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Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*

Derrick A. Bell, Jr.[†]

In the name of equity, we . . . seek dramatic improvement in the quality of the education available to our children. Any steps to achieve desegregation must be reviewed in light of the black community's interest in improved pupil performance as the primary characteristic of educational equity. We define educational equity as the absence of discriminatory pupil placement and improved performance for all children who have been the objects of discrimination. We think it neither necessary, nor proper to endure the dislocations of desegregation without reasonable assurances that our children will instructionally profit.

Coalition of black community groups in Boston¹

* This paper is a part of a larger study on the Roles of Courts in Desegregation of Education Litigation sponsored by the Institute of Judicial Administration through a grant from the Ford Foundation. The results of this research will be published in a forthcoming book on this subject.

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1. Freedom House Institute on Schools and Education, Critique of the Boston School Committee Plan, 1975, at 2 (emphasis added) (on file with *Yale Law Journal*). This 15 page document was prepared, signed, and submitted in February, 1975, directly to federal judge W. Arthur Garrity by almost two dozen of Boston's black community leaders. The statement was a critique of a desegregation plan filed by the Boston School Committee in the Boston school case: *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Morgan v. Kerrigan*, 388 F. Supp. 581 (D. Mass.), *aff'd*, 509 F.2d 599 (1st Cir. 1975); *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, No. 75-1184 (1st Cir., Jan. 14, 1976). It was written during two all-day sessions sponsored by the Freedom House Institute, a community house in Boston's black Roxbury area. Judge Garrity had solicited comments on the School Committee's plan from community groups. Those who prepared this statement did so on behalf of the Coordinated Social Services Council, a confederation of 46 public and private agencies serving minority groups in the Boston area. The cover letter was signed by Otto and Muriel Snowden, co-directors of Freedom House, Inc. and two of the most respected leaders in the Roxbury community. They advised Judge Garrity that the statement "represents the thinking of a sizable number of knowledgeable people in the Black community, and we respectfully urge your serious consideration of the points raised." Letter from Otto and Muriel Snowden to Judge W. Arthur Garrity, Feb. 4, 1975 (on file with *Yale Law Journal*).

Plaintiffs' counsel in the Boston school case, *supra*, expressed sympathy with the black community leaders' emphasis on educational improvement, but contended that the law required giving priority to the desegregation process. Few of the group's concerns were reflected in the plaintiffs' proposed desegregation plan rejected by the court. *See Morgan v. Kerrigan*, 401 F. Supp. 216, 229 (D. Mass. 1975), *aff'd*, No. 75-1184 (1st Cir., Jan. 14, 1976). For a more detailed account of the Boston litigation, see pp. 482-83 & notes 38-40 *infra*.

The espousal of educational improvement as the appropriate goal of school desegregation efforts is out of phase with the current state of the law. Largely through the efforts of civil rights lawyers, most courts have come to construe *Brown v. Board of Education*² as mandating "equal educational opportunities" through school desegregation plans aimed at achieving racial balance, whether or not those plans will improve the education received by the children affected. To the extent that "instructional profit" accurately defines the school priorities of black parents in Boston and elsewhere, questions of professional responsibility are raised that can no longer be ignored:

How should the term "client" be defined in school desegregation cases that are litigated for decades, determine critically important constitutional rights for thousands of minority children, and usually involve major restructuring of a public school system? How should civil rights attorneys represent the often diverse interests of clients and class in school suits? Do they owe any special obligation to class members who emphasize educational quality and who probably cannot obtain counsel to advocate their divergent views? Do the political, organizational, and even philosophical complexities of school desegregation litigation justify a higher standard of professional responsibility on the part of civil rights lawyers to their clients, or more diligent oversight of the lawyer-client relationship by the bench and bar?

As is so often the case, a crisis of events motivates this long overdue inquiry. The great crusade to desegregate the public schools has faltered. There is increasing opposition to desegregation at both local and national levels (not all of which can now be simply condemned as "racist"), while the once vigorous support of federal courts is on the decline. New barriers have arisen—inflation makes the attainment of racial balance more expensive, the growth of black populations in urban areas renders it more difficult, an increasing number of social science studies question the validity of its educational assumptions.

Civil rights lawyers dismiss these new obstacles as legally irrelevant. Having achieved so much by courageous persistence, they have not waived in their determination to implement *Brown* using racial balance measures developed in the hard-fought legal battles of the last two decades. This stance involves great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys. Indeed, muffled but increasing criticism of "unconditional integration" policies by vocal minorities in black communities is not limited to Boston. Now that traditional racial balance reme-

2. 347 U.S. 483 (1954).

dies are becoming increasingly difficult to achieve or maintain, there is tardy concern that racial balance may not be the relief actually desired by the victims of segregated schools.

This article will review the development of school desegregation litigation and the unique lawyer-client relationship that has evolved out of it. It will not be the first such inquiry. During the era of "massive resistance," Southern states charged that this relationship violated professional canons of conduct. A majority of the Supreme Court rejected those challenges,³ creating in the process constitutional protection for conduct that, under other circumstances, would contravene basic precepts of professional behavior. The potential for ethical problems in these constitutionally protected lawyer-client relationships was recognized by the American Bar Association *Code of Professional Responsibility*, but it is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the attorney's ideals. The magnitude of the difficulty is more accurately gauged in a much older code that warns: "No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other."⁴

I. School Litigation: A Behind-the-Scenes View⁵

A. *The Strategy*

Although *Brown* was not a test case with a result determined in advance, the legal decisions that undermined and finally swept away the "separate but equal" doctrine of *Plessy v. Ferguson*⁶ were far from fortuitous. Their genesis can be found in the volumes of reported cases stretching back to the mid-19th century, cases in which every con-

3. This strategy was effectively defeated in one decision, *NAACP v. Button*, 371 U.S. 415 (1963). See pp. 493-502 *infra*.

4. *Luke* 16:13 (King James). At the outset, it should be made clear that the problems growing out of the lawyer-client relationship in civil rights cases are not limited to the public interest field. James Lorenz, who founded the California Rural Legal Assistance Program (CRLA), has suggested that the latitude enjoyed by public interest lawyers in determining litigation strategy is often available to private practitioners. He notes that lawyers in big firms may undertake litigation or sponsor legislation on behalf of a whole industry. See Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1123 n.87 (1970). The authors correctly point out that clients of big firms are less vulnerable to manipulation by the lawyer and that the "latitude" exercised by the private lawyer is to further his client's interest. *Id.*

5. The author was a staff attorney specializing in school desegregation cases with the NAACP Legal Defense Fund from 1960 to 1966. From 1966 to 1968 he was Deputy Director, Office For Civil Rights, U.S. Department of Health, Education and Welfare.

6. 163 U.S. 537 (1896).

ceivable aspect of segregated schools was challenged.⁷ By the early 1930's, the NAACP, with the support of a foundation grant, had organized a concerted program of legal attacks on racial segregation.⁸ In October 1934, Vice-Dean Charles H. Houston of the Howard University Law School was retained by the NAACP to direct this campaign.⁹ According to the NAACP Annual Report for 1934, "the campaign [was] a carefully planned one to secure decisions, rulings and public opinion on the broad principle instead of being devoted to merely miscellaneous cases."¹⁰ These strategies were intended to eliminate racial segregation, not merely in the public schools, but throughout the society. The public schools were chosen because they presented a far more compelling symbol of the evils of segregation and a far more vulnerable target than segregated railroad cars, restaurants, or restrooms. Initially, the NAACP's school litigation was aimed at the most blatant inequalities in facilities and teacher salaries.¹¹ The next target was the obvious inequality in higher education evidenced by the almost total absence of public graduate and professional schools for blacks in the South.¹²

Thurgood Marshall succeeded Houston in 1938 and became Director-Counsel of the NAACP Legal Defense and Educational Fund (LDF) when it became a separate entity in 1939.¹³ Jack Greenberg, who succeeded Marshall in 1961, recalled that the legal program "built precedent," treating each case in a context of jurisprudential development rather than as an isolated private law suit.¹⁴ Of course, it was not possible to plan the program with precision: "How and when plaintiffs sought relief and the often unpredictable course of litigation were frequently as influential as any blueprint in determining the

7. For a detailed list of cases attacking a wide range of inequalities involving physical facilities and equipment, richness of curriculum, and salary, number, and qualifications of teachers, see Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 430-35 (1954). See also Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 482-83 & n.27.

8. J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 34-35 (1959). For an account of the development of the NAACP's legal program, see Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 214-18 (1976).

9. J. GREENBERG, *supra* note 8, at 35. Houston's work as the early architect of test cases that led eventually to the *Brown* decision is reviewed in McNeil, *Charles Hamilton Houston*, 3 BLACK L.J. 122 (1974).

10. J. GREENBERG, *supra* note 8, at 35, quoting from 1934 NAACP ANNUAL REPORT 22.

11. See note 7 *supra*.

12. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (examined further in *Fisher v. Hurst*, 333 U.S. 147 (1948)); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950).

13. See J. GREENBERG, *supra* note 8, at 37. The NAACP continued its legal program under its General Counsel, Robert L. Carter, who was succeeded in 1969 by Nathaniel Jones, the current General Counsel.

14. *Id.* at 39.

sequence of cases, the precise issues they posed, and their outcome."¹⁵ But as lawyer-publisher Loren Miller observed of *Brown* and the four other school cases decided with it, "There was more to this carefully stage-managed selection of cases for review than meets the naked eye."¹⁶

In 1955, the Supreme Court rejected the NAACP request for a general order requiring desegregation in all school districts, issued the famous "all deliberate speed" mandate, and returned the matter to the district courts.¹⁷ It quickly became apparent that most school districts would not comply with *Brown* voluntarily. Rather, they retained counsel and determined to resist compliance as long as possible.¹⁸

15. *Id.* Mr. Greenberg recently wrote about the early school cases:

The lawyers who brought the cases had adequate financial resources and an organizational base which could produce cases which presented the issues they wanted decided, where and when they wanted them. But this was far from automatic and not subject to tight control. Applicants had to appear and desire to go to the schools in question, but this sometimes could be encouraged and, more important, unpropitious cases could be turned down. No one, other than the NAACP and the NAACP Legal Defense Fund, was then interested in or financially able to bring such suits. In essence, there was a large measure of control, a substantial ability to influence the development and sequence of cases, which does not exist with many other efforts to make law in the courts today

Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 RECORD OF N.Y.C.B.A. 320, 331 (1974).

16. L. MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 334 (1966). Miller noted:

The state cases all presented the issue of the application of the equal-protection-of-law clause of the Fourteenth Amendment, and the Court could have reached and decided that question in any one of them, but the wide geographical range gave the anticipated decision a national flavor and would blunt any claim that the South was being made a whipping boy. Moreover, the combination of cases included Kansas with its permissive statute, while other cases concerned state constitutional provisions as well as statutes with mandatory segregation requirements. Grade-school students were involved in the Kansas case; high-school students in the Virginia case, and all elementary and secondary students in the Delaware and South Carolina cases. The District of Columbia case [*Bolling v. Sharpe*, 347 U.S. 497 (1954)] drew due process of law into the cases as an issue, in distinction to the equal-protection-of-law clause, and also presented an opportunity for inquiry into the congressional power to impose racial segregation. The NAACP had touched all bases.

Id. at 345.

17. *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

18. Issues concerning the professional behavior of attorneys who assisted school boards in resisting compliance by using every imaginable dilatory tactic and spurious argument are beyond the scope of this article. A review of materials discussing the refusal of virtually all lawyers in the Deep South to represent civil rights clients until the late 1960's is found in V. COUNTRYMAN & T. FINMAN, *THE LAWYER IN MODERN SOCIETY* 579-89 (1966). See also Frankel, *The Alabama Lawyer, 1954-1964: Has the Official Organ Atrophied?*, 64 COLUM. L. REV. 1243 (1964). The failings of civil rights lawyers due to over-commitment to their ideals, with which this article is concerned, pale beside the conduct of many lawyers representing school boards and state agencies.

Former NAACP General Counsel (now Judge) Robert L. Carter, like most commentators, places responsibility for resistance to *Brown* on Southern officials. Carter, *An Evaluation of Past and Current Legal Approaches to Vindication of the Fourteenth Amendment's Guarantee of Equal Educational Opportunity*, 1972 WASH. U.L.Q. 479, 486. But of course those officials were fully represented by lawyers. A telling manifestation

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By the late 1950's, the realization by black parents and local branches of the NAACP that litigation would be required, together with the snail's pace at which most of the school cases progressed, brought about a steady growth in the size of school desegregation dockets. Because of their limited resources, the NAACP and LDF adopted the following general pattern for initiating school suits. A local attorney would respond to the request of a NAACP branch to address its members concerning their rights under the *Brown* decision. Those

of the misconduct of school board lawyers is the line of decisions that depart from the American rule denying attorneys' fees to successful litigants. In *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963), the court justified its departure from the general rule:

Here we must take into account the long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education. To put it plainly, such tactics would in any other context be instantly recognized as discreditable. The equitable remedy would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme.

Id. at 500. The *Bell* decision was followed in *Felder v. Harnett County Bd. of Educ.*, 409 F.2d 1070, 1075-76 (4th Cir. 1969) (Sobeloff, J., dissenting); *Bradley v. School Bd.*, 345 F.2d 310 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965); *Kelley v. Alzheimer*, 297 F. Supp. 753 (E.D. Ark. 1969); *Pettaway v. County School Bd.*, 230 F. Supp. 480 (E.D. Va. 1964). For a general discussion, see Note, *Awarding of Attorneys' Fees in School Desegregation Cases: Demise of the Bad-Faith Standard*, 39 BROOKLYN L. REV. 371-402 (1972).

Congress viewed these awards as sufficiently appropriate to include a provision for such awards in § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. IV 1974). The Supreme Court interpreted this provision in *Northcross v. Board of Educ.*, 412 U.S. 427 (1973), as entitling prevailing parties in school desegregation litigation to a reasonable attorney's fee as part of the cost, absent special circumstances rendering such an award unjust. The provision was given a degree of retroactivity in *Bradley v. School Bd.*, 416 U.S. 696 (1974). There the Court held that § 718 can be applied to attorneys' services that were rendered before that provision was enacted, if the propriety of the fee award was pending resolution on appeal when the statute became law. Lower courts have also interpreted the provision liberally. See *Thompson v. Madison County Bd. of Educ.*, 496 F.2d 682, 689 (5th Cir. 1974) (rejecting defenses based on employment of plaintiffs' counsel by a civil rights organization and on the fact that plaintiffs incurred no obligation for legal fees); *Henry v. Clarksdale Municipal Separate School Dist.*, 480 F.2d 583 (5th Cir. 1973); *Davis v. School Dist. of the City of Pontiac, Inc.*, 374 F. Supp. 141 (E.D. Mich. 1974). *But see Thompson v. School Bd.*, 363 F. Supp. 458, 466 (E.D. Va. 1973), *aff'd*, 498 F.2d 195 (4th Cir. 1974).

