,⁶ and likelihood of future acceptance.⁷ It even has been suggested that courts as a third branch are simply wielding raw power and should admit it. Time does not permit debate with such noted scholars as Judges Craven and Wright and Professors Bickel and Wechsler on the abstract bases of judicial decisions.

Fortunately, it is not necessary to resolve that debate in order to evaluate the role of social science in judicial decision-making; these human factors in a legal problem are not the monopoly of either “conservative” or “liberal” jurists and they must be weighed by those who are attacked as judicial “activists” and by those who call themselves “strict constructionists.”

Whether motivated by principle or by pragmatism, a judge worthy of the name must reckon with facts before he decides. Neither principle nor “pragmatism” has any meaning in a vacuum. The pragmatist must know the score before his pragmatic computer can be fed. The principled jurist must know what happened before he knows what principle applies. Neither the tenth amendment nor the fourteenth amendment relates to a particular controversy except in terms of the grubby, everyday facts—the questions as to who did what to whom, and when and where; whether it was done or countenanced by government authority and, if so, which branch; who gains and who loses from it; what constitutional provision or what statute authorizes the case to come to court. Neither the most starry-eyed idealist nor the most hard-core realist can judge what is pragmatic or what is principled until he has dug out and understood the facts necessary to decide the question before him.

School segregation cases are not unique in this regard; and they are not unique in their dependence upon a great deal of principle and controversy and opinion which goes under the name of “social science.” How can an intelligent or just decision, pragmatic or principled, be made without weighing considera-

5. “. . . [E]xpediency: What is best for the nation?” Craven, *Paeon to Pragmatism*, 50 N.C.L. REV. 977, 981 (1972).

6. Kurland, *Earl Warren, the “Warren Court,” and the Warren Myths*, 67 MICH. L. REV. 353 (1968).

7. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 99 (1970). Compare Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971), with Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

tions of social science in any case involving such well known legal shibboleths as "due process," "equal protection," "public interest," "commerce," "abstention," "legitimate state interest," "cruel and unusual," "reasonable doubt," "bad faith," "political thicket," "fair trial," "free press," "free speech" or "privilege"; and who can forget the volumes of sociology, genetics, economics, and first and fourteenth amendment problems which Justice Holmes once compressed into six words: "Three generations of imbeciles are enough."⁸

Illustrations of the use of data and opinions from the social sciences abound in both recent and early school segregation decisions. *Brown v. Board of Education*⁹ may have been "bad" law when read solely against the historical facts that some framers of the Constitution owned slaves, and that segregation had been officially tolerated and enforced for sixty years since *Plessy v. Ferguson*.¹⁰ But though it may have been technically "bad" law when read purely against those precedents, it would be hard to challenge its basic message from the standpoint of strict construction of the Constitution, of equal protection of laws, of morals, of economics, of equity, fairness and justice, of the progress of society as a whole and of its individual members, and of the Judeo-Christian ethic (perhaps not unique, but ours) which professes to treat men as equal in the sight of God regardless of their condition or fortune. Those things were made the law of the land in the decision (principled or pragmatic) in *Brown*; and whether the persuasion came from Gunnar Myrdal or other sources,¹¹ the Supreme Court was talking sociology¹² which *ought* to have been law when it said: "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹³ Quoting a lower court opinion, the Supreme Court continued:¹⁴

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of [N]egro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.

8. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

9. 347 U.S. 483 (1954).

10. 163 U.S. 537 (1896).

11. The *Brown* Court noted that its finding that state-imposed racial segregation has a detrimental effect on minority children was "amply supported by modern authority"—referring in the now-famous footnote to the works of Professor Kenneth B. Clark and Dr. Gunnar Myrdal, among others. 347 U.S. at 494 n. 11. See G. MYRDAL, *AN AMERICAN DILEMMA* (1944).

12. *But see, e.g.*, Cahn, *Jurisprudence*, 30 N.Y.L. REV. 150, 159 (1955).

13. 347 U.S. at 494.