Many school board lawyers would probably defend their actions on the theory that *Brown* did not automatically become the "law of the land," and that, as one Alabama lawyer put it, "[n]o federal or state court of record in America has ever held that a decision of the Supreme Court of the United States or that of any other federal court is 'the law of the land' or 'the law of the Union.' Such decision is never anything more than the *law of the case* actually decided by the court and binding only upon the parties to the case and no others." Pittman, *The Federal Invasion of Arkansas in the Light of the Constitution*, 19 ALA. LAW. 168, 169-70 (1950), *quoted in* Frankel, *supra* at 1249. Responding to this position, Professor (now Judge) Marvin Frankel suggested that orderly processes would come to a halt if this "law of the case" theory were followed generally in other areas of the law. He took exception to the advice given Southern school officials that they should "ignore *Brown* until or unless they are specifically sued," suggesting that such advice nourished "a kind of lawlessness at all levels of society." Frankel, *supra* at 1249-50.

interested in joining a suit as named plaintiffs would sign retainers authorizing the local attorney and members of the NAACP staff to represent them in a school desegregation class action. Subsequently, depending on the facts of the case and the availability of counsel to prepare the papers, a suit would be filed. In most instances, the actual complaint was drafted or at least approved by a member of the national legal staff. With few exceptions, local attorneys were not considered expert in school desegregation litigation and served mainly as a liaison between the national staff lawyers and the local community.¹⁹

Named plaintiffs, of course, retained the right to drop out of the case at any time. They did not seek to exercise "control" over the litigation, and during the early years there was no reason for them to do so. Suits were filed, school boards resisted the suits, and civil rights attorneys tried to overcome the resistance. Obtaining compliance with *Brown* as soon as possible was the goal of both clients and attorneys. But in most cases, that goal would not be realized before the named plaintiffs had graduated or left the school system.²⁰

The civil rights lawyers would not settle for anything less than a desegregated system. While the situation did not arise in the early years, it was generally made clear to potential plaintiffs that the NAACP was not interested in settling the litigation in return for school board promises to provide better segregated schools.²¹ Black

19. Local attorneys filed papers and gathered information; they usually played a subordinate role in hearings and seldom made or even suggested major tactical decisions in the litigation. This is not to minimize the important role that local attorneys played. Without their assistance, particularly in the early days, many school desegregation cases could not have been filed. Local counsel often made the preparations for hearings and generally moved the admission, for the purposes of the case, of national staff lawyers who were not usually admitted to practice before the courts where the litigation was pending. They were on the scene to meet with the plaintiffs and members of the class, explain the progress of the case, and provide the national office staff with information and factual data. As they gained expertise, some local attorneys did much more and, in a few instances, handled every aspect of the case both at the district court level and on appeal. The latter situation was less frequent during the late 1950's and early 1960's than it is today. See Rabin, *supra* note 8, at 217 ("key factor in the recent development of the LDF has been the new role assumed by cooperating [local] attorneys").

20. For example, in *Spangler v. Pasadena City Bd. of Educ.*, 519 F.2d 430 (9th Cir.), *cert. granted*, 96 S. Ct. 355 (1975), the graduation of the named plaintiffs provided the basis of the school board's claim in the Supreme Court that the desegregation suit (which was not certified as a class action) was moot. Brief for Petitioner at 24-25.

21. I can recall a personal instance. While working on the James Meredith litigation in Jackson, Mississippi, in 1961, at a time when the very idea of school desegregation in Mississippi was dismissed as "foolishness" even by some civil rights lawyers, I was visited by a small group of parents and leaders of the black community in rural Leake County, Mississippi. They explained that they needed legal help because the school

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parents generally felt that the victory in *Brown* entitled the civil rights lawyers to determine the basis of compliance. There was no doubt that perpetuating segregated schools was unacceptable, and the civil rights lawyers' strong opposition to such schools had the full support of both the named plaintiffs and the class they represented. Charges to the contrary initiated by several Southern states were malevolent in intent and premature in time.²²

B. *The Theory*

The rights vindicated in school litigation literally did not exist prior to 1954. Despite hundreds of judicial opinions, these rights have yet to be clearly defined. This is not surprising. Desegregation efforts aimed at lunchrooms, beaches, transportation, and other public facilities were designed merely to gain access to those facilities. Any actual racial "mixing" has been essentially fortuitous; it was hardly part of the rights protected (to eat, travel, or swim on a nonracial basis). The strategy of school desegregation is much different. The actual presence of white children is said to be essential to the right in both its philo-

board had closed the black elementary school in their area even though the school had been built during the 1930's with private funds and was maintained, in part, by the efforts of the black community. Closing of the school necessitated busing black children across the county to another black school. In addition, the community had lost the benefit of the school for a meeting place and community center. The group wanted to sue the school board to have their school reopened. I recall informing the group that both LDF and NAACP had abandoned efforts to make separate schools equal, but if they wished to desegregate the whole school system, we could probably provide legal assistance. The group recognized as well as I did that there were only a few black attorneys in Mississippi who would represent the group, and that those attorneys would represent them only if a civil rights organization provided financial support. Sometime later, the group contacted me and indicated they were ready to go ahead with a school desegregation suit. It was filed in 1963, one of the first in the state.

The Leake County incident was unusual at that time because, in most instances, civil rights lawyers advised black parents of their rights under *Brown* in situations where there was little or no discussion of alternatives to integration. I did not consider my advice to the Leake County representatives anything more or less than the best and most accurate legal counsel I could provide. My view then was that a federal suit designed simply to reopen a segregated black school, even if successful, would constitute far less than the full realization of rights to which these parents were entitled under *Brown*. Following my detailed exposition of what their rights were, it was hardly surprising that the black parents did not reject them. To put it kindly, they had not been exposed to an adversary discussion on the subject.

This NAACP insistence on integration even preceded *Brown*. *Davis v. County School Board*, which reached the Supreme Court as a companion case to *Brown*, originated with a request by blacks to the NAACP for legal help following an unsuccessful year-long effort to obtain a new high school. According to one commentator, "[t]wo attorneys did come; but they explained that, in view of the new policy of the N.A.A.C.P., they could not help with litigation unless a suit was filed to abolish school segregation." Wilkerson, *The Negro School Movement in Virginia: From "Equalization" to "Integration,"* in *THE MAKING OF BLACK AMERICA* 259, 269 (A. Meier & E. Rudwick eds. 1969).

22. See p. 494 *infra*.

sophical and pragmatic dimensions. In essence the arguments are that blacks must gain access to white schools because "equal educational opportunity" means integrated schools, and because only school integration will make certain that black children will receive the same education as white children. This theory of school desegregation, however, fails to encompass the complexity of achieving equal educational opportunity for children to whom it so long has been denied.

The NAACP and the LDF, responsible for virtually all school desegregation suits, usually seek to establish a racial population at each school that (within a range of 10 to 15 percent) reflects the percentage of whites and blacks in the district. But in a growing number of the largest urban districts, the school system is predominantly black.²³ The resistance of most white parents to sending their children to a predominantly black school and the accessibility of a suburban residence or a private school to all but the poorest renders implementation of such plans extremely difficult.²⁴ Although many whites undoubtedly perceive a majority black school as ipso

23. "About half of the Nation's black students, 3.4 million, are located in the 100 largest school districts." STAFF OF SENATE SELECT COMM. ON EQUAL EDUC. OPPORTUNITY, 92D CONG., 2D SESS., REPORT: TOWARD EQUAL EDUCATIONAL OPPORTUNITY 114 (Comm. Print 1972).

More recent figures are even more depressing. It now appears that over two million black children attend schools in the nation's 20 largest urban school districts. An average of 60 percent of the school populations in these districts are minority group students, and 90 percent of them attend schools that are predominantly nonwhite. In the nation's five largest urban districts, the percentages of minority students are: New York, 66 percent; Los Angeles, 56 percent; Chicago, 71 percent; Philadelphia, 66 percent; and Detroit, 72 percent. In the next five largest districts (Houston, Baltimore, Dallas, Cleveland, and the District of Columbia), the minority school population averages 68 percent. Over 1.5 million minority children reside in these 10 districts. HEW, OFFICE FOR CIVIL RIGHTS, FALL 1972 AND FALL 1973 ELEMENTARY AND SECONDARY SCHOOL SURVEY PRESS RELEASE FORMAT REPORTS FOR 95 OF THE 100 LARGEST (1972) SCHOOL DISTRICTS (1975).

24. Whether because of school desegregation or not, there has been a sharp decline in the number of white children in many urban public school districts. While the national decline in white enrollment between 1968 and 1973 was about one percent annually, white pupil totals during the five year period fell by 62 percent in Atlanta, 41 percent in San Francisco, 32 percent in Houston, 21 percent in Denver, 40 percent in New Orleans, and 26 percent in New York. Boston lost 40 percent of its white pupils, or about 5,000 per year, from 1970 to 1975. Ravitch, *Busing: The Solution That Has Failed to Solve*, N.Y. Times, Dec. 21, 1975, § 4, at E3, col. 1.

Dr. James Coleman, the nationally known education expert whose studies furthered the school desegregation effort, see, e.g., HEW, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966), sparked an ongoing debate with a new study suggesting that school desegregation orders in large cities significantly encourage the exodus of whites from cities to suburbs. See *Integration, Yes; Busing, No* (Interview with Dr. James Coleman), N.Y. Times, Aug. 24, 1975, § 6 (Magazine), at 10. In a symposium called to evaluate Dr. Coleman's findings, one social scientist reported that although a statistical analysis of population changes in 125 school systems over a five year period revealed that a majority lost white students, there was no "significant" statistical link between the rate of desegregation and the level of immigration. Farley, *School Integration and White Flight*, in SYMPOSIUM ON SCHOOL DESEGREGATION AND WHITE FLIGHT 2 (Center for Nat'l Policy Rev., Catholic Univ. & Center for Civil Rights, Notre Dame, G. Orfield ed. Aug. 1975).

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facto a poor school, the schools can be improved and white attitudes changed.²⁵ All too little attention has been given to making black schools educationally effective. Furthermore, the disinclination of white parents to send their children to black schools has not been lessened by charges made over a long period of time by civil rights groups that black schools are educationally bankrupt and unconstitutional per se.²⁶ NAACP policies nevertheless call for maximizing racial balance within the district as an immediate goal while supporting litigation that will eventually require the consolidation of predominantly white surrounding districts.²⁷

The basic civil rights position that *Brown* requires maximum feasible desegregation has been accepted by the courts and successfully implemented in smaller school districts throughout the country.²⁸ The major resistance to further progress has occurred in the large urban areas of both South and North where racially isolated neighborhoods make school integration impossible without major commitments to

25. See, e.g., D. BELL, RACE, RACISM AND AMERICAN LAW 579-83 (1973); BLACK MANIFESTO FOR EDUCATION (J. Haskins ed. 1973); J. COMER & A. POUSSAINT, BLACK CHILD CARE 217-18 (1975); A. DAVIS, RACIAL CRISIS IN PUBLIC EDUCATION: A QUEST FOR SOCIAL ORDER (1975). Quality schooling was available in some black schools even prior to *Brown*. See, e.g., Sowell, *Black Excellence—The Case of Dunbar High School*, 35 PUB. INTEREST 3 (1974). A recent study has uncovered 71 public schools in the Northeast which are effective in teaching basic skills to poor children. Thirty-four of these schools serve student populations that are 50 percent or more black. Sixteen of the schools have black percentages greater than 75 percent. Letter from Ron Edmonds, Director, Center for Urban Studies, Harvard University Graduate School of Education, to author, Feb. 11, 1976 (on file with *Yale Law Journal*).

26. L. FEIN, THE ECOLOGY OF THE PUBLIC SCHOOLS: AN INQUIRY INTO COMMUNITY CONTROL 6 (1971):

In effect, the liberal community, both black and white, was caught up in a wrenching dilemma. The only way, it appeared, to move a sluggish nation towards massive amelioration of the Negro condition was to show how terrifyingly debilitating were the effects of discrimination and bigotry. The more lurid the detail, the more guilt it would evoke, and the more guilt, the more readiness to act. Yet the same lurid detail that did, in the event, prompt large-scale federal programs, also reinforced white convictions that Negroes were undesirable objects of interaction.

27. Significantly, LDF does not share NAACP's thirst for bringing more metropolitan school cases. James Nabrit reported that "in our litigation program at the Legal Defense Fund, at least for the short run future, we have no plans to pursue requests for interdistrict relief in the courts. I take the *Milliken* case to send us a broad signal that such cases are unlikely to succeed." CONFERENCE BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS, MILLIKEN V. BRADLEY: THE IMPLICATIONS FOR METROPOLITAN DESEGREGATION 21 (Gov't Printing Off. Nov. 9, 1974).

28. The standards are contained in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). In a companion case to *Swann*, lower courts were directed to make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971). Except where problems of distance and majority black percentages intervene, most courts continue to order plans patterned after the directives in *Swann*, *Keyes* and *Davis*. See, e.g., *United States v. School Dist.*, 521 F.2d 530, 535 n.7 (8th Cir. 1975); *Spangler v. Pasadena City Bd. of Educ.*, 519 F.2d 430 (9th Cir.), cert. granted, 96 S. Ct. 355 (1975).

the transportation of students, often over long distances. The use of the school bus is not a new phenomenon in American education,²⁹ but the transportation of students over long distances to schools where their parents do not believe they will receive a good education has predictably created strong opposition in white and even black communities.³⁰

The busing issue has served to make concrete what many parents long have sensed and what new research has suggested:³¹ court orders mandating racial balance may be (depending on the circumstances) educationally advantageous, irrelevant, or even *disadvantageous*. Nevertheless, civil rights lawyers continue to argue that black children are entitled to integrated schools without regard to the educational effect of such assignments.³² That position might well have

29. Of the more than 256,000 buses that traveled over 2.2 billion miles in 1971-1972, only a small percentage were used to achieve school desegregation. NAACP Legal Defense and Educational Fund, *It's Not the Distance, "It's the Niggers,"* in *THE GREAT SCHOOL BUS CONTROVERSY* 322 (N. Mills ed. 1973).

30. See pp. 482-86 *infra*; note 1 *supra*.

31. As one author summarized the situation, "During the past 20 years considerable racial mixing has taken place in schools, but research has produced little evidence of dramatic gains for children and some evidence of genuine stress for them." N. ST. JOHN, *SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN* 136 (1975). Some writers are more hopeful, e.g., Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 *LAW & CONTEMP. PROB.* 241 (1975); others are more cautious, e.g., Cohen, *The Effects of Desegregation on Race Relations*, 39 *LAW & CONTEMP. PROB.* 271 (1975); Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, 39 *LAW & CONTEMP. PROB.* 300 (1975).

32. NAACP General Counsel Nathaniel R. Jones cites frequent statements by Chief Justice Earl Warren to support his organization's position that "the *Brown* decision was not an educational decision resting in educational considerations. Rather, it was a decision regarding human rights." Denying that the quality of segregated schools is a major priority in NAACP school suits, he writes, "When we bring desegregation suits on behalf of black and white children, we do so because state-imposed school segregation is a living insult, in that it perpetuates that condition which the 14th Amendment proscribes." Comments of Nathaniel R. Jones at Harvard Law School, May 2, 3, 1974, at 1-2, 5 (on file with *Yale Law Journal*).

Civil Rights lawyer J. Harold Flannery, counsel in the Boston school desegregation case, asserts:

The constitutional objective is, and has always been, to rid this public institution completely of official segregation and discrimination, and comprehensively desegregated schools, i.e., each a microcosm of the district as a whole, is the central indicium of compliance—wholly without regard to educational consequences.

Letter from J. Harold Flannery to author, Aug. 25, 1975, at 4 (on file with *Yale Law Journal*). See note 38 *infra*.

Rhetoric irretrievably linking the relief under *Brown* to integration does not alter the educational decision made when racial balance remedies are advocated and obtained. Professor Alexander Bickel recognized as much:

Inevitably the Supreme Court [in *Swann* and its companion cases] imposes a choice of educational policy, for the time being at least, when it orders maximum integration, a choice committing moral, political and material resources to the exclusion of alternate attempts to improve the educational process, and I don't think we can be sure that the choice is the right one everywhere.

Bickel, *Education in a Democracy: The Legal and Practical Problems of School Busing*, 3 *HUMAN RIGHTS* 53, 54 (1973). In the same article, Professor Bickel suggested that,

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shocked many of the Justices who decided *Brown*, and hardly encourages those judges asked to undertake the destruction and resurrection of school systems in our large cities which this reading of *Brown* has come to require.

Troubled by the resistance and disruptions caused by busing over long distances, those judges have increasingly rejected such an interpretation of *Brown*. They have established new standards which limit relief across district lines³³ and which reject busing for intradistrict desegregation "when the time or distance of travel is so great as to either risk the health of children or significantly impinge on the educational process."³⁴ Litigation in the large cities has dragged on

given the paucity of alternative suggestions by either plaintiffs or school board counsel, racial balance remedies are adopted "because there is not much else that a court can do that will have an impact." *Id.* at 59-60.

Of course, the NAACP position that integration is required regardless of its educational effect allows it to ignore the social science studies pointing to disappointing minority group academic achievement in desegregated schools. See note 31 *supra*.

33. In *Milliken v. Bradley*, 418 U.S. 717, 745 (1974), the Supreme Court held (5-4) that desegregation remedies must stop at the boundary of the school district unless it can be shown that deliberately segregative actions were "a substantial cause of inter-district segregation":

Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. *Id.* at 744-45. The Court so held despite the fact that the only effective desegregation plan was a metropolitan area plan. The majority opinion, severely criticized by the dissenting Justices, has also been attacked by legal writers. See, e.g., Symposium, *Milliken v. Bradley and the Future of Urban School Desegregation*, 21 WAYNE L. REV. 751 (1975); Amaker, *Milliken v. Bradley: The Meaning of the Constitution in School Desegregation Cases*, 2 HASTINGS CON. L.Q. 349 (1975); Comment, *Milliken v. Bradley, Roadblock or Guide Post?: New Standards For Multi-District School Desegregation*, 48 TEMP. L.Q. 966 (1975).

The *Milliken* standard was followed in *United States v. Board of School Comm'rs*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). The district court deemed its interdistrict order necessary because requiring what it termed a massive "fruit basket" scrambling of schools within the city would simply lead to a white exodus from what would become substantially black schools. The court of appeals reversed all orders relating to a metropolitan remedy, but found "white flight" an unacceptable reason for failing to desegregate the city schools. *But see* *Newburg Area Council, Inc. v. Board of Educ.*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975), approving in the light of *Milliken* standards a pre-*Milliken* order requiring consolidation of city and county school districts on findings that neither had fully complied with the *Brown* desegregation mandate. After remand of the case, the Jefferson County and Louisville school districts merged under the provisions of state law. The court of appeals subsequently granted plaintiffs a writ of mandamus directing the district court to approve a desegregation plan for the newly created district to take effect for the 1975-1976 school year. *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578 (6th Cir. 1975). For similar cases, see *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del.), *aff'd*, 96 S. Ct. 381 (1975); *United States v. Missouri*, 515 F.2d 1365 (8th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3280 (U.S. 1975).

34. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 30-31 (1971). See also *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971) (requiring "every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation").

for years and often culminated in decisions that approve the continued assignment of large numbers of black children to predominantly black schools.³⁵

II. Lawyer-Client Conflicts: Sources and Rationale

A. *Civil Rights Rigidity Surveyed*

Having convinced themselves that *Brown* stands for desegregation and not education, the established civil rights organizations steadfastly refuse to recognize reverses in the school desegregation campaign—reverses which, to some extent, have been precipitated by their rigidity. They seem to be reluctant to evaluate objectively the high risks inherent in a continuation of current policies.

1. *The Boston Case*

The Boston school litigation³⁶ provides an instructive example of what, I fear, is a widespread situation. Early in 1975, I was invited by representatives of Boston's black community groups to meet with them and NAACP lawyers over plans for Phase II of Boston's desegregation effort. Implementation of the 1974 plan had met with violent resistance that received nationwide attention. Even in the lulls between the violent incidents, it is unlikely that much in the way of effective instruction was occurring at many of the schools. NAACP lawyers had retained experts whose proposals for the 1975-1976 school year would have required even more busing between black and lower class white communities. The black representatives were ambivalent about the busing plans. They did not wish to back away after years of effort to desegregate Boston's schools, but they wished to place greater emphasis on upgrading the schools' educational quality, to maintain existing assignments at schools which were already integrated, and to minimize busing to the poorest and most violent white districts. In response to a proposal filed by the Boston School Committee, they sent a lengthy statement of their position directly to District Judge W. Arthur Garrity.³⁷

35. For limitations on busing notwithstanding a substantial reduction in the potential for desegregation, see *Mapp v. Board of Educ.*, 525 F.2d 169 (6th Cir. 1975); *Northcross v. Board of Educ.*, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974); *Goss v. Board of Educ.*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); *Mapp v. Board of Educ.*, 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973); *Carr v. Montgomery County Bd. of Educ.*, 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd per curiam*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 96 S. Ct. 394 (1975).

36. *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); related decisions cited in note 1, *supra*.

37. See note 1 *supra*.

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At the meeting I attended, black representatives hoped to convince the lawyers to incorporate their educational priorities into the plaintiffs' Phase II desegregation plan. The lawyers assigned to the Boston case by the NAACP listened respectfully to the views of the black community group, but made clear that a long line of court decisions would limit the degree to which those educational priorities could be incorporated into the desegregation plan the lawyers were preparing to file.³⁸ That plan contained far more busing to balance the racial populations of the schools than was eventually approved by the federal court. Acting on the recommendations of appointed masters,³⁹ Judge Garrity adopted several provisions designed to improve the quality of the notoriously poor Boston schools.⁴⁰ But as in the Detroit and Atlanta cases discussed below, these provisions were more the product of judicial initiative than of civil rights advocacy.⁴¹

38. The court appointed a panel of four masters who held hearings on all plans submitted, adopted portions of each, and, with some additions, filed them with the court. *Morgan v. Kerrigan*, 401 F. Supp. 216, 227 (D. Mass. 1975), *aff'd*, No. 75-1184 (1st Cir., Jan. 14, 1976). At one of the masters' hearings, plaintiffs' attorney J. Harold Flannery presented a closing argument that emphasized the need to proceed immediately with full desegregation:

Educational innovation and school desegregation, I would hope, are complementary or not opposed or competing. But it seems to us an irreducible minimum that we must begin with assignments and then look to program, because that's the constitutional mandate. School desegregation, not educational innovation, that's not the Brown case. It is a race case, may it please the Court, not so much [an] education case.

Transcript of Masters' Hearings at 1809. See note 32 *supra*.

39. The plan filed by the masters, 401 F. Supp. at 227, included educational components at the expense of maximum racial balance. In their report, the masters found plaintiffs' plan "unsatisfactory" in several respects, despite its achievement of thorough numerical desegregation. In their view, "a plan should assure not just proper assignment of students, but also educational programs appropriate to the special needs of students who have been victimized by segregation." Report of the Masters in *Tallulah Morgan, Et Al, Versus John Kerrigan, Et Al*, Mar. 31, 1975, at 18 (on file with *Yale Law Journal*).

40. Dividing the system into eight community districts, the court established parent advisory councils at the citywide and community district levels and "racial-ethnic councils" at each school. Councils at the school level will participate in evaluating schools and school programs. The racial-ethnic councils, which will be composed of representatives from each racial and ethnic group, will investigate minority-group problems, propose solutions, and follow up with implementation activities. In addition, they will also work with parents, teachers, and administrators to further a sense of common purpose for improved schools. The advisory councils at the community district and citywide levels will communicate problems to the Community District Superintendents and the School Committee. The court also initiated contractual relationships between the public schools and 20 colleges and universities in the Greater Boston area to upgrade and equalize educational opportunities. Twenty businesses have been paired with schools, and 110 other institutions, members of the Metropolitan Cultural Alliance, are pledged to provide innovative and enriching programs for students. *Morgan v. Kerrigan*, 401 F. Supp. 216, 248-53, 259-60, 265-68 (D. Mass. 1975), *aff'd*, No. 75-1184 (1st Cir., Jan. 14, 1976).

41. In the course of the San Francisco school litigation, *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974), District Judge Weigel asked counsel: Assuming minority groups desire separate schools, and assuming they can show that

2. *The Detroit Case*

The determination of NAACP officials to achieve racial balance was also tested in the Detroit school case. Having failed in efforts to obtain an interdistrict metropolitan remedy in Detroit,⁴² the NAACP set out to achieve a unitary system in a school district that was over 70 percent black. The district court rejected an NAACP plan designed to require every school to reflect (within a range of 15 percent in either direction) the ratio of whites to blacks in the school district as a whole, and approved a desegregation plan that emphasized educational reform rather than racial balance.⁴³ The NAACP General Counsel, Nathaniel R. Jones, reportedly called the decision "an abomination" and "a rape of the constitutional rights of black children," and indicated his intention to appeal immediately.⁴⁴

such schools would not be inferior, should that desire, if it is manifested to this Court, be considered by the Court." Seeking to clarify his question, Judge Weigel explained, "[T]here's something new that's coming along. . . . There [is] beginning to emerge a demand on the part of large segments of minority groups, particularly among the blacks, that they run their own schools and they have black schools." D. Kirp, "Multitudes in the Valley of Indecision": The Desegregation of San Francisco's Public Schools, 1975, at 60 (unpublished paper prepared for the Institute of Judicial Administration project on judicial roles in desegregation of education litigation) (on file with *Yale Law Journal*). When a young black attorney recruited for the case by the NAACP sought to prepare a memorandum with an affirmative response to Judge Weigel's question, his colleagues on the case were shocked. Subsequently, the young attorney agreed to withdraw from the case, and his position was not asserted in any subsequent proceeding. *Id.* at 60-61.

42. See *Milliken v. Bradley*, 418 U.S. 717 (1974).

43. *Bradley v. Milliken*, 402 F. Supp. 1096 (E.D. Mich. 1975). The court pointed out that under the plaintiffs' definition,

any school whose racial composition varies more than 15% in either direction from the Detroit system-wide ratio is racially identifiable. Accordingly, an elementary school with 57.3%-87.3% black enrollment, a junior high school with 58.0%-88.0% black enrollment and a senior high school with 51.9%-81.9% black enrollment are desegregated schools. Carrying . . . [the] plan a step further, an elementary school that is 56% black is a racially identifiable white school and an elementary school that is 85% black is a desegregated non-racially identifiable school.

Id. at 1112. The court also noted that plaintiffs' plan would involve the transportation of thousands of black students from one predominantly black school to another and expressed concern that "rigid and inflexible desegregation plans too often neglect to treat school children as individuals, instead treating them as pigmented pawns to be shuffled about and counted solely to achieve an abstraction called 'racial mix.'" *Id.* at 1101. The court adopted a desegregation plan using a 50-50 enrollment as a starting point, but requiring only that no school be less than 30 percent black. *Id.* at 1133, 1135. In addition, lengthy provisions were included regarding faculty assignments, reading and communications skills, in-service training, vocational education, testing, students' rights, and responsibilities, school-community relations, counseling and career guidance, co-curricular activities, bilingual and ethnic studies, and monitoring by citizens' groups. *Id.* at 1132-45.

44. *Judge in Detroit Bars Busing Plans*, N.Y. Times, Aug. 17, 1975 at 1, col. 1; Detroit Free Press, Aug. 17, 1975, at 8A, col. 1. A local NAACP official was no less outspoken, referring to the decision as "'a traditional calamity [that] takes us back to the days of Dred Scott,'" and asserting that "[t]he NAACP will not allow this kind of travesty of justice to exist without being challenged The NAACP . . . is deeply

3. *The Atlanta Case*

Prior to Detroit, the most open confrontation between NAACP views of school integration and those of local blacks who favored plans oriented toward improving educational quality occurred in Atlanta. There, a group of plaintiffs became discouraged by the difficulty of achieving meaningful desegregation in a district which had gone from 32 percent black in 1952 to 82 percent black in 1974. Lawyers for the local NAACP branch, who had gained control of the litigation, worked out a compromise plan with the Atlanta School Board that called for full faculty and employee desegregation but for only limited pupil desegregation. In exchange, the school board promised to hire a number of blacks in top administrative positions, including a black superintendent of schools.

The federal court approved the plan.⁴⁵ The court's approval was apparently influenced by petitions favoring the plan's adoption signed by several thousand members of the plaintiffs' class.⁴⁶ Nevertheless the national NAACP office and LDF lawyers were horrified by the compromise. The NAACP ousted the Atlanta branch president who had supported the compromise.⁴⁷ Then, acting on behalf of some

angered" *Busing Foes Laud De Mascio Ruling*, *id.* at 1A, col. 7. Apparently the comments of neither official were tempered by the realization that the mayor of Detroit, Coleman Young, and the president of its school board, C. L. Golightly, both of whom are black, had favored a plan that would emphasize improving school quality. Both had opposed the NAACP's racial balance plan, and both praised the court's opinion for rejecting the idea that busing is a magic formula and for addressing itself to the improvement of Detroit's school system. *Id.* Roy Wilkins sent the mayor a telegram calling the statement "of a piece with those uttered by the most vicious Southern racists." Wentworth, *Detroit Blacks Divided*, *Wash. Post*, Sept. 2, 1973, at 1, col. 6. For a detailed review of decentralization and desegregation efforts in Detroit, see Pindur, *Professional Comment: Legislative and Judicial Roles in the Detroit School Decentralization Controversy*, 50 J. URB. L. 53 (1972).