14. *Id.*

Plessy v. Ferguson itself created a segregated society by relying upon an erroneous sociological premise—that separate facilities could be equal. *Brown v. Board of Education* corrected and reversed that premise.¹⁵ In *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁶ before reaching any conclusions, the district court went to considerable pains to review thousands of pages of sociological evidence, most of it from official school board and other government files, and found as fact that segregation in Charlotte was caused and required by numerous discriminatory governmental actions.¹⁷

15. *Id.* Even before *Brown*, there were indications that the “separate but equal” principle was being undermined, at least in the area of higher education. *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950).

16. 300 F. Supp. 1358 (W.D.N.C. 1969).

17. *Id.* at 1365-66.

Charlotte (270,000-plus) sits in the center of Mecklenburg County (550 square miles, total population over 335,000). The central city may be likened to an automobile hub cap, the perimeter area to a wheel, and the county area to the rubber tire. . . . Charlotte originally grew along the Southern railroad tracks. Textile mills with mill villages, once almost entirely white, were built. Business and other industry followed the highways and the railroad. The railroad and parallel highways and business and industrial development formed something of a barrier between east and west.

By the end of World War II many Negro families lived in the center of Charlotte However, the bulk of Charlotte’s black population lived west of the railroad . . . and . . . in the northwest part of town. The high priced, almost exclusively white, country was east Charlotte thus had a very high degree of segregation of housing before the first *Brown* decision.

Among the forces which brought about these concentrations should be listed the original location of industry along and to the west of the southern railroad; the location of Johnson C. Smith University two miles west of Tryon Street; the choice of builders in the early 1900’s to go south and east instead of west for high priced dwelling construction; the effect of private action and public law on choice of dwelling sites by black and by white purchasers or renters; real estate zoning which began in 1947; and the economics of the situation which are that Negroes have earned less money and have been less able to buy or rent expensive living quarters.

Local zoning ordinances starting in 1947 generally allow more varied uses in the west than in the east. Few if any areas identified as black have a residential restriction stronger than R-6, which means that a house can be built on a lot as small as 6,000 square feet. Zoning restrictions in other areas go as high as 12,000 and 15,000 square feet per lot. . . . Many black citizens live in areas zoned industrial, which means that the zoning law places no restriction on the use of the land.

[C]oncentration of Negroes in the northwest continues. Under the urban renewal program thousands of Negroes were moved out of their shotgun houses in the center of town and have relocated in the low rent areas to the west. This relocation of course involved many ad hoc decisions by individuals and by city, county, state and federal governments. Federal agencies (which hold the strings to large federal purses) reportedly disclaim any responsibility for the direction of the migration; they reportedly say that the selection of urban renewal sites and the relocation of displaced persons are matters of decision (“freedom of choice”?) by local individuals and governments. This may be correct; the clear fact however is that the displacement occurred with heavy federal financing and with active participation by local governments, and it has further concentrated Negroes until 95% or so of the city’s Negroes live west of the Tryon—railroad area, or on its immediate eastern fringes.

Onto this migration the 1965 school zone plan with freedom of transfer was superimposed. The Board accurately predicted that black pupils would be moved out of their

It was the view of the district court at that time, and now, that no answer to the question of discrimination could be given without a serious and careful study of that information. It was indeed thought that the data summarized by the court gave a full picture of how urban segregation had come to pass and was still being maintained by the most powerful of human forces—governmental and otherwise. That such is not a unanimous view is illustrated in the Fourth Circuit decision in *Bradley v. School Board of City of Richmond*.¹⁸ Despite the fact that the district court's findings¹⁹ in that case were rather

midtown shotgun housing and that white residents would continue to move generally south and east. Schools were built to meet both groups. Black or nearly black schools resulted in the northwest and white or nearly all white schools resulted in the east and southeast. Freedom of students of both races to transfer freely to schools of their own choices has resulted in resegregation of some schools which were temporarily desegregated. The effect of closing the black inner-city schools and allowing free choices has in overall result tended to perpetuate and promote segregation.

18. 462 F.2d 1058 (4th Cir. 1972).

19. 338 F. Supp. 67, 84-92 (E.D. Va. 1972).