45. *Calhoun v. Cook*, 362 F. Supp. 1249 (N.D. Ga. 1973). The plan included provisions that there would not be less than 20 percent blacks in already integrated "stabilized" schools nor less than 30 percent in other schools. The district court found the plan reasonable "considering the small percentage of white children (21%) now remaining in the system . . ." *Id.* at 1251 & n.7.

46. *See id.* at 1251 n.5.

47. Trillin, *U.S. Journal: Atlanta Settlement*, *NEW YORKER*, Mar. 17, 1973, at 101, 102. In an article attacking the Atlanta compromise, Dr. Buell G. Gallagher, Vice Chairman of the NAACP National Board of Directors, expressed the general view that any compromise with segregation would be a disaster.

Of one thing we may be sure: the system of racial caste will never be weakened or eradicated by blacks who cooperate with it. Every instance of the acceptance of segregation, whether voluntary or coerced, forges the chains of inequality more firmly. Segregation will not be eradicated by those who abandon integration as a goal, no matter what tortuous logic or euphemistic language may be used to rationalize the expedient compromise.

Gallagher, *Integrated Schools in the Black Cities?*, 42 J. NEGRO EDUC. 336, 348 (1973).

The NAACP also opposed the more recent compromise settlement of the St. Louis

local blacks who shared their views, LDF lawyers filed an appeal in the Atlanta case. The appeal also raised a number of procedural issues concerning the lack of notice and the refusal of the district court to grant hearings on the Compromise Plan. These issues gave the Fifth Circuit an opportunity to remand the case to the district court without reaching the merits of the settlement agreement.⁴⁸ Undaunted, LDF lawyers again attacked the plan for failing to require busing of whites into the predominantly black schools in which a majority of the students in the system were enrolled. But the district court's finding that the system had achieved unitary status was upheld by the same Fifth Circuit panel.⁴⁹

As in Detroit, NAACP opposition to the Atlanta Compromise Plan was not deterred by the fact that local leaders, including black school board members, supported the settlement. Defending the Compromise Plan, Dr. Benjamin E. Mays, one of the most respected black educators in the country, stated:

We have never argued that the Atlanta Compromise Plan is the best plan, nor have we encouraged any other school system to adopt it. This plan is the most viable plan for Atlanta—a city school system that is 82 percent Black and 18 percent white and is continuing to lose whites each year to five counties that are more than 90 percent white.

....

More importantly, Black people must not resign themselves to the pessimistic view that a non-integrated school cannot provide Black children with an excellent educational setting. Instead,

school litigation. The consent order, as in Atlanta, focuses on minimal percentages of teachers and staff positions. *Liddell v. Board of Educ.*, No. 72-C-100(1) (E.D. Mo., Dec. 24, 1975) (consent order). The order commits the board to reducing racial separation in the high schools, establishing magnet schools at the elementary level and specialized schools at the high school level, and undertaking a study of curriculum improvements. Following issuance of the consent judgment, the NAACP sought to intervene, but the motion was denied.

48. *Calhoun v. Cook*, 487 F.2d 680 (5th Cir. 1973). See note 130 *infra*. Significantly, the court permitted the Compromise Plan to take effect pending further hearings. *Id.* at 683-84. The Fifth Circuit noted that blacks occupied a majority of school board posts, two-thirds of the school administration and staff posts, and over 60 percent of the faculty positions. In addition, "the numerous nonappealing black plaintiffs who agreed to and support the present plan attest the district's lack of discrimination against black students as well as its freedom from the effects of past race-based practices." *Id.* at 719.

49. *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975). In a *per curiam* opinion denying appellant's petition for rehearing and petitions for rehearing en banc, the court denied that their decision conflicted with earlier Fifth Circuit decisions and Supreme Court rulings requiring every effort to achieve the greatest possible degree of actual desegregation. "It would blink reality and authority . . . to hold the Atlanta School System to be nonunitary because further racial integration is theoretically possible and we expressly decline to do so." *Calhoun v. Cook*, 525 F.2d 1203 (5th Cir. 1975).

Black people, while working to implement *Brown*, should recognize that integration alone does not provide a quality education, and that much of the substance of quality education can be provided to Black children in the interim.⁵⁰

B. *Alternatives to the Rigidity of Racial Balance*

Dr. May's thoughtful statement belies the claim that *Brown* can be implemented only by the immediate racial balancing of school populations. But civil rights groups refuse to recognize what courts in Boston, Detroit, and Atlanta have now made obvious: where racial balance is not feasible because of population concentrations, political boundaries, or even educational considerations, there is adequate legal precedent for court-ordered remedies that emphasize educational improvement rather than racial balance.⁵¹

The plans adopted in these cases were formulated without the support and often over the objection of the NAACP and other civil rights groups. They are intended to upgrade educational quality, and like racial balance, they may have that effect. But neither the NAACP nor the court-fashioned remedies are sufficiently directed at the real evil of pre-*Brown* public schools: the state-supported subordination of blacks in every aspect of the educational process. Racial separation is only the most obvious manifestation of this subordination. Providing unequal and inadequate school resources and excluding black parents

50. Mays, *Comment: Atlanta—Living with Brown Twenty Years Later*, 3 BLACK L.J. 184, 190, 191-92 (1974). For similar views, see Hamilton, *The Nationalist vs. the Integrationist*, in THE GREAT SCHOOL BUS CONTROVERSY 297 (N. Mills ed. 1973); Haskins, *A Black Perspective on Community Control*, INEQUALITY IN EDUC., Nov. 1973, at 23; Sizemore, *Is There A Case For Separate Schools*, 53 PHI DELTA KAPPAN 281 (1972); Sizemore, *Education for Liberation*, 81 SCHOOL REV. 389 (1973); Young & Bress, *A New Educational Decision: Is Detroit the End of the School Bus Line?*, 56 PHI DELTA KAPPAN 515 (1975).

51. Despite emphasis of plaintiffs' counsel on racial balance, the court in the Boston and Detroit cases approved plans that contained several education-oriented provisions. See notes 40, 43 *supra*. For a similar case, see *Hart v. Community School Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975) (approving use of predominantly minority junior high as a "magnet" school rather than requiring racial balance in all junior high schools as sought by plaintiffs).

It is true that the Supreme Court has evidenced considerable resistance to requests that "educational quality" be brought within the guarantees of the Constitution. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). And predictably, some lower courts interpret *Rodriguez* as a bar to ordering school districts to adopt specific educational plans as a remedy for unconstitutional segregation. See *Keyes v. School Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3399 (U.S. 1976) (holding district court lacked authority to impose a detailed program of bilingual and multicultural education). But in *Keyes* the court agreed that the board was obligated to help "Hispano school children to reach the proficiency in English necessary to learn other basic subjects." 521 F.2d at 482. Moreover, were the Denver court not already committed to a major desegregation effort on the racial balance model, it might have been more willing to impose education-oriented remedies.

from meaningful participation in school policymaking are at least as damaging to black children as enforced separation.

Whether based on racial balance precedents or compensatory education theories, remedies that fail to attack all policies of racial subordination almost guarantee that the basic evil of segregated schools will survive and flourish, even in those systems where racially balanced schools can be achieved. Low academic performance and large numbers of disciplinary and expulsion cases are only two of the predictable outcomes in integrated schools where the racial subordination of blacks is reasserted in, if anything, a more damaging form.⁵²

The literature in both law and education discusses the merits and availability of educational remedies in detail.⁵³ The purpose here has been simply to illustrate that alternative approaches to "equal educational opportunity" are possible and have been inadequately explored by civil rights attorneys. Although some of the remedies fashioned by the courts themselves have been responsive to the problem of racial subordination, plaintiffs and courts seeking to implement such remedies are not assisted by counsel representing plaintiff classes. Much more effective remedies for racial subordination in the schools could be obtained if the creative energies of the civil rights litigation groups could be brought into line with the needs and desires of their clients.

C. *The Organization and Its Ideals*

Civil rights lawyers have long experience, unquestioned commitment, and the ability to organize programs that have helped bring about profound changes in the last two decades. Why, one might ask, have they been so unwilling to recognize the increasing futility of "total desegregation," and, more important, the increasing number of defections within the black community? A few major factors that underlie this unwillingness can be identified.

52. See generally *Hawkins v. Coleman*, 376 F. Supp. 1330 (N.D. Tex. 1974) (disproportionately high discipline and suspension rates for black students in the Dallas school system found to be the results of "white institutional racism"). During the 1972-1973 school year, black students were suspended at more than twice the rate of any other racial or ethnic group. CHILDREN'S DEFENSE FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 12 (1975). The report suggests the figure is due in large part to the result of racial discrimination, insensitivity, and ignorance as well as to "a pervasive intolerance by school officials for all students who are different in any number of ways." *Id.* at 9. See also Green, *Separate and Unequal Again*, INEQUALITY IN EDUC., July 1973, at 14.

53. For a collection of sources, see Bell, *Waiting on the Promise of Brown*, 39 LAW & CONTEMP. PROB. 341, 352-66 & nn.49-119 (1975).

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1. *Racial Balance as a Symbol*

For many civil rights workers, success in obtaining racially balanced schools seems to have become a symbol of the nation's commitment to equal opportunity—not only in education, but in housing, employment, and other fields where the effects of racial discrimination are still present. As Dean Ernest Campbell has observed, “[T]he busing issue has acquired meanings that seem to have little relevance for the education of children in any direct sense.”⁵⁴ In his view, proponents of racial balance fear that the failure to establish busing as a major tool for desegregation will signify the end of an era of expanding civil rights. For them the busing debate symbolizes a major test of the country's continued commitment to civil rights progress. Any retreat on busing will be construed as an abandonment of this commitment and a return to segregation. Indeed, Dr. Campbell has suggested that some leaders see busing as a major test of black political strength. Under a kind of domestic domino theory, these leaders fear that failure on the busing issue would trigger a string of defeats, ending a long line of “major judicial and administrative decisions that substantially expanded the civil rights and personal opportunities of blacks in the post-World War II period.”⁵⁵

2. *Clients and Contributors*

The hard-line position of established civil rights groups on school desegregation is explained in part by pragmatic considerations. These organizations are supported by middle class blacks and whites who believe fervently in integration. At their socioeconomic level, integration has worked well, and they are certain that once whites and blacks at lower economic levels are successfully mixed in the schools, integration also will work well at those levels. Many of these supporters either reject or fail to understand suggestions that alternatives to integrated schools should be considered, particularly in majority-black districts. They will be understandably reluctant to provide financial

54. Campbell, *Defining and Attaining Equal Educational Opportunity in a Pluralistic Society*, 26 VAND. L. REV. 461, 478 (1973).

55. *Id.* The author also suggests that busing serves as a symbolic safeguard against white duplicity. Although some may argue that the “separate but equal” standard was impossible to realize only because of black political impotence, and that the current existence and continued growth of black political power means that segregation today need not, and would not, result in resource inequality, the suspicion remains that somehow the whites will connive to bring extra educational benefits and resources to white children. Busing, then, symbolizes the opportunity for blacks to discover what it is that whites have in their schools and to share fully in it—whatever “it” is.

Id. at 479.

support for policies which they think unsound, possibly illegal, and certainly disquieting. The rise and decline of the Congress of Racial Equality (CORE) provides a stark reminder of the fate of civil rights organizations relying on white support while espousing black self-reliance.⁵⁶

Jack Greenberg, LDF Director-Counsel, acknowledges that fund-raising concerns may play a small role in the selection of cases. Even though civil rights lawyers often obtain the clients, Greenberg reports, "there may be financial contributors to reckon with who may ask that certain cases be brought and others not."⁵⁷ He hastens to add that within broad limits lawyers "seem to be free to pursue their own ideas of right, . . . affected little or not at all by contributors."⁵⁸ The reassurance is double-edged. The lawyers' freedom to pursue their own ideas of right may pose no problems as long as both clients and contributors share a common social outlook. But when the views of some or all of the clients change, a delayed recognition and response by the lawyers is predictable.⁵⁹

School expert Ron Edmonds contends that civil rights attorneys often do not represent their clients' best interests in desegregation litigation because "they answer to a miniscule constituency while serving a massive clientele."⁶⁰ Edmonds distinguishes the clients of civil rights

56. See A. MEIER & E. RUDWICK, *CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942-1968* (1973).

57. Greenberg, *supra* note 15, at 349.

58. *Id.*

59. Professor Leroy Clark, a former LDF lawyer, is more critical than his former boss about the role of financial contributors in setting civil rights policy:

[T]here are two "clients" the civil rights lawyer must satisfy: (1) the immediate litigants (usually black), and (2) those liberals (usually white) who make financial contributions. An apt criticism of the traditional civil rights lawyer is that too often the litigation undertaken was modulated by that which was "salable" to the paying clientele who, in the radical view, had interests threatened by true social change. Attorneys may not make conscious decisions to refuse specific litigation because it is too "controversial" and hard to translate to the public, but no organization dependent on a large number of contributors can ignore the fact that the "appeal" of the program affects fund-raising. Some of the pressure to have a "winning" record may come from the need to show contributors that their money is accomplishing something socially valuable.

Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?* 19 KAN. L. REV. 459, 469 (1971).

The litigation decisions made under the pressure of so many nonlegal considerations are not always unanimous. A few years ago, LDF decided not to represent the militant black communist, Angela Davis. LDF officials justified their refusal on grounds that the criminal charges brought against Davis did not present "civil rights" issues. The decision, viewed by staff lawyers as an unconscionable surrender to conservative contributors, caused a serious split in LDF ranks. A few lawyers resigned because of the dispute, and others remained disaffected for a long period.

60. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 178 (1974). Edmonds is Director of the Center for Urban Studies, Harvard Graduate School of Education.

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attorneys (the persons on whose behalf suit is filed) from their "constituents" (those to whom the attorney must answer for his actions).⁶¹ He suggests that in class action school desegregation cases the mass of lower class black parents and children are merely clients. To define constituents, Edmonds asks, "[To] what class of Americans does the civil rights attorney feel he must answer for his professional conduct?"⁶² The answer can be determined by identifying those with whom the civil rights attorney confers as he defines the goals of the litigation. He concludes that those who currently have access to the civil rights attorney are whites and middle class blacks who advocate integration and categorically oppose majority black schools.

Edmonds suggests that, more than other professionals, the civil rights attorney labors in a closed setting isolated from most of his clients. No matter how numerous, the attorney's clients cannot become constituents unless they have access to him before or during the legal process. The result is the pursuit of metropolitan desegregation without sufficient regard for the probable instructional consequences for black children. In sum, he charges, "A class action suit serving only those who pay the attorney fee has the effect of permitting the fee paying minority to impose its will on the majority of the class on whose behalf suit is presumably brought."⁶³

61. *Id.*

62. *Id.* at 179.

63. *Id.* Poverty law lawyers have recognized a similar problem. As one group of student commentators have put it:

Many public interest lawyers, while representing specific clients in most of their legal work, see themselves as advocates for a much more loosely defined constituency or community. The lawyer's relationship to that constituency affects his independence in handling specific cases and, more importantly, in setting priorities as to the matters he will handle.

... Where the named plaintiffs in a class action control the law suit, there may be a tension between their desires and the interest of the larger class. It is often true, however, that the named plaintiffs are nominal only. Even so, this does not mean that the "larger class" controls the legal action. The lawyer's relationship to the class on whose behalf he brings the suit is likely to be extremely limited. In class actions, of course, courts are charged with determining whether the class is adequately represented, but it is important to realize the extent to which the lawyer is independent of the "class" client in determining the positions he takes. Comment, *supra* note 4, at 1124-25. Another commentator writes:

By definition, the public interest law firm begins with a concept of the public interest and fashions its clients around that. This reverses the traditional process where attorneys begin with clients and then fashion a concept of the public interest to correspond to the interests of their clients.

Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 811 (1971). Edgar and Jean Cahn, two of the most respected experts in the field of law reform, also have voiced their concern about the lack of accountability to clients and the willingness of too many lawyers to operate without consulting the client because the lawyer "knows best." Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1042 (1970).

It goes without saying that civil rights lawyers take the strongest exception to Edmonds's position. NAACP General Counsel Nathaniel Jones denies that school suits are brought only at the behest of middle class blacks, and points out what he considers to be the absurdity of attempting to poll the views of every black before a school desegregation suit is filed. But at the same time he states that his responsibility is to square NAACP litigation with his interpretation of what Supreme Court decisions require.⁶⁴

3. *Client-Counsel Merger*

The position of the established civil rights groups obviates any need to determine whether a continued policy of maximum racial balance conforms with the wishes of even a minority of the class. This position represents an extraordinary view of the lawyer's role. Not only does it assume a perpetual retainer authorizing a lifelong effort to obtain racially balanced schools. It also fails to reflect any significant change in representational policy from a decade ago, when virtually all blacks assumed that integration was the best means of achieving a quality education for black children, to the present time, when many black parents are disenchanted with the educational results of integration. Again, Mr. Jones would differ sharply with my evaluation of black parents' educational priorities, but his statement indicates

64. Letter from Nathaniel R. Jones to author, July 31, 1975:

It would be absurd to expect that each and every black person should be polled before a lawsuit is filed, or a plan of desegregation is proposed. Certainly, school boards, who resist these suits, do not poll their patrons on their views before shaping a position.

The responsibility I, as chief litigation officer of the NAACP have, is to insure that each plan the NAACP submits to a court, or any plan upon which a court is expected to act, and the overall legal theory relied upon must square with the legal standards pronounced by the Supreme Court as necessary to effectively vindicate constitutional rights, and bring into being a unitary system.

It seems to us that the Edmonds thesis could have the effect of trading off constitutional rights in favor of expedient, short term objectives that would result in perpetuating the evil proscribed by law. This constitutes a form of plea bargaining by school systems caught with their hands in the constitutional cookie jar of black children.

Racism, which we have demonstrated in the school cases, from Little Rock to Boston, to be the basic cause of segregation of pupils, is systematic in nature. It poisons the well, so to speak, thus affecting housing, jobs and other areas in which blacks must function. The only effective way of uprooting it is to pull it out systematically and fundamentally. This is not easy nor is it painless. But we have never found the fight against racism to be so.

Jones presented views similar to those contained in his letter at a May, 1974, Harvard Law School symposium featuring the Edmonds view. He emphasized that potential clients requested that school desegregation suits be filed on their behalf. Co-panelists responding to Edmonds with Jones were LDF President Julius Chambers and Jack Greenberg, LDF Director-Counsel. Both were sharply critical of Edmonds' position, but declined invitations to amplify their views for inclusion in this article.

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that it would make no difference if I were correct. The Supreme Court has spoken in response to issues raised in litigation begun and diligently pursued by his agency. The interpretation of the Court's response by him and other officials has then determined NAACP litigation policies.⁶⁵

This malady may afflict many idealistic lawyers who seek, through the class action device, to bring about judicial intervention affecting large segments of the community. The class action provides the vehicle for bringing about a major advance toward an idealistic goal. At the same time, prosecuting and winning the big case provides strong reinforcement of the attorney's sense of his or her abilities and professionalism. Dr. Andrew Watson has suggested that "[c]lass actions . . . have the capacity to provide large sources of narcissistic gratification and this may be one of the reasons why they are such a popular form of litigation in legal aid and poverty law clinics."⁶⁶ The psychological motivations which influence the lawyer in taking on "a fiercer dragon"⁶⁷ through the class action may also underlie the tendency to direct the suit toward the goals of the lawyer rather than the client.

III. Civil Rights Litigation and the Regulation of Professional Ethics

A. NAACP v. Button

The questions of legal ethics raised by the lawyer-client relationship in civil rights litigation are not new. The Supreme Court's 1963 treatment of these questions in *NAACP v. Button*,⁶⁸ however, needs to be examined in light of the emergence of lawyer-client conflicts which

65. A bizarre illustration of the lengths to which this reasoning can take the lawyer motivated by his own ideals is presented in a recent (and perhaps final) chapter of the East Baton Rouge school case, which was originally filed in 1956. See *Davis v. East Baton Rouge Parish School Bd.*, 398 F. Supp. 1013 (M.D. La. 1975). A motion for "supplemental relief" was filed by an attorney without authorization by any plaintiff. Referring to counsel as an "attorney-intervenor," Judge E. Gordon West interpreted the motion as seeking "'more integration' . . . sought solely for sociological reasons rather than for the purpose of improved educational opportunity for children." *Id.* at 1015. Nevertheless, the court appointed a state educational expert to investigate the East Baton Rouge school system to determine its compliance with the Constitution and prior court orders. A few of the expert's education-oriented recommendations were adopted, and the court then declared the board was operating a unitary school system and dismissed the suit. *Id.* at 1019-20.

66. COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., *LAWYERS, CLIENTS & ETHICS* 101 (M. Bloom ed. 1974).

67. *Id.*

68. 371 U.S. 415 (1963).

are far more serious than the premature speculations of a segregationist legislature.

1. *The Challenge*

As the implementation of *Brown* began, Southern officials looking for every possible means to eliminate the threat of integrated schools soon realized that the NAACP's procedure for obtaining clients for litigation resembled the traditionally unethical practices of barratry and running and capping.⁶⁹ Attempting to exploit this resemblance, a majority of Southern states⁷⁰ enacted laws defining NAACP litigation practices as unlawful. In Virginia, though unethical and unprofessional conduct by attorneys had been regulated by statute since 1849,⁷¹ NAACP legal activities had been carried on openly for many years. No attempt was made to use these regulations to proscribe NAACP activities until 1956. In that year, during an extra session "called to resist school integration,"⁷² the Virginia legislature amended its criminal statutes barring running and capping to forbid the solicitation of legal business by "an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."⁷³ An attorney accepting employment from such an organization was subject to disbarment.⁷⁴ The NAACP sued to restrain enforcement of these new provisions, claiming that the statute was unconstitutional. The Virginia Supreme Court of Appeals found that the statute's purpose "was to strengthen the existing statutes to further control the evils of solicitation of legal business."⁷⁵ The court held that the statute's expanded definition of improper solicitation of legal business did not violate the Constitution in proscribing many of the legal activities of civil rights groups such as the NAACP.⁷⁶

69. Barratry is "the offence of frequently exciting and stirring up suits and quarrels . . . either at law or otherwise." 4 W. BLACKSTONE, COMMENTARIES * 133. Cappers and runners are persons engaged to solicit business on behalf of an attorney or other professional. See *People v. Dubin*, 367 Ill. 229, 233, 10 N.E.2d 809, 811 (1931) (capper employed by dentist); *In re Mitgang*, 385 Ill. 311, 332, 52 N.E.2d 807, 816 (1944) (runner employed by attorney).

70. The states were Arkansas, Florida, Georgia, Mississippi, South Carolina, Tennessee, and Virginia. *NAACP v. Button*, 371 U.S. 415, 445 (1963) (Douglas, J., concurring).

71. *Id.* at 423.

72. 31 U.S.L.W. 3123 (Oct. 16, 1962).

73. *NAACP v. Button*, 371 U.S. 415, 423 (1963) (summarizing ch. 33 [1956] Acts of Gen. Assembly of Va., Extra Sess. 33).

74. 371 U.S. at 434-35.

75. *NAACP v. Harrison*, 202 Va. 142, 154, 116 S.E.2d 55, 65 (1960).

76. *Id.* at 159-60; 116 S.E.2d at 69. The Virginia Supreme Court also found that the NAACP's civil rights activities violated Canons 35 and 47 of the American Bar Asso-

2. *The Supreme Court Response*

The Supreme Court reversed, holding that the state statute as construed and applied abridged the First Amendment rights of NAACP members. Justice Brennan, writing for the majority, reasoned that "the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business"⁷⁷ Justice Brennan placed great weight on the importance of litigation to the NAACP's civil rights program. He noted (with obvious approval) that blacks rely on the courts to gain objectives which are not available through the ballot box and said:

We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought.⁷⁸

The Court deemed NAACP's litigation activities "a form of political expression" protected by the First Amendment.⁷⁹ Justice Brennan conceded that Virginia had a valid interest in regulating the tradi-

ciation's CANONS OF PROFESSIONAL ETHICS, which the court had adopted in 1938. *Id.* at 156; 116 S.E.2d at 67. Canon 35 provided:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

Canon 47 provided:

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

The canons were intended to set the standards of professional conduct for the commercial rather than the civil rights or poverty law practitioner. The danger that they would be applied to the latter group remained sufficiently serious three years after the *Button* decision that Attorney General Nicholas deB. Katzenbach urged the legal profession to meet the needs of the poor by relaxing its rules against lawyers soliciting clients. Speaking to a national conference on law and poverty, he said that the "historic strictures" of the canons of ethics should not be permitted to stand between poor people and legal help. He pointed out the anomaly of lawyers "reduced to inaction by ethical prohibitions against profiteering when the client may well be penniless," and urged the American Bar Association "to draft canons of ethics that would allow solicitation of poor clients but continue to forbid it when done for profit." N.Y. Times, June 25, 1965, at 15, col. 1, *quoted in* V. COUNTRYMAN & T. FINMAN, *supra* note 18, at 575-76.

77. 371 U.S. at 428-29.

78. *Id.* at 435 (footnotes omitted).

79. *Id.* at 429.

tionally illegal practices of barratry, maintenance, and champerty,⁸⁰ but noted that the malicious intent which constituted the essence of these common law offenses was absent here. He also reasoned that because the NAACP's efforts served the public rather than a private interest, and because no monetary stakes were involved, "there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants"⁸¹

To meet Virginia's criticism that the Court was creating a special law to protect the NAACP,⁸² the majority found the NAACP's activities "constitutionally irrelevant to the ground of our decision."⁸³ Even so, Justice Douglas noted in a concurring opinion that the Virginia law prohibiting activities by lay groups was aimed directly at NAACP activities as part "of the general plan of massive resistance to the integration of the schools."⁸⁴

Although the issue was raised by the state,⁸⁵ the majority did not decide whether Virginia could constitutionally prohibit the NAACP from controlling the course of the litigation sponsored, perhaps because the NAACP consistently denied that it exercised such control.⁸⁶

80. Maintenance is "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it." 4 W. BLACKSTONE, COMMENTARIES * 134. Champerty is "a species of maintenance . . . being a bargain with a plaintiff or defendant . . . to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense." *Id.* at * 134-35.

81. 371 U.S. at 443.

82. For this Court to reverse [the Virginia Supreme Court of Appeal's ruling that NAACP activities amounted to improper solicitation of legal business], it must disregard many court decisions that hold that solicitation is not proper. It is saying that Negroes have one set of ethics and we have another.

31 U.S.L.W. 3125 (Oct. 16, 1962) (*quoting* closing argument before Supreme Court of Henry T. Wickham, counsel for the State of Virginia).

83. 371 U.S. at 444-45.

84. *Id.* at 445.

85. "In reply to Mr. Justice White's question of what factors are necessary for violation of the statute, Mr. Wickham [counsel for the State of Virginia] stated that control is the key." 31 U.S.L.W. 3125 (Oct. 16, 1962). The Virginia Supreme Court had found: "The absence of the usual contact between many of the litigants and the attorneys instituting proceedings is indicative of the control of the litigation by the NAACP and the Conference." NAACP v. Harrison, 202 Va. 142, 155, 116 S.E.2d 53, 65-66 (1960). See note 76 *supra*.

86. In its brief, the NAACP argued:

While [the NAACP] only underwrites litigation aimed at the elimination of racial segregation, *per se*, once legal action is begun, the organization exercises no further control. When the lawyer-client relationship is established between the litigant and counsel, all action thereafter is taken with the client's consent.

Brief for Petitioner at 8, NAACP v. Button, 371 U.S. 415 (1963). At trial, counsel for the State of Virginia elicited the following testimony from NAACP officials:

Q. [Mr. Mays] [D]o you not insist that the case be conducted exactly in the way the Conference directs?

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Justice White, concurring in part and dissenting in part, cautioned:

If we had before us, which we do not, a narrowly drawn statute proscribing only the actual day-to-day management and dictation of the tactics, strategy and conduct of litigation by a lay entity such as the NAACP, the issue would be considerably different, at least for me; for in my opinion neither the practice of law by such an organization nor its management of the litigation of its members or others is constitutionally protected.⁸⁷

Justice White feared that the majority opinion would also strike down such a narrowly drawn statute.

3. *Justice Harlan's Dissent*

Joined by Justices Clark and Stewart, Justice Harlan expressed the view that the Virginia statute was valid. In support of his conclusion, Harlan carefully reviewed the record and found that NAACP policy required what he considered serious departures from ethical professional conduct. First, NAACP attorneys were required to follow policy directives promulgated by the National Board of Directors or lose their right to compensation.⁸⁸ Second, these directives to staff

A. [Mr. Banks, Executive Secretary of the Virginia State Conference of Branches of the NAACP] That, sir, is a situation that would be between the attorney and the client.

Q. You leave the entire matter of litigation to the attorney and the plaintiff himself?

A. . . . [Y]es. There are certain broad principles that the Association has . . . and it would certainly have to fall within those broad limits.