Not only do the existing barriers have no relation to natural obstacles or substantial governmental interests, but they are related to strict housing segregation patterns, maintained by public and private enforcement and owing their genesis in substantial part to the manner in which the three school divisions have been operated and expanded. Thus by the maintenance of existing school division lines the State advantages itself of private enforcement of discrimination and prolongs the effects of discriminatory acts of its own agents. . . . The proof here overwhelmingly establishes that the school division lines between Richmond and the counties here coincide with no natural obstacles to speak of and do in fact work to confine blacks on a consistent, wholesale basis within the city, where they reside in segregated neighborhoods. . . .

... ..

The longer term impact of the [school construction] policy has been the exaggeration of the racial disproportion between the city and the two neighboring counties. This has come about by virtue of the maintenance of school division lines as obstacles to pupil assignment for purposes of desegregation while the area's housing patterns, when its population grew, became increasingly segregated. The continued operation of the schools of each subdivision as racially identifiable facilities moreover necessarily caused each new school and old ones as well to take on the label of a black or white school.

Furthermore, not only has the manner of expansion of the community's school plant been such as to partake of the discrimination inherent in its housing patterns, but also it has played a substantial part in the development of those patterns. In addition, school officials have been abetted in the perpetuation of housing discrimination by other governmental agencies.

... ..

The interdependency of housing and school segregation is fully established by the record. Schools were planned with an eye to separate racial occupancy and opened as such, with zone and division lines imposed upon segregated housing patterns. . . . Overall, the area's population expanded, and over time black residents, with fewer options so far as housing was concerned, comprised a greater and greater proportion of the city's residents, while the area's whites occupied the suburban counties.

This was not beyond the power of school authorities in each of the areas and in the State's central offices to influence. By maintaining black schools and white schools, perceived as such, to serve particular areas, they turned such force as might have been exerted by school policies to assist in eliminating housing segregation in the opposite direction. Because the area's overall population was expanding, the consequences of the maintenance of segregated school systems were extreme.

... ..

similar to those made by the district court in *Swann v. Charlotte-Mecklenburg Board of Education*,²⁰ the Fourth Circuit said: "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of Richmond."²¹

Social science weapons are therefore legitimate; they may serve either or both views of a question; their effect depends upon which direction they can be aimed. Whether the judicial inquiry relates to the "track system";²² to the "open school" (like the three-teacher, eleven-grade school which I first attended); to problems of student discipline;²³ to the language segregation recently condemned in *Lau v. Nichols*;²⁴ or to any other of the myriad garbs in which discrimination can be clothed, social science can add valuable information and opinion to responsible judging—pragmatic, principled, or otherwise. Social science, therefore, is entitled to a respected place in the halls of justice. The study of people and their problems is a natural prerequisite of the legal decision of problems among people.

The departure of whites, as has occurred in the City, in the face of an increasing black component was predictable, but it was only possible—and only had reason to occur—when other facilities, not identifiable as black, existed within what was in practical terms, for the family seeking a new residence, the same community. . . .

In league with the defendant school administrators in perpetuating the dual school system to the extent that entire city and county school divisions have acquired the label of racial identifiability have been governmental agencies controlling the evolution of housing patterns in the area. Segregation in housing patterns [sic], once established, perpetuates itself and expands. New residents adhere to established patterns; private realtors adhere to governmentally enforced practices; and the pattern, once set, acquires an impetus of its own. The public housing policy in the area has, by action and inaction of the governmental bodies involved, contributed to school segregation. County policy has excluded low income housing entirely; in the city itself such housing has been barred when it might contribute to housing desegregation, and efforts to place it in mainly white areas in the city or the counties have been abandoned.

Federal policy to perpetuate segregated residential development and the use of racially restrictive covenants have also forced the area's housing into racially defined patterns. It is not decisive that the sources of these forces now no longer promote them; the momentum of discrimination continues.

20. 300 F. Supp. 1358 (W.D.N.C. 1969). See note 17 *supra*.

21. 462 F.2d at 1066.

22. *Lemon v. Bossier Parish School Bd.*, 444 F.2d 1400 (5th Cir. 1971); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd en banc sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

23. *Goss v. Lopez*, 419 U.S. 565 (1975). See CHILDREN'S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, INC., CHILDREN OUT OF SCHOOL IN AMERICA (1974).

24. 414 U.S. 563 (1974).