Q. But, within those limitations you leave it entirely to the litigant and the attorney as to the manner in which the litigation is conducted?

A. That is correct.

Q. And the Conference does not interfere?

A. The Conference has nothing to do with the attorney and the litigant.

Transcript of Record at 262-63.

A. [Mr. Wilkins, Executive Secretary of the NAACP] Well, I have heard our lawyers say many times that they cannot do anything that the plaintiff does not want done. I have heard them stop in the middle of a case, after they had reached a certain stage, and I have sat in on these conferences that took place on strategy, in which they . . . have said, "Well, before we can go further, we will have to find out what the plaintiff wants to do."

Q. [Mr. Mays] Have you run into any instances where the plaintiff wanted to do something different from the lawyer?

. . . .

A. I know of no such specific case.

Id. at 302-03.

87. 371 U.S. at 447.

88. The NAACP Board of Directors had passed a resolution requiring that:

"Pleadings in all educational cases—the prayer in the pleading and proof be aimed at obtaining education on a non-segregated basis and that no relief other than that will be acceptable as such.

"Further, that all lawyers operating under such rule will urge their client and the branches of the Association involved to insist on this final relief.

lawyers covered many subjects relating to the form and substance of litigation. Third, the NAACP not only advocated litigation and waited for prospective litigants to come forward; in several instances and particularly in school cases, "specific directions were given as to the types of prospective plaintiffs to be sought, and staff lawyers brought blank forms to meetings for the purpose of obtaining signatures authorizing the prosecution of litigation in the name of the signer."⁸⁹ Fourth, the

Transcript of Record at 246. This requirement was brought out at trial:

Q. [Mr. Mays, attorney for State of Virginia] Well, as you understand it then, . . . the Conference would not pay the lawyers unless they followed NAACP policy?

A. [Mr. Hill, attorney for NAACP, as witness] That is true.

Q. And, of course, the policy, the main policy was to go for desegregation in the schools [rather than separate-but-equal schools]?

....

A. There isn't any question about it.

Q. So that in those cases, if the plaintiffs decided on some other courses of action, of course counsel could not follow the plaintiff's direction and expect compensation from the Conference?

A. Not and expect compensation from the Conference no.

Id. at 94.

89. 371 U.S. at 450. For example, as a preliminary step to filing a school desegregation suit, NAACP branches circulated petitions to be presented to local school officials demanding compliance with *Brown*. Parents signing such petitions often became plaintiffs when the school board rejected their demands. One NAACP directive to local affiliates stated:

(5). Signatures should be secured from parents or guardians in all sections of the county or city. Special attention should be given to persons living in *mixed neighborhoods*, or near *formerly white schools*.

(6). The signing of the petition by a parent or guardian may well be only the first step to an extended court fight. Therefore, discretion and care should be exercised to secure petitioners who will—if need be—go all the way.

Transcript of Record at 218.

But the NAACP denied that it solicited plaintiffs for litigation. Mr. Wilkins, Executive Secretary of the NAACP, stated:

We do not go out into the general population and solicit a man by saying, "Don't you want to challenge such and such a law?" or "Don't you want to go to court on this or that point?" I think it is fair, however, and it is a matter of record, that we have said publicly, on many occasions, that such and such a law we believed to be unconstitutional and unfair and we believe that Negro citizens are deprived of their rights by this statute, or this practice, and that we believe it ought to be challenged in the courts, which is the proper place to challenge such legislation, and that we urge colored people to challenge these laws and that if any one of them steps forward and says he wishes to challenge such a law, we will agree to assist him, providing the case passes all of the requirements. But for actually going out and buttonholing people and saying, "Will you come in and help us test this?" we don't do that either.

Id. at 295. Lester Banks, Executive Secretary of the Virginia State Conference of Branches of the NAACP, testified at trial:

Q. [Mr. Mays, attorney for State of Virginia] Does the Conference instigate or attempt to instigate a person or persons to institute a lawsuit by offering to pay the expenses of litigation?

A. [Mr. Banks] No, sir, the Conference does not.

Q. It never looks for plaintiffs?

A. The Conference never looks for plaintiffs.

Q. And always it is an instance where the prospective plaintiff comes to the Conference and asks for help?

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retainer forms signed by prospective litigants sometimes did not contain the names of the attorneys retained, and often when the forms specified certain attorneys as counsel, additional attorneys were brought into the action without the plaintiff's consent. Justice Harlan observed that several named plaintiffs had testified that they had no personal dealings with the lawyers handling their cases and were not aware until long after the event that suits had been filed in their names.⁹⁰ Taken together, Harlan felt these incidents justified the corrective measures taken by the State of Virginia.

Justice Harlan was not impressed by the fact that the suits were not brought for pecuniary gain. The NAACP attorneys did not donate their services, and the litigating activities did not fall into the accepted category of aid to indigents. But he deemed more important than the avoidance of improper pecuniary gain the concern shared by the profession, courts, and legislatures that outside influences not interfere with the uniquely personal relationship between lawyer and client. In Justice Harlan's view, when an attorney is employed by an association or corporation to represent a client, two problems arise:

The lawyer becomes subject to the control of a body that is not itself a litigant and that, unlike the lawyers it employs, is not subject to strict professional discipline as an officer of the court. In addition, the lawyer necessarily finds himself with a divided allegiance—to his employer and to his client—which may prevent full compliance with his basic professional obligations.⁹¹

He conceded that “[t]he NAACP may be no more than the sum of the efforts and views infused in it by its members” but added a prophetic warning that “the totality of the separate interests of the members and others whose causes the petitioner champions, even in the field of race relations, may far exceed in scope and variety that body's views of policy, as embodied in litigating strategy and tactics.”⁹²

Justice Harlan recognized that it might be in the association's interest to maintain an all-out, frontal attack on segregation, even sacrificing small points in some cases for the major points that might win other cases. But, he foresaw that

A. That is correct.

Q. There are no exceptions in your experience?

A. I can think of no exceptions.

Id. at 260-61.

90. Some clients did not know the names of their lawyers, and many others stated they had had no contact whatsoever with counsel since they signed the authorization form. *E.g.*, 371 U.S. at 422 n.6; Transcript of Record at 119-20, 124, 151-52, 171.

91. 371 U.S. at 460.

92. *Id.* at 462.

it is not impossible that after authorizing action in his behalf, a Negro parent, concerned that a continued frontal attack could result in schools closed for years, might prefer to wait with his fellows a longer time for good-faith efforts by the local school board than is permitted by the centrally determined policy of the NAACP. Or he might see a greater prospect of success through discussions with local school authorities than through the litigation deemed necessary by the Association. The parent, of course, is free to withdraw his authorization, but is his lawyer, retained and paid by petitioner and subject to its directions on matters of policy, able to advise the parent with that undivided allegiance that is the hallmark of the attorney-client relation? I am afraid not.⁹³

4. NAACP v. Button *In Retrospect*

The characterizations of the facts in *Button* by both the majority and the dissenters contain much that is accurate. As the majority found, the NAACP did not "solicit" litigants but rather systematically advised black parents of their rights under *Brown* and collected retainer signatures of those willing to join the proposed suits. The litigation was designed to serve the public interest rather than to enrich the litigators. Not all the plaintiffs were indigent, but few could afford to finance litigation intended to change the deep-seated racial policies of public school systems.

On the other hand, Justice Harlan was certainly correct in suggesting that the retainer process was often performed in a perfunctory manner and that plaintiffs had little contact with their attorneys. Plaintiffs frequently learned that suit had been filed and kept abreast of its progress through the public media. Although a plaintiff could withdraw from the suit at any time, he could not influence the primary goals of the litigation. Except in rare instances, policy decisions were made by the attorneys, often in conjunction with the organizational leadership and without consultation with the client.

The *Button* majority obviously felt that the potential for abuse of clients' rights in this procedure was overshadowed by the fact that Virginia enacted the statute to protect the citadel of segregation rather than the sanctity of the lawyer-client relationship. As the majority pointed out, litigation was the only means by which blacks throughout the South could effectuate the school desegregation mandate of *Brown*.⁹⁴ The theoretical possibility of abuse of client rights seemed a rather slender risk when compared with the real threat to

93. *Id.*

94. *Id.* at 429-30.

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integration posed by this most dangerous weapon in Virginia's arsenal of "massive resistance."

Most legal commentators reacted favorably to the majority's decision for precisely this reason.⁹⁵ Justice Harlan was criticized by these writers for refusing to recognize the motivation for Virginia's sudden interest in the procedures by which the NAACP obtained and represented school desegregation plaintiffs. Professor Harry Kalven saw Harlan as driven "by an almost heroic desire to neutralize litigation on race issues."⁹⁶ In Kalven's view, Harlan's analysis of the possible conflict of interest between the NAACP lawyer and his client "verge[d] on the absurd."⁹⁷

It in effect tells the Negro that Virginia can curtail seriously the activities of the NAACP because of Virginia's benign interest in protecting Negro clients from the conflicts of interest that may arise when they are represented by NAACP lawyers in civil rights cases without financial cost to themselves.

Nevertheless, a few contemporary commentators found cause for sober reflection in Harlan's dissent.⁹⁸ And even those writers who viewed the decision as necessary to protect the NAACP conceded that the majority had paid too little attention to Justice Harlan's conflict-of-interest concerns. As one writer noted, Justice Brennan's response—quoting from Justice Harlan's opinion in *NAACP v. Alabama ex rel. Patterson*⁹⁹ to the effect that NAACP interests were identical with those of its members—was inadequate.¹⁰⁰ In the Alabama case the NAACP was attempting to protect the secrecy of its membership; the Court ruled that the organization had standing to defend the privacy and freedom of association of its members because they could not come forward without revealing their names and sacrificing the very rights at stake. But in school cases, as Justice Harlan observed in *Button*, an individual plaintiff might prefer a compromise which would frustrate attainment of the goals of the sponsoring groups. "[F]requently occasions might arise in which the choice between an immediate small gain and possible later achievement of a larger aim should at least be put to the plaintiff in whose name the suit was

95. E.g., Birkby & Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts*, 42 TEXAS L. REV. 1018 (1964); 12 AM. U. L. REV. 184 (1963); 32 U. CIN. L. REV. 550 (1963); 1963 U. ILL. L.F. 97.

96. H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 90 (Phoenix 1966).

97. *Id.* at 89-90.

98. E.g., *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 122-24 (1963); 29 BROOKLYN L. REV. 318 (1963); 15 S.C. L. REV. 845 (1963).

99. 357 U.S. 449 (1958).

100. Birkby & Murphy, *supra* note 95, at 1036.

being brought, not decided for him by third parties."¹⁰¹ It is no answer that the plaintiff is always at liberty to withdraw his name from the case, because "if the plaintiff does not know how—or if—his case is being conducted, he is not likely to be able to ascertain with any precision where his interests lie. Furthermore, the issue may be so complex that the litigant needs professional advice before the alternatives become clear to him."¹⁰²

B. *The ABA Response*

Button's recognition of First Amendment rights in the conduct of litigation led to subsequent decisions¹⁰³ broadening the rights of other lay groups to obtain legal representation for their members.¹⁰⁴ In so doing, these decisions posed new problems for the organized bar. The American Bar Association, faced with the reality of group practice which it had long resisted, has attempted to adopt guidelines for practitioners; but the applicable provisions of its new *Code of Professional Responsibility* provide only broad and uncertain guidance on the issues of control of litigation and conflict of interest as they affect civil rights lawyers.¹⁰⁵

101. *Id.* at 1036-37.

102. *Id.* at 1037.

103. *E.g.*, *Brotherhood of Ry. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964) (state restrictions on the practice of law voided to the extent that they impinged upon the right of a labor union to maintain a legal staff to give advice respecting prospective litigation and to recommend attorneys for investigation of claims under the Federal Employees Liability Act); *United Transp. Union v. State Bar*, 401 U.S. 576 (1971) (protecting the union's right to handle members' claims under the Federal Employees Liability Act); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (labor union entitled to hire attorneys on a salary basis to assist members in processing workmen's compensation claims).

104. *Cf. Freund, Civil Rights and the Limits of the Law*, 14 *BUFFALO L. REV.* 199, 207 (1964) (referring specifically to the genesis of the libel case, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in the reporting of civil rights protests in Alabama).

105. The *Code of Professional Responsibility* took effect in 1970 and was amended in 1970, 1974 and 1975. It consists of nine canons which broadly state the standards of professional conduct. There are two explanatory sections under each canon: Ethical Considerations (EC), which are "aspirational in character" and for purposes of guidance describe more particularly the principles set out in the canons; and Disciplinary Rules (DR), which "state the minimum level of conduct below which no lawyer can fall without being subjected to disciplinary action." ABA, *CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT* 1 (1975) (Preliminary Statement) [hereinafter cited by provision only]. The DR's are the only part of the *Code* which are mandatory and applicable to all lawyers "regardless of the nature of their professional activities." *Id.*

The key section for public interest lawyers is Canon 2, the outgrowth of *Button* and its progeny. Canon 2 provides that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." This Canon has created great controversy; as one writer observed,

the new Canon must prohibit individual champerty, maintenance, barratry, solicitation of legal business, and advertising, while encouraging similarly-directed group activities. Inasmuch as any group can act only through its members, a fine line is

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The *Code of Professional Responsibility* again and again admonishes the lawyer "to disregard the desires of others that might impair his free judgment."¹⁰⁶ But the suggestions assume the classical commercial conflict or a third-party intermediary clearly hostile to the client. Even when the *Code* seems to recognize more subtle "economic, political or social pressures," the protection needed by civil rights clients is not provided, and the suggested remedy, withdrawal from representation of the client, is hardly desirable if the client has no available alternatives.¹⁰⁷

The market system mentality of the drafters of the *Code* surfaces in another provision suggesting that problems of control are less likely to exist where the lawyer "is compensated directly by his client."¹⁰⁸ But solving the problem of control by relying on the elimination of compensation from a source other than the client was rejected in

then drawn between conduct of a lawyer that furthers his own interest or that furthers the common good. Particularly is this true when individual benefits are produced by permissible "professional" activities.

Smith, Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available," 48 TEXAS L. REV. 285, 287 (1970). See Elson, Canon 2—The Bright and Dark Face of the Legal Profession, 12 SAN DIEGO L. REV. 306 (1975); Nahstall, Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR 2-103 (D) (5): Stale Wine in New Bottles, 48 TEXAS L. REV. 334 (1970).

The ABA's recognition of group services has been grudging. In what has been called "a lateral pass to the Supreme Court," group legal services by nonprofit organizations were initially permitted "only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities." DR 2-103(D)(5); Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEXAS L. REV. 255, 262 (1970). Subsequent amendments have liberalized the range of permissible professional activity in the areas of legal services and group practice. See, e.g., EC 2-33 (Feb. 1975), which reminds lawyers of their professional obligations to individual clients and cautions against situations where there may be interference by lay officials or where, because of economic considerations, competence and quality of service may suffer.

106. EC 5-21. Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." And EC 5-1 reminds the lawyer of his or her duty to remain "free of compromising influences and loyalties."

107. EC 5-21 provides:

The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

108. EC 5-22 provides:

Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

Button. All that remains is the warning that a person or group furnishing lawyers "may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client."¹⁰⁹

The *Code* approach, urging the lawyer to "constantly guard against erosion of his professional freedom"¹¹⁰ and requiring that he "decline to accept direction of his professional judgment from any layman,"¹¹¹ is simply the wrong answer to the right question in civil rights offices where basic organizational policies such as the goals of school desegregation are often designed by lawyers and then adopted by the board or other leadership group. The NAACP's reliance on litigation requires that lawyers play a major role in basic policy decisions. Admonitions that the lawyer make no important decisions without consulting the client¹¹² and that the client be fully informed of all relevant considerations¹¹³ are, of course, appropriate. But they are difficult to enforce in the context of complex, long term school desegregation litigation where the original plaintiffs may have left the system and the members of the class whose interests are at stake are numerous, generally uninformed, and, if aware of the issues, divided in their views.

Current ABA standards thus appear to conform with *Button* and its progeny in permitting the representation typically provided by civil rights groups. They are a serious attempt to come to grips with and provide specific guidance on the issues of outside influence and client primacy that so concerned Justice Harlan. But they provide little help where, as in school desegregation litigation, the influence of attorney and organization are mutually supportive, and both are so committed to what they perceive as the long range good of their clients that they do not sense the growing conflict between those goals and the client's current interests. Given the cries of protest and the charges of racially motivated persecution that would probably greet any ABA effort to address this problem more specifically, it is not surprising that the conflict—which in any event will neither embarrass the profession ethically nor threaten it economically—has not received a high priority for further attention.

Idealism, though perhaps rarer than greed, is harder to control. Justice Harlan accurately prophesied the excesses of derailed benev-

109. EC 5-23.

110. *Id.*

111. EC 5-24.

112. EC 7-7.

113. EC 7-8.

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olence, but a retreat from the group representational concepts set out in *Button* would be a disaster, not an improvement. State legislatures are less likely than the ABA to draft standards that effectively guide practitioners and protect clients. Even well intentioned and carefully drawn standards might hinder rather than facilitate the always difficult task of achieving social change through legal action. And too stringent rules could encourage officials in some states to institute groundless disciplinary proceedings against lawyers in school cases, which in many areas are hardly more popular today than they were during the massive resistance era.

Client involvement in school litigation is more likely to increase if civil rights lawyers themselves come to realize that the special status accorded them by the courts and the bar demands in return an extraordinary display of ethical sensitivity and self-restraint. The "divided allegiance" between client and employer which Justice Harlan feared would interfere with the civil rights lawyer's "full compliance with his basic professional obligation"¹¹⁴ has developed in a far more idealistic and thus a far more dangerous form. For it is more the civil rights lawyers' commitment to an integrated society than any policy directives or pressures from their employers which leads to their assumptions of client acceptance and their condemnations of all dissent.

IV. The Class Action Barrier to Expression of Dissent

Even if civil rights lawyers were highly responsive to the wishes of the named plaintiffs in school desegregation suits, a major source of lawyer-client conflict would remain. In most such suits, the plaintiffs bring a class action on behalf of all similarly situated black students and parents; the final judgment will be binding on all members of the class.¹¹⁵ As black disenchantment with racial balance reme-

114. *NAACP v. Button*, 371 U.S. 415, 460-62 (1963) (Harlan, J., dissenting).

115. The school desegregation cases that led to the decision in *Brown* and virtually every school suit since then have been filed as class actions under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23(a) sets forth the prerequisites to a class action: One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

It is clear from the Notes of the Advisory Committee on Rules, Fed. R. Civ. P. 23, 28 U.S.C. app., at 7766 (1970), that under the 1966 revision to Fed. R. Civ. P. 23, subdivision (b)(2) was intended to cover civil rights cases including school desegregation litigation, "where a party is charged with discriminating unlawfully against a class, usually one whose

dies grows, the strongest opposition to civil rights litigation strategy may come from unnamed class members. But even when black groups opposed to racial balance remedies overcome their ambivalence and obtain counsel willing to advocate their positions in court, judicial interpretations of the federal class action rule make it difficult for dissident members of the class to gain a hearing in pending school litigation.

Ironically, the interpretations of Rule 23 which now hinder dissent derive from early school desegregation cases in which the courts sought to further plaintiffs' efforts to gain compliance with *Brown*. Typical of the early solicitude for plaintiffs in school desegregation cases was *Potts v. Flax*.¹¹⁶ Defendants maintained at trial that the suit was not a class action because neither of the two plaintiffs had affirmatively indicated that they sought class relief.¹¹⁷ The district court found first that the suit properly presented the question of constitutionality of defendant's dual school system. The court then determined that although the suit was instituted only by individuals, the right sued upon was a class right—the right to a termination of the system-wide policy of racial segregation in the schools—and thus affected every black child in the school district.¹¹⁸ The Fifth Circuit, approving the lower court's reasoning, doubted that relief formally confined to specific black children either could be granted or could be so limited in its effect. Viewing the suit as basically an attack on the unconstitutional practice of racial discrimination, the court held that the appropriate relief was an order that it be discontinued. Moreover, the court suggested, "to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the *class* discrimination."¹¹⁹

members are incapable of specific enumeration." 7A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1776 (1972). FED. R. CIV. P. 23(b)(2) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole

116. 313 F.2d 284 (5th Cir. 1963).

117. One parent testified that he was bringing suit for his own children and not for all other Negro children. The other parent was not questioned on this issue. *Id.* at 288.

118. *Flax v. Potts*, 204 F. Supp. 458, 463-66 (N.D. Tex. 1962).

119. 313 F.2d at 289. The Fifth Circuit had earlier suggested the importance of class-wide relief in school desegregation cases in *Bush v. Orleans Parish School Bd.*, 308 F.2d 491, 499 (5th Cir. 1962). *Potts* was followed in *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963), a suit to desegregate public facilities. See also *Gantt v. Clemson Agricultural College*, 320 F.2d 611 (4th Cir. 1963).

The Advisory Committee Notes to the 1966 revision of Rule 23 cited *Potts* to illustrate

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At one time, expressions of disinterest and even disapproval of civil rights litigation by portions of the class may have been motivated by fear and by threats of physical and economic intimidation. But events in Atlanta, Detroit, and Boston provide the basis for judicial notice that many black parents oppose total reliance on racial balance remedies to cure the effects of school segregation. As one federal court of appeals judge has put it: "Almost predictably, changing circumstances during those years of litigation have dissolved the initial unity of the plaintiffs' position."¹²⁰ Black parents who prefer alternative remedies are poorly served by the routine approval of plaintiffs' requests for class status in school desegregation litigation.¹²¹

Basic principles of equity require courts to develop greater sensitivity to the growing disagreement in black communities over the nature of school relief. Existing class action rules provide ample authority for broadening representation in school cases to reflect the fact that views in the black community are no longer monolithic. One aspect of class action status requiring closer scrutiny is whether the representation provided by plaintiffs will "fairly and adequately protect the interests of the class."¹²² Because every person is entitled

its view that Rule 23(b)(2) authorized class actions in civil rights cases. *Potts* has been cited frequently in subsequent civil rights cases. *E.g.*, *Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 (5th Cir. 1968); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 869-70 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

The *Potts* principle has been applied even in situations where members of the class are alleged to oppose the action or are antagonistic toward plaintiffs. In *Moss v. Lane Co.*, 50 F.R.D. 122 (W.D. Va. 1970), *remanded on other grounds*, 471 F.2d 853 (4th Cir. 1973), the court certified as a class action an employment discrimination suit brought by a discharged black employee on behalf of all black employees, even though the defendant employer argued that plaintiff did not have the consent of other class members to represent them. The employer supported its position with affidavits of all its black employees disclaiming any authority from them to commence the suit. The trial court reasoned that if the plaintiff prevailed, an injunction requiring an end to discriminatory practices would benefit all in the class, and noted further that some class members might have been afraid to join plaintiff for fear of placing their jobs in jeopardy. 50 F.R.D. at 125.

Similarly, satisfaction of the plaintiff's individual claim does not render an employment discrimination suit moot as to the class. *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). Problems may arise in employment discrimination suits where the main relief sought is damages in the form of back pay. The appropriateness of class actions in such suits is discussed in Comment, *Class Actions and Title VII of the Civil Rights Act of 1964: The Proper Class Representative and the Class Remedy*, 47 *TUL. L. REV.* 1005, 1015-16 (1973).

120. *Calhoun v. Cook*, 522 F.2d 717, 718 (5th Cir. 1975) (Clark, J.).

121. "It is undoubtedly true that many federal district judges have been careless in their dealings with class actions, and have failed to comply carefully with the technical requirements of Rule 23." *Board of School Comm'rs v. Jacobs*, 420 U.S. 128, 133 (1975) (Douglas, J., dissenting).

122. *FED. R. CIV. P.* 23(a)(4). The issue of adequacy of representation is of critical importance in school desegregation cases where all members of the class are bound by

to be adequately represented when his rights and duties are being adjudicated, it is incumbent upon the courts to ensure the fairness of proceedings that will bind absent class members. The failure to exercise such care may violate due process rights guaranteed by the Fifth and Fourteenth Amendments.¹²³

These problems can be avoided if, instead of routinely assuming that school desegregation plaintiffs adequately represent the class, courts will apply carefully the standard tests for determining the validity of class action allegations and the standard procedures for protecting the interests of unnamed class members.¹²⁴ Where object-

the decrees entered. C. WRIGHT & A. MILLER, *supra* note 115, §§ 1765, 1771. See Note, *Class Actions: Defining The Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23*, 53 B.U. L. REV. 406 (1973) (arguing for a more vigorous application of the prerequisites for class action status).

123. Cf. *Hansberry v. Lee*, 311 U.S. 32 (1940). At the least, the Fifth Circuit has held that the res judicata effect of a 23(b)(2) class action is not binding on the class when the class representative has failed to appeal from a trial court's judgment which granted the individual full relief but provided only partial relief to the rest of the class. *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). The court found that the failure to appeal from the provision of only partial relief to the class (such appeal not being patently meritless or frivolous) was itself evidence of inadequate representation.

124. Several steps might be taken to protect class interests:

(1) *Determination of class action.* Courts should take seriously their independent obligation under Rule 23(c)(1) to decide Rule 23 issues "as soon as practicable after the commencement of an action brought as a class action," even if neither of the parties moves for a ruling. C. WRIGHT & A. MILLER, *supra* note 115, § 1785. The rationale of *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963), now incorporated into subdivision (b)(2) cases, does not lessen the need for diligent judicial scrutiny of subdivision (a)(4) standards.

(2) *Notice to class.* Individual notice to known members of the class is required by Rule 23(c)(2) in Rule 23(b)(3) actions. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Individual notice might prove unnecessarily burdensome to plaintiffs in Rule 23(b)(2) civil rights suits and is not required. C. WRIGHT & A. MILLER, *supra* note 115, § 1793. But some effective means of advising the class of the existence of the suit, the type of relief to be sought, and the binding nature of the judgment should be considered by the court. See FED. R. CIV. P. 23(d)(2). Local newspapers usually report the filing of school suits, but provide little information about the significance of the class action nature of the litigation. Notice prepared by plaintiffs might, at the court's direction, be distributed to each minority child in the school system. Precedent exists for providing each parent with a letter and questionnaire advising the parent of the pending action and inquiring whether the parent wished to be represented by the plaintiffs and their counsel. *Knight v. Board of Educ.*, 48 F.R.D. 108 (E.D.N.Y. 1969). An individual notice procedure would provide several advantages. It would:

(a) Enable a fairly accurate determination to be made as to class support for the suit and for the form of relief sought by plaintiffs;

(b) Provide the court with indications regarding the possible need for special steps that might be taken to protect the interests of the class;

(c) Provide class members with an opportunity to provide information through the questionnaire as to individual instances of discrimination they have experienced;

(d) Provide class members with an opportunity to challenge class certification; and

(e) Provide objecting class members an opportunity to intervene. (Specific provision for intervention in class is provided in subdivision (d)(2).)

(3) *Preliminary hearing on class action issue.* In those instances where members of the class raise objections to the adequacy of plaintiffs' representation or the character

ing members of the class seek to intervene, their conflicting interests can be recognized under the provisions of Rule 23(d)(2).¹²⁵ In this regard, the class action intervention provisions are in harmony with those contained in Rule 24.¹²⁶

Even with the exercise of great care, the adequacy of representation may be difficult to determine, particularly at the outset of the litigation. For this reason, Professor Owen Fiss has suggested that the standard for adequacy of representation for certifying a class action should differ from that used in allowing intervention.¹²⁷ If the standards are the same, he reasons, the logical result will be that no member of the class will be allowed to intervene in a class action suit as a matter of right once it is determined that the representation is adequate as to the class. In some instances, although the representation by the named party is adequate as to a class, unnamed class members will have interests deserving of independent representation but not sufficiently important or conflicting to require that the class action be dismissed, the class representative replaced, or the class redefined to exclude the intervenors. The denial of intervention as of right whenever representation is adequate as to the class is particularly unacceptable to Fiss because the class representative is self-selected.¹²⁸

In *Norwalk CORE v. Norwalk Board of Education*,¹²⁹ groups seek-

of relief sought, courts may hold a hearing before deciding under subdivision (c)(1) whether to allow a class action. Challenges will seldom be made at the outset of school desegregation litigation. Subdivision (c)(1) orders are, of course, not irreversible and may be altered or amended at a later date. C. WRIGHT & A. MILLER, *supra* note 115, § 1785.

(4) *Partial class actions and subclasses.* Rule 23(c)(4) enables the court to authorize the class action as to only particular issues and to divide a class into appropriate subclasses. In school litigation, members of plaintiffs' class may differ substantially, but could rather easily be encompassed within the motion and hearing process normal to school litigation. *Cf. Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970); *Johnson v. ITT—Thompson Indus., Inc.*, 323 F. Supp. 1258 (N.D. Miss. 1971).

125. FED. R. CIV. P. 23(d)(2) provides:

In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . to some or all members of any step in the action, . . . to intervene and present claims or defenses, or otherwise to come into the action . . .

126. C. WRIGHT & A. MILLER, *supra* note 115, § 1799.

127. O. FISS, *INJUNCTIONS* 560-61 (1972).

128. *Id.* Professor Fiss notes that in an injunction suit where damages are not sought, the defendant is unlikely to challenge the class allegations—particularly if the plaintiff's case is viewed as weak and his counsel incompetent. *Id.* at 514. Challengers to the self-appointed class representative are not likely to be organized or to have counsel. Because the motion to intervene may be filed months and even years after the suit is initiated (although still only a short period after the conflict in interests and goals becomes apparent), courts are generally reluctant to grant intervention petitions.

129. 298 F. Supp. 208 (D. Conn. 1968), *aff'd*, 423 F.2d 121 (2d Cir. 1970).

ing integration more extensive than that sought by the named plaintiffs became ensnared in the traditional reading of the class action rule. The district court denied a motion to intervene as of right under Rule 24(a)(2) by a group purportedly representing blacks and Puerto Ricans in the community. CORE, which represented a class similarly defined, had challenged the method of school desegregation (the closing of facilities in the black and Puerto Rican communities and the transporting of minority children to predominantly white outlying schools) rather than the objective of desegregation itself. It sought reopening of the school facilities in the minority communities. The proposed intervenors asserted that this would hamper the board's efforts to integrate the schools. In denying the motion to intervene, the court reasoned that since neither group opposed school integration and both sought integrated schools, the question was simply whether the original plaintiff had standing to bring the suit. However, the district court in effect satisfied the intervenors' request by refusing the two-way busing sought by the original plaintiffs.¹³⁰

Courts have been more sensitive to the differing interests of persons of varied racial, ethnic, and national backgrounds. While efforts of white parents to intervene as defendants in order to make arguments similar to those being made by school boards generally have not been successful,¹³¹ courts have allowed intervention in recogni-

130. Intervenors fared somewhat better in the Atlanta school case. There, the Fifth Circuit held that the district court improperly denied intervention petitions filed by both CORE (seeking a community control plan) and the NAACP (seeking a full integration plan). It ruled that the lower court's approval of an integration-limiting compromise plan formulated by the defendant school board and the plaintiffs should have been preceded by a plenary hearing to obtain the views and objections of other persons purporting to represent members of the class. *Calhoun v. Cook*, 487 F.2d 680, 683 (5th Cir. 1973). Even as to the more radical CORE petition, the Fifth Circuit stated that CORE might have been able to justify its position if given the opportunity. *Id.* (It should be noted that this decision was rendered in the context of Rule 23(c), which requires approval of the court for the settlement of any class action; the court may have been more willing to allow intervention in this situation than in ongoing litigation).

131. See, e.g., *United States v. Board of School Comm'rs*, 466 F.2d 573 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *Spangler v. Pasadena City Bd. of Educ.*, 427 F.2d 1352 (9th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *Hatton v. County Bd. of Educ.*, 422 F.2d 457 (6th Cir. 1970); *Augustus v. School Bd.*, 299 F. Supp. 1067 (N.D. Fla. 1969). But see *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The *Smuck* court held that white parents could intervene in order to appeal a school desegregation decision after a majority of the board had determined not to appeal. The court found the requisite interest in the parents' legitimate concern for their children's education and also found potential harm if the petition were denied. The court stated that the desegregation decision presented "substantial and unsettled questions of law" which could be the basis of an appeal. *Id.* at 180.

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tion of the distinct interests of Mexican¹³² and Chinese-Americans.¹³³ The disagreements among blacks as to whether racial balance remedies are the most appropriate relief for segregated schools, particularly in large urban districts, reflect interests as divergent as those which courts have recognized at the request of other ethnic minorities.

The failure to carefully monitor class status in accordance with the class action rules can frustrate the purposes of those rules and intensify the danger of attorney-client conflict inherent in class action litigation.¹³⁴ To a measurable degree, the conflict can be traced to the civil rights lawyer's idealism and commitment to school integration. Such motivations do not become "unprofessional" because subjected to psychological scrutiny.¹³⁵ They help explain the drive that enables the civil rights lawyer to survive discouragement and defeat and renew the challenge for change. But when challenges are made on behalf of large classes unable to speak effectively for themselves, courts should not refrain from making those inquiries under the Federal Rules that cannot fail, when properly undertaken, to strengthen the position of the class, the representative, and the counsel who serve them both.

132. *E.g.*, *United States v. Texas Educ. Agency*, 467 F.2d 848, 853 n.5 (5th Cir. 1972).

133. *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349, 352-54 (9th Cir. 1974).

134. *Dam, Class Actions: Efficiency, Compensation, Deterrents and Conflict of Interest*, 4 J. LEGAL STUD. 47, 49 (1975):

Two different *conflicts of interest* should be considered. The first involves the representative party, who is a volunteer not normally chosen by the class members to act on their behalf. The representative plaintiff may have interests that are not in all ways congruent with those of the members of the class. The second, and for the analysis here more significant, conflict is faced by counsel representing the class. In particular, his decision calculus as to settlement versus continued litigation may be sharply different from that of the class.

A former legal services staff person has viewed the potential for lawyer-client conflict in class actions as even more serious when such actions are brought by law reform lawyers. Brill, *The Uses and Abuses of Legal Assistance*, 31 PUB. INTEREST 38 (1973). He charged that in the San Francisco legal services program, lawyers had a "one-track" commitment to class action strategy even though the results of this commitment were "minimal or even harmful." *Id.* at 41, 44. Class action suits were pursued when the legislative route might have been more effective and even when their use "jeopardized the specific goals and the autonomy of the community organizations [the lawyers] presumed to serve." *Id.* at 43. Even successful suits were sometimes counter-productive; the defeat of the one-year residency requirement for welfare recipients, for example, resulted in austerity measures and new restrictions resulting in a decrease in the total number of welfare recipients. *Id.* at 43-44. Subsequently, the director of the legal services office issued a strong denial of the charges, stating that the lawyers did serve their clients well and that class action suits were quite successful. Carlin, *The Poverty Lawyers*, 33 PUB. INTEREST 128 (1973). In an earlier article, however, Carlin presented a less rosy view of his office. He noted, *inter alia*, the division between militant white lawyers in the office and more conservative black professionals and neighborhood leaders. Carlin, *Storefront Lawyers in San Francisco*, TRANSACTION, Apr. 1970, at 64, 74.

135. See p. 493 *supra*.

V. The Resolution of Lawyer-Client Conflicts

There is nothing revolutionary in any of the suggestions in this article. They are controversial only to the extent they suggest that some civil rights lawyers, like their more candid poverty law colleagues, are making decisions, setting priorities, and undertaking responsibilities that should be determined by their clients and shaped by the community. It is essential that lawyers "lawyer" and not attempt to lead clients and class. Commitment renders restraint more, not less, difficult, and the inability of black clients to pay handsome fees for legal services can cause their lawyers, unconsciously perhaps, to adopt an attitude of "we know what's best" in determining legal strategy. Unfortunately, clients are all too willing to turn everything over to the lawyers. In school cases, perhaps more than in any other civil rights field, the attorney must be more than a litigator. The willingness to innovate, organize, and negotiate—and the ability to perform each with skill and persistence—are of crucial importance. In this process of overall representation, the apparent—and sometimes real—conflicts of interest between lawyer and client can be resolved.

Finally, commitment to an integrated society should not be allowed to interfere with the ability to represent effectively parents who favor education-oriented remedies. Those civil rights lawyers, regardless of race, whose commitment to integration is buoyed by doubts about the effectiveness of predominantly black schools should reconsider seriously the propriety of representing blacks, at least in those school cases involving heavily minority districts.

This seemingly harsh suggestion is dictated by practical as well as professional considerations. Lacking more viable alternatives, the black community has turned to the courts. After several decades of frustration, the legal system, for a number of complex reasons, responded. Law and lawyers have received perhaps too much credit for that response.¹³⁶ The quest for symbolic manifestations of new rights and the search for new legal theories have too often failed to

136. Blacks lost in *Plessy v. Ferguson*, 163 U.S. 537 (1896), in part because the timing was not right. The Supreme Court and the nation had become reactionary on the issue of race. As LDF Director-Counsel Greenberg has acknowledged:

[Plaintiff's attorney in *Plessy*, Albion W.] Tourgée recognized [that the tide of history was against him] and spoke of an effort to overcome its effect by influencing public opinion. But this, too, was beyond his control. All the lawyer can realistically do is marshal the evidence of what the claims of history may be and present them to the court. But no matter how skillful the presentation, *Plessy* and *Brown* had dynamics of their own. Tourgée would have won with *Plessy* in 1954. The lawyers who brought *Brown* would have lost in 1896. Greenberg, *supra* note 15, at 334.

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prompt an assessment of the economic and political condition that so influence the progress and outcome of any social reform improvement.¹³⁷

In school desegregation blacks have a just cause, but that cause can be undermined as well as furthered by litigation. A test case can be an important means of calling attention to perceived injustice; more important, school litigation presents opportunities for improving the weak economic and political position which renders the black community vulnerable to the specific injustices the litigation is intended to correct. Litigation can and should serve lawyer and client as a community-organizing tool, an educational forum, a means of obtaining data, a method of exercising political leverage, and a rallying point for public support.

But even when directed by the most resourceful attorneys, civil rights litigation remains an unpredictable vehicle for gaining benefits, such as quality schooling, which a great many whites do not enjoy. The risks involved in such efforts increase dramatically when civil rights attorneys, for idealistic or other reasons, fail to consider continually the limits imposed by the social and political circumstances under which clients must function even if the case is won. In the closest of lawyer-client relationships this continual reexamination can be difficult; it becomes much harder where much of the representation takes place hundreds of miles from the site of the litigation.¹³⁸

137. Several commentators have noted the tendency of law reform advocates to delude themselves with what one writer calls a "myth of rights," defined as "a social perspective which perceives and explains human interaction largely in terms of rules and of the rights and obligations inherent in rules." S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 13 (1974) (footnote omitted). See Mayer, *The Idea of Justice and the Poor*, 8 *PUB. INTEREST* 96 (1967).

138. Marian Wright Edelman, a former LDF staff lawyer who lived and practiced in Mississippi before moving to Washington, has spoken of her concern about the distance between her and her clients. She stated:

"We are up here filing desegregation suits, but something else is going on in the black community. I sensed it before I left Mississippi. We hear more about non-desegregation, about 'our' schools, about money to build up black schools. I'm not sure we are doing the right thing in the long run. We automatically assume that what we need to do is close lousy black schools. But desegregation is taking the best black teachers out of the black schools and putting lousy white teachers in black schools. It has become a very complex thing."

Comment, *supra* note 4, at 1129 (interview). The passage of time has left Ms. Edelman less uneasy. In 1975 she wrote, "School desegregation is a necessary, viable and important national goal." Acknowledging that the middle class can escape to the suburbs or private schools and that black children in desegregated schools are often classified as retarded or disciplined disproportionately, she nevertheless urged desegregation because "[t]he Constitution requires it. Minority children will never achieve equal educational opportunity without it. And our children will never learn to live together if they do not begin to learn together now." *N.Y. Times*, Sept. 22, 1975, at 33, col. 2.

Professor Leroy Clark has written that the black community's belief in the efficacy of litigation inhibited the development of techniques involving popular participation and control that might have advanced school desegregation in the South.¹³⁹ He feels that civil rights lawyers were partly responsible for this unwise reliance on the law. They had studied "cases" in which the conflict involved easily identifiable adversaries, a limited number of variables, and issues which courts could resolve in a manageable way. A lawyer seeking social change, Clark advises, must "make clear that the major social and economic obstacles are not easily amenable to the legal process and that vigilance and continued activity by the disadvantaged are the crucial elements in social change."¹⁴⁰ For reasons quite similar to those which enabled blacks to win in *Brown* in 1954 and caused them to lose in *Plessy* in 1896,¹⁴¹ even successful school litigation will bring little meaningful change unless there is continuing pressure for implementation from the black community. The problem of unjust laws, as Professor Gary Bellow has noted, is almost invariably a problem of distribution of political and economic power. The rules merely reflect a series of choices by the society made in response to these distributions. "[R]ule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism."¹⁴²

In the last analysis, blacks must provide an enforcement mechanism that will give educational content to the constitutional right recognized in *Brown*. Simply placing black children in "white" schools will seldom suffice. Lawyers in school cases who fail to obtain judicial

139. Clark, *supra* note 59, at 470.

140. *Id.*

141. See note 136 *supra*.

142. Comment, *supra* note 4, at 1077 (interview with Professor Bellow). Expressing serious reservations about NAACP's test case strategy, Professor Bellow felt law suits should be treated as "vehicles for setting in motion other political processes and for building coalitions and alliances." For example, Bellow suggests that a suit against a public agency (e.g., a school board) "may be far more important for the discovery of the agency's practices and records which it affords than for the legal rule or court order it generates." Such discovery may provide the detailed documentation that can spur movements for real political change. *Id.* at 1087. Bellow would also frame injunctive relief requests narrowly—so as to obtain quick relief that will encourage clients by accomplishing some change—rather than set out after all-encompassing orders that take years to litigate and may end in defeat or unenforceable rulings. *Id.* at 1088. Similar suggestions are made in Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 Wis. L. REV. 257, 276-79. And for a step-by-step account of how one attorney assisted her clients in obtaining a bilingual education program without resorting to any litigation, see Waserstein, *Organizing for Bilingual Education: One Community's Experience*, INEQUALITY IN EDUC., Feb. 1975, at 23.

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relief that reasonably promises to improve the education of black children serve poorly both their clients and their cause.

In 1935, W. E. B. DuBois, in the course of a national debate over the education of blacks which has not been significantly altered by *Brown*, expressed simply but eloquently the message of the coalition of black community groups in Boston with which this article began:

[T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.¹⁴³

DuBois spoke neither for the integrationist nor the separatist, but for poor black parents unable to choose, as can the well-to-do of both races, which schools will educate their children. Effective representation of these parents and their children presents a still unmet challenge for all lawyers committed to civil rights.

Conclusion

The tactics that worked for civil rights lawyers in the first decade of school desegregation—the careful selection and filing of class action suits seeking standardized relief in accordance with set, uncompromising national goals—are no longer unfailingly effective. In recent years, the relief sought and obtained in these suits has helped to precipitate a rise in militant white opposition and has seriously eroded carefully cultivated judicial support. Opposition to any civil rights program can be expected, but the hoped-for improvement in schooling for black children that might have justified the sacrifice and risk has proven minimal at best. It has been virtually nonexistent for the great mass of urban black children locked in all-black

143. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

schools, many of which are today as separate and unequal as they were before 1954.

Political, economic, and social conditions have contributed to the loss of school desegregation momentum; but to the extent that civil rights lawyers have not recognized the shift of black parental priorities, they have sacrificed opportunities to negotiate with school boards and petition courts for the judicially enforceable educational improvements which all parents seek. The time has come for civil rights lawyers to end their single-minded commitment to racial balance, a goal which, standing alone, is increasingly inaccessible and all too often educationally impotent.

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